No. _____

In the

Supreme Court of the United States

TIMOTHY DALE GOULD,
PETITIONER,

V.

UNITED STATES OF AMERICA,
RESPONDENT,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States District Court

Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v. Case Number 5:02-CR-0089-01-C

TIMOTHY DALE GOULD
Defendant.

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

The defendant, TIMOTHY DALE GOULD, was represented by E. G. Morris.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to count 3 and 4 of the indictment filed on 09/17/2002. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 USC § 2113(a) & (d)	Armed Credit Union Robbery	09/12/2002	3
18 USC § 924(c)(1)(A) & (c)(1)(A)(ii)	Using and Carrying a Firearm During and in Relation to a Crime of Violence and Possession of a Firearm in Furtherance of a Crime of Violence	09/12/2002	4

As pronounced on 01/23/2004, the defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, for count 3 and 4, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

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

Signed this the 23rd day of January, 2004.

DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

Defendant's SSN: 463-19-5883
Defendant's Date of Birth: 10/19/1961
Defendant's Address: 5908 88th Place, Lubbock, TX 79424
Defendant's USM No: 28900-180

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 57 months as to Count 3 and 300 months as to Count 4 with the terms of imprisonment to run consecutive with each other. These sentences will also be served concurrent to the sentences imposed in Case No. A-02-CR-290(01)SS, Western District of Texas, Austin Division, and Case No. 5:03-CR-102-C(01), Northern District of Texas, Lubbock Division.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years as to Count 3 and 5 years as to Count 4 with the terms of supervision to run concurrently with each other.

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

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

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

□ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

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

STANDARD CONDITIONS OF SUPERVISION

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

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the U.S. Probation Officer.

2. The defendant shall provide to the U.S. Probation officer any requested financial information.

3. The defendant shall participate in a program approved by the U.S. Probation Office for treatment of narcotic or drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. It is ordered that the defendant contribute to the costs of services rendered (co-payment) at a rate of at least $5.00 per month.

4. Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall pay restitution in the amount of $37,949 00, payable to the U.S. District Clerk for disbursement to:

   WesTex Federal Credit Union
   601 Avenue "K"
   Lubbock, TX 79401
   No Account Number

   If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least $100 00 per month until the restitution is paid in full. Further, it is ordered that interest on the unpaid balance is waived pursuant to 18 USC § 3612(f)(3). Restitution shall be reduced by the amount received from the proceeds of the sale of the seized property. The U.S. Attorney's Office shall report to the Court and the U.S. District Clerk the disbursement of said funds.

5. The defendant shall cooperate in the collection of DNA as directed by the U.S. Probation Officer.

RESTITUTION

Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall pay restitution in the amount of $37,949.00, payable to the U.S. District Clerk, 1205 Texas Avenue, Room 209, Lubbock, TX 79401 for disbursement to:

Name of Payee **$37,949.00**

WesTex Federal Credit Union
601 Avenue "K"
Lubbock, TX 79401
No Account Number

If upon commencement of the term of supervised release any part of the restitution remains unpaid, the defendant shall make payments on such unpaid balance beginning 60 days after release from custody at the rate of at least $100.00 per month until the restitution is paid in full. Restitution shall be reduced by the amount received from the proceeds of the sale of the seized property. The U.S. Attorney's Office shall report to the Court and the U.S. District Clerk the disbursement of said funds.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

Timothy Dale Gould, 28900-180
Federal Correctional Institution
PO Box 15330
Ft. Worth, Texas 76119

Honorable Sam Cummings
United States Courthouse
1205 Texas Avenue, Room 209
Lubbock, Texas 79401

Re: Johnson v US, 135 S. Ct. 2251 (2015)
US v Gould, 5:02-CR-0089-01-C (2004)

Dear Judge Cummings,

I am writing in reference to the above-mentioned cases. I was sentenced in the United States District Court, Northern District of Texas, Lubbock Division on January 23, 2004 under 18USC §2113(a) & (d) Bank Robbery and 18USC §924(C)(1)(A) & (c)(1)(A)(ii). My sentence carried an enhancement for carrying a firearm during a crime of violence.

I believe I may be able to pursue a claim for habeas relief based on *Johnson*. Because of *Johnson* I may no longer be subject to a sentence enhancement that relied on unconstitutionally vague definition of violent felony

I've been incarcerated over thirteen years and have paid over seven-thousand dollars toward mandatory victim's restitution.

As I am indigent would you please appoint a Federal Public Defender to evaluate my case and pursue, if appropriate, a claim under *Johnson*. The deadline for filing a *Johnson* claim is June 25th, 2016.

Thank you for your consideration in this matter.

Timothy Dale Gould

NORTH TEXAS TX PDC
DALLAS TX 750
17 MAY 2016 PM 4 L

Tim Gould, 28900-180
Federal Correctional Institution
PO Box 15330
Ft. Worth, Texas 76119

RECEIVED
MAY 20 2016
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

⇳28900-180⇳
Hon Sam Cummings
United States Courthouse
1205 Texas AVE
Room 209
Lubbock, TX 79401
United States

79401-402759

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 5:02-CR-089-01-C
	)	
TIMOTHY DALE GOULD	)	

ORDER

The Court having considered the letter from Timothy Dale Gould, received May 20, 2016, which is construed as a motion for the appointment of counsel, is of the opinion that the same should be **GRANTED** to the extent that the Office of the Federal Public Defender is **APPOINTED** to review this case to determine whether the conviction qualifies for relief under *Johnson v. United States*. All other relief requested is **DENIED**.

The Clerk is directed to file the letter as a motion for the appointment of counsel.

SO ORDERED.

Dated this 23rd day of May, 2016.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION UNDER 28 U.S.C. SECTION 2255,
TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A
PERSON IN FEDERAL CUSTODY

UNITED STATES OF AMERICA

Fort Worth FCI
PLACE OF CONFINEMENT

vs.

28900-180
PRISONER ID NUMBER

TIMOTHY DALE GOULD
MOVANT (full name of movant)

5:02-cr-00089-C-1
CRIMINAL CASE NUMBER

(If a movant has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

INSTRUCTIONS - READ CAREFULLY

1. This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

2. Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities needs to be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

3. Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

4. If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration provided with this motion, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

5. Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each such judgment.

6. Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

7. When the motion is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court for the Northern District of Texas at the appropriate divisional office whose address is:

Abilene Division	Amarillo Division	Dallas Division	Fort Worth Division
P.O. Box 1218	205 E. 5th St, Rm 133	1100 Commerce, Rm 1452	501 W. 10th St, Rm 310
Abilene, TX 79604	Amarillo, TX 79101	Dallas, TX 75242	Fort Worth, TX 76102

Lubbock Division	San Angelo Division	Wichita Falls Division
1205 Texas Ave., Rm 209	33 East Twohig St, Rm 202	P.O. Box 1234
Lubbock, TX 79401	San Angelo, TX 76903	Wichita Falls, TX 76307

8. Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court that entered the judgment of conviction you are challenging:

U.S. District Court, Northern District of Texas, Lubbock Division

2. Date of the judgment of conviction:

01/23/2004

3. Length of sentence: 357 months imprisonment, 5 years supervised release

4. Nature of offense involved (all counts):

(1) Armed Credit Union Robbery in violation of 18 U.S.C. 2113(a) and (d); and (2) Using and Carrying a Firearm During and In Relation to a Crime of Violence and Possession of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. 924(c)(1)(A) and (c)(1)(A)(ii).

5. (a) What was your plea? (Check one)

Not guilty ☐ Guilty ☑ Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge Only ☐

7. Did you testify at the trial? (Check one) Yes ☐ No ☐

8. Did you appeal from the judgment of conviction? (Check one) Yes ☐ No ☑

9. If you did appeal, answer the following:

Name of Court: _____

Result: _____

Date of result: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes ☐ No ☑

11. If your answer to 10 was "Yes" give the following information:

Name of Court: _____

Nature of proceeding:

Grounds raised:

Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

Result: _____

Date of result: _____

As to any *second* petition, application or motion, give the same information:

Name of Court: _____

Nature of proceeding:

Grounds raised:

Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

Result: _____

Date of result: _____

As to any *third* petition, application or motion, give the same information:

Name of Court: _____

Nature of proceeding:

Grounds raised:

Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

Result: _____

Date of result: _____

Did you appeal to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

First petition, etc.	Yes ☐	No ☐
Second petition, etc.	Yes ☐	No ☐
Third petition, etc.	Yes ☐	No ☐

If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

    CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this petition all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right to appeal.

A. Ground One:

The District Court erred in sentencing the Defendant to 300 months as to Count IV of the Indictment because the predicate offense upon which the conviction to this count is based (credit union robbery) is not a crime of violence in light of the Supreme Court decision in United States v. Johnson.

Supporting FACTS (tell your story briefly without citing cases or law):

The Defendant was sentenced to 300 months for carrying and using a weapon in relation to a crime of violence, with the crime of violence being robbery of a credit union.

B. Ground Two:

After Johnson v. United States, 135 S. Ct. 2551 (2015) and Welch v. United States, 136 S. Ct. 1257 (2016), Defendant's sentence is above the statutory maximum.

Supporting FACTS (tell your story briefly without citing cases or law):

Defendant was sentenced to 357 months imprisonment. The maximum term of imprisonment without the 18 U.S.C. § 924(c) conviction is 300 months, under 18 U.S.C. § 2113(d).

C. Ground Three:

Supporting FACTS (tell your story briefly without citing cases or law):

D. Ground Four:

Supporting FACTS (tell your story briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

The vagueness of the residual clause was not available to Defendant prior to the Supreme Court's decisions in Johnson v. United States and Welch v. United States.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:

(b) At arraignment and plea:

Edwin Gerald Morris
Law Office of EG Morris
2202 Lake Austin Blvd.
Austin, TX 78703

(c) At trial:

Edwin Gerald Morris
Law Office of EG Morris
2202 Lake Austin Blvd.
Austin, TX 78703

(d) At sentencing:

Edwin Gerald Morris
Law Office of EG Morris
2202 Lake Austin Blvd.
Austin, TX 78703

(e) On appeal

(f) In any post-conviction proceeding:

Brandon Elliot Beck
Federal Public Defender
1205 Texas Ave., Room 507
Lubbock, Texas, 79401

(g) On appeal from any adverse ruling in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☑

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☑

Wherefore, movant prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Brandon Beck
Signature

Federal Public Defender N.D. Texas
Firm Name (if any)

1205 Texas Ave., Room 507
Address

Lubbock, TX 79401
City, State & Zip Code

(806) 472-7236
Telephone (including area code)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 6/22/2016 (date).

Brandon Beck o/b/o Timothy Dale Gould
Signature of Movant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

TIMOTHY DALE GOULD, Petitioner,	
v.	CIVIL ACTION NO. 5:16-CV-129-C
UNITED STATES OF AMERICA, Respondent.	CRIMINAL NO. 5:02-CR-089-01-C

RESPONSE TO MOTION UNDER 28 U.S.C. § 2255

Respectfully submitted,

JOHN R. PARKER
United States Attorney

/s/ Steven M. Sucsy
Steven M. Sucsy
Assistant United States Attorney
Texas State Bar No. 19459200
1205 Texas Ave., Suite 700
Lubbock, Texas 79401
(806) 472-7351
steve.sucsy@usdoj.gov

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RESPONSE TO MOTION UNDER 28 U.S.C. § 2255

The government opposes Gould's Section 2255 motion because he is barred from bringing it, and, in any event, he has not demonstrated that he is entitled to relief. First, his motion is untimely. Second, his barebones, conclusory assertion of a constitutional violation is inadequate to permit this Court to vacate his 18 U.S.C. § 924(c) conviction and sentence. Third, he is procedurally barred from asserting his *Johnson*-based argument because he did not raise a vagueness challenge on direct appeal. Finally, even if he could raise his *Johnson*-based argument, it must fail because his sentence does not rely on the Armed Career Criminal Act's residual clause, and his conviction under 18 U.S.C. § 924(c) relied on its elements-clause definition of "crime of violence," not its residual-clause definition. Thus, this Court should deny his motion.

STATEMENT OF THE FACTS

Gould pled guilty to one count of Armed Credit Union Robbery in violation of 18 U.S.C. § 2113(a) and (d), and one count of Using and Carrying a Firearm During and in Relation to a Crime of Violence and Possession of a Firearm in Furtherance of a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (c)(1)(A)(ii). (CR Dkt. No. 34, PSR at ¶¶ 1 and 2.)[1] The Court sentenced him to 357 months in prison, which was beneath the statutory maximum sentence of imprisonment for life. (CR Dkt. Nos. 43, 44).

[1] "CR Dkt. No. __" refers to the docket of the underlying criminal proceeding, *United States v. Gould*, No. 5:02-CR-089-C. "CV Dkt. No. __" refers to the docket of this section 2255 action.

Gould did not appeal his conviction or sentence. The judgment, therefore, became final on February 6, 2004, when he failed to file any notice of appeal within the allotted time period. Gould filed his Section 2255 motion on June 22, 2016, over 11 years beyond the limitation period provided by law. *See* 28 U.S.C. § 2255(f)(1); (CV Dkt. No. 1 at 1.)

STATEMENT OF THE ISSUE

Gould appears to argue that his sentence should be vacated and that he should be resentenced because his section 924(c) conviction is invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). (*See* Motion at p. 7.) Although conclusory, his motion seems to claim that his conviction under Count Three—Armed Credit Union robbery—does not qualify as a proper predicate under section 924(c) because it does not meet its definition of "crime of violence." But every court to have addressed this issue post-*Johnson* has rejected it. His motion should be dismissed as conclusory, procedurally barred, time-barred, and meritless.

ARGUMENT AND AUTHORITIES

Standard of review

Motions pursuant to 28 U.S.C. § 2255 may only seek relief for particular types of errors. *See United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998). Under 28 U.S.C. § 2255, a prisoner may move the convicting court to vacate, set aside, or correct his conviction or sentence. It provides four grounds: "(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum

sentence; or (4) the sentence is 'otherwise subject to collateral attack.'" *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996) (citation omitted). Although these particular grounds are proper, a motion under section 2255 "may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982).

After conviction and the exhaustion or waiver of all appeals, the Court is "entitled to presume" that the prisoner "stands fairly and finally convicted." *Id.* at 164. A prisoner is not entitled to an evidentiary hearing on his Section 2255 motion unless he "presents independent indicia of the likely merit of his allegations." *United States v. Reed*, 719 F.3d 369, 373 (5th Cir. 2013).

Discussion

1. Gould's motion should be dismissed as untimely.

The Court should dismiss Gould's Section 2255 motion because it was filed over 11 years after the period of limitation expired. He appears to assert that the motion is timely because it was filed within one year of the Supreme Court's decision in *Johnson*—wherein the Supreme Court held that the residual clause in Armed Career Criminal Act ("ACCA") cases was unconstitutionally vague—but, for the reasons explained below, *Johnson* has no application here.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Gould must have filed his section 2255 motion within one year of the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United

> States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Gould makes no argument that he filed his motion within the deadlines established by subsections (f)(1), (2), or (4). The implicit concession is appropriate. The judgment became final on February 6, 2004, which was 10 days after the sentencing date, exclusive of intermediate Saturdays, Sundays, and legal holidays, as provided by Rule 26(a), Federal Rules of Appellate Procedure. Gould therefore had until February 6, 2005, to comply with the one-year limitations period in subsection (f)(1). He failed to file the motion until June 22, 2016, over 11 years after the limitations period expired. Nor can he take advantage of subsections (f)(2) and (4) since—by their plain terms—neither provision applies here. Thus, unless Gould complied with subsection (f)(3), his motion is untimely.

His motion is not timely under subsection (f)(3) because although it was filed within one year of the Supreme Court's holding in *Johnson*, that case has no bearing on his conviction and sentence. In *Johnson*, the Supreme Court considered whether "violent felony," as defined by the ACCA's residual clause, is unconstitutionally vague. 135 S. Ct. at 2563. The ACCA increases the maximum prison sentence that applies to certain offenses, including felon in possession of a firearm, but it has no application to Armed

Credit Union robbery cases under 18 U.S.C. § 2113(a) and (d), and section 924(c) offenses like the one to which Gould pled guilty. *See* 18 U.S.C. § 924(e).

The ACCA's residual clause defines "violent felony" to include an offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The Court in *Johnson* overruled its decisions in *James v. United States*, 550 U.S. 192 (2007), and *Sykes v. United States*, 564 U.S. 1 (2011), holding that the residual clause is void "in all its applications." 135 S. Ct. at 2561. The Supreme Court has now held that *Johnson* is retroactive on collateral review in ACCA cases. *See Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

But the holding in *Johnson* simply does not apply to Gould's conviction and sentence. Gould was not sentenced under the ACCA, so *Johnson* has no direct applicability here. And for the reasons explained below, *Johnson* cannot apply to invalidate Gould's section 924(c) conviction because Credit Union robbery qualifies under section 924(c)'s elements clause—wholly independent of its residual clause. *See Johnson*, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Because Gould cannot benefit from the expanded limitation period in Section 2255(f)(3) based on *Johnson*, and he failed to meet the governing deadline in Section 2255(f)(1), his motion should be dismissed as untimely.

2. If the Court reaches the merits of the motion, Gould's assertions should be rejected as conclusory.

"[M]ere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989). Vague references to constitutional violations are insufficient to raise an issue in a section 2255 motion. *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993).

