APPENDICES

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 17-3628
Filed May 28, 2019

EDWIN ARTHUR AVERY,
Petitioner-Appellant,
v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Ohio

BEFORE: COOK, and LARSEN, Circuit Judges.[1]

COOK, Circuit Judge. Edwin Arthur Avery challenges his enhanced Armed Career Criminals Act ("ACCA") sentence, alleging that two of his three predicate convictions no longer support the enhancement after *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). The district court barred this successive habeas petition on procedural grounds, then went on to decide that even if not barred, the petition would fail. Because Avery presented his current *Johnson II* claim in a previous application, we REMAND with instructions to dismiss the petition for lack of jurisdiction.

[1] The third member of this panel, Judge Damon J. Keith, died on April 28, 2019. This decision is entered by the quorum of the panel. 28 U.S.C. § 46(d).

I.

In 2007, a grand jury indicted Avery on one count of possessing a firearm as a convicted felon. As relevant here, the indictment listed three Ohio felony predicates: (1) a 2005 robbery conviction, (2) a 2005 felonious assault conviction, and (3) a 2002 robbery conviction. Avery pleaded guilty, acknowledging that his robbery and felonious assault convictions were "violent felonies" qualifying him for the ACCA's mandatory—minimum sentence of fifteen years. He also waived his right to appeal his conviction and "any right to bring a post—conviction collateral attack on the conviction or sentence." The court then imposed the agreed—upon fifteen—year sentence. When Avery later attempted to appeal his sentence, this court affirmed, upholding the plea waiver. *United States v. Avery*, No. 08-4271 (6th Cir. Aug. 12, 2009).

Over six years later, Avery challenged his sentence in a 28 U.S.C. § 2255 motion, asserting that *Johnson II* invalidated his ACCA enhancement. The district court dismissed that petition and declined to issue a certificate of appealability ("COA"). Avery did not appeal.

Instead, three months later, Avery sought and received authorization from this court to file this second § 2255 petition on his *Johnson II* claim. Again, the district court dismissed the petition. This time, however, the court granted a COA on the question of "whether a person in Avery's position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under [the] ACCA after *Johnson [II]*." This court later expanded the COA to consider, among other things, whether any procedural issues might bar Avery's *Johnson II* claim.

II.

We first examine whether we have jurisdiction over Avery's petition. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *SteelCo. v. Citizens for a Better Env't* 523 U.S. 83,94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Even if the parties fail to address jurisdiction in their briefs, "we are under an independent obligation to police our own jurisdiction." *Bonner v. Perry*, 564 F.3d 424, 426 (6th Cir. 2009) (quoting *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 665 (6th Cir. 2001)).

The district court here lacked jurisdiction to decide Avery's second § 2255 petition, and so do we. Two statutes bear on whether the district court could properly exercise jurisdiction. Section 2255(h) governs and requires that "[a] second or successive motion must be certified as provided in section 2244." 28 U.S.C. § 2255(h). And when we then look to § 2244, it instructs that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). Importantly, both the Supreme Court and this court describe § 2244(b) as jurisdictional. *See Panetti v. Quarterman*, 551 U.S. 930, 942 (2007); *Post v. Bradshaw*, 422 F.3d 419, 425 (6th Cir. 2005). Other circuits agree. *See In re Bradford*, 830 F.3d 1273, 1278 (11th Cir. 2016) ("Because § 2244(b)(1) is jurisdictional, we necessarily lack jurisdiction to hear a second or successive habeas petition premised exclusively on a claim that was presented in a prior application."); *Adams v. Thaler*, 679 F.3d 312, 322-23 (5th Cir. 2012); *Freeman v. Chandler*, 645 F.3d 863, 867 (7th Cir. 2011).

The district court interpreted § 2244(b)(1) to apply only to state prisoners because it cross-references § 2254, the section of the habeas statute addressing state prisoners. Thus, the court concluded that § 2244(b)(1) did not bar Avery—a federal prisoner—from pursuing a second § 2255 petition. But though § 2244(b)(1) explicitly references § 2254, our cases teach that its bar on repetitive filings extends to federal prisoners' § 2255 motions. *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) ("[Petitioner] is not entitled to file a successive § 2255 motion to vacate because he seeks permission to file the same claims that have already been denied on the merits. *See* § 2244(b)(1)."). We are bound by that holding. Indeed, every circuit to consider the issue has concluded that § 2255 incorporates § 2244(b)(1). *See White v. United States*, 371 F.3d 900, 901 (7th Cir. 2004) ("It would be odd if Congress had intended that a federal prisoner could refile the same motion over and over again without encountering a bar similar to that of section 2244(b)(1), and we have therefore held that 'prior application' in that section includes a prior motion under section 2255." (citing *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002))); *In re Baptiste*, 828 F.3d 1337,1339-40 (11th Cir. 2016); *Green v. United States*, 391T.3d 101,102 n.l (2d Cir. 2005).

Because Avery presented his current *Johnson II* claim in a previous application, we dismiss his petition for lack of jurisdiction. *See* 28 U.S.C. § 2244(b)(1); *Charles*, 180 F.3d at 758. In the absence of jurisdiction, we do not reach the merits of his petition. *See Steel Co.*, 523 U.S. at 94.

III.

We REMAND with instructions to dismiss the petition for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3:07-cr-205
Filed May 4, 2017

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN ARTHUR AVERY,
Defendant.

On Appeal from the United States District Court
for the Southern District of Ohio

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS, (ECF 62), OVERRULING PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATIONS, (ECF 63), DENYING MOTION FOR RECONSIDERATION. (ECF 60). THE INSTANT CASE REMAINS TERMINATED, HOWEVER, THE CLERK IS TO ISSUE A CERTIFICATE OF APPEALABILITY ON WHETHER A PERSON IN DEFENDANT'S POSITION IS ENTITLED TO THE BENEFIT OF THE DOUBT ABOUT WHETHER AN AMBIGUOUS PRIOR CONVICTION WAS OR WAS NOT UNDER A STATUTE THAT QUALIFIES UNDER ACCA AFTER *JOHNSON*.

On September 29, 2016, the Sixth Circuit granted Defendant Edwin Arthur Avery permission to file a second or successive motion challenging the determina-

tion of his sentence and transferred the case to this Court. *In re: Edwin Arthur Avery*, Case No. 16-3566 (6th Cir. Sept. 29, 2016)(unpublished; copy at ECF 47.) Avery's Second Motion to Vacate was opened that same day. (ECF 48.)

