No. 18 - ____

In The

Supreme Court of the United States

CHARLES NEUMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDICES

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6100

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES NEUMAN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

ORDER

Before: KEITH, WHITE, and BUSH, Circuit Judges.

Charles Neuman, a pro se federal prisoner, appeals the district court's judgment dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Neuman also moves for oral argument. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2009, a jury in the Eastern District of Louisiana convicted Neuman of conspiracy to traffic in counterfeit goods, trafficking in counterfeit goods, facilitating the importation of counterfeit goods, and being a felon in possession of a firearm. *See United States v. Neuman*, 406 F. App'x 847, 848-49 (5th Cir. 2010). Based upon two convictions in 1998 and 1999 for possession of substantial quantities of marijuana with intent to distribute, and three 1993 convictions for first-degree robbery under Louisiana Revised Statutes § 14:64.1, the district court determined that Neuman was an armed career criminal pursuant to 18 U.S.C. § 924(e)(1) and USSG § 4B1.4, subjecting him to a mandatory minimum sentence of 15 years for his violation of 18 U.S.C. § 922(g). The district court sentenced Neuman to 210 months of imprisonment for the

firearm offense, to run concurrently with his sentences for his other convictions. The Fifth Circuit affirmed his convictions and sentence on direct appeal. *Neuman*, 406 F. App'x at 852-53.

In 2012, Neuman filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion, and the Fifth Circuit denied him a certificate of appealability. *United States v. Neuman*, No. 12-30991 (5th Cir. July 31, 2013) (order). In 2016, Neuman sought permission from the Fifth Circuit to file a second or successive motion under § 2255, seeking to raise a claim based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson 2015*"), which held the Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. §924(e)(2)(B)(ii), void for vagueness. That court denied him permission, reasoning that pursuant to *United States v. Brown*, 437 F.3d 450, 452-53 (5th Cir. 2006), first-degree robbery under Louisiana law constituted a crime of violence under the ACCA's "use of force" clause, 18 U.S.C. § 924(e)(2)(B)(i), and that the ACCA's residual clause was not implicated. *In re Neuman*, No. 16-30646 (5th Cir. Aug. 23, 2016) (order). In 2017, Neuman again applied for leave to file a second or successive § 2255 motion in the Fifth Circuit, this time challenging his sentence in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). The Fifth Circuit denied him leave for a second time, concluding that he had not made a prima facie showing that *Mathis* announced a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. *In re Neuman*, No. 17-30087 (5th Cir. Mar. 29, 2017) (order).

In the present § 2241 petition filed in the Eastern District of Kentucky, Neuman cited *Johnson 2015* and *Mathis*, but argued that the Fifth Circuit should not have applied its precedent in *Brown* to conclude that his prior robbery convictions satisfied the use-of-force clause of the ACCA, § 924(e)(2)(B)(i), and that he is entitled to relief in the Sixth Circuit under § 2255(e)'s "savings clause," based on *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016). He argued that, subsequent to *Brown*, the Supreme Court, in *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson 2010*"), clarified the definition of "physical force" as used in § 924(e)(2)(B)(i) in a way that called *Brown* into question. He thus maintained that *Brown* was no longer good law. The district court denied Neuman's claims as failing to satisfy the savings clause of § 2255(e)

because, under *Hill*, he did not demonstrate that he was actually innocent, that his remedy under § 2255 was inadequate or ineffective, that *Mathis* was retroactive, and/or that he was sentenced under the pre-*United States v. Booker*, 543 U.S. 220 (2005) mandatory sentencing guidelines.

On appeal, Neuman reiterates his argument that the Fifth Circuit improperly relied upon its precedent in *Brown* to conclude that his prior robbery convictions satisfied the force clause of § 924(e)(2)(B)(i). He claims that the element "by use of force or intimidation" in Louisiana Revised Statutes § 14:64.1 does not in all instances mean the "threatened use of physical force against the person of another" as required in § 924(e)(2)(B)(i). Neuman continues to contend that *Johnson 2010* called *Brown* into question by clarifying that "physical force" as used in the force clause means only "force capable of causing physical pain or injury to another person," *Johnson 2010*, 559 U.S. at 140, and that mere "intimidation" did not qualify. He further argues that he is entitled to bring this challenge under § 2241 pursuant to our precedent in *Hill* because, if his prior robbery convictions no longer constitute valid predicate offenses for an ACCA enhancement, then he was sentenced in excess of the statutory maximum of ten years contained in § 924(a)(2), which he claims is the functional equivalent of having been sentenced under the mandatory sentencing guidelines as arguably required in *Hill*.

We review de novo a district court's denial of a § 2241 petition. *Charles v. Chandler*, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam). When, as here, a federal prisoner collaterally attacks the validity of his sentence, rather than its execution, he must ordinarily proceed under § 2255, not § 2241. *Id.* at 755-56; *Wright v. U.S. Bd. of Parole*, 557 F.2d 74, 77 (6th Cir. 1977). Under § 2255's "savings clause," a petitioner may proceed under § 2241 only when "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e); *see also Charles*, 180 F.3d at 755-56. Traditionally, relief through the "savings clause" is available only if the petitioner demonstrates "actual innocence." *Wooten v. Cauley*, 677 F.3d 303, 307 (6th Cir. 2012).

Until recently, we had consistently held that "[c]laims alleging 'actual innocence' of a sentencing enhancement cannot be raised under § 2241" in accordance with the savings clause. *Jones v. Castillo*, 489 F. App'x 864, 866 (6th Cir. 2012); *see also Bannerman v. Snyder*, 325

F.3d 722, 724 (6th Cir. 2003); *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001). But in *Hill*, we created a narrow exception, holding that a petitioner can use a § 2241 petition to challenge his sentence if he can show that his claim relies on "(1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect." 836 F.3d at 595.[1]

Neuman purports to rely on *Mathis* and *Descamps v. United States*, 570 U.S. 254 (2013), as the cases of statutory interpretation required by the *Hill* standard. *See Hill*, 836 F.3d at 595. Both cases involved the proper procedures that courts should follow when determining whether a conviction qualifies as a predicate offense under the "enumerated offenses" clause of the ACCA, and outlined when either the "categorical approach" or "modified categorical approach" is appropriately used to determine whether the elements of the offense of conviction are comparable to the generic analog. *Mathis*, 136 S. Ct. at 2251, 2256; *Descamps*, 570 U.S. at 258. Those decisions require a court to ask whether the predicate statute is "divisible," i.e., whether the statute defines multiple crimes. *See Mathis*, 136 S. Ct. at 2249. If the statute is "divisible," then the federal sentencing court can apply the "modified categorical approach" by looking to a "limited class of documents" to determine the particular crime the defendant actually committed. *Id.* *Mathis* refined *Descamps* by considering "a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual

[1] The district court relied on the even narrower three-part standard that appears at the very end of *Hill*. There, the *Hill* panel stressed that its decision addresses "only a narrow subset" of savings-clause petitions filed under § 2241 petitions, involving petitioners sentenced under the pre-*Booker* mandatory guidelines regimes who argued that a "subsequent, retroactive change in statutory interpretation by the Supreme Court reveals that a previous conviction is not a predicate offense for a career offender enhancement." *Hill*, 836 F.3d at 599-600. It is not clear whether this even narrower language was intended to add an additional element to the comparatively broader three-part substantive showing that a petitioner must make in order to challenge a sentencing error in a § 2241 petition under the savings clause, *see id.* at 595, or merely a statement of the specific circumstances before the court in *Hill*. Because Neuman cannot make the initial broader substantive showing required by *Hill*, however, we need not here address whether *Hill* is limited to career-offender enhancements imposed under the pre-*Booker* mandatory guidelines.

means of committing a single element." *Id.* The Supreme Court held that this type of statute was indivisible and subject only to the "categorical approach," meaning that, for a predicate offense to be considered a crime of violence under the enumerated-offenses clause, all of the different means prescribed by the statute of conviction had to define a crime the same as, or narrower than, the elements of the generic enumerated offense. *See id.* at 2257. In the context of the use-of-force clause, as in Neuman's case, *Mathis* would thus require that, if the two different methods of committing assault listed in section 14:64.1—"use of force or intimidation"—are considered "means" per *Mathis*, then both means would both have to satisfy the use-of-force clause.

Here, Neuman's specific arguments reflect that the distinctions drawn by *Descamps* and *Mathis* are irrelevant because the Fifth Circuit in *Brown* effectively concluded that both of the means set forth in section 14:64.1 *did* satisfy the force clause. *See Brown*, 437 F.3d at 452-53. Neuman's central contention is instead based on *Johnson 2010*, which, he argues, effectively nullifies *Brown*'s holding that "intimidation" in section 14:64.1 qualifies as "physical force." But *Johnson 2010* was decided before Neuman filed his initial motion to vacate under 28 U.S.C. § 2255. Thus, even if Neuman could show that *Johnson 2010* is a case of statutory interpretation that is retroactive, he is unable to show that it "could not have been invoked in the initial § 2255 motion." *Hill*, 836 F.3d at 595. Accordingly, he cannot show that the § 2255 was "inadequate or ineffective." *See id.* at 594.

For the reasons discussed above, we **AFFIRM** the district court's judgment. Neuman's motion for oral argument is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
AT LONDON

CIVIL ACTION NO. 17-3-DLB

CHARLES NEUMAN, **PETITIONER**

vs. **MEMORANDUM OPINION AND ORDER**

SANDRA BUTLER, Warden, **RESPONDENT**

*** *** *** ***

Inmate Charles Neuman has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. #1). The Court conducts an initial review of Neuman's Petition. 28 U.S.C. § 2243; *Alexander v. N. Bureau of Prisons*, 419 F. App'x 544, 545 (6th Cir. 2011). For the reasons set forth below, the Court must deny relief.

I. Factual and Procedural Background

In 2008, a federal grand jury in New Orleans issued a five-count indictment charging Neuman with smuggling, operating an enterprise to traffic in counterfeit merchandise, and being a felon in possession of a firearm. After he was found competent to stand trial, a jury found him guilty on all counts.

At the sentencing hearing, the trial court noted that Neuman had numerous prior convictions, including three for first-degree robberies under La. R. S. §14:64.1 committed on February 23, 1993, February 28, 1993, and March 2, 1993 in Case No. 93-1210. During at least two of those robberies, Neuman or his accomplice brandished a gun. He had also been twice convicted in 1998 and 1999 for possession with intent to distribute

APPENDIX B

substantial quantities of marijuana in Case No. 98-504 and Case No. 1037-001. Because at least three of those offenses qualified as "serious drug offenses" or "violent felonies," the trial court concluded that Neuman was an armed career criminal pursuant to 18 U.S.C. § 924(e)(1), subjecting him to a mandatory minimum sentence of 15 years for his violation of 18 U.S.C. § 922(g).

However, the court imposed a longer sentence of 210 months (17.5 years) for that offense—at the very bottom of the recommended range under the Sentencing Guidelines—based upon additional sentencing factors. That sentence was to run concurrently with his 210-month sentence for facilitating the importation of counterfeit goods. *United States v. Neuman*, No. 2:08-CR-24-EEF-ALC-1 (E.D. La. 2008).

The Fifth Circuit affirmed on direct appeal over Neuman's objections to both his convictions and resulting sentence. *United States v. Neuman*, 406 F. App'x 847 (5th Cir. 2010). In 2012, the trial court denied Neuman's initial motion for relief from the judgment and to vacate his convictions pursuant to 28 U.S.C. § 2255, and the Fifth Circuit denied a certificate of appealability.

In June 2015, the Supreme Court issued its decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), in which it held that the "residual clause" found in § 924(e)(2)(B)(ii) is unconstitutionally vague. *Id.* at 2557. Just shy of one year later and represented by a federal public defender, Neuman sought permission from the Fifth Circuit to file a second or successive motion under § 2255 to invoke *Johnson* as a new rule of constitutional law to invalidate the enhancement of his § 922(g) conviction pursuant to § 924(e). In August 2016, the Fifth Circuit denied his request because his predicate offenses for first-degree robbery under Louisiana law constituted crimes of violence under

the "use of force" clause found in § 924(e)(2)(B)(i), not the residual clause set forth in § 924(e)(2)(B)(ii) invalidated by *Johnson*. *In re: Charles Neuman*, No. 16-30646 (5th Cir. Aug. 23, 2016) (citing *United States v. Brown*, 437 F. 3d 450, 452-53 (5th Cir. 2006)). The "use of force" clause was unaffected by *Johnson*. *Johnson*, 135 S. Ct. at 2563.

In February 2017 Neuman filed another motion with the Fifth Circuit requesting permission to file a second or successive § 2255 motion. In a fashion similar to his first request, Neuman's application referred to the Supreme Court's recent decision in *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243 (2016), but his arguments were not based upon it. Instead, his application asserted the same arguments considered and rejected by the Fifth Circuit the year before. The Fifth Circuit denied Neuman's application because *Mathis* did not articulate a new rule of constitutional law made retroactively applicable to cases on collateral review by the Supreme Court, and his application therefore did not satisfy the gatekeeping provisions of § 2255(h). *In re: Neuman*, No. 17-30087 (5th Cir. Mar. 29, 2017).

In his *pro se* petition filed in this Court, Neuman again invokes *Johnson* and *Mathis* to assert that his prior first-degree robbery convictions could not be used as valid predicates to enhance his sentence under § 924(e). But while he makes passing references to *Johnson* and *Mathis* (Doc. # 1 at 3-4), his arguments are not based upon either decision. Instead, Neuman makes the same argument he made in both of his § 2244(b)(3) applications: that the Fifth Circuit should not apply its precedent in *Brown* to conclude that his robbery offenses qualified as predicates under the "use of force" clause in light of the Supreme Court's 2010 decision in *Johnson v. United States*, 559 U.S. 133 (2010). (Doc. # 1 at 5-9). Finally, Neuman contends that he may pursue his

claims in this proceeding in light of the Sixth Circuit's decision in *Hill v. Masters*, 836 F. 3d 519 (6th Cir. 2015).

II. Analysis

A. Neuman's Other Motions

Before discussing the merits of his claims, the Court will address the three motions Neuman filed after his petition was submitted. In the first, he asks the Court to expedite consideration of his petition, noting that a recent biopsy indicated that he has cancer and he wishes to seek outside medical treatment. (Doc. # 8). The Court has also received a seven letters in support of his petition from family members across the country expressing their concern for his health and his suitability for release from prison. (Doc. # 14). Under the circumstances, the Court will **grant** this request.

Neuman has also filed a Motion for Summary Judgment (Doc. # 10). However, the Court does not apply Federal Rule of Civil Procedure 56 in habeas proceedings, as the procedures and standards applicable to summary judgment motions in civil cases are distinct from those applicable to habeas proceedings. See Fed. R. Civ. P. 81(a)(4); Habeas Rule 12. He has also filed a Motion to Proceed *in forma pauperis*, apparently in a renewed effort to seek the appointment of counsel. (Doc. # 11). As the Court noted in denying Neuman's first such request, the appointment of counsel in habeas proceedings is the exception rather than the rule, and Neuman has presented his claims with adequate clarity. Therefore, the Court will **deny** both motions.

B. Neuman's § 2241 Petition

The Court has thoroughly reviewed Neuman's arguments in support of his petition, but concludes that none of them state a viable claim for relief under § 2241.

First, the Supreme Court's decisions in *Johnson* and *Mathis* cannot form the basis for a claim which can be asserted in a § 2241 petition. A Section 2241 petition may only be used as a vehicle to challenge actions taken by prison officials that affect the manner in which the prisoner's sentence is being carried out, such as computing sentence credits or determining parole eligibility. *Terrell v. United States*, 564 F.3d 442, 447 (6th Cir. 2009). A federal prisoner who instead wishes to challenge the legality of his conviction or sentence must use a motion under Section 2255. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001) (explaining the distinction between permissible uses for a § 2255 motion and a § 2241 petition).

28 U.S.C. § 2255(e) does permit a prisoner to challenge his conviction in a habeas corpus petition under § 2241, but only when the remedy afforded by § 2255 is structurally "inadequate or ineffective" to assert the claim. The prisoner may not resort to Section 2241 to seek relief even when Section 2255 is not presently "available" to him, whether because he filed a timely § 2255 motion and was denied relief; he did not file a timely § 2255 motion; or he filed an untimely motion. *Copeland v. Hemingway*, 36 F. App'x 793, 795 (6th Cir. 2002). In other words, prisoners cannot use a habeas petition under § 2241 as yet another "bite at the apple." *Hernandez v. Lamanna*, 16 F. App'x 317, 360 (6th Cir. 2001).

Here the Fifth Circuit correctly concluded that Neuman's *Johnson* claim could be asserted in a second or successive motion under § 2255 because it was constitutionally-

based and because the Supreme Court declared *Johnson* to be retroactively applicable to cases on collateral review in *Welch v. United States*, __ U.S. __ 136 S. Ct. 1257, 1265 (2016). The remedy under § 2255 was therefore not structurally inadequate or ineffective to assert a claim under it, preventing assertion of a *Johnson* claim in a § 2241 petition. *Cf. Woodson v. Meeks*, No. 0:15-4209-BHH, 2016 WL 8669184, at *1 (D.S.C. Oct. 14, 2016); *Lewis v. Butler*, No. 16-135-DLB, 2016 WL 4942005, at *2-3 (E.D. Ky. Sept. 14, 2016). That the Fifth Circuit denied Neuman's motion to file a successive § 2255 motion is of no moment: it did so because it concluded that his *Johnson* claim lacked merit, not because it failed to satisfy the requirements of § 2255(h)(2). Section 2255 was therefore a viable mechanism for Neuman to assert a *Johnson* claim, and resort to Section 2241 is impermissible. *Truss v. Davis*, 115 F. App'x 772, 773-74 (6th Cir. 2004).

Neuman's claim under *Mathis* also may not be pursued under § 2241, albeit for a different reason. Unlike *Johnson*, *Mathis* did not involve an issue of constitutional law, and therefore a claim under that decision could not be asserted in a second or successive § 2255 motion. However, 28 U.S.C. § 2255(e) permits a challenge to a conviction or sentence to be asserted in a § 2241 petition only in an extremely narrow class of cases where the inmate asserts a claim of "actual innocence." Actual innocence is a legal term of art which means a claim based upon a Supreme Court decision issued after his conviction became final which re-interprets the substantive terms of the criminal statute under which he was convicted in a manner that establishes that his conduct did not violate the statute. *Wooten v. Cauley*, 677 F.3d 303, 307-08 (6th Cir. 2012); *Hayes v. Holland*, 473 F. App'x 501, 501-02 (6th Cir. 2012).

The Supreme Court itself made abundantly clear that its decision in *Mathis* is not retroactively applicable to cases on collateral review because it did not articulate a "new" rule, but merely applied long-established precedent. *Mathis*, 136 S. Ct. at 2247, 2251-52 (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Consistent with the Supreme Court's direction, every federal court of appeals to have addressed the issue has so held. *Cf. In re: Hernandez*, 857 F. 3d 1162, 1164 (11th Cir. 2017); *United States v. Taylor*, 672 F. App'x 860, 864-65 (10th Cir. 2016). It therefore cannot be asserted as grounds for relief in a § 2241 petition. *Wooten*, 677 F.3d at 307-08.

But more fundamentally, *Mathis*, like *Descamps v. United States*, __ U.S. __, 133 S. Ct. 2276 (2013) before it, interprets the scope of neither the federal statute of conviction nor the state or federal statutes used to enhance the sentence imposed. Rather, those cases discuss merely the proper analytical method to be used by the federal trial court when evaluating whether a prior offense constitutes a valid predicate. Put another way, both cases address only process, not application of that process to a particular statute or class of statutes. These decisions neither "de-criminalized" the conduct giving rise to a federal conviction nor invalidated the use of a particular predicate offense as a basis for enhancement of a federal sentence, and hence are not the type of claim cognizable in a § 2241 petition. *Charles v. Chandler*, 180 F.3d 753, 755-57 (6th Cir. 1999) (per curiam) (citing *Bousley v. United States*, 523 U.S. 614, 622-23 (1998)).

In addition, in Neuman's particular circumstances neither case provides a basis for relief. Even where it applies, the decidedly narrow scope of relief available under Section 2241 has been limited to federal convictions, not to the sentence imposed. *Peterman*, 249 F.3d at 462; *Hayes v. Holland*, 473 F. App'x 501, 502 (6th Cir. 2012) ("The savings

clause of section 2255(e) does not apply to sentencing claims."). In *Hill v. Masters*, 836 F. 3d 591 (6th Cir. 2016), the Sixth Circuit articulated a very narrow exception to this general rule, permitting a challenge to a sentence to be asserted in a Section 2241 petition, but only where (1) the petitioner's sentence was imposed when the Sentencing Guidelines were mandatory before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005); (2) the petitioner was foreclosed from asserting the claim in a successive petition under § 2255; and (3) after the petitioner's sentence became final, the Supreme Court issued a retroactively applicable decision establishing that—as a matter of statutory interpretation—a prior conviction used to enhance his federal sentence no longer qualified as a valid predicate offense. *Hill*, 836 F. 3d at 599-600. Neuman's claim fails to satisfy the threshold requirement of *Hill* because he was sentenced in 2009, four years after *Booker* was decided, and his sentence was imposed under a Sentencing Guidelines regime that was advisory rather than mandatory. Neuman's claim therefore falls outside the decidedly narrow exception set forth in *Hill*, and his sentencing claim does not fall within the narrow scope of Section 2255(e)'s savings clause. *Peterman*, 249 F.3d at 462.

As the Fifth Circuit correctly noted, Neuman's offense was subject to a 15-year mandatory minimum because his first-degree robbery convictions constituted crimes of violence under the "use of force" clause found in § 924(e)(2)(B)(i). Neuman's reliance upon *Johnson* is misplaced because the now-invalidated "residual clause" in § 924(e)(2)(B)(ii) was not used to enhance his sentence; his reliance upon *Mathis* is likewise misplaced because the "enumerated offenses" clause at issue in that case was not used a basis to enhance his sentence either. Indeed, Neuman himself stated that the

enumerated offenses clause did not apply to his robbery convictions because "they are clearly not a generic burglary, arson, extortion, or use of explosives." *In re: Charles Neuman*, No. 16-30646 (5th Cir. June 20, 2016) (Doc. # 00513554842 therein). Thus, neither *Johnson* nor *Mathis* are relevant to the enhancement of Neuman's sentence.

Even if the Court could reach the merits of the claim Neuman actually does assert, that claim is without merit. Three of the five prior felony convictions used to enhance Neuman's sentence were for first-degree robbery. Louisiana law provides:

> First degree robbery is the taking of anything of value belonging to another from the person of another, or that is in the immediate control of another, by use of force or intimidation, when the offender leads the victim to reasonably believe he is armed with a dangerous weapon.

La. R. S. §14:64.1. Louisiana's criminal code defines a "crime of violence" as:

> Any offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very 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 or an offense that involves the possession or use of a dangerous weapon.

La. R. S. §14:2(B) (emphasis added). Notably, first-degree robbery categorically constitutes a "crime of violence" for purposes of Louisiana law, La. R. S. §14:2(B)(22), and thus necessarily involves "the use, attempted use, or threatened use of *physical* force against the person or property of another...."

In *United States v. Brown*, 437 F. 3d 450, 452-53 (5th Cir. 2006), the Fifth Circuit held that a conviction for simple robbery under Louisiana law—identical in its elements to first degree robbery but without the presence of a deadly weapon—constituted a "violent felony" within the meaning of 18 U.S.C. § 924(e)(1) because it necessarily "has as an

element the use, attempted use, or *threatened* use of *physical* force against the person of another," the "use of force" clause set forth in § 924(e)(2)(B)(i).

Neuman contends that in light of the Supreme Court's 2010 decision in *Johnson v. United States*, 559 U.S. 133 (2010), *Brown* can no longer be considered good law. In *Johnson*, the Court held that simple battery under Florida law cannot constitute a predicate under the "use of force" clause because the "simple unwanted touch" which can satisfy the Florida battery statute does not satisfy § 924(e)(2)(ii)'s "physical force" requirement. *Id.* at 139-43.

Purely as a matter of Louisiana law, first-degree robbery necessarily entails the "threatened use of *physical* force" pursuant to La. R. S. §14:2(B). As a matter of federal law, the Supreme Court in *Johnson* itself indicated that unlike battery, robbery is precisely the sort of crime that involves the "threatened use of physical force against the person of another," within the meaning of § 924(e)(2)(B)(i). *Id.* at 139 ("Black's Law Dictionary 717 (9th ed. 2009) ... defines 'physical force' as '[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.'"). Predictably, the Fifth Circuit continues to adhere to *Brown* after *Johnson*. *Cf. United States v. Richardson*, 672 F. App'x 368, 372 (5th Cir. 2016); *United States v. Ovalle-Chun*, 815 F. 3d 222, 226 (5th Cir. 2016). This result is wholly consistent with the approach taken by federal courts across the country. *See Smith v. United States*, No. 2:16-CV-139-JRG, 2016 WL 7365634, at *4 (E.D. Tenn. Dec. 16, 2016) ("All federal courts of appeals which have considered robbery offenses that, like North Carolina robbery, require more force than mere purse snatching have concluded that such offenses qualify as either crimes of violence or violent felonies under the use-of-physical-force clause.") (collecting cases).

The Court thanks Neuman's extended family for expressing their concern for his well-being and for their ongoing support during his prison term. However, his habeas petition does not provide a basis for relief from his sentence. Accordingly,

IT IS ORDERED as follows:

1. Neuman's Motion to Expedite (Doc. # 8) is **GRANTED**;

2. Neuman's Motion for Summary Judgment (Doc. # 10) and Motion for Leave to Proceed *in forma pauperis* (Doc. # 11) are **DENIED**;

3. Neuman's Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (Doc. # 1) is **DENIED**;

4. This action is **DISMISSED** and **STRICKEN** from the Court's active docket; and

5. A Judgment shall be entered contemporaneously herewith.

This 29th day of August, 2017.

Signed By:
David L. Bunning DB
United States District Judge

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No. 17-6100

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES NEUMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: KEITH, WHITE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C