Here, Gould's motion makes only a vague, conclusory allegation of error that is so lacking in specificity and discussion that it should be rejected. After noting the holdings in *Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016), and, by inference, the limitations period provided in 28 U.S.C. § 2255(f)(3), Gould simply asserts that "the predicate offense upon which this count (the 924(c) count) is based (credit union robbery) is not a crime of violence in light of the Supreme Court decision in *United States v. Johnson*." (Motion at 7.) He does not discuss the facts of his case, explain why he believes he was improperly sentenced under section 924(c)(1)(A) and 924(c)(1)(A)(ii), or provide any argument as to why his Armed Credit Union robbery does not qualify under section 924(c)(3)(A)'s elements clause, or even any argument as to why he believes *Johnson* applies to section 924(c)(3)(B)'s residual clause. (*See id.*) Gould's conclusory assertions are inadequate to permit this Court to vacate his section 924(c) conviction and sentence.

3. Gould's claim is procedurally barred because he did not raise it on direct appeal, and he does not demonstrate that *Johnson* and *Welch* allow him to avoid the procedural default.

Gould's sole argument on collateral review is that his sentence is unlawful in light of *Johnson*, in which the Supreme Court held that the residual clause of the ACCA's "violent felony" definition is void for vagueness. Although vague and conclusory, the government presumes that Gould's argument is that section 924(c)'s residual-clause definition of "crime of violence" is void for vagueness for the same reasons explained in *Johnson.* This argument is procedurally barred because he did not raise it on direct appeal. A defendant generally may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default—i.e., the failure to raise the issue on direct appeal—and "actual prejudice" resulting from the error. *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). "[F]utility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). Without a showing of cause, the Court need not reach prejudice. *See United States v. Scruggs*, 714 F.3d 258, 264-65 (5th Cir. 2013). As previously explained, *Johnson* has no direct applicability and does not save Gould's procedural default. Because he is procedurally barred from asserting this claim, the Court should deny his motion.

4. *Johnson* does not impact Gould's section 924(c) conviction and sentence, so his *Johnson*-based motion to vacate should be denied.

Section 924(c)(3) defines a "crime of violence" as a felony offense that "(A) has as an element the use, attempted use, or threatened use of physical force against the

person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Paragraph (A) is commonly referred to as the "force" clause, and paragraph (B) is commonly referred to as the "residual" clause. A crime has as an element the "use … of physical force" if committing it requires the use of matter or energy sufficient to cause physical pain or injury. *See Johnson v. United States*, 559 U.S. 133, 138-40 (2010) (*Johnson I*).

18 U.S.C.§§ 2113(a) and (d) state, in relevant part

> (a) Whoever, by force and violence or by intimidation, takes or attempts to take from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . .
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

With respect to the elements of Gould's counts of conviction, in his Armed Credit Union Robbery charge it was alleged that he "unlawfully and knowingly by force and violence, and by intimidation did take from the person or presence of another . . . money . . . and in committing and in attempting to commit said credit union robbery, did assault a person, and put in jeopardy the life of a person . . . by the use of a dangerous weapon, to wit, a firearm, while engaged in taking the money." (CR Dkt. No. 3, Indictment, Count 3). And Gould's conviction under 18 U.S.C. § 924(c) alleges that he "during and in relation to a crime of violence . . . did knowingly carry a firearm . . . in furtherance of a

crime of violence . . . that is, Armed Credit Union Robbery, as charged in Count 3 of this indictment." (CR Dkt. No. 3, Indictment, Count 4). Gould's factual resume likewise sets out elements of his convictions that make it clear that the "force" clause of 18 U.S.C. § 922(c) are satisfied:

> 18 U.S.C. § 2113(a) and (d):
>
> *First*: That the defendant intentionally took from a person or presence of another, money;
>
> *Second*: That the money belonged to or was in the possession of a federally insured bank at the time of the taking; and,
>
> *Third*: That the defendant took the money by means of force and violence or by means of intimidation.
>
> *Fourth*: That in committing the crime, the defendant put in jeopardy the life of a person by the use of a dangerous weapon.
>
> 18 U.S.C. 924(c)(1)(A) and 924(c)(1)(A)(ii):
>
> *First*: That the defendant committed the crime of armed bank robbery, which is a crime of violence; and
>
> *Second*: That the defendant knowingly used or carried a firearm during and in relation to the defendant's commission of the bank robbery.
>
> (CR Dkt. No. 36, Factual Resume, p. 2).

One court has carefully addressed the issue raised by Gould and has specifically rejected a *Johnson*-based challenge to section 924(c), concluding that robbery, in violation of 18 U.S.C. § 2113(a), is a "crime of violence" within the meaning of the force clause of 18 U.S.C. § 924(c)(3), because it "has as an element the use, attempted use, or threatened use of physical force" – specifically, the taking or attempted taking of property

"by force and violence, or by intimidation." *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016). In *McNeal*, the defendant's convictions included a count of bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and one count of brandishing a firearm during that bank robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), which are the same offenses of conviction before the Court in this case. *McNeal*, therefore, is on point, as it deals specifically with the definition of "crime of violence" in the context of 18 U.S.C. § 924(c)(1)(A)(ii), rather than the ACCA's residual clause, which was not involved in this case.

Furthermore, by way of analogy, the Hobbs Act, which also deals with robbery offenses, but under a different statute, defines "robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). Thus, because Hobbs Act "robbery" "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," it has been held to be a crime of violence under section 924(c)(3)(A). Every court that has addressed whether Hobbs Act robbery, like Gould's Credit Union robbery, continues to qualify as a crime of violence under section 924(c) post-*Johnson* has held that it does. In *In re Fleur*, for example, the prisoner sought authorization to bring a successive collateral attack, claiming that *Johnson* invalidated his section 924(c) conviction and sentence. __ F.3d __, 2016 WL 3190539, at *1 (11th Cir. June 8, 2016). The Eleventh Circuit explained that it need not decide whether *Johnson* invalidated section 924(c)(3)(B)'s residual clause "because Saint

Fleur's companion conviction for Hobbs Act robbery, which was charged in the same indictment as the § 924(c) count, clearly qualifies as a 'crime of violence' under the use-of-force clause in § 924(c)(3)(A)." *Id.* at *3; *see also United States v. Howard*, __ F.3d __, 2016 WL 2961978, at *1 (9th Cir. May 23, 2016) (holding that, even after *Johnson*, Hobbs Act robbery qualifies as a crime of violence under section 924(c)(3)(A)).

District courts have likewise routinely rejected *Johnson*-based challenges to section 924(c) convictions. They have unanimously concluded that Hobbs Act robbery is a crime of violence under section 924(c)(3)(A). Recently, for example, the Western District of Louisiana rejected a claim that, in light of *Johnson*, Hobbs Act robbery did not qualify as a section 924(c) "crime of violence." *United States v. Reed*, 2016 WL 2892055 (W.D. La. May 16, 2016). The court explained that "§ 1951 expressly includes in its definition any offense that "has as an element the use, attempted us, or threatened use of physical force against the . . . property of another" and includes in the definition of robbery "actual or threatened force, or violence, or fear of injury, immediate or future, to property." *Id.* at *4. As a result, the court "concurs with our sister courts and finds that a Hobbs Act robbery falls within the force clause of § 924(c)." *Id.*[2]

[2] *See, e.g.*, *United States v. Castillo*, 2016 U.S. Dist. LEXIS 58265 (D. N.M. May 2, 2016); *United States v. Luong*, 2016 U.S. Dist. LEXIS 53151 (E.D. Cal. April 20, 2016); *United States v. Johnson*, 2016 U.S. Dist. LEXIS 62364 (D. Nev. May 11, 2016); *United States v. Smith*, 2016 U.S. Dist. LEXIS 65543 (D. Nev. May 18, 2016); *United States v. Coleman*, 2016 U.S. Dist. LEXIS 48887 (N.D. Ill. April 12, 2016); *United States v. Moore*, 2016 U.S. Dist. LEXIS 59869 (E.D. Mich. May 5, 2016); *United States v. Reed*, 2016 U.S. Dist. LEXIS 64894 (W.D. La. May 16, 2016); *United States v. Williams*, 2016 US Dist. LEXIS 50686 (D. Me. April 15, 2016); *United States v. Brownlow*, 2015 WL 6452620 (N.D. Ala. Oct. 26, 2015); *United States v. Melgar-Cabrera*, 2015 U.S. Dist. LEXIS 145226 (D. N.M. Aug. 25, 2015); *United States v. Anglin*, 2015 U.S. Dist. LEXIS 151027 (E.D. Wis. Nov. 6, 2015); *United States v. Tsarnaev*, 2016 U.S. Dist. LEXIS 5428, at *55-56 (D. Mass. Jan. 15, 2016); *United States v. Pena*, 2016 U.S. Dist. LEXIS 18329 (S.D.N.Y. Feb. 11, 2016); *Hallman v. United States*, 2016 U.S. Dist. LEXIS 17608 (W.D.N.C. Feb. 12, 2016); *Brown v. United States*, 2016 U.S. Dist. LEXIS 19682 (E.D. Va. Feb. 9, 2016); *United*

This Court should reach the same conclusion in this case. Like the defendants in the above cases, Gould was convicted of robbery. 18 U.S.C. § 2113(a) has as an element "the use, attempted use, or threatened use of physical force" because it specifically criminalizes the taking or attempted taking of property "by force and violence, or by intimidation." Gould fails to distinguish the chorus of circuit court case law and district court opinions undermining his position.[3]

States v. Bennett, 2016 U.S. Dist. LEXIS 9934 (E.D. Va. Jan. 27, 2016); *United States v. Green*, 2016 U.S. Dist. LEXIS 7437 (D. Md. Jan. 21, 2016); *United States v. Walker*, 2016 U.S. Dist. LEXIS 3947 (E.D. Va. Jan. 12, 2016); *United States v. Wilson*, 2015 U.S. Dist. LEXIS 175861 (E.D. Va. Dec. 8, 2015).

[3] Although unnecessary for the resolution of this motion, Gould's conviction is likewise valid under section 924(c)(3)(B)'s definition, which was not invalidated by *Johnson*. In holding ACCA's residual clause unconstitutionally vague, the Court relied on language in section 924(e)(2)(B) that is not present in section 924(c)(3)(B) and that makes the former broader and less definite than the latter. Specifically, it relied on the introductory list of crimes ("burglary, arson, or extortion"), which is not present in 924(c)(3)(B); the broadening of the definition to include risks of injury that arise both during and after the crime is committed (in contrast to section 924(c)(3)(B), which requires that the risk of injury occur "in the course of committing the offense"); and the broadening of the definition to include all crimes that present a substantial risk of "injury to another" (in contrast to section 924(c)(3)(B), which more narrowly requires that the crime involve a substantial risk of the use of "physical force"). These are material distinctions that save section 924(c)(3)(B) from being unconstitutionally vague under *Johnson*. At least one court has also held that the residual clause of 18 U.S.C. § 924(c)(3) is not unconstitutionally vague. *See United States v. Prickett*, __F.3d__, 2016 WL 4010515 (8th Cir. 2016). ("Section 924(c)(3)(B) is the very type of statute that the *Johnson* Court explained would not be unconstitutionally vague under its holding.")

CONCLUSION

Gould's motion should be dismissed because it is time barred, conclusory, and procedurally barred. Even if Gould could clear these hurdles, he would still not be entitled to relief because *Johnson* can provide him no relief. Thus, the government respectfully requests that the Court deny Gould's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 22, 2016, I filed this response with the clerk of court for the U.S. District Court, Northern District of Texas. I also certify that a copy of this response was sent to Timothy Dale Gould, Register Number 28900-180, FCI Fort Worth, Federal Correctional Institution, P.O. Box 15330, Fort Worth, TX 76119, by first class certified mail.

/s/ Steven M. Sucsy
STEVEN M. SUCSY

In the United States District Court
for the Northern District of Texas
Lubbock Division

Timothy Dale Gould,	§	
Petitioner,	§	
	§	Case No. 5:16-CV-129-C
v.	§	Criminal Case 5:02-CR-89-01
	§	
United States of America,	§	
Respondent.	§	
	§	

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

The Government raises four main arguments against Mr. Gould's petition: (1) that the petition is untimely; (2) that the petition is too "conclusory" because it does not contain detailed legal arguments (which happens to be prohibited by this Court's own rules); (3) that Mr. Gould's *Johnson*-based claim was somehow procedurally defaulted; and, finally, (4) that *Johnson* does not impact his conviction or sentence for violating 18 U.S.C. § 924(e). Each of these contentions is wrong. They are addressed in reverse order..

I. UNDER THE LOGIC OF *JOHNSON V. UNITED STATES*, MR. GOULD'S CONVICTION AND SENTENCE FOR VIOLATING 18 U.S.C. § 924(C) MUST BE VACATED.

Mr. Gould was convicted of possession of a firearm in furtherance of a federal "crime of violence." The definition of "crime of violence" is found at 18 U.S.C. § 924(c)(3):

> **(3)**For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(B)** *that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*

The highlighted language, which is the focus of this brief, is materially identical to 18 U.S.C. § 16(b).

In this case, the predicate "crime of violence" was credit union robbery, a violation of 18 U.S.C. § 2113 While there is no dispute that credit union robbery was considered a crime of violence prior to *Johnson v. United States*, 135 S. Ct. 2551 (2015), that case cast serious doubt on the validity of § 924(c)'s residual clause. Without that clause, credit union robbery can no longer be considered a "crime of violence."

A. Section 924(c)'s residual clause must suffer the same fate as Section 924(e)'s residual clause.

At the outset, Mr. Gould acknowledges two unfavorable but distinguishable recent decisions from the Fifth Circuit. In *In re Fields*, 826 F.3d 785 (5th Cir. June 17, 2016), the Fifth Circuit declined to authorize a successive § 2255 petition seeking to challenge a § 924(c) conviction under *Johnson*. *Fields* held that the Supreme Court has not yet "made" *Johnson* retroactive to 924(c). And in *United States v. Gonzalez-Longoria*, __F.3d __, 2016 WL 4168127 (Aug. 5, 2016) (en banc), the full Fifth Circuit held that 18 U.S.C. § 16(b) is not unconstitutionally vague. Though the statutes are identical, at least one circuit court has reached different conclusions when considering whether § 16(b) and § 924(c)(3)(B) are unconstitutionally vague. *Compare Shuti v. Lynch*, 828 F.3d 440, (6th Cir. 2016) (holding § 16(b) to be unconstitutionally vague) *with United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (rejecting defendant's vagueness challenge to § 924(c)).

1.* Johnson *expressly overruled the "ordinary case" approach to determining whether a felony qualifies as a crime of violence.

In *Johnson,* the Supreme Court held that the ACCA residual clause is unconstitutionally vague because the process by which courts categorize prior convictions as violent felonies is too "wide-ranging" and indeterminate. *Johnson*, 135 S. Ct. at 2557, As a result, ACCA "both denies fair

notice to defendants and invites arbitrary enforcement by judges." *Id.* *Johnson* concluded that the test was unworkable and ultimately inconsistent with due process.

The Court began its analysis by explaining that, under *Taylor v. United States*, 495 U.S. 575 (1990), ACCA requires the categorical approach to determine whether a particular statute qualifies as a violent felony. *Id.* Courts must assess whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual might have committed it on a particular occasion." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

The Court further clarified that the residual clause "*requires* a court to picture the kind of conduct that the crime involves 'in the *ordinary case*,' and to judge whether that abstraction presents a serious risk of potential injury." *Id.* (citation omitted) (emphasis added). The Court linked the "ordinary case" framework to *James v. United States*, 550 U.S. 192 (2007), in which it held, "We do not view that approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony. . . Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *Id.* at 208 (citations omitted) (emphasis added). "As long as the offense is of a type that, *by its nature*, presents a serious risk of injury to another, it satisfies the requirements of [ACCA's] residual clause." *Id.* at 209 (emphasis added, brackets supplied).

Johnson concluded that the process of determining what is embodied in the "ordinary case" rather than "real-world facts" is fatally flawed, rendering ACCA unconstitutionally vague. "Grave uncertainty" surrounds the method of "determin[ing] the risk posed by the "judicially imagined

'ordinary case.'" *Johnson*, 135 S. Ct. at 2557. "The residual clause offers no reliable way to choose between . . . competing accounts of what 'ordinary' . . . involves." *Id.*

The *Johnson* Court considered and rejected different ways that a court might envision the hypothetical "ordinary case" since the statute offers no guidance. Specifically, the Court explained that a statistical analysis of reported cases, surveys, expert evidence, Google, and gut instinct are all equally unreliable in determining the "ordinary case." *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc)). Although earlier ACCA cases tried to rely on statistical analysis and "common sense," *Johnson* concluded that these methods "failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 2559 (referring to *Chambers v. United States*, 555 U.S. 122 (2009), and *Sykes v. United States*, 564 U.S. 1 (2011)).

This flaw alone establishes the residual clause's unconstitutional vagueness. The Court, however, explained that a closely related flaw exacerbates the problem. The residual clause also "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Although the level of risk required under the residual clause must be similar to the enumerated offenses (burglary, arson, extortion, or crimes involving use of explosives), *Johnson* rejected the notion that comparing a felony's "ordinary case" to the risk posed by certain enumerated offenses cures the constitutional problem.

Thus, *Johnson* not only invalidated the ACCA residual clause, but it invalidated the "ordinary case" analysis and statutory provisions that compel such an analytical framework. In other words, the only way to apply the residual clause is to use the "ordinary case" analysis, and the "ordinary case" analysis is impossible to apply in a constitutional manner.

2. The Supreme Court's ruling in* Johnson *directly applies to 18 U.S.C. § 924(c)(3)(B).

Section 924(c)'s residual clause has the same flaws that rendered ACCA's residual clause unconstitutionally vague. The statutory phrases are not identical, but the differences have no impact on the constitutional analysis.

Although the risk at issue in ACCA is a risk of injury, and the risk at issue in Section 924(c) is a risk that force will be used, this difference is immaterial to the due process problem and has no impact on the *Johnson* decision. The Court's holding did not turn on the type of risk, but rather how a court assesses and quantifies the risk. That inquiry is the same under both the ACCA and § 924(c). Both statutes require courts first to picture the "ordinary case" embodied by a felony, and then to decide if it qualifies as a crime of violence by assessing the risk posed by the "ordinary case."

The Fifth Circuit has explicitly held that a court must use the same unpredictable "ordinary case" inquiry under § 924(c)(3):

> We use the so-called categorical approach when applying these definitions to the predicate offense statute. "The proper inquiry is *whether a particular defined offense, in the abstract, is a crime of violence* [.]" *United States v. Chapa–Garza*, 243 F.3d 921, 924 (5th Cir.2001) (applying 18 U.S.C. § 16(b)). We do not consider the facts underlying Williams's conviction; *his actual conduct is immaterial.* Instead, we examine only the statutory text of § 242 to determine whether it satisfies the definition of § 924(c)(3).

United States v. Williams, 343 F.3d 423, 431 (5th Cir. 2003) (emphasis added).

In litigating *Johnson*, the government itself, through the Solicitor General, agreed that the phrases at issue in *Johnson* and here pose the same problem. First noting that the definitions of a crime of violence in both § 924(c)(3)(B) and § 16(b) are identical, the Solicitor General stated, "Although Section 16 refers to the risk that *force* will be used rather than that *injury* will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section

16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Johnson v. United States*, S. Ct. No. 13-7120, Supplemental Brief of Respondent United States at 22–23 (available at 2015 WL 1284964 at *22–*23). The Solicitor General was right. Section 924(c)(3)(B) and the ACCA are essentially the same and contain the same flaws. This Court should hold the government to that concession.

Section 924(c)(3)(B) also presents the second flaw evident in ACCA. In addition to identifying the abstract "ordinary case" of a federal offense, the court must also decide how much risk of intentional use of force is enough to bring the offense within § 924(c)(3)(B). Section 924(c) does not provide sufficient guidance, and that clause is unconstitutionally vague.

B. Without the residual clause, federal credit union robbery cannot be considered a crime of violence under § 924(c).

The government argues that credit union robbery falls under § 924(c)(3)(A), that is, its "elements" or "use of force" clause. Not so. Federal bank robbery does not have "force" as an element. The Fifth Circuit has repeatedly considered what it means for an offense to have "use of physical force against the person [or property] of another" as an element. That phrase occurs in several statutory and guideline provisions: U.S.S.G. § 4B1.2(a)(1); 18 U.S.C. § 924(e)(2)(B)(i) (ACCA's "violent felony"); 18 U.S.C. § 924(c)(3)(A); 18 U.S.C. § 16(a); USSG § 2L1.2, cmt., n.1(B)(iii) (Nov. 1, 2015 ed.) (sentencing guideline's definition of "crime of violence" for purposes of 16-level enhancement). For every predicate that includes a use-of-force prong, the Fifth Circuit has held that "use of force" means the intentional use of direct, destructive, physical force. For example, in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), the Fifth Circuit held that an offense defined as *causing injury* was not an offense which had *use of force* as an element. That

is because a defendant could cause injury by "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* at 879. None of those situations involve "use of force," and a crime that can be committed in any of those ways does not have force as an element. *Id.*; *see also, e.g.*, *United States v. Herrera-Alvarez*, 753 F.3d 132, 139 (5th Cir. 2014) ("Under the reasoning of *Villegas-Hernandez*, the harmful effect of the poison itself is not sufficient to furnish the destructive or violent physical force that the 'use of force' prong of § 2L1.2 demands."); *United States v. Johnson*, 286 F. App'x 155, 157 (5th Cir. 2008) (unpub.) (citing poison and traffic); *United States v. De La Rosa*, 264 F. App'x 446, 447–449 (5th Cir. 2008) (same).

Just as "[t]here is . . . a difference between the use of force and the causation of injury," *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc), there is also a difference between threatened harm and threatened use of force. Thus, the Fifth Circuit held that the California offense of "criminal threat" and the Pennsylvania crime of terroristic threatening do not have "threatened use of force" as an element, even though both statutes require proof that the defendant threatened to harm the victim. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276–277 (5th Cir. 2010), and *United States v. Ortiz-Gomez*, 562 F.3d 683, 687 (5th Cir. 2009).

The elements of federal bank robbery *do not* include proof that the defendant used force, attempted to use force, or threatened to use force. As the indictment and factual resume in this case demonstrate, a defendant may be guilty of credit union or bank robbery if he takes the money by "force and violence," but that is not a necessary element of proof. It is also sufficient if the defendant took the money by "intimidation." The federal statute is not divisible between these two alternatives.

The Fifth Circuit, like most (if not all) circuit courts, defines intimidation *very* broadly. A defendant may *intimidate* the victim *without* threatening to use force. For example, in *United States v. Higdon*, 832 F.2d 312 (5th Cir. 1987), the court stated:

> Under the definition of intimidation that we first set forth in [*United States v. Jacquillon*, 469 F.2d 380 (5th Cir.1972),] which we reaffirm here, "to make fearful or to put into fear," intimidation results when one individual acts in a manner that is reasonably calculated to put another in fear. Thus, from the perspective of the victim, a taking "by intimidation" under section 2113(a) occurs when an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts.

Higdon, 832 F.2d at 315. Thus, *fear of harm* accomplishes intimidation, even without a threat to actually use force. Moreover, "a defendant can be convicted under section 2113(a) *even if he did not intend* for an act to be intimidating." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (citing *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir.2003); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir.1996); and *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir.1993)). Bank robbery can be committed without intentional use of direct physical force or the threat of intentional use of direct physical force.

"[I]ntimidation" includes at least some non-violent and non-forceful takings, or else the phrase would be completely superfluous. The courts have struggled to come up with a precise definition for "intimidation," but have been willing to affirm convictions so long as the robber actually demanded money. The Fifth Circuit long ago held that a robber need not actually threaten a victim so long as he acts "in a manner that is reasonably calculated to put another in fear." *Higdon*, 832 F.2d at 315 (discussing *United States v. Jacquillon*, 469 F.2d 380, 385 (5th Cir. 1972)). Critically, that fear need not be concerned with any *use of force*. That much is clear from *Higdon* and the cases it cites:

> We think that the record is replete with evidence of a taking "by intimidation." Higdon's actions—from his insistent demands that the tellers empty their cash drawers under circumstances calculated to engender fear and surprise in banking personnel, to his scarcely-veiled threat of some unarticulated reprisal should the two victims "dare" to get up from the floor—were pungent with intimidation. Even we, who must rely on a dry, appellate record, can discern the aggressive, coercive nature of Higdon's terse and pointed orders to the savings and loan tellers. Further, Higdon's posture in the surveillance photographs, which are exhibits in the case, exudes an aggressive, threatening presence as he leans over the teller counter and, with his right hand, demands compliance by his gestures. We do not doubt that a jury reasonably could infer from the testimony of Russell and Dudek that the fear which they expressed reasonably resulted from the acts, the statements and the very posture of Higdon while robbing the bank.

Higdon, 832 F.2d 312, 315–316 (5th Cir. 1987).

Higdon favorably cited several decisions that were even further removed from any threat of "force." *See United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (The defendant handed teller a note that read, "Give me all your hundreds, fifties and twenties. This is a robbery." When the teller responded that she had none, the defendant replied, "Okay, then give me what you've got."); *see also United States v. Robinson*, 527 F.2d 1170, 1172 (6th Cir. 1975) (finding sufficient evidence of intimidation where the defendant wears a "leather coat" and, "after waiting somewhat nervously in line, attempts, at best, a sham commercial transaction . . . and commands with the imperative 'give' a teller to turn over 'all (her) money.'")

Since case after case holds that a defendant can be convicted of robbing "by intimidation" *without* any proof of a threat, it is odd that the government now contends that the statute requires proof of not only a threat, but threatened *use of force* as an element. In fact, the courts have interpreted *intimidation* so broadly that it is hard to find a demand that does not qualify as "intimidation." *C.f. United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004) (holding that an *attempted*

intimidation—entering with, but never delivering, a demand note—did not rise to an actual "intimidation").

A defendant robs "by intimidation" if he wears a leather coat and behaves nervously before making his demand. *Robinson*, 527 F.2d at 1172. Contrast that offense with the California offense of terroristic threating, which actually requires an explicit threat "to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat." Cal. Penal Code § 422. Surely *that* statute comes closer to containing an element of threatened use of force than the federal bank robbery offense. Yet the Fifth Circuit held that the offense has no element of "threatened use of physical force" in *Cruz-Rodriguez*, 625 F.3d at 276–277.

II. PROCEDURAL DEFAULT CANNOT BE INVOKED IN THIS CASE.

There are two reasons procedural default cannot be invoked by the Government here. First, Mr. Gould's claim is based upon a new rule announced by the Supreme Court that *overruled* previous Supreme Court and Fifth Circuit precedent. Second, once § 924(c) is stripped of its unconstitutionally vague residual clause, Mr. Gould is actually innocent of the offense.

A. Mr. Gould's petition relies on a new rule that was not reasonably available to him at the time of direct appeal.

At the time of Mr. Gould's original prosecution and sentence, the basis for his unconstitutional vagueness claim was not reasonably available to him or his counsel. Where a Supreme Court decision (1) "explicitly overrule[s] one of [the Supreme Court's] precedents"; (2) overturns a near-uniform body of circuit law; or (3) "disapproves a practice [the Supreme Court] has arguably sanctioned in the past," then a defendant can meet the "cause" standard to excuse any procedural default. *Reed v. Ross*, 468 U.S. 1, 17 (1984). When the Supreme Court makes a new rule

retroactive, "there will almost certainly have been no reasonable basis upon which an attorney previously could have" urged that claim. *Id.* Thus, the failure to raise the claim previously is "sufficiently excusable to satisfy the cause requirement." *Id.*

The rule announced in *Johnson* was not available to Mr. Gould at the time of his conviction, sentencing, and direct appeal. The rule in *Johnson* is new, and the Supreme Court made that rule retroactive. Thus, there is cause to excuse any procedural default. Prejudice is demonstrated by the merits argument.

B. Mr. Gould is actually innocent of the offense of possessing a firearm in furtherance of a "crime of violence," as that statute is limited by *Johnson.*

Alternatively, Mr. Gould can avoid the procedural default defense due to actual innocence or miscarriage of justice. Once his arguments on the merits are accepted, then he is not guilty of violating 18 U.S.C. § 924(c), as a matter of law. Actual innocence provides an exception to many procedural defaults in the habeas context. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931–1932 (2013) ("We have applied the miscarriage of justice exception to overcome various procedural defaults."

III. MR. GOULD WAS PROHIBITED FROM RAISING DETAILED LEGAL ARGUMENT IN HIS PETITION.

The Government faults Mr. Gould because his claim of error allegedly lacks "specificity and discussion." (Resp. at 6.) But the Rules and Orders of this Court explicitly forbid the kind of detailed argument demanded by the Government. "Each ground for relief and supporting factual allegations must be brief, concise and limited to factual statements. *No arguments or citations of authority may be included in the petition.*" N.D. Tex. Misc. Order No. 13, Establishing a Procedure to Be Followed in Petitions And/Or Motions For Post Conviction Relief Filed Pursuant to The Provisions of 28 U.S.C., Sections 2254 and 2255, and Delegations of Powers to Certain United States Magistrates,

at 2 (N.D. Tex. Mar. 18, 1977). The required form promulgated by this District and available on the Court's website reiterates this point in ALL CAPITAL LETTERS: "Supporting FACTS (tell your story briefly without citing cases or law)." It would be unfair and a denial of the constitutional rights of habeas corpus and access to the courts to *forbid* a petitioner from providing detailed argument, citations, and discussion in his petition, then to immediately dismiss his petition because it did not contain argument, citations, and discussion.

The Government does not claim that it is surprised or unsure of what Mr. Gould is arguing. It has prepared several pages responding directly to his argument. To the extent there is any doubt about what Mr. Gould is arguing, this Reply whould e.iminate it.

IV. THIS PETITION IS TIMELY FILED AND NOT SUBJECT TO DISMISSAL.

The Government also argues that this Court should dismiss the petition as untimely without even considering the merits. But the timeliness question is closely tied to the merits, and they cannot be considered separately.

Under 28 U.S.C. § 2255(f), the one-year limitation period begins to run "from the latest of" four events:

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(4)** the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

The Government's discussion under the "statute of limitations" section is quite merits-focused. (Resp., Doc. 3, at 3–5.) The arguments are the same as those that later appear in a discussion of the merits of the petition. (Resp. at 7–12.) The government narrowly construes *Johnson* as applying only to the residual clause of the Armed Career Criminal Act, but the "right" Mr. Gould asserts is the right to be free from an ad-hoc judicial determination of whether a judge-imagined ordinary case of an offense satisfies an uncertain "risk" standard. *Johnson* held that his type of rule did not provide adequate notice to defendants or guidance to sentences courts, and the same type of analysis is used in connection with the 924(c) residual clause.

If, as Petitioner contends, *Johnson* recognized the "right" to be free of an unconstitutionally vague residual clause based upon a categorical assessment of hypothetical risk, then that one-year period of limitation began to run on June 25, 2015—the date *Johnson* was decided. Mr. Gould filed his petition on June 22, 2016 (Doc. 1), thus falling within the one-year period after *Johnson*.

Counsel is aware that the Fifth Circuit refused to authorize a successive petition in *In re Fields*, __ F.3d __, 2016 WL 3383460 (5th Cir. June 17, 2016). But *Fields* dealt with a different statute and a different legal standard. If Mr. Gould were filing a *second* or *successive* § 2255 petition, he would need to rely upon "a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable." 28 U.S.C. § 2255(h)(2) (emphasis added). But Subsection (f)(3) is broader in at least two respects. First, the new "right" need not be *constitutional*. *Compare* 28 U.S.C. § 2255(h)(2) ("a new rule *of constitutional law*") *with* (f)(3) (". . . if that right has been newly recognized by the Supreme Court"). Second, and more importantly for present purposes, a defendant seeking to proceed under § 2255(h)(2) must prove that the new constitutional rule has been "made retroactive to cases on collateral review *by the Supreme Court*."

§ 2255(h)(2) (emphasis added). Subsection (f)(3) applies if *any court* makes the new right retroactive, so long as the Supreme Court is the one who "recognized" the right. *See* 28 U.S.C. § 2255(f)(3). Subsection (f)(3), unlike Subsection (h)(2), allows the court considering the petition to make the first determination about retroactivity:

> Had Congress desired to limit § 2255(3)'s retroactivity requirement, it would have similarly placed a 'by the Supreme Court" limitation immediately after the phrase "made retroactively applicable to cases on collateral review" in § 2255(3). Thus, we hold that § 2255(3) does not require that the retroactivity determination must be made by the Supreme Court itself.

United States v. Lopez, 248 F.3d 427, 431–32 (5th Cir. 2001); *accord United States v. Thomas*, 627 F.3d 534, 536–537 (4th Cir. 2010) (and cases cited) ("We now join those circuits that have considered the issue and hold that § 2255(f)(3) does not require that the initial retroactivity question be decided in the affirmative *only* by the Supreme Court.")

This Court has not yet decided whether the rule announced in *Johnson* applies to 18 U.S.C. § 924(c) and,, if so, that rule is retroactive. As for *In re Fields*, that case held that the disagreement among the lower courts showed that the Supreme Court itself had not yet made the rule retroactive. *See Fields*, 2016 WL 3383460, at *1 ("Further, even if *Johnson* does apply to that provision, the Supreme Court has not addressed whether this arguably new rule of criminal procedure applies retroactively to cases on collateral review."). But that decision is for this Court in the first instance, and it cannot be made in an absence of a ruling on the merits.

Finally, even if the petition were not filed within the time limits of 28 U.S.C. § 2255(f), *McQuiggin* establishes that a claim of actual innocence is enough to defeat a claim based on the statute of limitaitons.

THEREFORE, Petitioner asks the Court to grant his motion to vacate the 924(c) count.

Respectfully submitted,

/s/ J. Matthew Wright

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Certificate of Service

I filed this motion via ECF. Mr. Sucsy is a registered filer and is deemed served.

/s/ J. Matthew Wright

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

TIMOTHY DALE GOULD,	)	
	)	
Movant,	)	CIVIL ACTION NO.
	)	5:16-CV-129-C
v.	)	CRIMINAL NO.
	)	5:02-CR-089-01-C
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

On June 22, 2016, Timothy Dale Gould ("Movant") filed his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. The United States of America ("Respondent") filed its Response on August 22, 2016. Movant, represented by the Federal Public Defender, filed his Reply on September 19, 2016.[1]

Gould pleaded guilty to one count of armed credit union robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), and one count of using and carrying a firearm during and in relation to a crime of violence and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (c)(1)(A)(ii). On January 23, 2004, he was sentenced to a 357-month term of imprisonment. Gould did not appeal his conviction or sentence. This is his first § 2255 motion.

Gould pleads that he is entitled to relief under the Supreme Court's decision in *Johnson v. United States*, which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. 135 S. Ct. 2551 (2015); 18 U.S.C. § 924(e)(2)(B)(ii).

[1] Movant's Reply is timely pursuant to the Court's Order of September 13, 2016.

Specifically, he argues that his § 924(c) conviction arises from an offense that is not a crime of violence in light of the Supreme Court decision in *Johnson* and that, "[a]fter *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016), [his] sentence is above the statutory maximum." In *Welch*, the Supreme Court held that its decision in *Johnson* announced a new substantive rule of constitutional law that applies retroactively in a collateral challenge to an ACCA residual clause sentence. But Gould was not sentenced under the ACCA's residual clause. And even if his sentence had been imposed under the residual clause of § 924(c)(3), the United States Court of Appeals for the Fifth Circuit has recognized that the retroactively applicable rule of *Johnson* does not extend to the differently worded "crime of violence" definition under § 924(c) until the Supreme Court announces otherwise. *In re Fields*, 826 F.3d 785, 786 (5th Cir. 2016) (per curiam). *Johnson* does not apply in any way to Gould's § 2255 Motion and his motion is therefore without merit. Further, the Court is of the opinion that – because *Johnson* does not apply – Gould's Motion is otherwise time-barred because it was filed more than one year after the Court's judgment became final. 28 U.S.C. § 2255(f).

The Court has carefully considered Gould's Motion, the United States' Response, Gould's Reply, and the relevant records, and is of the opinion that Gould's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody should be **DENIED** and **DISMISSED with prejudice** for each of the reasons stated in the United States' thorough and well-drafted Response.

All relief not expressly granted is **DENIED**, and any pending motions are **DENIED**.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. For the reasons set forth

herein, Movant has failed to show that a reasonable jurist would find (1) this Court's "assessment of the constitutional claims debatable or wrong" or (2) "is debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED.

Dated August 8, 2017.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

In the United States District Court
for the Northern District of Texas
Lubbock Division

Timothy Dale Gould,	§	
Petitioner,	§	
	§	Case No. 5:16-CV-129-C
v.	§	Criminal Case 5:02-CR-89-01
	§	
United States of America,	§	
Respondent.	§	
	§	

Notice of Appeal

Timothy Jay Gould hereby appeals this Court's order denying and dismissing the motion to vacate (Doc. 8) and the accompanying judgment (Doc. 9) to the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ J. Matthew Wright

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Certificate of Service

I filed this motion via ECF. Opposing counsel is a registered filer and is deemed served.

/s/ J. Matthew Wright

In the United States Court of Appeals
for the Fifth Circuit

United States of America,	§	
Plaintiff-Appellee,	§	
	§	
v.	§	Case No. 17-10993
	§	
Timothy Dale Gould,	§	
Defendant-Appellant.	§	
	§	

Motion for Certificate of Appealability

Appellant Timothy Dale Gould respectfully asks the Court to issue a certificate of appealability on the following issues:

1. Mr. Gould challenged his conviction and sentence for 18 U.S.C. § 924(c), arguing that they were unconstitutional under the reasoning announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Was his motion—filed within one year of *Johnson* and within one year of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), timely under 28 U.S.C. § 2255(f)(3)?

2. Is Mr. Gould's conviction and sentence for carrying a firearm in furtherance of a "crime of violence," subject to collateral attack under *Johnson* and *Dimaya*?

For the reasons expressed in the Brief in Support of this motion, Appellant asks the Court to issue the COA.

Respectfully submitted,

/s/ J. Matthew Wright
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Certificate of Service

I filed this motion via ECF on October 4, 2018. Opposing counsel, a registered filer, is deemed served.

/s/ J. Matthew Wright

Certificate of Compliance

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because this document contains 287 words.

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/s/ J. Matthew Wright

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NUMBER 17-10993

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

TIMOTHY DALE GOULD,
DEFENDANT-APPELLANT.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

BRIEF IN SUPPORT OF MOTION FOR CERTIFICATE OF APPEALABILITY

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant:	Timothy Dale Gould
Defense Counsel:	Office of the Federal Public Defender, Northern District of Texas Brandon Elliott Beck Edwin Gerald Morris J. Matthew Wright
Prosecution:	U.S. Attorney's Offices for the Northern District of Texas C. Richard Baker Christy Lee Drake Steven M. Sucsy James Wesley Hendrix
District Judge:	The Honorable Sam R. Cummings

/s/ J. Matthew Wright
Counsel for Appellant

Statement Regarding Oral Argument

I do not request oral argument at the COA stage.

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Jurisdictional Statement

The district court had original jurisdiction over this case pursuant to 18 U.S.C. § 3231 as well as 28 U.S.C. §§ 1331 and 2255. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. The district court entered written judgment on August 8, 2017. (ROA.56). Mr. Gould lodged a timely notice of appeal on August 29, 2017. (ROA.57). Under Federal Rule of Appellate Procedure 22(b)(2), that notice of appeal "constitutes a request" to issue a certificate of appealability "addressed to the judges of the court of appeals." Mr. Gould has filed a separate motion requesting a COA, and this brief is submitted in support of that motion.

Statement of the Case

A. Mr. Gould pleaded guilty to robbing a credit union and carrying a gun in furtherance of that offense.

Mr. Gould pleaded guilty in the Northern District of Texas to one count of armed credit union robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of using and carrying a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c). (ROA.185). The district court sentenced him to an aggregate term of 357 months: 57 months for the robbery and a consecutive term of 300 months for the gun crime. (ROA.186). Around the same time, he was convicted of similar offenses in the Western District of Texas which are the subject of a separate collateral attack

pending in that district.[1] He did not appeal his convictions or sentence from the Northern District of Texas.

B. Mr. Gould moved to vacate the gun conviction arguing that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, but the district court denied that motion.

After the Supreme Court issued its watershed decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Gould wrote to the district court requesting appointment of counsel. (ROA.190). The court appointed the Federal Public Defender's office. (ROA.192). Mr. Gould's motion challenging his § 924(c) conviction and sentence was filed on June 22, 2016—less than one year after *Johnson* was decided. (ROA.194–203).

Mr. Gould argued that his § 924(c) conviction could not survive scrutiny after *Johnson*, because credit union robbery could no longer count as a crime of violence. (ROA.10). The Government responded that the motion was untimely, "conclusory," procedurally barred, and meritless. (ROA.16–32). Mr. Gould responded to each argument in a Reply (ROA.38–52), but the district court agreed with the Government. (ROA.53–55). The court specifically held that *Johnson* did not apply to § 924(c), and therefore Mr. Gould's claim was meritless and untimely. (ROA.54). This timely appeal follows. (ROA.57).

[1] *See Gould v. United States*, No. 1:16-cv-774-SS (W.D. Tex. filed June 24, 2016).

Summary of the Argument

This Court should issue a COA.

First, reasonable jurists could disagree with the district court's conclusion that Mr. Gould's motion is untimely. Under 28 U.S.C. § 2255(f)(3), a motion to vacate is timely if filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Reasonable jurists from several circuits, including the Fifth, have concluded that the timeliness question is debatable in light of intervening Supreme Court precedent.

Second, and for related reasons, reasonable jurists have concluded that § 924(c)(3)(B) is unconstitutionally vague. As of the time this brief is filed, the issue is actually foreclosed in Mr. Gould's favor by *United States v. Davis*, __ F.3d __, 2018 WL 4268432 (5th Cir. Sept. 7, 2018).

Third, it is debatable whether a "robbery" under 18 U.S.C. § 2113 satisfies the *elements* clause of 18 U.S.C. § 924(c)(3)(A). At least two federal district judges have concluded that federal robberies by "intimidation" do not have threatened use of physical force as an element. *See Knox v. United States*, No. 16-CV-5502, at *2–3 (W.D. Wash. Jan. 24, 2017) (Settle, J.) (federal bank robbery); *Doriety v. United States*, 2:16-cv-00924-JCC, Dkt. 12 (W.D. Wash. 2016) (Coughenour, J.) (federal bank robbery).

Eighth Circuit Judge Melloy has similarly concluded that this claim "warrants further explanation." *See Holder v. United States*, 836 F.3d 891, 893 (8th Cir. 2016) (Melloy, J., dissenting). This is part of a broader division among federal judges about how to address robbery convictions after *Johnson*. *See*, e.g., *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017) (discussing "eleven circuit-level decisions" about robbery, in which "five courts have found no violent felony and six have found a violent felony").

Fourth, if § 924(c)(3)(B) is unconstitutionally vague, and if robbery under § 2113 depends upon that residual clause to count as a "crime of violence," then Mr. Gould's predicate offense of credit union robbery would not violate the remaining portion of § 924(c). In other words, if the predicate offense is categorically excluded as a "crime of violence," then Mr. Gould is actually innocent of carrying a weapon *in furtherance of* a COV.

Argument

Mr. Gould is entitled to the issuance of a COA if he makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court denies relief (at least in part) on procedural grounds, "a COA should issue when the [appellant] shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it

debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, the procedural questions likely collapse into one. The district court's limitations holding flowed directly from its view that § 924(c)(3)(B) was not vague:

> *Johnson* does not apply in any way to Gould's § 2255 Motion and his motion is therefore without merit. Further, this Court is of the opinion that—because *Johnson* does not apply—Gould's motion is otherwise time-barred because it was filed more than one year after the Court's judgment became final.

(ROA.54).

Mr. Gould satisfies the COA standard because "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *accord Miller-El*, 537 U.S. at 327.

Issues for Which a COA is Requested

1. Mr. Gould challenged his conviction and sentence for 18 U.S.C. § 924(c), arguing that they were unconstitutional under the reasoning announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Was his motion—filed within one year of *Johnson* and within one year of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), timely under 28 U.S.C. § 2255(f)(3)?

2. Is Mr. Gould's conviction and sentence for carrying a firearm in furtherance of a "crime of violence," subject to collateral attack under *Johnson* and *Dimaya*?

Argument

I. This Court should issue a COA because recent decisions cast serious doubt on the district court's decision.

The Circuit Courts are currently divided (several ways) over the effect of *Johnson*. Everyone agrees that *Johnson* struck down ACCA's residual clause. But courts have diverged on whether the rule also applies to other residual clauses that depend upon the application of an uncertain risk standard to the judicially imagined ordinary case of a crime. Courts are likewise divided on whether *Johnson* reset the deadline to file motions challenging sentences under these other residual provisions.

In 2016, the en banc Court Fifth Circuit held that 18 U.S.C. § 16(b) is not unconstitutionally vague. *See United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc). The Court later held that § 924(c)(3)(B) should be governed by the same vagueness analysis as § 16(b), because those provisions are identical. *See, e.g.*, *United States v. Garcia*, 857 F.3d 708, 711 (5th Cir. 2017) ("But because Garcia concedes that *Gonzalez-Longoria* is controlling, we affirm his conviction under § 924(c)."); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017), ("Jones's argument that § 924(c)(3)(B) is unconstitutionally vague under *Johnson* is foreclosed by our en banc decision in" *Gonzalez-Longoria*.); *United States v. Davis*, 677 F. App'x 933, 936 (5th Cir. 2017) ("We

recognize the possibility that identical language in two different statutes could be differently construed but see no reason to do so here.").

The Supreme Court overruled *Gonzalez-Longoria* in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya* held that § 16(b) is unconstitutionally vague. In light of *Dimaya*, this Court held that § 924(c)(3)(B) is unconstitutionally vague. *Davis*, 2018 WL 4268432, at *3 ("Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same.").

II. Reasonable jurists could debate the timeliness ruling.

The circuits have reached divergent opinions about whether a motion challenging a § 924(c) conviction is timely if filed within one year of *Johnson* or *Dimaya*. In *United States v. Williams*, 897 F.3d 660, 662 (5th Cir. 2018), the Court recognized that *Dimaya* "vitiated" the argument that *Johnson* does not apply outside of ACCA. But the Court did not follow its prior rulings that § 924(c)(3)(B) and § 16(b) must be analyzed alike for purposes of vagueness. Instead, the Court applied AEDPA's *statute of limitations* to hold that the motion to vacate was filed *too early*:

> Section 2255(f)(3), which governs the timeliness of Williams's § 2255 motion, provides that a motion must be filed within one year from the latest of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3) . . . The Supreme Court held in *Johnson*

> that § 924(e)(2)(B)(ii) is unconstitutionally vague—which commenced the one-year clock for defendants sentenced under that statute—and held in *Dimaya* that § 16(b) is unconstitutionally vague—which commenced the one-year clock for defendants sentenced under that statute—but it has made no predicate holding vis-à-vis § 924(c)(3)(B). Though the Court has instructed the courts of appeals to reconsider § 924(c)(3)(B) cases in light of *Dimaya* . . . , that instruction does not amount to a determination that the provision is unconstitutional. There is no "newly recognized" right for Williams to assert here.

Williams, 897 F.3d at 662. Critically, the Court decided that "[t]he one-year clock on § 924(c)(3)(B) has not yet started." *Id.*

But both before and after *Williams*, judges in the Fifth Circuit and elsewhere have recognized that it is at least debatable whether motions like Mr. Gould's are timely if filed within one year of *Dimaya*. *See, e.g., United States v. Whitfield*, No. 17-11208 (5th Cir. June 5, 2018) ("Whitfield has shown"—in a Johnson-based attack on § 924(c)—"that reasonable jurists would debate the correctness of the district court's time-bar determination."). The Fifth Circuit recently granted COA on the timeliness question in *United States v. Carreon*, No. 16-11239.

One panel of the Tenth Circuit explicitly held that a § 2255 motion challenging § 924(c)(3)(B) was timely because it was filed within one year of *Johnson*. *See United States v. Nguyen*, 733 F. App'x 451, 453 (10th Cir. 2018) ("Petitioner's motion raising a

Johnson claim was, in fact, timely."). That legal conclusion was later deleted in a "revised order." *United States v. Nguyen*, 16-3311, 2018 WL 4293240 (10th Cir. Aug. 6, 2018, "nunc pro tunc" to July 31, 2018).

Plenty of well-reasoned district court opinions agree that these motions are timely. E.g., *Chapman v. United States*, __ F. Supp. 3d __, No. 1:03-CR-296-6, 2018 WL 3470304, at *8 (E.D. Va. July 19, 2018) (Brinkema, J.), and cases cited therein; accord *United States v. Meza*, CR 11-133-BLG-DLC, 2018 WL 2048899, at *5 (D. Mont. May 2, 2018) (Christensen, C.J.) ("Congress intended the statute of limitations to eliminate delays in the federal habeas review process . . . not to create them.").

More importantly, this Court recently held that it *did not have the authority* to hold that § 924(c)(3)(B) survived *Johnson* and *Dimaya*. *See Davis*, 2018 WL 4268432, at *3. This Court joined multiple courts that have applied *Johnson* and *Dimaya* to hold that § 924(c)(3)(B) is unconstitutionally vague. *See, e.g., United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (quoting *Dimaya*, 138 S. Ct at 1216) ("Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combine to produce 'more unpredictability and arbitrariness than the Due Process Clause tolerates.'"); *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (vacating two defendants' § 924(c) convictions in light of *Dimaya*).

Given the rapidly changing legal landscape, and the existence of several well-reasoned decisions recognizing that *Dimaya* and *Johnson* require the excision of § 924(c)(3)(B), it is reasonably debatable whether Mr. Gould's motion was timely.

III. It is at least reasonably debatable whether credit union robbery satisfies the elements clause in 18 U.S.C. § 924(c)(3)(A).

It is also demonstrably debatable whether a "robbery" under 18 U.S.C. § 2113 satisfies the *elements* clause of 18 U.S.C. § 924(c)(3)(A). At least two federal district judges have concluded that federal robberies by "intimidation" do not have threatened use of physical force as an element. *See Knox v. United States*, No. 16-CV-5502 (W.D. Wash. Jan. 24, 2017) (Settle, J.) (federal bank robbery); *Doriety v. United States*, 2:16-cv-00924-JCC, Dkt. 12 (W.D. Wash. 2016) (Coughenour, J.) (federal bank robbery). Eighth Circuit Judge Melloy has similarly concluded that this claim "warrants further explanation." *See Holder v. United States*, 836 F.3d 891, 893 (8th Cir. 2016) (Melloy, J., dissenting). This is part of a broader division among federal judges about how to address robbery convictions after *Johnson*. *See*, e.g., *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017) (discussing "eleven circuit-level decisions" about robbery, in which "five courts have found no violent felony and six have found a violent felony").

Mr. Gould concedes that this Court decided the question in an adverse matter in *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). He nonetheless contends the issue remains debatable.

These matters are at least debatable, and that is why the Court should grant a COA.

Conclusion

Mr. Gould has shown that reasonable jurists could debate the correctness of the disposition below. That means he is entitled to the issuance of a certificate of appealability.

Respectfully submitted,

/s/ J. Matthew Wright
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Certificate of Service

On October 4, 2018, I filed this Brief through the Court's ECF system. Opposing Counsel is a registered filer and is deemed served.

/s/ J. Matthew Wright

Certificate of Compliance

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/s/ J. Matthew Wright

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-10993

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TIMOTHY DALE GOULD,

Defendant-Appellant

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

O R D E R:

Timothy Dale Gould, federal prisoner # 28900-180, pleaded guilty to armed credit union robbery in violation of 18 U.S.C. § 2113(a) and (d) as well as using and carrying a firearm during and in relation to a crime of violence and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) and (c)(1)(A)(ii). He was sentenced to a total of 357 months of imprisonment and five years of supervised release. He moves for a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion challenging his § 924(c) conviction based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).

To obtain a COA, Gould must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court's denial of federal habeas relief

is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In his COA motion, Gould asserts that his § 2255 motion was timely filed under § 2255(f)(3) because it was filed within one year of the decision in *Johnson*. Additionally, he argues that the residual clause of § 924(c)(3)(A) is unconstitutionally vague under the reasoning of *Johnson*, and that the district court erred in holding that his § 924(c) conviction was not subject to collateral attack under *Johnson*. He further contends for the first time in his COA motion that his § 924(c) conviction should be vacated in view of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

Although Gould has shown that reasonable jurists would debate the correctness of the district court's determination that his § 2255 motion was not timely filed, he has not shown that reasonable jurists would debate the correctness of the district court's conclusion that his § 2255 motion did not state a valid claim of the denial of a constitutional right. *See Slack*, 529 U.S. at 484. Accordingly, Gould's COA motion is DENIED.

Patrick E. Higginbotham

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Mar 25, 2019

Tyke W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit