APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-10620
Non-Argument Calendar

D.C. Docket Nos. 2:16-cv-08084-LSC,
2:01-cr-00164-LSC-TMP-1

ANDREW LEVERT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(March 21, 2019)

Before TJOFLAT, JORDAN, and NEWSOM, Circuit Judges.

PER CURIAM:

Andrew Levert, proceeding pro se, appeals the district court's dismissal of his 28 U.S.C. § 2255 motion to vacate. After careful review of the parties' briefs and the record, we affirm.

I

Mr. Levert is a federal prisoner serving a 236-month sentence for the possession of a firearm as a felon in violation of 18 U.S.C. § 922(g). A jury found him guilty in 2002 and he was sentenced under the mandatory minimum provisions of the Armed Career Criminal Act ("ACCA") based on three prior convictions under California law—two for robbery with a firearm and one for assault with a deadly weapon. *See* 18 U.S.C. § 924(e). Mr. Levert's presentence investigation report (PSI) stated that the robberies qualified as violent felonies under the residual or elements clauses of the ACCA, and the assault qualified as a violent felony under the elements clause. Mr. Levert did not object to the PSI and there was no additional discussion about his prior convictions during the sentencing hearing. He appealed, and we affirmed his conviction and sentence. *See United States v. Levert*, 87 F. App'x 712 (11th Cir. 2003).

In 2002, Mr. Levert filed a motion under 28 U.S.C. § 2255 arguing that he was denied effective assistance of trial counsel, a fair trial, and effective assistance of appellate counsel. The district court denied that motion with prejudice. In June of 2016, following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Levert

sought and was granted authorization to file a second or successive § 2255 motion.

Mr. Levert argued in his motion that his two prior robbery convictions no longer qualify as violent felonies under the residual clause of ACCA, which *Johnson* held void for vagueness. He also argued that his two prior robbery convictions do not qualify as violent felonies under the elements clause of the ACCA because California robbery does not require the use, threatened use, or attempted use of physical force.

Before reaching the merits of the § 2255 motion, the district court considered whether Mr. Levert had met the requirements for filing a second or successive application under § 2255(h). It concluded that, under our recent binding precedent of *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), Mr. Levert had not demonstrated that it was "more likely than not" that the sentencing court had relied upon the residual clause—rather than the elements clause—to enhance his sentence under the ACCA. The district court dismissed Mr. Levert's § 2255 motion as an improper successive motion, and he appealed.[1]

II

Mr. Levert argues on appeal that the standard set forth in *Beeman* does not apply and that he need

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[1] Because the district court dismissed the § 2255 motion as successive, Mr. Levert does not need a certificate of appealability to appeal. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004).

only show that the ACCA sentencing enhancement was no longer authorized after *Johnson* voided the residual clause. He also maintains that the force element of the California robbery statute was unconstitutionally applied in the computation of his sentence.

We review de novo the district court's dismissal of a § 2255 motion as second or successive. *See McIver v. United States*, 307 F.3d 1327, 1329 (11th Cir. 2002). We also review de novo whether a defendant's prior conviction qualifies as a violent felony under the ACCA. *See United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015).

A federal prisoner who wishes to file a second or successive motion to vacate, set aside, or correct his sentence must move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h) (cross-referencing 28 U.S.C. § 2244). Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

> (1) 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; or
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> (2) 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)(1), (2). A 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." 28 U.S.C. § 2244(b)(3)(C). Whether or not authorization is granted, "[a] district court shall dismiss any claim" that does not meet the requirements for filing a second or successive motion. 28 U.S.C. § 2244(b)(4).

In *In re Moore*, 830 F.3d 1268, 1271 (11th Cir. 2016), we granted a prisoner leave to file a successive § 2255 motion based on our conclusion that he made a prima facie showing that his claim fell within the scope of the new substantive rule announced in *Johnson*. We explained that our threshold determination did not conclusively resolve the issue because the language of § 2244, cross referenced in § 2255(h), provides that a district court "shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C. § 2244(b)(4). Thus, a district court owes no deference to our prima facie determination and "our first hard look at whether the § 2255(h) requirements actually have been met will come, if at all, on appeal from the district court's decision." *Moore* 830 F.3d at 1271 (citation and quotation marks omitted).

We also provided guidance for how the district court should conduct its de novo review of the § 2255(h) requirements:

> The district court must decide whether or not [the prisoner] was sentenced under the residual clause . . . , whether the new rule in *Johnson* is implicated . . . , and whether [he] has established the § 2255(h) statutory requirements for filing a second or successive motion. Only then should the district court proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise.

Id. at 1271–72 (citation, quotations, and alterations omitted).

The ACCA, which imposes enhanced prison sentences for certain defendants with three prior convictions for either violent felonies or serious drug offenses, defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is the "elements clause," while the second prong includes the "enumerated crimes clause" and what is typically referred to as the "residual clause." *See United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

In *Johnson*, the Supreme Court determined that the residual clause is unconstitutionally vague but noted that its holding did not affect the elements clause. *See* 135 S. Ct. at 2557–58, 2563. The Supreme Court later held that *Johnson* applied retroactively to cases on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Thus, a § 2255 claim challenging a sentence under the residual clause is known as a "*Johnson* claim." A challenge to an improper sentence under the elements or enumerated crimes clauses, on the other hand, is sometimes called a "*Descamps* claim," after *Descamps v. United States*, 133 S. Ct. 2276, 2293 (2013), in which the Supreme Court clarified the "categorical approach" for evaluating offense elements.

In *Beeman v. United States*, 871 F.3d 1215, 1218–25 (11th Cir. 2017), we affirmed a district court's order denying a prisoner's original § 2255 motion asserting that his prior conviction under a Georgia aggravated assault statute was not a violent felony because *Johnson* invalidated the residual clause, assault is not among the enumerated crimes, and Georgia aggravated assault does not qualify as a violent felony under the elements clause. We determined that the prisoner's residual clause and elements clause arguments were two distinct claims: (1) a *Johnson* claim that he was sentenced under the ACCA's residual clause; and (2) a *Descamps* claim that he was incorrectly sentenced under the elements clause. *Id.* at 1220.

We affirmed the district court's dismissal of the *Descamps* claim as untimely under 28 U.S.C.

§ 2255(f)(3) because *Descamps* did not announce a new rule of constitutional law. *See id. See also In re Hires*, 825 F.3d 1297, 1304 (11th Cir. 2016) (holding that a prisoner could not "use *Johnson* as a portal to challenge his ACCA predicates . . . based on *Descamps*"). We also held that the prisoner failed to carry his burden to prove his *Johnson* claim on the merits because he did not show that the district court actually relied on the residual clause in applying the ACCA enhancement. *See Beeman*, 871 F.3d at 1225. We explained that a prisoner has failed to meet that burden "[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." *Id.* at 1221–22.

III

As in *Beeman*, the district court here identified the two distinct claims raised in Mr. Levert's § 2255 motion: (1) a *Johnson* claim that he was sentenced under the ACCA's residual clause; and (2) a *Descamps* claim that he was incorrectly sentenced under the elements clause. In conducting its de novo review, the district court correctly dismissed Mr. Levert's § 2255 motion as an inappropriate successive motion because Mr. Levert had not satisfied the requirements of § 2244. *See Moore*, 830 F.3d at 1271–72; 28 U.S.C. § 2244(b)(4). Under our binding precedent in *Beeman*, Mr. Levert cannot show as to his *Johnson* claim that it is more likely than not that the sentencing court relied upon the residual clause to enhance his sentence under the ACCA. *See* 871 F.3d at 1221–22. The PSI listed both the residual clause and the elements clause as the bases for

classifying his three prior convictions as predicate violent felonies under the ACCA and the court did not specify at sentencing whether it relied upon one clause over the other.

Mr. Levert cites to a recent Ninth Circuit case *United States v. Dixon*, 805 F.3d 1193, 1199 (9th Cir. 2015), which held that, under the categorical approach, California robbery does not qualify as a violent felony under the elements clause of the ACCA. At the time of Mr. Levert's sentencing, however, relevant case law established that California robbery did qualify as a violent felony under the elements clause. *See United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994). There is no additional information in the record that elucidates precisely how the two robbery convictions were categorized, so it is just as likely that the sentencing court relied on the elements clause to classify them as violent felonies. *See Beeman*, 871 F.3d at 1222.

Mr. Levert's *Descamps* claim is untimely. Because *Descamps* did not state a new rule of constitutional law, any challenge to Mr. Levert's sentence based on the elements clause had to be brought within one year of the date on which his judgment of conviction became final (which was December 5, 2002). *See* 28 U.S.C.A. § 2255(f)(1). Mr. Levert cannot "use *Johnson* as a portal to challenge his ACCA predicates . . . based on *Descamps*." *Hires*, 825 F.3d at 1304.

Mr. Levert cites to several additional cases in support of his claims, but they are inapposite. In *In re Chance*, 831 F.3d 1335 (11th Cir. 2016), we

granted a petitioner's request for authorization to file a successive motion to vacate his sentence, which argued that the residual clause found in 18 U.S.C. § 924(c)—similar to the residual clause invalidated in *Johnson*—was unconstitutionally vague. The panel was clear in *Chance* that the petitioner still had to prove to the district court on de novo review that his sentence was unlawful under precedent from the Eleventh Circuit or the Supreme Court. We later held upheld § 924(c) against the same unconstitutional vagueness challenge in *Ovalles v. United States*, 905 F. 3d 1231, 1253 (11th Cir. 2018) (en banc). The recent Supreme Court decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), only invalidated the similar residual clause found in 18 U.S.C. § 16(b), and its holding, as in *Johnson*, did not affect the similar elements clause found in the same statute. Finally, the defendant in *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), contested the district court's application of an incorrect guideline range in sentencing him after he pleaded guilty to being unlawfully present in the United States after deportation. *Molina-Martinez* did not involve a *Johnson* claim.

IV

Because Mr. Levert has not established that it was more likely than not that the sentencing court relied on the residual clause in concluding that his two prior California robbery convictions were violent felonies under the ACCA, and because the *Descamps* claim that his sentence was erroneously enhanced under the elements clause is time-barred,

we affirm the district court's dismissal of his § 2255 motion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANDREW LEVERT, Petitioner,	)	
vs.	)	2:16-cv-8084-LSC
UNITED STATES OF AMERICA, Respondent.	)	(2:01-cv-164-LSC-TMP)

MEMORANDUM OF OPINION

Andrew Levert ("Levert"), through counsel, the Office of the Federal Public Defender, has filed with the Clerk of this Court a motion to vacate, set aside, or otherwise correct his sentence pursuant to 28 U.S.C. § 2255. (Doc. 1.) The United States has opposed the motion, and Levert has filed a reply in support. For the following reasons, the motion is due to be denied.

I. Background

In 2002, Levert was convicted by a jury of a felon-in-possession-of-a-firearm count under 18 U.S.C. § 922(g). His Presentence Investigation Report ("PSR") indicates that following report of an assault to police, police apprehended Levert in possession of a semiautomatic weapon with one live round in the chamber.

Levert was sentenced under the mandatory-minimum provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), which provides enhanced penalties for defendants previously convicted of three or more "violent felonies," defined as offenses that either: (1) have as an element "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i) (known as the "elements clause"); (2) constitute "burglary, arson, or extortion, or involve[ ] the use of explosives," *id.* § 924(e)(2)(B)(ii) (known as the "enumerated offenses clause"); or (3) "otherwise involve[ ] conduct that presents a serious potential risk of physical injury to another," *id.* (known as the "residual clause").

Levert qualified for the ACCA enhancement on the basis of three California violent felony convictions: two for robbery with use of a firearm and one for assault with a deadly weapon. Specifically, according to the PSR, the above three convictions arose based on the following conduct by Levert. On September 25, 1980, Levert approached a cashier at Daisy's restaurant and, producing a sawed-off shotgun, demanded money; the cashier complied. Less than 15 minutes later, Levert entered a Baskin Robbins ice cream parlor and, again producing a sawed-off shotgun from a shopping bag, demanded money from everyone present. One of the patrons complied, and Levert's accomplice removed money from the cash register. Finally, later on the same evening, Levert robbed Falcone's Pizza. Again, taking a sawed-off shotgun from a bag, Levert pointed it at Marcelino Aguilar and when Aguilar started to walk

away, Levert shot him in the stomach. Levert's accomplice then took money from the cash register.

For the two robbery convictions, Levert's PSR specified that they constituted violent felonies under the ACCA because they each had "as an element the use, attempted use, or threatened use of physical force against the person of another, or [] otherwise involves conduct that presents a seriously potential risk of physical injury to another." In other words, the PSR referenced both the "elements clause" and the "residual clause" of the ACCA for each of these offenses. For the assault with a deadly weapon conviction, the PSR stated that this conviction qualified as a violent felony under the "elements clause" of the ACCA.

Without the ACCA enhancement, the maximum sentence Levert could have received was ten years (120 months). *See* 18 U.S.C. § 924(a)(2). However, as an armed career criminal, he faced a mandatory minimum sentence of 15 years (180 months) and a maximum sentence of life. 18 U.S.C. § 924(e)(1). This Court sentenced Levert to 236 months' imprisonment. The sentencing transcript indicates no discussion concerning the applicability of the ACCA enhancement.

Levert appealed, and the Eleventh Circuit affirmed his sentence. *United States v. Levert*, 87 F. App'x 712 (11th Cir. 2003). Levert has previously filed a § 2255 motion that was denied on the merits, but on June 29, 2016, the Eleventh Circuit authorized Levert to file a second-or-successive motion un-

der 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A) with respect to his claim that his sentence is invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016).

II. Discussion

In *Johnson*, the Supreme Court held that the residual clause of the violent felony definition of the ACCA is unconstitutionally vague and thus imposition of an enhanced sentence under that provision violates the Fifth Amendment's guarantee of due process. 135 S. Ct. at 2557. The Supreme Court made clear that its ruling on the residual clause did not call into question the validity of the elements clause or the enumerated crimes clause of the ACCA's definition of a violent felony. *Id.* at 2563. Subsequently in *Welch*, 136 S. Ct. at 1264-65, the Supreme Court held that *Johnson* applies retroactively to cases on collateral review.

Levert's argument that he is entitled to be resentenced without the ACCA enhancement is twofold: first, after *Johnson*, his California convictions for robbery no longer qualify as violent felonies under the residual clause of the ACCA, and second, without the residual clause, the classification of those two convictions under the remaining ACCA definitions of violent felony is also incorrect because in 2015, the Ninth Circuit held that California Penal Code § 211 does not satisfy the elements clause of the ACCA because the statute can be violated with the use of accidental force, *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015).

The Court first notes that the Eleventh Circuit's grant of permission to file this § 2255 motion is a "threshold determination" that "does not conclusively resolve" the question whether Levert has actually satisfied the requirements of § 2255(h). *In re Moore*, 830 F.3d 1268, 1270-71 (11th Cir. 2016). Rather, this Court "must[] determine for itself whether [the § 2244(b)(2)] requirements are met. *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357 (11th Cir. 2007)[1]; *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (reiterating that the court of appeals' threshold conclusion in granting a successive application that a prima facie showing has been made is necessarily a "limited determination," as the district court then must also decide "fresh" the issue of whether § 2255(h)'s[2] criteria are met, and, if so, proceed to considering the merits of the § 2255 motion).

Thus, it is clear that this Court must first decide whether Levert has met the requirements for filing a second or successive petition under 28 U.S.C. §§ 2255(h) and 2244(b)(2), giving no deference to the Eleventh Circuit's initial prima facie decision, and only if the Court finds that he has, the Court may then proceed to consider the merits of Levert's motion. *See Faust v. United States*, 572 F. App'x 941,

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[1] *Jordan* involved the functionally-equivalent § 2244(b)(2) successive application standard applicable to state prisoners.

[2] Courts often refer to 28 U.S.C. §§ 2255(h), which is applicable to federal prisoners, and 2244(b)(2), which is applicable to state prisoners, interchangeably, because the latter cross-references the former. *See* 28 U.S.C. § 2255(h).

943 (11th Cir. 2014) (unpublished) ("Only if the district court . . . concludes that the movant 'has established the statutory requirements for filing a second or successive motion' should it 'proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise.'") (quoting *Moss*, 703 F.3d at 1303).

Recent binding Eleventh Circuit precedent forecloses the possibility that Levert has met the requirements for filing a second or successive petition based on *Johnson*. In *Beeman v. United States*, the court stated:

> To prove a *Johnson* claim, a movant must establish that his sentence enhancement "turn[ed] on the validity of the residual clause." In other words, he must show that the clause actually adversely affected the sentence he received. *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016). Only if the movant would not have been sentenced as an armed career criminal absent the existence of the residual clause is there a *Johnson* violation. That will be the case only (1) 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 (neither of which were called into question by *Johnson*) to qualify a prior conviction as a violent felony, and (2) if there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony, or as a serious drug offense.

> Critical to our decision on the merits issue in this case is the burden of proof and persuasion. The Government contends that a § 2255 movant bears the burden of proving that his sentencing enhancement was imposed because the sentencing court used the residual clause. Beeman argues that if it is merely possible that the court relied on that clause to enhance the sentence, then he has met his burden. We conclude, and hold, that, like any other § 2255 movant, a *Johnson* § 2255 claimant must prove his claim. To prove a *Johnson* claim, the movant 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. If 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.

871 F.3d 1215, 1221-22 (11th Cir. 2017) (footnotes omitted). Although the *Beeman* mandate has not issued, it is binding in this circuit. *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992); 11th Cir. R. 36 (I.O.P. 2) ("Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.").

In Levert's case, the PSR relied on both the elements clause and the residual clause of the ACCA in classifying his two California robbery convictions

as violent felonies, and there was no discussion by the parties or the court as to which clause applied. Levert argues that he has to show only that the Court *may* have relied on the residual clause and points to an Eleventh Circuit panel dispute about the proper burden of proof in a *Johnson* claim. *Compare In re Moore*, 830 F.3d at 1272-73 (stating in dicta that a *Johnson* movant does bear the burden of proof) *with In re Chance*, 831 F.3d 1335, 1338-42 (11th Cir. 2016) (endorsing in dicta the position advocated by Levert that a movant must merely show the possibility that the court relied on the residual clause to enhance the sentence). But *Beeman*, decided during the pendency of this litigation, settled any purported dispute and held that a *Johnson* claimant "like any other § 2255 movant . . . 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 1221–22 & n.3 ("As to the case before us now, we have not deferred to dicta. We have examined this issue afresh in reaching our conclusion based on what we see as traditional legal principles."); *see also id.* at 1225 ("Where the evidence does not clearly explain what happened, the party with the burden loses.").

Indeed, it is just as likely, if not more likely, that this Court relied upon the elements clause in classifying Levert's two California robbery convictions as violent felonies under the ACCA. The *Beeman* court acknowledged that "if 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.* at 1224 n.5 (emphasis added). But the law at the time of Levert's sentencing in 2002 was that robberies committed in violation of California Penal Code § 211 qualified as violent felonies under the elements clause of the ACCA, *see United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994).[3] Thus, there would have been no need for this Court to rely instead on the more broadly-worded residual clause.

At best for Levert, the residual clause was included in the PSR as an alternative ground for characterizing Levert's robbery convictions as violent felonies. Levert's reliance upon a decision of the Ninth Circuit that post-dates his sentencing does not establish what Levert must establish in order to prevail here: that this Court rejected the application of the elements clause and instead relied solely upon the residual clause when applying the sentencing enhancement in 2002, which the Eleventh Circuit called a "historical fact." *Beeman*, 871 F.3d

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[3] California Penal Code § 211 prohibits "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211. The element of fear is defined as "fear of an unlawful injury to the person . . . of the person robbed" or "fear of an immediate and unlawful injury to the person . . . in the company of the person robbed at the time of the robbery." *Id.* Thus, a violation of California Penal Code § 211 includes the element of "threatened use of physical force against the person of another."

Id.

at 1224 n.5 (stressing that it is the state of the law at the time of the sentencing that matters, and subsequent legal decisions would "cast[] very little light, if any," on the question whether the defendant was sentenced under the residual clause). Under these circumstances, Levert cannot meet his burden of establishing that this Court relied solely upon the residual clause in classifying his two prior California robbery convictions as violent felonies under the ACCA, such that *Johnson* would apply to necessitate a re-sentencing.

III. Conclusion

For the reasons stated above, Levert's § 2255 motion is due to be dismissed as an improper successive petition. Additionally, to the extent this dismissal necessitates a ruling on the certificate-of-appealability-issue, one will not be issued by this Court. This Court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted). Levert's claim does not satisfy either standard. Accordingly, insofar as an application for a certificate of appealability is implicit in Levert's

motion, it is due to be denied. A separate closing order will be entered.[4]

DONE and **ORDERED** on February 1, 2018.

/s/L. Scott Coogler
L. Scott Coogler
UNITED STATES
DISTRICT JUDGE

[4] Levert recently filed a motion seeking to expedite a ruling in this action. (Doc. 11.) The motion is hereby DENIED AS MOOT.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 16-13174-J & 16-13322-J

IN RE: ANDREW LEVERT,

Petitioner.

Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence, 28 U.S.C. § 2255(h)

Before MARCUS, MARTIN, and JULIE CARNES, Circuit Judges.

BY THE PANEL:

In these consolidated proceedings pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Andrew Levert has filed two applications—one *prose* and the other through counsel—seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if we certify that the second or successive motion contains a claim involving:

(l) 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; or

(2) 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). "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." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corrs.,* 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his two applications, which are identical in substance, Levert indicates that he wishes to raise one claim in a second or successive § 2255 motion. He claims that the district court violated his due process rights by enhancing his sentence under the residual clause of the Armed Career Criminal Act ("ACCA"). Levert asserts that his claim relies upon a new rule of constitutional law, namely, the Supreme Court's holdings in *Johnson v. United States,* 576 U.S. __, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague, and *Welch v. United States,* 578 U.S. __, 136 S. Ct. 1257 (2016), which applied *Johnson* retroactively to cases on collateral review.

Identifying a new, retroactive rule of constitutional law is only the first step, however. The applicant must also make a *prima facie* showing "that he is entitled to file a second or successive petition based on [the particular new rule announced by the Supreme Court]." *In re Holladay,* 331 F.3d 1169, 1173 (11th Cir. 2003) (determining whether a state prisoner made a *prima facie* case in his successive application filed pursuant to § 2244-subsection equivalent to § 2255(h)(2) and concluding that prisoner had shown "a reasonable likelihood that he is in fact mentally retarded," which predicate was necessary to support his claim under the new Supreme Court rule"). Accordingly, a prisoner must show not only that the new substantive rule announced in *Johnson* applies retroactively but also that he falls within the scope of that rule. *See, e.g.*, *id.,* 28 U.S.C. § 2244(b)(3)(C). Stated another way, Levert must make a *prima facie* showing that his claim involves the Supreme Court's new rule that the residual clause is unconstitutional.

The ACCA is a sentence enhancer that provides for a mandatory-minimum sentence of 15 years and increases the statutory maximum of the underlying § 922(g) conviction from 10 years to life. The ACCA is applicable if a defendant has three prior felony offenses that constitute either a violent felony or a serious drug crime. As to the former, the ACCA defines a violent felony as any crime punishable by a term exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause"; the first nine words of the second prong constitute the "enumerated crimes clause"; the last fifteen words comprise the "residual clause." The Supreme Court clarified in *Johnson* that its striking of the residual clause did not affect the validity of the two remaining clauses. *Johnson,* 135 S. Ct. 2563.

Levert was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g). The Presentence Investigation Report ("PSR") indicates that following report of an assault to the local police, the latter apprehended Levert in possession of semiautomatic weapon with one live round in the chamber. [PSR at ¶ 5] Levert went to trial and a jury convicted him of the above offense.

The PSR recommended a sentencing enhancement under the ACCA based on Levert's two California convictions for robbery with use of a firearm in California and his California conviction for assault with a deadly weapon. Specifically, according to the PSR, the above three convictions arose based on the following conduct by Levert. On September 25, 1980, Levert approached a cashier at Daisy's restaurant and, producing a sawed-off shotgun, demanded money; the cashier complied. Less than 15 minutes later, Levert entered a Baskin Robbins ice cream parlor and, again produc-

ing a sawed-off shotgun from a shopping bag, he demanded money from everyone in the establishment. One of the patrons complied, and Levert's accomplice removed money from the cash register. Finally, a bit later on the same evening, Levert robbed Falcone's Pizza. Again, taking a sawed-off shotgun from a bag, Levert pointed the gun at Marcelino Aguilar and when Aguilar started to walk away, Levert shot him in the stomach. Levert's accomplice then took money from the cash register. [PSR at ¶¶ 35-37]

The PSR stated that Levert's robbery convictions qualified as violent felonies under both the ACCA elements clause and the residual clause. As to Levert's conviction for assault with a deadly weapon, the PSR stated that this conviction qualified as a violent felony under the elements clause of the ACCA. [*Id.*]

The district court sentenced Levert in 2002 for the federal crime of possession of a firearm by a felon. Adopting the factual statements made in the PSR, the district court applied the ACCA enhancement recommended by the PSR and sentenced Levert to 236 months imprisonment. The sentencing transcript indicates no discussion concerning the applicability of the ACCA enhancement, or which clause warranted the enhancement.

As noted, the PSR, which was adopted by the district court, relied on the elements clause, only, in characterizing the conviction for assault with a deadly weapon as a violent felony. But even assuming that the district court did not rely on the residual clause in its consideration of this conviction as a predicate offense, Levert has nonetheless made a *prima*

facie case that the residual clause may have factored into the district court's conclusion that the ACCA enhancement should apply. This is so because, as to Levert's two robbery convictions, the PSR relied on both the elements clause and the residual clause and there was no discussion by the parties or the court as to which clause applied. Thus, viewed as a threshold determination, Levert has presented a *prima facie* case under *Johnson.*

Nevertheless, it is important to note that our threshold determination that an applicant has made a *prima facie* showing that he has met the statutory criteria of § 2255(h), thus warranting our authorization to file a second or successive § 2255 motion, does not conclusively resolve the question whether the prisoner has actually satisfied the requirements of § 2255(h). It will be the district court's job to decide that question in the first instance. *See Jordan,* 485 F.3d at 1357 (involving the functionally equivalent § 2244(b)(2) successive application standard applicable to state prisoners). In *Jordan,* we emphasized that, once the prisoner files his authorized § 2255 motion in the district court, "the district court not only can, but must, determine for itself whether those [§ 2255(h)] requirements are met." *Id.* Notably, the statutory language of § 2244, which is cross referenced in § 2255(h), expressly provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." *Id*. (quoting 28 U.S.C. § 2244(b)(4)). We rejected

the assertion that the district court owes "some deference to a court of appeals' prima facie finding that the requirements have been met." *Id.* at 1357. We explained that, after the district court looks at the § 2255(h) requirements de novo, "[o]ur first hard look at whether the § [2255(h)] requirements actually have been met will come, if at all, on appeal from the district court's decision . . . ." *Id.* at 1358; *see also In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (reiterating that our threshold conclusion in granting a successive application that a prima facie showing has been made is necessarily a "limited determination," as the district court then must also decide "fresh" the issue of whether § 2255(h)'s criteria are met, and, if so, proceed to considering the merits of the § 2255 motion). Furthermore, the Supreme Court instructed in *Welch* that even if a defendant's prior conviction was counted under the residual clause, courts can now consider whether that conviction counted under another clause of the ACCA even without the residual clause. *See Welch*, 578 U.S. at __, 136 S. Ct. at 1268.

Stated another way, this grant is a limited determination on our part, and, as we have explained before, "[t]he district court is to decide the [§ 2255(h)] issues fresh, or in the legal vernacular, *de novo*." *Jordan,* 485 F.3d at 1358. The district court must decide whether or not Levert was sentenced under the residual clause in 2002, whether the new rule in *Johnson* is implicated as to Levert's sentencing, and whether the § 2255(h) "applicant has established the [§ 2255(h)] statutory requirements for filing a second or successive motion." *In re Moss,* 703 F.3d at 1303.

Only then should the district court "proceed to consider the merits of the motion, along with any defenses and arguments the respondent may raise." *Id.* We repeat what we have said before:

> Any determination that the district court makes about whether [the § 2255(h) applicant] has satisfied the requirements for filing a second or successive motion, and any determination it makes on the merits, if it reaches the merits, is subject to review on appeal from a final judgment or order if an appeal is filed. Should an appeal be filed from the district court's determination, nothing in this order shall bind the merits panel in that appeal.

Id.

Accordingly, because Levert has made a *prima facie* showing that he has raised a claim that satisfies the criteria set forth in § 28 U.S.C. § 2255(h), his application for leave to file a second or successive § 2255 motion is hereby

GRANTED.

MARTIN, Circuit Judge, concurring in judgment only:

I concur in the result of the court's order, but I write separately to respond to dicta in that order. The order says "the district court is to decide the § 2255(h) issues fresh, or in the legal vernacular, *de novo*." Maj. Op. at 6 (quotation omitted and alteration adopted). This is unquestionably true. But in the next sentence, the order directs that "[t]he district court *must* decide

whether or not Levert was sentenced under the residual clause in 2002" among other questions. Maj. Op. at 8 (emphasis added). This direction is concerning, because § 2255(h) is, at this time, this court's sole source of legal authority to do or say anything about Mr. Levert's case. The order's discussion of topics other than "the § 2255(h) issues" therefore exceeds our legal authority. The District Court should rule on Mr. Levert's motion based on binding precedent, and not the dicta in this order.

This three-judge panel has granted Mr. Levert's application. We did so because Mr. Levert's application made the "prima facie showing" required by 28 U.S.C. § 2244(b)(3)(C). In contrast to the commands included in the order, I find the following advice to the District Court to be more appropriate: "it would make no sense for the district court to treat our prima facie decision as something more than it is or to mine our order for Dore to be assayed." *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1358 (11th Cir. 2007).

APPENDIX D

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924:

Penalties.

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter, shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the

provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x) (2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

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

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

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

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property

of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture

of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary

sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)), travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)), smuggles or knowingly brings into

the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) Penalties relating to secure gun storage or safety device.--

(1) In general.--

(A) Suspension or revocation of license; civil penalties.--With respect to each violation of section

922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing--

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) Review.--An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) Administrative remedies.--The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

28 U.S.C. § 2244:

Finality of determination.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that

was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(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.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear

in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2255:

Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence 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 is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) 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; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.