

No. 18-_____

In the

Supreme Court of the United States

CHRISTOPHER JOE CANTU,
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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a federal prisoner demonstrates that judges have, in fact, disagreed about the legal issues governing his post-conviction claim, is he entitled to issuance of a certificate of appealability?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Christopher Joe Cantu was the defendant and movant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff and respondent in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Joe Cantu asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's order denying a certificate of appealability was unpublished, but is reprinted in the Appendix. Pet. App. 1a–2a. The Appendix also contains copies of the district court's original judgment of conviction (Pet. App. 3a–8a); the Fifth Circuit's opinion on direct appeal (Pet. App. 9a–18a); the Fifth Circuit order authorizing a successive motion to vacate (Pet. App. 19a–21a); and the district court's order denying the authorized successive motion with prejudice. (Pet. App. 32a).

JURISDICTION

The Fifth Circuit denied a certificate of appealability on May 14, 2019. Pet. App. 1a. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 253 (1998) (“We hold this Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge.”).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of 28 U.S.C. § 2253(c):

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The underlying dispute also involves analysis of the Armed Career Criminal Act's definition of "violent felony":

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

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

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

18 U.S.C. § 924(e)(2)(B).

STATEMENT OF THE CASE

A jury convicted Petitioner of possessing a firearm after felony conviction in violation of 18 U.S.C. § 922(g)(1). Pet. App. 1a. The district court concluded that Petitioner's two prior Texas convictions for burglary and his prior Texas conviction for aggravated robbery were all "violent felonies," so it enhanced his sentence under ACCA. Pet. App. 10a. The district court sentenced him to 284 months in prison. Pet. App. 10a. In July 2009, the Fifth Circuit affirmed the conviction and ACCA sentence. Pet. App. 9a–18a. Without ACCA, the statutory maximum sentence would have been 120 months. *See* 18 U.S.C. § 924(a)(2).

In May 2016, the Fifth Circuit granted authorization for Petitioner to challenge his ACCA sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015). Pet. App. 19a–21a. Relying on recent Fifth Circuit decisions, the district court concluded (a) that the burglary convictions were *historically* considered violent felonies under the enumerated offense clause (rather than the residual clause); and (b) that the aggravated robbery conviction was *currently* considered a violent felony under ACCA’s elements clause. Pet. App. 25a–32a.

The Fifth Circuit refused to grant a certificate of appealability, breezily stating that Petitioner “has failed to present constitutional claims that deserve encouragement to proceed further.” Pet. App. 2a. This timely petition follows.

REASONS TO GRANT THE PETITION

Petitioner’s application for COA demonstrated that federal judges actually had disagreed over the analysis of his prior convictions. By definition, this satisfies the COA standard—when federal judges *have* disagreed about the proper resolution of a legal issue, then “jurists of reason *could* disagree with the district court’s resolution of his constitutional claims.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This Court should summarily reverse the decision below, or grant the petition to clarify the proper application of the COA standard.

I. REASONABLE JUDGES HAVE DISAGREED ABOUT WHETHER TEXAS BURGLARY IS A GENERIC OFFENSE, AND ABOUT WHETHER *JOHNSON* RELIEF IS AVAILABLE.

The sentencing record was silent regarding whether the district court “relied on” the enumerated offense clause, the residual clause, or (more likely) the entire definition of “violent felony” when it applied the ACCA enhancement. But on direct

appeal, after the Government supplemented the record with additional documents that were never considered by the district court, the Fifth Circuit held that Petitioner's burglaries were generic burglaries. Pet. App. 13a–18a.

More recently, a majority of the en banc Fifth Circuit held that Texas burglary is indivisible and non-generic. *United States v. Herrold*, 883 F.3d 517, 522–542 (5th Cir. 2018) (en banc). This Court later vacated that decision and remanded for further consideration in light of intervening authority. *See United States v. Herrold*, __ S. Ct. __, 2019 WL 2493911 (June 17, 2019). The case is still pending in the Fifth Circuit.

After *Johnson*, courts in the Fifth Circuit and throughout the country disagreed about whether that decision warranted post-conviction relief where an ACCA sentence was predicated upon a non-generic burglary. *See, e.g., Hardeman v. United States*, 1:96-CR-192, 2016 WL 6157433, at *2–4 (W.D. Tex. Oct. 21, 2016) (explaining that the Government “continued” to argue that non-generic Texas burglaries were still violent felonies under the residual clause “until *Johnson* was decided,” and rejecting the Government’s attempt to ignore *Johnson*’s impact on the analysis of non-generic burglaries); *accord United States v. Gomez*, 2:04-CR-2126-RMP, 2016 WL 1254014, at *3 (E.D. Wash. Mar. 10, 2016); *Thrower v. United States*, No. 04-CR-0903, 2017 WL 1102871, at *4 (E.D.N.Y. Feb. 13, 2017), and cases cited therein (“[T]he vast majority of the district courts that have considered the issue have decided that a petitioner meets his burden of proving constitutional error if the rec-

ord is unclear and the petitioner shows that the sentencing court may have relied on the residual clause in calculating his sentence.”).

At the time Petitioner was sentenced, judges and parties understood that offenses *similar to* generic burglary would be classified as violent felonies under ACCA’s residual clause. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (“[B]urglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.”); *James v. United States*, 550 U.S. 192, 203–204 (2007) (holding that even attempted burglary is a violent felony because of “the possibility of a face-to-face confrontation between the burglar and a third party”). The Fifth Circuit itself even granted relief to some prisoners. *See, e.g., United States v. Stewart*, No. 17-50274 (5th Cir. July 24, 2018); *United States v. Castro*, No. 17-50447 (5th Cir. Oct. 8, 2018).

The proper analysis of Texas burglary remains a matter of dispute in the Fifth Circuit. But, at this early stage, Petitioner is not required to show that he will win. “At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation omitted).

[W]hen a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the petitioner at the COA stage.

Id. at 774 (quoting *Miller-El*, 537 U.S. at 336–337 (2003)).

The existence of disagreement among federal judges is sufficient to show that reasoned disagreement is possible. The Fifth Circuit placed too high a burden on Petitioner. The decision below should be reversed.

II. REASONABLE JUDGES HAVE DISAGREED ABOUT WHETHER TEXAS AGGRAVATED ROBBERY SATISFIES ACCA’S ELEMENTS CLAUSE.

The situation is nearly identical with regard to the aggravated robbery conviction. At the time Petitioner was sentenced, Texas aggravated and simple robbery were considered violent felonies under ACCA’s residual clause. *See United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007) (Texas robbery “qualifies as a violent felony under the residual clause of § 924(e).”); *accord United States v. Gore*, 636 F.3d 728, 744 (5th Cir. 2011) (Higginbotham, J., concurring) (“We have previously concluded that, as defined by Texas law, both robbery and aggravated robbery are violent felonies under the Residual Clause, and the statutory history of the ACCA supports that conclusion.”).

Since *Johnson*, judges in the Fifth Circuit have held that Texas robbery is not categorically violent and that it is categorically violent. *Compare United States v. Burris*, 896 F.3d 320 (5th Cir. 2018) (holding robbery is not categorically violent), *with United States v. Burris*, 920 F.3d 942 (5th Cir. 2019) (holding the opposite on remand).

The Fifth Circuit has also expressed differing opinions about whether Texas aggravated robbery is divisible and categorically violent. *Compare United States v.*

Wheeler, 733 F. App'x 221 (5th Cir. 2018) (affirming non-ACCA sentence because Texas aggravated robbery is no longer a violent felony), *with United States v. Wheeler*, *Wheeler*, 754 F.App'x 282 (5th Cir. 2019) (vacating prior opinion and remanding case to district court for further consideration).

These decisions are enough to demonstrate that the merits of Mr. Cantu's claim are at least debatable. The denial of COA should be reversed.

CONCLUSION

This Court should grant the petition and summarily reverse the denial of COA. Alternatively, the Court should grant the petition and set the case for a decision on the merits.

Respectfully submitted,



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AUGUST 12, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10529



UNITED STATES OF AMERICA,

Plaintiff-Appellee

A True Copy

Certified order issued May 14, 2019

v.

CHRISTOPHER JOE CANTU,

Jyle W. Cayce

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

Defendant-Appellant

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

ORDER:

Christopher Joe Cantu, federal prisoner # 37143-177, was convicted following a jury trial of being a felon in possession of a firearm and was sentenced to 284 months of imprisonment. Cantu was subject to the enhanced penalty provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), based on his prior Texas convictions for armed robbery and two burglary offenses. This court granted Cantu authorization to file a successive 28 U.S.C. § 2255 motion to challenge his sentence under the ACCA in light of *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015). See *In re Cantu*, No. 16-10089 (5th Cir. May 13, 2016).

Cantu now seeks a certificate of appealability (COA) to appeal the district court's denial of his successive 28 U.S.C. § 2255 motion. He argues that the district court erred in denying his claims that his sentence was

invalidly enhanced under the Armed Career Criminal Act (ACCA), based on his prior Texas conviction for aggravated robbery in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Further, Cantu contends that the district court should have conducted a harmless error analysis under current law to determine whether he was prejudiced by a determination that his prior Texas convictions for burglary were violent felonies within the meaning of the ACCA.

To obtain a COA, Cantu must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). A COA movant makes that showing “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Cantu has failed to present constitutional claims that deserve encouragement to proceed further. His motion for a COA is DENIED.

/s/ Edith H. Jones

EDITH H. JONES

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

Northern District of Texas - Dallas Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

CHRISTOPHER JOE CANTU

Case Number: **3:07-CR-197-P(01)**

USM Number: **37143-177**

George R. Milner, III, Esq. U.S. DISTRICT COURT
Defendant's Attorney NORTHERN DISTRICT OF TEXAS

FILED

MAY - 1 2008

CLERK, U.S. DISTRICT COURT

By _____ Deputy *R. Milner*

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) 1 of Indictment filed June 19, 2007
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense
18 USC §§ 922(g)(1) & 924 (e)	Felon in Possession of a Firearm

Offense Ended	Count
April 4, 2007	1

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.

April 30, 2008

Date of Imposition of Judgment

Jorge A. Solis
Signature of Judge

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

May 1, 2008
Date

18-10529.1206

DEFENDANT: **CHRISTOPHER JOE CANTU**
CASE NUMBER: **3:07-CR-197-P(01)**

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **TWO HUNDRED EIGHTY-FOUR (284) MONTHS.**

The court makes the following recommendations to the Bureau of Prisons:
Participation in the 500 Hour Residential Drug Treatment Program, if eligible.

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

18-10529.1207

DEFENDANT: CHRISTOPHER JOE CANTU
CASE NUMBER: 3:07-CR-197-P(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **FOUR (4) YEARS.**

The defendant must 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 unlawfully possess a controlled substance. 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 determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any 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 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 of 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; and
- 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.

18-10529.1208

DEFENDANT: CHRISTOPHER JOE CANTU
CASE NUMBER: 3:07-CR-197-P(01)

SPECIAL CONDITIONS OF SUPERVISION

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 U.S. Probation Officer.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, 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. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

The defendant shall participate in workforce development programs and services involving activities relating to occupational and career development, including but not limited to assessments and testing, educational instruction, training classes, career guidance, counseling, case management, and job search and retention services, as directed by the probation officer until successfully discharged from the program.

The defendant shall participate in a domestic violence treatment program as directed by the probation officer until successfully discharged. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

18-10529.1209

DEFENDANT: **CHRISTOPHER JOE CANTU**
CASE NUMBER: **3:07-CR-197-P(01)****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ -0-	\$ N/A

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	----------------------------	-------------------------------

TOTALS	\$ _____
---------------	----------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

18-10529.1210

DEFENDANT: CHRISTOPHER JOE CANTU
CASE NUMBER: 3:07-CR-197-P(01)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the defendant pay to the United States a special assessment of \$100.00, for Count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

18-10529.1211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

July 14, 2009

No. 08-10596

Charles R. Fulbruge III
Clerk

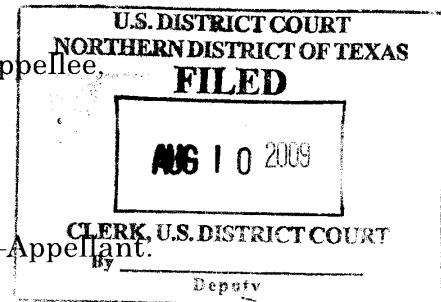
UNITED STATES OF AMERICA,

v.

CHRISTOPHER JOE CANTU,

Plaintiff-Appellee,

Defendant-Appellant.



Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:07-CR-197

Before DAVIS, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Christopher Joe Cantu appeals his conviction for being a felon in possession of a firearm. We affirm.

I

Officers Michael Conway and Patrick Burke were patrolling in a high crime area of Dallas and observed a red Eagle Talon running two stop signs. The officers turned on their emergency lights with the intent to make a traffic

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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stop. The red car pulled into a grassy area alongside of a house, and the police car pulled up a distance behind it.

Officers Conway and Burke testified that they watched Cantu exit the car and walk toward the left front quarter panel of a parked Suburban carrying a medium-sized object. They then saw Cantu squat down below the Suburban and place the object underneath the vehicle. After detaining Cantu, the officers approached the place where Cantu had crouched near the Suburban and found a blue bullet proof vest and a firearm.

A jury convicted Cantu of being a felon in possession of a firearm. Following Cantu's conviction, the presentence report (PSR) recommended that Cantu receive a base offense level of twenty-four because he committed the instant offense after having at least two prior felony convictions for burglaries of a habitation and a conviction for aggravated robbery with a deadly weapon. Additionally, because Cantu had three prior convictions for a violent felony, he was classified as an armed career criminal subject to an enhanced sentence under the Armed Career Criminal Act (ACCA). This increased his recommended total offense level to thirty-three. Based on a total offense level of thirty-three and a criminal history category of VI, Cantu's sentencing guidelines range was 235-293 months. The district court sentenced Cantu to a term of imprisonment of 284 months. Cantu timely appealed.

II

Cantu argues that the evidence was insufficient to support his conviction. In analyzing a sufficiency of the evidence challenge, this court "must decide whether a rational trier of fact could have found that each element of the charged criminal offense was proven beyond a reasonable doubt."¹ "We consider

¹ *United States v. Guidry*, 406 F.3d 314, 317-18 (5th Cir. 2005).

all the evidence in a light most favorable to the [G]overnment, drawing all inferences and credibility choices in its favor.”²

To prove possession of a firearm by a convicted felon under 18 U.S.C. § 922(g), the Government must prove that the defendant: (1) had previously been convicted of a felony; (2) possessed a firearm; and (3) that the firearm traveled in or affected interstate commerce.³ Cantu contests the sufficiency of the evidence only as to the third element.

“The interstate commerce element of a § 922(g)(1) charge is satisfied where the [G]overnment demonstrates that the firearm was manufactured out of state.”⁴ At trial, Jennifer McCarty, an expert in interstate nexus training, testified that the firearm seized was manufactured in Croatia, shipped to the Springfield Armory in Illinois, and was eventually sold by a dealer to a consumer in Texas. The Government produced sufficient evidence from which a jury could conclude beyond a reasonable doubt that the firearm possessed by Cantu affected interstate commerce.

Cantu also mounts an as-applied constitutional challenge to his conviction under § 922(g)(1), arguing that the Government had to prove that his possession of a firearm had a “substantial” effect on interstate commerce under *United*

² *Id.* at 318.

³ *Id.*

⁴ *Id.*

States v. Lopez,⁵ *United States v. Morrison*,⁶ and *Jones v. United States*.⁷ As Cantu concedes, this argument is foreclosed by our precedent.⁸

III

Cantu contends that the district court erred in instructing the jury that constructive possession could provide a basis for a conviction in his case. Because Cantu preserved his challenge to the jury instruction, our review is for abuse of discretion.⁹

“The trial court’s charge must not only be legally accurate, but also factually supportable; the court may not instruct the jury on a charge that is not supported by evidence.”¹⁰ In assessing whether the evidence sufficiently supports the jury instruction, this court “view[s] the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Government.”¹¹ Additionally, any error is subject to harmless error review.¹²

The district court’s charge required the jury to find that Cantu “knowingly possessed a firearm, as charged.” Cantu argues that there was no evidence to support a finding of constructive possession because the Government failed to

⁵ 514 U.S. 549 (1995).

⁶ 529 U.S. 598 (2000).

⁷ 529 U.S. 848 (2000).

⁸ See *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996) (“[N]either the holding in *Lopez* nor the reasons given therefor constitutionally invalidate § 922(g)(1).”); *United States v. Daugherty*, 264 F.3d 513, 518 (5th Cir. 2001) (“Neither *Jones* nor *Morrison* affects or undermines the constitutionality of § 922(g).”).

⁹ *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005).

¹⁰ *United States v. Mendoza-Medina*, 346 F.3d 121, 132 (5th Cir. 2003) (citation and internal quotation marks omitted).

¹¹ *Id.* (citation and internal quotation marks omitted).

¹² *Id.*

show that the firearm was already under the Suburban and that Cantu knew of its location. Assuming, arguendo, that Cantu is correct, any error is harmless.

Possession of a firearm may be actual or constructive.¹³ Cantu does not argue that the Government did not have evidence to prove actual possession. Officers Conway and Burke provided unrebutted testimony that Cantu carried objects from his car and placed them under the Suburban and that the officers recovered the firearm and vest from that location. A rational juror could have found beyond a reasonable doubt that Cantu had actual possession of the firearm. Thus, we conclude that any error in the jury instruction was harmless.¹⁴

IV

Cantu argues that the district court erred in finding that he was subject to the ACCA enhancement. “We review *de novo* the legal conclusions underlying the district court’s application of the ACCA.”¹⁵

Pursuant to the ACCA, a defendant convicted under 18 U.S.C. § 922(g) who has three prior convictions “for a violent felony . . . committed on occasions different from one another” is subject to a mandatory minimum sentence of fifteen years imprisonment.¹⁶ A “violent felony” is defined by the ACCA as any crime that is punishable by a term of imprisonment exceeding one year and “is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁷

¹³ *United States v. Patterson*, 431 F.3d 832, 837 (5th Cir. 2005).

¹⁴ See *Mendoza-Medina*, 346 F.3d at 134-35 (holding that the error in giving a deliberate ignorance instruction was harmless because there was substantial evidence of actual knowledge).

¹⁵ *United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006).

¹⁶ 18 U.S.C. § 924(e)(1).

¹⁷ § 924(e)(2)(B)(ii).

The Supreme Court has interpreted “burglary” in § 924(e) to require that the state statute contain, at a minimum, the following elements: “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.”¹⁸ Under Texas Penal Code § 30.02(a)(1), a person commits burglary if, without the effective consent of the owner, that person “enters a habitation, or a building (or any portion of a building) not then open to the public, with the intent to commit a felony, theft, or an assault.” Further, under Texas Penal Code § 30.02(a)(3) a person commits burglary if that person “enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.” This court has previously held that the offense of burglary of a habitation under Texas Penal Code § 30.02(a)(1) qualifies as a generic burglary for purposes of the ACCA.¹⁹ This court has also determined that a burglary conviction under § 30.02(a)(3) is not a conviction for generic burglary because it does not require an intent to commit another crime at the time of entry.²⁰

In determining whether an offense satisfies the ACCA, a court is limited to “examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented,”²¹ or to “some comparable judicial record of this information.”²² The court may examine a judicial confession to

¹⁸ *Taylor v. United States*, 495 U.S. 575, 598 (1990).

¹⁹ *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992); *see also United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006) (same).

²⁰ *United States v. Constante*, 544 F.3d 584, 585-86 (5th Cir. 2008).

²¹ *Shepard v. United States*, 544 U.S. 13, 16 (2005).

²² *Id.* at 26.

determine whether a prior conviction qualifies as a crime of violence.²³

Cantu contends that the Government failed to prove that he has three prior convictions for violent felonies. Cantu does not dispute that his conviction for aggravated robbery with a deadly weapon is a violent felony. The Government also concedes that one of Cantu's three burglary convictions does not qualify under the ACCA because it was reduced to a misdemeanor offense. Therefore, at issue are two of Cantu's prior burglary convictions in Texas.

A

In regard to Cantu's first burglary offense, case number F-9573956, the Government supplemented the record on appeal with a confession by Cantu. The confession reads, in relevant part, that Cantu did:

unlawfully, knowingly and intentionally enter a habitation without the effective consent of . . . the owner thereof, with the intent to commit theft . . .

Through the production of Cantu's confession, the Government has shown that Cantu's burglary conviction in case number F-9573956 violated Texas Penal Code § 30.02(a)(1) and was therefore a violent felony.

B

Cantu claims that his second Texas burglary conviction, case number F-9575353, does not qualify as a violent felony. Cantu did not object to the ACCA enhancement based on this conviction in the district court. Therefore, we review this claim for plain error.²⁴ To prevail under the plain error standard, Cantu must demonstrate (1) error, (2) that is clear and obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or

²³ *United States v. Garcia-Arellano*, 522 F.3d 477, 481 (5th Cir.) (holding that a federal court may rely on a written judicial confession in determining the nature of a Texas offense to which a defendant pleaded guilty), *cert. denied*, 129 S. Ct. 353 (2008).

²⁴ *United States v. Molina*, 530 F.3d 326, 329 (5th Cir. 2008).

public reputation of judicial proceedings.²⁵

In case number F-9575353, the Government charged Cantu with the alternative theories of burglary under Texas Penal Code § 30.02(a)(1) and § 30.02(a)(3). The indictment reads, in relevant part that:

Cantu, Christopher Joe, defendant,

on or about the 9th day of June A.D. 1995 in the county of Dallas and said State, did

unlawfully, knowingly and intentionally enter a habitation without the effective consent of . . . the owner thereof, with the intent to commit theft,

and further, said defendant did knowingly and intentionally enter a habitation without the effective consent of . . . the owner thereof, and did then and there commit and attempt to commit theft.

The Government produced a confession from Cantu that included only the second sentence of the first paragraph and the entire second paragraph in the indictment. The confession reads, in relevant part:

On the 9 day of June 1995, in Dallas County, Texas, I did unlawfully,

consent of . . . the owner thereof with the intent to commit theft,

and further, said defendant did knowingly and intentionally enter a habitation without the effective consent of . . . the owner thereof, and did then and there commit and attempt to commit theft.

In addition to the specific admissions above, the confession included a general, boiler-plate clause that stated, "I further judicially confess that I committed the offense with which I stand charged exactly as alleged in the indictment in this cause."

This court has previously considered information contained within a plea document to determine the character of a prior offense even though the

²⁵ *Id.*

information did not specifically relate to the charge in question. In *United States v. Lopez-DeLeon*, the defendant had pled no contest in a California court to that state's equivalent of statutory rape and to one count of "lewd act with a child under the age of 14."²⁶ Lopez-DeLeon was deported and was later arrested for illegal reentry.²⁷ At sentencing, the district court found that Lopez-DeLeon's prior conviction for statutory rape was a "crime of violence" pursuant to United States Sentencing Guidelines § 2L1.2(b)(1)(A)(ii).²⁸ The California crime of statutory rape does not meet the generic definition of statutory rape because a person may be convicted for actions with a victim as old as seventeen.²⁹ Nevertheless, this court held that the defendant's stipulation to the child's younger age in the related count sufficiently established a generic statutory rape.³⁰

Similar to *Lopez-DeLeon*, here the sum of Cantu's confession sufficiently establishes that he committed a generic burglary. In the second paragraph of the confession, Cantu admitted that he knowingly and intentionally entered a habitation without the consent of the owner. In the portion of the first paragraph of the indictment included in the confession, Cantu confessed that, on the same date, he had the intent to commit theft. While the sentence including the intent portion is of poor quality, it is legible and entered into evidence without objection. Cantu's generic admission that he committed the offense as charged in the indictment, coupled with his specific admissions,

²⁶ 513 F.3d 472, 473, 474 n.2 (5th Cir. 2008).

²⁷ *Id.* at 473.

²⁸ *Id.*

²⁹ *Id.* at 475 ("Thus, § 261.5(c) is overly broad for the purposes of defining statutory rape pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii).").

³⁰ *Id.* at 475-76.

supports a conclusion that Cantu confessed to committing burglary under Texas Penal Code § 30.02(a)(1).³¹ Therefore, we cannot say that the district court clearly erred in its determination that Cantu's Texas burglary conviction, case number F-9575353, qualifies as a violent felony.

* * *

AFFIRMED.

³¹ See *United States v. Garcia-Arellano*, 522 F.3d 477, 481 (5th Cir. 2008) (holding that the defendant's specific confession of the crime charged as well as a boiler-plate statement that he "committed the offense with which [he] stand[s] charged exactly as alleged in the indictment in this case" conclusively established that the defendant's prior conviction qualified as a drug trafficking offense under the United States Sentencing Guidelines).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10089



In re: CHRISTOPHER JOE CANTU,

Movant

A True Copy
Certified order issued May 13, 2016

Jyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Dallas to consider
a successive 28 U.S.C. § 2255 motion

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Christopher Joe Cantu, federal prisoner # 37143-177, has filed a motion for authorization to file a successive 28 U.S.C. § 2255 motion to challenge his 284-month sentence for being a felon in possession of a firearm. In his proposed motion, Cantu seeks to challenge the enhancement to his sentence under the Armed Career Criminal Act based on the Supreme Court's recent decisions in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In his motion, Cantu asserts that the district court erred in characterizing his § 2255 motion as successive and transferring it to this court. He contends that he is raising claims that were not available to him when he filed his initial § 2255 motion and therefore his motion cannot be successive. We rejected this argument in *Leal Garcia v. Quarterman*, 573 F.3d 214, 220-21 (5th Cir. 2009). There, we construed identical language appearing in 28

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U.S.C. § 2244(b) and explained that “[n]ewly available claims based on new rules of constitutional law (made retroactive by the Supreme Court) are *successive*.” *Leal Garcia*, 573 F.3d at 221. Because Cantu seeks to challenge errors at sentencing, the district court properly construed Cantu’s motion as a successive § 2255 motion and transferred it to this court for consideration. *See Tolliver v. Dobre*, 211 F.3d 876, 877-78 (5th Cir. 2000); *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997).

A prisoner seeking to file a second or successive § 2255 motion must apply for leave to do so from this court. *See* § 2255(h); 28 U.S.C. § 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001). We will not authorize the filing of such a motion unless Cantu makes a *prima facie* showing that his claims rely on either (1) “newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense” or (2) “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” § 2255(h); *see* § 2244(b)(3)(C).

With respect to his claim based upon *Johnson*, Cantu has made “a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Reyes-Requena*, 243 F.3d at 899 (internal quotation marks and citation omitted); *see Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Accordingly, his motion for authorization to file a successive § 2255 motion is granted in part with respect to his *Johnson* claim. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Cantu has failed to make the showing required to file such a motion. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. Because Cantu fails to make the required showing with respect to his

Descamps-based claim, *see* § 2255(h); *Reyes-Quenya*, 243 F.3d at 900, his motion is also denied in part. Additionally, Cantu's motion for appointment of counsel is denied as moot.

IT IS ORDERED that Cantu's motion for authorization to file a successive § 2255 motion is GRANTED IN PART AND DENIED IN PART. His motion for appointment of counsel is DENIED AS MOOT.

18-10529.73

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

MEMORANDUM OPINION AND ORDER

Before the Court is Christopher Cantu's (Movant) motion to vacate, set-aside, or correct sentence pursuant 28 U.S.C. § 2255. For the following reasons, the Court denies the motion.

I. BACKGROUND

Cantu was charged by indictment with felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e). (Doc. 1.) Unless otherwise indicated, all document numbers refer to the docket number assigned in the underlying criminal action, 3:07-CR-197-K. He pled not guilty, and a jury convicted him. (Doc. 46.) He was an armed career criminal because his federal conviction under 18 U.S.C. § 924(e) subjected him to an enhanced sentence under the Armed Career Criminal Act (ACCA) based on prior violent felony convictions for burglary of a habitation (2 prior convictions) and aggravated robbery. (Doc. 75 at 6). He was sentenced to 284 months' imprisonment. (Doc. 59.)

The judgment was affirmed on appeal. (Doc. 79); *United States v. Cantu*, 340 F.

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App'x 186 (5th Cir. 2009). Among the issues raised on appeal, Cantu contended that his two convictions for burglary did not qualify as violent felonies under the ACCA. The United States Court of Appeals for the Fifth Circuit noted that it had previously held that a burglary under Tex. Penal Code § 30.02(a)(1) was a generic burglary as enumerated in the ACCA, so it qualifies as a violent felony, but a burglary under § 30.02(a)(3) was not a generic burglary *Cantu*, 340 F. App'x at 190. The Court held that Cantu's convictions for burglary under § 30.02(a)(1) qualified as violent felonies under the ACCA. *Id.* at 190-91. The Fifth Circuit recently reconsidered its case law and held that the Texas burglary statute is indivisible and is not generic burglary under the ACCA. *Herrold v. United States*, 2018 WL 948373 (5th Cir. Feb. 20, 2018). *Herrold* was a direct appeal, and it was not a § 2255 case.

Cantu's § 2255 motion was transferred to the Fifth Circuit as successive. (3:15-CV-3896-K, doc. 4.) He sought to "challenge the enhancement to his sentence under the Armed Career Criminal Act based on the Supreme Court's recent decisions in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Johnson v. United States*, 135 S. Ct. 2551 (2015)." (3:15-CV-3896-K, doc. 5); *In re Cantu*, No. 16-10089 (5th Cir. May 13, 2016). In the *Descamps* claim, he argued that his burglary convictions were not generic burglaries under the ACCA, because the Texas burglary statute is indivisible and it includes burglary of a vehicle. (3:15-CV-3896-K, doc. 2 at 4-6, 16-20.) In the *Johnson* claim, he argued that his conviction for aggravated robbery was not a violent felony in

light of *Johnson*. (*Id.* at 20-24.) The Fifth Circuit authorized a successive § 2255 motion for the *Johnson* claim, but denied authorization for the *Descamps* claim. *Id.*

Cantu filed an amended § 2255 motion and raises the following grounds:

(1) “Using Texas burglary under ACCA violates due process. Using Texas burglary under ACCA violates due process. *See Johnson v US*, 135 S.Ct. 2551 (15). It is not equivalent to “generic burglary” because the Texas burglary statute contains just one offense, & is broader than generic burglary. *See Mathis v. US*, 2016 WL 1165970 (2016), 135 S.Ct. 2551 (15); *US v. Constante*, 544 F3d 584 (5C 08).”

(2) “*Johnson v. US*, 135 S.Ct. 2551 (2015), forbids using Texas “aggravated robbery” under ACCA. It can be committed multiple ways that lack “the use, attempted use, or threatened use of force,” including threats of forceless injury, or recklessly causing injury. Tex. Penal Code 29.02, 29.03; *US v Vargas-Duran*, 356 F3d 598.”

(3:15-CV-3896-K (doc. 9 at 7.)

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

“Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that “a collateral challenge may not do service for an appeal.” *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

A failure to raise a claim on direct appeal may procedurally bar an individual

from raising the claim on collateral review. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Defendants may only collaterally attack their convictions on grounds of error omitted from their direct appeals upon showing “cause” for the omission and “actual prejudice” resulting from the error. *Shaid*, 937 F.2d at 232. However, “there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal” because “requiring a criminal defendant to bring [such] claims on direct appeal does not promote the[] objectives” of the procedural default doctrine, “to conserve judicial resources and to respect the law’s important interest in the finality of judgments.” *Massaro v. United States*, 538 U.S. 500, 503-04 (2003). The Government may also waive the procedural bar defense. *Willis*, 273 F.3d at 597.

III. BURGLARY CONVICTIONS

The Fifth Circuit denied authorization to file a successive motion on the *Descamps* claim, which challenged the ACCA enhancement using the burglary convictions as violent felonies, because they were indivisible under *Descamps*. Cantu now argues that the burglary convictions are indivisible under *Mathis v. United States*, 136 S.Ct. 2243 (2016). He asserts that the burglary statute is indivisible and is broader than generic burglary under the ACCA, because it includes burglary under § 30.02(a)(1) and (3). In both *Descamps* and *Mathis*, the Supreme Court set out the analysis for determining whether a statute is divisible and the type of categorical approach to use in analyzing a statutory offense. *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 133 S. Ct.

at 2281.

The Fifth Circuit did not authorize a successive § 2255 motion for his claim regarding the two burglary convictions under *Mathis*. Moreover, such a claim does not meet the requirements for a successive motion to be authorized, because *Mathis* did not announce a new rule. *See In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016) (per curiam) (denying authorization to file a successive § 2255 motion that relied on *Mathis* because *Mathis* did not announce a new rule of constitutional law). Although Cantu cites *Johnson* in support of this claim, the burglary convictions were used for ACCA enhancement as generic burglaries, and not under the residual clause. *See Cantu*, 340 F. App’x 186.

IV. AGGRAVATED ROBBERY

Cantu challenges the use of his aggravated robbery conviction under the ACCA. As the Supreme Court of the United States noted in *Johnson*,

Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years’ imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a “serious drug offense” or a “violent felony,” [Section 924 of the Armed Career Criminal Act] increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Curtis Johnson v. United States*, 559 U.S. 133, 136 (2010). The Act defines “violent felony” as follows”

any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.* § 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause.

135 S.Ct. at 2555-56 (citation modified). Subsection (i) is known as the elements clause, and the portion of subsection (ii) regarding a prior conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another" is known as the residual clause. *See United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017).

In *Johnson*, the Supreme Court held that the imposition of an increased sentence under the residual clause of the ACCA violates the Constitution's guarantee of due process because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. This holding is retroactively available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

After *Johnson*, "[a] violent felony is one of a number of enumerated offenses or a felony that 'has an element the use, attempted use, or threatened use of physical force against the person of another.'" *United States v. Moore*, ____ F. App'x ___, 2017 WL 4804355, at *1 (5th Cir. 2017) (per curiam) (quoting § 924(e)(2)(B)). Aggravated robbery is not an enumerated offense. To determine whether murder is a violent felony

under the elements clause, the elements of the offense must be determined. *See United States v. Lerma*, 877 F.3d 628, 631 (5th Cir. 2017).

“Criminal statutes are indivisible or divisible.” *Id.* An indivisible statute sets out one set of elements to define one crime. *See id.* A divisible statute “list[s] elements in the alternative, and thereby define[s] multiple crimes.” *Id.* “Elements are the constituent parts of a crime’s legal definition—the things the prosecution must prove to sustain a conviction.” *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (internal quotation marks and citations omitted). “At a trial, [elements] are what the jury must find beyond a reasonable doubt to convict the defendant,” and “[a]t a plea hearing, they are what the defendant necessarily admits when he pleads guilty.” *Id.* (citation omitted).

“An element of a crime must be distinguished from the means of satisfying a single element.” *Lerma*, 877 F.3d at 631.

For example, a statute may require the use of a ‘deadly weapon’ as an element of a crime. The statute may then further list as potential deadly weapons a knife, gun, bat, or similar weapon. That ‘list merely specifies diverse means of satisfying a single element of a single crime.’ [Mathis, 136 S.Ct.] at 2249. A jury need not find any particular weapon in the list was used in order to convict, so long as all of the jurors agreed that the defendant used a deadly weapon.

Id. at 631. “Elements must be agreed upon by a jury. When a jury is not required to agree on the way that a particular requirement of an offense is met, the way of satisfying that requirement is a means of committing an offense not an element of the

offense.” *United States v. Howell*, 838 F.3d 489, 498 (5th Cir. 2016) (quoting *United States v. Hinkle*, 832 F.3d 569, 574-75 (5th Cir. 2016)). To determine whether a statute is divisible or indivisible, the court may consider several sources, including the statutory text and state court decisions. *United States v. Reyes-Contreras*, ____ F.3d ____ , 2018 WL 722552 at *3 (5th Cir. Feb. 6, 2018).

If a statute is indivisible, the sentencing court must apply the “categorical approach.” *Id.* at 2248. It “requires the sentencing court, when determining whether a crime qualifies as a violent felony under the elements clause, to focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another.” *Lerma*, 877 F.3d at 630. “The sentencing court is not permitted to review the particular facts of the case.” *Id.*

If a statute is divisible, the district court must use the “modified categorical approach” to determine the elements under which the defendant was convicted. *Mathis*, 136 S.Ct. at 2253. Under the modified categorical approach, the district court looks “to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of [committing].” *Id.* at 2249 (citations omitted). “The court can then determine, in deciding whether the crime satisfies the elements clause, if one of those elements included the use, attempted use, or threatened use of physical force against the person of another.” *Lerma*, 877 F.3d at 630.

Cantu was convicted of aggravated robbery in Texas in 1995. (3:15-CV-3896-K, doc. 16 at 3.) In 1995, Texas Penal Code § 29.03 provided, in pertinent part:

(a) A person commits an [aggravated robbery] if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) A disabled person.

Tex. Penal Code § 29.03.

The Texas robbery statute—incorporated into the first paragraph of the aggravated robbery statute—provided as relevant:

(a) A person commits [robbery in Texas] if, in the course of committing theft ...

and with intent to obtain or maintain control of the property, he:

(1) Intentionally, knowingly, or recklessly causes bodily injury to another,

or

(2) Intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02.

The Fifth Circuit has “conclude[d] that [this] Texas aggravated robbery statute

is divisible.” *Lerma*, 877 F.3d at 634. So, this Court must use the modified categorical approach to determine whether Cantu’s aggravated robbery conviction satisfies Section 924(e)’s force clause. *See id.*

The modified categorical approach “permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record.” *Johnson*, 559 U.S. at 144. The Court may refer to the “charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusion of law from a bench trial, and jury instructions and verdict forms.” *Id.* (citations omitted).

Here, the record contains Cantu’s indictment and judicial confession in support of his guilty plea, which show that he:

did unlawfully then and there while in the course of committing theft and with intent to obtain and maintain control of the property of [the victim] ..., without the effective consent of [the victim] and with intent to deprive [the victim] of said property, did then and there knowingly and intentionally threaten and place [the victim] in fear of imminent bodily injury and death, and [Cantu] did then and there use and exhibit a deadly weapon, to-wit: a firearm.

(3:15-CV-3896-K, doc. 16 at 9.) Because Cantu’s aggravated robbery conviction involved his commission of a robbery and his using and exhibiting a deadly weapon, his conviction was based on Section 29.03(a)(2) of the Texas aggravated robbery statute.

The Fifth Circuit has held that a “conviction[] for aggravated robbery under Texas Penal Code § 29.03(a)(2)” is a violent felony “under the force clause of the

ACCA.” *Lerma*, 877 F.3d at 631; *see also id.* at 636 (“There can be no question that a crime under Texas Penal Code § 29.03(a)(2), that is, threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against another.”). Accordingly, Cantu’s aggravated robbery conviction still qualifies as a violent felony after *Johnson*. *See Rodriguez v. United States*, No. 3:16-CV-1740-K, 2018 WL 276337 (N.D. Tex. Jan. 2, 2018) (Texas aggravated robbery under § 29.03(a)(2) is a violent felony under the ACCA).

V. CONCLUSION

For the foregoing reasons, the § 2255 motion is DENIED with prejudice.

SO ORDERED.

Signed March 5th, 2018.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

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

CHRISTOPHER CANTU,)
)
 Movant,) No. 3:15-CV-3896-K
vs.)
)
)
UNITED STATES OF AMERICA,) No. 3:07-CR-197-K
)
 Respondent.)

JUDGMENT

This action came on for consideration by the Court, and the issues having been
duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that:

1. The motion to vacate, set aside or correct sentence filed under 28 U.S.C. § 2255 is DENIED with prejudice.
2. The Clerk shall transmit a true copy of this Judgment to all parties.

SO ORDERED.

Signed March 5th, 2018.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

18-10529.145

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

CHRISTOPHE CANTU	§	
	§	
	§	
Movant,	§	
	§	
V.	§	No. 3:15-cv-3896-K
	§	No. 3:07-cr-197-K (01)
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER DENYING CERTIFICATE OF APPEALABILITY

Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the Court DENIES a certificate of appealability. The Court adopts and incorporates by reference the Magistrate Judge's Findings, Conclusions, and Recommendation filed in this case in support of its finding that the Petitioner has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it 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).

Rule 11 of the Rules Governing §§ 2254 and 2255 Cases, as amended effective on December 1, 2009, reads as follows:

18-10529.146

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

In the event that Petitioner will file a notice of appeal, the Court notes that she will need to pay the applicable filing fee of \$505.00 or move for leave to proceed *in forma pauperis* on appeal.

SO ORDERED.

Signed March 5th, 2018.



ED KINKEADE
UNITED STATES DISTRICT JUDGE