

UNITED STATES DISTRICT COURT

Southern

District of

Mississippi

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

JOHN HUDSON

Case Number: 3:03cr138WHB-AGN-001

USM Number: 08625-043

Defendant's Attorney:

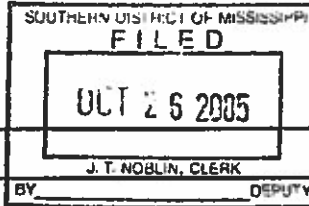
Omodare Jupiter
201 S. Lamar Street, Suite 100S
Jackson, MS 39201
(601) 948-4284

THE DEFENDANT:

pleaded guilty to count(s) single-count Indictment

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. § 922(g)(1)	Felon in Possession of a Firearm	06/15/03	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.

Date of Imposition of Judgment October 14, 2005

Signature of Judge *William H. Barbour, Jr.*

Name and Title of Judge William H. Barbour, Jr., U. S. District Judge

Date 10/24/05

DEFENDANT: HUDSON, John
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IMPRISONMENT

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

180 months

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 2 p.m. 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 _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

five (5) 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.

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SPECIAL CONDITIONS OF SUPERVISION

- (A) The defendant shall submit to random urinalysis testing and complete any substance abuse treatment program deemed necessary by the supervising U.S. Probation Officer.
- (B) The defendant is to provide any financial information, business or personal, to the U.S. Probation Office upon request and is prohibited from incurring new charges or opening additional lines of credit without the approval of the U.S. Probation Office.

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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	\$ 1,500.00	\$

- 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) to the following payees in the amount 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>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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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:

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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 monthly (e.g., weekly, monthly, quarterly) installments of \$ 50.00 over a period of 30 months (e.g., months or years), to commence 30 days (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:

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 Clerk of Court, P. O. Box 23552, Jackson, MS 39225-3552.

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:

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.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

VS.

**CRIMINAL NO. 3:03-cr-138-WHB-ALL
CIVIL ACTION NO. 3:16-cv-505-WHB-ALL**

JOHN HUDSON

OPINION AND ORDER

This cause is before the Court on Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("Motion to Vacate").¹ Having considered the pleadings, the record in the underlying criminal case, as well as supporting and opposing authorities, the Court finds the Motion is not well taken and should be denied.

I. Factual Background and Procedural History

John Hudson ("Hudson") pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Prior to sentencing, a Presentence Investigation Report ("PSI") was prepared to determine the applicable sentencing range under the United States Sentencing Guidelines ("U.S.S.G."). Although Hudson's initial Adjusted Offense Level was 24, he was deemed to be an armed career criminal that required that his sentence be calculated from

¹ The Fifth Circuit authorized the filing of this successive Motion to Vacate. See In re John Hudson, No. 16-60279, slip Op. (5th Cir. Jun. 27, 2016).

an Adjusted Offense Level of 33 pursuant to U.S.S.G. § 4B1.4(b). The prior felony convictions used to support the armed career criminal designation included a Mississippi conviction for house burglary, a Mississippi conviction for robbery, and a Michigan conviction for assault with intent to rob being unarmed. Following a three-level reduction for acceptance of responsibility, Hudson's Total Offense Level was 30, which, when considered in conjunction with his Criminal History Level and the statutory minimum sentence, resulted in a Sentencing Guideline Range of 180 to 210 months. The minimum statutory sentence was based on 18 U.S.C. § 924(e), which provides, in relevant part, that a person who violates Section 922(g)(1) and who has three previous convictions "shall be ... imprisoned not less than fifteen years." Hudson was sentenced to a 180-month term of imprisonment in July of 2006. He has completed his term of imprisonment, and is currently serving his term of supervised release.

Relying on Johnson v. United States, --- U.S. ---, 135 S.Ct. 2552 (2015), Hudson filed the subject Motion to Vacate. In his Motion, Hudson argues that under Johnson, his Mississippi conviction for robbery and his Michigan conviction for assault with intent to rob and steal being unarmed, should not have been considered for the purposes of either sentencing him as a career offender under 18 U.S.C. § 924(e), or for the purpose of applying the enhancements under U.S.S.G. § 4B1.4 when calculating his

sentence. In response, the Government argues that Hudson's Motion to Vacate should be dismissed on the grounds that his prior convictions were properly considered at sentencing, his claims are barred by the applicable statute of limitations, and/or that he waived his right to seek post-conviction relief as part of his plea agreement. The Court now considers Hudson's Motion to Vacate.

II. Discussion

In Johnson v. United States, --- U.S. ---, 135 S.Ct. 2552 (2015), the United States Supreme Court considered a due process challenge to the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e). This statute provides, in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both, ... such person shall be fined under this title and imprisoned not less than fifteen years ...

(2) As used in this subsection -

...

(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). The specific issue raised to the Court was whether the residual clause in Section 924(e)(2)(B)(ii), which reads "or otherwise involves conduct that presents a serious potential risk of physical injury to another" was unconstitutionally vague. In deciding the issue, the Johnson Court held that an "increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, 133 S. Ct. at 2563. The Court also held that its decision did not "call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Id.

In his Motion to Vacate, Hudson argues that following Johnson, neither his Mississippi robbery conviction, nor his Michigan conviction for assault with intent to rob and steal being unarmed, can be considered "violent felonies" under the ACCA for the purposes of enhancing his sentence.²

Contrary to Hudson's arguments, the United States Court of Appeals for the Fifth Circuit has found that robbery and armed robbery offenses under Mississippi law constitute violent felonies for the purpose of the ACCA because those offenses "'necessarily

² Hudson does not challenge whether his prior Mississippi burglary conviction was properly considered when his sentence was imposed. See Mot. to Vacate [Docket No. 48], 4 (challenging only the Michigan conviction for assault with intent to rob and the Mississippi conviction for robbery).

involve violence - or at least the threat of imminent violence to another - to accomplish the crime.'" See In re Collins, No. 16-60437, slip op., at 2 (5th Cir. Jul. 29, 2016) (quoting Brown v. State, 102 So.3d 1087, 1091 (Miss. 2012)). The Court likewise finds, contrary to Hudson's arguments, that his Michigan conviction for assault with intent to rob and steal being unarmed was properly considered a "violent felony".

Michigan Compiled Laws Annotated Section 750.88 defines "Assault with intent to rob and steal; unarmed" as follows:

Assault with intent to rob and steal being unarmed - Any person, not being armed with a dangerous weapon, who shall assault another with force and violence, and with intent to rob and steal, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

The Michigan Supreme Court has held that this statute is "conjunctive", i.e. "there must be an assault with force and violence." People v. Gardner, 265 N.W.2d 1, 5 (Mich. 1978). "The essential elements of assault with intent to rob being unarmed are (1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed. The crime necessarily requires an assault and the requisite intent, but not necessarily the taking." Id. at 5 n.1. Because a conviction for "Assault with intent to rob and steal; unarmed" under Michigan law requires "an element of 'physical force,' that is, 'violent force' capable of causing physical pain or injury to another person," see U.S. v. Beckworth, 2016 WL 4203510, at *4 (S.D. Miss. Aug. 9, 2016) (citing

Johnson, 559 U.S. at 140), the Court finds that that conviction constitutes a "violent felony" under the elements provision of Section 924(e) (2) (B) (I).

Having considered the applicable law, the Court finds Hudson's Mississippi conviction for robbery, and his Michigan conviction for assault with intent to rob and steal being unarmed, both qualify as violent felonies under the elements clause of the ACCA and, therefore, were properly considered when determining whether he was a career offender under that statute. Additionally, as the subject convictions qualify as violent felonies under the elements clause of the ACCA, the decision of the Supreme Court in Johnson respecting the residual clause of that statute is not applicable in this case. Finally, because Hudson had three qualifying convictions for the purpose of sentencing him as a career offender under Section 924(e), the Court finds he has failed to show that he is entitled under 28 U.S.C. 2255. Hudson's Motion to Vacate will, therefore, be denied.³

³ Because Hudson was sentenced to a statutory minimum sentence, his challenge to the manner in which his guideline range was calculated, i.e. application of the armed career criminal enhancement under U.S.S.G. § 4B1.4, is moot.

Additionally, because the Court finds that Hudson was properly sentenced as a career offender under Section 924(e), it does not considered the timeliness or waiver arguments advanced by the Government.

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that Defendant's Motion to Vacate Conviction and Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 [Docket No. 48] is hereby denied. A Final Judgment dismissing this case with prejudice shall be entered this day.

IT IS FURTHER ORDERED that a Certificate of Appealability should not issue. Defendant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED this the 27th day of June, 2018.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

VS.

**CRIMINAL NO. 3:03-cr-138-WHB-ALL
CIVIL ACTION NO. 3:16-cv-505-WHB-ALL**

JOHN HUDSON

FINAL JUDGMENT

In accordance with Rule 58 of the Federal Rules of Civil Procedure, and with the Opinion and Order that denied Defendant John Hudson's Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, this case is hereby dismissed with prejudice.

SO ORDERED this the 27th day of June, 2018.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60479



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

A True Copy
Certified order issued Jun 12, 2019

v.

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

JOHN HUDSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

O R D E R:

In 2005, John Hudson, federal prisoner # 08625-043, pleaded guilty to one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to 180 months of imprisonment and five years of supervised release. Hudson filed a second or successive 28 U.S.C. § 2255 motion challenging his ACCA sentence enhancement based on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Hudson contends that *Johnson* applies to his case because his 1986 Michigan conviction for assault with intent to rob and steal while being unarmed and his 1992 Mississippi conviction for robbery were deemed violent felonies under the ACCA's residual clause. The district court denied Hudson's motion and denied a certificate of appealability (COA). Hudson now seeks a COA from this Court.

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A COA “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires “showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

Determining whether to grant a COA requires considering the debatability of not only the merits of Hudson’s constitutional claim but also any procedural bars to relief. *See ibid.*; *Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004). A judge “may deny a COA if there is a plain procedural bar to habeas relief, even though the district court did not rely on that bar.” *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005); *see also United States v. Arrington*, 763 F.3d 17, 24 (D.C. Cir. 2014). If the district court would lack jurisdiction to give relief, that is a procedural hurdle that justifies denial of a COA. *See Davis*, 425 F.3d at 834.

Thus, a COA cannot issue unless reasonable jurists could debate whether the district court would have jurisdiction to grant Hudson’s § 2255 motion. In this Circuit, binding precedent deciding an issue can foreclose debate among reasonable jurists about that issue. *See Ward v. Stephens*, 777 F.3d 250, 269 (5th Cir. 2015), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Reed v. Stephens*, 739 F.3d 753, 789–90 (5th Cir. 2014).

Two of our recent opinions—published after the district court’s orders in this case—demonstrate reasonable jurists could not debate the jurisdictional issue here. In *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), this Court identified a jurisdictional barrier to a second or successive § 2255 motion: A movant “must actually prove at the district court level that the relief he seeks

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relies either on a new, retroactive rule of constitutional law or on new evidence.” *Id.* at 723. For a movant to prove he is relying on the rule announced in *Johnson*, he must show “the sentencing court relied on the residual clause in making its sentencing determination.” *Id.* at 724. In *United States v. Clay*, 921 F.3d 550, 558–59 (5th Cir. 2019), this Court clarified that a movant must make that showing by a preponderance of the evidence. If he fails to do so, the district court must dismiss. *See Wiese*, 896 F.3d at 723.

“In determining potential reliance on the residual clause by the sentencing court, [this Court] may look to (1) the sentencing record for direct evidence of a sentence, and (2) the relevant background legal environment that existed at the time of the defendant’s sentencing and the presentence report . . . and other relevant materials before the district court.” *Wiese*, 896 F.3d at 725 (quotation, citations, and brackets omitted). Hudson has not provided either type of evidence. Hudson does not argue the sentencing court expressly relied on the residual clause, nor does he point to legal authorities from the time of sentencing that suggest the sentencing court relied on the residual clause. Hudson’s citations to authorities published after he was sentenced are not sufficient because those authorities could not have informed the sentencing court’s decision.

Thus, after *Wiese* and *Clay*, Hudson’s failure to demonstrate that the sentencing court relied on the residual clause is not debatable by reasonable jurists. In light of this procedural bar to § 2255 relief, issuing a COA would be improper. Hudson’s COA motion is DENIED.



ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE