A P P E N D I X

APPENDIX

Appendix A

Appendix B: Unpublished Legal Authorities and Court Orders From Other Jurisdictions Not Found in Standard Reporters

A-1

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

December 08, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-13365-JJ
Case Style: Charles Jones v. USA
District Court Docket No: 1:16-cv-22268-KMM
Secondary Case Number: 1:02-cr-20875-KMM-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-13365

CHARLES EDWARD JONES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:16-cv-22268-KMM

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Corrected Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Corrected Petition for Rehearing En Banc is also treated as a Corrected Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

A-2

82 F.4th 1039
United States Court of Appeals, Eleventh Circuit.

Charles Edward JONES, Petitioner-Appellant,
v.
UNITED STATES of America,
Respondent-Appellee.

No. 20-13365
|
Filed: 09/14/2023

Synopsis

Background: Federal prisoner serving mandatory life sentence under federal three-strikes law filed second motion to vacate sentence, alleging that the law's residual clause defining serious violent felony was unconstitutionally vague under due process principles, and seeking retroactive application of Supreme Court's decision in *Johnson v. United States* concerning Armed Career Criminal Act's (ACCA) residual clause defining violent felony, Supreme Court's decision in *Sessions v. Dimaya*, 138 S.Ct. 1204, concerning residual clause of statutory definition of crime of violence incorporated into Immigration and Nationality Act's (INA) definition of aggravated felony, and Supreme Court's decision in *United States v. Davis*, 139 S.Ct. 2319, concerning residual clause of statutory definition of crime of violence for purposes of conviction for using, carrying, or possessing firearm during and in relation to crime of violence. The United States District Court for the Southern District of Florida, No. 1:16-cv-22268-KMM, denied the motion. Prisoner appealed.

Holdings: The Court of Appeals, Luck, Circuit Judge, held that:

[1] *Johnson* decision was not, with respect to prisoner's due process claim, a new rule of constitutional law that was previously unavailable and that was made retroactive to cases on collateral review by Supreme Court, as would provide statutory basis for second motion to vacate sentence;

[2] *Dimaya* was not a new rule of constitutional law for prisoner's due process claim; and

[3] *Davis* was not a new rule of constitutional law for prisoner's due process claim.

Order vacated; remanded for dismissal for lack of jurisdiction.

Wilson, Circuit Judge, filed a dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (14)

[1] **Criminal Law** Review De Novo
Criminal Law Post-conviction relief

On appeal in a proceeding on a motion to vacate, set aside, or correct sentence, the Court of Appeals reviews the District Court's factual findings for clear error and its legal determinations de novo. 28 U.S.C.A. § 2255.

[2] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions

While neither government, nor amicus curiae appointed by Court of Appeals to defend District Court's judgment in light of government's confession of error, raised, on federal prisoner's appeal from denial of his second motion to vacate sentence, issue of District Court's jurisdiction to consider second motion as being based on retroactive application of Supreme Court decision that was new rule of constitutional law that was previously unavailable, Court of Appeals was obligated to address District Court's jurisdiction before reaching merits of prisoner's motion challenging, as unconstitutionally vague under due process principles, residual clause of

statutory definition of serious violent felony for purposes of federal three-strikes law. U.S. Const. Amend. 5; 18 U.S.C.A. § 3559(c)(2)(F)(ii); 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[3] **Criminal Law** Review De Novo

Court of Appeals would review de novo, on federal prisoner's appeal from denial of his second motion to vacate sentence, District Court's jurisdiction to consider the second motion as being based on retroactive application of Supreme Court decision that was new rule of constitutional law that was previously unavailable, which motion challenged, as unconstitutionally vague under due process principles, residual clause of statutory definition of serious violent felony for purposes of federal three-strikes law. U.S. Const. Amend. 5; 18 U.S.C.A. § 3559(c)(2)(F)(ii); 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[4] **Criminal Law** Particular issues and cases

Criminal Law Proceedings

Statute allowing a federal prisoner to file a second or successive motion to vacate sentence, based on a new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by the Supreme Court, incorporates not only statutory requirement that prisoner obtain authorization from Court of Appeals in order to file second or successive motion, but also statutory requirement that prisoner, at appeals-court authorization stage, make prima facie showing that application to file second or successive motion satisfies whole range of procedures and limitations on second or successive motions, including prima facie showing that prisoner's motion would satisfy "new rule of constitutional law" requirement. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[5] **Criminal Law** Particular issues and cases

Authorization from Court of Appeals for a federal prisoner to file second or successive motion to vacate sentence, based on prisoner's prima facie showing of applicability of new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by Supreme Court, only gets prisoner through District Court's door, and District Court owes no deference to Court of Appeals' order authorizing filing of motion; instead, District Court has jurisdiction to determine for itself if motion satisfies "new rule of constitutional law" requirement, and at that point, District Court is to decide that issue fresh, or in the legal vernacular, de novo. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

1 Case that cites this headnote

[6] **Criminal Law** Particular issues and cases

After authorization from Court of Appeals for a federal prisoner to file second or successive motion to vacate sentence, based on prisoner's prima facie showing of applicability of new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by Supreme Court, satisfaction of "new rule of constitutional law" requirement is jurisdictional, and if District Court decides that prisoner's motion meets the requirement, then District Court has

jurisdiction to decide whether any relief is due under the motion; conversely, if the motion does not meet the requirement, then District Court lacks jurisdiction to decide whether the motion has any merit, and District Court must dismiss the motion for lack of jurisdiction. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), (b)(4), 2255(h)(2).

1 Case that cites this headnote

[7] **Criminal Law** Particular issues and cases

Only the Supreme Court can announce a new rule of constitutional law, for purposes of statute allowing a federal prisoner to file a second or successive motion to vacate sentence, based on a new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by the Supreme Court. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

1 Case that cites this headnote

[8] **Criminal Law** Particular issues and cases

A Supreme Court decision announces a "new rule" of constitutional law, within meaning of statute allowing a federal prisoner to file a second or successive motion to vacate sentence, based on a new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by Supreme Court, when the decision breaks new ground or imposes a new obligation on the government, and a rule is a new rule if the result of the case announcing the rule was not dictated by precedent existing at the time the prisoner's conviction became final. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[9] **Criminal Law** Particular issues and cases

Even where the Supreme Court applies an already existing rule, its decision may create a new rule of constitutional law, for purposes of statute allowing a federal prisoner to file a second or successive motion to vacate sentence, based on a new rule of constitutional law that was previously unavailable and that has been made retroactive to cases on collateral review by Supreme Court, by applying an existing rule in a new setting, thereby extending the rule in a manner that was not dictated by prior precedent. 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

1 Case that cites this headnote

[10] **Criminal Law** Particular issues and cases

Supreme Court's decision in *Johnson v. United States*, which held that Armed Career Criminal Act's (ACCA) residual clause defining violent felony, for purpose of recidivist sentencing, was unconstitutionally vague under due process principles, was not, with respect to federal prisoner's due process challenge to residual clause of statutory definition of serious violent felony for purposes of federal three-strikes law, a new rule of constitutional law that was previously unavailable and that had been made retroactive to cases on collateral review by Supreme Court, as would provide statutory basis for prisoner, who was serving mandatory life sentence under three-strikes law, to bring second motion to vacate sentence; prisoner was not sentenced under ACCA's residual clause, and he did not fall within scope of new

rule in *Johnson*. U.S. Const. Amend. 5; 18 U.S.C.A. §§ 924(e)(2)(B)(ii), 3559(c)(2)(F)(ii); 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[11] **Criminal Law** Particular issues and cases

Supreme Court's decision in *Sessions v. Dimaya*, 138 S.Ct. 1204, which held that residual clause of statutory definition of crime of violence for purposes of recidivist criminal sentencing, as incorporated into Immigration and Nationality Act's (INA) definition of aggravated felony, was unconstitutionally vague under due process principles, was not, with respect to federal prisoner's due process challenge to residual clause of statutory definition of serious violent felony for purposes of federal three-strikes law, a new rule of constitutional law that was previously unavailable and that had been made retroactive to cases on collateral review by Supreme Court, as would provide statutory basis for prisoner, who was serving mandatory life sentence under three-strikes law, to bring second motion to vacate sentence; prisoner was not sentenced under residual clause of definition of crime of violence, and he did not fall within scope of new rule in *Dimaya*. U.S. Const. Amend. 5; Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(43)(F); 18 U.S.C.A. §§ 16(b), 3559(c)(2)(F)(ii); 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[12] **Criminal Law** Particular issues and cases

Supreme Court's decision in *United States v. Davis*, 139 S.Ct. 2319, which held that residual clause of statutory definition of crime of violence, for purposes of conviction for using, carrying, or possessing firearm during and in relation to crime of violence, was unconstitutionally vague under due process principles, was not, with respect to federal prisoner's due process challenge to residual clause of statutory definition of serious violent felony for purposes of federal three-strikes law, a new rule of constitutional law that was previously unavailable and that had been made retroactive to cases on collateral review by Supreme Court, as would provide statutory basis for prisoner, who was serving mandatory life sentence under three-strikes law, to bring second motion to vacate sentence; prisoner was not sentenced under residual clause of definition of crime of violence, and he did not fall within scope of new rule in *Davis*. U.S. Const. Amend. 5; 18 U.S.C.A. §§ 924(c)(1)(A), (c)(3)(B), 3559(c)(2)(F)(ii); 28 U.S.C.A. §§ 2244(b)(1), (b)(3)(A, C), 2255(h)(2).

[13] **Criminal Law** Scope of Inquiry

A confession of error on the part of the United States does not relieve the Supreme Court of the performance of the judicial function.

[14] **Statutes** Context

Reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. §§ 16(b), 924(c)(3)(B), (e)(2)(B)(ii).

Prior Version Recognized as Unconstitutional

U.S.S.G. § 4B1.2(a)(2)

***1043** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:16-cv-22268-KMM

Attorneys and Law Firms

Margaret Y. Foldes, Michael Caruso, Federal Public Defender's Office, Fort Lauderdale, FL, for Petitioner-Appellant.

Kathryn Dalzell, U.S. Attorney's Office, Grand Rapids, MI, Jason Wu, Lisa Tobin Rubio, Emily M. Smachetti, U.S. Attorney Service - SFL, Miami, FL, for Respondent-Appellee.

Freddy Funes, Toth Funes, PA, Miami, FL, for Amicus Curiae United States District Court Southern District of Florida.

Before Wilson, Luck, and Lagoa, Circuit Judges.

Opinion

Luck, Circuit Judge:

A federal prisoner may move to vacate, set aside, or correct his sentence if it violates the Constitution or laws of the United States, exceeds the maximum sentence allowed by law, was entered without jurisdiction, or is otherwise subject to collateral review. 28 U.S.C. § 2255(a); R. Governing § 2255 Proceedings 1(a). But there are strict limits on second or successive motions. This case involves one of those limits.

For the federal courts to have jurisdiction to consider the prisoner's second or successive motion, it must be based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). [1] The issue here is whether the Supreme Court has announced a "new rule of constitutional law" that applies to the residual clause in 18 U.S.C. section 3559—the three-strikes law. We conclude that it hasn't. And because it hasn't, the district court did not have jurisdiction to decide the merits of Charles Jones's second section 2255 motion to vacate his life sentence under the three-strikes law. We therefore vacate the district court's order and remand for Jones's motion to be dismissed for lack of jurisdiction.

1 A second or successive motion can also be based on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." § 2255(h)(1). But, because the motion in this case wasn't based on newly discovered evidence, section 2255(h)(1) isn't at issue here.

*1044 FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2002, the grand jury indicted Jones for (1) armed bank robbery, in violation of 18 U.S.C. section 2113(a) and (d); (2) knowingly carrying, using, possessing, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. section 924(c)(1)(A)(iii); and (3) possessing a firearm as a felon, in violation of 18 U.S.C. section 922(g)(1). The government then filed a notice that Jones qualified for the enhanced sentence under section 3559.

Section 3559—known as the three-strikes law—provides that a person convicted of a "serious violent felony" shall receive a mandatory life sentence if he has previously been convicted of "[two] or more serious violent felonies," so long as "each serious violent felony ... used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony." *Id.* § 3559(c)(1)(A)(i), (B). The government's enhancement notice cited two of Jones's prior convictions as predicate "serious violent felonies": (1) a 1988 Florida conviction for burglary and robbery; and (2) a 2001 Florida conviction for burglary with an assault or battery.

There are three different ways a prior conviction can qualify as a "serious violent felony" under the three-strikes law. First, the three-strikes law's enumerated offenses clause lists specific offenses that qualify, like robbery, manslaughter, and murder—but not burglary. *Id.* § 3559(c)(2)(F)(i). Second, the elements clause makes any offense punishable by at least ten years in prison "that has as an element the use, attempted use, or threatened use of physical force against the person of another" a serious violent felony. *Id.* § 3559(c)(2)(F)(ii). And third, the residual clause provides that any offense punishable by at least ten years in prison "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense" is a serious violent felony. *Id.* The government's enhancement notice didn't say which clause (or clauses) it was relying on.

Jones went to trial in 2003, and the jury convicted him as charged. The presentence investigation report calculated that Jones would've had a sentencing guideline range of 360 months' imprisonment to life but, because he faced a mandatory life sentence under the three-strikes law for his armed bank robbery conviction, the guideline range was life.

The district court sentenced Jones to life in prison for the armed bank robbery, a concurrent 360 months in prison for possessing a firearm as a felon, and a consecutive 120 months for knowingly carrying, using, possessing, and discharging a firearm during and in relation to a crime of violence. The district court also didn't say whether Jones's predicate convictions qualified as serious violent felonies under the three-strikes law's elements clause, residual clause, or both.

Jones appealed his convictions and sentences, and we affirmed. *United States v. Jones*, 90 F. App'x 383 (11th Cir. 2003) (table). He also filed a section 2255 motion in 2005, raising claims that are not relevant here. The district court denied the 2005 motion on the merits, and we denied Jones's request for a certificate of appealability.

That's how Jones's case stood until 2015. That year, the Supreme Court ruled that the residual clause in a different recidivist statute—the Armed Career Criminal Act—was unconstitutionally vague. *See* ***1045** *Johnson v. United States*, 576 U.S. 591, 597, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Following *Johnson*, Jones filed an application requesting an order authorizing the district court to consider a second section 2255 motion. He sought to argue that, applying *Johnson*, the three-strikes law's residual clause was also unconstitutionally vague. We granted Jones's application as to this claim.

Jones then filed in the district court a second section 2255 motion—the motion at issue here. He argued that, because the three-strikes law's residual clause was "very similar" to the residual clause in the Armed Career Criminal Act, it was "likewise unconstitutional in light of *Johnson*." And, because his prior conviction for burglary with an assault or battery conviction didn't satisfy the three-strikes law's elements or enumerated offenses clauses, it wasn't a valid predicate offense and he didn't qualify for the enhanced life sentence.

In November 2017, the district court denied Jones's motion. It concluded that, because we said in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), that the residual clause in 18 U.S.C. section 924(c) wasn't unconstitutionally vague, the same logic applied to the three-strikes law given that the two statutes and their residual clauses were similar.[2] The district court granted Jones a certificate of appealability as to whether *Johnson* applied to the three-strikes law's residual clause.

2 In *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc) (*Ovalles II*), we concluded that section 924(c)(3)(B) required a conduct-based approach to determine whether an offense was a crime of violence within the meaning of the statute and, therefore, the statute wasn't unconstitutionally vague. *Id.* at 1252. Our decision in *Ovalles II* was overruled by the Supreme Court in *United States*

> *v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), which ruled that section 924(c)(3)(B) required a categorical approach, rather than a conduct-based approach, and, therefore, was unconstitutionally vague. *Id.* at 2327, 2336.

Jones appealed the denial of his motion. But, while the appeal was pending, the government moved to remand his case based on *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017).[3] The government argued that "the existing record d[id] not indicate how or why Jones's original sentencing court classified either of his two predicate offenses as 'serious violent felonies' for purposes of the three-strikes enhancement," and a remand was proper because "[t]he district court [wa]s best-positioned to address that question in the first instance." We granted the government's motion and remanded for the district court to reconsider Jones's second section 2255 motion under the *Beeman* standard.

3 In *Beeman*, we concluded (among other things) that a prisoner challenging (via section 2255) the enhancement of his sentence under the Armed Career Criminal Act had the burden of proving "that it was more likely than not" that "he in fact was sentenced as an armed career criminal under the residual clause." 871 F.3d at 1225.

On remand, Jones filed a brief addressing *Beeman*. He argued that the enhancement of his sentence under the three-strikes law was based solely on the residual clause. Jones maintained that his 2001 conviction for burglary with an assault or battery could qualify as a predicate offense only under the three-strikes law's residual clause because, at the time of his sentencing, a burglary conviction didn't qualify under either the enumerated offenses or elements clauses.

The government responded that Jones couldn't meet his burden under *Beeman* because the record was silent as to which clause the district court relied on to conclude that his burglary with an assault or ***1046** battery conviction was a predicate offense, and "there was a viable or possible avenue" for the district court to apply the three-strikes law's elements clause at the time of Jones's sentencing. This was so, the government argued, because Jones's burglary conviction had an "accompanying assault or battery," and the district court "may have concluded that both of those offenses had as an element the use, attempted use, or threatened use of physical force against the victim," satisfying the statute's elements clause.

The district court entered an order again denying Jones's second section 2255 motion. The district court found that Jones met his burden under *Beeman* because—based on its interpretation of our caselaw at the time of Jones's sentencing—burglary "was a 'serious violent felony' under *only* the residual clause." But the district court declined to declare the three-strikes law's residual clause unconstitutionally vague. The district court said that no court of appeals had applied the Supreme Court's decisions in *Johnson*, *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), or *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), to the statute's residual clause and it would not do so without controlling precedent. Because this issue was "unsettled," the district court again granted Jones a certificate of appealability as to whether the three-strikes law's residual clause was unconstitutionally vague.

This is Jones's appeal. Rather than continue to oppose Jones's motion, the government now concedes that the three-strikes law's residual clause is unconstitutionally vague. The government doesn't argue an alternative basis for affirmance and instead maintains that we should reverse the denial of Jones's section 2255 motion. We appointed amicus curiae counsel to defend the district court's judgment.

STANDARD OF REVIEW

[1] **[2]** **[3]** "In a proceeding on a motion to vacate, set aside, or correct sentence, we review the district court's factual findings for clear error and legal determinations de novo." *United States v. Pickett*, 916 F.3d 960, 964 (11th Cir. 2019) (citing *Devine v.*

United States, 520 F.3d 1286, 1287 (11th Cir. 2008)). Although neither the government nor the amicus curiae raised the issue, we're obligated to address the district court's jurisdiction under section 2255(h)—a legal question we consider de novo—before reaching the merits of Jones's motion. *See Randolph v. United States*, 904 F.3d 962, 964 (11th Cir. 2018); *Granda v. United States*, 990 F.3d 1272, 1283 (11th Cir. 2021).

DISCUSSION

Jones and the amicus curiae focus their briefs on the merits of Jones's second section 2255 motion —namely, whether the three-strikes law's residual clause is unconstitutionally vague and, if so, whether Jones met his burden under *Beeman*. But we can't address those issues without first resolving a threshold question: whether the district court had jurisdiction to consider Jones's second section 2255 motion.

We conclude that the district court lacked jurisdiction because Jones's motion failed to satisfy the requirements of 28 U.S.C. section 2255(h)(2). We break our analysis into five parts. First, we discuss the jurisdictional requirements of section 2255(h)(2). Second, we review the constitutional rules announced by the Supreme Court in *Johnson*, *Dimaya*, and *Davis*. Third, we consider how we've interpreted section 2255(h)(2)'s new-constitutional-rule requirement and, in particular, how, after *Johnson*, we've applied that requirement to motions challenging other residual clauses. Fourth, we apply these principles ***1047** to Jones's case and conclude that he failed to establish that his second section 2255 motion met the new-constitutional-rule requirement of section 2255(h)(2). And fifth, we address some of the points raised by the dissenting opinion.

Second or Successive Section 2255 Motions

We begin with the text of section 2255. Section 2255 allows a federal prisoner to move "to vacate, set aside[,] or correct [his] sentence." § 2255(a). A prisoner can challenge his sentence on the ground that it "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or [that the sentence] is otherwise subject to collateral attack." *Id.*

But section 2255 strictly limits a prisoner's ability to file a second or successive motion. The statute provides that "[a] second or successive motion must be certified as provided in [28 U.S.C.] section 2244 by a panel of the appropriate court of appeals to contain ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2). Where a prisoner's second or successive motion is based on a new rule of constitutional law, the prisoner has a one-year limitations period to file the motion, running from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." *Id.* § 2255(f)(3).

[4] And section "2255(h) incorporates the whole range of procedures and limitations set out in [section] 2244(b)(1), (b)(3), and (b)(4)." *In re Bradford*, 830 F.3d 1273, 1276 (11th Cir. 2016). So section 2255(h) doesn't only "incorporate[ ] the requirement in [section] 2244(b)(3)(A) that a[prisoner] must obtain authorization from this Court in order to file a [second or] successive [section] 2255 motion." *Id.*; *see also* § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the [prisoner] shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."). Section 2255(h) also incorporates section 2244(b)(3)(C)'s requirement that a prisoner, at the appeals-court authorization stage, "make a prima facie showing that the application" to file a second or successive motion "satisfies the other requirements contained in section 2244(b)." *Bradford*, 830 F.3d at 1276 (cleaned up); *see also* § 2244(b)(3)(C) ("The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing

that the application satisfies the requirements of this subsection."). That includes a prima facie showing that the prisoner's motion would satisfy section 2255(h)(2)'s "new rule of constitutional law" requirement. *See* *In re Pinder*, 824 F.3d 977, 978–79 (11th Cir. 2016).

[5] But this prima facie showing only gets a prisoner through the district court's door. That is, although a prisoner can file a second or successive section 2255 motion after we've authorized it, the district court owes no "deference to our order authorizing" the prisoner to file that motion. *Randolph*, 904 F.3d at 965. Instead, "the district court has jurisdiction to determine for itself if the motion relies on 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.' " *Id.* at 964 (quoting § 2255(h)(2)). At that point, "the district court is to decide the section 2255(h) issues fresh, or in the legal ***1048** vernacular, de novo." *Id.* at 965 (cleaned up); *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (explaining that, because our conclusion that a prisoner has "made a prima facie showing that his application satisfies sections 2255(h) and 2244(b)(3)(C)" is "a limited determination," the district court must decide for itself whether the prisoner "has established the statutory requirements for filing a second or successive motion" (cleaned up)).

[6] Importantly, section 2255(h)(2)'s requirements are jurisdictional. So if—after fresh consideration of the section 2255(h) issues—the district court decides the prisoner's "motion meets those requirements, [then] the district court has jurisdiction to decide whether any relief is due under the motion"; conversely, "if the motion does not meet the [section] 2255(h) requirements, [then] the court lacks jurisdiction to decide whether the motion has any merit." *Randolph*, 904 F.3d at 964. If the section 2255(h) requirements are not met, the district court must dismiss the motion for lack of jurisdiction. *See* *Bradford*, 830 F.3d at 1276 (explaining that, in the context of second or successive section 2255 motions, we have adopted the decision in *Jordan v. Secretary, Department of Corrections*, 485 F.3d 1351 (11th Cir. 2007), "which held that [section] 2244(b)(4) requires a district court to dismiss a claim that this Court has authorized ... if that claim fails to satisfy the requirements of [section] 2244").

Just as the district court has to take a fresh look at section 2255(h)'s jurisdictional requirements even after our order authorizing a second or successive motion, we too must consider anew the jurisdictional requirements on appeal. Indeed, "[a]fter the district court looks at the section 2255(h) requirements de novo, our first hard look at whether the section 2255(h) requirements actually have been met will come, if at all, on appeal from the district court's decision." *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016) (cleaned up).

In short, Jones's second section 2255 motion could only be heard by the district court if it was based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2). If Jones failed to meet those requirements, then the district court had to dismiss his motion for lack of jurisdiction. *See Randolph*, 904 F.3d at 964; *Bradford*, 830 F.3d at 1276. Although the district court didn't expressly consider whether Jones's motion satisfied section 2255(h)(2), we must now take a "hard look" at whether section 2255(h)(2)'s requirements were met here. *See* *Moore*, 830 F.3d at 1271 (citation omitted).

The Decisions in Johnson*,* Dimaya*, and* Davis

But, before we apply section 2255(h)(2) to Jones's case, it's helpful to review the cases he relies on to satisfy the new-constitutional-rule requirement. Jones contends that *Johnson*, *Dimaya*, and *Davis*—which found the residual clauses in the Armed Career Criminal Act, 18 U.S.C. section 16(b), and 18 U.S.C. section 924(c), unconstitutionally vague—announced new rules of constitutional law satisfying section 2255(h)(2) for purposes of his challenge to the three-strikes law's residual clause.

Johnson

Johnson involved 18 U.S.C. section 924(e)(2)(B)(ii), the Armed Career Criminal Act's residual clause. This enhancement statute applied to a person with three or more prior convictions for a "serious drug offense" or "violent felony" who violated 18 U.S.C. section 922(g) by unlawfully possessing a firearm. § 924(e)(1). The Act's residual clause defined "violent felony" ***1049** as any felony that "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii).

The Supreme Court had, since 1990, "use[d] a framework known as the categorical approach" to determine whether a conviction fell within the Act's residual clause. *Johnson*, 576 U.S. at 596, 135 S.Ct. 2551 (citing *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). "Under the categorical approach, a court assesse[d] whether a crime qualifie[d] as a violent felony in terms of how the law define[d] the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Id.* (cleaned up). Thus, deciding whether a crime fell within the residual clause "require[d] a court to picture the kind of conduct that the crime involve[d] in 'the ordinary case,' and to judge whether that abstraction present[ed] a serious potential risk of physical injury." *Id.* (citation omitted).

The *Johnson* Court ruled that the "ordinary case" approach required by the residual clause made it unconstitutionally vague. *Id.* at 597, 135 S.Ct. 2551. This was because, the Supreme Court explained, "the residual clause le[ft both] grave uncertainty about how to estimate the risk posed by a crime"—because "[i]t tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements"—as well as "uncertainty about how much risk it t[ook] for a crime to qualify as a violent felony." *Id.* at 597–98, 135 S.Ct. 2551. Because judicial speculation about both the risk posed by an offense's "ordinary case" and the quantum of risk necessary "for a crime to qualify as a violent felony" was unpredictable and arbitrary, the residual clause violated due process. [4] *Id.*

4 In *Welch v. United States*, 578 U.S. 120, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), the Supreme Court concluded that *Johnson* had announced a new constitutional rule that applied retroactively. *Id.* at 135, 136 S.Ct. 1257.

Dimaya

In *Dimaya*, the Supreme Court considered the application of *Johnson* to 18 U.S.C. section 16(b), which defined "crime of violence" for other federal statutes—including, in Dimaya's case, as incorporated into the Immigration and Naturalization Act's definition of "aggravated felony" in 8 U.S.C. section 1101(a)(43)(F). 138 S. Ct. at 1211. Section 16(b)'s residual clause defined "crime of violence" as any felony offense "that, by its nature, involve[d] a substantial risk that physical force against the person or property of another m[ight] be used in the course of committing the offense." § 16(b). Like the Armed Career Criminal Act's residual clause, courts used the categorical approach to determine whether "a conviction posed the substantial risk that [section] 16(b) demand[ed]." *Dimaya*, 138 S. Ct. at 1211 (citation omitted). Thus, this approach to section 16(b) "require[d] a court to ask whether 'the ordinary case' of an offense pose[d] the requisite risk." *Id.* (citation omitted).

The *Dimaya* Court ruled that, under a "straightforward application" of *Johnson*, section 16(b)'s residual clause was unconstitutionally vague. *Id.* at 1213–16. Like

the Armed Career Criminal Act's residual clause, section 16(b)'s residual clause "call[ed] for a court to identify a crime's 'ordinary case' in order to measure the crime's risk." *Id.* at 1215. And like the Armed Career Criminal Act's residual clause—with its "serious potential risk of physical injury" threshold—the section 16(b) residual clause's "substantial risk [of] physical force" threshold left district ***1050** courts facing "uncertainty about the level of risk that ma[de] a crime 'violent.' " *Id.* Section 16(b)'s "formulation," the *Dimaya* Court said, wasn't "any more determinate than the [Armed Career Criminal Act's]." *Id.* The approach called for by section 16(b) therefore failed to "work in a way consistent with due process." *Id.* at 1216.

Davis

Finally, in *Davis*, the Supreme Court addressed the constitutionality of 18 U.S.C. section 924(c)'s residual clause. This statute applied to defendants who used a firearm in connection with certain federal crimes. § 924(c)(1)(A). Its residual clause encompassed felonies "that[,] by [their] nature, involve[d] a substantial risk that physical force against the person or property of another m[ight] be used in the course of committing the offense." *Id.* § 924(c)(3)(B). The Supreme Court found this residual clause unconstitutionally vague too. *Davis*, 139 S. Ct. at 2336.

The *Davis* Court concluded that by looking at the "nature" of the predicate conviction "the statutory text command[ed] the categorical approach." *Id.* at 2327–28. *Davis* also observed that section 924(c)'s residual clause was "almost identical to the language of [section] 16(b), ... [a]nd we normally presume that the same language in related statutes carries a consistent meaning." *Id.* at 2329. Because section 924(c)(3)(B) required the categorical approach, rather than the "case-specific approach" the government advocated for, the *Davis* Court concluded that the reasoning of *Johnson* and *Dimaya* applied to its residual clause. *Id.* at 2326–27.

Applying The New-Constitutional-Rule Requirement After Johnson

We turn now to how we've interpreted and applied section 2255(h)(2)'s new-constitutional-rule requirement, paying particular attention to how we've applied the requirement to second or successive section 2255 motions invoking *Johnson* to challenge other residual clauses. Those cases, it turns out, show how we should approach Jones's motion invoking *Johnson* (and *Dimaya* and *Davis*) to challenge the three-strikes law's residual clause.

The New-Constitutional-Rule Requirement

[7] We begin, briefly, with some foundational principles about "new rules." For section 2255(h)(2) purposes, only the Supreme Court can announce a new rule of constitutional law. *See In re Bowles*, 935 F.3d 1210, 1219 (11th Cir. 2019) ("The existence of a 'new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,' depends solely on Supreme Court decisions ...."); *In re Wright*, 942 F.3d 1063, 1065 (11th Cir. 2019) (denying application to file a second section 2255 motion raising a double jeopardy claim partly because the cases the prisoner relied on "were decided by courts other than the Supreme Court"); *see also Woods v. Warden, Holman Corr. Facility*, 951 F.3d 1296, 1298 (11th Cir. 2020) ("[S]ection 2244(b) allows us to authorize the filing of a second petition only when the Supreme Court recognizes a 'new rule of constitutional law ....' ").

[8] **[9]** " '[A] case announces a new rule when it breaks new ground or imposes a new obligation' on the government." *In re Hammoud*, 931 F.3d 1032, 1037

(11th Cir. 2019) (quoting *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). "A rule is 'new' if the result of the case announcing the rule 'was not dictated by precedent existing at the time the defendant's conviction became final.' " *Id.* (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. 1060). "[E]ven where a court applies an already existing rule, its decision may create ***1051** a new rule by applying the existing rule in a new setting, thereby extending the rule 'in a manner that was not dictated by [prior] precedent.' " *Id.* at 1038 (quoting *Stringer v. Black*, 503 U.S. 222, 228, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992)).

Jones argues that the "clear rule of unconstitutional vagueness" announced in *Johnson* (and "repeated and applied in *Dimaya* and *Davis*") transcends the statutes at issue in those cases and applies to the three-strikes law's residual clause. But we've made clear, in two lines of cases, that the new rule announced in *Johnson* did not necessarily apply to other, almost-identical residual clauses.

Post-*Johnson* Challenges to the Career Offender Guideline's Residual Clause

The first line of cases is the application of *Johnson* to the career offender sentencing guideline's residual clause. A defendant is a career offender for purposes of the sentencing guidelines where the underlying "offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a) (2021). Prior to August 2016, the guidelines defined "crime of violence" to include any felony "involv[ing] conduct that present[ed] a serious potential risk of physical injury to another"—language identical to the Armed Career Criminal Act's residual clause. *Compare id.* § 4B1.2(a) (2015), *with* § 924(e)(2)(B)(ii). [5]

5 The sentencing commission removed the residual clause from guideline section 4B1.2(a) after *Johnson*. *See* Supplement to 2015 Guidelines Manual, § 4B1.2(a) (2016).

In *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016), the prisoner sought leave to file a second section 2255 motion raising a claim that, under *Johnson*, "his sentence was improperly enhanced under the career offender guideline." *Id.* at 1352. We denied the application. *Id.* at 1356. We began by explaining that "it is not enough for a federal prisoner to simply identify *Johnson* and the residual clause as the basis for the claim or claims he seeks to raise in a second or successive [section] 2255 motion"; rather, "he also must show that he was sentenced under the residual clause in the [Armed Career Criminal Act] and that he falls within the scope of the new substantive rule announced in *Johnson*." *Id.* at 1354. We then concluded that the prisoner failed to make a prima facie showing that his claim satisfied section 2255(h)(2)'s requirements. *Id.* at 1354–56.

The prisoner, we said, "was not sentenced under the [Armed Career Criminal Act] or beyond the statutory maximum for his drug crime." *Id.* at 1354. Instead, his case "involve[d] only the career offender guideline." *Id.* And, more importantly, even if *Johnson* applied to the sentencing guidelines, that still would not satisfy section 2255(h)(2)'s requirements in the prisoner's case. *Id.* at 1355. This was because, we explained, "[a] rule that the [sentencing g]uidelines must satisfy due process vagueness standards ... differs fundamentally and qualitatively from a holding that a particular criminal statute or the [Armed Career Criminal Act] sentencing statute—that increases the statutory maximum penalty for the underlying new crime—is substantively vague." *Id.* at 1356.

We expanded on *Griffin*'s reasoning in *In re Anderson*, 829 F.3d 1290 (11th Cir. 2016). The *Anderson* prisoner also sought to challenge, in a second

section 2255 motion, the sentencing guidelines' career offender provision "based on the new rule of constitutional law announced in *Johnson*." *Id.* at 1291. We denied the application. ***1052** *Id.* at 1292. We recognized that the Supreme Court had granted certiorari in *Beckles v. United States*, 579 U.S. 927, 580 U.S. 256, 136 S. Ct. 2510, 195 L.Ed.2d 838 (2016), a case presenting the question whether the residual clause in the career offender guideline was unconstitutionally vague. *Anderson*, 829 F.3d at 1292–93. "[I]f the Supreme Court holds in *Beckles*, which is a [section] 2255 case, that the [section] 4B1.2(a)(2) residual clause is unconstitutional," we explained, then "that decision will establish 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.' " *Id.* at 1293 (quoting § 2255(h)(2)). "If that happens, [the prisoner] will be able to file a new application seeking certification to file a second or successive [section] 2255 motion based not on *Johnson* but on *Beckles*." *Id.*; *see also* *Bradford*, 830 F.3d at 1279 ("If the Supreme Court decides in *Beckles*, or some other decision, that the residual clause of [section] 4B1.2(a)(2) of the career offender provisions of the guidelines is unconstitutional, [the prisoner] will have a new claim under [section] 2255(h)(2) for which he can then file an application to file a second or successive [section] 2255 motion." But, we said, "[i]t will not be a *Johnson*/*Welch* claim"; it will be "a *Beckles* claim." (footnote and emphasis omitted)). [6]

6 In *Beckles v. United States*, the Supreme Court concluded that the advisory sentencing guidelines "are not subject to vagueness challenges under the Due Process Clause." 580 U.S. 256, 259, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017).

Post-*Johnson* Challenges to Section 924(c)'s Residual Clause

The second line of cases is *Johnson*'s application to section 924(c)'s residual clause. We begin with *In re Smith*, 829 F.3d 1276 (11th Cir. 2016), where we considered—following the Supreme Court's decision in *Johnson* but before its decision in *Davis*—a prisoner's application for leave to file a second section 2255 motion challenging his section 924(c) conviction. *Id.* at 1277–78. The *Smith* prisoner "assert[ed] that his claim relie[d] upon the new rule of constitutional law announced in *Johnson*." *Id.* at 1277. We were skeptical about the application of *Johnson*'s new rule to a section 924(c) conviction in the context of a second section 2255 motion. "*Johnson* rendered the residual clause of the [Armed Career Criminal Act] invalid," but "[i]t said nothing about the validity of the definition of a crime of violence found in [section] 924(c)(3)." *Id.* at 1278. And it was "not self-evident," we said, "that the rule promulgated in *Johnson* ... mean[t] that [section] 924(c)'s residual clause must likewise suffer the same [constitutional] fate" as the Armed Career Criminal Act's. *Id.* at 1279. Rather, we observed that "there [we]re good reasons to question an argument that *Johnson* mandate[d] the invalidation of [section] 924(c)'s particular residual clause." *Id.* For example, "an analysis of a statute's vagueness is necessarily dependent on the particular words used and, while similar, the language in the two statutes [wa]s not the same." *Id.*

Then, in *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), *abrogated on other grounds by* *Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757, we concluded that "neither *Johnson* nor *Dimaya* supplie[d] any 'rule of constitutional law'—'new' or old, 'retroactive' or nonretroactive, 'previously unavailable' or otherwise—that c[ould] support a vagueness-based challenge to the residual clause of section 924(c)." *Id.* at 689. We reached

this conclusion based on *Ovalles II*, which had interpreted section 924(c) to require "a conduct-based approach that account[ed] for the actual, real-world facts of the crime's commission, ***1053** rather than a categorical approach." *Id.* (citation omitted). We recognized that our pre-*Ovalles* cases in effect at the time of the *Garrett* prisoner's sentencing interpreted section 924(c) to require a categorical approach—but this "ma[d]e no difference." *Id.* "[E]ven if we construed [the prisoner's] claim as a challenge to the use of a categorical approach by his sentencing court," we said, "[t]he substitution of one interpretation of a statute for another never amounts to 'a new rule of *constitutional* law,' not even when it comes from the Supreme Court." *Id.* (citations omitted).

Although the Supreme Court's decision in *Davis* abrogated *Garrett* to the extent it ruled that section 924(c)'s residual clause wasn't unconstitutionally vague, we have since reaffirmed *Garrett*'s conclusion that *Johnson* and *Davis* announced different new constitutional rules for purposes of section 2255(h)(2). *See Hammoud*, 931 F.3d at 1036–38. In *Hammoud*, the prisoner sought leave—prior to *Davis*—to file a second or successive section 2255 motion, arguing that his section 924(c) conviction was unconstitutional under the new rule of constitutional law announced in *Johnson* and *Dimaya*. *Id.* at 1036. We denied his application "under our then-binding precedent in" *Ovalles II*. *Id.* Following *Davis*—which overruled *Ovalles II*—the *Hammoud* prisoner filed another application for leave to file a second or successive section 2255 motion, arguing that his section 924(c) conviction was invalid "in light of the new rule of constitutional law set forth in *Davis*, *Dimaya*, and *Johnson*." *Id.*

We expressly rejected the prisoner's argument that *Johnson*'s or *Dimaya*'s rule supported his claim. The prisoner's "reliance on *Dimaya* and *Johnson* to support his [section] 924(c) challenge [was] misplaced," we said, "as those cases involved 18 U.S.C. [section] 16(b) and the [Armed Career Criminal Act], respectively, not [section] 924(c)." *Id.* at 1036 n.1. Instead, the *Hammoud* prisoner's claim was "best described as a *Davis* claim." *Id.*

The *Hammoud* court then addressed "whether *Davis* announced a new rule of constitutional law" for section 2255(h)(2) purposes. *Id.* at 1036–37. It did. We explained that *Davis*'s rule was new "because it extended *Johnson* and *Dimaya* to a new statute and context." *Id.* at 1038. "*Davis*, like *Johnson* before it, announced a new substantive rule," we said, "because, just as *Johnson* narrowed the scope of the Armed Career Criminal Act, *Davis* narrowed the scope of section 924(c) by interpreting its terms, specifically, the term crime of violence." *Id.* (cleaned up). In other words, "*Davis* restricted for the first time the class of persons [section] 924(c) could punish and, thus, the government's ability to impose punishments on defendants under that statute." *Id.*

And because *Davis*'s new constitutional rule was different than the rules announced by *Johnson* and *Dimaya*, the *Hammoud* court concluded that the prisoner's application wasn't barred by our decision in *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016). *Hammoud*, 931 F.3d at 1039–40. In *Baptiste*, we found that 28 U.S.C. section 2244(b)(1), which prohibits state prisoners from presenting repeat claims in a second or successive section 2254 habeas corpus petition, also barred federal prisoners from raising claims in a second or successive section 2255

motion that were presented in a prior application. 828 F.3d at 1339–40. And in *Bradford*, we said that section 2244(b)(1)—and by extension *Baptiste*—created a jurisdictional bar to claims that were raised and rejected in a prior application. 830 F.3d at 1277–79. But the *Hammoud* court concluded that *Baptiste*'s bar didn't apply to the prisoner's successive application raising a *Davis* ***1054** claim, even though his prior application sought to challenge his section 924(c) conviction under *Johnson* and *Dimaya*. 931 F.3d at 1039–40. *Baptiste*'s bar didn't apply, we explained, because "*Davis* announced a new substantive rule of constitutional law in its own right, separate and apart from (albeit primarily based on) *Johnson* and *Dimaya*. Thus, [the prisoner's] present claim is a new *Davis* claim, not a *Johnson* or *Dimaya* claim, and is, therefore, not barred by *In re Baptiste*." *Id.* at 1040,; *see also* *In re Navarro*, 931 F.3d 1298, 1301 (11th Cir. 2019) ("[The prisoner's] current application seeks to assert new *Davis* claims, not *Dimaya* claims, and is not barred by *In re Baptiste*.").

* * *

Jones's case isn't the first time we've been asked to apply *Johnson* to other residual clauses. The new rule in *Johnson* didn't extend to an identical residual clause in the sentencing guidelines. *Griffin*, 823 F.3d at 1356; *Anderson*, 829 F.3d at 1292. Instead, if the Supreme Court in *Beckles* extended *Johnson*'s reasoning to the career offender guideline's residual clause, that would've constituted a "new rule of constitutional law" for section 2255(h) purposes. *Anderson*, 829 F.3d at 1293. And the new rule in *Johnson* didn't apply to the residual clause in section 924(c). *Smith*, 829 F.3d at 1278–79; *Garrett*, 908 F.3d at 689; *Hammoud*, 931 F.3d at 1036 n.1. Instead, because the Court "extended *Johnson* and *Dimaya* to a new statute and context"—namely, section 924(c)'s residual clause—*Davis* announced a separate new constitutional rule for purposes of section 2255(h)(2). *Hammoud*, 931 F.3d at 1038. That's why *Baptiste* doesn't bar *Davis*-based section 924(c)-conviction challenges previously asserted as *Johnson* or *Dimaya* claims. *Id.* at 1039–40; *accord* *Navarro*, 931 F.3d at 1301.

Jones Did Not Satisfy the New-Constitutional-Rule Requirement

With these principles in mind, we now turn to the threshold jurisdictional question raised by this case: whether Jones's second section 2255 motion relied on a "new rule of constitutional law" announced by the Supreme Court. § 2255(h)(2). Jones's second section 2255 motion relied on *Johnson* to satisfy section 2255(h)(2)'s new-constitutional-rule requirement. But it was "not enough for [Jones] to simply identify *Johnson* and the residual clause as the basis for the claim" he sought "to raise in a second or successive [section] 2255 motion." *See* *Griffin*, 823 F.3d at 1354. Jones also had to "show that he was sentenced under the residual clause in the [Armed Career Criminal Act] and that he falls within the scope of the new substantive rule announced in *Johnson*." *See* *id.* Jones failed to make this showing. He wasn't sentenced under the Act's residual clause, and he doesn't fall within the scope of *Johnson*'s new rule.

[10] **[11]** **[12]** To be sure, Jones's three-strikes law claim resembles a *Johnson* claim: both claims assert that the residual clause of a recidivist statute is unconstitutionally vague. But that doesn't mean Jones can rely on *Johnson*—or *Dimaya* or *Davis*, as he asserted on appeal—to supply the new

rule of constitutional law he needs to satisfy section 2255(h)(2). Our decisions in *Griffin*, *Anderson*, and *Hammoud* demonstrate why.

If the new rule announced in *Johnson* applied to every other similarly worded residual clause, we wouldn't have said in *Griffin* that a vagueness challenge to the career offender guideline's residual clause "differ[ed] fundamentally and qualitatively" from a *Johnson* claim. 823 F.3d at 1356. We wouldn't have said in *Anderson* that a vagueness challenge to the residual ***1055** clause in the career offender guideline was a (hypothetical) *Beckles* claim rather than a *Johnson* claim. 829 F.3d at 1293. And there would've been no need for *Hammoud* to consider whether *Davis* had announced a new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court—we would've simply applied *Johnson* and *Dimaya* to the *Hammoud* prisoner's section 924(c) claim. But we couldn't simply apply *Johnson* to the *Hammoud* prisoner's section 924(c) claim, because "[his] present claim [was] best described as a *Davis* claim." *Hammoud*, 931 F.3d at 1036 n.1. His claim wasn't a *Johnson* claim despite their similarities.

Rather than apply *Johnson*'s new rule to the *Hammoud* prisoner's *Davis* claim, we instead "conclude[d] that *Davis*, like *Johnson* before it, announced a new substantive rule." *Id.* at 1038. And this rule, which narrowed the class of people eligible for conviction under section 924(c), was new "because it extended *Johnson* and *Dimaya* to a new statute and context." *Id.* Any attempt in a second or successive section 2255 motion to apply the rule announced in *Johnson*, *Dimaya*, or *Davis* to a different statute and context is "misplaced." *Id.* at 1036 n.1.

That's precisely what Jones seeks to do here with the three-strikes law. He doesn't rely on a decision from the Supreme Court announcing a new rule that the three-strikes law's residual clause is unconstitutionally vague. (There isn't one.) Rather, Jones maintains that this rule flows from *Johnson*. We rejected that reasoning in *Griffin*, *Anderson*, and *Hammoud*, and we reject it here too.

The dissenting opinion gives three reasons why *Hammoud* doesn't apply to Jones's claim. First, the dissenting opinion explains, *Hammoud* didn't "say[ ] anything about whether the *Johnson* rule applies to other statutes." But it did. *Hammoud* was not the prisoner's first time seeking leave to file a successive section 2255 motion. He filed an application a year earlier arguing that the residual clause in section 924(c) was unconstitutional in light *Johnson* and *Dimaya*. *Hammoud*, 931 F.3d at 1036. We denied the earlier application because, pre-*Davis*, "neither *Johnson* nor *Dimaya* could support a vagueness-based challenge to" the section 924(c) residual clause. *Id.* The prisoner's "reliance on *Dimaya* and *Johnson* to support his [section] 924(c) challenge [wa]s misplaced," we said, because "those cases involved [section] 16(b) and the [Armed Career Criminal Act], respectively, not [section] 924(c)." *Id.* at 1036 n.1.

If *Johnson* applied to the other recidivist statutes, as the dissenting opinion claims, then we would have granted the *Hammoud* prisoner's initial application and he wouldn't have needed to re-apply after *Davis*. But he did need to re-apply because, without *Davis*, *Johnson* and *Dimaya* did not support a vagueness-based challenge to the almost identical residual clause in section 924(c). Because the new rule in *Johnson* didn't apply to other statutes, the

Hammoud prisoner needed *Davis* to meet the new rule requirement in section 2255(h)(2).

Second, the dissenting opinion says that *Hammoud* is "distinguishable" because it relied on the fact that "*Davis* extended *Johnson* to a new *context* (i.e., a non-recidivist statute)." *Hammoud*, the dissenting opinion explains, found that *Davis* was a new rule because "[t]he applicability of *Johnson* to [section] 924(c), a non-recidivist statute, was a closer question" than *Johnson*'s applicability to the three-strikes law, another recidivist statute. But the dissenting opinion's premise is off. Section 924(c) is not non-recidivist. It, like the Armed Career Criminal Act, has recidivist ***1056** provisions. The Supreme Court itself has said so several times. *See, e.g.*, *United States v. O'Brien*, 560 U.S. 218, 235, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010) ("The current structure of [section] 924(c) is more favorable to that interpretation ... particularly because the machinegun provision is now positioned between the sentencing factors provided in (A)(ii) and (iii) and the *recidivist* provisions in (C)(i) and (ii), which are typically sentencing factors as well. (citation omitted and emphasis added)); *Castillo v. United States*, 530 U.S. 120, 125, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) ("The next three sentences of [section] 924(c)(1) ... refer directly to sentencing: the first to *recidivism*, the second to concurrent sentences, the third to parole. (emphasis added)).

Third, the dissenting opinion says that, unlike for section 924(c), where "[r]easonable jurists ... debate[d] whether *Johnson* dictated the demise" of the residual clause, "[h]ere ... there is simply no credible argument that the rule set forth in *Johnson* could spare" the three-strikes law's residual clause. In support, the dissenting opinion cites the government's concession to Congress that there's "*no reasonable basis*" to distinguish the three-strikes law's residual clause from section 924(c)'s residual clause, which the Supreme Court found unconstitutionally vague in *Davis*.

[13] But we've been down this road before. In *Beckles*, another post-*Johnson* challenge, the government "agree[d] with [the] petitioner that the [g]uidelines [we]re subject to vagueness challenges." 580 U.S. at 261, 137 S.Ct. 886. So the Supreme Court appointed "amicus curiae to argue the contrary position." *Id.* at 261–62, 137 S.Ct. 886. The *Beckles* Court rejected the aligned position of the government and the petitioner and adopted the amicus curiae's argument "that the advisory [g]uidelines [we]re not subject to vagueness challenges under the Due Process Clause." *Id.* at 259, 137 S.Ct. 886. The Supreme Court didn't read the government's confession of error to mean there was no credible argument that *Johnson* didn't apply to the career offender guideline's residual clause. That's because "[a] confession of error on the part of the United States does not relieve th[e] [c]ourt of the performance of the judicial function." *Gibson v. United States*, 329 U.S. 338, 344 n.9, 67 S.Ct. 301, 91 L.Ed. 331 (1946) (quotation omitted).

Here, as in *Beckles*, after the government's confession, we appointed amicus curiae to defend the district court's judgment that the three-strikes law's residual clause was not unconstitutionally vague. And, as in *Beckles*, amicus counsel "ably discharged his responsibilities." *See* 580 U.S. at 262, 137 S.Ct. 886. Amicus counsel argued that *Johnson* didn't apply to the three-strikes law's residual clause because the Armed Career Criminal Act's residual clause was "materially differe[nt]" in two key ways. First, the Act's residual clause was vague because it included conduct that had a "potential risk of physical injury," while the three-strikes law was limited to offenses that involved a "substantial risk that physical force ... may be used." The *Johnson* Court "found the term 'potential risk' to be troublesome, because 'assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out.' "

[14] Second, the Act's enumerated clause "listed a mere handful of examples ... that were not inherently violent or did not inherently present a risk of physical injury," while the three-strikes law's "enumerated clause lists truly violent crimes that do provide guidance to and notice of which crimes fall within" the residual clause. The dissenting opinion's chart, ***1057** which narrowly focuses on a small part of the Armed Career Criminal Act and section 924(c), cuts out the important differences between those statutes and the three-strikes law. But that's not how we read statutes. A "reasonable statutory interpretation must account for both the specific context in which ... language is used and the broader context of the statute as a whole." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (omission in original, quotations omitted). The omissions in the dissenting opinion's chart cut out the necessary context.

To be sure, we don't know whether amicus counsel's arguments will carry the day when this issue is eventually decided on the merits. Because Jones has not met the section 2255(h)(2) requirements, we cannot reach the merits of his vagueness argument. (And, because we do not reach the merits, we are not "continu[ing] the same path as we did before," as the dissenting opinion suggests.) But, reading the amicus brief, we cannot say, as the dissenting opinion does, that "there is simply no credible argument that the rule set forth in *Johnson* could spare" the three-strikes law's residual clause. Amicus counsel's arguments were credible and debatable enough that we denied the government's motion for summary reversal.

Turning away from *Hammoud*, Jones and the dissenting opinion cite three cases to show that his motion was based on a new constitutional rule and satisfied section 2255(h)(2): *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001), and *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021). But each one is distinguishable.

The dissenting opinion points to *Stringer* as signifying that "not every extension of Supreme Court precedent to a new statute requires a new rule of constitutional law"—meaning we don't need a "new and separate rule" applying the principle from *Johnson* to the three-strikes law's residual clause. Jones, for his part, argues that *Stringer* shows that existing precedents, even if not themselves announcing new rules, can combine to announce a new rule of constitutional law in a novel setting. Jones says that *Johnson*, *Dimaya*, and *Davis*, taken together, "set out a clear rule of unconstitutional vagueness in criminal residual clauses," and that "vagueness rule"—"like the vagueness rule in *Stringer*"—"transcends specific statutes." Because *Johnson* and its progeny, taken together, dictate by precedent a rule of unconstitutional vagueness applicable to the three-strikes law (a "similarly-worded provision in a different statute"), Jones contends, "[t]he Supreme Court d[id] not have to issue a fourth case naming [that statute] as unconstitutional."

We think *Stringer* doesn't apply as Jones or the dissenting opinion urge for four reasons. First, in *Stringer*, the Supreme Court reached the conclusion that it did *because* its existing precedents —*Davis v. Mississippi*, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 797 (1990) and *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)—did not announce new rules of constitutional law. *See, e.g.*, *Stringer*, 503 U.S. at 228, 112 S.Ct. 1130 ("First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes ... the decision is not available to the petitioner."); *id.* ("In the case now before us Mississippi does not argue that *Maynard* itself announced a new rule. To us this appears a wise concession."). But here, unlike in *Stringer*, the existing precedents that Jones relies on —*Johnson* and *Davis*—did announce new rules. *See* *Hammoud*, 931 F.3d at 1038 ***1058** ("We

conclude that *Davis*, like *Johnson* before it, announced a new substantive rule.").

Second, in *Stringer*, the Supreme Court applied its existing precedents finding statutory aggravating factors unconstitutional—*Davis* and *Maynard*—to a virtually identical statutory aggravating factor. But here, the existing precedents Jones relies on (*Dimaya* and *Davis*) did not find virtually identical statutes unconstitutional. *Dimaya* involved a statute defining elements for federal crimes and immigration violations, while *Davis* involved its own substantive federal offense. The three-strikes law, by contrast, is a sentence enhancement statute, establishing a mandatory minimum if the defendant had three qualifying convictions.

Third, in *Stringer*, the Supreme Court made clear that the existing precedents had to exist before the prisoner's conviction and sentence became final. *See id.* at 227, 112 S.Ct. 1130 ("[A] case decided after a [prisoner's] conviction and sentence became final may not be the predicate for federal habeas corpus relief unless the decision was dictated by precedent *existing when the judgment in question became final*." (emphasis added)). But here, the existing precedents Jones relies on (*Johnson*, *Dimaya*, and *Davis*) were decided after Jones's conviction and sentence became final. *See In re Thomas*, 988 F.3d 783, 789 (4th Cir. 2021) (In determining whether a decision was dictated by precedent, "the Supreme Court mandates that we look to the precedent existing at the time [the prisoner's] conviction became final in 2011. And in 2011, neither *Johnson* nor *Dimaya* had been decided. So ... [*Davis*] certainly was not dictated by precedent in 2011." (cleaned up)).

And fourth, we have already rejected the argument that the existing precedents in *Johnson* and *Dimaya* "transcend[ ]" their context and automatically announce new rules applicable to other residual clauses. In *Hammoud*, we explained that the prisoner's "reliance on *Dimaya* and *Johnson* to support his [section] 924(c) challenge [was] misplaced" because "those cases involved 18 U.S.C. [section] 16(b) and the [Armed Career Criminal Act], respectively, not [section] 924(c)." 931 F.3d at 1036 n.1. Instead, the *Hammoud* prisoner's claim was "best described as a *Davis* claim." *Id.*

In other words, Jones and the dissenting opinion are wrong that a residual clause is a residual clause is a residual clause. Although the three-strikes law's residual clause is "similarly worded" to the residual clauses in *Johnson*, *Dimaya*, and *Davis*, we can't pluck the rules announced by those decisions and plop them onto Jones's challenge to a different statute in a different context. Our precedent expressly forbids doing that. So, we won't.

Jones's reliance on the decision in *Tyler* is even further off the mark. There, the Supreme Court addressed the question of retroactivity and said that "[m]ultiple cases can render a new rule retroactive ... if the holdings in those cases necessarily dictate retroactivity of the new rule." *Tyler*, 533 U.S. at 666, 121 S.Ct. 2478. But the jurisdictional problem for Jones isn't retroactivity. It's whether any Supreme Court decision has announced a new constitutional rule that applies to the three-strikes law's residual clause. Whether a new constitutional rule exists and, if so, whether it's retroactive are two different questions. *Tyler* doesn't help Jones as to the first question.

The last case Jones and the dissenting opinion rely on is our decision in *Granda*. The prisoner in *Granda* filed a second section 2255 motion challenging the use of his conviction for conspiracy to commit Hobbs Act robbery as a predicate for his ***1059** conviction for conspiracy to possess a firearm in furtherance of a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. section 924(o). 990 F.3d at 1280. Although we would now call this a *Davis* claim, the prisoner filed his motion before *Davis*,

and "we gave [him] leave to file a *Johnson* challenge." *Id.* at 1282–83.

We concluded in *Granda* that the district court had jurisdiction over the prisoner's motion. *Id.* at 1283. We recognized that "a *Johnson* claim is distinct from a *Davis* claim for purposes of the rule against filing repeat petitions raising claims that had been previously rejected" and noted that we had only authorized the prisoner to file a *Johnson* claim. *Id.* But this did not divest the district court of jurisdiction, we said, because "to resolve the *Johnson* claim we did authorize, we can, indeed we must, apply the controlling Supreme Court law of *Davis*." *Id.* We explained that

> *Davis* extended the reasoning of *Johnson*, providing us with the answer to a question central to [the prisoner's] petition: whether the [section] 924(c)(3)(B) residual clause is unconstitutionally vague. Applying *Davis* to resolve [the prisoner's] vagueness claim does not transform the authorized claim—which originally relied on *Johnson*—into a distinct, unauthorized *Davis* claim.

Id. at 1283–84.

Granda shows that where we have authorized a *Johnson* claim and the prisoner has really raised a *Davis* claim, the district court has jurisdiction to decide the *Davis* claim the prisoner has brought. Thus, if the Supreme Court had decided, while Jones's petition was pending, that the three-strikes law's residual clause was unconstitutionally vague, *Granda* would solve Jones's jurisdictional problem. We would be able to say that this new Supreme Court case "extended the reasoning of *Johnson*" and "provid[ed] us with the answer to a question central to [Jones]'s petition: whether the [three-strikes law's] residual clause is unconstitutionally vague." *See id.* at 1283–84. But that case does not exist; the Supreme Court has not yet answered the "question central" to Jones's petition. *See id.* at 1283. And that, in turn, means there is no new rule of constitutional law from the Supreme Court allowing for Jones's second section 2255 motion.

The Dissenting Opinion

Before concluding, we briefly respond to two parts of the dissenting opinion. First, the dissenting opinion reaches the conclusion that it does because it reads the new rule in *Johnson* as: "defendants have the right not to be sentenced under an unpredictable and arbitrary residual clause." But this is not the new rule in *Johnson*.

The "new rule of constitutional law announced in *Johnson*" was "that the definition of violent felony in the residual clause of the Armed Career Criminal Act [wa]s unconstitutionally vague." *In re Burgest*, 829 F.3d 1285, 1286 (11th Cir. 2016) (citations omitted). We've described it that way at least a half dozen times. *See, e.g.*, *In re Watt*, 829 F.3d 1287, 1289 (11th Cir. 2016) (describing the "new rule of constitutional law" as "the definition of violent felony in the residual clause of the Armed Career Criminal Act is unconstitutionally vague" (citations omitted)); *Burgest*, 829 F.3d at 1286; *In re Williams*, 826 F.3d 1351, 1353 (11th Cir. 2016) (describing the "new rule of constitutional law" in *Johnson* as "that the residual clause of the violent felony definition in the Armed Career Criminal Act ... is unconstitutionally vague and that imposing an

increased sentence under that provision ... violates due process" (citation omitted)); *In re Colon*, 826 F.3d 1301, 1302 (11th Cir. 2016) (describing the ***1060** "new rule of constitutional law" in *Johnson* as "the residual clause of the Armed Career Criminal Act ... is unconstitutionally vague" (citations omitted)); *Anderson*, 829 F.3d at 1291 (describing the "new rule of constitutional law announced in *Johnson*" as "the residual clause of the Armed Career Criminal Act is unconstitutionally vague" (citations omitted)); *In re Fleur*, 824 F.3d 1337, 1338 (11th Cir. 2016) (describing the "new rule of constitutional law" in *Johnson* as "the residual clause of the Armed Career Criminal Act is unconstitutionally vague" (citations omitted)).

If the dissenting opinion's broad framing of *Johnson*'s new rule were right, then we would have allowed the *Griffin* and *Anderson* prisoners to file successive section 2255 motions challenging the almost-identical residual clause in the career offender guideline. But we didn't. We denied permission. And, if the dissenting opinion's framing of *Johnson*'s new rule were right, then we would have allowed the *Hammoud* prisoner to file a successive section 2255 motion challenging the almost-identical residual clause in section 924(c). But we didn't. We denied the *Hammoud* prisoner's *Johnson*-based application. We denied them because the new rule in *Johnson* was not so broad to cover all the other similarly-worded residual clauses, as the dissenting opinion claims.

Second, the dissenting opinion ends by noting that prisoners sentenced under the three-strikes law's residual clause "will be barred from vindicating their rights" because "the government has conceded that this residual clause is unconstitutional and, therefore, no longer seeks to apply it in criminal prosecutions." We don't agree. The dissenting opinion ignores cases on direct appeal that were in the pipeline before the government's confession of error.[7] It overlooks prisoners who have challenged the three-strikes law in an initial section 2255 motion—they, unlike prisoners filing successive motions, do not have to meet the jurisdictional requirements in section 2255(h)(2). *Compare, e.g.*, *In re Palacios*, 931 F.3d 1314, 1314–15 (11th Cir. 2019) (requiring section 2255(h) showing for second or successive motion to vacate prisoner's sentence), *with* *Seabrooks v. United States*, 32 F.4th 1375, 1382–83 (11th Cir. 2022) (explaining that initial motion to vacate prisoner's sentence isn't analyzed under section 2255(h)). And the dissenting opinion assumes that the government will never change its position on the three-strikes law. But the government's legal position is not written in stone. It changes, sometimes from Administration to Administration.

7 If the government confesses error on direct appeal, as the dissenting opinion suggests, then we will consider the government's confession in deciding the merits of whether the three-strikes law's residual clause is unconstitutionally vague. But the point is that on direct appeal, unlike on a second section 2255 motion, we will have the opportunity and the jurisdiction to consider the merits of the government's confession.

Take the three-strikes law as an example. From *Johnson* in 2015 until the government's letter to Congress in 2020, the government's position was that the three-strikes law's residual clause was not unconstitutionally vague. In 2020, five years after *Johnson*, the government's position changed. Even in this case, the government defended the application of the three-strikes law to Jones and only flipped its position on appeal. There's no reason to believe the government will never flip again.

CONCLUSION

We end, as we began, by highlighting how narrow today's decision is. We have not decided whether the three-strikes law's ***1061** residual clause is unconstitutionally vague. And we have not decided whether Jones met his burden under *Beeman*. Instead, our review is limited to the threshold question whether Jones has met the jurisdictional requirements of section 2255(h)(2).

The district court had jurisdiction to consider Jones's second section 2255 motion only if he could establish that a new constitutional rule supported his claim. But no decision from the Supreme Court has announced the new rule that Jones needs. The district court therefore "lack[ed] jurisdiction to decide whether [Jones's] motion ha[d] any merit." *See Randolph*, 904 F.3d at 964. We vacate the district court's denial of Jones's motion on the merits and remand for the dismissal of his motion.

VACATED AND REMANDED.

Wilson, Circuit Judge, Dissenting:

In 2015, the Supreme Court struck down the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), as unconstitutionally vague. *See* *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Shortly thereafter, the Court held that *Johnson* applies retroactively to cases on collateral review. *See* *Welch v. United States*, 578 U.S. 120, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). A decade earlier, the defendant in this case, Charles Jones, was sentenced to life in prison under a similar residual clause in the federal three strikes law, 18 U.S.C. § 3559(c). By the time *Johnson* came down from the Supreme Court, Jones had long since exhausted his direct appeal and his initial habeas petition. So, in 2016, we authorized Jones to file a second or successive § 2255 motion to vacate his § 3559(c) enhancement. We certified that, in the wake of *Johnson* and *Welch*, Jones had made a prima facie showing that his motion contained "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," as required by 28 U.S.C. § 2255(h)(2). The district court denied relief on the merits but granted a certificate of appealability.

The majority now holds that we lack jurisdiction to hear this appeal, finding that Jones's motion does not rely on the "new rule of constitutional law" established in *Johnson*. That is a view rejected by all the litigants in this case: the government, the defense, and court-appointed amicus. And what justification does the majority offer? Because Jones seeks to invalidate his enhanced sentenced imposed under the residual clause contained in § 3559(c) rather than the ACCA's residual clause, the majority reasons that *Johnson* is no help to Jones.

That reasoning is flawed. The Supreme Court has made clear that "a case does *not* 'announce a new rule, [when] it [is] merely an application of the principle that governed' a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347–48, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013) (quoting *Teague v. Lane*, 489 U.S. 288, 307, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)) (emphasis and alterations in original). Here, Jones is merely asking us to enforce the principle that governed *Johnson*: that defendants have the right not to be sentenced under an unpredictable and arbitrary residual clause. That principle applies to § 3559(c)'s residual clause, which is indistinguishable from the one at issue in *Johnson*. Therefore, I would hold that we have jurisdiction pursuant to § 2255(h)(2).

Viewing the rules of *Johnson* and *Dimaya* [1] and *Davis* [2] as specific only to the ***1062** statutes they addressed is in essence holding that when the Supreme Court establishes a rule it can govern *only* that statute, and that applying the same principle to another statute necessarily requires a new and separate rule. But Supreme Court precedent shows otherwise. Consider, for example, the Supreme Court's decision in *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992), in which the Court had to determine which of its prior decisions constituted a new rule of constitutional law. There, the Court noted that one decision, *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), had "invalidated a death sentence" that rested on a vaguely worded Georgia statute. *Stringer*, 503 U.S. at 228, 112 S.Ct. 1130. Later, in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the Court had "applied the same analysis and

reasoning" to invalidate a similar Oklahoma statute. *Stringer*, 503 U.S. at 228, 112 S.Ct. 1130. Yet, although *Maynard* extended *Godfrey* to a new statute, *it did not announce a new rule of constitutional law*. *See id.* at 228–29, 112 S.Ct. 1130. The Court explained:

> *Godfrey* and *Maynard* did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before us in that case. In applying *Godfrey* to the language before us in *Maynard*, we did not "brea[k] new ground." *Maynard* was, therefore ... controlled by *Godfrey*, and it did not announce a new rule.

Id. (alteration in the original). Thus, not every extension of Supreme Court precedent to a new statute requires a new rule of constitutional law. A rule is not "new" where it simply applies an existing rule in a way that would be obvious to reasonable jurists. *See Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

1 *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018).

2 *Davis v. United States*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019).

The majority identifies two lines of this court's post-*Johnson* cases to support its analysis. The first line of cases relate to post-*Johnson* challenges to the career offender's residual clause. I understand the majority's use of those cases and I do not quibble with those cases especially in light of *United States v. Beckles*, 580 U.S. 256, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017). In *Beckles*, the Supreme Court declined to extend *Johnson* and void for vagueness challenges to sentencing guidelines. Specifically, the Court explained that void for vagueness applies to "laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses," and sentencing guidelines "merely guide the exercise of a court's discretion in choosing an appropriate sentence with the statutory range." 580 U.S. at 262–63, 137 S.Ct. 886. This is reasonable and our line of cases that developed before *Beckles* understood that distinction the Supreme Court ultimately made.

But I think most of the majority's errors stem from its overreading on the second line of cases, most specifically *In re Hammoud*,[3] where we held that the Supreme Court announced a new rule of constitutional law when it extended *Johnson*'s reasoning to invalidate 18 U.S.C. § 924(c). 931 F.3d 1032, 1038 (11th Cir. 2019) (per curiam) (discussing *Davis v. United States*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)).

3 The majority faults the dissent for focusing on *Hammoud* when it cites a dozen cases post-*Johnson* to support its analysis. And there is no doubt that the majority does cite more cases than *Hammoud*, but in my view, the majority focuses extensively on *Hammoud* which I agree is an influential case in resolving this question.

Our decision in *Hammoud* does not require a different result. To understand ***1063** *Hammoud*, one must understand what preceded it. As the majority recounts, the Supreme Court struck down three separate residual clauses between 2015 and 2019.

The first to go was the ACCA's residual clause, which defines a violent felony as one that "involves conduct that presents a serious potential risk of physical injury

to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). That clause was unconstitutionally vague because it required courts, using the categorical approach, "to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction present[ed] a serious potential risk of physical injury." *Johnson*, 576 U.S. at 596, 135 S.Ct. 2551. Second, a few years later, the Court applied the same reasoning to strike down a similarly worded residual clause, 18 U.S.C. § 16(b). *See Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 1213, 200 L.Ed.2d 549 (2018) ("*Johnson* is a straightforward decision, with equally straightforward application here. ... *Johnson* effectively resolved the case now before us."). Third, the Court went a step farther, striking down the residual clause in 18 U.S.C. § 924(c), which was at least arguably distinguishable from those at issue in *Johnson* and *Dimaya*. *See Davis*, 139 S. Ct. at 2323–24. Whereas the residual clauses in *Johnson* and *Dimaya* required courts to look back at a defendant's *previous* convictions, the residual clause at issue in *Davis* involved *contemporaneous* predicate offenses. *Compare* § 924(e) (defining previous convictions for the purpose of a criminal-recidivist sentencing enhancement), *and* § 16(b) (defining previous convictions for purposes of determining removability in the immigration context), *with* § 924(c) (making it a separate offense for anyone to use, carry, or possess a firearm while committing a violent felony).

Prior to *Davis*, several circuits, including our own, found that distinction significant for the following reason. For example, in *Ovalles v. United States*, we reasoned that the backward-looking nature of the residual clauses in the ACCA and § 16(b) unquestionably required courts to apply the categorical approach, which contributed to the vagueness problem that infected those clauses. 905 F.3d 1231, 1248–49 (11th Cir. 2018) (en banc), *abrogated by Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757. In contrast, because § 924(c) "operate[d] entirely in the present," it arguably enabled courts to employ a conduct-based approach that focused on a defendant's real-world behavior, thus avoiding the vagueness issues that would otherwise render it unconstitutionally vague. *See id.* at 1249 (reasoning that "the look-back problem doesn't arise with respect to § 924(c), which serves an altogether different function from the statutes at issue in *Johnson* and *Dimaya* and operates differently in order to achieve that function"). As it turned out, the Supreme Court rejected that distinction, abrogating our *Ovalles* decision and settling a circuit split. *See Davis*, 139 S. Ct. at 2326 (comparing § 924(c)'s residual clause with those at issue in *Johnson* and *Dimaya* and finding "no material difference in the[ir] language or scope").

Against that backdrop came our decision in *Hammoud*. There, the movant had filed a habeas petition in 2018—after *Johnson* but before *Davis*—seeking to extend *Johnson*'s reasoning to § 924(c). We denied that petition on the merits, applying our decision in *Ovalles*, which was binding at the time. But once *Davis* overruled *Ovalles* in 2019, Hammoud filed a new petition, this time purporting to rely on a new rule of constitutional law as set forth in *Davis*. *See Hammoud*, 931 F.3d at 1036. The question before us then was whether to ***1064** view *Davis* as a new rule of constitutional law. *Id.* at 1036–37.

We held that *Davis* was a new rule, rather than merely an application of *Johnson* and *Dimaya*, for two reasons. First, "it extended *Johnson* and *Dimaya* to a new statute and context." *Id.* at 1038. The Supreme Court's holding in *Davis*, we explained, "restricted for the first time the class of persons § 924(c) could punish and, thus,

the government's ability to impose punishments on defendants under that statute." *Id.* Second, we observed that "the Supreme Court's grant of *certiorari* in *Davis* to resolve the circuit split on whether § 924(c)(3)(B) was unconstitutionally vague illustrates that the rule in *Davis* was not necessarily 'dictated by precedent,' ... or 'apparent to all reasonable jurists[.]' " *Id.* (citing *Stringer*, 503 U.S. at 228, 112 S.Ct. 1130; *Lambrix v. Singletary*, 520 U.S. 518, 527–28, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997)).

To begin, *Hammoud* decided an entirely different question than the one before us. And it is axiomatic that "a judicial decision is inherently limited to the facts of the case then before the court and the questions presented to the court in the light of those facts." *United States v. Johnson*, 921 F.3d 991, 1003 (11th Cir. 2019) (en banc) (alterations adopted). On the circumstances presented in *Hammoud* we sensibly concluded that a movant seeking to invalidate his § 924(c) conviction post-*Davis* of course proceeds under *Davis* rather than *Johnson* or *Dimaya*. The majority focuses on the fact that *Hammoud* held *Davis* was a "new substantive rule," *Hammoud*, 931 F.3d at 1038, distinct from *Johnson* and *Dimaya*. Maj. Op. at 1054-55. The majority notes that *Hammoud* called reliance on the *Johnson* and *Dimaya* lines of cases "misplaced" in the § 924(c) context. Maj. Op. at 1055 (citing *Hammoud*, 931 F.3d at 1036 n.1). But neither of these facts says anything about whether the *Johnson* rule applies to other statutes. Notwithstanding that *Davis* announced a "new" rule, the question in this case is whether the *Johnson* rule applies to statutes such as § 3559(c).

But even taking *Hammoud*for all its persuasive worth, its reasoning is distinguishable. To be sure, the *Hammoud* panel found it significant that *Davis* extended *Johnson* to a new *statute*. *Hammoud*, 931 F.3d at 1038. Critically, however, the *Hammoud* panel also noted that *Davis* extended *Johnson* to a new *context* (i.e., a non-recidivist statute).[4] *Id.* Jones seeks to apply *Johnson* to a new statute, but he does not seek to apply it in a new context. Section 3559(c), like the ACCA, is a recidivist statute requiring courts to look back and assess a defendant's previous convictions. It thus operates in the same context as the rule announced in *Johnson*.

4 The majority responds that § 924(c) contains certain recidivist provisions, citing to *United States v. O'Brien*, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010) and *Castillo v. United States*, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000). However, the majority's emphasis is misplaced. First, both cases dealt with § 924(c) in its creation of either offense elements or sentencing factors, where a consideration of an offender's characteristics—including recidivism—tips the scale toward the latter. Second, and importantly, whether § 924(c) contains certain recidivist provisions does not negate the fact that the statute is non-recidivist as a whole.

Relatedly, we emphasized in *Hammoud* that *Davis* was not necessarily "dictated by precedent," as it resolved an issue that had produced a circuit split and generated disagreement among reasonable jurists —none of which is true here. *Id.* Recall that the debate surrounding *Johnson*'s applicability to § 924(c)—which the Court addressed in *Davis*—hinged entirely on the ***1065** premise that § 924(c) might not require the categorical approach. *See* *Davis*, 139 S. Ct at 2327; *see also* *Ovalles*, 905 F.3d at 1239–40 (reasoning that "if we are required to apply the categorical approach in interpreting § 924(c)(3)'s residual clause— ... as the Supreme Court did in voiding the residual clauses before it

in *Johnson* and *Dimaya*—then the provision is done for"). Everyone agreed that "the categorical approach dooms § 924(c)(3)'s residual clause, while a conduct-based interpretation salvages it." *Ovalles*, 905 F.3d at 1240. Here, there is no doubt that the categorical approach applies, and, thus, there can be no real contention that § 3559(c) should survive. Reasonable jurists could—and did—debate whether *Johnson* dictated the demise of § 924(c) (a non-recidivist statute), but there is simply no credible argument that the rule set forth in *Johnson* could spare § 3559(c) (a recidivist statute).[5] *See Sawyer*, 497 U.S. at 234, 110 S.Ct. 2822.

5 In the wake of *Davis*, the government has recognized as much, "reluctantly determin[ing] that *no reasonable basis* exists to distinguish the substantial-risk clause in § 3559(c)(2)(F)(ii) from the provision the Supreme Court found to be unconstitutionally vague in [*United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)]." *See* Department of Justice, Letter from Acting Solicitor General Wall to the Honorable Jerrold Nadler, Committee Chairman on the U.S. House of Representatives Judiciary Committee (Sept. 28, 2020) (emphasis added). Accordingly, the government moved for summary reversal in this appeal. We denied that motion and appointed counsel to defend the district court's judgment.

To put a finer point on this, § 3559(c) is not materially different from the statutes at issue in *Johnson, Dimaya*, and *Davis*. Section 3559(c) states "the term 'serious violent felony' means ... any other offense punishable by a maximum term of imprisonment of 10 years or more ... that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." Now compare Section 3559(c) with the statutes from *Johnson, Dimaya*, and *Davis*—they are indistinguishable.

***1066**

Davis (18 U.S.C. § 924(c))	"For purposes of this subsection the term 'crime of violence' means an offense that is a felony and — ... 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."
Dimaya (18 U.S.C. § 16(b))	"The term 'crime of violence' means— ... any other offense that is a felony and 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."
Johnson (18 U.S.C. § 924(e))	"[T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year ... that

> — ... otherwise involves conduct that presents a serious potential risk of physical injury to another."

These residual clauses at issue require sentencing judges to ask an arbitrary and indeterminate question about the risk of physical force. That sort of inquiry is so unpredictable that it does not put defendants on notice of what conduct the statute criminalizes. Because on several occasions the Supreme Court has found similar language to be unconstitutionally vague, the same should follow here. [6]

6 We have been down this road before in narrowly construing Supreme Court precedents on this topic before being reversed by the Supreme Court. *See* *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), *abrogated by* *Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757. Despite knowing this, we continue the same path as we did before.

To summarize, it follows necessarily from the new rule of constitutional law articulated in *Johnson* that § 3559(c)'s residual clause, which uses materially similar language to the ACCA's residual clause and operates in the same context, suffers from the same fatal defect. The applicability of *Johnson* to § 924(c), a non-recidivist statute, was a closer question. *See* *Hammoud*, 931 F.3d at 1038. In that context, it ***1067** was less obvious that the categorical approach would apply and therefore less obvious that *Johnson*'s reasoning would carry the day. Accordingly, I see nothing contradictory in viewing *Davis* as a new rule of constitutional law, as we did in *Hammoud*, while viewing Jones's motion as proceeding within the scope of *Johnson*.

Indeed, our decision in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), shows that we are not divested of jurisdiction simply because the petitioner relies on *Johnson* to challenge the three-strikes provision in § 3559(c) rather than the ACCA. *Id.* at 1283. In *Granda*, we authorized the petitioner to file a successive habeas petition after *Johnson*. *Id.* But by the time the petitioner's case reached us on appeal, the Supreme Court decided *Davis* and this court decided *Hammoud*. *Id.* at 1283–84. This presented a question of our jurisdiction: because we had authorized a *Johnson* claim but not a *Davis* claim, we would have lacked jurisdiction if we viewed the petition as asserting a *Davis* claim. *See* *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (per curiam) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition."). However, we held that "[a]pplying *Davis* to resolve [petitioner's] vagueness claim does not transform the authorized claim—which originally relied on *Johnson*—into a distinct, unauthorized *Davis* claim." *Granda*, 990 F.3d at 1284. Thus, in *Granda*, we held that we had jurisdiction to consider a challenge to a non-ACCA conviction even though the petitioner proceeded under *Johnson*.

On the jurisdictional question, I can see no difference between that situation and the situation presented in this case. Jones was authorized by this court to bring a *Johnson* claim, and he challenges his life-sentence under § 3559—a non-ACCA statute—on vagueness grounds. If *Hammoud*'s ruling did not divest this court of jurisdiction to consider the *Granda* petitioner's claim, it does not divest this court of jurisdiction to hear Jones's claim. [7]

7 The majority responds that: "*Granda* shows that where we have authorized a *Johnson* claim and the prisoner has really

> raised a *Davis* claim, the district court has jurisdiction to consider the *Davis* claim the prisoner has brought." Maj. Op. at 1059. Respectfully, this is not what *Granda* says. Again, we held that the intervening decision in *Davis* "does *not* transform" the *Johnson* claim into a *Davis* claim. *Granda*, 990 F.3d at 1284 (emphasis added). In *Granda*, the only claim we authorized was a *Johnson* claim, and so it was that claim that gave us jurisdiction.
>
> * * *

The majority's holding that we lack jurisdiction to hear this appeal is alarming. If the majority's view is correct, then despite the Supreme Court's clear guidance in three recent decisions that residual clauses of this sort are unconstitutional—and despite the Court's holding that these decisions should apply retroactively—prisoners like Jones will be barred from vindicating their rights.[8] And it is small comfort to suggest that such prisoners wait for us to strike down § 3559(c)'s residual clause on plenary appeal. Such an occasion will not arise since the government has conceded that this residual clause is unconstitutional and, therefore, no longer seeks to apply it in criminal prosecutions. The majority thus leaves Jones and others like ***1068** him to serve out unconstitutional sentences. Because our precedents do not require this injustice, I respectfully dissent.

8 The majority also faults the dissent for ignoring cases on direct appeal or on the initial § 2255 motions. But the majority is relying only on speculation that there are cases in those postures addressing this issue. Further, if the government confesses error in successive petitions—as it did here—there is no reason to suspect the government won't confess error in cases on direct appeal or initial § 2255 motions as well. And if no court goes against those concessions, those will be unfruitful challenges as well.

All Citations

82 F.4th 1039, 30 Fla. L. Weekly Fed. C 193

A-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:16-cv-22268-KMM

CHARLES JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on remand from the United States Court of Appeals for the Eleventh Circuit. The Parties briefed the issue of whether the Court's denial of Petitioner Charles Jones' Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support ("Mot.") (ECF No. 5) was consistent with the rule set out in *Beeman v. United States*. ("Petitioner's Br.") (ECF No. 43-1); ("Respondent's Br.") (ECF No. 46). Magistrate Judge Chris M. McAliley issued a Report and Recommendation recommending that the Court find that Petitioner failed to meet his burden under *Beeman*. ("R&R") (ECF No. 56). Petitioner filed objections. ("Objs.") (ECF No. 57). Respondent responded. ("Resp.") (ECF No. 58). Petitioner replied. ("Reply") (ECF No. 59). The matter is now ripe for review. As set forth below, the Court ADOPTS the R&R IN PART.

I. BACKGROUND

Petitioner is serving a life sentence in connection with a 2003 criminal conviction. (CR ECF No. 74).[1] Petitioner was convicted of (i) armed bank robbery in violation of 18 U.S.C.

[1] Cites to docket entries in *United States v. Jones*, No. 02-cr-20875-KMM will be cited as "CR ECF No. __."

§ 2113(a) and (d); (ii) knowingly carrying, using, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and (iii) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (CR ECF No. 59). Petitioner's Presentence Investigation Report ("PSI") indicated that Petitioner was eligible for the "three-strikes" sentencing enhancement pursuant to 18 U.S.C. § 3559(c). PSI ¶ 55. Petitioner did not file written objections to the PSI. Although the PSI did not specify which prior convictions qualified as the predicate offenses for the three-strikes enhancement, Respondent identified (1) a Florida conviction for burglary with assault or battery, in violation of Fla. Stat. § 810.02(2)(a) (the "1998 Burglary") and (2) a Florida conviction for robbery in violation of Fla. Stat. § 812.13(1) and burglary in violation of Fla. Stat. § 810.02 (the "1987 Robbery") in its Notice of Sentencing Enhancement. (CR ECF No. 38). Accordingly, the Court sentenced Petitioner to life imprisonment on the count of armed bank robbery with the three-strikes enhancement, as well as a concurrent thirty (30) year term of imprisonment for the felon-in-possession charge and a consecutive ten (10) year term of imprisonment for the charge of carrying, using, and discharging a firearm in relation to a crime of violence. (CR ECF No. 74). However, the Court did not specify during sentencing which of Petitioner's prior convictions were the predicate offenses for the purposes of the three-strikes enhancement. *Id.*

Petitioner filed the Motion on June 26, 2016. *See generally* Mot. The Court referred the matter to the Honorable Patrick A. White, United States Magistrate Judge, who issued a Report and Recommendation recommending that the Motion be denied. (ECF No. 22). The Court adopted in part Magistrate Judge White's Report and Recommendation and issued a certificate of appealability on the issue of whether the "residual clause" of 18 U.S.C. § 3559(c) was unconstitutionally vague. (ECF No. 31). Petitioner appealed the Court's denial of the Motion.

(ECF No. 33). On July 2, 2019, the United States Court of Appeals for the Eleventh Circuit vacated the Court's denial of the Motion and remanded to the Court for the purpose of determining whether denial of the Motion was consistent with the rule set out in *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). ("11th Cir. Remand") (ECF No. 37).

II. LEGAL STANDARD

The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). A *de novo* review is therefore required if a party files "a proper, specific objection" to a factual finding contained in the report. *Macort v. Prem, Inc.*, 208 F. App'x 781, 784 (11th Cir. 2006). "It is critical that the objection be sufficiently specific and not a general objection to the report" to warrant *de novo* review. *Id.*

III. DISCUSSION

The three-strikes enhancement in § 3559(c) has three independent clauses, each of which provides a different avenue through which a prior-conviction can constitute a predicate offense triggering an enhancement: (1) the "enumerated offenses clause," which lists specific offenses that qualify as a serious violent felony, 18 U.S.C. § 3559(c)(2)(F)(i); (2) the "elements clause," which defines a qualifying offense as one "that has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 3559(c)(2)(F)(ii); and (3) the "residual clause," which identifies as a qualifying offense one "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense," *id.*

In *Johnson v. United States*, the United States Supreme Court ruled that a sentence enhancement pursuant to the Armed Career Criminal Act's ("ACCA") residual clause, which resembles the three-strikes enhancement's residual clause, is violative of due process, and thus unconstitutional. 135 S. Ct. 2551, 2563 (2015). The Eleventh Circuit articulated the burden of proof a movant must meet for a court to vacate a sentence enhanced by the residual clause of the ACCA in *Beeman*. There, the Eleventh Circuit held that a *Johnson* movant must show that it is more likely than not that the sentencing court relied solely on the residual clause of the ACCA for the enhancement of the movant's sentence. 871 F.3d at 1221–22. The question of whether a movant was sentenced solely under the residual clause is a "historical fact." *Id.* at 1224 n.5. The Eleventh Circuit opined that such a fact could be proven most persuasively by caselaw that provides that "*at the time of sentencing*[,] only the residual clause would authorize a finding that the prior conviction was a violent felony." *Id.* (emphasis added).

As set forth in the R&R, Magistrate Judge McAliley finds that Petitioner failed to meet his burden under *Beeman* for two reasons. First, Magistrate Judge McAliley finds that Respondent had not waived its ability to argue that Petitioner was sentenced under the elements clause of the three-strikes enhancement. R&R at 7. Specifically, Magistrate Judge McAliley observed that while Respondent's Brief did not address Petitioner's claim that the elements clause did not apply, Respondent "did not expressly disclaim reliance on the elements clause." *Id.* Therefore, Magistrate Judge McAliley found that Respondent had not waived the argument, and that even if it had waived the argument, whether the moving party meets their burden is a "foundational principle" that cannot be ignored by a court even if stipulated to by the parties. *Id.* at 7–8.

Second, Magistrate Judge McAliley finds that it was just as likely that the Court relied on the elements clause, solely or alternatively, in sentencing Petitioner, as opposed to the residual

clause alone. *Id.* at 13. In coming to this conclusion, Magistrate Judge McAliley finds that because the 1998 Burglary was a Florida burglary with assault *or* battery, and the Court would have been permitted to look to the facts as laid out in the PSI to determine that the 1998 Burglary was a burglary with assault rather than battery, that the Court could have then established that the 1998 Burglary conviction "necessarily required, as an element, the use, attempted use or threatened use of force." *Id.* at 11–13. Accordingly, Magistrate Judge McAliley finds that the Court could have relied upon the elements clause, either "solely, or alternatively, to conclude that the 1998 [Burglary] qualified as a predicate offense under the three-strikes enhancement." *Id.* at 13.

Petitioner has several objections to the R&R. First, Petitioner argues that he met his burden under *Beeman*. Objs. at 2–3. Second, Petitioner argues that Magistrate Judge McAliley erred in using a conduct-based analysis from *United States v. Webb*, 139 F.3d 1390 (11th Cir. 1998) to determine that the 1998 Burglary could have qualified as an offense requiring the use, attempted use, or threatened use of force *at the time of sentencing*. *Id.* at 3–9. Specifically, Petitioner argues that in 2003, courts were limited to a strict categorical analysis, as set out in *United States v. Fulford*, 267 F.3d 1241 (11th Cir. 2001). Reply at 3. Third, Petitioner argues that "neither the assault nor the battery aggravators of the burglary offense had the requisite level of force necessary to qualify under § 3559(c)'s elements' clause." Objs. at 9–10. Fourth, Petitioner argues that the record after the Court's resolution of the Motion indicates that the Court relied exclusively on the residual clause of the three-strikes enhancement, even though the Court did not indicate which clause it relied on at the time of sentencing. *Id.* at 11–13. Fifth, Petitioner argues that *Beeman* was wrongly decided. *Id.* at 14–15. Sixth, Petitioner argues that Magistrate Judge McAliley's finding that Petitioner conceded that he could not meet his burden under *Beeman* as it related to the 1987 Robbery conviction was erroneous, because Petitioner had explicitly "preserved the

issue" for appellate review in Petitioner's Brief. *Id.* at 15. Seventh, Petitioner argues that Magistrate Judge McAliley erred in failing to issue a certificate of appealability. *Id.* at 16.

A. Petitioner Met His Burden Under *Beeman*

While the Court agrees with Magistrate Judge McAliley's account of the facts and procedural posture of the case, and the finding that Respondent did not waive its opportunity to argue that the Court relied on the elements clause in sentencing Petitioner, the Court respectfully disagrees with the finding that Petitioner failed to meet his burden under *Beeman*. Specifically, the Court finds that, at the time of sentencing, the 1998 Burglary was a "serious violent felony" under *only* the residual clause. As set forth more fully below, Florida burglary with assault or battery was not a qualifying crime under the elements clause at the time Petitioner was sentenced. Further, because the 1998 Burglary did not qualify under either the elements clause or the enumerated clause, the Court could only have considered the residual clause when it sentenced Petitioner.

Petitioner's objection to Magistrate Judge McAliley's use of *Webb*'s conduct-based approach to determine whether the 1998 Burglary could qualify as a predicate offense under the elements clause is persuasive. Petitioner argues that in *Webb*, the Eleventh Circuit analyzed the United States Sentencing Guidelines ("U.S.S.G.") rather than a sentence enhancement statute and, at the time, the sentencing guidelines had a practice note instructing courts to examine the conduct underlying a conviction that, by definition, is ambiguous as to whether it requires, as an element, the use, threatened use, or attempted use of force. *Id.* at 5. Thus, Petitioner submits that the proper standard for elements clauses of recidivist statutes, as opposed to the U.S.S.G., is a categorical approach as set forth in *Fulford*. *Id.* at 5–7; Reply at 3–6.

Respondent agrees with Petitioner that the *Webb* conduct-based approach is an inappropriate method of determining whether a given crime can be a predicate offense under the

three-strikes enhancement. Resp. at 16. However, Respondent argues that the R&R does not utilize a pure conduct-based approach, but instead applies a modified-categorical approach per *Rozier v. United States*, 701 F.3d 681, 685 (11th Cir. 2012), which permits examination of certain court documents that contextualize a charge to determine "which statutory phrase was the basis for the conviction." *Id.* at 17. Petitioner replies that the modified-categorical approach used in *Rozier* was not articulated by the Eleventh Circuit until long after 2003, and thus the Court, in determining the Court's sentencing methodology at the time, is limited to the *Fulford* categorical standard. *See* Reply at 1–7.

In *Fulford*, the Eleventh Circuit examined how to interpret a prior conviction for aggravated assault that was challenged as a "serious violent felony" predicate offense for the purposes of the three-strikes enhancement. 267 F.3d at 1247. The petitioner argued that the court could not look beyond the judgment of conviction, while the government urged the court to consider the pre-trial Information—which revealed that the aggravated assault was committed with a firearm, thus triggering the enumerated clause of the three-strikes enhancement. *Id.* at 1248. Thus, the question before the Eleventh Circuit turned on whether, in interpreting an offense to determine whether it qualified as a "serious violent felony," the court could look only "to the statutory definitions of the prior offenses." *Id.* at 1259. Like the 1998 Burglary, the aggravated assault charge at issue in *Fulford* "encompass[ed] some offenses that would satisfy the enhancement statute, and others that would not." *Id.* at 1250.

The scope of the court's review in interpreting the charge was dispositive: to look to the Information would render the aggravated assault a predicate offense under the three-strikes enhancement, but to look solely at the criminal statute would leave open the question of whether

the conviction qualified, because the statute encompassed qualifying and non-qualifying offenses. *Id.* at 1248.

The *Fulford* court compared *Taylor v. United States*, 495 U.S. 575 (1990), and *United States v. Spell*, 44 F.3d 936 (11th Cir. 1995) to the facts and legal questions before it. *Id.* at 1249. Both cases stood for the proposition that an examination of "the conduct surrounding a conviction" is appropriate "if ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself." *Id.* (quoting *Spell*, 44 F.3d at 939). However, the *Fulford* court found that both cases interpreted enhancement provisions that did not require review of the *elements* of the charged crime. *Id.* at 1250. Specifically, the differences in the language of the three-strikes enhancement's § 3559(c)(2)(D), on the one hand, and 18 U.S.C. § 924(e)(2)(B)(ii)—interpreted in *Taylor*—and U.S.S.G. § 4B1.2(1)(ii) —interpreted in *Spell*—on the other hand, rendered *Taylor* and *Spell* distinguishable. *Id.* Thus, the rule that the court can look beyond the charge where the criminal statute is ambiguous did not apply. *Id.* Accordingly, the *Fulford* court found that "because § 3559(c)(2)(D) refers only to the elements of the offense on which the enhanced statute is to be predicated, the sentencing court may not look past the conviction to the charging document." *Id.* at 1251.[2]

Here, both *Webb*, relied on by Magistrate Judge McAliley, and *Rozier*, as suggested by Petitioner, interpret the U.S.S.G. rather than the three-strikes enhancement's elements clause. *See Webb*, 139 F.3d at 1394 (applying a conduct-based approach to determine whether the petitioner's conviction qualified as a crime of violence pursuant to the *enumerated* clause—§ 4B1.2—of the

[2] For the purposes of the *Fulford* rule, the elements clause now before the Court uses the same language, in relevant part, as § 3559(c)(2)(D). C*ompare* § 3559(c)(2)(F)(ii) ("that has *as an element* the use, attempted use, or threatened use of physical force . . .") *with* § 3559(c)(2)(D) ("an offense that has *as its elements* those described in section 924(c) or 929(a) . . .").

U.S.S.G. career offender enhancement); *Rozier*, 701 F.3d at 684–86 (applying the modified categorical approach in upholding a conviction under the *residual* clause—§ 4B1.2(a)(2)—of the U.S.S.G. career offender enhancement). However, "the 'categorical approach' must be used when a sentence enhancement statute requires proof of the *elements* of a prior offense." *United States v. Breitweiser*, 357 F.3d 1249, 1254 (11th Cir. 2004) (citing *Fulford*, 267 F.3d at 1250–51).[3]

Accordingly, the Court sustains Petitioner's objection and applies a strict categorical approach to whether the 1998 Burglary qualifies as a predicate under the elements clause. In so doing, the Court finds that the 1998 Burglary does not qualify as a predicate under the elements clause because Florida burglary with assault or battery does not require as an element the use, attempted use, or threatened use of force.

B. Petitioner's Remaining Objections are Unpersuasive

The Court is not persuaded, however, by Petitioner's objection to Magistrate Judge McAliley's finding that Respondent had not waived its ability to argue that the Court relied on the

[3] *Beeman* instructs that the law at the time of sentencing is persuasive, and that statements of the law today cast "very little light, if any" on whether the prior conviction in question qualified under any other clause of an enhancement statute. 871 F.3d at 1224 n.5. The Court acknowledges that, today, the "modified categorical approach," which permits courts to look beyond the charging document itself to other court documents like a presentence report, is often used to determine whether certain prior convictions qualify as predicate offenses under the enhancement statutes. *See Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1340–41 (11th Cir. 2013) (applying the modified categorical approach in analyzing convictions for battery on a law enforcement officer and aggravated battery), *abrogated on other grounds*, *Bruten v. United States*, 814 F. App'x 486 (11th Cir. 2020). In *Descamps v. United States*, the Supreme Court cured any ambiguity regarding the modified categorical approach by holding that such an approach is appropriate where the sentencing court must consider a "divisible" statute, or one that lists multiple crimes under one statutory violation, some of which are predicate crimes and some of which are not. 570 U.S. 254, 265 (2013). However, the modified categorical approach, particularly in the form set forth by *Turner*, *Curtis Johnson*, and *Descamps* was not at the Court's disposal when it sentenced Petitioner in 2003. At that time, the Court was bound by the *Fulford* rule, as set out even more clearly in *Breitweiser*. Respondent has not submitted any legal precedent where a court used the modified categorical approach to interpret a criminal statute under an elements clause of an enhancement statute before Petitioner was sentenced. Accordingly, the Court finds that it would have applied a strict categorical method in 2003.

elements clause at sentencing. Specifically, Petitioner argues that the "R&R's findings that [(1)] the record was void of any indication that the sentencing court relied exclusively on 3559(c)'s residual clause, and [(2)] the government did not effectively disclaim reliance on 3559(c)'s elements' clause, or that the government did not otherwise concede or waive the issue" are in error. Objs. at 11. Respondent argues that the question of whether the Court relied exclusively on the elements clause is not an affirmative defense that the government can "waive through inaction," but a burden of proof to which a party cannot stipulate. Resp. at 22.

Inherent in Petitioner's objection are two factual disputes: (1) whether the Court expressed its reliance on the residual clause after sentencing Petitioner; and (2) whether Respondent waived its argument by relying on the residual clause. On the matter of the Court's expression of reliance on the residual clause, Petitioner concedes that the Court "did not make explicit its basis for applying the § 3559(c) enhancement at the original sentencing." Objs. at 11. While Petitioner argues that the Court's conduct post-sentencing is indicative of the Court's reasoning in 2003, Petitioner fails to identify where the Court ever subsequently "made clear that it relied exclusively on § 3559(c)'s residual clause." *Id.* The Court finds that the record, both before and after Petitioner's sentencing, does not make clear which provision of the three-strikes enhancement the Court relied on.

With respect to Petitioner's assertion that Magistrate Judge McAliley erred in finding that Respondent did not "explicitly disclaim reliance" on the residual clause, Petitioner again fails to identify a single instance of such an explicit disclaimer. His claim that exclusive reliance is established by Respondent having "*effectively* disclaimed reliance" on the elements clause is telling. *Id.* Petitioner's argument stems from Respondent's earlier position on the applicability of *Johnson*. Specifically, Petitioner refers to Respondent's arguments throughout the pendency of

the Motion that *Johnson* was only applicable to the residual clause of the ACCA, and that it should not be held to apply to the residual clause of the three-strikes enhancement. *See, e.g.*, (ECF No. 8) at 8 (arguing that the residual clause of the three-strikes enhancement "focuses on physical force, rather than ACCA's focus on risk of physical injury"). These arguments do not constitute an explicit reliance on the residual clause or an explicit disclaimer of the elements clause. But even if they did, neither an explicit reliance or disclaimer would permit the Court to sanction Petitioner's claim on the sole basis that the Parties stipulated, or Respondent had waived any objection, to Petitioner having met his burden of proof. *See United States v. One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 462 (11th Cir. 1983). Accordingly, Petitioner's objection on these bases is unpersuasive.

Petitioner also objects on the ground that he did not concede that he could not satisfy his *Beeman* burden on the 1987 Robbery, but was "preserving the issue" for appellate purposes on the theory that Florida robbery would not qualify as a predicate offense under the elements clause if it was a "mere snatching." Objs. at 15 (citing *Stokeling v. United States*, 139 S. Ct. 544 (2019)). Respondent does not address the issue in its Response. Magistrate Judge McAliley does not merely find that Petitioner conceded that the 1987 Robbery was a qualifying offense. Rather, she finds that Petitioner "failed to offer any meaningful argument regarding the 1987 [Robbery, and thus concludes] that Petitioner *effectively* concedes that he cannot meet his burden under *Beeman* with respect to that offense." R&R at 3 (emphasis added). The Court echoes that assessment. Petitioner relegated his discussion of the 1987 Robbery to a footnote, where he immediately acknowledges that "the Eleventh Circuit has held that Florida robbery is a violent felony under various clauses of ACCA and other enhancements, and the Supreme Court has recently upheld Florida robbery as a violent felony under ACCA's elements' clause in *Stokeling v. United States*."

Petitioner's Br. at 8 n.4. Petitioner's "mere snatching" argument is cursory at best, and far-fetched at worst. Because it is Petitioner's burden under *Beeman* to persuade the Court that the Court relied exclusively on the residual clause at sentencing, and Petitioner does not attempt to meet that burden here, Petitioner has "effectively conceded" its ability to satisfy *Beeman* on the 1987 Robbery for the purposes of the 11th Cir. Remand. Accordingly, this objection is also unpersuasive.[4]

In sum, the Court finds that Petitioner met his burden under *Beeman* but is not persuaded by Petitioner's other objections.

C. The Residual Clause of the Three-Strikes Enhancement Has Not Been Ruled Unconstitutional by Any Court with Binding Authority

Because Petitioner has met his burden under *Beeman* and the Eleventh Circuit vacated the Court's denial of Petitioner's Motion, the Court now turns to Petitioner's argument that his sentence must be overturned because it was enhanced pursuant to the residual clause of § 3559. Petitioner contends that the residual clause of § 3559(c) "is very similar to ACCA's residual clause, and is likewise unconstitutional in light of *Johnson*." Mot. at 11. Further, Petitioner argues that in *Johnson*'s wake, courts have applied *Johnson*'s reasoning to the residual clauses of 18 U.S.C. § 16(b) and § 924(c) and ruled them unconstitutionally vague as well. *Id.* at 14.

In the four years since Petitioner filed the Motion, the Supreme Court has applied *Johnson* to the § 16(b) and § 924(c) residual clauses and reached the same result. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1207 (2018) ("Section 16(b) has the same two features as ACCA's residual clause . . . combined in the same constitutionally problematic way."); *United States v. Davis*, 139 S. Ct.

[4] Petitioner's remaining objections are either moot by way of the Court's findings as set forth above, or not "proper, specific objection[s]," to the factual findings and legal conclusions in the R&R. *See Macort*, 208 F. App'x at 784. Accordingly, they are overruled.

2319, 2336 (2019) (holding that § 924(c)(3)(B) is unconstitutionally vague). *Dimaya* and *Davis* beg the question: is § 3559(c)'s residual clause, like the § 16(b) and § 924(c) residual clauses, rendered unconstitutionally vague when subjected to the *Johnson* analysis. *See United States v. Morrison*, 751 F. App'x 1026, 1027 (9th Cir. 2019) ("The residual clause in § 16(b) seems materially indistinguishable from the residual clause contained in § 3559(c)(2)(F)."). Some district courts have answered the question affirmatively. *See generally United States v. Goodridge*, 392 F. Supp. 3d 159 (D. Mass. 2019); *United States v. Minjarez*, 374 F. Supp. 3d 977 (E.D. Cal. 2019); *Haynes v. United States*, 237 F. Supp. 3d 816 (C.D. Ill. 2017). However, no federal court of appeals has provided a definitive answer. *See, e.g.*, *Morrison*, 751 F. App'x at 1027 (declining to address whether the three-strikes enhancement's residual clause was unconstitutional because the issue was not addressed by the district court).

Ultimately, the Eleventh Circuit has not considered *Johnson*'s applicability to § 3559(c) in light of *Dimaya* and *Davis*. Although the residual clauses of the ACCA, § 16(b) and 924(c) were declared unconstitutional, and these statutes differ only slightly from § 3559(c), *Johnson*, *Dimaya*, or *Davis* are not written such that their holdings necessarily apply to other residual clauses. Thus, in the absence of any controlling precedent to the contrary, and in consideration of the narrow scope of the 11th Cir. Remand, the Court declines to strike the residual clause of § 3559(c) as unconstitutional. *See Walker v. United States*, No. 16-21973-Civ-Scola, 2017 WL 3588645, at *1 (S.D. Fla. Aug. 18, 2017) ("Simply put, *Johnson* did not recognize as a new right that the residual clauses of § 3559(c)(2)(F)(ii) or a similarly worded residual clause are unconstitutionally vague.") (citation and internal quotation marks omitted); *Richitelli v. United States*, No. 16-61345-CIV-COHN/SELTZER, 09-60229-CR-COHN, 2016 WL 9132037, at *6 (S.D. Fla. Oct. 25, 2016) (noting that the residual clause in the three-strikes enhancement statute is "similar to [but]

nonetheless distinct from" the residual clause of the ACCA invalidated in *Johnson*). *See also Holman v. United States*, No. 3:16-cv-1775-D-BN, 2019 WL 2525505, at *4 (N.D. Tex. Mar. 21, 2019) (recommending that the court decline to extend *Johnson*'s holding to § 3559(c)'s residual clause because the Supreme Court has yet to do so), *report and recommendation adopted*, 2019 WL 2524915 (N.D. Tex. June 19, 2019).

Accordingly, although Petitioner met his burden under *Beeman*, he fails to successfully challenge his sentence because the residual clause of § 3559(c) is not recognized as unconstitutional under *Johnson*. Additionally, because the issue of § 3559(c)'s residual clause remains unsettled, the Court again issues a certificate of appealability on whether the residual clause is unconstitutionally vague.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the R&R, the Objections, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Magistrate Judge McAliley's Report and Recommendation is ADOPTED IN PART (ECF No. 56). It is further ORDERED that Petitioner's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and Memorandum of Law in Support (ECF No. 5) is DENIED. Moreover, the Court issues a certificate of appealability as to whether § 3559(c)'s residual clause is unconstitutional in light of *Johnson*. The Clerk of the Court is instructed to CLOSE this case. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of August, 2020.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22268-CIV-MOORE/MCALILEY

CHARLES JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

CORRECTED REPORT AND RECOMMENDATION[1]

Petitioner Charles Jones filed a Motion to Vacate, Set Aside, or Correct a Sentence, pursuant to 28 U.S.C. § 2255 ("the Motion"), (ECF No. 5, 9). Following briefing and a Report and Recommendation from United States Magistrate Judge Patrick A. White, the Court denied Petitioner's Motion, and Petitioner appealed. (ECF No. 8, 16, 22, 31, 33). Upon the government's motion, the Eleventh Circuit Court of Appeals entered an Order of Remand, (ECF No. 37), directing this Court to address whether Petitioner has satisfied his burden under *United States v. Beeman*, 871 F.3d 1215 (11th Cir. 2017). The parties filed briefs addressing this limited issue, (ECF Nos. 43-1, 46, 49-1), and the Honorable K. Michael Moore referred the matter to me for a report and recommendation, (ECF Nos. 38, 53). For the reasons set forth below, I recommend that the Court find that Petitioner has not satisfied his burden under *Beeman*.

[1] This Report and Recommendation corrects scrivener's errors in the Report filed on June 26, 2020.

I. BACKGROUND

In 2003, a jury convicted Petitioner of (i) armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); (ii) knowingly carrying, using, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and (iii) being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (CR-ECF No. 59).[2] Prior to trial, the government filed a notice of intent to seek a sentencing enhancement pursuant to 18 U.S.C. § 3559(c), known as the "three-strikes enhancement." (CR-ECF No. 38). The notice identified two predicate offenses to support this enhancement: (1) a Florida conviction for burglary with assault or battery, in violation of Fla. Stat. § 810.02(2)(a) (Dade County Case No. 98-26076) (the "1998 Offense"); and (2) a Florida conviction for robbery, in violation of Fla. Stat. § 812.13(1), and burglary, in violation of Fla. Stat. § 810.02 (Broward County Case No. 87-21860CF10) (the "1987 Offense"). (*Id*.).

Following Petitioner's conviction, a Presentence Investigation Report was prepared. The PSR concluded that Petitioner is eligible for the three-strikes enhancement but did not specify its basis for finding that Petitioner's prior convictions qualified as predicate offenses. Petitioner did not file written objections to the PSR. (ECF No. 46 at 3-4). In April 2003, the Court sentenced Petitioner to life imprisonment on Count 1 (bank robbery) based upon the three-strikes enhancement, a concurrent 30 year term of imprisonment on Count 4 (felon-in-possession) and a consecutive ten year term of imprisonment on Count 3

[2] *United States v. Jones*, Case No. 02-20875-Moore. (ECF No. 9). Record entries from Petitioner's underlying criminal action are cited to herein as CR-ECF No. __.

(carrying a firearm during a crime of violence). (CR-ECF No. 74). Like the PSR, the Court did not specify the basis of its conclusion that Petitioner's prior convictions qualified as predicate offenses for purposes of the three-strikes enhancement.

The 1987 Offense and the 1998 Offense are the only predicate offenses addressed in the parties' briefs. Petitioner, however, focuses his analysis exclusively upon the 1998 Offense, reasoning that "[w]ithout the 1998 burglary offense, there are not enough § 3559(c) predicates to sustain the [three-strikes] enhancement." (ECF No. 43-1 at 8, n.4). Rather than challenge the 1987 Offense, Petitioner asserts that he "preserves for further review that his 1987 robbery" does not qualify as a serious violent felony under § 3559(c). (*Id.*). Having failed to offer any meaningful argument regarding the 1987 Offense, I conclude that Petitioner effectively concedes that he cannot meet his burden under *Beeman* with respect to that offense. Accordingly, I limit my analysis to whether Petitioner has satisfied his burden under *Beeman* with respect to the 1998 Offense.

II. ANALYSIS

A. Legal Standard

The three-strikes enhancement mandates a sentence of life imprisonment for a person who is convicted of a serious violent felony, and who has previously been convicted of two or more "serious violent felonies" or at least one "serious violent felony" and at least one serious drug offense. 18 U.S.C. § 3559(c)(1). The term "serious violent felony" is defined as:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section

> 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

18 U.S.C. § 3559 (c)(2)(F). I refer to subpart (i) as the "enumerated offenses" clause, as it lists specific offenses that qualify as a "serious violent felony." 18 U.S.C. § 3559 (c)(2)(F)(i). The parties make no argument that the 1998 Offense falls within the enumerated offenses clause, and with good reason: burglary is not one of the offenses listed therein. *Id*.

Subpart (ii) has two separate clauses, both of which apply to offenses punishable by imprisonment of ten years or more. I refer to the "elements" clause as that portion of subpart (ii) that defines a qualifying offense as one "that has as an element the use, attempted use, or threatened use of physical force against the person of another…." 18 U.S.C. § 3559 (c)(2)(F)(ii). I refer to the "residual" clause as that portion of subpart (ii) that provides that an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense" is also a serious violent felony. *Id.* As explained below, the question here is whether Petitioner has demonstrated that it is more likely than not that the Court relied exclusively

upon the residual clause to conclude that the 1998 Offense is a "serious violent felony" that rendered Petitioner eligible for the three-strikes enhancement.

The *Beeman* decision did not involve the three-strikes enhancement. Rather, it addressed a § 2255 petitioner's burden to establish that his sentence enhancement pursuant to the Armed Career Criminal Act ("ACCA") was unconstitutional under the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2563 (2015). In *Johnson*, the Supreme Court held that the ACCA's residual clause was unconstitutionally vague and could not serve as a basis to enhance sentencing penalties. *Id*. at 2563. The *Beeman* Court set out a petitioner's burden of proof to establish a *Johnson* claim. It held that a § 2255 movant who makes a *Johnson* claim must show that, more likely than not, "it was use of the residual clause that led to the sentencing court's enhancement of his sentence." 871 F.3d at 1222.

Here, Petitioner argued in his Motion that the three-strikes enhancement was unconstitutional under *Johnson*. Although this Court disagreed, it issued a certificate of appealability as to whether the residual clause of § 3559(c) is unconstitutionally vague. If Petitioner cannot meet his burden of proof under *Beeman*, his *Johnson* claim regarding the three-strikes enhancement fails.

The *Beeman* court set forth several important principles that are relevant here. First, the court explained that a movant can meet his burden of proof "only…if the sentencing court relied *solely* on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause…" *Id.* at 1221 (emphasis added). As a result, "[i]f it is just as likely that the sentencing court relied on the elements or enumerated

offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." *Id*. at 1222.

Second, if the record does not suggest that the district court relied solely upon the residual clause, the movant can meet his burden of proof by showing that precedent existed at the time of sentencing "holding, or otherwise making obvious" that the offense qualified as a predicate offense "only under the residual clause." *Id*. at 1224. The matter is one of historical fact, and the movant "bears the burden of proving that historical fact." *Id*. at 1224, n.5. "[I]f the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." *Id*.

Third, if the record is unclear whether the sentencing court relied on the residual clause or the elements clause, or both, in finding that the offense qualified as a violent felony, and the movant does not identify precedent in effect at the time of sentencing demonstrating that the prior offense qualified as a violent felony only under the residual clause, the movant fails to meet his burden of proof. *Id*. at 1224-25. The *Beeman* court reasoned that "where…the evidence does not clearly explain what happened[,] the party with the burden loses." *Id*. at 1225.

Here, the parties agree that the trial record does not make clear whether the Court relied solely on the residual clause to determine that the 1998 Offense is a "serious violent felony" under the three-strikes enhancement. The PSR did not specify which provision of § 3559 (c)(2)(F) it relied upon, nor did the Court during sentencing. Thus, the relevant issue is whether Petitioner has shown that precedent in 2003 held or made obvious that the 1998

Offense could have qualified as a "serious violent felony" under only the residual clause. As explained below, I conclude that Petitioner has not made this showing.

B. The Government Has Not Waived Its Ability to Argue that Petitioner Was Sentenced Under the Elements Clause

As an initial matter, I address Petitioner's argument that the government waived its reliance on any § 3559(c) provision other than the residual clause. (ECF No. 43-1 at 6-7). Petitioner argued, both in his Motion and objections to the Report and Recommendation, that the residual clause in § 3559(c) was unconstitutionally vague under *Johnson* and that the elements clause of that statute did not apply. (*Id.*). In its response, the government did not address Petitioner's argument regarding the elements clause, and instead argued that *Johnson* did not apply to § 3559(c). (*Id.*) Petitioner contends that the failure to address his elements clause argument bars the government from now relying on that clause to argue that Petitioner cannot meet his burden under *Beeman*. (*Id.*). I disagree for three reasons.

First, the government did not expressly disclaim reliance on the elements clause in its response to either the Motion or Petitioner's objections. The absence of an explicit disclaimer distinguishes this case from the authority upon which Plaintiff relies. *See United States v. Maida*, 650 Fed. App'x 682 (11th Cir. 2016) ("the government's statements effectively disclaimed reliance on the ground that it now seeks to pursue on remand"); *Curtis Johnson v. United States*, 559 U.S. 133, 145, 130 S. Ct. 1265, 1274, 176 L. Ed. 2d 1 (2010) ("The Government did not keep this option alive because it disclaimed at sentencing any reliance upon the residual clause.").

Second, the Eleventh Circuit directed this Court, and by extension the parties, to address whether Petitioner met his burden of proof, as established by *Beeman*, to prevail on his *Johnson* claim. Petitioner's burden of proof is a foundational principle that cannot be waived or artificially shifted by the parties. *See United States v. One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 462 (11th Cir. 1983) ("[A] stipulation of the parties to an action may be ignored by the court if it is a stipulation as to what the law requires.").

Third, Petitioner's waiver argument runs afoul of the directives in *Beeman*. As explained above, *Beeman* requires Petitioner to demonstrate that this Court "more likely than not" relied upon solely the residual clause in classifying the 1998 Offense as a serious violent felony. *Beeman*, 871 F.3d at 1221. To make this determination, the Court must necessarily address whether "it was just as likely" the Court relied upon the elements clause, in addition to or instead of the residual clause, in applying the three-strikes enhancement. *Id*. at 1222. It is thus not surprising that the Eleventh Circuit rejected the contention that the government waived or forfeited its *Beeman* argument by failing to "raise a burden-of-proof defense before the district court." *Smith v. United States*, 749 Fed, App'x 827, 831 (11th Cir. 2018). As the *Smith* court aptly stated, courts "cannot simply ignore controlling precedent." *Id.* at 831.

C. Petitioner Has Not Established that the Sentencing Court More Likely Than Not Relied on the Residual Clause

As mentioned above, the 1998 Offense is a conviction for burglary with assault or battery in violation of Florida Statutes § 810.02(2)(a). The statute states that "[b]urglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding

life imprisonment…if, in the course of committing the offense, the offender: (a) [m]akes an assault or battery upon any person….” Fla. Stat. § 810.02(2)(a) (1998). The 1998 Offense meets the three-strikes enhancement elements clause requirement that the predicate offense be punishable by “a maximum term of imprisonment of 10 years or more.” 18 U.S.C. § 3559(c)(2)(F)(ii). The question then is whether the 1998 Offense, under Florida law in 2003, had as an element “the use, attempted use, or threatened use of physical force against the person of another.” *Id*.

Neither party directs the Court to any precedent in effect at the time of Petitioner’s sentencing that held that burglary with assault or battery necessarily required the use, attempted use, or threatened use of physical force against another. To address the question, I turn first to the language of the statute itself. At the time of Petitioner’s crime, Florida Statutes § 810.02(1) defined burglary as “entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.” Fla. Stat. § 810.02(1) (1998). Thus, the plain language of the burglary statute did not include as an element the use, attempted use or threatened use of physical force.

A decision of the United States Supreme Court in 1990 confirmed that the crime of burglary did not contain an element of physical force. *See Taylor v. United States*, 495 U.S. 575 (1990). In *Taylor*, the Supreme Court discussed the addition of burglary, and other property crimes, to the enumerated crimes clause of the ACCA.[3] It noted that “the most

[3] As already noted, burglary is not included in the enumerated crimes clause of the three-strikes enhancement. 18 U.S.C. § 3559 (c)(2)(F)(i).

likely explanation" for including these offenses in the enumerated crimes clause of the ACCA is that they "so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement even though, *considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person*." *Id*. at 597 (emphasis added). Congress' inclusion of burglary in the enumerated crimes clause of the ACCA is an acknowledgment that the offense was not covered by the elements clause.

Of course, the 1998 Offense is something more than burglary; it is the Florida crime of burglary with assault or battery, which terms are themselves independently defined crimes. Florida Statutes § 784.011 defined assault as "an intentional, unlawful *threat by word or act to do violence to the person of another*, coupled with the apparent ability to do so, and doing some act with creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011(1) (1998) (emphasis supplied). From this I conclude that the crime of burglary with assault had to include the offender's threat of physical force against another person.

However, the plain language of the statute ("assault *or* battery") means Petitioner could have committed the offense of burglary with battery alone. Under Florida Statutes § 784.03, battery "occurs when a person actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a) (1998). The statutory language makes clear that battery does not require the use of physical force; it can be committed by mere unwanted touching, however slight.

Florida criminal statutes must be strictly construed in favor of the accused. *See* Fla. Stat. § 775.021(1) (2003) ("The provisions of this [criminal] code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."). Given that the statutory elements of the 1998 Offense required the State to prove burglary with *either* an assault *or* a battery, this offense did not necessarily require, as an element, proof of the use, attempted use or threatened use of physical force against another person.[4]

In this situation, where the predicate crime could be committed with or without the use, attempted use or threatened use of physical force, the Eleventh Circuit instructed sentencing courts to look to the conduct underlying the conviction. *See United States v. Webb*, 139 F.3d 1390 (11th Cir. 1998). In *Webb*, the defendant challenged the district court's decision to sentence him as a career offender under the Sentencing Guidelines arguing, in part, that his conviction for intimidation of a postal worker under 18 U.S.C. § 111 did not constitute a crime of violence because it did not "implicate as an element the use, threatened use, or attempted use of physical force." *Id*. at 1392-93. He asserted that the district court was confined to "the plain statutory language referenced in his judgment"

[4] While acknowledging that case law issued after Petitioner's sentencing would "cast very little light, if any" on whether Petitioner was sentenced under only the residual clause, *Beeman*, 871 F.3d at 1224, n.5, I note that several Florida District Courts of Appeal have subsequently held that based upon the statutory text alone, burglary with assault or battery does not involve the use or threat of physical force. *See Crosley v. State*, 247 So. 35 69, 70 (Fla. 1st DCA 2018) ("Since a battery can be committed merely by the intentional touching of another person, which may not involve the use or threat of force or violence, the crime of burglary of a conveyance with assault or battery can be committed without the use or threat of physical force or violence.") (collecting cases).

and was "precluded from looking at the conduct underlying the conviction." *Id*. at 1393. The Eleventh Circuit disagreed. The Court reasoned that:

> We readily can imagine circumstances in which an individual is able to induce fear by either physical means (*i.e.*, the threat of actual physical violence) or non-physical means (for example, the threat of economic harm). Even assuming that we adopt Webb's argument that a legal distinction exists between different types of force, we nonetheless cannot say with certainty whether "forcible intimidation" under § 111 contains, as an element, the use, attempted use, or threatened use of physical force. Having found the statute to be ambiguous with regard to this issue, we must look to the conduct underlying Webb's conviction.

Id. 1394 (citing *United States v. Spell*, 44 F.3d 936, 939 (11th Cir. 1995) ("A district court may only inquire into the conduct surrounding a conviction if ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself.")). The Eleventh Circuit concluded that the district court properly characterized the defendant as a career offender because it was "undisputed" that the conduct that gave rise to his forcible intimidation conviction was armed robbery, which the Sentencing Guidelines expressly identified as a crime of violence. *Id.*

This Court was bound by *Webb* at the time it sentenced Petitioner, and it thus could have looked to the conduct underlying Petitioner's conviction for burglary with assault or battery to determine whether the use, attempted use or threatened use of physical force against another person was a necessary element of the crime. The Court could have thus determined whether the elements of assault or the elements of battery were essential to Petitioner's conviction. The PSR described the 1998 Offense this way:

> On July 30, 1998 at the location of NW 27th Avenue and 79th Street in Hialeah, Florida, the defendant approached the 83 year old victim while he was seated in his vehicle. The defendant reached inside the victim's vehicle and struck the victim several times with a brick. The defendant took $200 in cash from the victim who was later transported to the hospital for his injuries. The defendant was apprehended after a brief foot chase ensued.

(*Presentence Investigation Report* at ¶ 70). Petitioner did not object to the PSR.

Based upon these undisputed facts, the Court could have concluded that Petitioner was convicted of the 1998 Offense when he committed burglary with assault. In other words, the elements of assault were necessary to Petitioner's conviction. With this conclusion, the Court could have found that Petitioner's conviction under § 810.02(2)(a) necessarily required, as an element, the use, attempted use or threatened use of force. This leads me to conclude that it is "just as likely" that the Court relied upon the elements clause, solely, or alternatively, to conclude that the 1998 Offense qualified as a predicate offense under the three-strikes enhancement. *See Beeman*, 871 F. 3d at 1222. I thus conclude that Petitioner has failed to show that precedent in 2003 held or made obvious that the 1998 Offense could have qualified as a "serious violent felony" under only the residual clause. Therefore, Petitioner has not demonstrated that, more likely than not, the residual clause led to the Court's enhancement of his sentence under § 3559(c).

III. RECOMMENDATION

For the reasons explained above, I recommend that the Court find that Petitioner has not met his burden under *United States v. Beeman*.

IV. OBJECTIONS

No later than fourteen days from the date of this Report and Recommendation

the parties may file any written objections to this Report and Recommendation with the Honorable K. Michael Moore, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985), *Henley v.* Johnson, 885 F.2d 790, 794 (11th Cir. 1989), 28 U.S.C. § 636(b)(1), 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Miami, Florida, this 27th day of June 2020.

CHRIS McALILEY
UNITED STATES MAGISTRATE JUDGE

Copies to: The Honorable K. Michael Moore
All counsel of record

A-5

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

CHARLES EDWARD JONES

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1:02CR20875-001-MOORE

Counsel For Defendant: William Thomas, AFPD
Counsel For The United States: Kurt Erskine
Court Reporter: Sally Rice

The defendant was found guilty on Count(s) 1,3 and 4 of the Indictment.
ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18:2113(a) and (d)	Bank robbery and assault with a deadly weapon	9/30/02	1
18:924(c)(1)(A)(iii)	Carrying a firearm during a crime of violence	9/30/02	3
18:922(g)(1)	Possession of a firearm during a crime of violence	9/30/02	4

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No. 254-62-0902
Defendant's Date of Birth: 1/30/68
Deft's U.S. Marshal No.: 69056-004

Date of Imposition of Sentence:
April 24, 2003

Defendant's Mailing Address:
In custody

Defendant's Residence Address:
In custody

K. MICHAEL MOORE
United States District Judge

April 24th, 2003

DEFENDANT: CHARLES EDWARD JONES
CASE NUMBER: 1:02CR20875-001-MOORE

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **LIFE as to Count 1, and 360 MONTHS as to Count 4, to run concurrently with each other. As to Count 3, 120 MONTHS, to run consecutive to the term of confinement imposed in Counts 1 and 4.**

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

Consistent with the defendant's security risk, the Court recommends confinement in the southern area of Florida

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: CHARLES EDWARD JONES
CASE NUMBER: 1:02CR20875-001-MOORE

SUPERVISED RELEASE

If released from imprisonment, the defendant shall be on supervised release for a term of **5 years as to Counts 1,3 and 4, to run concurrently with each other.**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.
The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHARLES EDWARD JONES
CASE NUMBER: 1:02CR20875-001-MOORE

SPECIAL CONDITIONS OF SUPERVISION

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

The defendant shall participate in an approved treatment program for mental health/substance abuse, as directed by the U.S. Probation Office, and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment, if deemed necessary. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

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

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: CHARLES EDWARD JONES
CASE NUMBER: 1:02CR20875-001-MOORE

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.	$	$9,624.90

It is further ordered that the defendant shall pay restitution in the amount of $9,624.90. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay.

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: CHARLES EDWARD JONES
CASE NUMBER: 1:02CR20875-001-MOORE

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. Lump sum payment of **$300.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Pursuant to the forfeiture count in the Indictment.

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

B-1

DOJ LETTER TO CONGRESS

U.S. Department of Justice
Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

September 28, 2020

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Henry Wainwright* v. *United States*, No. 19-cv-62364 (S.D. Fla. Apr. 6, 2020), appeal pending, No. 20-12921 (11th Cir.); *Jay Anthony Richitelli* v. *United States*, No. 16-cv-61345 (S.D Fla. Dec. 6, 2016), appeal pending, No. 17-10482 (11th Cir.)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced decisions of the United States District Court for the Southern District of Florida. Copies of the district court's orders of December 6, 2016, and April 6, 2020, are enclosed.

Under 18 U.S.C. 3559(c), a district court is required to impose a sentence of life imprisonment for a defendant convicted of committing a "serious violent felony" if the defendant has previously been convicted of two or more "serious violent felon[ies]." Under the "substantial-risk clause" in 18 U.S.C. 3559(c)(2)(F)(ii), a "serious violent felony" is defined to include "any other offense punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."

In 2010, co-defendants Jay Anthony Richitelli and Henry Wainwright were convicted after separate jury trials of, among other things, conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and of attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a). The district court determined that those offenses both qualified as serious violent felonies under Section 3559(c)(2)(F) and that each defendant also had two or more prior qualifying felony convictions for purposes of Section 3559(c). Accordingly, the district court imposed mandatory life sentences on those two counts of conviction for each defendant. Those convictions were upheld on direct appeal and in collateral proceedings under 28 U.S.C. 2255.

In 2015, the Supreme Court held that the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B), which is worded similarly to Section 3559(c)(2)(F)(ii)'s

substantial-risk clause, is unconstitutionally vague. *See Johnson* v. *United States*, 576 U.S. 591, 597 (2015). Richitelli later filed an authorized second-or-successive post-conviction motion under Section 2255, seeking to vacate his two life sentences on the theory that the substantial-risk clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of *Johnson*. On December 6, 2016, the district court denied Richitelli's motion without addressing the constitutionality of the substantial-risk clause; the court instead determined that Richitelli's life sentences could be sustained on alternative grounds that did not rely on the substantial-risk clause. Richitelli's appeal from that decision is currently pending before the U.S. Court of Appeals for the Eleventh Circuit as No. 17-10482. The court of appeals has stayed the appeal pending the resolution of ongoing proceedings in district court concerning other counts of conviction not at issue here.

In 2019, the Supreme Court held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B), which is nearly identical to Section 3559(c)(2)(F)(ii)'s substantial-risk clause, is unconstitutionally vague for the same reasons that had led the Court to find ACCA's residual clause unconstitutional in *Johnson*. *See Davis* v. *United States*, 139 S. Ct. 2319, 2325-2327 (2019). Wainwright later filed an authorized second-or-successive post-conviction motion under Section 2255 seeking to vacate his two life sentences on the theory that the substantial-risk clause of Section 3559(c)(2)(F)(ii) is unconstitutionally vague in light of *Davis*. On April 6, 2020, the district court granted Wainwright's motion. The court concluded that Section 3559(c)(2)(F)(ii) is unconstitutionally vague under *Davis* and that, contrary to its earlier decision in Richitelli's post-conviction proceedings, the life sentences that the court had imposed in this case relied upon the now-invalid substantial-risk clause and could not be sustained on an alternative ground. The court resentenced Wainwright to a term of 204 months of imprisonment. The government's appeal from those proceedings is currently pending before the U.S. Court of Appeals for the Eleventh Circuit as No. 20-12921. The government's opening brief is due on October 13, 2020.

The Department of Justice has reluctantly determined that no reasonable basis exists to distinguish the substantial-risk clause in Section 3559(c)(2)(F)(ii) from the provision the Supreme Court found to be unconstitutionally vague in *Davis*. The substantial-risk clause in Section 3559(c)(2)(F)(ii) is almost identical to Section 924(c)(3)(B), which was at issue in *Davis*. *Compare* 18 U.S.C. 3559(c)(2)(F)(ii) (an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense"), *with* 18 U.S.C. 924(c)(3)(B) (an 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"). The substantial-risk clause in Section 3559(c)(2)(F)(ii) has also been interpreted to require the same "categorical approach" to the classification of predicate offenses as the provision at issue in *Davis*, and the Court in *Davis* indicated that the statutory language compelled such an interpretation. *See Davis*, 139 S. Ct. at 2327-2329. Accordingly, the Department has concluded that *Davis* rendered the substantial-risk clause of Section 3559(c)(2)(F)(ii) unconstitutional.

The Department has also determined not to contest the district court's conclusion that the particular life sentences imposed here depended on the substantial-risk clause of Section 3559(c)(2)(F)(ii) and cannot be sustained on alternative grounds under other still-valid provisions in Section 3559(c). The Department has therefore decided to withdraw its appeal in Wainwright's proceedings (No. 20-12921) and to agree in Richitelli's appeal (No. 17-10482) that the court of appeals should remand the case to the district court for Richitelli to be resentenced. The Department

has also determined that it will similarly acknowledge that *Davis* rendered the substantial-risk clause of Section 3559(c)(2)(F)(ii) unconstitutional in other cases in which the issue arises. Please let me know if we can be of further assistance.

Sincerely,

Jeffrey B. Wall
Acting Solicitor General

Enclosure

B-2

SHABAZZ

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**No. 3:11cr23-1**
	:	**No. 3:16cv1368**
v.	**:**	
	:	**(Judge Munley)**
KAREEM SHABAZZ,	**:**	
Defendant	**:**	

::

MEMORANDUM

Before the court for disposition is Defendant Kareem Shabazz's motion to vacate and correct his sentence under 28 U.S.C. § 2255. Defendant seeks relief from a sentence imposed under the Armed Career Criminal Act (hereinafter "ACCA") and federal "Three Strikes Law" (hereinafter "TSL"). The applicability of these statutes, and their mandatory minimum sentences, hinges on whether defendant's prior robbery convictions from New York state amount to "violent felonies" under federal law. The motion has been fully briefed and is ripe for disposition.

Background

The United States brought charges against Defendant Shabazz related to a robbery at the M&T Bank in Hanover Township, Pennsylvania. At the conclusion of a four-day trial, on May 4, 2012, a jury convicted defendant of the following charges: Count 1 -Brandishing a Firearm During and in Relation to a Crime of

Violence, 18 U.S.C. § 924(o); Count 2 – Bank Robbery, 18 U.S.C. § 2113(d) and 2; Count 3 - Using a Firearm in Furtherance of a Crime of Violence, 18 U.S.C. § 924(c) and 2; Count 4 - Possession of Firearm by a Person Convicted of a Crime Punishable by Imprisonment Exceeding One Year, 18 U.S.C. § 922(g)(1) and § 924(e); and Count 5 - Transportation of a Firearm in Interstate Commerce, 18 U.S.C. § 924(b) and 2. (Doc. 112, Verdict).

The court sentenced defendant to a term of life imprisonment on Counts 1, 2, and 5, and one hundred eighty (180) months (that is fifteen years) on Count 4 to run concurrently with the sentences on Counts 1, 2 and 5. On Count 3, the court imposed another life sentence to be served consecutively to the terms imposed on Counts 1, 2, 4, and 5. (Doc. 133, Judgment). The court imposed the life sentences pursuant to the TSL and the fifteen-year sentence as a mandatory minimum under the ACCA. These statutes were invoked due to the defendant's prior state court criminal convictions. Defendant now argues that the sentences are unconstitutional under the Supreme Court's decision in Johnson v. United States, - - U.S. - - , 135 S.Ct. 2551 (2015).

Defendant appealed his conviction to the United States Court of Appeals for the Third Circuit. (Doc. 139, Notice of Appeal). The Third Circuit affirmed his conviction on August 8, 2013. (Doc. 163, Doc. 164, Judgment and Mandate of the United States Court of Appeals); 533 Fed. Appx. 158 (3d Cir. 2013).

Defendant then filed a petition for a writ of certiorari with the United States Supreme Court, which was denied on December 16, 2013. Shabazz v. United States, 134 S.Ct. 832 (2013).

Defendant then filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence. We denied that motion on February 17, 2016. (Doc. 177). On June 24, 2016, the defendant filed a counseled motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. This motion raised arguments based upon the Supreme Court decision in Johnson v. United States, - - U.S. - - , 135 S.Ct. 2551 (2015). Defendant also filed a motion with the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 2244 to file a second or successive motion under 28 U.S.C. § 2255. We stayed his motion in this court, until the Third Circuit ruled upon his motion to file a second or successive section 2255 motion. (Doc. 192).

The Third Circuit granted defendant leave to file a second or successive section 2255 motion on August 11, 2016, and we lifted the stay on September 2, 2016. (Doc. 195). Because the appeals courts were clarifying aspects of the law involved in this case, we granted several stays.[1] The parties then completed briefing the issues, and the matter is now ripe for decision.

[1] For example, the government moved for us to stay the case again pending the Third Circuit ruling in United States v. Robinson, No. 15-8544 and the United States Supreme Court ruling in Beckles v. United States, 135 S.Ct.

Jurisdiction

As defendant brings his motion under section 2255 with permission from the Court of Appeals to file a second or subsequent 2255 motion, we have jurisdiction under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). We also have jurisdiction under 28 U.S.C. § 2241 ("Writs of habeas corpus may be granted by . . . the district courts[.]").

Standard of review

Generally, a federal prisoner in custody under the sentence of a federal court may, within one year from when the judgment becomes final, move the sentencing court to "vacate, set aside, or correct" a sentence "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). A

2551. Robinson and Beckles dealt with issues pertinent to the defendant's motion. We granted this stay on September 14, 2016. (Doc.197). The Robinson and Beckles cases were finally decided and the stay was lifted again. (Doc. 201).

The parties next moved for a stay because petitions for writs for certiorari to the Supreme Court had been filed in several cases which would likely offer significant guidance regarding this case. (Doc. 206). We granted the stay on May 10, 2017. (Doc. 207). The Supreme Court eventually denied certiorari in these cases, and the stay in this case was lifted again. (Doc. 213). The defendant then moved to stay the case pending the disposition of Sessions v. Dimaya before the United States Supreme Court. We granted the stay on March 13, 2018. (Doc. 221). The Supreme Court issued its decision in Sessions and thus on April 20, 2018, we lifted the stay yet again. (Doc. 225).

federal prisoner may also file a section 2255 motion within one year from "[t]he date on which the right asserted was initially recognized by the Supreme Court, if that right was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).[2] A section 2255 motion may attack a federal prisoner's sentence on any of the following grounds: (1) the judgment was rendered without jurisdiction; (2) the sentence imposed was not authorized by law or otherwise open to collateral attack; or (3) there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. 28 U.S.C. § 2255(b).

Section 2255 does not, however, afford a remedy for all errors that may have been made at trial or sentencing. United States v. Essig, 10 F.3d 968, 977 n. 25 (3d Cir. 1993). Rather, section 2255 permits relief for an error of law or fact constituting a "fundamental defect which inherently results in complete miscarriage of justice." United States v. Eakman, 378 F.3d 294, 298 (3d Cir. 2004) (citing United States v. Addonizio, 442 U.S. 178, 185 (1979)). If the court determines that the sentence was not authorized by law, was unconstitutional, or is otherwise open to collateral attack, the court may vacate the judgment,

[2] Timeliness is not an issue in the instant case.

resentence the prisoner, or grant the prisoner a new trial as appropriate. See 28 U.S.C. § 2255(b).

Discussion

As noted above, the defendant received mandatory sentences under the ACCA and the TSL. The sentencing is at issue currently, thus, we will describe with more particularity the sentence in this case.

The jury found defendant guilty of the following:

Count 1 - Brandishing a Firearm During and in Relation to a Crime of Violence, 18 U.S.C. § 924(o);

Count 2 - Bank Robbery, 18 U.S.C. § 2113(d) and 2;

Count 3 - Using a Firearm in Furtherance of a Crime of Violence, 18 U.S.C. § 924(c) and 2;

Count 4 - Possession of Firearm by a Person Convicted of a Crime Punishable by Imprisonment Exceeding One Year 18 U.S.C. § 922(g)(1) and § 924(e); and

Count 5 – Transportation of a Firearm in Interstate Commerce, 18 U.S.C. § 924(b) and 2.

The federal TSL provides for mandatory life imprisonment upon the third conviction of a serious violent felony. 18 U.S.C. § 3559.[3]

Prior to trial the United States filed an "Information of Prior Convictions Notifying Defendant of Intention to Seek Mandatory Life Imprisonment," which informed the defendant that the government would seek mandatory life imprisonment under the TSL on Counts 1, 2, 3 and 5. (Doc. 95). The information indicated that defendant had been convicted of the following prior charges:

1) Robbery 1 and Criminal Possession of Stolen Property, New York state, 1976;

2) Robbery 1, Grand Larceny 3, Escape 1 and Criminal Possession of a Weapon 4, New York state, 1983;

3) Criminal Possession of a Weapon 2nd Degree, Robbery 1st degree, Robbery 1st degree, attempted murder 2nd degree, attempted murder 2nd degree, criminal possession of a Weapon 2nd Degree, Criminal Possession of a Weapon 2nd Degree, 1988.

(Doc. 95, Govt's Information of Prior Convictions).

[3] The TSL also applies after the second conviction of a serious violent felony if the defendant also has a conviction for a serious drug offense

The Presentence Report used the second and third of these three prior offenses as a justification to impose the TSL and its mandatory life sentence. (PSR ¶ ¶ 38, 51, 52). The Presentence Report also suggested that defendant is an armed career criminal due to three prior convictions for violent felonies under 18 U.S.C. § 924(c). (PSR ¶ 76). The defendant's motion challenges all of these findings. We will address them all in turn.

A. Career Criminal

The court sentenced the defendant as a "career criminal" under the United States Sentencing Guidelines (hereinafter "USSG") § 4B1.2(a)(2). The instant petition originally argued that defendant's classification as a "career criminal" is not proper, and therefore, his sentence should be vacated. In his reply brief, however, the defendant concedes that he is not entitled to any relief on this issue.[4]

B. ACCA

The court also sentenced the defendant under the ACCA. The ACCA mandates a minimum fifteen-year prison sentence for a defendant who possessed a firearm after three prior convictions for serious drug offenses or

[4] The defendant's argument had been that the USSG career criminal section was void for vagueness and thus violated the Constitution's Due Process Clause. Subsequent to the filing of this petition, however, the United States Supreme Court held that the USSG cannot be challenged for vagueness under the Due Process Clause. United States v. Beckles, - - U.S. - - , 37 S.Ct. 866, 895 (2017).

violent felonies committed on different occasions. 18 U.S.C. § 924(e). These prior convictions are termed "predicate offenses." The court applied this enhancement to Count 4 – Possession of Firearm by a Person Convicted of a Crime Punishable by Imprisonment Exceeding One Year, 18 U.S.C. § 922(g)(1) and § 924(e).

Defendant attacks this sentencing enhancement on the basis that, although he has several New York state robbery convictions, they do not amount to predicate offenses under the ACCA. After a careful review, we agree in that the New York robbery statute does not categorically amount to a "violent felony" as that term is defined under federal law.

To begin our analysis we will review the defendant's prior state court convictions. The government bears the burden of establishing by a preponderance of the evidence each element required for a sentencing enhancement, United States v. Hernandez, 218 F.3d 272, 278 (3d Cir. 2000), and as set forth above, the government filed an information of prior convictions revealing defendant's prior convictions as follows:

> 1) Robbery 1 and Criminal Possession of Stolen Property, New York state, 1976;
> 2) Robbery 1, Grand Larceny 3, Escape 1 and Criminal Possession of a Weapon 4, New York state, 1983;
> 3) Criminal Possession of a Weapon 2nd Degree, Robbery 1st degree, Robbery 1st degree, attempted murder 2nd degree, attempted murder 2nd degree, criminal

possession of a Weapon 2nd Degree, Criminal Possession of a Weapon 2nd Degree, 1988.

(Doc. 95, Govt's Information of Prior Convictions).

Next, we must determine if these crimes amount to crimes of violence as that term is defined by the ACCA. Under ACCA, a crime of violence is one where it is a felony and "**(i)** has as an element the use, attempted use, or threatened use of physical force against the person or property 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 violent felony definition can be broken down into three different clauses. The portion of the definition starting with "has as an element …" is referred to as the "elements clause." Next is the enumerated offenses clause which lists burglary, arson, extortion and crimes involving explosives. The remainder of the definition, including conduct which presents a serious potential risk of physical injury, is called the residual clause. The United States Supreme Court has declared the residual clause unconstitutional. Johnson v. United States, - - U.S. - -, 135 S.Ct. 2551 (2015). The Court held that the clause violates the Due Process Clause of the Constitution because it is too vague. Id.

As the residual clause has been deemed unconstitutional, we must determine whether the defendant's prior convictions fall within either the

enumerated offenses or the "elements clause." If they do not then the ACCA is inapplicable.[5]

The enumerated offenses are burglary, arson, extortion and offenses involving explosives. Defendant's prior convictions involving robbery do not fit within the enumerated offenses, and thus we must examine them to conclude if they fall within the "elements clause."[6]

The "elements clause" provides that a crime is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" 18 U.S.C. § 924(e)(2)(B)(i). The government's first argument is that all grades of "robbery" in New York have as an element "forcible stealing." That the action needed to amount to "forcible stealing" is enough to also meet the requirement of "violent" physical force under the ACCA. Thus, any conviction of robbery in New York can serve as a predicate conviction for application of the ACCA. The defendant disagrees. After a careful review, we agree with the defendant.

---

[5] The Third Circuit Court of Appeals has held that once a defendant has cleared the gatekeeping requirements of filing a second or successive section 2255 motion, then he may rely upon cases which were decided after his sentencing to ensure that the ACCA is applied appropriately. United States v. Peppers, 899 F. 3d 211, 230 (3d Cir. 2018). Accordingly, we have not limited our review to only cases which were decided before the defendant's sentencing.

[6] The defendant's prior convictions also include attempted murder. The parties, however, have not argued that this crime is relevant to the ACCA analysis and we have not considered it.

The government is correct to point out that all grades of robbery in New York require "forcible stealing." In pertinent part, New York law provides:

> Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property to engage in other conduct which aids in the commission of the larceny.

N.Y. PENAL LAW § 160.00.

According to the government, the term "forcible stealing" connotes the same physical, violent force required for the crime to fall under the ACCA as a violent felony. The Supreme Court, however, has explained that for a crime to be a "violent felony" means "*violent* force – that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010). The term "violent" "connotes a substantial degree of force." Id. Thus, for the government's first argument to be convincing, the "forcible stealing" must involve force capable of causing physical pain or injury to another person. To determine what level of force is required for "forcible stealing" under the New York statute we look to New York state law and its interpretation of its statute and elements. Id. at 138. It appears that under New York law an individual may be

convicted of robbery without the use of violent force capable of causing physical pain or injury to another person.

For example, the defendant cites to the following New York cases where the courts found "forcible stealing": "Defendant bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit." People v. Lee, 602 N.Y.S.2d 138, 139 (N.Y. App. Div. 1993); "[Defendant] and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away." People v. Bennett, 631 N.Y.S.2d 834 (N.Y. App. Div. 1995); "Proof that store clerk grabbed the hand in which defendant was holding the money [he was robbing] and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove that defendant used physical force for the purpose of overcoming the victim's resistant to the taking." People v. Safon, 560 N.Y.S. 2d 552 (N.Y. App. Div. 1990). The United States District Court for the Eastern District of New York has explained that "the 'forcibly stealing' element . . . which is . . . common to all New York robbery offenses, includes *de minimis* levels of force which do not fall within the federal definition of 'crime of violence' in 18 U.S.C. § 16(a)." United States v. Moncrieffe, 167 F. Supp. 3d 383, 404 (E.D. N.Y. 2016). The court stated that "New York courts have explained that the 'physical force' threatened or employed [to justify a

robbery conviction under New York law] can be minimal, including a bump, a brief tug-of-war over property, or even the minimal threatened force exerted in 'blocking' someone from pursuit by simply standing in their way." Id. at 403. The *de minimis* level of force needed for a robbery conviction is less than the amount of force need to fall under the federal definition of "crime of violence". Therefore, we reject the government's first argument that all robberies under New York law are violent felonies under federal law. [7]

We will, thus, proceed with our analysis of the prior New York robbery convictions at issue in the present case. The Presentence Investigation Report (hereinafter "PSR") lists the above-mentioned New York state robbery convictions.[8] (See PSR ¶¶ 49, 51, 52). The PSR, however, does not mention the grading of the robberies. The information of prior convictions reveals that the robberies are of the first degree, and that is the manner in which we will address

[7]The Third Circuit Court of Appeals has similarly found that third degree robbery under Pennsylvania law is not a crime of violence under federal law because it requires only the "merest touching". Peppers, 899 F.3d at 232-33.

[8] Several other crimes are mentioned in the PSR but as to the ACCA analysis, the parties focus on the robbery convictions. If the robbery convictions are not violent felonies under the ACCA, then the defendant does not have a sufficient number of predicate convictions for the application of the ACCA sentencing enhancement.

them to determine if they are "violent felonies" so as to make sentencing enhancements applicable.[9]

As discussed above, New York law provides that a robbery occurs when one "forcibly steals property," and it is graded as a "first degree" robbery where the defendant:

> 1. Causes serious physical injury to any person who is not a participant in the crime; or
> 2. Is armed with a deadly weapon; or
> 3. Uses or threatens the immediate use of a dangerous instrument; or
> 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm[.]

N.Y. PENAL LAW § 160.15.

To apply the analytic framework provided by the Supreme Court, we must initially determine if this criminal statute is "divisible" or "indivisible" under federal law. See Mathis v. United States, - - U.S. - - , 136 S.Ct. 2243, 2256 (2016). A statute is "divisible" if its subsections "comprise[] multiple, alternative versions of the crime." United States v. Chapman, 866 F.3d 129, 134 (3d Cir. 2017). On the other hand, the statute is "indivisible" if it "sets out a single set of elements to define a single crime." Id. n.5. Because there are four different scenarios under the statute which can grade a robbery as "first degree," the criminal statute is

[9] The PSR does not even mention the robbery listed as the first predicate offense in the information. Rather, it only mentions the criminal possession of stolen property. This failure to mention the robbery appears to merely be an oversight.

divisible. In other words, the four subsections set forth above all describe different alternative versions of the crime, rather than setting forth elements, all of which must be met, to describe one specific crime. Thus, the criminal statute is "divisible."

Where a criminal statute is "divisible" we use the "modified categorical" approach to determine if the crime described therein is a violent felony under the ACCA. The United States Supreme Court has explained as follows:

> We have previously approved a variant of this method—labeled (not very inventively) the "modified categorical approach"—when a prior conviction is for violating a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

Descamps v. United States, 570 U.S. 254, 257 (2013).

We may examine "extra-statutory materials," called Shepard documents, to determine the specific crime of conviction. These materials include the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard v.

United States, 544 U.S. 13, 16 (2005). In other words, we apply what has been deemed the modified categorical approach and examine a limited set of documents from the defendant's criminal record to see if it conclusively demonstrates under which of the statutory sections he was convicted. Once the specific crime of conviction has been determined then we use the categorical approach and compare the state criminal statute of conviction to the relevant generic federal offense of robbery. Peppers, 899 F.3d at 232.

The government bears the burden of establishing by a preponderance of the evidence each element required for a sentencing enhancement. United States v. Hernandez, 218 F.3d 272, 278 (3d Cir. 2000). To that end, the government has submitted several documents for the court to examine to determine if defendant's state court convictions amount to a violent felony. These documents are "Certificates of Disposition" and such records may be used in these instances. See United States v. Green, 480 F.3d 627, 632-33 (2d Cir. 2007); United States v. Hernandez, 218 F.3d at 278-279 (holding that Certificates of Disposition may be used, however, they are not always conclusive).

Here, the Certificates of Disposition do nothing to enlighten the issue of what subsection of the New York robbery statute the defendant was convicted under. The certificates merely state that the defendant on these various occasions was convicted of Robbery 1. (Doc. 236).

When we cannot determine which version of the robbery statute the defendant has been convicted of, we examine the minimum conduct necessary to be found guilty of robbery under the statute. Johnson v. United States, 559 U.S. at 138(examining the minimum conduct necessary to be found guilty because "nothing in the record" would lead the court to conclude that the conviction "rested upon anything more than the least of these acts."). If this minimum conduct does not meet the definition of "violent felony," then the prior robbery conviction cannot be used as a predicate offense. Id.

Of the four acts listed above which can make a robbery be graded as "first degree," the minimum conduct needed is for the defendant to commit the robbery while carrying a deadly weapon. N.Y. PENAL LAW § 160.15(2); United States v. Jones, 830 F.3d 142, 151 (2d Cir. 2016) (vacated on other grounds); United States v. Jones, CR No. 9-06, 2017 WL 1954566 (W.D. Pa. 2017). Thus, defendant may have been found guilty for possessing a weapon. Mere possession of a weapon, while very serious and dangerous, is insufficient to meet the "force" requirement of the ACCA. See Jones, 2017 WL at * 3; United States v. Parnell, 818 F.3d 974, 980 (9th Cir. 2016); United States v. Moore, 2003 F. Supp. 3d 854, 861 (N.D. Oh. 2016). The minimum conduct needed to be convicted of first degree robbery under New York state law does not meet the definition of "violent felony" and the ACCA. Accordingly, defendant's prior

robbery convictions cannot be used as predicate offenses to support imposition of the ACCA's sentencing enhancement. The judgment of sentence regarding Count 4 will thus be vacated, and we will resentence the defendant.

C. The Three-Strikes Law

Lastly, the court also enhanced the defendant's sentence based upon the TSL, 18 U.S.C. § 3559. This sentencing enhancement resulted in mandatory life sentences on four of the counts of conviction. The TSL applies when someone is convicted of a serious violent felony where they have had two or more prior convictions for "serious violent felonies."

The "Three Strikes Law" or "Habitual Offender Act" specifically provides:

> **(1) Mandatory life imprisonment.** - - Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if- -
> **(A)** the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of - -
> **(i)** 2 or more serious violent felonies; [.]

18 U.S.C. § 3559 (c)(1)(A)(i).

Accordingly, for the TSL to apply, the defendant must be convicted of a "serious violent felony" and have two prior convictions of "serious violent felonies."

Federal law defines "serious violent felony" as follows:

> **(F)** the term "serious violent felony" means--

> **(i)** a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); . . . robbery (as described in section 2111, 2113, or 2118);. . . and
> **(ii)** any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

18 U.S.C. § 3559(c)(2)(F).

This enhancement of a mandatory life imprisonment sentence was applied to Counts 1, 2, 3 and 5. Thus at sentencing, the court found that the defendant's current charges were for serious violent felonies and that he had two or more prior convictions of serious violent felonies. To analyze whether this enhancement was properly imposed we must first determine if the federal crimes charged in Counts 1, 2, 3 and 5 are "serious violent felonies" then we must examine the defendant's prior state convictions to determine if at least two of them are "serious violent felonies" under the TSL. We will first address the crimes charged and then the prior convictions.

1. Crimes Charged

Counts 1, 2, 3 and 5 involved the following crimes: conspiracy to use, carry and brandish firearms in furtherance of an armed bank robbery; armed bank robbery; using, carrying and brandishing firearms in furtherance of an armed bank robbery; and shipping transporting or receiving a firearm or ammunition in

interstate commerce. These crimes invoke the TSL because they involve bank robbery and incidental crimes. See 18 U.S.C. § 2113. The defendant does not appear to argue that they are not serious violent felonies under the TSL. (See Doc. 188, Def's. Mot. To Correct Sentence at 16 n.9 ("Mr. Shabazz acknowledges that armed bank robbery in violation of 18 U.S.C. § 2113 is an enumerated offense within the three strikes law, 18 U.S.C. § 3559(c)(2)(F)(i)."). Thus, the first factor for application of the TSL is met – the jury in this case convicted the defendant of serious violent felonies.

2. Prior convictions

Next, we must review defendant's prior state convictions to decide whether two or more of them are "serious violent felonies" so as to render the TSL applicable.

As noted above, under the TSL, a defendant who has two prior convictions of "serious violent felonies" faces a minimum life sentence. 18 U.S.C. § 3559(c). Federal law defines "serious violent felony" as follows:

> **(F)** the term "serious violent felony" means--
> **(i)** a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); . . . robbery (as described in section 2111, 2113, or 2118);. . . and
> **(ii)** any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the

> person of another may be used in the course of committing the offense;

18 U.S.C. § 3559(c)(2)(F).

Just as with the ACCA, the TSL provides a definition of "serious violent felony" that contains various clauses. The definition includes an enumerated clause, an elements clause and a residual clause. The residual clause in the TSL is nearly identical to the residual clause of the ACCA which the Supreme Court found unconstitutional in Johnson.[10] Thus, the constitutionality of the residual clause here is seriously called into doubt.[11] To determine if the defendant's prior crimes are "serious violent felonies" under the TSL, we will determine if they are included in the enumerated offenses clause or the elements clause.[12]

---

[10] The residual clause of the TSL defines "serious violent felony" as an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]" 18 U.S.C. § 3559(c)(2)(F)(ii). The residual clause in the ACCA defines "violent felony" as an 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[.]" 18 U.S.C. § 924(e)(2)(B).

[11] In fact, the Third Circuit granted the petitioner leave to file a second or successive motion under 28 U.S.C. § 2255 because the motion contains a new rule of constitutional law (found in Johnson) that was previously unavailable and made retroactive to cases on collateral review. (See Doc. 194).

[12] In Johnson, the Supreme Court explained that the Fifth Amendment Due Process Clause prohibits federal criminal laws which are so vague that they "fail to give ordinary people fair notice of the conduct [they] punish[] , or so standardless that it invites arbitrary enforcement." Johnson v. U.S., 135 S.Ct. 2551, 2556 (2015). The Supreme Court found that the residual clause of the ACCA defining "serious felony" was unconstitutionally vague under this standard.

In the instant case, one of the prior convictions is for robbery and the other is for attempted murder. As noted above, the enumerated offenses clause includes robbery and murder, and attempt to commit such, as serious violent felonies. 18 U.S.C. § 3559(c)(2)(F)(i). The defendant does not dispute that attempted murder falls under the enumerated offenses. The question becomes therefore, whether a robbery committed in New York state falls under the enumerated offenses and failing that, whether such a conviction falls under the elements clause. Based upon our analysis above with regard to the ACCA, it appears that the defendant's New York state robbery convictions do not fall under either clause.

With regard to the enumerated offense of "robbery" we apply the categorical approach. We analyze the general federal definition of "robbery" versus the state definition for robbery. As set forth above, the New York state definition of "robbery" is broader than the federal definition of robbery. Therefore, the defendant's prior robbery conviction does not fall under the enumerated offenses of the TSL.

Next, we must determine whether the defendant's New York state robbery conviction falls under the TSL's elements clause. The elements clause defines "serious violent felony" as an offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted

use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 3559(c)(2)(F)(ii).

In the previous section of this memorandum, we decided that the defendant's New York state conviction did not fall under the "elements clause" of the ACCA. Here, the elements clause of the TSL is identical to the elements clause of the ACCA. Accordingly, we find that the same analysis applies, and the defendant's prior robbery convictions from New York state do not meet the definition of "serious violent felony" found in the elements clause of the TSL.

We have found that defendant's New York state convictions do not fall within the enumerated offenses or within the elements clause. We have further found we cannot rely upon the residual clause as its constitutionality is seriously in doubt. Those are the only three ways in which the defendant's convictions could be used as predicate acts under the TSL. Because defendant does not have the requisite number of predicate acts, we find that the TSL does not apply. Accordingly, the defendant's motion under section 2255 with regard to the TSL will be granted. Defendant's judgment of sentence with regard to Counts 1, 2, 3, and 5 regarding the mandatory life sentence will be vacated, and he will be resentenced.

Conclusion

Based upon our reasoning above, we find that granting the defendant relief under section 2255 is appropriate. He does not have the predicate convictions for the sentencing enhancements of the ACCA or the TSL. As he was sentenced with both enhancements, we will vacate our judgment of sentence and order the defendant resentenced. An appropriate order follows.

BY THE COURT:

Date: Aug. 21, 2019

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

B-3

WAINWRIGHT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-62364-CIV-COHN

HENRY WAINWRIGHT,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER GRANTING MOTION TO VACATE

THIS CAUSE is before the Court upon Movant Henry Wainwright's Motion to Vacate Pursuant to § 2255 ("Motion") [DE 8]. Movant seeks vacatur of several of his convictions and/or sentences on the ground that a recent Supreme Court decision renders them unconstitutional. The Court has carefully considered the Motion, the Government's Response [DE 9], Movant's Reply [DE 12-1], and oral argument, and is otherwise advised in the premises. For the reasons set forth below, Movant's Motion is granted.

I. BACKGROUND

In August of 2009, Movant was arrested along with two codefendants for his involvement in an attempted robbery. CR-DE[1] 55 at 1. In November 2009, a grand jury returned a multi-count superseding indictment against Movant charging him with:

1. Count One: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);

[1] All citations to the record in Movant's criminal case, case number 09-cr-60229, shall be denoted by "CR" preceding the docket entry.

2. Count Two: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);
3. Count Three: conspiracy to use and carry a firearm during and in relation to a crime of violence (i.e., a violation of Title 18, U.S.C. § 1951(a) as set forth in Counts One and Two) and to possess the firearm in furtherance of that crime of violence in violation of 18 U.S.C. § 924(o);
4. Count Four: knowingly carrying a firearm during and in relation to a crime of violence (i.e., a violation of Title 18, U.S.C. § 1951(a) as set forth in Counts One and Two) and possessing the firearm in furtherance of that crime of violence in violation of 924(c)(1)(A); and
5. Count Six:[2] violation of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

CR-DE 55.

Just prior to trial, the Government filed a notice that it would seek an enhanced sentence of life imprisonment pursuant to 18 U.S.C. § 3559(c) (the "three-strikes law") should Movant be convicted on Count One or Count Two or both. DE 8 at 2. On May 28, 2010, the jury returned a general verdict finding Movant guilty on all Counts. Id. at 4. On August 31, 2010, the Court sentenced Movant to concurrent sentences of life imprisonment on Counts One and Two; 240 months concurrent on Count Three; 60 months consecutive on Count Four; and 180 months concurrent on Count Six. The total sentence was therefore life plus 60 months' imprisonment. Id. at 5.

[2] Movant's original indictment contained a Count Five (being a felon in possession of a firearm), but the superseding indictment charged Movant with Count Six instead of Count Five. DE 8 at 1-2.

The Eleventh Circuit affirmed Movant's convictions on appeal on August 15, 2011. Id. Movant timely filed a motion to vacate pursuant to 28 U.S.C. § 2255, which was denied on September 21, 2015. CR-DE 358. Less than a year after his first motion to vacate was denied, the Supreme Court invalidated the residual clause in the Armed Career Criminal Act ("ACCA") in Johnson v. U.S., 135 S.Ct. 2551 (2015), pursuant to which Movant filed another motion to vacate. DE 8 at 5. In that motion, the Eleventh Circuit permitted him to challenge his sentence on Count Four, the § 924(o) charge. DE 8 at 8. After Movant had submitted his second motion to vacate, however, the Eleventh Circuit issued two opinions that effectively decided the motion,[3] and the Court was therefore bound by precedential authority to deny it. Id. at 13-14. Movant appealed this denial to the Eleventh Circuit, but after Movant had filed his appeal, the Supreme Court issued its opinion in U.S. v. Davis, 139 S.Ct. 2319 (2019), which clearly invalidated the residual clause in § 924(c). Id. at 14. As a result, Movant voluntarily dismissed his appeal to seek leave to file another successive motion to vacate incorporating the Davis decision. Id. at 16.

The Eleventh Circuit granted Movant leave to file the instant Motion, finding that Movant had made a *prima facie* showing that (1) his § 924(o) and § 924(c) convictions (Counts Three and Four) may be based on the residual clause found unconstitutional in Davis, and (2) that his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs act robbery (Counts One and Two) may only qualify as "serious violent

[3] The Eleventh Circuit first announced in Ovalles v. U.S., 861 F.3d 1257 (11th Cir. 2017) (commonly known as "Ovalles I"), that the holding in Johnson did not extend to § 924(c). It later upheld this conclusion, though on different reasoning, in Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018), (commonly referred to as "Ovalles II").

felonies" under the residual clause of § 3559(c), which may also be invalid after Davis. Id. at 17-19. These are the arguments Movant now raises in this Motion.

II. STANDARD OF REVIEW

Prisoners in federal custody may seek relief from the court that imposed their sentence on the grounds that (1) the sentence was imposed in violation of the Constitution or another federal law, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). In order to file a second or successive motion pursuant to this statute, a prisoner must be granted leave to file another motion from the appropriate court of appeals. 28 U.S.C. § 2255(h). Courts of appeals will only approve such applications if the successive motion involves newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Id.

III. ANALYSIS

In his Motion, Movant argues that his sentences on Counts One and Two must be vacated because neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c)(2)(F) without resort to its residual clause, which must be unconstitutionally vague after Davis. In addition, Movant argues that his convictions and sentences on Counts Three and Four must be vacated because the predicate convictions for these Counts are not crimes of violence under § 924(c) without resort to that statute's residual clause, which the Supreme Court struck down in Davis.

A. Counts One and Two

The Government first argues that Movant is procedurally barred from presenting his arguments on Counts One and Two because (1) Davis does not apply to the three-strikes law, and there is therefore no new rule of constitutional law applicable to the Motion that would permit a successive motion to vacate under § 2255(h), (2) without a new rule of constitutional law, the Motion is untimely; and (3) Movant did not raise the arguments he makes in the Motion at sentencing or on direct appeal and is therefore procedurally barred from bringing them now. Although the Eleventh Circuit found that Movant presented a *prima facie* case that his claims satisfied the requirements of § 2255, the Government correctly notes that the Court must itself determine whether it has jurisdiction over the Motion. See Jordan v. Sec'y, Dept. of Corrs., 485 F.3d 1351, 1357 (11th Cir. 2007). Movant responds, also correctly, that the Government's procedural arguments fail or succeed depending on whether the Court agrees with the merits of Movant's substantive arguments. In order to know whether the Motion is timely, for example, the Court must determine whether Davis stated a new rule of constitutional law relevant to Movant's convictions and sentences. It is therefore necessary to evaluate the merits of Movant's claims before addressing the Government's procedural arguments.

Section 3559(c), commonly known as the "three-strikes law," calls for a mandatory sentence of life imprisonment upon an individual's conviction for a serious violent felony where that individual has at least two prior convictions for serious violent felonies or one conviction for a serious violent felony and one conviction for a serious drug offense. 18 U.S.C. § 3559(c). The statute defines a "serious violent felony" in

three ways: (i) the enumerated offenses clause lists specific crimes which constitute a serious violent felony, (ii) the elements clause expands the definition to include offenses that have the actual, attempted, or threatened use of force as an element, and (iii) the residual clause broadens the definition further to include any crime that, by its nature, involves a substantial risk of force being used against another. 18 U.S.C. § 3559(c)(2)(F).

It is undisputed that Movant did have at least two prior convictions for serious violent felonies. Movant argues, however, that his third-strike offenses, that is, his convictions on Counts One and Two (conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, respectively), do not qualify as serious violent felonies. This is so, he asserts, because neither of the offenses of which he was convicted in these Counts qualifies as a "serious violent felony" under § 3559(c)(2)(F) without resort to its residual clause, and that residual clause is so similar to the one found void for vagueness in Davis that it, too, must be unconstitutional. He concludes that he was therefore unconstitutionally sentenced to life imprisonment on Counts One and Two pursuant to a statutory provision that is void for vagueness.

a. Davis extends to § 3559(c)(2)(F)

There has been no Supreme Court or Circuit Court ruling that definitively extends the holding in Davis to § 3559(c)(2)(F)(ii).[4] Nonetheless, there is strong support in favor of Movant's position.

The first point in favor of Movant's argument is the fact that the residual clauses in § 924(c)(3)(B) and § 3559(c)(2)(F)(ii) are nearly identical. The provision struck down

[4] The District Court of Massachusetts, however, has extended Davis to invalidate the residual clause in 3559(c)(2)(F)(ii). United States v. Goodridge, 392 F.Supp.3d 159 (D. Mass. 2019).

in Davis, § 924(c)(3)(B), defined "crime of violence" to include a felony "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." The residual clause in § 3559(c)(2)(F)(ii) defines "serious violent felony" to include an offense "that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." Aside from the inclusion of the words "or property" in the residual clause Davis struck down, the clauses are identical. And the inclusion of the words "or property" in § 924(c)(3)(B) does not alter the meaning of the clause such that its absence from § 3559(c)(2)(F)(ii) might save that provision from vagueness.[5] Thus, the residual clauses in §§ 3359(c)(2)(F)(ii) and 924(c)(3)(B) are virtually identical and the invalidation of one supports the invalidation of the other.

The case law leading up to Davis also supports Movant's argument. If Davis were the only case in which the Supreme Court invalidated a residual clause, one might conclude that the holding has only narrow application. But Davis was the third Supreme Court case invalidating a residual clause. The first in this line was Johnson, where the Supreme Court held that the residual clause in the ACCA's definition of "violent felony" was void for vagueness. Johnson, 135 S.Ct. 2551 (2015). Key to this holding was the confirmation that the ACCA's residual clause required a categorical approach to determining whether a particular offense fit the definition. Id. at 2557. Under the categorical approach, courts must look only to the elements of the crime itself, not the actual facts underlying a particular conviction. Id.

[5] It is notable, too, that the residual clause in the ACCA, which was struck down in Johnson, only refers to injury against another person, not property. 18 U.S.C. § 924(e)(2)(B)(ii). The phrase "or property" therefore does not appear to have any impact on the constitutionality of the clauses.

Subsequent Circuit Court cases were split on whether the holding was applicable to another, similar residual clause in § 16(b) of the Immigration and Naturalization Act ("INA"), and so the Supreme Court took up Sessions v. Dimaya, 138 S.Ct. 1204 (2018), to resolve the split. In Dimaya, the Court employed the same reasoning it had employed in Johnson to invalidate the residual clause in the INA. Justice Kagan explained that the Court's holding in Johnson rested on the fact that the ACCA's residual clause contained two layers of abstraction: first, in construing the statute a court would be required to imagine what the "ordinary case scenario" for a particular crime is, and second, that the court would need to guess what degree of risk constitutes a "serious potential risk." Dimaya, 138 S.Ct. at 1213-14. The Court found that the same two levels of ambiguity existed in the INA as did in the ACCA and invalidated the INA's provision accordingly. Id. at 1216. The Court also reaffirmed that the categorical approach was required in determining whether a particular offense qualified as a "crime of violence" under the INA. Id. at 1211.

Circuit Courts became split again, however, on whether Johnson and Dimaya applied to yet another similarly-drafted residual clause. And so, in Davis, Justice Gorsuch delivered the Court's opinion extending the holdings in Johnson and Dimaya to § 924(c)(3)(B). In his opinion, Justice Gorsuch first notes that there was no dispute that under the categorical approach, the residual clause in § 924(c)(3)(B) must be void for vagueness. Davis, 139 S.Ct. at 2320. Rather, the Court's inquiry was whether the residual clause in § 924(c)(3)(B) could survive constitutional scrutiny by applying a "case-specific" instead of a "categorical" approach. Id. at 2327. Justice Gorsuch admits that employing the case-specific approach "would avoid the vagueness problems that

doomed the statutes in Johnson and Dimaya." Id. However, he reasons that "the statute's text, context, and history" cannot support the use of the case-specific approach. Id. Thus, for the third time, the Supreme Court struck down an impermissibly vague residual clause, rejecting many of the arguments that had been used to preserve residual clauses in the wake of Johnson and Dimaya.

That there have been three Supreme Court cases consistently finding that the residual clauses of various statutes are void for vagueness is a strong indication that courts should continue to apply the same principles that the Court applied in Johnson: (1) that enhancement statutes must be evaluated using a categorical approach, and (2) that dual ambiguity renders a provision unconstitutionally vague. Applying these principles to the residual clause in § 3559(c)(2)(F)(ii), this Court finds the same two layers of vagueness that existed in the clauses at issue in all three Supreme Court cases: first, courts must determine what constitutes a "substantial risk" of force, and second, courts must imagine what the "nature" of a particular crime is without resort to the actual facts of an underlying offense. It is therefore clear that Davis and its predecessors also render § 3559(c)(2)(F)(ii) unconstitutional.

Nor is the three-strikes law's residual clause saved by its "escape hatch" provisions, as the Government contends. It is true that § 3559(c)(3) explicitly excludes certain methods of committing robbery and arson from the definition of a serious violent felony. Robbery, for example, will not qualify as a serious violent felony if it can be established by clear and convincing evidence that no dangerous weapon was used in the commission of the offense and the offense did not result in anyone's death or serious bodily injury. 28 U.S.C. § 3559(c)(3)(A). This exclusion, however, does not

alter the construction of the residual clause itself, which still contains the same dual layers of ambiguity. And while it does clearly require courts to employ the case-specific method to determine whether the provision is applicable, this does not mean that courts may apply the case-specific method to the entire statute because these exclusions only apply to the crimes of arson and robbery, but the residual clause could be applied to any crime. The residual clause cannot be unconstitutionally vague with respect to some offenses and not others. This argument is therefore unpersuasive.

Accepting Movant's preliminary argument that the residual clause of § 3559(c)(2)(F)(ii) is unconstitutionally vague, the next question is whether conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery still qualify as serious violent felonies under either the enumerated offenses clause or the elements clause of the statute. Movant argues that neither offense otherwise qualifies as a serious violent felony. The Government responds that both offenses qualify under the enumerated offenses clause.

b. The Elements Clause

The elements clause of § 3559(c)(2)(F)(ii) broadly defines a "serious violent felony" to include any "offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another." Movant argues that neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery qualifies as a serious violent felony under the elements clause because the elements clause clearly requires a serious violent felony to involve actual, attempted, or threatened use of force against a **person**, while the Hobbs Act offenses could be perpetrated by actual, attempted, or

threatened force against **property**. The Government does not respond to this argument directly because the Solicitor General has conceded in a briefing before the Supreme Court that attempted Hobbs Act robbery does **not** qualify as a serious violent felony under the elements clause.

The Government does footnote, however, that in an order denying one of Movant's codefendants a Certificate of Appealability ("COA Order"), the Eleventh Circuit stated that attempted Hobbs Act robbery **is** a serious violent felony under the elements clause of § 3559(c)(2)(F)(ii). See Richitelli v. United States, No. 17-10482-G at 11 (11th Cir. Oct. 25, 2017). The COA Order was issued by a single judge and is not published, so it is not binding precedent, but district courts may view such orders as persuasive authority. The COA Order, however, does not contain sufficient independent discussion to provide guidance here. And the precedential landscape has changed significantly since the COA Order was issued such that any analysis that was provided may no longer be persuasive. Not only had the Supreme Court not yet decided Dimaya or Davis, but the Government had not yet conceded that Hobbs Act robbery is not a serious violent felony under the elements clause. It is also notable that the COA Order is currently under appellate review with the Eleventh Circuit. The Court therefore declines to rely upon the COA Order.

Even though the undersigned was the trial judge in Richitelli, the undersigned recognizes that a fresh analysis is appropriate here. The Supreme Court has clearly stated in Johnson, Dimaya, and Davis that in determining whether or not a particular crime qualifies as a predicate offense for the purposes of a sentence enhancement statute, courts must apply the categorical approach. This means that courts may not

look to the actual facts of any particular case or the manner in which any specific defendant perpetrated a predicate offense in determining whether the predicate offense qualifies for enhancement. Rather, courts must simply compare the elements of the predicate crime as stated in the defining statute with the elements required by the sentence enhancement statute. See Johnson, 135 S.Ct. at 2557.

Applying this standard to the case at issue, it is clear that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are not serious violent felonies under § 3559(c)(2)(F)(ii)'s elements clause. The elements clause has only two elements: first, that the predicate crime carry a maximum sentence of ten or more years' incarceration, and second, that the predicate crime have as an element "the use, attempted use, or threatened use of physical force against the person of another." There is no dispute that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery carry a maximum sentence of ten or more years' incarceration. Movant argues, however, and the Court agrees, that the Hobbs Act offenses do not require force against another as an element. The elements of a conspiracy to commit Hobbs Act robbery are "(1) two or more people, including the defendant, agreed to commit Hobbs Act robbery; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in furthering that goal." Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019). The Eleventh Circuit has explicitly held that none of these elements requires the use of threatened or attempted force. Id. Conspiracy to commit Hobbs Act robbery therefore is not a serious violent felony under the elements clause.

Nor is attempted Hobbs Act robbery. The elements of an attempt of a federal crime are "(1) hav[ing] the specific intent to engage in the criminal conduct with which [a defendant] is charged; and (2) [taking] a substantial step toward the commission of the offense that strongly corroborates his criminal intent." United States v. St. Hubert, 909 F.3d 335, 351 (11th Cir. 2018). Neither of these elements requires the use or threatened use of force. Even assuming that these elements necessarily incorporate the elements of the principal offense, the force element of Hobbs Act robbery can be committed against a person **or property**. 18 U.S.C. § 1951(b)(1). The elements clause, however, is more narrowly drafted to only include the element of force against a person. By its own language, the principal crime of Hobbs Act robbery encompasses a broader array of conduct than the elements clause does. Attempted Hobbs Act robbery therefore also does not qualify as a serious violent felony under the elements clause.

Supreme Court case law also supports Movant's position. In U.S. v. Evans, 478 F.3d 1332 (2007), the Supreme Court was presented with the question of whether a conviction under 28 U.S.C. § 2332a(a)(3) for threatening to use a weapon of mass destruction against federal property qualified as a serious violent felony under the three-strikes law. In the course of concluding that threatening federal property is not a serious violent felony, the Court specifically addressed the inapplicability of the elements clause, noting that "[the elements clause] does not apply in this case either because the offense to which Evans pled guilty does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.' Under the offense charged, the only force threatened was against property, not against a person." Evans, 478 F.3d at 1342 (quoting the elements clause) (internal citation omitted). Here,

the Supreme Court's reading of the elements clause comports with Movant's: where an offense is committed by force against property, it cannot satisfy the elements clause of § 3559(c)(2)(F)(ii). Although it must be noted that the principal crime which was the basis for Movant's convictions can be effected by force against persons or property, the fact remains that the elements clause requires force against a person specifically. Therefore, neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery is a serious violent felony within the meaning of the three-strikes law's elements clause.

c. The Enumerated Offenses Clause

Movant argues that neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery can qualify as a serious violent felony under the enumerated offenses clause, either, because Hobbs Act robbery is not itself explicitly listed in the clause and is substantially different from the forms of robbery that are listed. The Government counters that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do each qualify as a serious violent felony under the enumerated offenses clause because the elements of those crimes substantially correspond to the elements of the robbery statutes that are listed. Whether Hobbs Act robbery itself is a serious violent felony is the dispositive inquiry because the enumerated offenses clause explicitly includes "attempt, conspiracy, or solicitation to commit any of the [listed] offenses." 18 U.S.C. § 3559(c)(2)(F)(i). Therefore, if Hobbs Act robbery qualifies as a serious violent felony under the enumerated offenses clause, attempts and conspiracies to commit Hobbs Act robbery also qualify.

Movant first argues that the enumerated offenses clause does not encompass Hobbs Act robbery because Hobbs Act robbery is not listed there. The enumerated offenses clause only explicitly lists "robbery (as described in section 2111, 2113, or 2118) . . . ." 18 U.S.C. § 3559(c)(2)(F)(i). Section 2111 of Title 18 of the United States Code criminalizes maritime robbery, § 2113 covers bank robbery, and § 2118 deals with robberies involving controlled substances. The Government has not provided, and the Court has not located, any examples of a federal court finding that a federal offense qualified as a serious violent felony under the enumerated offenses clause except where the federal offense is clearly listed. While the Fourth Circuit has found that a conviction under 18 U.S.C. § 2114 for robbing a mail carrier is an appropriate predicate offense for purposes of a three-strikes law enhancement, its conclusion was based upon the elements clause, not the enumerated offenses clause. United States v. McAnulty, 175 F.3d 1017 (4th Cir. 1999). This seems to indicate that, at least as to federal crimes, the list should be strictly construed.

However, Movant's argument does not comport with the plain language of the statute. The enumerated offenses clause, by its own language, includes "Federal or State offense[s], **by whatever designation and wherever committed** . . . ." 28 U.S.C. § 3559(c)(2)(F)(i) (emphasis added). The phrase "by whatever designation and wherever committed" clearly qualifies both federal and state offenses. See United States v. Wicks, 132 F.3d 383, 387 (7th Cir. 1997) ("Both the language of the [three-strikes] statute and its legislative history support the proposition that it reaches a broad range of both state and federal crimes."). The plain language of the provision therefore

indicates that the list is not meant to be exhaustive, even with respect to federal crimes. For this reason, Movant's initial argument is unpersuasive.

Movant next argues that Hobbs Act robbery is not a serious violent felony under the enumerated offenses clause because the definition of Hobbs Act robbery encompasses a broader array of conduct than do the enumerated robbery offenses. The Government disagrees, arguing that the elements of Hobbs Act robbery and the enumerated robbery offenses "substantially correspond" such that Hobbs Act robbery is included in the enumerated offenses clause.

The parties agree, though, that the categorical approach applies when comparing federal laws to the enumerated offenses in § 3559(c)(2)(F)(i). When applying the categorical approach to determine whether a particular offense qualifies as an enumerated offense in a sentence enhancement statute, courts must compare the elements of the offense at issue with the elements of the crimes listed. See Descamps v. U.S., 570 U.S. 254 (2013). Where the elements of the offense at issue criminalize an array of conduct equal to or narrower than the elements of the enumerated offense, the enumerated offenses clause includes that offense at issue. Id. at 254; see also United States v. Johnson, 915 F.3d 223, 228 (4th Cir. 2019) ("We will thus apply a 'categorical approach,' meaning that we will compare the New York robbery statute, rather than the facts underlying Johnson's convictions, to the federal statutes that Congress referenced to describe robbery in the three-strikes law.")

In broad terms, §§ 2111, 2113, and 2118 criminalize the taking of property from the person or presence of another by "force and violence, or intimidation." Hobbs Act robbery similarly requires a taking of personal property from the person or in the

presence of another. Movant theorizes, however, that Hobbs Act robbery can not only be effected by "force and violence, or intimidation," but also with (1) threats of force or violence, (2) causing fear of harm, (3) using threatened or actual force against tangible and intangible property, (4) taking something which is "not at the locus of the taking," (5) taking something that does not belong to the person from whose presence the item is taken, and (6) threats of future force or violence.

Most of these assertions are unpersuasive. It is not clear, for example, how a robber would take property "not at the locus of the taking" and still be in the presence of another, so the fourth method does not appear to describe a realistic manner of effecting Hobbs Act robbery. Also, all the enumerated robbery offenses define robbery to include takings effected by intimidation, and "intimidation" means "fear of bodily injury." See Morrison v. United States No. 16-cv-1517 DMS, 2019 WL 2472520 at *7 (S.D. Cal. June 12, 2019). And putting someone in fear of bodily injury requires some sort of threat of force. The first two methods Movant lists therefore do not render Hobbs Act robbery broader than the enumerated offenses. For the same reason, Movant's sixth proposed method is also one by which the enumerated offenses could be effected. A threat of force is, in essence, a promise to commit some action in the future, even if only a few minutes in the future. Robbery by "intimidation" therefore is perpetrated with threat of future force. And the enumerated robbery offenses by their terms do not require that the item taken belong to the person present at the time of the crime, so the fifth method listed does not render Hobbs Act robbery broader than the enumerated offenses.

It is not so clear, however, whether the enumerated robbery offenses can occur through actual or threatened violence or force against property, like Hobbs Act robbery can. The Government argues, unconvincingly, that the inclusion of conduct against property in the definition of Hobbs Act robbery is a "modest deviation" from the definitions of the enumerated robbery offenses that the Court should simply disregard. But the Supreme Court has found that even "modest" differences can render a particular crime too broad to fit an enumerated offense under the categorical approach. See Descamps, 570 U.S. 254 (finding a state form of burglary could not qualify as a "violent felony" under the ACCA because California's burglary statute did not require an unlawful entry and the "generic" form of burglary enumerated in the ACCA's enumerated offenses clause did so require). The Government also cites to Gray v. United States, 622 F. App'x 788 (11th Cir. 2015), and Unites States v. Rosario-Delgado, 198 F.3d 1354 (11th Cir. 1999), for the proposition that the three strikes law in general, and the enumerated offenses clause specifically, should be interpreted to be inclusive. Those cases, however, deal with state robbery statutes, none of which are written so broadly as Hobbs Act robbery. In neither case did the Eleventh Circuit address the question presented here, so these citations provide little guidance for the present analysis. The question requires the determination of what is meant by the phrase, present in all the enumerated robbery offenses, "force and violence, or intimidation." If this phrase encompasses actual or threatened force against property, then Movant's argument fails. If not, then the enumerated offenses clause does not encompass Hobbs Act robbery.

Wherever these elements are discussed in case law, the discussion suggests that they are intended to refer to conduct against a person. For example, in determining what level of force is required in the commission of an offense in order for that offense to qualify as a "violent felony" under the ACCA, the Supreme Court has determined that the "ordinary meaning" of the phrase "physical force" is "force capable of causing physical pain or injury **to another person**." Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis added). The Supreme Court later revisited this determination in Stokeling v. United States, clarifying that the level of force required was that which was required at common law: force sufficient to overcome a victim's resistance, however slight that resistance may be. 139 S.Ct. 544, 551 (2019). In discussing its conclusion, the Court noted that

> robbery that must overpower a victim's will – even a feeble or weak-willed victim – necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself capable of causing physical pain or injury.

Id. at 553 (internal quotation marks omitted). Each time the Supreme Court has explained what is meant by "force," its discussion assumes that the force required to perpetrate the crime of robbery is exerted against a person. Therefore, per Supreme Court jurisprudence, one can conclude that both the ordinary meaning of the term and the common-law meaning of the term denotes conduct against a person, not property.

This point is particularly relevant because in United States v. Carr, the D.C. Circuit Court found that bank robbery as described in § 2113 "plainly uses language drawn from the classic definition of common law robbery . . . ." 946 F.3d 598, 603 (D.C. Cir. 2020). Therefore, the D.C. Circuit concluded, § 2113 "call[s] for the amount of force

required under the common law definition of robbery." Id. And, as discussed above, the common law definition of robbery required force sufficient to overcome a victim's resistance. The D.C. Circuit went on in Carr to endorse the Tenth and Seventh Circuits' determination that "intimidation" requires a threat of physical force that would put a victim in fear of bodily harm. See; United States v. McCranie, 889 F.3d 677, 680 (10th Cir. 2018) ("[I]ntimidation requires an objectively reasonable fear of bodily harm . . . ."); United States v. Jones, 932 F.2d 624 (7th Cir. 1991); see also United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990) ("This court has defined 'intimidation' under section 2113(a) to mean 'wilfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm."). This indicates not only that bank robbery as described in § 2113 requires force against a person, but also that the offenses described in §§ 2111 and 2118, which also use the phrase "force and violence, or intimidation," all require force against a person.

Several courts have also found that "generic" robbery does not include crimes that can be committed by force against property. See United States v. O'Connor, 874 F.3d 1147, 1153 (10th Cir. 2017) ("[W]e conclude that because Hobbs Act robbery includes threats to property, it is broader than . . . generic robbery . . . ."); United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) ("We agree with the Tenth Circuit that Hobbs Act robbery reaches conduct that falls outside of generic robbery."); United States v. Bankston, 901 F.3d 1100 (9th Cir. 2018) (finding that a California robbery offense, which could be perpetrated by force against property, was not a crime of violence under the Sentencing Guidelines because generic federal robbery cannot be perpetrated by force against property). While generic robbery is not the same as

common law robbery, and also differs from the robbery offenses enumerated in § 3559(c)(2)(F)(i), these cases are still informative because they indicate that federal robbery statutes in general do not describe crimes in which force is exerted against property. It is therefore reasonable to conclude, based on the body of case law discussing all federal forms of robbery, that Hobbs Act robbery is unusual in its inclusion of conduct against property and because of this, it is not included in the enumerated offenses clause of § 3559(c)(2)(F)(i).

The conclusion that Movant's convictions cannot qualify as serious violent felonies under either the elements or the enumerated offense clause is further bolstered by the Eleventh Circuit's recent decision in United States v. Eason, No. 16-15413, 2020 WL 1429110 (11th Cir. Mar. 24, 2020). There, the Eleventh Circuit found that Hobbs Act robbery does not qualify as a "crime of violence" under the career offender sentencing guidelines. The definition of "crime of violence," like the three-strikes law, has both an elements clause and an enumerated offenses clause. Its elements clause includes any offense punishable by more than a year's imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. 4B1.2. It is thus identical to the elements clause in the three-strikes law. Applying the categorical approach, the Circuit Court found that "[b]y its terms, the Hobbs Act robbery statute — which can be violated with threats of force to 'person *or* property,' . . . is broader than the Guidelines' elements clause definition." Eason at *3. The Eason Court went on to find that Hobbs Act robbery also does not qualify as a "crime of violence" under the definition's enumerated offenses clause, which includes generic robbery. In so finding, the Court rejected the same argument the

Government makes here, that Hobbs Act robbery is "substantially" similar to the enumerated robbery offense, stating that "[t]he government's reading of the statute would render the word 'property' superfluous or insignificant." Id. at *7. Binding precedent therefore leads to the conclusion that Movant's convictions on Counts One and Two do not qualify as serious violent felonies for purposes of the three-strikes law, and his sentences on those two Counts are due to be vacated.

Because Davis does extend to the three-strikes law's residual clause, the Motion satisfies the jurisdictional requirements of 28 U.S.C. § 2255(h) and the timing requirements of 28 U.S.C. § 2244(d). Similarly, Movant can avoid the bar of procedural default because he has successfully demonstrated a jurisdictional error. See United States v. Bane, 948 F.3d 1290, 1294 (11th Cir. 2020) ("[Defendant] can avoid the procedural-default bar altogether, meaning he can raise a claim for the first time on collateral review without demonstrating cause and prejudice, if the alleged error is jurisdictional."). That is, Movant's lifetime sentences on Counts One and Two were in excess of the twenty-year statutory maximum for Hobbs Act offenses, see 18 U.S.C. § 1951(a), and federal courts may not impose a heavier sentence than is authorized by statute. See United States v. Bushert, 997 F.2d 1343, n.18 (11th Cir. 1993) ("It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute.") Finally, by showing that his charged offenses cannot qualify as serious violent felonies under the elements or the enumerated offenses clause, Movant has shown that his convictions more likely than not relied upon the residual clause, and thus he has carried the burden of proof all § 2255 movants bear: a showing, by a preponderance of the evidence, that they are

entitled to relief. See Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017) (affirming that the burden of proof in a § 2255 proceeding lies with the movant). Therefore, the Government's procedural arguments fail.

B. *Counts Three and Four*

Movant argues that his convictions and sentences on Counts Three and Four cannot stand following the Supreme Court's decision in Davis. Section 924(c)(1) of Title 18 of the United States Code, under which Movant was charged in Count Four, criminalizes using or carrying a firearm in furtherance of a "crime of violence." 18 U.S.C. § 924(c)(1). Section 924(o), under which Movant was charged in Count Three, criminalizes conspiring to commit the offense described in § 924(c)(1). 18 U.S.C. § 924(o). Congress defined a "crime of violence" in two ways: the elements clause includes felonies that "[have] as an element the use, attempted use, or threatened use of physical force against the person or property of another," and the residual clause expanded the definition to include any felony 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). Davis, however, invalidated the residual clause, and thus an offense only qualifies as a crime of violence if it satisfies the elements clause.

Movant asserts that his convictions on Count Three and Count Four are invalid because they both rely on § 924(c)(3)'s now-invalid residual clause. Specifically, Movant argues that conspiracy to commit Hobbs Act robbery, the charge in Count One, was the only possible predicate crime for the Count Three and Four convictions, but the Eleventh Circuit has clearly established that conspiracy to commit Hobbs Act robbery

cannot qualify as a crime of violence after Davis. See Brown, 942 F.3d at 1075. In the alternative, Movant argues that (1) where, as here, the predicate for a § 924(c) conviction is unclear, courts must assume that the least culpable offense charged was the predicate, and (2) even if the convictions on Counts Three and Four were predicated upon the attempt charge, attempted Hobbs Act robbery is not a "crime of violence" within the meaning of § 924(c).

The second argument is patently without merit. In United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit held that although the "substantial step" required to show an attempted crime may not use actual or threatened force, attempted Hobbs Act robbery is still a crime of violence. Although Movant notes that this decision has been appealed to the Supreme Court, it is still binding precedent at this time. Movant's conviction on Count Two is therefore a proper predicate for his convictions on Counts Three and Four. The question, then, is whether the attempt charge actually was the predicate for Movant's convictions on Counts Three and Four.

Movant claims that the Court's jury instructions foreclosed the possibility that the jury could have used the Count Two attempt charge as the predicate offense for convicting him on Counts Three and Four. To support his assertion with respect to Count Three, Movant relies on two specific instructions: (1) the Court's instruction that Movant could only be found guilty of the offense charged in Count Three if the jury found, beyond a reasonable doubt, that Movant "conspired to commit the crime of violence charged in **Count One** of the Indictment," and (2), the Court's instruction that Movant was charged with violating the law "as charged in **Count One** in two separate ways." CR-DE 255 at 16, 17 (emphasis added). With respect to Count Four, Movant

points to the Court's instruction that the jury should refer back to the Count Three instructions for clarification of what constitutes a violation of § 924(c). Id. at 18. Movant asserts that the Court's instructions on Count Three, and the reference back to them in the Count Four instructions, required the jury to consider the conspiracy charge as the only predicate offense for both convictions.

The Court finds this argument persuasive as to Count Three. It must be noted that the Court also instructed the jury as to Count Three by initially noting that Movant was charged with conspiring to possess and use a firearm "in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in **Counts One and Two** of the Indictment." Id. at 16. The jury also had access to the indictment itself during its deliberations. However, the jury instructions were clear that Movant could be found guilty on Count Three "**only if**" the jury found that he had conspired to commit the crime of violence charged in **Count One**. Id. (emphasis added). The instructions later confirmed that Count Three charged Movant with "violat[ing] the law as charged in **Count One** in two separate ways." Id. at 17. The plain language of the instructions therefore clearly required the jury to base its Count Three conviction on the Count One charge. Movant has therefore shown that his Count Three conviction was, more likely than not, based on the conspiracy offense, which the Eleventh Circuit has determined is not a crime of violence without resort to § 924(c)'s residual clause. See Brown, 942 F.3d 1069, 1075. The Count One conviction was therefore not a proper predicate for Movant's conviction on Count Three.

The language of the Count Four instructions is not so clear, however. It is true that the Court did refer back to the Count Three instructions to inform the jury as to

"[w]hat constitutes a violation of Title 18, United States Code, Section 924(c)(1)." Id. at 18. Shortly thereafter, though, the Court also stated that the indictment charged that Movant 1) knowingly carried a firearm in relation to a **conspiracy** to commit a crime of violence, 2) possessed a firearm in furtherance of a **conspiracy** to commit a crime of violence, 3) knowingly carried a firearm in relation to an **attempt** to commit a crime of violence, and 4) possessed a firearm in furtherance of an **attempt** to commit a crime of violence. Id. The Court went on to note that while the Government charged Movant with violating the law in four ways, it only needed to prove beyond a reasonable doubt that Movant violated the law in one of those ways. The instructions therefore did, in part, include language which might have led the jury to predicate its Count Four conviction on the Count Two attempt charge. It is therefore unclear from the instructions that the jurors could not have predicated their Count Four conviction on the attempt charge.

Movant next argues that the Court must presume that the least culpable conduct charged, i.e. the conspiracy of Count One, was the predicate for the Count Three and Count Four convictions. He cites three lines of cases he asserts support this argument. He first cites Moncrieffe v. Holder, 569 U.S. 184 (2013), in which the Supreme Court, in the context of a challenge to a sentence enhancement under the ACCA, clarified that when a court applies the categorical approach to a state statute that provides multiple means of committing a particular offense, the court must presume that the defendant only engaged in the least culpable conduct. He next cites Stromberg v. People of California, 283 U.S. 359 (1931), in which the Supreme Court found that a conviction could not be upheld where the underlying statute criminalized several different actions,

one of which was found to be an unconstitutional prohibition. Finally, he cites In re Gomez, 830 F.3d 1225 (11th Cir. 2016), where the Eleventh Circuit permitted a prisoner to file a successive § 2255 motion to challenge his duplicitous conviction under § 924(c) in light of the Supreme Court's then-recent decision in Johnson.

In re Gomez deals with the issue of duplicitous indictments, that is, indictments that charge two separate crimes in a single count. See United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). Because the Motion can be disposed of on other grounds, the Court need not address this argument here. And the facts underlying the Motion are clearly distinguishable from those in Moncreiffe, which dealt with the determination of whether a particular state crime could qualify as a violent felony under the ACCA. In the instant action, the question of whether a crime qualifies as a crime of violence has already been answered by the Eleventh Circuit. See Brown 942 F.3d at 1075 (finding that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)); St. Hubert, 909 F.3d at 351 (finding that attempted Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause). Movant infers from Moncrieffe that where there are insufficient facts to answer a particular question definitively, courts must assume the facts are most favorable to a defendant. But as there is no discussion in the opinion that clearly supports this argument, Movant's inference is closer to speculation than interpretation. That case is therefore inapplicable to the inquiry at hand.

Stromberg is applicable, however. In Stromberg, the Supreme Court reviewed the conviction of an appellant who had been convicted under a state statute that criminalized several actions. The criminalization of one of these actions, however, was

ruled an unconstitutional restriction on free speech. Because it was unclear whether the appellant's conviction had been predicated upon that constitutionally protected conduct, the Supreme Court found that "the conviction could not be upheld." Stromberg, 283 U.S. at 368. The Eleventh Circuit has clarified the Stromberg holding to mean that "a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) *one of the listed grounds was constitutionally invalid*." Knight v. Dugger, 863 F.2d 705, 730 (11th Cir. 1988) (emphasis in original) (quoting Adams v. Wainwright, 764 F.2d 1356, 1362 (11th Cir. 1985)) (internal quotation marks omitted). Movant is clearly entitled to relief under this standard with respect to both his Count Three and Count Four convictions. First, the jury was instructed that Counts Three and Four could be predicated on the attempt or the conspiracy charge. Second, as the Government concedes, it is impossible to determine upon which charge the jury actually based its Count Three and Four convictions. And finally, the conspiracy charge was a constitutionally invalid predicate for a conviction on Counts Three and Four. Therefore, applying Stromberg to the instant action, Movant's convictions on Counts Three and Four are due to be vacated.

The Government does not refute Movant's argument that, per the jury instructions, only Count One could have been the predicate offense for the convictions on Counts Three and Four, nor does the Government take any position with respect to whether the Court must presume that the Count Three and Four convictions were predicated upon the conspiracy conviction. The Government's only arguments on

Counts Three and Four are procedural. First, the Government argues that Movant has procedurally defaulted on these claims. This argument is unpersuasive as to Counts Three and Four for the same reasons it was unpersuasive as to Counts One and Two: jurisdictional challenges are not defaultable. See Bane, 948 F.3d at 1294. Next, the Government argues that Movant cannot carry his burden of proof with respect to those Counts. According to the Government, because the jury returned a general verdict that does not indicate the predicate offenses for Counts Three and Four, Movant cannot carry his burden of showing that, more likely than not, his Count Three and Four convictions were predicated upon the conspiracy offense charged in Count One, as the Government contends Beeman, 871 F.3d 1215, requires him to do.

It should be noted in the first instance that, even if the Government if correct, Movant has carried his burden with respect to his Count Three conviction, as noted above. But the Government is not correct. Beeman is not applicable to Counts Three and Four in the same way it is applicable to Counts One and Two, however. Beeman merely reaffirmed that a § 2255 movant bears the burden of proving that he is entitled to relief. In the context of a challenge to a judge's determination that a particular crime qualified for a sentence enhancement, as was the case in Beeman, a petitioner is entitled to relief if his enhanced sentence was based upon an unconstitutionally vague residual clause. Therefore, a Beeman-style movant's burden is to show that he, more likely than not, received an enhanced sentence pursuant to an unconstitutional residual clause. But this is not the question in Movant's case. The question here is whether a jury based its conviction upon a constitutionally invalid ground. And per Stromberg and Knight, a movant is entitled to relief when he shows the three things required in Knight.

It is the uncertainty of the grounds for the jury verdict that triggers the entitlement to relief. Therefore, while Movant does need to carry his burden of proof, his burden is to show, by a preponderance of the evidence, that it is unclear whether the jury based its convictions on Counts Three and Four on the Count One charge or the Count Two charge, which Movant has done.

During oral argument, the Government suggested that the Eleventh Circuit's opinion in In re Cannon, 931 F.3d 1236 (11th Cir. 2019), supports its argument, but the undersigned finds the Government's reading of that case to be overly broad. In Cannon, the Eleventh Circuit found that a § 2255 movant had made a *prima facie* case that his § 924(c) conviction may have relied upon the residual clause the Supreme Court struck down in Davis. It cautioned the movant, however, that he "still bears the burden of proving the likelihood that the jury based its verdict of guilty in Count 3 solely on the Hobbs Act conspiracy, and not also on one of the other valid predicate offenses identified in the count (four drug crimes and two carjackings)." Cannon, 931 F.3d at 1243. This comment, however, which was not given in the context of a fulsome discussion and thus may be characterized as nonprecedential dicta, must be read within the context of the whole opinion. The Eleventh Circuit, just prior to making this statement, pointed out that "Cannon's predicate crimes seem inextricably intertwined." Id. That is to say that it was "difficult to see how a jury would have concluded that Cannon was guilty of using a firearm during and in furtherance of the underlying Hobbs Act predicates without at the same time also concluding that he did so during and in furtherance of the underlying drug and carjacking predicates." Id. The Eleventh Circuit's comment, therefore, is better interpreted to simply note that Cannon would

need to show that the predicate crimes for his conviction were not so inextricably intertwined that the jury's finding him guilty of his Hobbs Act offenses necessitated the jury's finding him guilty of the drug and carjacking predicates. To interpret it otherwise, as the Government suggests, one would need to believe that the Eleventh Circuit intended to call into question not only its own, also the Supreme Court's, precedential authority on a question of constitutional law, without any discussion of those precedents, and in a single sentence. This the undersigned does not believe, and the Government's only argument must therefore fail.

IV. Conclusion

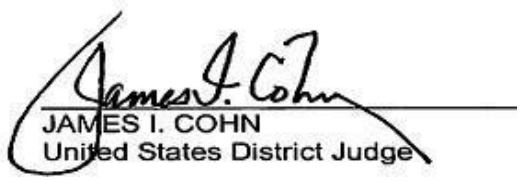
In summation, because Movant's sentence enhancement on Counts One and Two relied upon the unconstitutionally vague residual clause in 18 U.S.C. § 3559(c)(2)(F)(ii), his sentences on those two Counts must be vacated, and he must be resentenced for the underlying convictions. Movant's convictions and sentences on Counts Three and Four are also due to be vacated because one of the predicate crimes for those convictions is not a crime of violence without resort to the unconstitutionally vague residual clause in § 924(c)(2). It is thereupon

ORDERED AND ADJUDGED as follows:

1. Movant Henry Wainwright's Motion to Vacate Pursuant to § 2255 [DE 8] is **GRANTED**.
2. Movant's convictions and sentences as to Counts Three and Four are hereby **VACATED**.

3. Movant's sentences as to Counts One and Two are hereby **VACATED**. Movant shall be **RESENTENCED** as to Counts One and Two only. The Court will enter a separate order setting a resentencing hearing.
4. The United States Probation Office shall prepare an amended Presentence Investigation Report recalculating Movant's Advisory Guideline Sentencing Range with respect to Counts One and Two only.
5. The Clerk of Court is directed to **CLOSE** this case and **DENY as moot** all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of April, 2020.



Copies provided to:
Counsel of record via CM/ECF
U.S. Probation

B-4

RICHITELLI

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10482-HH

JAY ANTHONY RICHITELLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON, GRANT, and LAGOA, Circuit Judges.

BY THE COURT:

The parties' "Joint Motion to Remand" is GRANTED. The matter is REMANDED in full to the district court.

The Clerk is directed to close the file on this appeal.

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

November 02, 2020

Sivashree Sundaram
U.S. Attorney's Office
500 E BROWARD BLVD
FORT LAUDERDALE, FL 33394

Appeal Number: 17-10482-HH
Case Style: Jay Richitelli v. USA
District Court Docket No: 0:16-cv-61345-JIC
Secondary Case Number: 0:09-cr-60229-JIC-1

The enclosed copy of this Court's order of remand is issued as the mandate of this Court. Counsel and parties are advised that with this order of remand this appeal is concluded. If further review is to be sought in the future a timely new notice of appeal must be filed.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH
Phone #: 404-335-6169

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61345-CIV-COHN
(Case No. 09-60229-CR-COHN)

JAY ANTHONY RICHITELLI,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER GRANTING MOTION TO VACATE

THIS CAUSE is before the Court upon the Mandate of the United States Court of Appeals for the Eleventh Circuit remanding the above-styled action. DE 31. The Court has reviewed Movant Jay Anthony Richitelli's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [DE 4] ("Motion"), the Government's Response [DE 10], Movant's Reply [DE 15], the record in this case, and is otherwise advised in the premises.

In his Motion, Movant challenges the constitutionality of his mandatory life sentences under 18 U.S.C. § 3559(c) in light of Johnson v. United States, 576 U.S. 591 (2015). DE 4. On December 6, 2016, the Court denied the Motion because it determined that Movant's life sentences could be sustained on alternative grounds that did not rely on § 3559(c)'s residual clause. DE 21. Movant appealed. In 2019, during the pendency of the appeal, the Supreme Court held that the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which is nearly identical to Section 3559(c)'s residual clause, is unconstitutionally vague for the same reasons that led the Court to

find the Armed Career Criminal Act's residual clause unconstitutional in Johnson. Davis v. United States, 139 S. Ct. 2319, 2325-2327 (2019). In light of Davis and other post-Johnson decisions, the Court recently granted a § 2255 motion filed by Movant's co-defendant, Henry Wainwright, and held that Section 3559(c)(2)(F)(ii)'s residual clause is unconstitutionally vague and that Wainwright's life sentences (based on same offenses as Movant's life sentences) relied upon the now-invalid residual clause and could not be sustained on an alternative ground. Henry Wainwright v. United States, No. 19-cv-62364 (S.D. Fla. Apr. 6, 2020).

On September 10, 2020, in connection with proceedings concerning Movant's other counts of conviction not at issue here, the Court issued an indicative ruling that, if the Eleventh Circuit remanded Movant's appeal, the Court would conclude that Movant's life sentences imposed in Counts 1 and 2 of the Superseding Indictment pursuant to 18 U.S.C. § 3559(c) are invalid for the reasons stated in Wainwright v. United States, No. 19-cv-62364 (S.D. Fla. Apr. 6, 2020) and impose a lesser sentence. Case No. 09-cr-60229, DE 445 (August 12, 20202). Accordingly, now that the Eleventh Circuit has remanded Movant's appeal, it is

ORDERED and ADJUDGED as follows:

1. Movant's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 [DE 4] is **GRANTED** for the reasons stated in Wainwright v. United States, No. 19-cv-62364 (S.D. Fla. Apr. 6, 2020).

2. Movant's sentences as to Counts One and Two are hereby **VACATED**.

3. Movant shall be **RESENTENCED** and the Court will enter a separate order setting a resentencing hearing.

4. The United States Probation Office shall prepare an amended Presentence Investigation Report recalculating Movant's advisory guideline sentencing range.

5. The Clerk shall **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 3rd day of November, 2020.

Copies provided to:
Counsel of record via CM/ECF
U.S. Probation

B-5

THOMPSON

FILED: April 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7775
(4:06-cr-00031-MSD-JEB-1)
(4:16-cv-00098-MSD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SCOTT WILLIAM THOMPSON

Defendant - Appellant

O R D E R

Upon consideration of appellant's unopposed motion to remand, the court grants the motion and remands this case to the district court to allow appellant to renew and update his arguments that his 1988 California robbery conviction does not qualify as a predicate offense under 18 U.S.C. § 3559(c)(1)(F)(i), the government to respond to those arguments, and the district court to rule on the merits of appellant's motion to vacate in the first instance.

The clerk shall forward a copy of this order, accompanied by a copy of the

motion to remand, to the district court.

Entered at the direction of Chief Judge Gregory with the concurrence of Judge Motz and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff/Appellee*,	)	
v.	)	Case No. 19-7775
SCOTT WILLIAM THOMPSON, *Defendant/Appellant.*	)	

MOTION TO REMAND

This appeal arises from the denial of Scott Thompson's second or successive motion for relief under 28 U.S.C. § 2255, in which he has challenged his mandatory life sentence, imposed under 18 U.S.C. § 3559(c), in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019). By separate motion, counsel also requests that the Court suspend the reply brief deadline pending the Court's ruling on this motion to remand.

1. In 2007, Scott Thompson was sentenced to mandatory life imprisonment under the federal "three-strikes" provision in 18 U.S.C. § 3559(c). Mr. Thompson's mandatory life sentence is predicated on an offense – California second-degree robbery – that he contends does not qualify as a "serious violent felony" under any part of § 3559(c)(2)(F)'s definition of that term.

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Thompson moved under 28 U.S.C. § 2255 to vacate his sentence. Because the motion was his second, he sought and received authorization

from this Court prior to filing. Applying the reasoning of *Johnson* and its progeny, Mr. Thompson argued that his California second-degree robbery conviction could not qualify as a "serious violent felony" under § 3559(c)(2)(F)'s residual clause because that clause was constitutionally invalid. He further argued that the offense also failed to qualify as a "serious violent felony" under either § 3559(c)(2)(F)'s force clause or its enumerated-offense clause. Therefore, he did not have the two predicate offenses necessary to qualify for a "three-strikes" mandatory life sentence.

During its evaluation of Mr. Thompson's claim for relief, the district court identified an error independent of the *Johnson* claim: that California second-degree robbery carries only a five-year statutory maximum term of imprisonment and therefore never could have qualified under either clause in § 3559(c)(2)(F)(ii) – the force and residual clauses – because that provision contains a preliminary ten-year statutory maximum requirement. There is nothing in the record indicating that anyone at the time of sentencing – the court, the government, or the defense – knew of the offense's statutory maximum, much less its implications for sentencing under § 3559, at the time of sentencing. In fact, the record is completely silent as to which of § 3559(c)(2)(F)'s three clauses the sentencing court applied to find that California second-degree robbery was a qualifying predicate.

After its *sua sponte* identification of this § 3559(c) error, the district court ruled that the error prevented the court's consideration of Mr. Thompson's *Johnson*

claim because, the court reasoned, the sentencing court could not have relied on the residual clause as a matter of law due to the ten-year penalty requirement. The court believed itself "compelled to reach this conclusion notwithstanding the potential merit behind Petitioner's argument that recent developments in (non-binding) case law reveal that California robbery does not qualify as 'robbery,' under the § 3559(c)(2)(F)(i) enumerated crimes clause." J.A. 260.

Accordingly, the district court granted the government's motion to dismiss on the procedural ground that Mr. Thompson failed to satisfy the gatekeeping requirements set forth in 28 U.S.C. § 2255(h)(2) because his motion did not rely on a new rule of constitutional law, made retroactive to cases on collateral review. The court, however, granted a certificate of appealability "[b]ecause reasonable minds could differ on such issue, and because Petitioner otherwise has made a colorable showing of the right to relief on the merits." J.A. 262.

2. In his opening brief, and in keeping with the certificate of appealability, Mr. Thompson argued that the district court erred when it concluded that the proper test for determining that a second or successive petition based on *Johnson* has satisfied § 2255(h)(2)'s gatekeeping requirement is whether the sentencing court could have relied on an unconstitutionally vague residual clause, as opposed to whether it may have relied on such a clause, albeit erroneously. Appellant's Br., ECF Doc. 29, at 4, 25-25; *cf.* J.A. 260-62. Given the nature of the district court's

error and the court's belief that it was precluded from considering "the potential merit behind Petitioner's argument … that California robbery does not qualify as 'robbery,' under the § 3559(c)(2)(F)(i) enumerated crimes clause," J.A. 260, Mr. Thompson did not seek to expand the certificate of appealability to include a second issue concerning that argument.

3. In its response brief, the government has expressly waived its defenses under 28 U.S.C. § 2255(f)(3) and (h)(2) to Mr. Thompson's § 2255 motion. Gov't Br., ECF Doc. 37, at 13-15. But as the government points out, "the United States may defend a judgment on other grounds, even if not relied on by the district court, and does not have to obtain a certificate of appealability." Gov't Br. at 13.

That is what the government has done in its response brief, in which it argues at considerable length that Mr. Thompson's § 2255 motion should be denied on the merits because his California robbery properly qualifies as an enumerated offense under § 3559(c)(2)(F)(i). *See* Gov't Br. 15-51. In making its arguments, however, the government attempts to anticipate the arguments that it believes Mr. Thompson would make. Gov't Br. 31 ("The government anticipates at least three separate arguments as to why" "California robbery is not 'robbery' under 18 U.S.C. § 3559(c)."); *see* Gov't Br. 32 ("The first argument that the defendant might make …."); Gov't Br. 36 ("Next, the defendant may argue …."); Gov't Br. 43 ("Finally, the defendant may assert ….").

At the same time, the government states that the Court may remand the case to the district court to consider the merits in the first instance. Gov't Br. at 2, 12, 52. The Court should accept the government's suggestion to remand the case, and should include instructions to permit briefing in the usual order. The alternative forces Mr. Thompson – who, again, is serving a mandatory life sentence for which he contends he does not qualify – to address in a reply brief the government's response in opposition to substantial arguments that the government may or may not have accurately anticipated, while at the same time precluding Mr. Thompson from making arguments different from, or in addition to, those anticipated by the government.

In sum, where the government has both waived its procedural defenses and stated its view that it may be appropriate to remand the case to the district court for consideration of the merits, remanding the case at this time is appropriate so that Mr. Thompson can present his arguments in the first instance, the government can respond to the arguments he actually presents, Mr. Thompson can reply to the government's response, and the district court can rule on the issue with the benefit of fulsome briefing from both sides.

4. Counsel has advised counsel for the government, Daniel T. Young, of the intended filing of this motion. The government has informed defense counsel that it takes no position on a motion to remand. In the government's view, "because

the only matters at issue here are pure questions of law, the Court is well positioned to resolve them now. At the same, the government defers to the Court's discretion as to whether it prefers the district court to address these issues in the first instance on remand."

Wherefore, Mr. Thompson asks the Court to remand this case, at which point Mr. Thompson can renew and update his arguments that his 1988 California robbery conviction does not qualify as a predicate offense under 18 U.S.C. § 3559(c)(1)(F)(i), the government can respond to those arguments, Mr. Thompson can reply to the government's response, and the district court can rule on the merits of the motion to vacate.

Respectfully submitted,

GEREMY C. KAMENS
Federal Public Defender
for the Eastern District of Virginia

s/ Frances H. Pratt
Frances H. Pratt
Assistant Federal Public Defender
Counsel for Appellant
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800
Fran_Pratt@fd.org

Dated April 1, 2021

CERTIFICATE OF COMPLIANCE

1. This Motion has been prepared using Microsoft Word for Office 365, Times New Roman font, 14-point proportional type size.

2. The body of this motion, exclusive of the case caption, title, and signature block, contains no more than 5,200 words, specifically 1,268 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

April 1, 2021
Date

s/ Frances H. Pratt
Frances H. Pratt
Assistant Federal Public Defender

B-6

SUTTON

FILED

FEB 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY J. SUTTON, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 18-56571 D.C. Nos. 2:16-cv-03635-PA 2:02-cr-00106-PA-1 Central District of California, Los Angeles ORDER

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

The parties' joint motion for summary vacatur and remand (Docket Entry No. 14) is granted. We vacate the district court's judgment dismissing appellant's 28 U.S.C. § 2255 petition as untimely, and remand for the district court to consider the merits of appellant's § 2255 petition in light of *United States v. Davis*, 139 S. Ct. 2319 (2019).

VACATED and REMANDED.

AMY M. KARLIN (Bar No. 150016)
Interim Federal Public Defender
BRIANNA FULLER MIRCHEFF (Bar No. 243641)
(E-Mail: Brianna_Mircheff@fd.org)
Deputy Federal Public Defender
ELENA SADOWSKY (Bar No. 302053)
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4784
Facsimile: (213) 894-0081

Attorneys for Petitioner
ANTHONY J. SUTTON

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANTHONY J. SUTTON, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No. CR 02-106-PA Case No. CV 16-3635-PA **ORDER**

For the reasons set out in the parties' stipulation, the Court hereby reinstates the Order Granting 2255 And Vacating Sentence, issued July 5, 2018, Docket #292. Petitioner's 2255 Motion is GRANTED. Petitioner's sentence is VACATED. The Court will schedule a resentencing in a separate order.

DATED: February 12 , 2020

PERCY ANDERSON
United States District Judge

Presented by:

/s/ Brianna Fuller Mircheff
BRIANNA FULLER MIRCHEFF
Deputy Federal Public Defender