APPENDIX

Appendix A	Judgement and Opinion of First Circuit
Appendix B	Order Denying Petition For Rehearing
Appendix C	Memorandum And Order Of District Court

EXHIBIT A

United States Court of Appeals
For the First Circuit

No. 17-1900

KIRK LASSEND,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

JUDGMENT

Entered: August 2, 2018

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's dismissal of Kirk Lassend's 28 U.S.C. § 2255 petition is affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Karen A. Pickett
Kirk Lassend
Mark T. Quinlivan
Cynthia A. Young
Karin Michelle Bell

898 F.3d 115

Kirk LASSEND, Petitioner, Appellant,
v.
UNITED STATES, Respondent, Appellee.

No. 17-1900

United States Court of Appeals, First Circuit.

August 2, 2018

Summaries:

Source: Justia

The First Circuit affirmed the district court's denial of Appellant's 28 U.S.C. 2255 petition, holding that Appellant's three prior convictions were Armed Career Criminal Act (ACCA) predicates, and therefore, Appellant's sentence as an armed career criminal was proper. On appeal, Appellant argued that his sentence under the ACCA was unconstitutional under Johnson v. United States, 135 S. Ct. 2551 (2015), Supreme Court precedent decided after his earlier appeal from his conviction was rejected. The First Circuit disagreed, holding that three of Appellant's convictions qualified as violent felonies under the ACCA's force clause, and therefore, the district court did not err in dismissing Appellant's section 2255 petition.

Karen A. Pickett, Boston, MA, with whom Pickett Law Offices, P.C., was on brief, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, was on brief, for appellee.

Before Torruella, Lynch, and Kayatta, Circuit Judges.

LYNCH, Circuit Judge.

Kirk Lassend appeals from the district court's denial of his § 2255 petition. United States v. Lassend, No. CR 10-40019, 2017 WL 2960518 (D. Mass. July 11, 2017), certificate of appealability granted, 265 F.Supp.3d 103 (D. Mass. 2017). He argues that his sentence as an armed career criminal under the Armed Career Criminal Act ("ACCA") is unconstitutional under Supreme Court precedent decided after his earlier appeal from his conviction was rejected in 2013.

We affirm the district court and find that the three prior convictions are ACCA predicates. We again hold that a Massachusetts conviction for assault with a deadly weapon is a predicate offense under the ACCA's force clause. As to Lassend's New York conviction for attempted second-degree assault, we conclude that a conviction under New York Penal Law § 120.05(7) qualifies as a violent felony under the ACCA's force clause. We reach the same conclusion as to Lassend's conviction for New York first-degree robbery under New York Penal Law § 160.15(4). Our analysis is consistent with that of many other circuits, and as to the New York first-degree robbery conviction, consistent with the views of the Second Circuit in Stuckey v. United States, 878 F.3d 62 (2d Cir. 2017), petition for cert. filed, No. 17-9369 (U.S. June 11, 2018). Lassend's sentence stands.

[898 F.3d 119]

I. Background

A. Lassend's Arrest and Conviction

In July 2010, two individuals in Fitchburg, Massachusetts called 911 to report that Lassend had been walking up and down the street with a gun and firing shots into the air. Police officers placed Lassend under arrest at the scene. The officers recovered ammunition from Lassend's pocket and found a gun in an unlocked closet in the common hallway of a nearby apartment building. A search of Lassend's residence uncovered a holster that

appeared to fit that gun, and additional ammunition.

In September 2010, Lassend was indicted on charges of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count One), and being a felon in possession of ammunition, also in violation of § 922(g)(1) (Count Two). After a five-day trial, the jury convicted Lassend of both counts in October 2011.

B. Original District Court Sentencing Proceedings

The Probation Office's 2012 presentence report ("PSR") determined that Lassend was subject to a sentencing enhancement under the ACCA because he had at least three prior convictions for a violent felony or a serious drug offense. The PSR identified four of his prior convictions as qualifying ACCA predicates: (1) a 1992 New York conviction for "Robbery in First Degree: Forcible Theft Armed with Deadly Weapon"; (2) a 1997 New York conviction for "Robbery in First Degree: Display What Appears to [Be a] Firearm"; (3) a 1998 New York conviction for "Assault in Second Degree"; and (4) a 2010 Massachusetts conviction for "Assault and Battery by Dangerous Weapon" ("ABDW") and "Assault by Dangerous Weapon" ("ADW").

The PSR determined that Lassend's Guidelines sentencing range ("GSR") was 235 to 293 months, with a mandatory minimum of 15 years under the ACCA. Lassend objected, inter alia, in the district court to the PSR's conclusion that he was subject to an ACCA enhancement, arguing that the residual clause of the ACCA was "unconstitutionally void for vagueness."

At sentencing, in March 2012, the district court overruled Lassend's objections to the PSR, including his objection to the PSR's determination that he was subject to an ACCA enhancement. Lassend stated that he had no other objections to the PSR "just as long as [his] objection to the [ACCA] on grounds that it's constitutionally void for vagueness [wa]s preserved." The district court then adopted the PSR's calculations and determined that Lassend's GSR was 235 to 293 months. After hearing from both parties, the district court sentenced Lassend to a term of imprisonment of 235 months on each count, to be served concurrently, followed by a five-year term of supervised release.

C. Direct Appeal

Lassend filed a direct appeal challenging his conviction. See United States v. Lassend, 545 F. App'x 3 (1st Cir. 2013) (per curiam). He did not appeal his sentence, nor argue that the residual clause of the ACCA was unconstitutional. See id. Lassend's conviction was affirmed in October 2013. See id. Lassend did not petition for certiorari.

D. Habeas Corpus Proceedings Before the District Court

The Supreme Court later decided Johnson v. United States ("Johnson II"), --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), on June 26, 2015. On July 20, 2015,

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Lassend filed a supplemental[1] pro se petition under § 2255, arguing that he should not have been sentenced under the ACCA in light of Johnson II. The government opposed his petition.

After the district court appointed counsel to represent Lassend in the § 2255 proceedings, Lassend filed another supplemental petition in which he argued that his sentence was unconstitutional because the government could not show that his criminal record contained violent felonies under the ACCA's force clause, 18 U.S.C. § 924(e)(2)(B)(i). Consequently, he argued, his ACCA sentence must have been based on predicates that

relied on the ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), which was declared unconstitutionally vague in Johnson II, see 135 S.Ct. at 2563. In particular, Lassend argued that (1) his New York conviction for attempted second-degree assault does not qualify as a violent felony because the crime can be committed recklessly; (2) his New York first-degree robbery convictions do not qualify as violent felonies because they do not require the use of violent force; (3) his Massachusetts ABDW conviction does not qualify as a violent felony because the crime can be committed recklessly and by a mere touching; and (4) his Massachusetts ADW conviction does not qualify as a violent felony because it does not require the intentional use of violent force.

The government opposed these arguments for the same reasons it now gives in support of the district court's decision.[2] It also argued those issues should not be reached because Lassend had procedurally defaulted his Johnson II claims. We deal with the procedural default and merits arguments below.

We also note that the government obtained the indictment and plea-colloquy transcript for Lassend's New York attempted second-degree assault conviction and placed them in the record before the district court.[3] The government argued that although the indictment did not cite the statutory provision for the counts charged, it contained language mirroring the statutory language of New York Penal Law § 120.05(2) as to the first count and New York Penal Law § 120.05(7) (prisoner assault) as to the second count. The government argued that the plea-colloquy transcript showed that Lassend pled guilty to the second count of the indictment, and, consequently, the applicable statutory provision for his conviction was § 120.05(7).

At the hearing on Lassend's § 2255 petition in May 2017, Lassend argued for the first time that his New York first-degree robbery conviction under New York Penal Law § 160.15(4) is not a violent felony because the statute does not require the actual use of a dangerous weapon to threaten the victim, nor, he says, does it require that the perpetrator himself intentionally use violent force.

On July 11, 2017, the district court denied Lassend's § 2255 petition in a careful decision. See

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Lassend, 2017 WL 2960518, at *1. Addressing Lassend's procedural default on his ACCA claim, the district court noted that the Supreme Court had rejected vagueness challenges to the ACCA's residual clause in James v. United States, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), overruled by Johnson II, --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569, and Sykes v. United States, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), overruled by Johnson II, --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569, and those decisions were controlling at the time of Lassend's sentencing and direct appeal. Lassend, 2017 WL 2960518, at *8. Moreover, Lassend's direct appeal was filed, argued, and decided before the Supreme Court granted certiorari in Johnson II. Id. As such, the district court found that a Johnson II claim was not reasonably available to Lassend at the time of his direct appeal, thereby establishing cause. Id. The district court also reasoned that the prejudice inquiry merged with Lassend's merits claims because if Lassend could show that he should not have been sentenced under the ACCA in light of Johnson II, "his failure to raise that claim obviously resulted in prejudice." Id.

As to the merits of Lassend's claims, the district court first found that, under clear First Circuit precedent, Lassend's Massachusetts ADW conviction qualifies as a violent felony under the ACCA's force clause. Id. at *10. The district court also found that

Lassend's New York attempted second-degree assault conviction qualifies as an ACCA predicate under the force clause. Id. at *10-12. Applying the modified categorical approach, the district court determined that Lassend had been convicted under New York Penal Law § 120.05(7) because the relevant Shepard documents—the state court indictment and the plea-colloquy transcript—showed that Lassend had pled guilty to the second count of the indictment, the language of which mirrored that of § 120.05(7). Lassend, 2017 WL 2960518, at *11. The district court rejected Lassend's argument that a conviction under § 120.05(7) does not constitute a violent felony because a perpetrator can violate subsection (7) without using violent force in causing injury. Id. at *11-12. In doing so, the district court noted that the Supreme Court's decision in United States v. Castleman, 572 U.S. 157, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), undermined cases suggesting that the indirect application of force cannot involve the use of physical force as required by the force clause. Lassend, 2017 WL 2960518, at *12.

The district court next found that Lassend's 1997 New York first-degree robbery conviction qualifies as a violent felony. Id. at *12-16. It applied the modified categorical approach to determine that Lassend had been convicted under § 160.15(4). Id. at *13. It then determined that the "[d]isplays what appears to be a ... firearm" element of that subsection involves the threatened use of physical force, thereby qualifying the 1997 conviction as a violent felony. Id. at *14-15 (alteration in original) (quoting N.Y. Penal Law § 160.15(4)). The district court also determined that § 160.15(4) satisfies both the intent requirement of Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), and the force requirement of Johnson v. United States ("Johnson I"), 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). Lassend, 2017 WL 2960518, at *16 (citing Stuckey v. United States, 224 F.Supp.3d 219, 225-230 (S.D.N.Y. 2016)).

The district court accordingly held that Lassend was properly sentenced as an armed career criminal. Id.

The district court granted Lassend a certificate of appealability on Lassend's claim that his ACCA sentence violates the Constitution.

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II. Discussion

An individual in federal custody may petition for post-conviction relief under 28 U.S.C. § 2255(a) if, inter alia, the individual's sentence "was imposed in violation of the Constitution or laws of the United States" or "is otherwise subject to collateral attack." Id. The petitioner bears the burden of proof. Wilder v. United States, 806 F.3d 653, 658 (1st Cir. 2015) (citing David v. United States, 134 F.3d 470, 474 (1st Cir. 1998)). When reviewing a district court's denial of a § 2255 petition, we review the district court's legal conclusions de novo and any factual findings for clear error. Id. (citing Owens v. United States, 483 F.3d 48, 57 (1st Cir. 2007), abrogated on other grounds by Weaver v. Massachusetts, ––– U.S. ––––, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017)).

A. Procedural Default

"[C]laims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." Massaro v. United States, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (citing United States v. Frady, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) ; Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). The procedural default rule is "adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." Id.

1. Cause

A petitioner has cause for procedurally defaulting a constitutional claim where that claim was "so novel that its legal basis [wa]s not reasonably available to counsel" at the time of the default. Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). Despite that broad language of reasonableness, the Supreme Court also held in Reed that a claim "will almost certainly have [had] ... no reasonable basis" when the claim is based on a "constitutional principle that had not been previously recognized but which is held to have retroactive application," and the constitutional principle arises from a decision in which the Court (1) "explicitly overrule[s] one of [its own] precedents," or (2) "overtur[ns] a longstanding and widespread practice to which [the] Court ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved." Id. at 17, 104 S.Ct. 2901. We are bound by those latter statements.

At the time of Lassend's direct appeal in 2013, the Supreme Court's decisions in James and Sykes were still good law. Both of those decisions had rejected challenges to the ACCA's residual clause on constitutional vagueness grounds. Sykes, 564 U.S. at 28, 131 S.Ct. 2267 (Scalia, J., dissenting); James, 550 U.S. at 210 n.6, 127 S.Ct. 1586. Johnson II expressly overruled James and Sykes in relation to the ACCA. See 135 S.Ct. at 2563. Even though Lassend had made a vagueness argument in the district court and had abandoned it on appeal, under Reed, we find that Lassend has shown cause for his procedural default. See United States v. Snyder, 871 F.3d 1122, 1127 (10th Cir. 2017) (holding that petitioner's procedurally defaulted Johnson II claim was not reasonably available because Johnson II overruled Sykes and James, thus satisfying the first prong of Reed).

The government argues that Bousley requires that we find that Lassend had no cause. In that case, the petitioner argued that he had cause for his procedural default because it would have been futile to raise the argument in question. Bousley, 523 U.S. at 623, 118 S.Ct. 1604. The Court rejected this contention, stating that "futility

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cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Id. (quoting Engle v. Isaac, 456 U.S. 107, 130 n.35, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)). The government uses this case to argue that Lassend had no cause for procedurally defaulting his ACCA constitutionality argument even though Sykes and James foreclosed such a challenge. Bousley is no help to the government because the petitioner's argument in that case was not based on a constitutional right created by the Supreme Court's overruling of its own precedent. See 523 U.S. at 622, 118 S.Ct. 1604. Reed stated that, where the Supreme Court "explicitly overrule[s] one of [its own] precedents, ... the failure of a defendant's attorney to have pressed such a claim ... is sufficiently excusable to satisfy the cause requirement." 468 U.S. at 17, 104 S.Ct. 2901. That is what happened here. Unlike the defaulted argument in Bousley, Lassend's argument was not "available at all," Smith v. Murray, 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (internal quotation marks omitted), until the Supreme Court "explicitly overrule[d]" Sykes and James, Reed, 468 U.S. at 17, 104 S.Ct. 2901.

2. Prejudice

To overcome procedural default, Lassend must also show " 'actual prejudice' resulting from the errors of which he complains." Frady, 456 U.S. at 168, 102 S.Ct. 1584. If Lassend is correct that the prior convictions he is challenging are not violent felonies, he can argue actual prejudice because his sentence was undoubtedly influenced by the determination that he had qualifying ACCA

predicates.[4] On the other hand, if Lassend's challenge fails on the merits, there cannot be actual prejudice because there would be no error from which such prejudice would flow. While we have found little law on the topic of prejudice, we think that the prejudice inquiry dovetails with the merits inquiry, and is not satisfied by mere argument. Contra Snyder, 871 F.3d at 1128.

B. Merits of Constitutional Challenge to the ACCA

An individual who violates 18 U.S.C. § 922(g)(1) is generally subject to a maximum penalty of ten years' imprisonment. See id. § 924(a)(2). However, under the ACCA, a violation of § 922(g)(1) carries a mandatory minimum of fifteen years' imprisonment if the defendant has "three previous convictions ... for a violent felony...." Id. § 924(e)(1). The ACCA's force clause defines "violent felony" as a conviction that carries a maximum term of imprisonment of more than one year, and that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. § 924(e)(2)(B)(i). The Supreme Court has defined "physical force" under the force clause as "violent force—that is, force capable of causing physical pain or injury to another person." Johnson I, 559 U.S. at 140, 130 S.Ct. 1265 (citing Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003)).

On appeal, Lassend challenges the district court's determination that his convictions for Massachusetts ADW, New York attempted second-degree assault, and New York first-degree robbery qualify as predicates under the ACCA's force requirement, as defined in Johnson I, making

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different arguments as to each. The parties agree that each of the statutes giving rise to these three convictions are divisible. Hence, we apply the modified categorical approach. See id. at 144, 130 S.Ct. 1265. Under it, we first determine "which of the multiple offenses listed in the statute[s] w[ere] the crime[s] committed by the defendant," United States v. Faust, 853 F.3d 39, 53 (1st Cir.), reh'g denied, 869 F.3d 11 (1st Cir. 2017), and then evaluate whether those offenses meet the ACCA's violent-force requirement, see United States v. Starks, 861 F.3d 306, 315-16 (1st Cir. 2017). We consider whether the least serious conduct covered by the offense "necessarily involves the use[, attempted use, or threatened use] of violent force," but there must be "a 'realistic probability' of a charge and conviction" for that conduct. Id. at 315 (citing Moncrieffe v. Holder, 569 U.S. 184, 190-91, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013) ; United States v. Fish, 758 F.3d 1, 6 (1st Cir. 2014)).[5]

1. Massachusetts ADW

The Massachusetts ADW statute provides that

> [w]hoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Mass. Gen. Laws ch. 265, § 15B(b). Lassend does not dispute that he was convicted under this statute.

In United States v. Whindleton, 797 F.3d 105, 116 (1st Cir. 2015), we rejected the argument that Johnson I overruled our holding in United States v. Am, 564 F.3d 25 (1st Cir. 2009), that the Massachusetts ADW statute " 'has as an element the use, attempted use, or threatened use of physical force' as required by the ACCA's Force Clause." Whindleton, 797 F.3d at 116 (citing Am, 564 F.3d at 33). While Whindleton left open the question as to

whether Massachusetts ADW fails to qualify as a violent felony under ACCA because it lacks a requirement that the use or threat be intentional, id. at 116 n.12, we answered that question in the negative in United States v. Hudson, 823 F.3d 11 (1st Cir. 2016). There, we held that a conviction under the Massachusetts ADW statute "includes a mens rea requirement sufficient to qualify the conviction as a predicate under the ACCA's force clause." Id. at 17.

Of course, "newly constituted panels in a multi-panel circuit court are bound by prior panel decisions that are closely on point." United States v. Wurie, 867 F.3d 28, 34 (1st Cir. 2017) (quoting San Juan Cable LLC v. P.R. Tel. Co., 612 F.3d 25, 33 (1st Cir. 2010)), cert. denied, --- U.S. ----, 138 S. Ct. 690, 199 L.Ed.2d 568 (2018). Lassend fails to even make the argument that an exception[6] to this rule

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applies. We are bound by the law of the circuit that a conviction under Mass. Gen. Laws ch. 265, § 15B(b) constitutes a violent felony under the ACCA's force clause.

2. New York Attempted Second-Degree Assault under Subsection (7)

Under New York Penal Law § 120.05(7),

> [a] person is guilty of assault in the second degree when ... [h]aving been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with intent to cause physical injury to another person, he causes such injury to such person or to a third person....

Id. Reading the second count of the indictment underlying Lassend's conviction for attempted second-degree assault and his plea colloquy, it is clear that Lassend was convicted under New York Penal Law § 120.05(7).[7]

Both the indictment and the plea-colloquy transcript are Shepard-approved documents. See Mathis v. United States, --- U.S. ----, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016) (citing Shepard v. United States, 544 U.S. 13, 26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). The district court correctly concluded that § 120.05(7) was the applicable statue of conviction.

We reject[8] Lassend's assertion that the indictment must expressly cite § 120.05(7) for the documents to establish that he was convicted under that statutory provision. See United States v. Sanchez-Espinal, 762 F.3d 425, 430 (5th Cir. 2014) (holding that "[a] charging [document] that closely tracks the language of a particular statute can establish that the defendant was charged under that section").

Lassend next argues that a conviction under § 120.05(7) does not qualify as a violent felony because the statute does not actually require that physical force be used to cause the injury. To support this argument, Lassend relies primarily on two district court decisions from other circuits, which concern a different subsection of § 120.05 and purport to rely on a suggestion from Second Circuit reasoning in Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003), which the Second Circuit may have itself disavowed.[9] The Second Circuit

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recently recognized that, to the extent that its reasoning in Chrzanoski suggests that the use of physical force cannot be indirect, that logic does not survive the Supreme Court's decision in Castleman. See United States v. Hill, 890 F.3d 51, 60 (2d Cir. 2018). In Castleman, the

Court held that the common law concept of physical force "encompasses even its indirect application," so, for example, sprinkling poison in a victim's drink constitutes the use of physical force because the use of force is not the sprinkling of the poison, but "the act of employing poison knowingly as a device to cause physical harm." 134 S.Ct. at 1414-15.

The Court in Castleman also held that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force" under 18 U.S.C. § 921(a)(33)(A). 134 S.Ct. at 1414 (emphasis added). But the Court recognized that while the term "physical force" as used in § 921(a)(33)(A) should be given its presumptive common law meaning of "offensive touching," the same cannot be said for the term "physical force" in the ACCA's force clause. Id. at 1410. Specifically, the ACCA deals with violent felonies and, consequently, violent force—not merely offensive touching—is required for a crime to satisfy the ACCA's force clause. Id. As such, the Court expressly stated that it was not reaching the issue of "[w]hether or not the causation of bodily injury necessarily entails violent force." Id. at 1413 (emphasis added).[10]

We need not decide whether some methods

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of indirectly causing physical harm[11] —for example, deliberately withholding vital medicine—do not involve the use of violent force, because Lassend's challenge to the use of § 120.05(7) as an ACCA predicate suffers from an antecedent flaw.

In evaluating whether a crime satisfies the force clause, we examine "the least serious conduct for which there is a 'realistic probability' of a charge and conviction." Starks, 861 F.3d at 315 (emphasis added) (citing Moncrieffe, 569 U.S. at 190-91, 133 S.Ct. 1678 ; Fish, 758 F.3d at 6). Lassend has not shown how there is a realistic probability of violating § 120.05(7) —which requires that the assault be committed by a prisoner in a correctional facility—without using violent force. It is hard to imagine how a prisoner could intentionally cause physical harm to someone in prison by, for instance, failing to fulfill a legal duty.[12] And Lassend does not point us to a single New York case in which a conviction under § 120.05(7) has been obtained based on nonviolent conduct. Because "[w]e are not supposed to imagine 'fanciful, hypothetical scenarios' in assessing what the least serious conduct is that the statute covers," United States v. Ellison, 866 F.3d 32, 38 (1st Cir. 2017) (quoting Fish, 758 F.3d at 6), we conclude that Lassend's conviction under § 120.05(7) qualifies as a violent felony under the ACCA's force clause.

3. New York First-Degree Robbery

Lassend was convicted under New York Penal Law § 160.15(4), which provides, in relevant part, that:

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime ... [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm....

Id. (emphasis added). New York Penal Law § 160.15(4) requires the state to prove that a defendant displayed an item that appears to be a firearm in the course of "forcibly steal[ing]" property. Id."A person 'forcibly steals' when the person 'uses or threatens the immediate use of physical force upon another person for the purpose of ... [c]ompelling the owner of such property or another person to deliver

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up the property.' " People v. Lamont, 25 N.Y.3d 315, 12 N.Y.S.3d 6, 33 N.E.3d 1275, 1278 (2015) (alteration in original) (quoting N.Y. Penal Law § 160.00(2)). The government satisfies the display requirement by "show[ing] that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display." People v. Lopez, 73 N.Y.2d 214, 538 N.Y.S.2d 788, 535 N.E.2d 1328, 1331 (1989) (citing People v. Baskerville, 60 N.Y.2d 374, 469 N.Y.S.2d 646, 457 N.E.2d 752, 756 (1983)). That display objectively puts a victim in reasonable fear of physical harm, regardless of whether the item displayed is actually capable of producing such harm. As such, as the district court correctly held, § 160.15(4)"has as an element the ... threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

As the New York Court of Appeals stated in People v. Miller, 87 N.Y.2d 211, 638 N.Y.S.2d 577, 661 N.E.2d 1358 (1995), the core robbery offense "involves the misappropriation of property under circumstances that pose a danger not only to the property but to the person." Id., 638 N.Y.S.2d 577, 661 N.E.2d at 1362 (emphasis added). "It is the robber's intent ... to permanently deprive the victim of property by compelling the victim to give up property or quashing any resistance to that act that is prohibited by law." Id.

The court went on to discuss the "attendant circumstances" (such as displaying a weapon), noting that these aggravating circumstances embody a "legislative determination" that the " 'aggravating factors' exacerbate[ ] the core criminal act and increase[ ] the danger of serious physical injury ..., thus warranting harsher punishment for the robber." Id., 638 N.Y.S.2d 577, 661 N.E.2d at 1361.

Lassend does not contest the fact that he was convicted under § 160.15(4). Nor does he contest that his conviction shows that he intended to forcibly steal property. That alone, he says, is not enough.[13] He challenges the use of his conviction as an ACCA predicate on two aspects of the aggravating circumstances.

i. Display of What Appears To Be a Firearm

Lassend first argues that the display element of § 160.15(4) does not satisfy Johnson I's violent-force requirement because a defendant can display an item that is not actually dangerous. He focuses his argument on the language "displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." N.Y. Penal Law § 160.15(4) (emphasis added). He says our decision in United States v. Starks, 861 F.3d 306 (1st Cir. 2017), requires that we rule in his favor.

Lassend is correct that, under New York law, an individual can violate § 160.15(4) by displaying an item that is not actually a firearm, but only appears to the victim to be such.[14] There is a New York case suggesting that "[a] towel wrapped around a black object ..., a

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toothbrush held in a pocket ...[,] or even a hand consciously concealed in clothing" can satisfy the display element of § 160.15(4)"if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery." Lopez, 538 N.Y.S.2d 788, 535 N.E.2d at 1331. "[I]t must appear to the victim by sight, touch or sound that he is threatened by a firearm." Baskerville, 469 N.Y.S.2d 646, 457 N.E.2d at 756. What matters for § 160.15(4) is not whether the defendant's displayed item is actually capable of inflicting physical injury, but rather whether the defendant's actions cause the victim to be in reasonable fear of bodily harm.

Case law has long made it clear that display of what appears to be a weapon increases fear of bodily harm. Lassend's reliance on our decision in Starks does not work because that case involved the crime of Massachusetts armed robbery, which we found not to be a violent felony. See 861 F.3d at 320, 324. That crime does not require the defendant to use, or make the victim aware of the display of what appears to be a weapon. Id. at 320.

Our own case law requires rejection of Lassend's argument, as does the law of other circuits. In Ellison, we held that federal bank robbery is categorically a crime of violence under U.S.S.G. § 4B1.2(a), even though it can be committed "by intimidation," 18 U.S.C. § 2113(a). 866 F.3d at 33-34. Intimidation is shown through evidence that the defendant's actions "would, as an objective matter, cause a fear of bodily harm" in the victim. Id. at 37. Similarly, in United States v. Luna, 649 F.3d 91 (1st Cir. 2011), we held that Massachusetts armed robbery involving only "threatening words or gestures" satisfies the ACCA's force clause because it has "as an element the ... attempted use[ ] or threatened use of physical force." Id. at 108 (alteration in original) (citing 18 U.S.C. § 924(e)(2)(B)(i)). In both cases, we focused on whether the victim reasonably perceived a threat of bodily harm, not on whether the defendant could have carried out that threat.

Case law from other circuits follows the same approach. The Fifth Circuit in United States v. Ovalle-Chun, 815 F.3d 222 (5th Cir. 2016), held that a conviction under the Delaware aggravated-menacing statute—which is violated "when by displaying what appears to be a deadly weapon[, a] person intentionally places another person in fear of imminent physical injury," Del. Code Ann. tit. 11, § 602(b) —qualifies as a "crime of violence" under U.S.S.G. § 2L1.2(b)(1). Ovalle-Chun, 815 F.3d at 224, 226-27 ; see also Ledoue v. Att'y Gen., 462 Fed. App'x 162, 165-66 (3d Cir. 2011) (per curiam) (unpublished) (similar). In doing so, the Fifth Circuit explicitly rejected the defendant's argument "that aggravated menacing does not involve physical force because it only requires that the victim have the perception that there is a weapon but does not require an actual weapon." Ovalle-Chun, 815 F.3d at 226.

The Sixth Circuit reached a similar conclusion in United States v. Gloss, 661 F.3d 317 (6th Cir. 2011), with respect to the Tennessee aggravated robbery statute, which covers

> "the intentional or knowing theft of property from the person of another by violence or by putting the person in fear," where that theft is "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or ... [w]here the victim suffers serious bodily injury."

Id. at 318 (alteration in original) (quoting Tenn. Code. Ann. §§ 39-13-401, 39-13-402). The Sixth Circuit held that a conviction under the Tennessee statute qualifies as a

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violent felony under the ACCA's force clause because "[a]ny robbery accomplished with a real or disguised deadly weapon ... falls under the first clause of the definition of violent felony, as it necessarily involves 'the use, attempted use, or threatened use of physical force against the person of another.' " Id. at 319 (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

ii. Accomplice

Lassend next urges us to hold that a conviction under § 160.15(4) is not a violent felony under Leocal and Johnson I because the statute does not require a defendant to intend the use of violent force as to the display of a firearm. In Leocal, the Supreme

Court held that the phrase "use ... of physical force against the person or property of another" in 18 U.S.C. § 16(a)"most naturally suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9, 125 S.Ct. 377. Accordingly, the Court determined that a conviction under Florida's DUI statute—which makes it a third-degree felony to operate a vehicle while under the influence and "by reason of such operation, caus[e] ... [s]erious bodily injury to another," Fla. Stat. § 316.193(3)(c)(2) —is not a crime of violence under § 16(a). Leocal, 543 U.S. at 7-10, 125 S.Ct. 377. Lassend contends that, under § 160.15(4), a defendant can be convicted of first-degree robbery if an accomplice displays a weapon without the defendant's knowledge. Lassend argues that this means that § 160.15(4) does not require a level of intent "higher ... than negligent or merely accidental conduct." Leocal, 543 U.S. at 9, 125 S.Ct. 377.

We reject Lassend's argument that the fact that a defendant can be convicted when an accomplice displays a firearm or what appears to be a firearm means that § 160.15(4) does not satisfy the ACCA's intent requirement under Leocal.

The ACCA defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year ... that has 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) (emphasis added). This definition focuses on the elements of the crime of conviction, not on the particular act committed by the defendant or the circumstances of his conviction. What matters for the force clause, then, is whether a felony's legal definition involves violent force, not whether a particular individual actually employed or intended to employ violent force in committing that felony. In order for there to be a conviction under § 160.15(4), one of the offenders must have threatened the use of violent force.[15] The force clause does not inquire into which offender in fact made that threat.

The Supreme Court addressed similar language in Dean v. United States, 556 U.S. 568, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009). That case concerned 18 U.S.C. § 924(c)(1)(iii), which provides a mandatory minimum sentence of 10 years to a person who uses or carries a firearm during and in relation to any violent crime or drug-trafficking crime, or possesses a firearm

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in furtherance of such a crime, "if the firearm is discharged." Dean, 556 U.S. at 572, 578, 129 S.Ct. 1849 (citing 18 U.S.C. § 924(c)(1)(A)(iii)). The petitioner in that case argued that he could not be sentenced under that provision because he did not intend for the firearm to be discharged. Id. at 571, 129 S.Ct. 1849. The Court rejected that argument, holding that § 924(c)(1)(A)(iii) did not impose an intent requirement as to the discharge of the firearm. Id. at 572-74, 129 S.Ct. 1849. The Court reasoned that the phrase "if the firearm is discharged," "focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." Id. at 572, 129 S.Ct. 1849. From that, the Court determined that the statute was concerned with "whether something happened—not how or why it happened." Id. The same logic applies here. The force clause focuses on the elements of the crime of conviction—i.e., what acts occurred—"without respect to any actor's intent or culpability." Id.

Our interpretation of the ACCA's force cause is consistent with that of the Second Circuit, which recently rejected an identical § 160.15(4) argument in Stuckey. It noted that "the intent and force requirements outlined in Leocal and [Johnson I] are examined separately." Stuckey, 878 F.3d at 70. It determined that (1) § 160.15(4) satisfies Leocal's requirement that a defendant have "a

higher degree of intent than negligent or merely accidental conduct," because the state is required to establish the defendant's intent to commit forcible stealing, id. at 71 (quoting Leocal, 543 U.S. at 9, 125 S.Ct. 377), and (2) that Johnson I's violent-force requirement is separately met by the statute's aggravating-circumstance element, id.

The Second Circuit began by acknowledging that the parties agreed that first-degree robbery under New York law required the display of a weapon "in the course of a robbery," which "well exceeds the degree of violent physical force the ACCA requires." Id. at 70. As explained above, we agree that § 160.15(4) meets the force requirement. The court reasoned that the intent requirement announced in Leocal was met because, in order to be convicted, "[t]he defendant must ... actively and intentionally engage in the commission of the robbery—precisely what Leocal requires...." Id. at 71. Because § 160.15(4) requires as an element of the offense that there be a use of force or threatened use of force that is more than merely negligent, this case is distinguishable from Leocal, which involved a Florida reckless driving statute that did not require criminal intent. Id.

Indeed, our holding also comports with traditional accomplice-liability principles. As the Second Circuit noted, § 160.15(4)"reflects the principle of criminal law that a defendant may be held responsible for actions taken by an accomplice to certain crimes." Stuckey, 878 F.3d at 70 (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) ; Francis Bowes Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689, 702–04 (1930)). The government says it found one other case that supports this. See United States v. Young, 229 F. App'x 423, 424 (8th Cir. 2007) (per curiam) (unpublished) (noting that recognizing a distinction between "solo and group crimes" in evaluating whether an offense is a violent felony under the ACCA "would be inconsistent with the general principle that a person convicted as an accomplice is guilty of the same underlying offense as the principal").

The Supreme Court dealt with the culpability of principals and accomplices in Gonzales v. Duenas-Alvarez, 549 U.S. 183, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). In

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that case, the Court applied the categorical approach to determine whether aiding and abetting a vehicle theft offense under California law was a generic theft offense for the purposes of 8 U.S.C. § 1101(a)(43)(G). Duenas-Alvarez, 549 U.S. at 185, 127 S.Ct. 815. The California statute in that case stated in relevant part that "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing [of a vehicle], is guilty of a public offense." Cal. Veh. Code Ann. § 10851(a) (emphasis added). The Ninth Circuit had held that § 10851(a) was not a generic theft offense because "generic theft has as an element the taking or control of others' property" and the Ninth Circuit "believed that one might 'aid' or 'abet' a theft without taking or controlling property." Duenas-Alvarez, 549 U.S. at 188, 127 S.Ct. 815 (citing Penuliar v. Ashcroft, 395 F.3d 1037, 1044-45 (9th Cir. 2005)).

The Court, in reversing the Ninth Circuit, recognized that "every jurisdiction—all States and the Federal Government—has 'expressly abrogated the distinction' " between principals, aiders and abettors present at the scene of a crime, and accessories before the fact. Id. at 189-90, 127 S.Ct. 815 (quoting 2 W. LaFave, Substantive Criminal Law § 13.1(e), at 333 (2d ed. 2003)). Given that accomplices are to be treated the same as principals for the purposes of state and federal law, it is perfectly natural that § 160.15(4) holds a defendant responsible when a fellow robbery participant displays a weapon.

The government draws a similar analogy to the felony murder rule. In Dean, the Court observed that:

> It is unusual to impose criminal punishment for the consequences of purely accidental conduct. But it is not unusual to punish individuals for the unintended consequences of their unlawful acts. See 2 W. LaFave, Substantive Criminal Law § 14.4, pp. 436–437 (2d ed. 2003). The felony-murder rule is a familiar example: If a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder. See 18 U.S.C. § 1111.

Dean, 556 U.S. at 575, 129 S.Ct. 1849. The Court also noted that 18 U.S.C. § 924(c)(1)(A)(iii)

> accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible. An individual who brings a loaded weapon to commit a crime runs the risk that the gun will discharge accidentally. A gunshot in such circumstances—whether accidental or intended—increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response. Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the underlying violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place.

Dean, 556 U.S. at 576, 129 S.Ct. 1849 (citation omitted). Similarly, an individual who commits first-degree robbery with an accomplice "runs the risk," id., that the accomplice will employ or threaten violent force to facilitate the robbery. And when such violent force is actually employed or threatened during the robbery, "the risk of harm resulting from the manner in which the crime is carried out," id., increases, and all participants in the crime are fairly burdened with enhanced sentences under the ACCA.[16]

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The intent requirement for conviction as an accomplice or accessary can vary by crime and jurisdiction. Compare Rosemond v. United States, 572 U.S. 65, 134 S.Ct. 1240, 1243, 188 L.Ed.2d 248 (2014) (holding that, under federal law, to prove aiding and abetting the crime of using or carrying a firearm during a crime of violence, the government must prove "that the defendant actively participated in the underlying [crime] ... with advance knowledge that a confederate would use or carry a gun during the crime's commission") with Miller, 638 N.Y.S.2d 577, 661 N.E.2d at 1363 (holding that strict liability attaches to the aggravating circumstances under New York Penal Law § 160.15). When Congress passed the ACCA, it was presumably aware that various states imposed vicarious liability under certain criminal laws. Congress made no attempt to exclude convictions under such laws from the force clause.

If Congress had desired to preclude convictions from qualifying as ACCA predicates where the defendant acted as an accomplice and did not intend the principal's use of force, it would have done so clearly. Congress could have included an express intent requirement in the ACCA's force clause, as it did in other subsections of 18

U.S.C. § 924. See, e.g., 18 U.S.C. § 924(a)(1), (a)(2), (a)(3), (a)(5), (a)(6)(B), (a)(7), (b), (d)(1), (f), (h), (i)(1), (k) ; see also Dean, 556 U.S. at 572-73, 129 S.Ct. 1849 (refusing to read an intent requirement into 18 U.S.C. § 924(c)(1)(A)(iii) in part because "Congress expressly included an intent requirement" for the preceding subsection, 18 U.S.C. § 924(c)(1)(A)(ii) (citing Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983))).

For these reasons, we hold, consistent with the Second Circuit, that § 160.15(4) meets the requirements of Leocal and Johnson I. First, § 160.15(4)'s display element independently meets Johnson I's violent-force requirement. Second, § 160.15(4) does not criminalize the type of "negligent or merely accidental conduct" that Leocal discussed, 543 U.S. at 9, 125 S.Ct. 377, because a weapon must be consciously displayed during forcible stealing to violate § 160.15(4). Hence, a conviction under § 160.15(4) is a violent felony under the ACCA's force clause.

III. Conclusion

Because three of Lassend's convictions qualify as violent felonies under the ACCA's force clause,[12] we affirm the district

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court's dismissal of his § 2255 petition.

Notes:

[1] On October 14, 2014, Lassend had filed a timely pro se petition under 28 U.S.C. § 2255, challenging his conviction on four grounds.

[2] The government also explained that the district court need not reach the issue of whether Lassend's Massachusetts ABDW conviction should also be considered a violent felony given that Lassend's criminal record contained three other predicate violent felonies.

[3] The government also obtained certified copies of convictions showing that Lassend's 1992 first-degree robbery conviction was for violating § 160.15(2) and that his 1997 first-degree robbery conviction was for violating § 160.15(4). Lassend does not dispute that he was convicted under these statutes.

[4] The finding that Lassend was an armed career criminal under the ACCA subjected him to a statutory minimum sentence of 15 years for violating 18 U.S.C. § 922(g)(1), see id. § 924(e)(1), compared to a ten-year statutory maximum that would otherwise be applicable, see id. § 924(a)(2). The finding also increased his total offense level, and thereby his GSR, under the Sentencing Guidelines. See U.S.S.G. § 4B1.4.

[5] For the purposes of our analysis, we assume that decisions construing the term "crime of violence" in the Sentencing Guidelines and decisions construing the term "crime of violence" in 18 U.S.C. § 16(a) inform the construction of the term "violent felony" in the ACCA. See Fish, 758 F.3d at 9 ; United States v. Hart, 674 F.3d 33, 41 n.5 (1st Cir. 2012).

[6] There are narrow exceptions to the law of the circuit rule, including (1) "when the holding of the prior panel is 'contradicted by controlling authority, subsequently announced' "; or (2) when "authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." Wurie, 867 F.3d at 34 (first quoting San Juan Cable, 612 F.3d at 33 ; then quoting United States v. Rodríguez, 527 F.3d 221, 225 (1st Cir. 2008)).

[7] The second count of the indictment stated the following:

> The grand jury of the County of the Bronx by this indictment, accuses the defendant Kirk Lassend of the crime of assault in the second degree committed as follows:
>
> The defendant, Kirk Lassend, ... with intent to cause physical injury to another person, Willie Wells, did cause such injury to Willie Wells, where at the time of the commission of the act, the defendant was confined in a correctional facility pursuant to having been charged with or convicted of a crime.

And defense counsel stated that "Mr. Lassend has authorized me ... to enter a plea of guilty to attempted assault in the second degree, under count two of [the] indictment...." (emphasis added). The trial court also confirmed with Lassend that he was pleading guilty to "attempted assault in the second degree under the second count of the indictment...." (emphasis added).

§ We also reject Lassend's claim that the documents do not establish that he was convicted under § 120.05(7) because the plea-colloquy transcript shows that he pled guilty to "attempted assault" whereas the indictment charged assault. Lassend fails to explain how this alleged discrepancy is material, given that Lassend acknowledged during the plea colloquy that he was pleading guilty to count two of the indictment. Moreover, the ACCA's force clause expressly encompasses crimes involving the "attempted... use of physical force." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

§ Lassend relies on United States v. Poindexter, No. 3:97-CR-00079, 2016 WL 6595919 (E.D. Va. Nov. 7, 2016) and Grant v. United States, No. 06-CR-732, 2017 WL 2881132 (E.D.N.Y. July 5, 2017). The district courts in both Poindexter and Grant held that a conviction for second-degree assault under New York Penal Law § 120.05(1) is not a violent felony under the ACCA's force clause. Grant, 2017 WL 2881132, at *5 ; Poindexter, 2016 WL 6595919, at *4. Under § 120.05(1), second-degree assault is committed when an individual, "[w]ith intent to cause serious physical injury to another person, causes such injury to such person or to a third person." N.Y. Penal Law § 120.05(1). Both Poindexter and Grant relied on the Second Circuit's reasoning in Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003). See Grant, 2017 WL 2881132, at *5-6 ; Poindexter, 2016 WL 6595919, at *4. In Chrzanoski, the Second Circuit held that a conviction under Connecticut General Statutes § 53a-61(a)(1) — which contains virtually identical language to New York Penal Law § 120.05(1) —does not qualify as a crime of violence pursuant to 18 U.S.C. § 16(a). 327 F.3d at 192, 195. In so holding, the Second Circuit noted that

> it seems an individual could be convicted of intentional assault in the third degree for injury caused not by physical force, but by guile, deception, or even deliberate omission.... [H]uman experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient....

Id. at 195-96. Like the Second Circuit in Chrzanoski, we held in Whyte v. Lynch, 807 F.3d 463 (1st Cir. 2015), that a conviction under Connecticut General Statutes § 53a-61(a)(1) does not qualify as a crime of violence under 18 U.S.C. § 16(a). Whyte, 807 F.3d at 467, 471. However, the government in Whyte had waived the argument that, under the Supreme Court's reasoning in Castleman, causing injury categorically "involves the use of physical force by the defendant himself even if the defendant's misconduct was limited to guile, deception, or deliberate

omission." Whyte v. Lynch, 815 F.3d 92, 92-93 (1st Cir. 2016) (internal quotation marks omitted) (denying petition for rehearing). Moreover, as we explain below, there is a material difference between generic assault statutes like Connecticut General Statutes § 53a-61(a)(1) and New York Penal Law § 120.05(1), on the one hand, and New York Penal Law § 120.05(7), on the other.

[10] Justice Scalia concurred in Castleman. 134 S.Ct. at 1416 (Scalia, J., concurring in part and concurring in the judgment). Under his view, the term "physical force" in § 921(a)(33)(A)(ii) should be given the same meaning as the term "physical force" in the ACCA's force clause. Id. at 1417. Moreover, Justice Scalia believed that " 'intentionally or knowingly causi[n]g bodily injury' ... categorically involves the use of 'force capable of causing physical pain or injury to another person.' " Id. (citation omitted).

[11] Following Castleman, the Fourth Circuit has consistently drawn a distinction between the causation of bodily injury and the use of violent force. See United States v. Middleton, 883 F.3d 485, 491 (4th Cir. 2018) (noting that "the use of violent force" cannot be conflated "with the causation of injury"); United States v. McNeal, 818 F.3d 141, 156 & 156 n.10 (4th Cir. 2016) (same). On the other hand, other circuits have not recognized such a distinction. See, e.g., United States v. Ontiveros, 875 F.3d 533, 535, 538 (10th Cir. 2017) (concluding that a conviction for Colorado second-degree assault—which is committed when a person "[w]ith intent to cause bodily injury to another person, ... causes serious bodily injury to that person or another person," Colo. Rev. Stat. § 18-3-203(1)(g) —is a crime of violence under U.S.S.G. § 4B1.2(a)(1) because it is impossible to cause bodily injury without the use of physical force), cert. denied, --- U.S. ----, 138 S.Ct. 2005, --- L.Ed.2d ---- (2018) ; United States v. Ovalle-Chun, 815 F.3d 222, 226 (5th Cir. 2016) ("Impairing a person's physical condition or causing a person substantial pain is consistent with a force violent enough to constitute a crime of violence under U.S.S.G. § 2L1.2.").

[12] It is possible that the hypothetical conduct described in Chrzanoski—withholding vital medicine—can be the basis of an assault charge under § 120.05(1), at least where there is a legal duty to provide such medicine, see People v. Miranda, 204 A.D.2d 575, 612 N.Y.S.2d 65, 66 (1994).

[13] Neither party disputes that the "forcibly steals property" element of § 160.15(4) does not satisfy Johnson I's violent-force requirement in light of our decision in United States v. Steed, 879 F.3d 440 (1st Cir. 2018).

[14] A defendant charged under § 160.15(4) can present an affirmative defense that the firearm displayed "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged." This affirmative defense does not "constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime." Id.

[15] To the extent Lassend may be arguing that a defendant can be convicted where he unintentionally displays a weapon, he has waived that argument by failing to develop it. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). The argument would fail even if properly raised. In order to sustain a conviction under § 160.15(4), the prosecution must show, inter alia, "that the defendant consciously displayed something that could reasonably be perceived as a firearm." See, e.g., People v. Smith, 29 N.Y.3d 91, 52 N.Y.S.3d 692, 75 N.E.3d 84, 87-88 (2017) (emphasis added) (quoting Lopez, 538 N.Y.S.2d 788, 535 N.E.2d at 1331).

[16] In line with Dean, many circuits have explained that it is typical to hold defendants accountable for the unintended consequences of intentional criminal acts. See, e.g., United States v. McDuffy, 890 F.3d 796, 802 (9th

Cir. 2018) (holding that there is "no need to read a mens rea requirement" into 18 U.S.C. § 2113(e), which punishes criminals for killing someone in the course of a bank robbery, because "[c]ommitting the basic crime of bank robbery is already wrongful conduct"); United States v. Burwell, 690 F.3d 500, 502, 507 (D.C. Cir. 2012) (en banc) (holding that there is no need to read a mens rea requirement into 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a mandatory minimum sentence of 30 years' imprisonment for an individual who carries a machine gun while committing a crime of violence because, inter alia, it is not "unusual to punish individuals for the unintended consequences of their unlawful acts"); United States v. Taylor, 659 F.3d 339, 343-44 (4th Cir. 2011) (upholding the validity of U.S.S.G. § 2K2.1(b)(4)(A) — which increases a defendant's offense level by two points if a firearm involved in a § 922(g) offense was stolen, regardless of whether the defendant knew or had reason to believe that the firearm was stolen—because "[a]n unlawful course of conduct inevitably carries its share of risks").

[17] Because we have determined that three of Lassend's convictions qualify as ACCA predicates, we need not decide whether his conviction for forcible theft while armed with a deadly weapon under New York Penal Law § 160.15(2) is an ACCA predicate. See United States v. Mastera, 435 F.3d 56, 62 (1st Cir. 2006).

EXHIBIT B

United States Court of Appeals
For the First Circuit

No. 17-1900

KIRK LASSEND

Petitioner - Appellant

v.

UNITED STATES

Respondent - Appellee

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: October 26, 2018

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Karen A. Pickett
Mark T. Quinlivan
Cynthia A. Young
Karin Michelle Bell

EXHIBIT C

UNITED STATES of AMERICA
v.
KIRK LASSEND, Defendant.

Criminal No. 10-40019-FDS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

July 11, 2017

MEMORANDUM AND ORDER ON MOTIONS TO VACATE SENTENCE

SAYLOR, J.

This is a proceeding to vacate and correct a sentence pursuant to 28 U.S.C. § 2255. In 2011, Kirk Lassend was found guilty by a jury of two charges: possession of a firearm by a convicted felon and possession of ammunition by a convicted felon, both in violation of 18 U.S.C. § 922(g)(1). On April 10, 2012, he was sentenced pursuant to the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), to a term of imprisonment of 235 months.

Lassend seeks to vacate his sentence on six grounds: (1) ineffective assistance of counsel; (2) unlawful search and seizure; (3) defective indictment; (4) failure of the prosecution to disclose evidence favorable to the defendant; and (5) the unconstitutionality of the residual clause of the ACCA, as determined by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"); and (6) the district court's lack of jurisdiction over the criminal proceeding. For the reasons stated below, the motion will be denied.

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I. Background

A. The Underlying Arrest and Conviction

On July 12, 2010, witnesses placed two separate calls to a 911 operator reporting that a man was walking up and down Day Street in Fitchburg, Massachusetts, with a gun and firing shots into the air. (Tr. at 3:32; Tr. at 5:33). At trial, both callers identified Lassend as the man they saw with the gun. (Tr. at 3:33; Tr. at 5:36). Several police officers from the Fitchburg Police Department arrived at the scene and observed a man (Lassend) who matched the description provided by the callers exiting an apartment building. (Tr. at 3:61-64). The officers placed Lassend in handcuffs and conducted a pat frisk, recovering an ammunition clip (or magazine) from his pocket. (Tr. at 3:68-70). The officers then searched the common hallway of the apartment building Lassend had just exited and found a firearm underneath a plastic bag in an unlocked closet in the hallway. (Tr. at 3:71-72).

The officers then walked a short distance to Lassend's apartment, where he lived with his girlfriend. (Tr. at 3:76-77). The girlfriend was present at the apartment, and the officers asked for her consent to "search the apartment to check to make sure there's nobody inside that's hurt." (Tr. at 3:78). She consented, and the officers performed a search of the apartment (the basement unit in a multi-apartment building). (*Id.*). The officers encountered a locked door in the kitchen that Lassend's girlfriend helped them open. (Tr. at 3:78-79). The door led into a storage area in the basement, where the officers recovered a holster that appeared to fit the firearm they had just recovered and an additional ammunition clip. (Tr. at 3:79-80).

The officers also conducted a search of Day Street, and recovered a 9mm shell casing, consistent with the ammunition found in the clip recovered from Lassend's pocket. (Tr. 3:109; 4:138). Lassend was searched upon booking at the Fitchburg Police station, and officers

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recovered a live 9mm round from his person. (Tr. at 3:183-84). The ammunition clip recovered from Lassend's pocket and the ammunition clip recovered from his apartment were both found to fit the firearm officers recovered at the scene. (Tr. 4:81-89).

On September 8, 2010, Lassend was indicted on charges of being a felon in possession of a firearm and ammunition, both in violation of 18 U.S.C. § 922(g)(1). On October 21, 2011, after a five-day jury trial, at which Lassend was represented by attorney Raymond O'Hara, he was convicted on both counts.

B. The Pre-Sentence Report and Sentencing

Following Lassend's conviction, the United States Probation Department prepared a pre-sentence report ("PSR"). According to the PSR, Lassend was "subject to the Armed Career Criminal provisions at 18 U.S.C. § 924(e) and the guidelines at U.S.S.G. § 4B1.4 as: (1) the offense of conviction is a violation of 18 U.S.C. § 922(g); and (2) the defendant has at least three prior convictions for a violent felony or a serious drug offense or both, committed on occasions different from one another." (PSR ¶ 31). The PSR identified the following prior convictions as predicate offenses under the Armed Career Criminal statute: (1) a 1992 New York conviction for "Robbery in the First Degree: Forcible Theft Armed with Deadly Weapon"; (2) a 1997 New York conviction for "Robbery in the First Degree: Display of What Appears to [be a] firearm"; (3) a 1998 New York conviction for "Assault in the Second Degree"; and (4) a 2010 Massachusetts conviction for "Assault and Battery by Dangerous Weapon, Assault by Dangerous Weapon." (PSR ¶¶ 38, 39, 40, 43, 48). Based on his status as an Armed Career Criminal, Probation determined that Lassend's criminal history category was VI and that his guideline imprisonment range was 235 to 293 months.

On March 2, 2012, the Court sentenced Lassend to a term of imprisonment of 235

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months, to be followed by a five-year term of supervised release.

B. Procedural Background

On March 7, 2012, Lassend appealed his convictions to the First Circuit. The appeal raised three issues: (1) that the court erred in failing to delay, *sua sponte*, jury empanelment due to a medical condition he had at the time, (2) that the court erred in its jury instructions on police investigation techniques, and (3) that the court erred in precluding him from making use at trial of evidence of a testifying police officer's prior malfeasance. The appeal was denied, and his convictions affirmed on October 23, 2013.

On October 14, 2014, Lassend filed a motion to vacate his sentence, asserting four grounds for relief: (1) ineffective assistance of counsel; (2) unlawful search and seizure; (3) defective indictment; and (4) failure of the prosecution to disclose favorable evidence to defendant.

On July 20, 2015, Lassend filed a *pro se* supplemental motion to vacate. That motion, filed following the Supreme Court's decision in *Johnson II*, contends that he should not have been sentenced under the ACCA because the residual clause was unconstitutional and he did not have three predicate offenses that qualified as violent felonies under the ACCA's "force clause."

Lassend filed a second supplemental motion to vacate on September 21, 2015, adding as a ground for relief that the district court lacked jurisdiction over the charged violations of federal criminal law.

On April 8, 2016, Lassend filed a motion to have counsel appointed to represent him as

to his claim for relief under *Johnson II*. That motion was granted, and Lassend, through counsel, filed a third supplemental motion to vacate on June 21, 2016. His third supplemental motion focused exclusively on the issue of whether he was properly sentenced under the ACCA in light

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of *Johnson II*.

II. Analysis

A. The Initial Motion to Vacate, Set Aside, or Correct His Sentence

1. Ineffective Assistance of Counsel Claim

In his initial motion, Lassend contends that his trial counsel rendered ineffective assistance at trial in violation of the Sixth Amendment. In particular, he contends that his counsel rendered ineffective assistance because he (1) never had DNA tests performed upon the firearm, (2) failed to provide all discovery to defendant for his review, (3) failed to have an investigator photograph his home or the common basement in which the holster and magazine were recovered; (4) failed to object on Fourth Amendment grounds to the admission of evidence seized from his home; and (5) failed to object to the admission of the 911 calls or to impeach the credibility of the witnesses who placed those calls.

The standard for determining claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must demonstrate that (1) counsel's performance "fell below an objective standard of reasonableness" and (2) counsel's performance prejudiced the defense so that there is a "reasonable probability" that the outcome would have been different absent the deficient performance. *Id.* at 687-88, 694-95. Reviewing courts are not required to address the two prongs in that order; if it is possible to dispose of a claim on the grounds that the petitioner did not suffer prejudice, a court does not need to address the reasonability of counsel's performance. *Id.* at 697.

Under *Strickland*, reasonable performance on the part of the attorney is presumed, and the petitioner bears the burden of overcoming that presumption. *See id.* at 689; *Cirilo-Munoz v. United States*, 404 F.3d 527, 530 (1st Cir. 2005). Furthermore, "judicial scrutiny of counsel's

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performance must be highly deferential." *Strickland*, 466 U.S. at 689. If an attorney's choices or courses of action can reasonably be characterized as trial strategy and were "made after thorough investigation of law and facts relevant to plausible options," those decisions "are virtually unchallengeable . . . ." *Strickland*, 466 U.S. at 690; *Sleeper v. Spencer*, 510 F.3d 32, 38 (1st Cir. 2007) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003)) (stating that counsel "has 'wide latitude in deciding how best to represent a client'").

Even if a petitioner can show that the attorney's performance was objectively unreasonable, he or she must also show prejudice. To do so, a petitioner must show that there is a "probability sufficient to undermine confidence in the outcome" that if it were not for counsel's deficient performance, the petitioner would have obtained a more favorable result. *Strickland*, 466 U.S. at 694.

a. Failure to Conduct DNA Testing

Lassend's claim that counsel's failure to request DNA testing of the firearm seized at the scene of his arrest fails both prongs of the *Strickland* test. First, it appears quite clear from the record that counsel's failure to

request DNA testing was the result of sound trial strategy rather than any oversight or deficiency in representation. Faced with substantial evidence against Lassend—including eyewitness testimony, the ammunition clip and ammunition recovered from his person, and the ammunition clip and holster recovered from the storage area of his apartment—it appears that counsel did not request DNA testing so that its absence could be used in an attempt to undermine the weight and credibility of the government's evidence. (*See* Tr. 3:26, 5:105-10 (arguing about absence of DNA evidence)). The attorney's strategic decision fell comfortably within the range of reasonable conduct. *See Strickland*, 466 U.S. at 690 (noting that decisions that can reasonably be characterized as trial strategy are "virtually unchallengeable").

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Second, Lassend has failed to establish that, in light of all of the other evidence against him presented at trial, DNA testing of the seized firearm would have changed the outcome of the trial.

b. Failure to Provide Discovery

Lassend's claim that counsel's performance was deficient because he failed to provide him with the evidence against him also fails under *Strickland*. He contends that counsel failed to provide him with certain photographs taken of the firearm, ammunition clips, and ammunition taken by witnesses Kelley King (a chemist) and Emily Labrecque (a trooper). It appears that counsel shared with Lassend black-and-white photocopies of photographs of all of the evidence in the case, but may not have shared color copies of all photographs taken of the evidence in the state crime laboratory. (*See* Tr. 5:11-12).

Even assuming that Lassend could establish that counsel's failure to provide color copies of all photographs taken in the crime laboratory was somehow unreasonable, he has failed to establish any resulting prejudice. He does not articulate how his ability to review all of the photographs—which depicted the firearm, ammunition clips, ammunition, and holster that were themselves entered into evidence—would have changed the outcome of the trial.

c. Failure to Have an Investigator Photograph Lassend's Apartment

Lassend has also failed to establish that counsel's failure to have an investigator photograph his apartment was either objectively unreasonable or prejudicial. he contends that his counsel should have had an investigator photograph his apartment, and, in particular, the basement storage area form which the ammunition clip and holster were recovered, in order to show that the storage area was a common area that could be accessed from entrances other than through his apartment.

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As with the lack of DNA testing, it appears that the failure to take photographs of the basement storage area was a strategic decision. Detective Sergeant Martineau was one of the officers who responded to the scene of Lassend's arrest. During his cross-examination of Martineau, defense counsel highlighted the fact that he had taken many photographs of the apartment building from which the firearm was recovered and the evidence that was recovered from the apartment, but none of the interior of the apartment or of the basement storage area. (Tr. 3:186-87). Thus, it appears that the absence of photographs of the basement area was a reasonable, strategic decision made in an attempt to weaken the weight and credibility of the government's evidence.

Furthermore, even if Lassend could establish that the failure to photograph the

basement area was unreasonable, he has not established any resulting prejudice. Detective Sergeant Martineau himself testified that the basement storage area appeared to be a common area. (Tr. 3:172). On cross-examination, defense counsel clarified and emphasized that "common area" means an area of the building that is shared by all units in the apartment building. (Tr. 3:187). In light of that testimony, it is unclear how the addition of photographs of the basement area would have changed the outcome of the case. Finally, even if such photographs might have caused the jury to disregard the evidence seized from the basement, there was still substantial evidence—including eyewitness testimony as well as the ammunition clip and ammunition recovered from Lassend's person and the firearm recovered nearby—on which the jury could have relied in finding him guilty.

d. Failure to Object to Admission of Evidence Recovered from Lassend's Apartment on Fourth Amendment Grounds

It appears that Lassend also challenges the effectiveness of his counsel's performance based on his failure to object, on Fourth Amendment grounds, to the admission of the evidence

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seized from his apartment. He contends that the seizure of the holster and ammunition clip from the basement storage area was constitutionally improper because it exceeded the scope of the consent given for the search. He further contends that he requested that defense counsel object to the admission of that evidence, and that his failure to object was unreasonable.

"When defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, [in addition to the objective unreasonableness of counsel's performance,] the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Here, Lassend has not established any of the required elements of such a claim.

First, Lassend has failed to establish that his Fourth Amendment claim is meritorious. Under the "plain view" doctrine, a seizure is legitimate if: (1) "the initial intrusion that brings the police within plain view of [the seized] article is supported [by either a warrant or] one of the recognized exceptions to the warrant requirement;" (2) the incriminating nature of the seized object was "immediately apparent;" and (3) the officer who seized the object had "a lawful right of access to the object itself." *Horton v. California*, 496 U.S. 128, 135-37 (1990). Here, the officers' initial intrusion, as well as their access to the seized objects, was supported by the consent of Lassend's girlfriend, who had the apparent authority to consent to the search. (Tr. 3:78). Furthermore, the incriminating nature of the holster and ammunition clip was immediately apparent in light of the facts surrounding the arrest.

Furthermore, Lassend has failed to establish that counsel's performance was rendered ineffective due to his failure to object to the admission of the holster and ammunition clip or that

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his failure caused any prejudice. *See Acha v. United States*, 910 F.2d 28, 32 (1st Cir. 1990) ("Trial counsel was under no obligation to raise meritless claims. Failure to do so does not constitute ineffective assistance of counsel."); *United States v. Victoria*, 876 F.2d 1009, 1013 (1st Cir. 1989) ("Since raising meritless points would not have affected the

outcome of the trial, counsel's failure to raise them did not constitute 'ineffective assistance.'").

e. Failure to Suppress 911 Calls and/or Impeach Witnesses

It appears that Lassend also contends that counsel's assistance was ineffective due to his failure to seek suppression of the 911 calls or to impeach the credibility of the two witnesses who placed those calls.

The admissibility of the 911 calls was the subject of a motion *in limine* filed by the government. The government sought to admit the calls as either excited utterances or present-sense impressions. The court admitted them on that basis. Lassend contends that counsel should have requested an evidentiary hearing in connection with a motion to suppress the calls. However, in light of the clear precedent establishing the admissibility of 911 calls, *see, e.g., United States v. Shoup*, 476 F.3d 38, 41-42 (1st Cir. 2007), *United States v. Brito*, 427 F.3d 53, 62-63 (1st Cir. 2005), the decision not to request an evidentiary hearing can reasonably be characterized as matter of sound trial strategy and is therefore not objectively unreasonable. Furthermore, in light of the other evidence presented at trial, Lassend has failed to show that the admission of the 911 calls caused any prejudice.

Counsel's alleged failure to impeach the callers likewise did not constitute ineffective assistance. When a petitioner asserts that counsel failed to challenge the credibility of a government witness, the First Circuit considers three factors: "first, the strength of the prosecution's case; second, the effectiveness of the defense that was presented at trial; [and]

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third, the potential value of . . . new avenues for cross-examination in undermining the credibility of the government witnesses' testimony." *Turner v. United States*, 699 F.3d 578, 584 (1st Cir. 2012) (internal quotation marks omitted). As to the first factor, the case against Lassend was quite strong, even without the calls. As to the second factor, defense counsel did in fact impeach the credibility of the eyewitness reports. At trial, he called to the jury's attention to inconsistencies in statements made by both eyewitnesses. (*See, e.g.*, Tr. 3:89-91, 121; Tr. 5:54). As to the final factor, Lassend has not identified any new avenues from cross-examination, nor does it appear from the trial transcripts that any additional avenues of impeachment were available.

2. Lassend's Other Claims

The second claim raised in Lassend's initial motion to vacate is that evidence used against him was acquired as a result of an unlawful search and seizure. He contends that his girlfriend gave the police permission to search his apartment solely on the condition that they were checking to see if anyone in the apartment was harmed. He further contends that her consent was inadequate because she did not live in the apartment.

The third claim raised in the initial motion is that the indictment was defective. Lassend appears to object to the fact that the ACCA was deemed applicable to him despite the fact that "Felon in Possession of Firearm/Ammunition" is itself a non-violent offense. He also appears to object, for the same reason, to the government's argument at sentencing, which referred to the "violent nature" of the offense.

The fourth claim raised in the initial motion is that the prosecution unlawfully withheld potentially exculpatory evidence. Lassend contends that the prosecution possessed several proffer notes and statements of key witnesses that could have impeached their testimony. He

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contends that the prosecution unlawfully kept this information from the defendant and that he was unable to "push for dismissal" as a result.

Those three claims have been procedurally defaulted because Lassend failed to raise the claims either at trial or on direct appeal.[1] "[A] defendant's failure to raise a claim in a timely manner at trial or on appeal constitutes a procedural default that bars collateral review, unless the defendant can demonstrate cause for the failure and prejudice or actual innocence." *Berthoff v. United States*, 308 F.3d 124, 127-28 (1st Cir. 2002) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)). In this context, "'[a]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623.

Lassend offers no argument regarding the cause for his default. While he contends, in conclusory fashion, that he is innocent of the crimes for which he was convicted, he has not put forth any "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). *See also McQuiggin v. Perkins*, 133 S. Ct. 1924, 1936 (2013) (stressing that "the *Schlup* standard is demanding"). Therefore, Lassend cannot now raise his defaulted claims.

B. Lassend's First and Third Supplemental Motions

Lassend's first and third supplemental motions contend that he should not have been sentenced as an armed career criminal.[2] Specifically, he contends that his sentencing under the residual clause of the ACCA was unconstitutional following *Johnson II*, and that he could not

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otherwise have been sentenced as an armed career criminal, because he did not have three predicate offenses that qualify as violent felonies under either the "force clause" or "enumerated offenses clause." The government contends that Lassend has procedurally defaulted his *Johnson* claims or, in the alternative, that his sentencing under the ACCA remains appropriate under the "force clause" because he has three qualifying predicate offenses.

1. Whether Lassend Has Procedurally Defaulted

Lassend's *Johnson* claim has been procedurally defaulted. Although he raised the claim in trial court at sentencing (*see* PSR at 22; Sentencing Tr. at 8), he failed to raise the claim on direct appeal. *See Bucci v. United States*, 662 F.3d 18, 29 & n.10 (1st Cir. 2011) (clarifying that claims are procedurally defaulted unless raised at both trial and on direct appeal). However, Lassend contends that he has shown both cause and prejudice to excuse his default. The Court agrees.

a. Cause

To show cause, a petitioner must demonstrate that "some objective factor external to the defense" prevented him from raising a constitutional claim. *Murray*, 477 U.S. at 488. The Supreme Court has held that a finding of cause is warranted where the petitioner shows that, at the time of the direct appeal, "the factual or legal basis for a claim was not reasonably available to counsel." *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)). To show that there was no legal basis for the defaulted claim at the time of the direct appeal, it is not sufficient for a petitioner to show merely that the claim likely would have been futile based on then-existing precedent. *See Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982). Rather, a petitioner seeking relief based on a change in the law must show that

the "constitutional claim is so novel that its legal basis [was] not reasonably available to counsel." *Reed*, 468 U.S. at 16. A claim is sufficiently novel to

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warrant a finding of cause if it is based on a Supreme Court opinion that (1) "explicitly overrule[s]" prior Supreme Court precedent; (2) overturns "a longstanding and widespread practice to which [the Supreme Court] ha[d] not spoken, but which a near-unanimous body of lower court authority ha[d] expressly approved"; or (3) "disapprove[s] a practice [the Supreme Court] arguably ha[d] sanctioned in prior cases." *Id.* at 17 (quoting *United States v. Johnson*, 457 U.S. 537, 558 (1982)).

The government contends that Lassend cannot establish that his *Johnson* claim was sufficiently novel because his trial counsel argued at sentencing that the residual clause of the ACCA was void for vagueness. However, the relevant standard is not whether a claim has ever been raised before, but whether "the factual or legal basis for a claim was not reasonably available to counsel." *Murray*, 477 U.S. at 488. Put differently, the issue is whether "there was no reasonable basis in existing law" for the claim. *Reed*, 468 U.S. at 15.

Lassend contends that he has established cause under prong one of the *Reed* test, as *Johnson II* explicitly overruled prior Supreme Court precedent. In April 2007, the Supreme Court decided *James v. United States*, upholding an offender's sentence under the residual clause of the ACCA. 550 U.S. 192, 214 (2007) *overruled by Johnson II*, 135 S. Ct. 2551 (2015). Justice Scalia dissented from the Court's opinion, suggesting that the residual clause was void for vagueness. *Id.* at 216-17. The majority explicitly rejected that contention, stating, "we are not persuaded . . . that the residual provision is unconstitutionally vague." *Id.* at 210 n.6. That holding was reaffirmed four years later in *Sykes*, with Justice Scalia again in dissent. *See Sykes v. United States*, 564 U.S. 1, 16, 28 (2011) *overruled by Johnson II*, 135 S. Ct. 2551 (2015). Then, in June 2015, the Supreme Court decided *Johnson II*—this time with Justice Scalia writing for the majority—holding that the residual clause was unconstitutionally vague and that the

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court's "contrary holdings in *James* and *Sykes* are overruled." *Johnson II*, 135 S. Ct. at 2563.

James and *Sykes* were controlling Supreme Court precedent at the time of Lassend's sentencing and his direct appeal. Furthermore, Lassend's appeal was filed, argued, and decided before the Supreme Court had even granted *certiorari* in *Johnson II*. Therefore, his *Johnson* claim was not reasonably available at the time of his appeal, and he has established cause for his failure to raise the claim on direct appeal.

b. Prejudice

To be excused from a procedural default, a habeas petitioner must also show "actual prejudice." *See United States v. Frady*, 456 U.S. at 167. To demonstrate actual prejudice, the petitioner must show "not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." *Id.* at 170.

Here, the prejudice argument merges with the argument on the merits. If Lassend shows that he would not qualify as an armed career criminal after *Johnson II*, his failure to raise that claim obviously resulted in prejudice. Therefore, the Court will proceed to the merits to determine whether he qualifies as an armed career criminal.

2. Whether Lassend Qualifies as an Armed Career Criminal

a. The Armed Career Criminal Act

Federal law makes it a crime for a convicted felon to possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(1). That statute generally carries a maximum penalty of a term of imprisonment of ten years. *See id.* § 924(a)(2). However, under the ACCA, a defendant is subject to a much longer prison term if he has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." *Id.* § 924(e). Qualifying defendants are subject to a mandatory minimum term of imprisonment of

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fifteen years. *See id.*

At the time of Lassend's sentencing, a "violent felony" was defined as a conviction that carried a maximum term of imprisonment exceeding one year, and that either (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) "is burglary, arson, or extortion, [or] involves use of explosives"; or (3) "otherwise . . . presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B); *see also Johnson II*, 135 S. Ct. at 2555-56. Those provisions are commonly referred to as the "force clause," the "enumerated offenses clause," and the "residual clause," respectively.

In *Johnson II*, the Supreme Court held that the residual clause was unconstitutionally vague. *Johnson II*, 135 S. Ct. at 2563. The following year, in *Welch*, the Court found that *Johnson II* applied retroactively on collateral review. *Welch*, 136 S. Ct. at 1268. Accordingly, to be lawful, an enhanced sentence under the ACCA must be based on predicate offenses that qualify as "violent felonies" under either the enumerated offenses clause or force clause of 18 U.S.C. § 924(e)(2)(B).

Under the force clause, the term "physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*") (emphasis in original). The question is not whether the defendant actually committed multiple violent crimes. Rather, the question is whether, as a legal matter, the offenses for which he was convicted qualify as "violent" felonies under the strict requirements of the ACCA. His actual conduct "is of no relevance" under that inquiry. *United States v. Serrano-Mercado*, 784 F.3d 838, 843 (1st Cir. 2015).

b. Standard of Review

A court must undertake a three-step analysis to determine whether a predicate offense, as

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the law defined it at the time of the conviction, qualifies as "violent" under the ACCA. *See United States v. Faust*, 853 F.3d 39, 51-52 (1st Cir. 2017) (citing *McNeill v. United States*, 563 U.S. 816, 820 (2011)).

At step one, the court must take a "categorical" approach to determine whether the offense of conviction encompasses non-violent forms of committing the crime. Courts must look at the offense in the abstract, considering the elements of the crime, rather than the particular defendant's underlying conduct. *Taylor v. United States*, 495 U.S. 575, 602 (1990). Under that approach, "the first question a sentencing court must answer . . . is whether all of the conduct covered by the statute categorically requires violent force." *Faust*, 853 F.3d at 51. If so, "then a conviction under the statute will always count as a predicate under the ACCA." *Id.* If not, then the court proceeds to step two. *Id.*

At step two, the court may determine whether the offense is "divisible." *Id.* An offense may set out only a single set of

elements to define a single crime—constituting an "indivisible" offense—or it may "list elements in the alternative, and thereby define multiple crimes"—constituting a "divisible" offense. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). An offense is divisible if it provides multiple *elementally* distinct forms of commission, but not if it merely "enumerates various *factual means* of committing a single element." *Id.*; *see also United States v. Fish*, 758 F.3d 1, 5 (1st Cir. 2014). In determining whether an alternative form of commission presents different elements or means, the touchstone inquiry is whether the elements must be proved beyond a reasonable doubt to a jury. *Mathis*, 136 S. Ct. at 2257; *see also United States v. Tavares*, 843 F.3d 1, 15 (1st Cir. 2016), *reh'g denied*, 849 F.3d 529 (1st Cir. 2017). If an offense of conviction encompasses at least one non-violent form of commission and is indivisible, it cannot serve as an ACCA predicate under the force clause. If it is divisible, the

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court proceeds to step three and applies what is called the "modified categorical approach." *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

At step three, the court may look to a limited class of documents approved under *Shepard v. United States*, 544 U.S. 13 (2005), to determine "what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. So-called *Shepard* documents include "the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. Again, the court undertakes that inquiry not to determine the actual conduct in which the petitioner engaged. *Serrano-Mercado*, 784 F.3d at 843. Instead, it does so to "identify (if such identification is possible) the actual offense of conviction from among the distinct offenses set forth in a divisible statute." *Id.*

There is no First Circuit precedent as to who bears the burden to produce *Shepard* documents on collateral review. *Cf. Faust*, 853 F.3d at 60 (finding on direct appeal that if "it is unclear" which form of a divisible predicate offense the petitioner committed, that conviction "cannot be used as a predicate under the ACCA"); *see also Tavares*, 843 F.3d at 20 (remanding after direct appeal to "allow the government the opportunity to put forth *Shepard* documents" in order to determine whether defendant's conviction was for the violent form of a divisible offense). In many cases, no such documents exist, and therefore the question of who bears the burden of proof will effectively determine the result.

Generally, a habeas petitioner bears the burden to prove that his sentence "was imposed in violation of the Constitution or laws of the United States." *Wilder v. United States*, 806 F.3d 653, 658 (1st Cir. 2015) (quoting 28 U.S.C. § 2255(a)). That principle is in some tension with the rule that at sentencing and on appeal the government bears the burden of establishing that "a

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prior conviction qualifies as a predicate offense for sentencing enhancement purposes." *United States v. Davila-Felix*, 667 F.3d 47, 55 (1st Cir. 2011). The Seventh Circuit has resolved the issue by holding that the government retains the burden to produce *Shepard* documents on collateral review. *Kirkland v. United States*, 687 F.3d 878, 889 (7th Cir. 2012). Perhaps a better way to reconcile the conflict is to arrive at the same result through a different avenue: to conclude that the petitioner bears the burden to establish that his prior conviction is presumptively unlawful at steps one and two, and, upon such a showing, the burden shifts to the government to produce *Shepard* documents at step three. Applying that

framework, if the government fails to produce *Shepard* documents that "ma[ke] plain" which form of a divisible offense is the offense of conviction, that offense "cannot be used as a predicate under the ACCA." *Faust*, 853 F.3d at 60.

Here, Lassend contends that none of his five prior convictions qualify as predicate offenses under either the force clause or the enumerated offenses clause.[3] If he demonstrates that three of those convictions were not "violent felonies," the ACCA does not apply.

c. 2010 Massachusetts Conviction for Assault with a Dangerous Weapon

On April 29, 2010, Lassend was convicted of assault with a dangerous weapon ("ADW") in violation of Mass. Gen. Laws ch. 265 § 15B. That crime qualifies as a violent felony under the force clause. In *United States v. Am*, 564 F.3d 25 (1st Cir. 2009), the First Circuit held that "[b]y its terms, [Massachusetts ADW], which criminalizes 'an assault upon another' by 'means of a dangerous weapon,' 'has as an element the use, attempted use, or threatened use of physical force' as required by ACCA." *Id.* at 33 (citations omitted). In so holding, the First Circuit relied

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on Massachusetts case law requiring that, in order to convict a defendant of ADW, the state must either attempt to use or immediately threaten to use physical force by means of a dangerous weapon. *Id.* (citing *Commonwealth v. Melton*, 436 Mass. 291, 295 (2002); *Commonwealth v. Gorassi*, 432 Mass. 244, 248 (2000)). In *United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015), the First Circuit clarified that, even though assault itself may be "accomplished by mere touching" and therefore does not qualify as a violent felony, ADW is a violent felony "by means virtue of the additional dangerous-weapon element." *Id.* at 113-15. Finally, in *United States v. Hudson*, 823 F.3d 11 (1st Cir. 2016), the First Circuit addressed whether Massachusetts ADW satisfies the mens rea requirement of the ACCA. *Id.* at 16-17. Relying on Massachusetts case law requiring proof of specific intent, the First Circuit held that ADW "includes a mens rea requirement sufficient to qualify the conviction as a predicate under the ACCA's force clause." *Id.* at 17. Accordingly, Lassend's 2010 Massachusetts ADW conviction constitutes a violent felony and a predicate conviction under the ACCA.

d. 1998 New York Conviction for Attempted Assault in the Second Degree

On January 13, 1998, Lassend was convicted of attempted assault in the second degree in violation of N.Y. P.L. § 120.05. Section 120.05 of the New York Penal Law includes approximately twenty subsections defining different elements in the alternative. The statute criminalizes, among other things, recklessly causing injury by means of a deadly weapon or dangerous instrument, as well as causing injury to various public employees with the intent to prevent those employees from fulfilling their duties. Because the statute encompasses conduct that recklessly causes injury, it does not, as a categorical matter, qualify as a violent felony under the ACCA. *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006). The Court must therefore proceed to the second step.

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Section 120.05 enumerates different elements in the alternative, thereby defining multiple crimes. It is therefore divisible. *See Mathis*, 136 S. Ct. at 2249. *See also United States v. Walker*, 442 F.3d 787, 788-89 (2d Cir. 2006) (applying modified categorical approach to N.Y. P.L. § 120.05). The Court will therefore proceed to step three.

The government has produced the relevant indictment and a transcript of the plea colloquy that, together, show that Lassend was convicted under subsection seven of the statute. According to the plea colloquy, he pleaded guilty to the second count of the indictment. (Docket No. 183-1 at 3). The second count of the indictment charged as follows:

> The defendant, Kirk Lassend, on or about March 27, 1997, in the County of the Bronx, with intent to cause physical injury to another person . . . did cause such injury to [that person], where at the time of the commission of the act, the defendant was confined in a correctional facility pursuant to having been charged with or convicted of a crime.

(Docket No. 182-1 at 4). While the indictment does not provide a statutory citation for the offenses charged, and therefore does not expressly indicate the subsection of the statute under which Lassend was charged (and ultimately convicted), the cited language from the indictment mirrors the language of § 120.05(7), which states as follows:

> Having been charged with or convicted of a crime and while confined in a correctional facility . . . with intent to cause physical injury to another person, he causes such injury to such person or to a third person.

N.Y. P.L § 120.05(7). That is sufficient to establish the precise offense for which Lassend was convicted.

Section 120.05(7) requires that a defendant both "inten[ds] to cause physical injury to another person" and that he actually "causes such injury." N.Y. P.L. § 120.05(7). It therefore has, as an element, the use of "violent force," meaning "force capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140. Section 120.05(7) of the New York Penal

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Law therefore constitutes a violent felony under the ACCA.

Lassend points to *United States v. Poindexter*, 2016 WL 6595919 (E.D. Va. Nov. 7, 2016), which reached a contrary conclusion. In *Poindexter*, the district court concluded, in *dicta*, that subsection one of Section 120.05—which, like subsection seven, states that a person is guilty of second-degree assault when "[w]ith intent to cause serious physical injury to another person, he causes such injury"—does not constitute a violent felony under the ACCA. The court relied on, and quoted, the opinion of the Fourth Circuit in *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) *abrogation recognized in In re Irby*, -- F.3d --, 2017 WL 2366996 (4th Cir. June 1, 2017). It reasoned, based on that opinion, that "requiring only intent and result does not satisfy the force clause because 'a crime may *result* in . . . serious injury without involving the *use* of physical force.'" *Id.* at *4 (quoting *Torres-Miguel*, 701 F.3d at 168).

In *Torres-Miguel*, the Fourth Circuit had distinguished between crimes that involve the *use* of physical force—as is required under the force clause of the ACCA—and those that "may *result* in death or serious injury without involving the *use* of physical force." 701 F.3d at 168. The court gave as an example the use of poison, which may cause physical injury without the use of physical force. *Id.* at 169.

However, the Fourth Circuit recently recognized that "the distinction [it] drew in *Torres-Miguel* between indirect and direct applications of force and [the] conclusion that poison 'involves no use or threatened use of force,' no longer remains valid in light of [the]

explicit rejection [by the Supreme Court in *United States v. Castleman*, 134 S. Ct. 1405 (2014)] of such a distinction." *In re Irby*, 2017 WL 2366996, at *6. In *Castleman*, the Supreme Court interpreted the meaning of the phrase "physical force" in the context of 18 U.S.C. § 922(g)(9). That statute forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic

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violence," defined to include an offense that "has, as an element, the use or attempted use of physical force." 134 S. Ct. at 1408-09 (quoting 18 U.S.C. §§ 922(g)(9), 921(a)(33)(A)). Specifically, the Supreme Court addressed whether "'intentionally or knowingly caus[ing] harm to' the mother of [the defendant's] child" constituted such an offense. *Id.* at 1408. The court first held that, in that context—unlike in the context of the ACCA, where "physical force" is used to define a "violent felony"—the term "physical force" "incorporated the common-law meaning of 'force'—namely, offensive touching." *Id.* at 1410. That distinguishes *Castleman* from this case. However, the court in *Castleman* went on to hold that the offense at issue categorically had, as an element, the use of physical force. *Id.* at 1413. Although the operative definition of "physical force" was different, the court's reasoning is relevant here. The court rejected the argument that "causing harm" can be accomplished without the use of "physical force"—for example, by deceiving someone into taking poison. *Id.* In part, the court reasoned that "the common-law concept of 'force' encompasses even its indirect application," such as through the administration of poison. *Id.* But the court also rejected the argument that causing harm by administering poison does not constitute "physical force" because "no one would say that a poisoner 'employs' force . . . when he or she sprinkles poison in a victim's drink." *Id.* at 1415. The court reasoned that the relevant "use of force" is "not the act of 'sprinkl[ing] the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Id.* Thus, whether an injury is caused by means of a punch, a gunshot, or poison, it still involves the *use* of physical force.

While *Castleman* establishes that even indirect means of causing injury constitute the *use* of force, there remains the question of whether such an indirect means of causing injury—such as the administration of poison—constitutes *violent* force as required under the ACCA. In

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Johnson I, the Supreme Court interpreted "physical force" as used in the ACCA to mean "*violent* force, that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. Logic thus dictates that causing injury, even by means of poison, constitutes violent force as required under the ACCA. If violent force is force capable of causing physical pain or injury, it must be that any force that did in fact cause injury was capable of causing injury. Accordingly, the *Poindexter* decision is not persuasive, and this Court declines to follow it.

Finally, Lassend contends that his conviction cannot categorically constitute a violent felony because he was convicted for *attempted* assault in the second degree. According to Lassend, "[i]f a defendant is convicted of an attempted assault, categorically there can be no assurance that violent physical force was actually employed." (Pet. Reply at 3). However, by its very terms, the force clause applies to crimes that 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). Under New York law, a person is guilty of an attempted crime "when, with the intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." N.Y. P.L. § 110.00. Intending to commit a crime that itself requires both the intent to cause

physical harm and that physical harm actually result, *and* engaging in conduct which tends to effect the commission of that crime—which is to say, engaging in conduct which tends to effect the infliction of physical harm upon another—constitutes the attempted use of violent force. *Cf. United States v. Mitchell*, 653 Fed. Appx. 639, 645 (10th Cir. 2016) (holding that assault by means of attempted battery with a dangerous weapon constitutes the attempted use of force).

In summary, Lassend's conviction under N.Y. P.L § 120.05(7) qualifies as a conviction for a crime of violence, and is therefore a predicate offense under the ACCA.

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e. 1997 New York Conviction for Robbery in the First Degree

On July 23, 1997, Lassend was convicted of robbery in the first degree in violation of New York Penal Law § 160.15. That statute provides as follows:

> A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefore, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) Is armed with a deadly weapon; or (3) Uses or threatens the immediate use of a dangerous instrument; or (4) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . .

N.Y. P.L. § 160.15. A person "forcibly steals" property when

> he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

Id. § 160.00.

The offenses set forth in the statute do not categorically qualify as crimes of violence. As the First Circuit recently held in *United States v. Starks*, -- F.3d --, 2017 WL 2802755 (1st Cir. June 28, 2017), armed robbery committed with *de minimis* force does not qualify as a violent felony under the ACCA if the defendant is armed with, but does not use or display, a dangerous weapon. *Starks*, 2017 WL 2802755, at *11-13 (analyzing substantially similar Massachusetts armed robbery statute). Section 160.15 thus does not categorically constitute a violent felony under the ACCA. However, the statute is divisible, as it lists elements in the alternative, defining multiple crimes. The Court will therefore proceed to step three.

The government has produced a document titled "Certificate of Disposition Indictment," indicating that Lassend was convicted of "Robbery 1st Degree PL 160.15 04 BF." (Gov. Opp. Ex. 2 at 2). "In New York, a Certificate of Disposition is a judicial record of the offense of

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which a defendant has been convicted." *United States v. Green*, 480 F.3d 627, 632 (2d Cir. 2007). Under New York law, such certificates "constitute[] presumptive

evidence of the facts stated" in the certificate. N.Y. Crim. Pro. Law § 60.60(1). Certificates of Disposition are regularly considered by New York Courts when deciding whether sentencing enhancements based on prior convictions should be applied, and they are "the type of judicial record that the *Shepard* Court indicated a federal district court may consider in an effort to determine the nature of the New York offense to which a federal defendant has previously pleaded guilty." *Green*, 480 F.3d at 633. However, Certificates of Disposition are not necessarily conclusive evidence of the specific subsection of a statute under which a defendant was convicted. "[W]hen the accuracy of the Certificate of Disposition is 'seriously' questioned, the district court should consider 'easily produced court documents, such as a plea colloquy,' in order to determine whether a given Certificate of Disposition is accurate." *Id.* (quoting *United States v. Hernandez*, 218 F.3d 272, 279 (3d. Cir. 2000)).

Here, the accuracy of the Certificate of Disposition has not been "seriously" questioned. Lassend contends that "the Government has offered no evidence besides the certified copy of the conviction and thus has failed to meet its burden to show that Mr. Lassend admitted to having used violent force." (Pl. Reply at 12). However, he offers no reason why the certificate is insufficient to establish that he was convicted under subsection four of § 160.15, nor does he offer any contradictory evidence. *Cf. Hernandez*, 218 F.3d at 279 (holding that defendant "is entitled to rely on certain easily produced court documents, such as a plea colloquy, in order to establish that he was not convicted of a statute qualifying as a predicate offense" and vacating sentence where district court judge refused to consider plea colloquy offered by defendant). The

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Court therefore concludes that Lassend was convicted of subsection four of N.Y. P.L. § 160.15.[4]

In addition to the general element that a defendant "forcibly steals property," subsection four adds, as an additional element, that "in the course of the commission of the crime or of immediate flight therefore, he or another participant in the crime . . . [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ." N.Y. P.L. § 160.15(4). Thus, there are two separate elements of the offense that could potentially satisfy the requirements of the force clause: (1) forcibly stealing property and (2) displaying what appears to be a firearm.

(1) Forcibly Stealing Property

Under New York Law, the "forcibly stealing" element can be satisfied by minimal force and therefore does not satisfy the requirements of the force clause. New York courts have held that the "force" requirement of § 160.15 can be satisfied by bumping the victim, blocking the

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victim's passage, or engaging in a brief tug-of-war. *See United States v. Moncrieffe*, 167 F. Supp. 3d 383, 403 (E.D.N.Y. 2016) (collecting cases). For example, in *People v. Bennett*, 219 A.D. 2d 570 (Sup. Ct. N.Y. 1995), the court held that the force requirement was satisfied where the defendant and three others "formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket." *Id.* at 570. The court stated that "[t]he requirement that a robbery involve the use, or the treat of immediate use, of physical force . . . does not mean that a weapon must be used or displayed or that the victim must be physically injured or touched." *Id.* (internal citations omitted). The force required under § 160.15 itself therefore does not categorically

require "violent" force, and for that reason does not satisfy the requirements of the force clause of the ACCA. *See Johnson I*, 559 U.S. at 140; *Castleman*, 134 S. Ct. at 1412.

(2) Displaying What Appears to be a Firearm

The additional element of subsection four—that the defendant "or another participant in the crime . . . [d]isplays what appears to be a . . . firearm" does, however, categorically require "violent" force as required under the force clause. Under New York law, that element requires that the defendant (or another participant in the crime) "consciously display something that could reasonably be perceived as a firearm with the intent of compelling an owner of property to deliver it up or for the purpose of preventing or overcoming resistance to the taking." *People v. Baskerville*, 457 N.E.2d 752, 756 (Ct. App. N.Y. 1983). Furthermore, "the display must actually be witnessed in some manner by the victim, i.e., it must appear to the victim by sight, touch or sound that he is threatened by a firearm." *Id.* However, the item used need not closely resemble a gun, nor must it actually be dangerous; "A towel wrapped around a black object . . . a toothbrush held in a pocket . . . or even a hand consciously concealed in clothing may suffice . . .

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if under all of the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery." *People v. Lopez*, 535 N.E.2d 1328, 1331 (Ct. App. N.Y. 1989) (internal citations omitted).

The First Circuit has recognized repeatedly that the presence of a firearm can elevate force that would otherwise be insufficient under the force clause—such as simple assault involving the threat of harmful or offensive touching—into violent force. *See Whindleton*, 707 F.3d at 113-14 (holding that Massachusetts assault with a deadly weapon satisfies the force clause and stating that "[w]hile simple assault is not a violent felony, because it can involve the mere attempted or threatened offensive touching, the additional element of the dangerous weapon ratchets up the violence"); *Am*, 564 F.3d at 33 & n.9. Furthermore, in *United States v. Luna*, 649 F.3d 91 (1st Cir. 2011), the First Circuit held that Massachusetts armed robbery—which requires, at a minimum, "(1) 'the defendant was armed with a dangerous weapon' (though it need not be used); (2) 'the defendant . . . by words or gestures put [the victim] in fear' . . . ; and (3) 'the defendant took the money or . . . the property of another with intent to steal it'"—constitutes a violent felony under the force clause. *Id.* at 108 (quoting *Commonwealth v. Rogers*, 459 Mass. 249, 252 n.4 (2011) (last alteration original).

The question remains whether that reasoning applies when a defendant (or another participant in the crime) uses an object that only appears to be a firearm. In a different context, courts have repeatedly held that both unloaded guns as well as toy guns are "dangerous weapons." In *McLaughlin v. United States*, 476 U.S. 16 (1986), the Supreme Court held that an unloaded gun is a "dangerous weapon" within the meaning of the federal bank robbery statute,

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18 U.S.C. § 2113.[5] As is relevant here, the court reasoned, in part, that simply "the display of a gun instills fear in the average citizen." *Id.* at 17-18. Relying on similar reasoning, the First, Sixth, and Ninth Circuits have also held that the display of a toy gun constitutes the use of a "dangerous weapon" under § 2113. *See United States v. Cannon*, 903 F.2d 849 (1st Cir. 1990); *United States v. Perry*, 991 F.2d 304 (6th Cir. 1993); *United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989). In *United States v. Benson*, 918 F.2d 1 (1st Cir. 1990), the First Circuit

went even further and held that the sentencing enhancement in § 2113(d) applied where the defendant "announced to the teller that he had a gun and then placed his hand in his pocket in a menacing manner, revealing a metallic object which the teller, who was familiar with weapons, reasonably believed to be a gun." *Id.* at 3.

Thus, it is well-recognized that the display of an object that only appears to be a firearm can instill, in the average person, a fear of imminent physical harm. The display of what appears to be a firearm—particularly where, as required under New York law, it must in fact "appear to the victim by sight, touch or sound that he is threatened by a firearm," *Baskerville*, 457 N.E.2d at 756—therefore constitutes the use of a gesture that puts the victim in fear. As the First Circuit established in *Luna*, the use of threatening words and/or gestures that put a victim in fear constitutes a threat of violent force. *See* 649 F.3d at 108. Furthermore, while the actual object being used may not itself be particularly dangerous, its use in the way required under New York law communicates to the victim an ability and a willingness to cause serious physical injury.

The First Circuit's recent decision in *United States v. Starks*, -- F.3d --, 2017 WL 2802755 (1st Cir. June 28, 2017), does not change the analysis. In *Starks*, the First Circuit held

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that armed robbery under Massachusetts law does not constitute a violent felony under the ACCA. *Id.* at *13. However, while Massachusetts armed robbery requires that a defendant be armed with a dangerous weapon, it does not require that the defendant use, display, or otherwise make the victim aware of the present of the weapon. *Id.* at *9-10. The First Circuit concluded, in essence, that the mere *presence* of a dangerous weapon—without any use, display, or other means of making the victim *aware* of its presence—does not elevate non-violent force (such as purse-snatching) into violent force. *See id.* at 11-13. But N.Y. P.L. § 160.14(4) does require that a defendant display either a firearm or what appears to be a firearm. For the reasons stated above, such a display constitutes the threatened use of physical force.

The display of what appears to be a firearm therefore constitutes the threatened use of violent force, and § 160.15(4) is thus a "violent felony" under the force clause of the ACCA. *See Stuckey v. United States*, -- F. Supp. 3d --, 2016 WL 7017419, at *6 (S.D.N.Y. Dec. 1, 2016) (holding that N.Y. P.L. § 160.15(4) "ha[s] as an element the use of violent force") *appeal docketed*, No. 16-4133 (2d Cir. Dec. 9, 2016); *United States v. Gloss*, 661 F.3d 317, 318-19 (6th Cir. 2011) (holding that Tennessee aggravated robbery—which requires "'the intentional or knowing theft of property from the person of another by violence or putting the person in fear,' where that theft is '[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon . . ."—is a violent felony under the force clause of the ACCA (quoting Tenn. Code Ann. §§ 39-13-401, 39-13-402) (first alteration in original)).

(3) Display by Another Participant in the Crime

Defendant contends that § 160.15(4) cannot constitute a predicate offense because one can be convicted under that subsection even if the aggravating element—the display of what

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appears to be a firearm—was committed by another participant in the crime. For that reason, defendant contends that a conviction under § 160.15(4) cannot satisfy the intent requirement set forth in *Leocal v. Ashcroft*,

543 U.S. 1 (2004). That argument was recently rejected by the Southern District of New York, *see Stuckey*, 2016 WL 7017419, at *7-8, and this Court rejects it as well for much the same reason.

In *Leocal*, the Supreme Court held that driving under the influence of alcohol (as defined by Florida law) was not a violent felony because it did not require proof of any particular mental state and therefore did not require the "use . . . of physical force against the person or property of another," which requires "a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 7, 9-10. In holding that a conviction under § 160.15(4) satisfies *Leocal's* intent requirement, the court in *Stuckey* reasoned, in part, that *Leocal* requires only that a *crime* involve a mens rea of more than negligence, not that the use of violent force must be more than negligent. 2016 WL 7017419, at *8. On that point, this Court disagrees. *Leocal* appears to be clear that it is the "use [or attempted use or threat] of physical force against the person or property of another" that must be more than negligent. *See* 543 U.S. at 9-10.

However, the *Stuckey* court went on to conclude that § 160.15(4) satisfies *Leocal's* intent requirement even if it is read to apply to the use of force itself. First, the court reasoned that subsection four has been interpreted to require the intentional display of what appears to be a firearm. *Id.* (citing cases). Second, the court rejected the argument that *Leocal's* intent requirement "require[s] proof that each individual defendant in a multiple-defendant crime intended the use of violent force." *Id.* at 9. As the court reasoned:

> This argument exposes a tension between the focus on *crimes* and *elements* required by the categorical approach, and the focus on individual *defendants* that animates the ACCA's sentencing enhancement in the first instance. Indeed, it might seem illogical to say that Stuckey was himself convicted of a violent felony when it is

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> possible that he is being held strictly liable for violent actions of a codefendant of which he lacked any knowledge, let alone intent. But this is what current law under the ACCA and the categorical approach requires. It is also the better reading of the text of the statute, which refers to 'crimes' and 'elements' in defining a predicate 'violent felony.' Moreover, this approach comports with traditional understandings of accomplice liability.

Id. (emphasis original). That reasoning appears sound, and this Court will adopt it here. Thus, Lassend's conviction under N.Y. P.L. § 160.15(4) qualifies as a conviction for a crime of violence, and therefore is a predicate offense under the ACCA.

3. Conclusion

In summary, the Court concludes that three of Lassend's prior convictions—the 2010 Massachusetts ADW conviction, the 1998 New York conviction for attempted assault in the second degree, and the 1997 New York conviction for robbery in the first degree under § 160.15(4)—constitute predicate offenses under the "force clause" of the ACCA. Accordingly, Lassend's motion to vacate will be denied to the extent it seeks relief on the grounds that his sentencing under the ACCA was improper.

C. Lassend's Second Supplemental Motion

In his second supplemental motion, filed *pro se*, petitioner contends that this court lacked jurisdiction over the charged violations of federal law. He appears to contend that the court lacked jurisdiction because the federal statute under which he was indicted (18 U.S.C. § 922(g)(1)) could not constitutionally be applied to him as the conduct underlying his arrest and indictment took place in a state (Massachusetts). He further contends that trial counsel's assistance was rendered ineffective due to his failure to investigate whether the relevant statute could be applied to conduct that took place within the states.

Petitioner's arguments must fail. He relies on *Morrison v. National Australian Bank, Ltd.*, 561 U.S. 247 (2010), for the proposition that federal criminal law does not apply outside of

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the United States and therefore does not apply in Massachusetts. His reliance is misplaced. *Morrison* simply states the "longstanding principle" that, absent a contrary intent from Congress, legislation "is meant to apply only within the territorial jurisdiction of the United States," and not within foreign lands. *Id.* at 255 (internal quotation marks omitted). Massachusetts is obviously within the territorial jurisdiction of the United States. Furthermore, 18 U.S.C. § 922(g)(1) has been held to be a valid exercise of Congress' power under the Commerce Clause. *See, e.g., United States v. Dupree*, 258 F.3d 1258, 1259-60 & n.1 (11th Cir. 2001) (collecting cases).

In addition, federal courts unquestionably have jurisdiction over criminal cases involving charged violations of federal criminal law:

> Article III gives to the federal judicial branch authority—that is, subject matter jurisdiction—over all cases arising under the laws of the United States; and by statute Congress has given the federal district courts this authority over federal criminal cases in the first instance. 18 U.S.C. § 3231 (2000). Conventionally, a federal criminal case is within the subject matter jurisdiction of the district court if the indictment charges . . . that the defendant committed a crime described in Title 18 or in one of the other statutes defining federal crimes. . . . In such a case subject matter jurisdiction, that is to say, authority to decide all other issues presented within the framework of the case, exists.

United States v. Gonzalez, 311 F.3d 440, 442 (1st Cir. 2002). Because the indictment charged Lassend with violations of a crime described in Title 18—namely, 18 U.S.C. § 922(g)(1)—the court's jurisdiction was proper.

Finally, Lassend's ineffective assistance of counsel claim based on counsel's failure to investigate the constitutionality of the statute under which he was indicted also fails. Because the constitutionality of § 922(g)(1) is well-established, *see, e.g., Dupree*, 258 F.3d at 1259-60 & n.1, counsel's failure to investigate or challenge its constitutionality was neither unreasonable nor prejudicial. *See Acha*, 910 F.2d at 32 ("Trial counsel was under no obligation to raise meritless claims. Failure to do so does not constitute ineffective assistance of counsel.");

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Victoria, 876 F.2d at 1013 ("Since raising meritless points would not have affected the outcome of the trial, counsel's failure to raise them did not constitute 'ineffective assistance.'").

IV. Conclusion

For the foregoing reasons, the motion to vacate (Docket No. 140) and the supplemental motion to vacate (Docket No. 173) are DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: July 11, 2017

Footnotes:

[1] To the extent Lassend contends that his sentencing under the ACCA is improper following *Johnson II*, that argument is addressed below in connection with his first and third supplemental motions.

[2] Lassend's first supplemental motion was prepared *pro se*, while his third supplemental motion was prepared with the assistance of counsel.

[3] While Lassend contends that his Massachusetts conviction for assault with a dangerous weapon does not constitute a violent felony, he recognizes that the First Circuit has recently held that it does. *See, e.g.*, *United States v. Hudson*, 823 F.3d 11 (1st Cir. 2016).

[4] Lassend's reliance on *United States v. Rosa*, 507 F.3d 142 (2d Cir. 2007) is misplaced. In *Rosa*, the district court had relied upon various documents to conclude that a prior conviction for robbery in the first degree—committed when the defendant was 15—constituted a violent felony under the ACCA. Under the ACCA, in order for juvenile offenses to constitute predicate convictions, they must not only satisfy the requirements of either the force clause or the enumerated offenses clause, they must also "involve the use or carrying of a firearm, knife, or destructive device." 18 U.S.C. § 924(e)(2)(B). During the plea colloquy, the defendant had admitted that he aided and abetted others who forcibly stole property while displaying what appeared to be a firearm, but denied that he ever carried a gun. *Id.* at 147. The district court relied upon the bill of particulars filed by the government in support of the indictment (which indicated that a firearm had been used) as well the PSR and sentencing transcript (in which, according to the government, Rosa implicitly assented to its statements suggesting that a firearm had been used in the robbery) in concluding that a firearm had in fact been used and that the juvenile offense therefore constituted a violent felony under the ACCA. The Second Circuit held that reliance on those documents was improper under *Shephard*. *Id.* at 154-59. In applying the ACCA, the district court had also relied upon the logical inference that Rosa must have necessarily conceded that the weapon was a firearm by pleading guilty to robbery in the *first* degree, because by so doing he waived the affirmative defense, available under New York law, that would reduce robbery in the first degree to robbery in the *second* degree if the firearm used "'was not a loaded weapon from which a shot . . . could be discharged.'" *Id.* at 160 (quoting N.Y. P.L. § 160.15(4)). The Second Circuit rejected that argument, too, concluding that by pleading guilty to robbery in the first degree, Rosa only *necessarily* admitted to facts sufficient for a conviction of robbery in the first degree, which requires the display of something that appears to be a firearm but does not itself require that an actual firearm be used. *Id.* Thus, in determining that the offense involved the use of an actual firearm, the district court engaged in fact-finding that went beyond the facts compelled by the state record of conviction. *Id.* at 161. Here, however, the certificate of disposition compels the conclusion that Lassend pleaded guilty to § 160.15(4). For present purposes, and unlike in *Rosa*, the Court need not go any further than that, and need not determine

whether the object displayed actually was a firearm, in order to conclude that the conviction constitutes a violent felony under the ACCA.

5. Section 2113 provides for a greater maximum penalty for those who, in the course of committing a bank robbery, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d).