On December 28, 2016, Magistrate Michael R. Merz filed a Report and Recommendations urging that Avery's Second Motion to Vacate (ECF 48) be dismissed with prejudice and a certificate of appealability be denied. (ECF 56.) On January 20, 2017, the Court adopted the Report and Recommendations, (ECF 57), and terminated the case on February 25, 2016. (3:16-cv-002.)

On February 13, 2017, Avery filed a Motion for Reconsideration, (ECF 60), asking the Court to revisit its decision that Avery's second Motion to Vacate under 28 U.S.C. § 2255 be dismissed with prejudice. On March 1, 2017, Magistrate Judge Merz filed a Report and Recommendations on Motion to Amend the Judgment, (ECF 62), recommending that Avery's Motion for Reconsideration, (ECF 60) be denied but that he be granted a certificate of appealability permitting him to proceed on appeal *in forma pauperis* on whether a person in Avery's position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under ACCA after *Johnson*. (Id.) On March 17, 2017, Avery objected to this Report and Recommendation. (ECF 63.)

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a *de novo* review of the record in this case, taking into consideration Defendant's objections. Upon said review, the Court finds that Plaintiffs objections, (Docs. 63), to Report and Recommendations, (ECF. 62), are not well

taken and they are hereby **OVERRULED**. Wherefore, the Court **ADOPTS IN FULL** the Magistrate Judge's Report and Recommendations. (ECF 62.) The Motion for Reconsideration, (ECF 60) is hereby **DENIED**. Because the resolution of Avery's motion would be debatable among reasonable jurists, Avery is **GRANTED A CERTIFICATE OF APPEALABILITY** permitting him to proceed on appeal *in forma pauperis* on whether a person in Avery's position is entitled to the benefit of the doubt about whether an ambiguous prior conviction was under a statute that qualifies under ACCA after *Johnson*. The case remains **CLOSED** in all other respects.

DONE and **ORDERED** this Thursday, May 4, 2017.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3:07-cr-205
(Also 3:16-cv-002)

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN ARTHUR AVERY,
Defendant.

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz
Filed March 1, 2017

REPORT AND RECOMMENDATIONS ON MOTION TO AMEND THE JUDGMENT

This § 2255 case is before the Court on Defendant's Motion to Alter, Amend, or Reconsider Judgment Denying Motion under 28 U.S.C. § 2255 (ECF No. 60). This proceeding is Mr. Avery's second § 2255 motion, on which he was granted permission to proceed by the Sixth Circuit (ECF No. 47).

Timeliness of Objections

After the Motion was filed, the Court found Mr. Avery had adequately proved that his receipt of the Report and Recommendations (the "Report," ECF

No. 56) was delayed by the institutional mail at his place of imprisonment to such an extent that he could not have filed objections within the seventeen days allowed by Fed. R. Civ. P. 72. Therefore the Magistrate Judge recommends that the Court should reconsider its final decision by applying to the recently filed Objections (ECF No. 60-3) the same standard it would have applied if the objections had been filed within that time. That is to say, the Magistrate Judge's findings of fact should be set aside if clearly erroneous and his conclusions of law should be reviewed de novo, per Fed. R. Civ. P. 72(b).

The Report recommends dismissal of the Second § 2255 Motion (ECF No. 48) with prejudice on three separate bases:

1. Mr. Avery waived collateral review of his conviction and sentence in the Plea Agreement (Report, ECF No. 56, at PageID 274-78).

2. The claim made in this Second § 2255 Motion is the same claim made in Mr. Avery's First § 2255 Motion (ECF No. 41) which the Court dismissed with prejudice (ECF No. 46) and which Mr. Avery did not appeal. His Second § 2255 Motion is therefore barred by the law of the case (ECF No. 56, at PageID 273-740).

3. In any event, Mr. Avery's Second § 2255 Motion is without merit because he still has three predicate convictions which qualify under the Armed Career Criminal Act ("ACCA") without reference to the residual clause declared unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On February 15, 2017, the Magistrate Judge notified the United States Attorney of his intention to recommend consideration of Mr. Avery's Objections (ECF

No. 60-3, PageID 296-304) on the merits and advised the Government that its time to respond would expire on February 27, 2017. That time has expired and no response has been filed. The Court accordingly proceeds to consideration of the merits of the objections.

Analysis

Waiver of Collateral Review

The Report found that Mr. Avery had waived collateral review of his conviction (Report, ECF No. 56, PageID 274, citing Plea Agreement, ECF No. 21, PageID 39, ¶ 8). The waiver formed one basis for recommending dismissal of the First § 2255 Motion. Avery never objected and never appealed from dismissal. The Report recommends dismissal of the Second § 2255 Motion on the same basis and because that basis has become the law of the case (ECF No. 56, PageID 275).

Avery tried to overcome that waiver and prior decision by claiming he is "actually innocent" of violating the Armed Career Criminal Act ("ACCA") and therefore this Court lacked jurisdiction to sentence him under that Act (Second Motion, ECF No. 48, PageID 196). The Report discusses reasons why the authorities he cites do not show lack of jurisdiction (ECF No. 56, PageID 276-78).

Avery objects that, in light of his actual innocence of a crime carrying a maximum sentence in excess of ten years, "neither a waiver, the law of the case doctrine, or the fact that the petitioner raise[d] the exact same claim in a previous § 2255 petition, prevents this court from hearing this claim." (Objections, ECF No. 60-3, PageID 299.)

He relies in the first place on *McQuiggin v. Perkins*, 569 U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). In *McQuiggin*, the Supreme Court held

> [A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U. S., at 329, 115 S. Ct. 851, 130 L. Ed. 2d 808; see *House*, 547 U.S., at 538, 126 S. Ct. 2064, 165 L. Ed. 2d. 1 (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup*, 513 U. S., at 332, 115 S. Ct. 851, 130 L. Ed. 2d. 808.

133 S. Ct. at 1928. The holding in *McQuiggin* was that actual innocence could overcome the bar of the statute of limitations. In addition, the Court did cite historical uses of the actual innocence gateway exception to avoid procedural bars that existed prior to adoption of the AEDPA in 1996. 133 S. Ct. at 1931-32.

Nothing in *McQuiggin* suggests "actual innocence" will excuse a bargained-for waiver in a plea agreement. For that proposition, Avery relies on *United States v.*

Terrell, 2016 U.S. Dist. LEXIS 153552 (E.D. Wa 2016).[1] The Washington court wrote regarding waivers:

> As part of Mr. Terrell's plea agreement, Terrell voluntarily and expressly waived his "right to file any post-conviction motion attacking his conviction and sentence, including a motion pursuant to 28 U.S.C. § 2255," except one based upon ineffective assistance of counsel. A defendant may waive his right to collaterally attack a conviction and sentence. *See United States v. Leniear*, 574 F.3d 668, 672 & n.3 (9th Cir. 2009). Courts recognize strong public policy considerations justify the enforcement of plea agreements containing knowing and voluntary waivers of statutory rights of appeal or collateral attack because such "waivers usefully preserve the finality of judgments and sentences imposed pursuant to valid plea agreements." *United States v. Anglin*, 215 F.3d 1064, 1066 (9th Cir. 2000). Subsequent changes in the law, which do not render the sentence unconstitutional, do not undercut the validity of a collateral attack waiver. *See United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). A waiver will not be invalidated merely because unanticipated events occur in the future. *See e.g., U.S. v. Eastwood*, 148 Fed. Appx. 589 (9th Cir. 2005)(waiver enforceable and resentencing not warranted, despite changes in sentencing law brought about by *U.S. v. Booker* holding the

[1] There is a typographical error in Mr. Avery's citation. The case which actually appears at 2016 U.S. Dist. LEXIS 152552 in the LEXIS database is *El-Saba v. University of South Alabama*, a civil case from the Southern District of Alabama.

> Guidelines were advisory and not mandatory); *U.S. v. Morgan*, 406 F.3d 135 (2d Cir. 2005), cert denied 546 U.S. 980, 126 S. Ct. 549, 163 L. Ed. 2d 465 (2005)(same); c.f. *Adesina v. United States*, 461 F.Supp.2d 90, 96 (E.D.N.Y. 2006) ("Under the well-settled law of the Second Circuit, a valid waiver of the right to appeal or otherwise challenge a sentence is enforceable as to subsequent changes in the law, even as to constitutional arguments, that were not anticipated at the time the waiver was made.").
>
> However, all federal courts agree that waivers are not ironclad. In the Ninth Circuit, a valid waiver "will not apply" if "the sentence violates the law." *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). "A sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Id.* The Ninth Circuit has held that if Johnson nullifies the residual clause of the Career Offender Guidelines, sentences rendered pursuant to that clause are likely unconstitutional and would be "illegal," and thus waivers in plea agreements cannot bar collateral attacks on that basis. *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016). Accordingly, the court must determine whether the sentence "violates the law" to determine whether the waiver applies.

Id. at *15-16. Thus the Washington court did not hold that "actual innocence" would avoid a waiver, but that a waiver would not bar consideration of a sentence made unconstitutional by *Johnson*, i.e., a sentence based on use of the residual clause made unconstitutional by *Johnson*. Avery's sentence was not based on use of the residual clause. Instead, he was found to have violated

the ACCA by virtue of his prior convictions for robbery on two occasions and felonious assault. These prior convictions are analyzed further below.

Furthermore, Avery has not presented evidence of "actual innocence" as that term is used in habeas corpus jurisprudence. As the Sixth Circuit has held:

> [I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). "Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005). Avery's claim of actual innocence is not about presenting any new evidence that he did not actually commit either the crime he pled guilty to in this Court or any of the three predicate offenses used to enhance his sentence under the ACCA. Rather his argument goes to the legal classification of those three prior offenses.

The Prior Convictions

The Report found that Avery had three prior convictions that qualified as predicate offenses under ACCA, (1) an August 2005 robbery conviction in the Clark County Common Pleas Court, (2) an August 2005 conviction in the same court of felonious assault, and (3) a 2002 conviction for robbery in the Clark County Common Pleas Court. None of those convictions were found by this Court at sentencing to be predicate offenses on the basis of the residual clause.

As to the felonious assault conviction, the record shows that Avery pled guilty to that offense under a divisible sub-section of Ohio's felonious assault statute which requires proof of causing serious physical harm to another (Report, ECF No. 56, PageID 281). As to that particular statute, the Sixth Circuit has held its violation is a violent felony within the meaning of ACCA. *Id.*, *citing United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012). Avery objects that Anderson has been "effectively" overruled by *Walter v. Kelly*, 653 Fed. Appx. 378 (6th Cir. 2016)(Objections, ECF No. 60-3, PageID 296). The Magistrate Judge disagrees.

First of all, the felonious assault statute at issue in *Walter* was Ohio Revised Code § 2903.11(a)(2), whereas Avery was convicted under Ohio Revised Code § 2903.11(a)(1) which requires proof of actually causing

serious physical harm to another. Anderson, supra, was concerned with Ohio Revised Code § 2903.11(a)(1), not (a)(2). Second, even if *Walter* were inconsistent with *Anderson*, it would not in any way be overruled by *Walter* because *Anderson* is a published opinion of the circuit court and *Walter* is unpublished. In the Sixth Circuit an unpublished opinion cannot overrule an earlier published opinion. *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014); *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001); *Salmi v. Secretary of HHS*, 774 F.2d 685, 689 (6th Cir. 1985); accord 6th Cir. R. 206(c). A panel of the Sixth Circuit may not overrule the published decision of another panel. *Hinchman v. Moore*, 312 F.3d 198, 203 (6th Cir. 2002); *Neuman v. Rivers*, 125 F.3d 315 (6th Cir. 1997). "[A] prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or the Sixth Circuit sitting en banc overrules the prior decision. *Hinchman*, 312 F.3d at 203.

Regarding the two prior robbery convictions, the Report notes that Ohio Revised Code § 2911.02 defines robbery in Ohio to include the use of force against another person (Report, ECF No. 56, PageID 278).

In its Answer the Government conceded that the Court would not be able to tell from the relevant state court records whether Avery's earlier[2] robbery conviction was under Ohio Revised Code § 2911.02(A)(1) or (A)(2), and that an (A)(1) conviction would only have qualified under the residual clause. However, the Government argued that because Avery bore the burden of

[2] The 2005 robbery conviction clearly qualifies as a predicate offense under the elements clause of ACCA.

proof with respect to showing the conviction qualified only under the residual clause and could not meet that burden, the Section § 2255 Motion should be denied.

Avery responds that he should not have to bear the burden of proof that the earlier robbery conviction only qualified under the residual clause.

He cites first what he calls the plain language of § 2255 which requires further process unless, upon initial filing, the record "conclusively shows the prisoner is entitled to no relief." But this case was not dismissed on initial review. Instead, as directed by the Sixth Circuit, the Court ordered the Government to file additions to the record and an answer, which it did. The Report constitutes the Magistrate Judge's recommendations as to findings of fact and conclusions of law as required by the statute.

Avery relies on several cases which he argues entitle him to the benefit of the doubt with respect to whether prior convictions qualified only under the residual clause (Objections, ECF No. 60-3, PageID 300, citing *Fugitt v. United States*, 2016 U.S. Dist. LEXIS 131591 (W.D. Wash. 2016); *Murray v. United States*, 2015 U.S. Dist. LEXIS 156853 (W.D. Wash. 2015); *Kilgore v. United States*, 2016 U.S. Dist. LEXIS 170916 (W.D. Wash. 2016); and *United States v. Ellingsworth*, 2016 U.S. Dist. LEXIS 47974 (E.D. Wash. 2016)).

In *Fugitt*, the United States conceded that two of the predicate offenses would not have qualified as such after *Johnson*, but argued that Fugitt could not prove the Government relied on the residual clause when he was sentenced. The court decided:

> When a sentencing court accepts a stipulation that a defendant's prior convictions constitute

> violent felonies under the ACCA, typically no record exists explaining whether his prior convictions fit the elements clause, the enumerated offenses clause, or the residual clause. The court makes the final determination, but the parties evaluate the relationship between the defendant's prior convictions and the violent felony clauses behind closed doors. The Court has concluded that in the context of habeas review of an ACCA-enhanced sentence where the defendant stipulated to his ACC classification, the benefit of the doubt lies with the petitioner: the Court presumes his predicate offenses only satisfied the residual clause. *See, e.g., Murray v. United States*, 15-cv-5720- RJB, 2015 U.S. Dist. LEXIS 156853, 2015 WL 7313882, at *5 (W.D. Wash. Nov. 19, 2015) (applying the rule of lenity in the petitioner's favor where the record was unclear why the defendant's prior convictions classified as violent felonies); *Gibson*, 2016 U.S. Dist. LEXIS 78815, 2016 WL 3349350, at *1-2 (following *Murray* and relying on *O'Neal* to conclude that when "grave doubt" exists about the constitutionality of the petitioner's sentence, the reviewing court must conclude the sentencing court relied on the residual clause).

Fugitt, at *10-11. Judge Leighton, who wrote the opinion in *Fugitt*, is a nationally-respected jurist and there is nothing unlawful about giving the benefit of the doubt to a petitioner in the circumstances *Fugitt* presented, which are quite parallel to those of Mr. Avery. That is, Avery stipulated to his ACCA violent felony priors and the Court had no occasion to make a finding

on whether they qualified under the residual clause or the elements clause of § 924.

But decisions of the District Court in the State of Washington are not binding precedent on this Court and Judge Leighton gives no particular reason why the benefit of the doubt should shift to the § 2255 movant. The fact is, Avery's earlier robbery conviction could fall under the elements clause and most likely did, because it was a plea to a charge reduced from aggravated robbery. As noted in the Report, the burden of proof in a § 2255 proceeding is ordinarily on the movant and no Sixth Circuit precedent compels us to shift that burden.

Avery next relies on *In re Chance*, 831 F.3d 1335 (11th Cir. 2016). That decision was not on the merits, but merely granted Chance's request to proceed on a second motion, the same thing the Sixth Circuit did here. The *Chance* panel criticized what a prior panel had said in dictum, to wit, that the movant had to prove he was sentenced under the residual clause. But it ended up emphasizing that the district court had to decide the case de novo. Of course neither Chance nor the *In re Moore* case it criticized is binding on this Court, seeing as how they are decisions of the Eleventh Circuit Court of Appeals.

In addition to his "benefit of the doubt" argument, Mr. Avery relies on his own statement that his earlier robbery conviction was under Ohio Revised Code § 2911.02(A)(1) rather than § 2911.02(A)(2):

> Petitioner states that he plead [sic] guilty to section (A)(1), which the government admits would only have qualified as a violent felony under the residual clause. But both the government and the Magistriat [sic] argue that this petitioner bears the burden of proving that

> his prior conviction was used by the federal sentencing court under the now unconstitutional residual clause. But this circuit (and all others) have stated that a petitioner's allegations in a § 2255 petition are to be taken as true.

(Objections, ECF No. 60-3, PageID 302, *citing Ewing v. United States*, 651 Fed. Appx. 405 (6th Cir. 2016)).

The undersigned finds several difficulties with these assertions.

First of all, Mr. Avery asks the Court to takes his word for the statute of conviction when he offers no corroboration at all. How does he remember? The state court record does not reflect whether the conviction was under (A)(1) or (A)(2). It would hardly have been important to Avery at the time – he or his attorney had just negotiated a charge reduction from aggravated robbery to simple robbery. The penalty was the same for either subsection – the imprisonment provided for a felony of the second degree, as opposed to a first degree felony for aggravated robbery. It is inherently incredible that a person convicted many times of felony offenses would remember, fifteen or sixteen years after the fact, the statutory subsection under which he was convicted when the offense would have been labeled "robbery" in either case. Of course, Mr. Avery's claim is also subject to the credibility factor that it has just now become important for him to remember this fact; he does not point to any documentation showing he made this distinction at any time in the past.

The distinction does not appear in his Second § 2255 Motion. At page 6 of the Motion, he refers to his "convictions for robbery under O.R.C. § 2911.02" without citing a subsection (ECF No. 48, PageID 189). Again in

the body of the memorandum in support, he refers to "neither of his robbery conviction[s] under Ohio Rivised [sic] statutes 2911.02" without stating a subsection. *Id.* at PageID 192. On the very next page he refers to "robbery under Ohio Revised Code § 2911.02" without distinguishing the subsection. On the same page he refers to robbery under Ohio Revised Code § 2911.02(A)(3), which clearly is not at issue. None of the references to the robbery offenses of conviction made in the Second § 2255 Motion as recently as September 29, 2016, make the distinction which Avery now claims to remember, less than six months later. If the Court were bound to accept as true the allegations made in a § 2255 Motion, that would not assist Avery because he does not make an assertion in the Motion about which subsection was involved.

However, *Ewing v. United States*, cited by Mr. Avery, does not require the Court to accept as true a petitioner's allegations in a § 2255 motion. *Ewing*, which is not a published decision, cites the usual standard for granting an evidentiary hearing taken from published opinions, particularly *Smith v. United States*, 348 F.3d 545 (6th Cir. 2003). But there is no occasion for holding a hearing when the essential fact claim – Avery's claim to remember what subsection of Ohio Revised Code § 2911.02 he was convicted under in 2001 or 2002 – is inherently incredible for the reasons given above.

Conclusion

Upon reconsideration in light of the Objections, it is again respectfully recommended that Mr. Avery's Second § 2255 Motion be DISMISSED WITH PREJUDICE. Reasonable jurists could disagree with the conclusion that a person in Mr. Avery's position is not enti-

tled to the benefit of the doubt about whether an ambiguous prior conviction was or was not under a statute that qualifies under ACCA after *Johnson*. Mr. Avery should be granted a certificate of appealability on that question, but otherwise denied such a certificate.

March 1, 2017.

s/ Michael R. Merz
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3:07-cr-205
(Also 3:16-cv-002)

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWIN ARTHUR AVERY,
Defendant.

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz
Filed December 28, 2016

REPORT AND RECOMMENDATIONS

This § 2255 case is before the Court on Defendant's [Second] Motion to Vacate (ECF No. 48). The Sixth Circuit granted Defendant permission to file a second or successive motion and transferred the case to this Court. *In re: Edwin Arthur Avery*, Case No. 16-3566 (6th Cir. Sept. 29, 2016)(unpublished; copy at ECF No. 47.) The instant Motion is called hereinafter the "Second Motion" to distinguish it from Mr. Avery's First Motion to Vacate (ECF No. 41). The circuit court also decided that "without an expansion of the record, it cannot be determined whether Avery qualifies as an armed career criminal after *Johnson*." (ECF No. 47,

PageID 183.) Accordingly the Court ordered the Government to file an Answer and it has done so (ECF No. 52). Mr. Avery has filed a Reply to the Answer (ECF No. 55) and the case is therefore ripe for decision.

Defendant pleads the following grounds for relief:

> **Ground One**: Petitioner's convictions for robbery under Ohio Revised Code § 2911.02 & his conviction under § 2903.11 are invalid by Johnson.
>
> **Supporting Facts**: As fully explained in the attached brief, Petitioner's convictions for robbery under Ohio Revised Code § 2911.02 are no longer crimes of violence after *Johnson*, 135 S. Ct. 2251 (2015) because the crime can be accomplished without any physical force, but force is necessary under the ACCA.
>
> **Ground Two**: Petitioenr [sic] conviction for felonious assault is no longer a [sic] ACCA predicate offense after *Johnson v. U.S.*, 135 S. Ct. 2551.
>
> **Supporting Facts**: See attached brief.

(Second Motion, ECF No. 48, PageID 189.)

Procedural History

Edwin Avery was indicted by the grand jury for this District on December 20, 2007, and charged in one count with a violation of 18 U.S.C. §§ 922(g)(1) and 924(e) in that he was alleged to have possessed a firearm after having been convicted as follows:

> (1) on or about August 8, 2005, Defendant Edwin Arthur Avery was convicted in the Court of Common Pleas of Clark County, Ohio, in case

> number 05-cr-293, of robbery, in violation of Ohio Revised Code section 2911.02;
>
> (2) on or about August 8, 2005, Defendant Edwin Arthur Avery was convicted in the Court of Common Pleas of Clark County, Ohio, in case number 05-cr-539 of felonious assault, in violation of Ohio Revised Code section 2903.11;
>
> (3) on or about January 4, 2002, Defendant Edwin Arthur Avery was convicted in the Court of Common Pleas of Clark County, Ohio, in case number 01-cr-758, of trafficking in crack cocaine, in violation of Ohio Revised Code section 2925.03;
>
> (4) on or about January 4, 2002, Defendant Edwin Arthur Avery was convicted in the Court of Common Pleas of Clark County, Ohio in case number 01-cr-578, of robbery, in violation of Ohio Revised Code section 2911.02;
>
> (5) on or about March 14, 2000, Defendant Edwin Arthur Avery was convicted in the Court of Common Pleas of Clark County, Ohio in case number 99-cr-611, of trafficking in crack cocaine, in violation of Ohio Revised Code section 2925.03.

(Indictment, ECF No. 1, PageID 1-2.)

On June 6, 2008, Avery entered into a Plea Agreement with the United States in which he agreed to plead guilty to Count One of the Indictment (Plea Agreement, ECF No. 21). The plea was made pursuant Fed. R. Crim. P. 11(c)(1)(C) and agreed that "the appropriate disposition of this case is a sentence of fifteen (15) imprisonment …", the mandatory minimum for the offense to which he was pleading guilty. *Id.* at PageID

37, ¶ 4. As part of the Plea Agreement, Mr. Avery gave up his right to appeal unless the Court did not impose the agreed sentence and his "right to bring a post-conviction collateral attack on the conviction or sentence." *Id.* at PageID 39, ¶ 8.

After reviewing a Presentence Investigation Report ("PSR") prepared by the Probation Department, the Court imposed the agreed sentence (Judgment, ECF No. 29), but Avery appealed anyway (ECF No. 31). The Sixth Circuit considered the case on the merits, but also ruled that the appeal waiver was valid. *United States v. Avery*, Case No. 08-4271 (6th Cir. Aug. 21, 2009)(unpublished, copy at ECF No. 35).

Mr. Avery filed his First Motion to Vacate January 4, 2016 (ECF No. 41). On an original and supplemental Report and Recommendations (ECF No. 42, 45), District Judge Rose on February 24, 2016, dismissed the First Motion with prejudice and denied Mr. Avery a certificate of appealability (ECF No. 46). Mr. Avery took no appeal, but filed his Application for Leave to File a Second or Successive Motion to Vacate with the Sixth Circuit on May 23, 2016 (ECF No. 48). That court granted leave on September 29, 2016. *In re: Edwin Arthur Avery*, Case No. 16-3566 (6th Cir. Sep. 29, 2016)(unpublished; copy at ECF No. 47).

The Sixth Circuit noted the Supreme Court's recent decision in *Welch v. United States*, 136 S. Ct. 1257 (2016), in which that Court held its prior decision in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), announced a new substantive rule that has retroactive effect in cases on collateral review. It noted that

> the government does not dispute that Avery has made a prima facie showing that he is entitled to relief from his ACCA sentence based on

> *Johnson*. In particular, two of the predicate offenses for Avery's armed career criminal designation—convictions for robbery under Ohio Revised Code § 2911.02—do not categorically qualify as violent felonies without reference to the residual clause. See *United States v. Torres*, Nos. 15-3346, 15-3353, 2016 WL 1274536, at *6–8 (6th Cir. Apr. 1, 2016). And the drug trafficking convictions identified by the district court in its dismissal of Avery's first § 2255 motion were not counted as predicate offenses for his armed career criminal designation at the time of sentencing and appear to be fourth-degree felonies that do not qualify as "serious drug offense[s]" under the ACCA. See 18 U.S.C. § 924(e)(2)(A) (defining a "serious drug offense" in relevant part as one for which the maximum term of imprisonment is ten years or more); Ohio Rev. Code §§ 2925.03(C)(4)(b), 2929.14(A)(4).

(ECF No. 47, PageID 183.) Hence it directed this Court to order an expansion of the record, which has been done.

Analysis

Despite having conceded to the Sixth Circuit that Mr. Avery had pled a prima facie case under *Johnson*, the United States defends Avery's conviction under the Armed Career Criminal Act ("ACCA"). The ACCA is codified at 18 U.S.C. § 924(e) and provides

(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for

a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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 pre-**

sents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

In *Johnson*, *supra*, the Supreme Court declared the so-called residual clause of the ACCA, bold-faced above, to be unconstitutionally vague. In *Welch*, *supra*, it declared *Johnson* was to be applied retroactively to cases on collateral review.

As the Sixth Circuit noted in the Transfer Order, the sole question before it on Avery's Application is whether he had made "a prima facie showing that his proposed claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (ECF No. 47, PageID 183.) The Government had conceded that a prima facie case had been pled, so the Sixth Circuit would have had to rule against both litigants if it denied the Application.

After transfer, this Court is to consider the Second Motion de novo. *In re Embry*, 831 F.3d 377 (6th Cir. 2016).

Does the Second Motion Raise the Same Claim Made in the First Motion and Denied by this Court?

The United States seeks dismissal because, it asserts, the Second Motion raises the same claim made in the First Motion and finally dismissed with prejudice by this Court (Answer, ECF No. 52, PageID 211-12, citing 28 U.S.C. § 2255(h) and 2244(b)(1)).

Avery does not deny that he is raising the same Johnson claim in the Second Motion as he raised in the

first, but contends that "section 2255 actually allows such a claim under very specific circumstances." (Reply, ECF No. 55, PageID 259.) Mr. Avery is correct that § 2244(b)(1) applies only to petitions for writ of habeas corpus under § 2254, which the Second Motion is not. He also correctly notes that § 2244(a) permits consideration of a claim made in a prior case "as provided in section 2255." *Id.* at PageID 260. Finally he notes that § 2255(h)(2) allows a second or successive 2255 motion if a panel of the court of appeals finds it contains a claim based on "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." In the Transfer Order, the Sixth Circuit notes that the decision in *Welch*, holding *Johnson* was substantive and therefore retroactive, was "recent." *Welch* was decided April 18, 2016, about a month after Avery filed his Application in the circuit court on May 23, 2016, and two months after the First Motion was dismissed on February 24, 2016.

The question is whether a *Johnson* claim was "previously unavailable," i.e. at the time the First Motion was filed. Although Welch had not yet been decided, the Sixth Circuit had decided on December 17, 2015, before Avery filed his First Motion, that *Johnson* had announced a new rule of constitutional law not previously available. *In re: Windy Watkins*, 810 F.3d 375 (6th Cir. 2015). In deciding the First Motion, this Court treated *Johnson* as retroactively applicable on collateral review (See Report, ECF No. 42). In fact, the First Motion is entirely based on *Johnson*.

The Supreme Court has held that "Congress enacted [the] AEDPA [including adopting § 2255(h)] to reduce delays in the execution of state and federal criminal sentences, … and to further the principles of comi-

ty, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202 (2003); *Ryan v. Gonzales*, U.S. , 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013), *citing Woodford*. At common law a judgment denying a writ of habeas corpus had no res judicata effect and the petition could be re-submitted to as many judges as one could find. While not enacting a res judicata rule for § 2255 motions, Congress plainly intended that there be finality of determination of claims, while allowing newly-available claims to be presented if the Supreme Court made them available. But Avery's *Johnson* claim was fully available to him when he filed the First Motion and was in fact litigated and not appealed. Avery's Second Motion should therefore be dismissed as a re-filing of the same claim made in the First Motion.

Waiver of Right to Collateral Attack

As noted above, when he entered into the Plea Agreement, Avery gave up his right to make a collateral post-conviction attack on the judgment (Plea Agreement, ECF No. 21, PageID 39, ¶ 8). A defendant who has knowingly, intelligently, and voluntarily agreed not to contest his sentence in any post-conviction proceeding has waived the right to file a § 2255 motion. *Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001). This waiver also precludes attacks based on new law, e.g., claims under *Johnson v. United States*. *In re: Garner*, Case No. 16-1655, 2016 U.S. App. LEXIS 19996 (6th Cir. Nov. 2, 2016).

The Magistrate Judge relied in part on the waiver when recommending dismissal of Avery's First Motion (See Report and Recommendations, ECF No. 42, PageID 165). Avery objected that he was not attacking the conviction, but pointing out that there was a new mandatory minimum sentence applicable to his conviction

(Objections, ECF No. 43, PageID 169). In a Supplemental Report and Recommendations, the Magistrate Judge rejected this argument by noting that the mandatory minimum sentence for an ACCA violation was still fifteen years and the First Motion was "undoubtedly a collateral attack on his sentence and is therefore barred by the Plea Agreement." (ECF No. 45, PageID 177.)

Avery filed no objections to the Supplemental Report. The failure to file specific objections is a waiver of right to raise issues on appeal. *Alspaugh v. McConnell*, 643 F.3d 162, 166 (6th Cir. 2011); *Cowherd v. Million*, 380 F.3d 909, 912 (6th Cir. 2004); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999); *Thomas v. Arn*, 474 U.S. 140 (1985).

In the absence of Objections, Judge Rose adopted the Supplemental Report (ECF No. 46). Mr. Avery took no appeal. Although this Court had denied him a certificate of appealability, he was free to ask the Court of Appeals to grant such a certificate, but he did not do so. Thus the validity of Avery's waiver of collateral review is now the law of the case.

Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation. *United States v. Moored*, 38 F. 3d 1419, 1421 (6th Cir. 1994), *citing United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993). "As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983), *citing 1B Moore's Federal Practice* ¶0.404

(1982); *Patterson v. Haskins*, 470 F.3d 645, 660-61 (6th Cir. 2006); *United States v. City of Detroit*, 401 F.3d 448, 452 (6th Cir. 2005). "While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967), quoted approvingly in *Association of Frigidaire Model Makers v. General Motors Corp.*, 51 F.3d 271 (6th Cir. 1995). The purpose of the doctrine is twofold: (1) to prevent the continued litigation of settled issues; and (2) to assure compliance by inferior courts with the decisions of superior courts. *United States v. Todd*, 920 F.2d 399 (6th Cir. 1990), *citing* Moore's Federal Practice.

Mr. Avery attempts to overcome this prior decision by arguing that he is actually innocent of violating the ACCA and therefore this "court was without jurisdiction to sentence him." (Second Motion, ECF No. 48, PageID 196.)

For that proposition, he relies first on Gomez v. United States, 490 U.S. 858 (1989), where the Supreme Court reversed a conviction obtained at a trial where a United States Magistrate[1] presided over voir dire and jury selection without the consent of the parties. The

[1] The judicial officer in question held the same office as the undersigned under 28 U.S.C. § 636, et seq. The title of the office was changed to United States Magistrate Judge shortly after *Gomez* was decided.

Court held that those functions were not authorized to be delegated to a federal magistrate in a felony case without the consent of the parties. Judgment in this case was imposed by District Judge Thomas Rose, appointed by the President under Article III of the Constitution. There is no question that District Judges have the authority to impose felony sentences and Gomez suggests nothing to the contrary.

Mr. Avery next cites *McGrath v. Kristensen*, 340 U.S. 162 (1950). There the Government had claimed federal courts had no jurisdiction to consider the Attorney General's suspension of deportation proceedings because that was not a justiciable question under Article III. While permitting the issue to be raised, the Court found it was without merit. Avery *cites McGrath* for the proposition that "subject matter jurisdiction questions can be raised at any time … (ECF No. 48, PageID 196.) While that is true, McGrath provides no basis for finding a lack of subject matter jurisdiction here. United States District Courts have exclusive original subject matter jurisdiction over federal criminal cases. That has been true since the Judiciary Act of 1789 when the First Congress decided the point.

Finally, Mr. Avery cites *California v. La Rue*, 409 U.S. 109 (1972), for the unremarkable proposition that jurisdiction cannot be conferred on a federal court by consent, stipulation, or action. Again, nothing in *La Rue* suggests this Court did not have jurisdiction over the subject matter of this case.

More critically, Mr. Avery cites no case which even begins to suggest that a post- conviction showing of actual innocence deprives a sentencing court of subject matter jurisdiction. The actual innocence doctrine has been recognized by the Supreme Court only as a means

of avoiding a procedural default in a habeas corpus case. *McQuiggin v. Perkins*, 569 U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). Avery relies on *United States v. Gray*, 2016 U.S. Dist. LEXIS 6753 (E.D. Wash. Jan. 19, 2016), where the § 2255 petitioner characterized his situation, as does Avery here, of being "actually innocent" of the ACCA conviction because the predicate offenses no longer qualify. That is a colorable argument, but it does not speak to the jurisdictional claim. And in *Gray* the government did not seek to enforce a collateral review waiver.

The Predicate Offenses

In his Second Motion, Mr. Avery asserts that, in light of *Johnson*, he no longer has three qualifying predicate offenses under the ACCA. He challenges here his convictions for robbery under Ohio Revised Code § 2911.02 and felonious assault under Ohio Revised Code § 2901.11.[2]

The Robbery Convictions

The two robbery convictions counted as qualifying predicate offenses were (1) an August 8, 2005, conviction for robbery in violation of Ohio Revised Code § 2911.02 in the Clark County Common Pleas Court and (2) a January 4, 2002, conviction for robbery under the same statute and in the same court (Indictment, ECF No. 1, PageID 1-2).

---

[2] In deciding the First Motion, the Magistrate Judge also relied on two drug convictions. The United States concedes that those do not qualify under the ACCA as "serious drug offenses." (Answer, ECF No. 52, PageID 210, n. 5.) Accordingly, no further analysis is made of those convictions.

Ohio Revised Code § 2911.02 defines robbery as including the following elements: (1) infliction, attempting to inflict, or threatening to inflict physical harm on another person or (2) the use or threatened immediate use of force against another. Thus the Ohio crime of robbery fits squarely within the so-called "elements" or "force" clause of the ACCA because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." There was no need to resort to the unconstitutional residual clause of the ACCA to find that these two robbery convictions were qualifying predicate offenses.

Avery argues these two convictions should not be counted because the so-called "categorical approach" must be used in determining whether an offense qualifies as a violent felony (Second Motion, ECF No. 48, PageID 192, citing *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013)). Moreover, he claims, force does not qualify unless it is violent force. *Id.* citing *Johnson v. United States*, 559 U.S. 133 (2010).

This argument has nothing to do with the 2015 *Johnson* case declaring the residual clause unconstitutional because, as the Magistrate Judge put it summarily in the original Report and Recommendations on the First Motion, Avery was not convicted under the residual clause. In other words, Avery is not pleading a 2015 *Johnson* claim, but a *Descamps* claim or a 2010 Johnson claim. Avery was convicted before Descamps was decided. If *Descamps* were applicable retroactively to collateral attacks, then Avery's deadline for filing an attack under *Descamps* would have been one year after it was decided, or June 20, 2014. But he did not file his First Motion until November 13, 2015 (ECF No. 38). And *Descamps* is not retroactively applicable. *Zemba v. Farley*, 2015 U.S. App. LEXIS 12430 (6th Cir. 2015);

In re Black, 2014 U.S. App. LEXIS 15452 (6th Cir. 2014); *Headbird v. United States*, 813 F.3d 1092 (8th Cir. 2016). The same responses apply to any claim under the 2010 Johnson case except that it is three years older than *Descamps*. The 2015 *Johnson* decision on the residual clause did not resurrect possible claims based on earlier interpretations of the ACCA.

In the Transfer Order, the Sixth Circuit refers to *United States v. Torres*, 644 Fed. Appx. 663 (6th Cir. Apr. 1, 2016). Torres co-Defendant Turner appealed his ACCA conviction in part because his conviction under Ohio Revised Code § 2911.02 had been classified as a prior violent felony under the residual clause which *Johnson 2015* had eliminated. Because the parties disagreed on whether Turner had been convicted under Ohio Revised Code § 2911.02(A)(1) or (A)(3) and the Court of Appeals could not resolve the issue on the documents before it, it remanded the case for that determination, just as the Sixth Circuit did here.

In its Answer, the United States concedes that this Court will not be able to tell from the state court record whether Avery's 2001 robbery conviction was under Ohio Revised Code § 2911.02(A)(1) or (2)(ECF No. 52, PageID 216-18). Presumably this is because Avery was originally indicted for aggravated robbery with the use of a firearm and was permitted to plead guilty to the lesser-included robbery offense without specification of the statute involved (See Plea, at ECF No. 52, PageID 222). The Government concedes further that a conviction under (A)(1) would qualify only under the residual clause Because Avery bears the burden of proof on his Second Motion and cannot prove Court reliance on the residual clause, the Government argues the Motion should be denied. *Id.*, citing *Pough v. United States*, 442 F.3d 959 (6th Cir. 2006); *McQueen v. United States*,

58 Fed. Appx. 73 (6th Cir. 2003); *In re: Moore*, 830 F.3d 1268 (11th Cir. 2016); and *Stanley v. United States*, 827 F.3d 562 (7th Cir. 2016).

Avery responds that the burden of proving the validity of the conviction should be on the United States, relying on *United States v. Torres*, 644 Fed. Appx. 663 (6th Cir. 2016). *Torres*, however, was a direct appeal case and it clearly would be part of the Government's burden at trial to prove beyond a reasonable doubt that the predicate offenses qualified. If Avery had contested the qualification of the robberies as predicate offenses, *Torres* supports the unremarkable proposition that the Government would have had to prove they qualified. Even if he had not contested the qualification, *Torres* supports the further proposition that the claim could be upheld on appeal as plain error. But that is not what happened here. Avery admitted these predicate offenses were violent felonies and did not contest their classification that way in the PSR. Nor did he raise that claimed error on appeal. The first time he made the claim was in his First Motion and he repeats it now in the Second Motion. It is well established that on a § 2255 motion, the burden of proving entitlement to relief is on the § 2255 movant. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006); *McQueen v. United States*, 58 Fed. Appx. 73 (6th Cir. 2003).

The Felonious Assault Conviction

Another prior conviction counted against Avery as a qualifying predicate offense was his conviction for felonious assault in violation of Ohio Revised Code § 2903.11 in the Clark County Common Pleas Court on August 8, 2005 (Indictment, ECF No. 1). Avery argues now, although he did not at the time of conviction or on direct appeal, that his felonious assault conviction does

not qualify because it does not require "serious physical harm." (ECF No. 48, PageID 195.)

Avery argues that Ohio Revised Code § 2903.11(A)(2) requires only some harm or attempt to cause harm (ECF No. 48, PageID 195). However, the record shows that Avery pled guilty to violating Ohio Revised Code § 2903.11(A)(1) which requires proof of causing serious physical harm to another (See Plea at ECF No. 52-6, PageID 249). The Sixth Circuit, applying the categorical approach, has held that felonious assault in violation of Ohio Revised Code § 2903.11(A)(1) is a violent felony within the meaning of the ACCA. *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012).

Avery attempts to distinguish *Anderson* because it was decided before *Descamps*, *Johnson 2015*, *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604, 610 (June 23, 2016), and *Walter v. Kelly*, 2016 U.S. App. LEXIS 11634 (6th Cir. Jun 22, 2016). However, he offers no analysis of how any of those cases render *Anderson* bad law. *Walter* in particular does not consider whether felonious assault under Ohio Revised Code § 2903.11 is a violent felony for ACCA purposes, although its analysis is consistent with that conclusion.

Conclusion

Because this Court has already held in an unappealed judgment that Avery has waived collateral review of his conviction and sentence, the Second Motion to Vacate should be DISMISSED WITH PREJUDICE. Because this Court has already determined Avery's *Johnson* 2015 claim against him on the merits, that claim should be DISMISSED WITH PREJUDICE on this alternative grounds. Finally, Avery has not established the merits of his Johnson 2015 claim as

to the predicate offenses counted against him and the Second Motion should be DISMISSED WITH PREJUDICE on that basis as well. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

December 28, 2016.

s/ Michael R. Merz
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walter*s, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3566
Filed September 29, 2016

IN RE: EDWIN ARTHUR AVERY,
Movant,

ORDER

Before: BATCHELDER, MOORE, and DONALD, Circuit Judges.

Edwin Arthur Avery, a federal prisoner proceeding pro se, moves for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h). Avery, who was sentenced under the Armed Career Criminal Act (ACCA), seeks to challenge his sentence under *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), in which the Supreme Court invalidated the ACCA's residual clause as unconstitutionally vague. The government agrees that the motion should be granted.

In 2008, Avery pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court determined that Avery qualified as an armed career criminal based on his two prior Ohio convictions for robbery and one for felonious assault and sentenced him to 180 months of imprison-

ment, the minimum sentence mandated by the ACCA. *See* 18 U.S.C. § 924(e)(1). This court affirmed.

In January 2016, Avery filed a § 2255 motion in the district court, seeking relief from his ACCA sentence based on *Johnson*. The district court summarily dismissed the motion, concluding that Avery in fact had five qualifying predicate offenses, not just three, none of which depended on the residual clause. Avery did not appeal. Avery filed this request, for authorization to file a second or successive § 2255 motion in May 2016.

We may authorize the filing of a second or successive § 2255 motion when the applicant makes a prima facie showing that his proposed claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h)(2). The Supreme Court recently held that Johnson announced a new, "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). And the government does not dispute that Avery has made a prima facie showing that he is entitled to relief from his ACCA sentence based on Johnson. In particular, two of the predicate offenses for Avery's armed career criminal designation—convictions for robbery under Ohio Revised Code § 2911.02—do not categorically qualify as violent felonies without reference to the residual clause. *See United States v. Torres*, Nos. 15-3346, 15-3353, 2016 WL 1274536, at *6–8 (6th Cir. Apr. 1, 2016). And the drug trafficking convictions identified by the district court in its dismissal of Avery's first § 2255 motion were not counted as predicate offenses for his armed career criminal designation at the time of sentencing and appear to be fourth-degree felonies that do not qualify as "serious drug offense[s]" under the ACCA. *See* 18

U.S.C. § 924(e)(2)(A) (defining a "serious drug offense" in relevant part as one for which the maximum term of imprisonment is ten years or more); Ohio Rev. Code §§ 2925.03(C)(4)(b), 2929.14(A)(4). Accordingly, without an expansion of the record, it cannot be determined whether Avery qualifies as an armed career criminal after Johnson.

For these reasons, we **GRANT** Avery's motion, **AUTHORIZE** the district court to consider his proposed § 2255 application, and **TRANSFER** the case to the United States District Court for the Southern District of Ohio for further proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-3628
Filed September 4, 2019

EDWIN ARTHUR AVERY,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

O R D E R

BEFORE: COOK and LARSEN, Circuit Judges.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

* The third member of this panel, Judge Damon J. Keith, died on April 28, 2019. This order is entered by the quorum of the panel 28.U.S.C. § 46(d).

Deborah S. Hunt, Clerk

APPENDIX G

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasona-

ble factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of

such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or
>
> **(B)(i)** there is an absence of available State corrective process; or
>
> **(ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of coun-

sel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule

promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(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.