APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4345

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

WILLIE JOHNSON,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Norman K. Moon, Senior District Judge. (3:02-cr-00015-NKM-RSB-1)

Argued: December 13, 2018 Decided: February 6, 2019

Before WILKINSON, HARRIS, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Harris and Judge Quattlebaum joined.

ARGUED: Lisa M. Lorish, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellant. Jennifer R. Bockhorst, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia. **ON BRIEF:** Frederick T. Heblich, Jr., Interim Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia, for Appellant. Thomas T. Cullen, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

WILKINSON, Circuit Judge:

Defendant Willie Johnson challenges the district court's order resentencing him for armed bank robbery and related crimes following a successful petition vacating his original sentence under 28 U.S.C. § 2255. The district court honored the sentencing recommendation in Johnson's original plea agreement, in which the government agreed not to seek a mandatory life sentence under the federal three-strikes law. See 18 U.S.C. § 3559(c). Johnson now argues that he received no benefit from the plea agreement because his prior conviction for a New York robbery offense would not have counted as his third strike, and he thus would have been ineligible for a mandatory life sentence. We disagree. The text and structure of § 3559(c) reveal a congressional intent to encompass state laws such as the New York robbery offense here, which shares the essential characteristics of the enumerated robbery offenses under federal law. We therefore affirm the district court's sentencing decision.

I.

The record of the sentencing hearing revealed the following: On February 1, 2002, Willie Johnson robbed federally insured Farmer and Merchants Bank in Afton, Virginia along with his then-girlfriend's son, Khalid Ahmad. Both men wore ski masks and carried firearms—Johnson an AR-15 rifle, Ahmad a .40 caliber pistol. Johnson ordered customers to get on the floor and, when one hesitated, yelled, "I told you to get down, I don't want to have to shoot nobody." J.A. 219. He then commanded tellers to stuff the bank's cash in a pillowcase, this time with less subtlety: "If you don't hurry up I'll kill you, don't think I won't kill you." *Id.* After collecting about six-thousand dollars,

Johnson and Ahmad sped away at more than one hundred miles-per-hour in a vehicle they had stolen earlier that morning. In the course of the attempted getaway, the men jumped a curb and drove through a school playground. They ditched the car at the edge of a forested area near the school and ran into the woods. Witnesses heard gunshots. Schoolchildren were rushed indoors. While the men evaded capture that day, they were apprehended shortly after.

A federal grand jury indicted Johnson for conspiring to commit bank robbery and conspiring to use and carry a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 371 (Count One); robbing a bank with a deadly weapon, in violation of 18 U.S.C. § 2113(a) and (d) (Count Two); brandishing a semiautomatic assault weapon during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Three); and possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1), with three previous convictions for violent felony offenses under 18 U.S.C. § 924(e) (the Armed Career Criminal Act, or ACCA) (Collectively, Count Five).[1]

The Presentence Investigation Report also revealed the following: Johnson's criminal record, even excluding numerous juvenile adjudications and parole violations, was extensive. In 1975, Johnson assaulted a man with a pool cue, and he later pled guilty to New York assault charges. In 1976, Johnson pled guilty to New York Robbery and was sentenced to seven years' incarceration. He had robbed a man at gunpoint, pistol-whipping the man near his eye and causing a concussion. In 1983, Johnson was charged

[1] Count Four related to Johnson's co-conspirator.

with ten bank robberies in the United States District Court for the Eastern District of New York. He pled guilty to two of them and received a sentence of ten years' imprisonment. In 1994, he burglarized at least two homes, crimes for which he subsequently pled guilty to attempted burglary and was sentenced to 30-60 months' incarceration. In 1999, Johnson was convicted of three crimes related to breaking into a residence, for which he received three consecutive one-year terms in jail. The present offenses took place in 2002.

Federal law provides for lengthier sentences for repeat, violent offenders like Johnson. Most relevant to Johnson's case was the federal three-strikes law, which provides for a mandatory sentence of life in prison after a third conviction for a "serious violent felony." See 18 U.S.C. § 3559(c)(2)(F) (listing "robbery" as a "serious violent felony"). Leading up to Johnson's trial for the instant offenses, the United States filed an Information, see 21 U.S.C. § 851(a), a document alerting the court that Johnson had two prior "serious violent felony" convictions—specifically, Johnson's 1976 New York robbery and 1983 federal bank robbery convictions. A conviction in the 2002 bank robbery case, in other words, would have been Johnson's third strike.

Staring at a mandatory life sentence, Johnson agreed to plead guilty on the third day of trial. Johnson specified in the plea agreement, "In exchange for my pleas of guilty to the charges in the Indictment, the United States will move to dismiss the Information filed pursuant to 18 U.S.C. § 3559(c) and 21 U.S.C. § 851(a)." J.A. 23. The agreement also contained the following sentencing recommendation: "I agree to an upward departure on Count Two [bank robbery] to the maximum statutory sentence for that

charge [of 300 months]. I agree to this recommendation, in exchange for the United States moving to dismiss the Information that would otherwise enhance my sentence to mandatory life imprisonment." J.A. 24.

The United States honored its end of the bargain by dismissing the Information. The United States District Court for the Western District of Virginia then held Johnson to his end of the bargain, imposing concurrent 300-month sentences for bank robbery (Count Two) and under the Armed Career Criminal Act (Count Five), along with a concurrent 60-month sentence for the conspiracy charge (Count One). This sentence fell within Johnson's then-mandatory guidelines range of 262-327 months. The district court also sentenced Johnson to 120 months in prison for brandishing a semiautomatic assault weapon during and in relation to a crime of violence (Count Three), to be served consecutively. Johnson's effective sentence totaled 420 months in prison.

About a dozen years later, the Supreme Court ruled that ACCA's residual clause was impermissibly vague under the Fifth Amendment's Due Process Clause. See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). The defendant then filed a petition under 28 U.S.C. § 2255, seeking to vacate his 420-month sentence because Count Five had included a charge based on ACCA's residual clause. See 18 U.S.C. § 924(e)(2)(B). There remained a dispute whether ACCA still applied to Johnson without the residual clause. ACCA properly applied if Johnson had three previous "violent felony" convictions. *Id.* A violent felony includes a state felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e) (the force clause). Johnson effectively conceded that his two 1983 federal bank robbery

convictions counted as violent felonies. See *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (18 U.S.C. § 2113 qualifies under ACCA's force clause). The parties disagreed as to whether Johnson's 1976 New York third-degree robbery conviction required as an element the use of physical force.

The district court ultimately sided with the defendant. Under that ruling, Johnson no longer qualified as an armed career criminal, and his existing sentence on Count Five therefore exceeded the statutory maximum for a felon-in-possession charge without the ACCA enhancement. The court granted Johnson's § 2255 petition and vacated his existing sentence in full under the sentencing package doctrine, which provides that "when a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan, and that if some counts are vacated," the judge should revisit the sentences on all the remaining counts. *United States v. Ventura*, 864 F.3d 301, 309 (4th Cir. 2017) (internal quotation marks omitted).

The United States Probation Office prepared a new Presentence Investigation Report reflecting the district court's determination that Johnson was not an armed career criminal under ACCA, and also not listing him as a career offender under the Sentencing Guidelines, resulting in an amended guidelines range of 130-162 months. The district court resentenced Johnson to 60 months for possessing a firearm as a convicted felon (Count Five), instead of the original 300-month sentence that reflected the ACCA enhancement.

The sentencing court, however, imposed the same sentences as before on the remaining counts after considering the original plea agreement and the § 3553(a) factors. The court observed "that the offense conduct was very serious, exposing both the individuals at the bank as well as those in [the] path of his flight to danger." J.A. 203. It also rejected Johnson's argument that his sentence should be reduced because of his age. Johnson's "extreme criminal history," coupled with a present offense that was "one of the worst that ha[d] come before the [c]ourt," demonstrated that "Johnson is a danger to society whenever he has been out of prison." *Id.* 204.

The court found that Johnson agreed to plead guilty and accept the maximum sentence for bank robbery in exchange for the government's moving to dismiss the Information filed under the three-strikes law. 18 U.S.C. § 3559(c). That law applies mandatory life sentences to convictions for a serious violent felony for those defendants who were previously convicted "on separate prior occasions" of at least two other serious violent felonies. *Id.* The present offense and the two prior offenses together counted as the three strikes. Johnson's 1976 New York robbery conviction, his 1983 federal bank robbery conviction, and his federal bank robbery conviction in the present case, in the district court's view, each would have counted as a strike. "Because Johnson would still be eligible for mandatory life imprisonment [under § 3559(c)], he is still receiving the benefit of avoiding a much higher sentence." J.A. 203. The district court therefore resentenced Johnson to "the parties' prior recommended sentence [for] the aggravated bank robbery charge in the plea agreement" in order to "honor[] the original plan . . .

[that] the parties agreed to." J.A. 203. In the end, the reduced sentence on the firearm possession count did not alter the original effective sentence of 420 months.

II.

Johnson now asks this court to vacate his new sentence. His principal argument is that the district court made a legal error in concluding that his New York robbery conviction would count as a third strike under the federal three-strikes law, which lists robbery as a qualifying offense. 18 U.S.C. § 3559(c). We review the sentencing court's legal conclusion interpreting § 3559(c) de novo. *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012). Because we agree with the district court's conclusion that New York robbery counts as an enumerated robbery offense and that Johnson thus continued to receive the benefit of his original bargain, we affirm.[2]

A.

The federal three-strikes law provides for mandatory life in prison for criminals who are convicted of their third "serious violent felony." 18 U.S.C. § 3559(c). There is no question that Johnson's two federal bank robbery convictions under 18 U.S.C. § 2113—the 1983 conviction and the 2002 conviction in the instant case—count as two strikes against him. 18 U.S.C. § 3559(c)(2)(F)(i) (listing "robbery []as described in" 18 U.S.C.

[2] Johnson may also have borne the risk that his plea agreement would prevent him from taking advantage of subsequent legal developments. See *McMann v. Richardson*, 397 U.S. 759, 774 (1970). Since the district court's decision rested upon the fact that Johnson continued to receive the benefit of his plea agreement, we too rest our decision on that ground. See *Hughes v. United States*, 138 S. Ct. 1765, 1777 (2018). We thus need not address the question of the extent to which Johnson's plea agreement assumed the risk of foregoing subsequent legal developments in his favor.

§ 2113). What remains is whether Johnson's 1976 New York robbery conviction counts as strike three.

We begin, as always, with the text of the statute. Congress defined a serious violent felony to include:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118 [of Title 18]); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

18 U.S.C. § 3559(c)(2)(F). The statutory text includes the familiar three-part structure, with an enumerated clause, a force clause, and a residual clause. Johnson argues that § 3559(c)'s force clause does not apply to him because his robbery conviction was not "punishable by a maximum term of imprisonment of 10 years or more . . . ." 18 U.S.C. § 3559(c)(2)(F)(ii); see N.Y. Penal Law § 160.05 ("Robbery in the third degree is a class D felony."); *id.* § 70.00(2)(d) (Class D felonies are punishable by a maximum of seven years.). As to the residual clause, Johnson argues that it is unconstitutionally vague under the Supreme Court's precedents *Johnson*, 135 S. Ct. 2551, and *Dimaya*. *Sessions v.*

Dimaya, 138 S. Ct. 1204 (2018). The district court, for its part, rested its case on the enumerated clause. The question, therefore, boils down to this: Did Congress intend to include New York third degree robbery as a serious violent felony in its listing of specific crimes in § 3559(c)?

The answer, unsurprisingly, is yes. Congress, after all, specifically listed robbery as a qualifying state offense. The statutory language in § 3559(c) asks whether the "Federal or State offense," not a defendant's actions, "consist[s] of" an enumerated offense. 18 U.S.C. § 3559(c)(2)(F)(i). We will thus apply a "categorical approach," meaning that we will compare the New York robbery statute, rather than the facts underlying Johnson's convictions, to the federal statutes that Congress referenced to describe robbery in the three-strikes law. *Id.* (describing robbery by reference to 18 U.S.C. §§ 2111, 2113, 2118); see also *United States v. McNeal*, 818 F.3d 141, 152 (4th Cir. 2016) (describing categorical approaches in general).

Statutes requiring application of a categorical approach may be worded differently, but the ultimate inquiry remains the same: What in fact was the congressional intent? Congress faced no small task in writing the three-strikes law in a way that would incorporate the contours and nuances of myriad state criminal codes, especially with the understanding that those codes will develop over time. With that in mind, Congress could hardly have been clearer in the text of the statute that § 3559(c)'s enumerated clause should be understood broadly. It listed more than a dozen distinct types of criminal offenses. Cf. 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA, listing only three). And the enumerated clause either directly describes each crime in § 3559(c)(2) (*e.g.*, arson,

extortion, and kidnapping), or, more often, describes that crime by cross reference to another federal statute (*e.g.*, robbery, carjacking, and firearms possession).

Moreover, Congress began the definition with prefatory language of greater rather than lesser inclusion: a "serious violent felony" includes "a Federal or State offense, by whatever designation and wherever committed." This broad language has no counterpart in ACCA, and was no doubt meant to capture a wide variety of state and federal offenses. "It is hard to see why Congress would have used this language, if it had meant that every detail of the federal offense, including its jurisdictional elements, had to be replicated in the state offense." *United States v. Wicks*, 132 F.3d 383, 386-87 (7th Cir. 1997). A straightforward interpretation of this language calls upon courts to look to the essential nature of a crime, not to minor definitional tweaks or wrinkles in individual jurisdictions.

Following that broad prefatory language, § 3559(c) references other federal robbery offenses using the words "described in" rather than "defined in." This is a meaningful distinction, since "'described in' is the broader of the two terms." *Espinal-Andrades v. Holder*, 777 F.3d 163, 168 (4th Cir. 2015) (discussing identical language in a different statutory context). The edition of Black's Law Dictionary at the time of § 3559(c)'s passage confirms this understanding. Compare "Define," *Black's Law Dictionary* (5th ed. 1979) ("To explain or state the exact meaning of words and phrases . . . ."), with "Describe," *Black's Law Dictionary* (5th ed. 1979) ("To narrate, express, explain . . . ."). "Bearing the plain meaning of 'define' and 'describe' in mind, it appears as if Congress intended for the [crimes] 'described in' the pertinent federal

statute to include crimes that are not 'defined in'—that is, precisely identical to—that federal statute." *Espinal-Andrades*, 777 F.3d at 168.

Our inquiry, of course, does not end there, for we "interpret the relevant words not in a vacuum, but with reference to the statutory context." *Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) (interpreting statute using "described in" as a cross-reference to another federal statute). And the statutory context of § 3559(c) points decidedly towards inclusivity. That is nowhere truer than for robbery. Section 3559(c)(3)(A) exempts robberies (but not other enumerated offenses) from counting under the three-strikes law if a defendant can "establish[] by clear and convincing evidence that—(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and (ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person." In other words, if a defendant can prove (which Johnson cannot) that his robbery did not involve a dangerous weapon or a serious injury, then the offense is not a qualifying strike. In light of this language, courts must be especially cautious in carving exceptions to § 3559(c) for the various state robbery offenses. Congress has already provided a fact-based escape hatch; courts are not at liberty to create additional ones.

B.

With those principles in mind, we must now determine whether Congress's understanding of robbery in § 3559(c) maps on to the elements of New York's crime of robbery in the third degree. See *McNeal*, 818 F.3d at 152. Johnson's robbery conviction may not qualify as a serious violent felony under § 3559(c)'s enumerated clause if the

New York statute applies to conduct outside the broad language Congress used to describe the enumerated robbery offense under the three-strikes law.

In New York, "The essence of the crime of robbery is forcible stealing." *People v. Miller*, 661 N.E.2d 1358, 1360 (N.Y. 1995); see also *United States v. Hammond*, 912 F.3d 658, 661-65 (4th Cir. 2019) (emphasizing the violent nature of the force required by New York's robbery laws). Johnson's conviction was for third degree robbery. "A person is guilty of robbery in the third degree when he forcibly steals property." N.Y. Penal Law § 160.05. Forcible stealing means:

> [W]hen, in the course of committing a larceny, [a person] uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00.

New York's robbery offense reflects the essence of robbery as Congress described it in § 3559(c). The federal statute defines "serious violent felony" to include "a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118 [of Title 18])." 18 U.S.C. § 3559(c)(2)(F)(i). The statute references the federal offenses of maritime or territorial robbery (§ 2111), bank robbery (§ 2113), and robbery of a controlled substance (§ 2118). These references are joined with the disjunctive "or," meaning that a state crime that matches even one of those statutes must count as a strike. The maritime and territorial

statute provides the cleanest language describing a robbery: "Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years." 18 U.S.C. § 2111. The bank robbery and controlled substance robbery statutes define robbery in materially the same way, with the different jurisdictional hooks previewed by their titles.[3]

On those definitions, we agree with the district court's conclusion that "Johnson would still be eligible for mandatory life in prison, as a robbery is an enumerated offense." J.A. 202. The essence of both the federal and state robbery offenses is a theft or attempted theft by use of force. Where New York requires a defendant to "use[] or threaten[] the immediate use of physical force upon another person," the federal statutes require that the taking be done "by force and violence, or by intimidation," 18 U.S.C.

[3] The relevant text of those statutes is as follows: 18 U.S.C. § 2113(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 . . . ."); 18 U.S.C. § 2118(a) ("Whoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material or compound containing any quantity of a controlled substance belonging to or in the care, custody, control, or possession of a person registered with the Drug Enforcement Administration under section 302 of the Controlled Substances Act (21 U.S.C. 822) shall . . . be fined under this title or imprisoned not more than twenty years, or both, if (1) the replacement cost of the material or compound to the registrant was not less than $500, (2) the person who engaged in such taking or attempted such taking traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate such taking or attempt, or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt.").

§ 2111. Similarly, where New York requires a larceny, the federal statutes penalize the "tak[ing of] . . . anything of value," *id.* We agree with the Second Circuit that New York robbery matches robbery as used in § 3559(c). Since New York robbery's "statutory elements parallel those required to establish robbery under 18 U.S.C. §§ 2111, 2113(a), and 2118(a), there can be no question that New York State convictions for first and second degree robbery by definition qualify as serious violent felonies under § 3559(c)(2)(F)(i)." *United States v. Snype*, 441 F.3d 119, 144 (2d Cir. 2006). This conclusion is no less true for Johnson's third-degree robbery conviction, as "the core crime of New York robbery, irrespective of degree, is defined as forcibly stealing property." *Hammond*, 912 F.3d at 662 (internal quotation marks and alterations omitted).[4]

It should go without saying, of course, that New York does not use the exact same words to describe robbery as do the federal robbery statutes. Congress could hardly have expected the fifty states to cut-and-paste federal verbiage into every state law. Using different words to prohibit the same conduct, therefore, poses no barrier to a match in the

[4] Johnson encourages us to discount *Snype*, which interpreted § 3559(c), in favor of a recent Second Circuit decision holding that New York robbery is not "a 'crime of violence' under the 'enumerated offenses' in application note 1(B)(iii) to Section 2L1.2 of the 2014 [Sentencing] Guidelines." *United States v. Pereira-Gomez*, 903 F.3d 155, 161 (2018). In that case, the Second Circuit compared New York robbery to the generic offense of robbery, finding that the state offense was not a "crime of violence" because it lacked a presence requirement. *Id.* at 161-64. But this is not a case about the Guidelines or the generic robbery offense. This is a case about § 3559(c). No matter how New York robbery might or might not compare with the generic robbery offense, we note here that § 3559(c) describes robbery with sufficient breadth to include New York robbery. Moreover, *Pereira-Gomez* did not mention *Snype*, and we assume the Second Circuit would not overrule *sub silentio* its prior precedent. And while we are not, of course, bound by decisions of other circuits, we find *Snype*, in all events, to be persuasive.

§ 3559(c) context. For example, New York law specifies the ways that force or a threat of force could be used in the commission of a robbery, including by "[c]ompelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." N.Y. Penal Law § 160.00. This language, however, deviates in no material respect from federal law's concise force requirement, which prohibits those very same types of conduct.

Take, for example, the federal bank robbery statute, which proscribes a taking "by force and violence, or by intimidation . . . from the person or presence of another." 18 U.S.C. § 2113(a). The reference to § 2113(a)'s person or presence requirement, however, indicates no intention to exclude the New York law. In *United States v. Hackett* this court "conclude[d] that property is taken from a bank in the presence of another when bank officers are induced by threats of violence to leave the bank's money at a pre-arranged drop site." 623 F.2d 343, 345 (4th Cir. 1980). The federal bank robbery statute, in other words, penalizes robbery through delivery just like the New York statute. N.Y. Penal Law § 160.00 (including robbery by "[c]ompelling the owner of such property or another person to deliver up the property").

The New York robbery statute also prohibits robbery by using force to compel another person to "aid[] in the commission" of the offense. *Id.* Federal law, too, covers robbery by conscription. For example, when "a robber forces a bank's customer to withdraw money, the customer becomes the unwilling agent of the robber, and the bank is robbed." *United States v. Durham*, 645 F.3d 883, 893 (7th Cir. 2011) (internal quotation marks and alterations omitted). Section 3559(c) thus concisely describes

robbery in a way that traces New York's articulation of the same. To rule otherwise would assume that Congress, through inclusive language, somehow meant to exclude the robbery statutes of almost twenty different states which may not have a presence requirement, but which do share with the referenced federal statutes the essential elements of taking from another by force and violence, or by intimidation.[5]

The Supreme Court has repeatedly cautioned against interpreting federal statutes to exclude state offenses that employ language common among the several states. To take but one example, the Court just recently rejected a reading of ACCA that would have excluded "many States' robbery statutes" from qualifying as predicate offenses. *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019). "Where, as here, the applicability of a federal criminal statute requires a state conviction," we must follow the Court's lead in "declin[ing] to construe the statute in a way that would render it inapplicable in many States." *Id.*

Despite the congruence between New York's robbery statute and § 3559(c)'s robbery offense, Johnson argues that New York robbery is distinct from the federal

[5] At least nineteen states do not include a narrow presence requirement in their definition of robbery. Wayne R. LaFave, *3 Subst. Crim. L.* § 20.3(c), at n.42 (3d ed. 2018 update) (compiling state statutes); see Ala. Code § 13A-8-43; Ark. Code Ann. § 5-12-102; Conn. Gen. Stat. § 53a-133; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. § 708-840; Iowa Code § 711.1; Ky. Rev. Stat. Ann. § 515.020; Me. Stat. tit. 17-A, § 651; Mo. Ann. Stat. § 570.023; Mont. Code Ann. § 45-5-401; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.00; N.D. Cent. Code § 12.1-22-01; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. § 164.395; 18 Pa. Cons. Stat. § 3701; Tex. Penal Code Ann. § 29.02; Wyo. Stat. § 6-2-401; see also *Model Penal Code* § 222.1(1) (Am. Law Inst. 1962) (including no presence requirement).

robbery offenses because it need not occur in the special maritime or territorial jurisdiction of the United States (as in § 2111), take place in a bank (§ 2113), or involve a controlled substance (§ 2118). This argument is not persuasive. These jurisdictional elements are not essential to robbery in § 3559(c). Take § 2111, the maritime and territorial robbery statute, for example. Congress surely did not seek to exempt Johnson from the three-strikes law simply because his *state* robbery conviction did not have an element requiring the crime to occur within the *federal* territorial or maritime jurisdiction of the United States. That would be quite an odd element to find in a state criminal offense. Indeed, the Supreme Court has ignored jurisdictional elements of federal crimes when comparing them to state offenses in the context of statutes that, as here, use the "described in" terminology. See *Torres*, 136 S. Ct. 1619. Even more clearly, § 3559(c)(2)(F) specifically includes a "State offense . . . wherever committed"—*i.e.*, in a special federal jurisdiction or not.

All in all, we are left with the conviction that Congress intended robbery under the three-strikes law to encompass New York robbery in the third degree. The statute uses language of greater inclusion time and time again when describing the variety of state offenses that qualify under its enumerated clause. And the essence of robbery in New York is just the same as that of the federal robbery statutes that § 3559(c) references, which is a taking from another by force and violence, or by intimidation. See *Hammond*, 912 F.3d at 662-63 (describing New York robbery offense). For these reasons, we affirm the district court's conclusion that Johnson's New York robbery conviction qualifies as a "serious violent felony" under the federal three-strikes statute's enumerated clause.

III.

Johnson also argues that the district court should not have considered his original plea agreement during his resentencing. That plea agreement, in Johnson's view, was based on mutual mistakes in believing that he was an armed career criminal and career offender, both of which increased his then-mandatory guidelines range. But at bottom, Johnson exchanged a guilty plea and sentencing recommendation for the government's agreement not to seek a mandatory life sentence under § 3559(c). Johnson has continued to benefit from the agreement at resentencing by avoiding the mandatory life sentence. The district court therefore acted well within its discretion in considering the earlier plea agreement when imposing a new sentence on Johnson.

The sentencing court's decision whether to consider certain facts is an element of procedural reasonableness, *Ventura*, 864 F.3d at 311, which we review for an abuse of discretion, *United States v. Susi*, 674 F.3d 278, 282 (4th Cir. 2012). With respect to plea agreements, "A plea agreement is 'essentially a contract between an accused and the government' and is therefore subject to interpretation under the principles of contract law." *United States v. Davis*, 689 F.3d 349, 353 (4th Cir. 2012) (quoting *United States v. Lewis*, 633 F.3d 262, 269 (4th Cir. 2011)). As contracts, plea agreements are voidable when both parties make a mistake "as to a basic assumption on which the contract was made," that mistake "has a material effect on the agreed exchange of performances," and the party seeking to void the contract does not "bear[] the risk of the mistake." Restatement (Second) of Contracts § 152 (Am. Law Inst. 1981; October 2018 Update).

The Supreme Court recently affirmed that district courts "can consider the benefits the defendant gained by entering a Type–C" plea agreement when reconsidering a sentence even after the guidelines range has been retroactively lowered. *Hughes v. United States*, 138 S. Ct. 1765, 1777 (2018). The agreed-upon sentence in a Type–C plea agreement, unlike the sentencing recommendation in Johnson's plea agreement, is binding on the sentencing court. If sentencing courts may consider mandatory plea agreements that were based on subsequently modified guidelines ranges, then courts may surely consider an agreement that merely recommended a sentence to the court.[6]

Moreover, Johnson continued to enjoy his benefit from the plea agreement at his resentencing hearing—namely, he avoided a mandatory life sentence. That was the heart of his plea agreement. The agreement plainly said as much. J.A. 23 ("In exchange for my pleas of guilty to [all four] charges in the Indictment, the United States will move to dismiss the Information filed pursuant to 18 U.S.C. § 3559(c) and 21 U.S.C. § 851(a)."). And Johnson agreed to recommend the maximum sentence on the bank robbery count for the same reason. J.A. 24 ("I agree to an upward departure on Count Two [bank robbery] to the maximum statutory sentence for that charge. I agree to this recommendation, in exchange for the United States moving to dismiss the Information that would otherwise

[6] Indeed, Justice Sotomayor specifically described in her concurrence a situation like what we have here: "[T]here may be circumstances in which the Government makes substantial concessions in entering into a Type–C agreement with a defendant—*e.g.*, by declining to pursue easily proved and weighty sentencing enhancements—such that there is a compelling case that the agreed-upon sentence in the Type–C agreement would not have been affected if the subsequently lowered Guidelines range had been in place at the relevant time. If such circumstances exist, I expect that district courts will take that into account . . . ." *Id.* at 1780 n.2 (Sotomayor, J., concurring).

enhance my sentence to mandatory life imprisonment."). The mutual mistakes Johnson alleges (assuming, for present purposes, that they were indeed mistakes) did not materially affect the exchange of performances or deprive Johnson of the benefits for which he bargained. The district court was well within its discretion to provide the United States with its benefit from the bargain by resentencing Johnson to the maximum sentence on the bank robbery count.

It bears mention that the able district judge here conducted Johnson's sentencing with care and patience. He calculated the advisory guidelines range and explained exactly why the sentencing factors of § 3553(a) warranted an upward variance from the range. Johnson's chief argument at sentencing was that he had aged out of his prime crime years. The district court considered this argument to be outweighed by the violent and extensive character of his crimes, spread over many decades, and the fact that he had agreed to the sentence imposed in exchange for the government's agreement not to pursue a mandatory life sentence. We need not dwell in detail upon the full extent of Johnson's daunting criminal record in order to conclude that the sentence was procedurally and substantively reasonable and in accord with all requirements of law. The district court's decision resentencing Johnson is therefore

AFFIRMED.

FILED: February 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4345
(3:02-cr-00015-NKM-RSB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WILLIE JOHNSON

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

UNITED STATES OF AMERICA	Criminal No. 3:02cr00015
Plaintiff,	
vs.	Charlottesville, Virginia
WILLIE JOHNSON,	
	10:43 a.m.
Defendant.	May 14, 2018

TRANSCRIPT OF RESENTENCING HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States:	NANCY HEALEY, ESQ. U.S. Attorneys Office 255 W. Main St. Room 130 Charlottesville VA 22902
For the Defendant:	LISA M. LORISH FPD Office 401 E. Market St. Suite 106 Charlottesville VA 22902
Court Reporter:	Sonia Ferris, RPR, OCR U.S. Court Reporter 116 N. Main St. Room 314 Harrisonburg, VA 22802 540.434.3181. Ext. 7

Proceedings recorded by mechanical stenography; transcript produced by computer.

THE COURT: Good morning.

Call the case, please.

THE CLERK: Yes, Your Honor.

This is Criminal Action No. 3:02cr15, United States of America v. Willie Johnson, Defendant No. 1.

THE COURT: Government ready?

MS. HEALEY: Yes, Your Honor.

THE COURT: Defendant ready?

MS. LORISH: Yes, Your Honor.

THE COURT: Mr. Johnson, I have the revised report after -- that was made after this case was returned for resentencing.

Are there any issues in dispute?

MS. LORISH: Not with respect to the guideline determination as far as I'm aware.

MS. HEALEY: That's correct.

The only thing would be regarding the interpretation of the plea agreement and 3559.

THE COURT: That being said, I find that the amended offense level is 28 and the Criminal History Category is V.

Correct?

MS. HEALEY: I think that's correct, Your Honor.

MS. LORISH: That's right.

THE COURT: I have received extensive briefing in this situation.

Is there any other evidence?

MS. HEALEY: No evidence.

MS. LORISH: The only other evidence, Your Honor, Ms. Healey had quoted from -- in her most recent response in the sentencing memorandum -- a progress report, without actually including the report. There's no objection, I believe, from the government if I just introduce the actual report, and I've redacted the personal identifying information from this copy.

If I can approach?

(Said document handed to the Court.)

I can address the significance.

THE COURT: Do you wish to be heard, then?

MS. HEALEY: Just briefly, Your Honor, because as the Court has just mentioned, we have certainly extensively briefed this case.

I think the most important thing from the government's perspective is that the career offender designation and the armed career criminal status did not drive the plea agreement in this case. It was the exchange of the information filed pursuant to 3559 and the 851 that would have enhanced the defendant's sentence to mandatory life imprisonment. It's not a (C) plea. The government acknowledges it's not a (C) plea, so the Court can fashion the sentence accordingly. However, it is the plea agreement

that was bargained for on the third day of trial. The defendant definitely did not want to be sentenced as a mandatory life candidate and so, therefore, the plea agreement was pretty strict, based on the nature of the offense, the fact that he did go to trial, the fact that his criminal history was very serious. His history of violations were very serious. He had numerous crimes that seemed to have been very strong that didn't result in convictions, for whatever reason, but the crimes for which he was convicted started when he was a young teen, and continued. As I said in my memo; he did it in his teens, he did it in his 20s, he did it in his 30s, he did it in his 40s. The fact that he has minimal infractions and works -- great. I'm glad he can behave while he's in prison, but the simple fact is when he committed the robbery that occurred in our jurisdiction, Your Honor, he had a very good job. He had a steady girlfriend, who, I think, owned her own business at the time. She had a son who had a minimal record and he recruited him and got him involved and now he's a convicted felon as well. So working did not deter him.

It was a violent robbery. He made threats that implied he was willing to shoot if he had to and if people didn't comply with his orders. So I think that the original sentence, even if this Court were to decide that he was not a mandatory life person now -- and I don't think there's any

evidence to suggest he's not mandatory life now -- his sentence is appropriate in this case, and it does say that the remedies for breach would be that we would move for an upward departure.

Significantly, on the legal spectrum, I found no cases that would suggest that 3559 goes by the wayside the way that career offender and armed career criminal have gone by the wayside. I've read a number of cases. Obviously, I cited an unpublished -- acknowledging it's an unpublished case from the Eleventh Circuit saying all robberies would qualify. I find it significant that because there's a safety valve that allows for a defendant to prove that his robberies do not qualify as a serious robbery or a serious felony offense -- whatever the language is -- suggests that the Court is allowed to look at the underlying facts of the robbery.

In this case, that particular robbery in 1976 in New York was a robbery that involved a pellet gun, which, clearly, from what the facts suggest, did not make the victim think it was a fake gun, and even if it is a fake gun, that is a dangerous instrument, or something that would qualify as a serious violent felony offense. The defendant, at his original sentencing, did not suggest anything about that particular offense.

I would also note that with respect to the fact that

he's working in prison -- I don't think I said this in the -- it's a minor point, but I don't think I said this in my memos. Paragraph 8 of the plea agreement states that -- let me get to that page. "I further agree to fully participate in inmate employment under any available or recommended programs operated by the Federal Bureau of Prisons, and to pay any fines, assessments or restitution not paid prior to incarceration through the auspices of such program. I agree that any fines, assessments and restitution shall be immediately payable upon entry of a judgment of conviction."

I state this because the amount of restitution, of course, that has been paid is minimal, and he was obligated to try to work towards that end. So that's another reason why his inmate employment really isn't that significant.

The government's position is that if the government is correct on the 3559 argument -- and we think we are -- that it would be a breach of the agreement for the defense to argue for a sentence inconsistent with the plea agreement. I don't think the plea agreement has been negated by the Court's opinion on the 2255 motion. I think the plea agreement still has provisions that should be enforced and that the government and defendant are entitled to the benefits of that particular plea agreement. So if the government is correct that the 3559 is still valid and that Mr. Johnson's 1976 robbery conviction applies, then the

defendant should not be allowed to argue anything inconsistently with the plea agreement.

Thank you, Your Honor.

THE COURT: Okay.

Ms. Lorish?

MS. LORISH: Good morning, Your Honor.

First, with respect to the issue of restitution, since Ms. Healey addressed that near the end of her remarks -- the defendant does not currently have any restitution obligations before this court, according to the court's records. Essentially, he was paying restitution through his work at the Bureau of Prisons, but at the time the restitution was issued in this case, there's -- it times out at a certain point. So it's not that he repaid the full amount. He certainly did not. But at some point, under statutes -- and I confirmed this with the court's clerk -- that restitution was no longer being automatically withdrawn from his dollar-an-hour job through the Bureau of Prisons wages that he had. So it's not that he's -- I think he's done what he was asked to do by the Court. He was employed. He's maintained employment in the Bureau of Prisons. He paid the restitution as long as they were taking it from his account, and it aged out as a matter of law. So the court does not show any balance owed right now. I have confirmed that with the court's clerk. There's no balance currently

owed with respect to how the court calculates restitution. So just to clarify that.

With respect to the remainder of Ms. Healey's arguments, it essentially seems to be two things with respect to this allegation that because the defendant entered into a plea agreement when he was threatened with mandatory life had he been convicted at trial, therefore, he can't ask for anything less today -- I think that that's incorrect on the law. I think the law with respect to 3559 has changed, but it doesn't really matter for this purpose.

The plea agreement that he entered into -- and I believe the Court was given a copy in the last few days -- says that he's an armed career offender. The plea agreement says that he acknowledges that he's a career offender. We now know those things aren't true, despite the fact he acknowledged those things. He also acknowledged he would qualify -- or likely qualify -- the Court never actually made any findings. This is before we even had the Alleyne case. They weren't actually proved -- his prior convictions -- to the jury. There were never any findings that we would know for certain that 3559 applied then. But the greater point being this plea agreement is already invalid because the other parts of it are invalid. Unlike today when the government adds into its plea agreements a paragraph that says if part of the agreement is not valid, the rest of it is

still valid -- that's not in his contract. Part of the agreement is no longer valid. It says the 15-year mandatory minimum applies under the Armed Career Criminal Act. It doesn't apply anymore. So the agreement is no longer valid and I think that Mr. Johnson is not precluded from arguing for whatever sentence he wants to argue for today.

Now, of course, all of the things that would go into his criminal history, which the government argues would, theoretically, still trigger, or did trigger then, the 3559 mandatory life -- the Court has to consider that. I'm not suggesting the Court overlooks the criminal history. It should just be part of the factors the Court considers when sentencing him today de novo, because that is the standard in a resentencing. In a de novo resentencing, the Court looks at the 3553 factors, and one of those is, obviously, considering the nature and characteristics of the defendant.

As is clear from the presentence report, as is acknowledged in his sentencing memorandum, he has a long criminal history for robberies. That's not disputed here. It is also the case that he's been incarcerated now for almost 16-and-a-half years. He's in his 60s, and I've cited evidence in the sentencing memorandum that that's the data and statistics we have from nonpartisan sources that show that people age out of criminality.

So my argument today is, essentially, that if we look

at the reasons we sentence people -- if he's going to be rehabilitated -- and Ms. Healey can suggest he hasn't, but I'm not sure what would really show he had in the Department of Corrections -- in the Bureau of Prisons, but that's been done. 16 years versus 20 years -- I don't know that there's anything that tells us that another 4 years, another 10 years, another 20 years is going to rehabilitate him any more.

I think the same is true with deterrence. I don't think there's any evidence or any statistics that suggest another year of time would help deter Mr. Johnson or anybody else from this offense. I think the Court is aware of the studies my office always cites at that point.

So if we're worried about incapacitation or worried that Mr. Johnson falls in that same percentage of offenders that even in his 60s -- in his 60s, he suffers probably now, on average, more health problems than a normal 60-year-old that hasn't been living, essentially, in and out of prison for his entire life. If we're worried about incapacitation, that's where home confinement can help address that concern. If we really think this person can't go a year without committing a bank robbery, he can be on home confinement conditions and as soon as he leaves his house for something other than employment or to go to church, he'll be back before this Court with the expectation he gets the full

amount of time the Court can give him on a supervised release violation.

So I don't think there's any 3553 factors that would suggest that he needs more time than what would be a low end of the guideline sentence today, which essentially gets him out time served, which is what we argued for.

I think, of course, the robbery committed had violent aspects to it and the offense level already accounts for that. He got many offense-specific enhancements off of the base offense level for basic robbery that have already accounted for some of that violation. Again, he comes before you as a Criminal History Category V, also accounting for the criminal history that Ms. Healey has cited to. So I think there's good reasons, if the Court doesn't want to give a time served sentence, should at least give a guideline sentence.

I did want to also quote from another case that was before this case, another one of these Johnson-related 2255s, the case of Tony Johnston. Just with respect to Ms. Healey's argument that somehow his plea agreement precludes relief for him today, in that case, that was a (c)(1)(C) plea. I'm just going to quote from your decision in that case where the government had similarly argued that he shouldn't be able to get relief. You held, "Because the parties were operating under the belief that Johnston might be considered an armed

career criminal, and the PSR reenforced that belief, I conclude that Johnston's Rule 11(c)(1)(C) plea agreement does not preclude me from considering whether he's entitled to relief pursuant to 18 U.S.C. Section 2255."

Of course, the government had also made the same argument in its motion to dismiss Mr. Johnston's original 2255, saying you should never have granted this motion in the first place because of his plea agreement, and the Court didn't find that convincing then and shouldn't find it convincing now, and should sentence him based on the 3553 factors and his new guidelines.

Thank you.

MS. HEALEY: Your Honor, may I just respond?

THE COURT: Yes.

MS. HEALEY: Johnston was my case as well. It wasn't a 3559 case. The career offender cases and the armed career criminal cases are distinguished from this particular case.

This guy is a mandatory lifer. He's a three-striker, and the government should still get the benefit of its plea. To suggest now that 3553 factors don't merit a sentence above time served now, I think, is ludicrous. This guy has a horrendous record. He's gotten breaks many times. He admitted to committing ten bank robberies to New York. He pled to two of them. I think he got a 10-year sentence or something -- I'm not looking at the PSR right now. So he's

gotten breaks, and despite being given leniency in prior cases, he has a history of violations while on probation and parole, which include, of course, committing new serious, serious offenses. The guy has 14 robberies from what I counted, I believe, and I think those are the charged robberies, or the ones that were adjudicated, and he's got three residential burglaries where one person actually saw him in her bedroom. This is a serious offender. This guy relied on crime for his livelihood. That's borne out by the fact that his most recent robbery was committed when he had a $10 an hour construction job and had a stable situation. This man is, at least, by a layman's sense, a true career offender, and this is someone who just commits crime after crime after crime.

I still don't understand -- I haven't seen any law that suggests that he is not obligated to keep with the terms of his plea agreement. From what I understand, we don't go back to square one. If we do, I'm not aware of that particular law.

I don't think a lien would apply in this particular case. He did not dispute the merits of his conviction prior and, you know, we could, I guess, have another determination that he would be a lifer. We didn't have to have a determination that he was a lifer. He acknowledged that he was a lifer at the time that he bargained to give up his

mandatory life, Your Honor.

And finally, I would say, you know, there is also the portion -- well, first of all, let me go back. Aging out of crimes? I've seen a number of people who have not aged out of crimes. I've prosecuted a number of people who are up in their 60s and 70s, who have not aged out of their crimes. Clearly, we have a lot of people in their 50s and 40s. He's -- I don't know -- five years older than I am. I'm not changing the way I am in a lot of things and I can't see this man right now changing the way he is right now.

And finally, Your Honor, there is the just desserts part of the crime as well, and if anybody deserves the charge he got originally, it is this particular defendant, Your Honor.

Thank you.

MS. LORISH: Just very briefly.

The Court has to consider his criminal history. I think that's clear. I think that the government's position that somehow this is different because of 3559 and that means he really meant it when he signed the plea agreement is just inaccurate based on the fact that every plea agreement that has come up in these Johnson resentencings across this district and across the country -- there are guideline stipulations that no longer apply. The defendant said this guideline applies. Well, we know now it doesn't apply.

There are mandatory minimums the government forewent pursuing. Times when 851s were withdrawn as part of plea agreements. Times when somebody got a lesser included offense as part of a plea agreement. We haven't gone back to say that someone can't be resentenced de novo now that the law has changed. That's the situation that we're in.

So I would encourage the Court to apply the 3553 factors today, including the defendant's significant criminal history, but to do so without any prejudice based on the fact the defendant previously entered into a plea agreement when the law was very different.

Thank you.

THE COURT: Okay.

Well, he was still subject to the life -- facing life imprisonment.

MS. LORISH: I believe he -- under the law at the time that he was sentenced, he likely, if the government had proved to the jury beyond a reasonable doubt that he had the prior convictions -- and everyone agreed under the law at the time, yes, he likely would have been subject to it then. I disagree that he would be subject to it now.

THE COURT: Why? I know you've already argued, but --

MS. LORISH: I made my arguments.

It hasn't been brought up in the post-Johnson world

in a case that's got a posted decision in any circuit Court of Appeals. I've, obviously, cited one district court where the Court has made that finding. Particularly, I think that the real case -- the only cases the government has cited were before the Supreme Court's decision in Dimaya, which has continued to apply the same reasoning to other and differing statutes beyond just the Armed Career Criminal Act. So it would appear that the Supreme Court is holding where there's a mandatory minimum that applies, that's different where there's just a guideline, and that's where the Court is applying the same reasoning from Johnson.

This is the defendant's sister, Your Honor, who's been able to join us.

THE COURT: The Fourth Circuit addressed the 3559 issues in the United States v. Wheeler in 2018, and said Alleyne did not require the jury findings.

MS. LORISH: I believe it addressed the residual clause on constitutionality.

I apologize if I'm incorrect on that point.

THE COURT: I'm not saying you're incorrect. I'm just saying that's what they said.

MS. LORISH: With respect to the Alleyne factors then, I'll withdraw that argument, but I still think that because of the residual clause that existed at the time, it was very apparent that Mr. Johnson would have qualified at

the time of his original trial as someone who would be subject to mandatory life, but, today, that is not as apparent because of the same reasons that he's not an armed career criminal and he's not a career offender.

MS. HEALEY: Judge, Dimaya addressed only the residual clause. We aren't arguing the robbery applied solely under the residual clause.

THE COURT: Thank you all.

Let me respond to the argument before I impose the sentence.

The sentence will be -- is a variance above the mandatory guideline range -- the specific sentence that will be imposed -- after considering the parties' recommendation and the plea agreement and the factors set forth in 18 U.S.C. 3553(a).

With respect to the plea agreement, Johnson agreed to an upward departure on the aggravated bank robbery charge to the maximum statutory sentence on that charge. He agreed to this recommendation in exchange for the United States moving to dismiss the information that would otherwise enhance his sentence to mandatory life imprisonment. Johnson would still be eligible for mandatory life in prison, as a robbery is an enumerated offense. Two of Johnson's three strikes are satisfied by the statute's incorporation of the federal bank robbery statute into the definition of robbery. The third

strike is for New York second degree robbery. The Second Circuit in U.S. v. Snipe, 441 F.3d 119, Second Circuit 2006, said because these statutory elements parallel those required to establish robbery under 18 U.S.C. Sections 2111 and 2113(a) and 2118(a), there can be no question that New York State convictions for first and second degree robbery, by definition, qualify as serious violent felonies under 3559(c)(2)(F)(1).

Because Johnson would still be eligible for mandatory life imprisonment, he is still receiving the benefit of avoiding a much higher sentence. He has not moved to withdraw his plea agreement -- and I'm not sure that he could, but, anyway, that's beside the point.

Accordingly, I will respect the parties' prior recommended sentence of the aggravated bank robbery charge in the plea agreement. Doing so honors the original plan, citing here U.S. v. Ventura, 864 F.3d, 301, 309 Fourth Circuit, 2017; and it's the original plan the parties agreed to.

With regard to the 3553 factors, I note that the offense conduct was very serious, exposing both the individuals at the bank as well as those in his path of his flight to danger.

At the first sentencing hearing, Judge Michael said that there is no doubt that the offense record of Mr. Johnson

is one of the worst that has come before the Court. I'd have to agree with that. His extensive history of violent robberies and other crimes have demonstrated that Johnson is a danger to society whenever he has been out of prison.

I reject his argument that he should receive a lower sentence based on his age. While older individuals are less likely to recidivate, Mr. Johnson's extreme criminal history counterbalances that more general trend. You know, say -- when he was sentenced -- I mean, to this long term, it was known then that he was going to reach this age, and he still would not have been released.

Upon release from imprisonment -- Mr. Johnson, would you stand, please?

Is there anything you would like to say before the Court pronounces sentence?

THE DEFENDANT: Yes, sir, Your Honor.

I'm no longer the same person that I was. I don't even think the same anymore, Your Honor. I don't know if I'll go out and get in the work force. I don't know the extent or how far I will go, but whatever I do out there, it's going to be done legally.

I'd like to say that I'm sorry to anybody that I offended in this case.

That's about it.

THE COURT: All right. Thank you.

Pursuant to the Sentencing Reform Act of 1984, and having considered the factors noted in 18 U.S.C. 3553(a), and after having consulted the advisory sentencing guidelines, it is the judgment of the Court that the defendant, Willie Johnson, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a total term of 420 months. This term consists of 60 months on the conspiracy charge, 300 months on the aggravated bank robbery charge, 60 months on the felon in possession charge, all such terms to be served concurrently. The term also consists of 120 months on the brandishing charge, to run consecutively.

The sentence is a variance above the amended advisory guideline range and the specific sentence is imposed after consideration of the parties' recommendation in the plea agreement and the factors noted in 18 U.S.C. Section 3553(a).

Upon release from imprisonment, defendant shall be on supervised released for a term of five years on all counts, to run concurrently.

You must comply with the follow mandatory conditions of supervision: Not commit another federal, state or local crime; not unlawfully possess a controlled substance; refrain from any unlawful use of a controlled substance.

You must submit to one drug test within 15 days of release from imprisonment, and at least two periodic drug tests thereafter as determined by the Court.

You must cooperate in the collection of DNA as directed by the probation officer.

You must comply with the standard conditions of supervision adopted by this court as well as any special condition imposed by Judge Michael.

The defendant shall pay the United States a special assessment of $400, which is due and payable immediately.

The defendant shall continue paying the restitution of $6,242 that was previously imposed, but to the extent that it's paid -- if the record shows he doesn't owe it, that it's already been paid, that's okay. I don't have any record before me for that.

MS. HEALEY: I think there was something in the report that said he paid a couple hundred dollars. Maybe it was in the document that Ms. Lorish gave to me.

THE COURT: I did see he had paid something, but I don't know how much. But anyway, he'll get credit for whatever he's already paid.

MS. LORISH: Your Honor, I believe, currently, he doesn't owe a balance to the court. I would just ask that whatever he owes to the court be continued as part of this judgment. So if he still owes something, he owes it. If it's been satisfied, it's been satisfied.

THE COURT: That will be the order.

He owes whatever the balance is, if there be a

balance.

The Court finds the defendant does not have the ability to pay a fine and it will be waived.

Advise the defendant of his right to appeal. A notice of appeal must be filed within 14 days of entry of judgment or within 14 days of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on behalf of the defendant.

Also advise the defendant of a right of a person unable to pay the cost of an appeal to apply for leave to appeal without prepayment of such costs.

Anything else?

MS. HEALEY: No, Your Honor.

MS. LORISH: Thank you, Your Honor.

THE COURT: Recess.

(Proceedings concluded at 11:13 a.m.)

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

(NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA
V.
WILLIE JOHNSON

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW302CR000015-001
Case Number:
USM Number: 08703-084

Date of Original Judgment: 2/6/03
(Or Date of Last Amended Judgment)

Lisa Lorish, Assistant Federal Public Defender
Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☒ Direct Motion to District Court Pursuant ☒ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☒ pleaded guilty to count(s) One, Two, Three and Five
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 371	Conspiracy to defraud the United States	2/1/2002	1
18 U.S.C. § 2113(d)	Bank Robbery by force or violence	2/1/2002	2
18 U.S.C. § 924(c)(1)	Violent Crime/Drugs/Machine gun	2/1/2002	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____
☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

May 15, 2018
Date of Imposition of Judgment

Signature of Judge

Norman K. Moon, Senior United States District Judge
Name and Title of Judge

5/21/18
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 924(e)(2)	Armed career criminal	2/1/2002	5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

420 months. This term consists of 300 months as to Count Two and 60 months as to Counts One and Five, all such terms to be served concurrently. The term also consists of 120 months on Count Three, to run consecutively to the terms imposed in Counts One Two and Five.

☐ The court makes the following recommendations to the Bureau of Prisons:

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 2/18 - VAW Additions 05/17) Amended Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: WILLIE JOHNSON
CASE NUMBER: DVAW302CR000015-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Five years. This term consists of 36 months as to Count One and 60 Months as to Counts Two, Three and Five; all said terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. ☐ You must make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution. *(check if applicable)*
3. You must not unlawfully possess a controlled substance.
4. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: WILLIE JOHNSON
CASE NUMBER: DVAW302CR000015-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.*

Defendant's Signature _____ Date _____

DEFENDANT: WILLIE JOHNSON
CASE NUMBER: DVAW302CR000015-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall pay any special assessment, and restitution that is imposed by this judgment.
2. The defendant shall provide probation officer with access to any requested financial information.
3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
4. The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
5. The defendant shall not possess a firearm or destructive device and shall reside in a residence fire of firearms and destructive devices.
6. The defendant shall submit to warrantless search and seizure of person an property as directed by the probation officer, to determine whether the defendant is in possession of illegal controlled substances and firearms.