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United States Court of Appeals For the First Circuit

No. 19-1338

MICHAEL COLLINS,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Torruella, Thompson and Barron,
Circuit Judges.

JUDGMENT

Entered: August 7, 2019

Petitioner Michael Collins seeks a certificate of appealability ("COA") in relation to the district court's denial of his 28 U.S.C. § 2255 motion pressing challenges to his armed career criminal status pursuant to Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II). After careful consideration, we conclude that the district court's denial of Collins' § 2255 claim(s) was neither debatable nor wrong and that Collins "has [not] made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000) (COA standard). As the district court concluded, and as Collins concedes, his claims run afoul of recent precedent from this court. See United States v. Edwards, 857 F.3d 420, 421-22 (1st Cir.), cert. denied, 138 S. Ct. 283 (2017) (Massachusetts armed assault with intent to murder categorically qualifies as "violent felony" under ACCA force clause); United States v. Hudson, 823 F.3d 11, 16 (1st Cir. 2016), cert. denied, 137 S. Ct. 620 (2017) (same re Massachusetts assault with a dangerous weapon); United States v. Whindleton, 797 F.3d 105, 111-16 (1st Cir. 2015), cert. dismissed, 137 S. Ct. 23 (2016), and cert. denied, 137 S. Ct. 179 (2016) (same). The district court was bound by those decisions, and subsequent panels of this court are bound by those decisions "in the absence of supervening authority sufficient to warrant disregard of established precedent," Peralta v. Holder, 567 F.3d 31, 35 (1st Cir. 2009) (internal quotations omitted). With his counseled COA application, Collins does not identify any "supervening authority" legitimately calling into question the decisions cited above. Moreover, to the extent Collins suggests that the grant of a COA is a prerequisite for further review by the en banc court or the Supreme Court, he

is mistaken. See, e.g., Welch v. United States, 136 S. Ct. 1257 (2016) (reviewing denial of a COA in a case that happened also to center about Johnson II); see also Fed. R. App. P. 35 (rehearing en banc may be sought as to "an appeal or *other proceeding*") (emphasis added).

Accordingly, Collins' application for a certificate of appealability is **DENIED**. Any remaining pending motions are moot. The appeal is hereby **TERMINATED**.

By the Court:

Maria R. Hamilton, Clerk

cc:

Elizabeth Prevett
Michael Collins
Cynthia A. Young
Dustin Ming Chao

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL COLLINS,)	
)	CIVIL ACTION NO.
Petitioner,)	16-11363-DPW
)	
v.)	
)	CRIMINAL ACTION NO.
UNITED STATES,)	13-10191-DPW
)	
Respondent.)	
)	

MEMORANDUM AND ORDER
April 11, 2019

I. BACKGROUND

The Petitioner in this federal habeas corpus proceeding, Michael Collins, was charged in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He pled guilty to that offense and was sentenced as an armed career criminal to the mandatory minimum sentence of 15 years incarceration. *See Collins v. United States*, 354 F. Supp. 3d 105, 109 (D. Mass. 2019).

Mr. Collins thereafter initiated this habeas corpus proceeding by filing a motion to correct his sentence under 28 U.S.C. § 2255 on the basis that he lacked the requisite three predicate offenses to qualify as an armed career criminal under the Armed Career Criminal Act ("ACCA"). In particular, Mr. Collins challenged the classification of his convictions under Massachusetts law for larceny from the person, assault and

battery with a dangerous weapon, assault with a dangerous weapon, and armed assault with intent to kill as "violent felonies" under the force clause of ACCA. See 18 U.S.C. § 924(e)(2)(B). On January 24, 2019, I denied his motion, concluding that under binding First Circuit precedent, three of Mr. Collins's prior convictions qualify as "violent felonies," and that Mr. Collins was properly sentenced under the ACCA sentencing enhancement. *Collins*, 354 F. Supp. 3d at 113-15. In particular, I held that armed assault with intent to kill and assault with a dangerous weapon were categorically "violent felonies" and that his three separate convictions for those crimes qualified as predicate offenses under ACCA.¹ Accordingly, I declined to reformulate Mr. Collins's sentence.

Mr. Collins has now filed a notice of appeal of my dismissal of his habeas petition,² [Dkt. No. 56], and seeks a certificate of appealability ("COA") from this court. [Dkt. No.

¹ Mr. Collins also has a prior conviction for Breaking and Entering at Night, though this conviction was not listed as one of his predicates in his Presentence Report. See *Collins v. United States*, 354 F. Supp. 3d 105, 116 (D. Mass. 2019). Nevertheless, in this habeas proceeding, I considered whether that conviction would qualify as an ACCA predicate offense and held that it would because it falls within the common law definition of burglary. *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 598 (1990) and *United States v. Stitt*, --U.S.--, 139 S. Ct. 399, 405-06 (2018)). Mr. Collins apparently does not seek to challenge this holding in his habeas appeal.

² His notice of appeal is to be treated as an application to the First Circuit for a certificate of appealability ("COA"). *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

55]. Declining his invitation to declare that the First Circuit precedent binding upon me is questionable, I conclude that his request for a COA from this court must be denied.

II. DISCUSSION

Under federal habeas corpus law, "[a]n appeal may be taken to the court of appeals from the order entered on the motion [under 28 U.S.C. § 2255] as from a final judgment on application for a writ of habeas corpus." 28 U.S.C. § 2255(d). The 1996 amendments to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") added the condition that a prisoner has a right of appeal only if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1); *see also* FED. R. APP. P. 22(b).³ "[A] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(2).

³ Despite the reference in the statute to "a circuit justice or judge," the First Circuit has interpreted this provision to give district judges the authority to issue COAs. *Grant-Chase v. Commissioner, New Hampshire Dept. of Corrections*, 145 F.3d 431, 436 (1st Cir. 1998) ("[L]itigants in possession of a COA as to an issue from a district judge need not apply to this court for issuance of a second certificate on that issue; they need only present this court with a copy of the district court order granting a certificate of appealability."). The First Circuit's Local Rules provide that "[i]n this Circuit, ordinarily neither the court nor a judge thereof will act on a request for a certificate of appealability if the district judge who refused the writ is available and has not ruled first." First Circuit Rule 22.0(a).

In interpreting this provision, the Supreme Court has held that a prisoner is entitled to a COA if he can show "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). Under this standard, "[a] prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("It is generally agreed that probable cause requires something more than the absence of frivolity . . . We agree with the weight of opinion in the Courts of Appeals that a certificate of probable cause requires petitioner to make a substantial showing of the denial of a federal right." (internal quotations and citations omitted))).

I conclude that Mr. Collins has not made such a showing in this Court. His arguments with respect to his convictions for assault with a dangerous weapon and assault with intent to kill, as he acknowledges, are foreclosed by First Circuit precedent directly on point. The First Circuit has explicitly held that convictions for both offenses qualify as predicate offenses for the purposes of ACCA. See generally *United States v.*

Whindleton, 797 F.3d 105 (1st Cir. 2015) (holding that a prior conviction for assault with a dangerous weapon under Massachusetts law qualified as a "violent felony" under ACCA); *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017) (holding that Massachusetts armed assault with intent to murder constituted a "violent felony).

Mr. Collins argues that reasonable jurists could disagree with the First Circuit's classifications of assault with a dangerous weapon and armed assault with intent to kill as "violent felonies" under the force clause of ACCA. Even assuming that there could be disagreement with this First Circuit precedent, as a subordinate judge subject to First Circuit appellate review, I am duty bound faithfully to apply the decisions of the First Circuit. *Cf. Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 n. 3 (D. Mass. 2009) ("[U]nless and until the Supreme Judicial Court has addressed a pertinent state law issue, a federal district court is bound by First Circuit precedent." (citing *Esquire, Inc. v. Esquire Slipper Mfg. Co.*, 243 F.2d 540, 544 (1st Cir. 1957) and *Winter Panel Corp v. Reichhold Chems., Inc.*, 823 F. Supp. 963, 969 (D. Mass. 1993))); *see also Beazer v. United States*, -- F. Supp. 3d --, 2019 WL 470205 at *4 (D. Mass. Feb. 6, 2019) (same); *United States v. Turner*, 2014 WL 3109864 at *2 (D. Mass.

July 7, 2014) ("This Court is bound by the First Circuit's ruling.").

The First Circuit for its part appears to consider itself bound by panel precedent in the absence of *en banc* reconsideration supervening Supreme Court development, or statutory abrogation. The First Circuit has consistently emphasized that "a rule of law by a panel of [the First Circuit] is binding upon subsequent panels." *Whindleton*, 797 F.3d at 113 (citing *Arebico Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 22 (1st Cir. 2001)); see also *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 441 (1st Cir. 2007) ("A panel of this court is normally bound to follow an earlier panel decision that is closely on point, unless an exception exists to the principles of *stare decisis*"). Though the First Circuit may decide that intervening case law from other courts around the country "offer[s] a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind," *Rodriguez-Pacheco*, 475 F.3d at 442, the decision to do so rests with the First Circuit alone.⁴ I do not

⁴ The First Circuit also recognizes an exception to *stare decisis*, which "applies when an existing panel decision is undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an *en banc* opinion of the circuit court, or a statutory overruling." *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 441 (1st Cir. 2007). Mr. Collins points to no authority from the Supreme Court, the Supreme Judicial Court of Massachusetts, or the First Circuit

believe that, as a judge of a subordinate court obligated to follow circuit precedent, I should require – however indirectly – the First Circuit to reexamine a previous ruling by declining to give full weight to its existing precedent directly on point.⁵ The First Circuit precedent binding upon me evidences

itself which would undermine the prior rulings relied upon here. Nor is there any statutory development calling the panel precedent into question. Indeed, with one exception – *Commonwealth v. Lednum*, 916 N.E.2d 416 (Mass. App. Ct. 2009) – the Massachusetts state cases on which Mr. Collins relies have all been explicitly considered by the First Circuit. See generally [Dkt. No. 55 *passim*]; *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017); *United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015). There is no reason to believe that further explicit consideration of a prior ruling by the intermediate Massachusetts appellate court would undermine current First Circuit law.

Just as the First Circuit has consistently held that it ordinarily is bound by its prior decisions, the Supreme Court has firmly held that its decisions can only be overruled by a change in the statute, a constitutional amendment, or a subsequent decision by the Supreme Court itself. See generally *Agostini v. Felton*, 521 U.S. 203, 235–36 (1996); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

⁵ I recognize that, as a practical matter, the issuance of a Certificate of Appealability on a reasoned basis by a District Court calling into question binding precedent – assuming the underlying judgment has not been displaced – does not necessarily require the First Circuit to reexamine its prior rulings. Appellate courts developing protocols for treatment of Certificates of Appealability have approached the issue pragmatically. The Supreme Court has observed that:

[t]he COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels. Once a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, however, the COA has fulfilled that gatekeeping function. Even if additional screening of already-issued COAs for § 2253(c)(3) defects could further winnow the cases before the courts

full consideration of the issues Mr. Collins seeks to raise on appeal. I am aware of no additional issues that have not been subject to their consideration.⁶

The Supreme Court has been clear that "[i]t is this Court's

of appeals, that would not outweigh the costs of further delay from the extra layer of review.

Gonzalez v. Thaler, 565 U.S. 134, 145 (2012).

Although the First Circuit does not appear to have addressed the question in a reported opinion, other Circuits have. They have consistently affirmed the right of an appellate court to review and vacate an improvidently granted COA while generally allowing a case in which the District Court issued a COA to proceed on appeal in the ordinary course unless considerations of judicial economy counsel otherwise. See, e.g., *Phelps v. Alameda*, 366 F.3d 722, 728 (9th Cir. 2004); *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001); *Soto v. United States*, 185 F.3d 48, 52 (2d Cir. 1999); *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997).

Consequently, it may be a matter of discretion rather than an obligation to judicial hierarchy for a District Judge to decline to precipitate reconsideration of binding circuit precedent by issuing a COA. In any event, I view such an act to be supererogatory when any issue on which I might otherwise allow a COA has been fully considered by the Court of Appeals and there has been nothing new that might call into question the prior consideration of the issue by the First Circuit.

⁶ I note that Mr. Collins now appears to challenge current First Circuit precedent by arguing in part that, under Massachusetts law, an individual may be convicted for assault with a dangerous weapon, or assault with intent to kill, when the individual uncaps a gas line in a home, [Dkt. No. 55 at 5] or attempts to poison a person. [*Id.* at 6]. However, the Supreme Court of the United States has held that these actions constitute "physical force," *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014), and the First Circuit has previously considered the argument and suggested that those actions constitute "violent force" under ACCA. *Edwards*, 857 F.3d at 425-27 (1st Cir. 2017).

prerogative alone to overrule one of its precedents. . . . [The Court's] decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing validity." *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions.").

The First Circuit similarly has gently but firmly made clear that "[t]he doctrine of *stare decisis* renders the ruling of law in a case binding in future cases before . . . other courts owing obedience to the decision." *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) (emphasis in original).⁷ It should go without saying I am one of those courts owing obedience.

Consequently, given the existence of binding First Circuit precedent in this area, I cannot say that "reasonable jurists would find the *district court's* assessment of the constitutional

⁷ Other circuits have been more direct about the duty of obedience owed by district courts. "[D]istrict courts are, of course, bound by the law of their own circuit, and are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." *Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (internal quotations omitted) [MacDonald, J.]; see also, e.g., *Hopkins v. Price Waterhouse*, 921 F.2d 967, 974-75 (D.C. Cir. 1990).

claims debatable or wrong.” *Slack*, 529 U.S. at 484 (emphasis supplied). Nor can I conclude that Mr. Collins has made a substantial showing that he has been denied a constitutional right. *Id.* at 483; see also *United States v. Rodriguez*, 321 F. Supp. 3d 256, 259 (D. Mass. 2018).

The First Circuit itself, of course, may accept an invitation by Mr. Collins to revisit its precedent and independently issue a COA to hear his claims in this matter. In that connection, it might, for example, conclude that “the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). However, I believe it would be beyond the proper exercise of my authority as a judge of a subordinate court to do so,⁸ particularly when, as here, the First Circuit has fully considered all the issues which the Petitioner urges me to put in contention by issuing a Certificate of Appealability.

⁸ I recognize that District Judges in the Northern District of Florida have granted Certificates of Appealability when they believe the law of the circuit should be reconsidered *en banc* or changed by the Supreme Court. See *United States v. Anthony*, No. 13-103, 2017 U.S. Dist. LEXIS 94843, at *5 (N.D. Fla. June 17, 2017) [Hinkle, J.]; *United States v. Upshaw*, No. 02-3, 2017 WL 5709563, at *1 (N.D. Fla. November 27, 2017) [Walker, J.]. With respect, I do not believe the writ of a District Court justifiably extends in this setting, see *supra* note 5, as far as Judges Hinkle and Walker apparently do, even assuming *arguendo* that, left to my own devices – unconstrained by binding precedent – I might reach a different result than the First Circuit. Needless to say, I decline to express a view one way or the other whether that assumption is valid in this case.

III. CONCLUSION

For the foregoing reasons, the request for a Certificate of Appealability from this court regarding the questions whether assault with a dangerous weapon and assault with intent to kill under Massachusetts law are violent felonies [Dkt. No. 55] is DENIED.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL COLLINS,)	
)	CIVIL ACTION NO.
Petitioner,)	16-11363-DPW
)	
v.)	
)	CRIMINAL ACTION NO.
UNITED STATES,)	13-10191-DPW
)	
Respondent)	
)	

MEMORANDUM AND ORDER
January 24, 2019

This matter has its origin in the conviction of the Petitioner, Michael Collins, for being a Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1). On January 23, 2014, Mr. Collins was sentenced to 15 years in prison as an armed career criminal subject to the sentencing enhancement imposed by the Armed Career Criminal Act ("ACCA"). Mr. Collins filed the present petition for habeas corpus to vacate and correct his sentence under 28 U.S.C. § 2255 in 2016, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), he was not properly characterized as an armed career criminal subject to the ACCA's enhancement. Case law in the First Circuit since *Johnson II* undermines the contentions which are offered in the petition.

I. BACKGROUND

A. *Factual Background.*

On June 25, 2013, Mr. Collins was charged in a one count indictment as a felon in possession of a firearm (a Norinco, Model SKS, 7.62 millimeter rifle), in violation of 18 U.S.C. § 922(g)(1).

Both the Presentence Investigation Report ("PSR") prepared by the Probation Office and the Government's Sentencing Memorandum, stated that Mr. Collins had at least three prior state convictions and therefore qualified as an Armed Career Criminal. In particular, the PSR listed the following convictions which could be considered predicate offenses for the purpose of the ACCA sentencing enhancement:

- (1) March 6, 1990 conviction in Boston Municipal Court for Larceny from the Person and Assault and Battery by a Dangerous Weapon, [PSR ¶ 32];
- (2) June 18, 1992 convictions in Suffolk Superior Court for Armed Assault with Intent to Kill and Assault and Battery by a Dangerous Weapon, [PSR ¶ 35];
- (3) July 2, 1992 conviction in Middlesex Superior Court for Assault and Battery by a Dangerous Weapon, [PSR ¶ 36];

- (4) August 12, 1992 convictions in Cambridge District Court for Assault and Battery by a Dangerous Weapon,¹ [PSR ¶ 34];
- (5) October 15, 2001 convictions in Suffolk Superior Court for Armed Robbery, Armed Assault with Intent to Rob, Kidnapping, and Assault with a Dangerous Weapon, [PSR ¶ 39]; and,
- (6) October 16, 2008 conviction in West Roxbury District Court for Assault with a Dangerous Weapon.² [PSR ¶ 47].

In addition, the Government's Sentencing Memorandum referenced a July 27, 2005 conviction in Somerville District Court for Breaking and Entering a Building in the Nighttime as a predicate offense, although the PSR did not include this particular conviction in its list of predicate offenses.

On January 17, 2014, Mr. Collins filed his own sentencing memorandum, and objected generally to his classification as an Armed Career Criminal because his prior convictions were not charged, admitted to, or proven by the Government. I rejected

¹ The defendant was also convicted on August 12, 1992 of malicious destruction of property. There has never been a contention in this case that this offense can be an ACCA predicate.

² The defendant also had convictions on October 16, 2008 for possession of burglaries instruments and carrying dangerous weapons. There has never been a contention in this case that either of those offenses can be an ACCA predicate.

that argument and sentenced him as an armed career criminal to the mandatory minimum sentence required by the ACCA of 15 years incarceration. He did not appeal.

If Mr. Collins had not been classified as an armed career criminal, he would have been subject to, at most, ten years incarceration – the statutory maximum penalty for a violation of 18 U.S.C. § 922 in the absence of the ACCA sentencing enhancement. See 18 U.S.C. §§ 922(g)(1), 924(a)(2).

B. The Current Legal Context

The ACCA imposes a mandatory minimum sentence of 15 years incarceration for “[any] person who violates section 922(g) . . . and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The statute defines a “violent felony” as any felony that either “(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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B).

In 2015, the Supreme Court struck down part of the second clause of 18 U.S.C. § 924(e)(2)(B), the so-called residual clause, as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct.

2551, 2557 (2015) (*Johnson II*). “[T]he residual clause,” the Court held, “leaves grave uncertainty about how to estimate the risk posed by a crime” because it “ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime.” *Id.* It also “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony,” especially because the residual clause required judges to apply “an imprecise ‘serious potential risk’ standard” to “a judge-imagined abstraction.” *Id.* at 2558. However, the Court left in place the first clause of ACCA, known as the force clause, and the portion of the second clause that classifies “burglary, arson, or extortion” or any crime that “involves the use of explosives” as violent felonies under the statute. 18 U.S.C. § 924(e)(2)(B).

The following year, the Supreme Court held that “*Johnson [II]* announced a substantive rule that has retroactive effect in cases on collateral review.” *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). A few months later, Mr. Collins petitioned through the motion now before me to have me vacate and correct his sentence pursuant to 28 U.S.C. § 2255.

C. The Instant Petition

Mr. Collins now contends in his petition that he was improperly characterized as an armed career criminal under 18 U.S.C. § 924(e) because certain predicate convictions may not properly be counted in reaching the threshold for Armed Career

Criminal status. In particular, he argues that his convictions for larceny from the person, assault and battery with a dangerous weapon, assault with a dangerous weapon,³ and armed assault with intent to kill are not categorically violent felonies under the force clause of ACCA. He also argues, albeit in a footnote, that his conviction for breaking and entering was not a violent felony under the force clause, observing correctly that neither the PSR nor I relied on that conviction during his original sentencing when determining that he was an armed career criminal.

II. PROCEDURAL DEFAULT

Although not raised in the Government's opposition to Mr. Collins's petition, which focuses on the merits, I consider it important to address a threshold question: whether Mr. Collins claims are procedurally barred.⁴ Although Mr. Collins did object

³ Mr. Collins acknowledges that the First Circuit has held that assault with a dangerous weapon is categorically a violent felony under the force clause. See generally *United States v. Whindleton*, 797 F.3d 105 (1st Cir. 2015). He nevertheless challenges this conviction as a predicate offense to preserve the issue, presumably for appeal, on the basis that the First Circuit's reasoning was flawed.

⁴ In this connection, I also address whether the petition here is time-barred. Federal law imposes a 1-year period of limitation for all claims for habeas relief, which runs 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 . . . is removed; (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

to his classification as a career offender prior to his sentencing, he did not, at that time, raise any of the arguments he raises now in his request for habeas relief; nor did Mr. Collins seek direct review of his sentence. Consequently, his claims may be considered procedurally defaulted. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81 (1977); *Bousley v. United States*, 523 U.S. 614, 622 (1998).

As a general matter, "procedural default is an affirmative defense," and must be raised and pled by the Government to bar a habeas petition. *Oakes v. United States*, 400 F.3d 92, 98 (1st Cir. 2005); *see also Trest v. Cain*, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter.") (internal quotations omitted). Since the Government has chosen not to raise the issue of procedural default in its response to the petition for habeas relief, the issue appears to have been waived.

retroactively applicable to cases on collateral review; or
(4) the date on which facts supporting the claim . . .
could have been discovered.

28 U.S.C. § 2255.

The Supreme Court recognized the right asserted here in *Johnson v. United States*, 135 S. Ct. 2551 (2015) on June 26, 2015, and made the right retroactively applicable on collateral review in *Welch v. United States*, 136 S. Ct. 1257 (2016), on April 18, 2016. Mr. Collins filed his petition for habeas relief on June 24, 2016. Consequently, his petition was filed within the 1-year limitations period and is timely.

Nevertheless, I may still consider procedural default *sua sponte*, even if I may not “bypass, override, or excuse [the government’s] deliberate waiver” of an affirmative defense. *Wood v. Milyard*, 556 U.S. 463, 466 (2012); *see also Oakes*, 400 F.3d at 97 (“[W]e hold that a district court has the discretion, in a section 2255 case, to raise questions of procedural default *sua sponte*, even when the government has filed a reply and eschewed any reference to the defense.”). Had the Government here raised procedural default in its response to the present petition, I would have been barred from hearing the merits of Mr. Collins’s claim unless he could demonstrate both cause for the default and actual prejudice. *See, e.g., Wainwright*, 433 U.S. at 81; *Bousley*, 523 U.S. at 622.

A petitioner may show cause by demonstrating that his claim is “so novel that its legal basis is not reasonably available to counsel” at the time of conviction. *Bousley*, 523 U.S. at 622. However, this standard does not mean that the claim was viewed as futile, or otherwise “was unacceptable to that particular court at that particular time.” *Id.* at 623. Instead, for a constitutional claim to be “new,” it must “represent[] a clear break with the past.” *Reed v. Ross*, 468 U.S. 1, 17 (1984). It may arise when the Supreme Court “explicitly overrule[s] one of [its] precedents,” when a decision “overturn[s] a longstanding and widespread practice to which [the Supreme Court] has not

spoken, but which a near-unanimous body of lower court authority has expressly approved," or when a decision of the Supreme Court "disapprove[s] a practice that [the Supreme Court] arguably has sanctioned in prior cases." *Id.*

The Court's holding in *Johnson II* clearly satisfies this standard. When Mr. Collins was sentenced in 2014, "the Supreme Court's decisions in *James* [v. *United States*, 550 U.S. 192 (2007)] and *Sykes* [v. *United States*, 564 U.S. 1 (2011)] were still good law. Both those decisions had rejected challenges to the ACCA's residual clause on constitutional vagueness grounds." *Lassend v. United States*, 898 F.3d 115, 122 (1st Cir. 2018). *Johnson II* "expressly overruled *James* and *Sykes* in relation to the ACCA," meaning it signaled a "clear break from the past." *Id.* at 17. Consequently, the ACCA claims raised in this petition were not reasonably available to Mr. Collins at the time of his sentencing, and he has therefore demonstrated "cause" for any procedural default regarding this issue.

Mr. Collins must also show that he suffered "actual prejudice" to overcome procedural default. If the prior convictions Mr. Collins is challenging are not violent felonies under the force clause of ACCA, "he can argue actual prejudice because his sentence was undoubtedly influenced by the determination that he had qualifying ACCA predicates" and should

be sentenced as a career offender. *Lassend*, 898 F.3d at 123.⁵ In other words, if Mr. Collins succeeds on the merits of his habeas petition, he undoubtedly suffered actual prejudice and is entitled to relief. See *Lassend*, 898 F.3d at 123 (“[T]he prejudice inquiry dovetails with the merits inquiry.”).

I now turn to consider Mr. Collins’s claims on the merits, recognizing that this consideration addresses and will effectively resolve the prejudice dimension of the procedural default issue.

III. THE MERITS

A. *Predicate Offenses Challenged in the Petition*

In his petition, Mr. Collins argues that Larceny from the Person, Armed Assault with Intent to Kill, Assault with a Dangerous Weapon (“ADW”),⁶ and Assault and Battery by a Dangerous

⁵ Mr. Collins does not argue that his October 15, 2001 convictions for armed robbery, armed assault with intent to rob, and kidnapping, [PSR ¶ 39], do not remain violent felonies post-*Johnson II*. Since all three of these convictions arose out of the same set of factual circumstances, they were not “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Consequently, these three convictions cannot be counted together to trigger the ACCA sentencing enhancement because they may be counted to include only one conviction for ACCA purposes.

⁶ Mr. Collins has two convictions for Assault with a Dangerous Weapon: one on October 15, 2001, which was accompanied by convictions for armed robbery, kidnapping, and armed assault with intent to rob, [PSR ¶ 39], and one on October 16, 2008, which was accompanied by convictions for possession of burgled instruments and carrying dangerous weapons. [PSR ¶ 47].

Weapon ("ABDW"),⁷ as defined by Massachusetts law, are not categorically violent felonies under the force clause of the ACCA. He also argues in a footnote that Breaking and Entering at Night under Massachusetts law is not an ACCA predicate offense.

I will address each challenged offense in turn.

1. Larceny from the Person

On March 6, 1990, Mr. Collins was convicted of larceny from the person in Boston Municipal Court, and I considered this conviction as a predicate offense under the now inapplicable residual clause for his subsequent classification as an armed career criminal. [PSR ¶¶ 32, 50]. Though the Government does not argue that larceny from the person is a violent felony under the force clause of ACCA, because Mr. Collins does challenge this conviction in his petition for habeas relief, I will address the question.

⁷ Mr. Collins has four separate convictions for Assault and Battery by a Dangerous Weapon ("ABDW"): one on March 6, 1990, [PSR ¶ 32], one on August 12, 1992, [[PSR ¶ 34], one on June 18, 1992, [PSR ¶ 35], and one on July 2, 1992 [PSR ¶ 36]. The March 6, 1990 ABDW conviction was accompanied by the conviction for Larceny from the Person, and will only qualify as a predicate offense if Larceny from the Person is not a violent felony under ACCA. [PSR ¶ 32]. Similarly, the June 18, 1992 conviction was accompanied by a conviction for Armed Assault with Intent to Kill, and will only qualify as a predicate offense if Armed Assault with Intent to Kill is not a predicate offense. [PSR ¶ 35].

Under Massachusetts law, an individual is guilty of larceny from the person if he "commits larceny by stealing from the person of another." M.G.L. c. 266 § 25. The Supreme Judicial Court of Massachusetts ("SJC") has interpreted this provision to incorporate and expand the common law of larceny. *Commonwealth v. Jones*, 283 N.E.2d 840, 843 n. 2 (Mass. 1972). As at common law, larceny from the person requires "the taking and carrying away of the personal property of another against his will with the intent to steal." *Id.* (internal citations and quotations omitted). It specifically does not require proof of force or violence.

Consequently, "[t]he use of physical force is not an element of the offense," meaning larceny from the person is not categorically a crime of violence under the force clause of the ACCA. *United States v. Rodriguez*, 659 F.3d 117, 118 (1st Cir. 2011). It could only serve as an ACCA predicate offense under the residual clause, which has, of course, been stuck down. *Id.* at 118-19.

Larceny from the person is therefore not a violent felony and cannot serve as an ACCA predicate offense.

2. Assault with Intent to Kill

Mr. Collins challenges the classification of his June 18,

1992 conviction for Armed Assault with Intent to Kill⁸ as a predicate offense. [PSR ¶ 35]. As a general matter, Massachusetts law recognizes two theories of assault: "attempted battery and threatened battery." *Commonwealth v. Porro*, 939 N.E.2d 1157, 1163 (Mass. 2010). "A conviction of assault under a theory of attempted battery requires the prosecution to prove that the defendant intended to commit a battery, took some overt step toward accomplishing that intended battery, and came reasonably close to doing so." *Id.* In this context, the victim need not be aware of the attempt, and the battery need involve nothing more than an offensive touch. *Id.* In contrast, "[a] conviction of assault under a theory of threatened battery requires the prosecution to prove that the defendant engaged in conduct that a reasonable person would recognize to be threatening, that the defendant intended to place the victim in fear of an imminent battery, and that the victim perceived the threat." *Id.*

A conviction for "[a]rmed assault with intent to murder requires proof of assault (while armed with a dangerous weapon) and a specific intent to kill that equates with malice." *Commonwealth v. Vick*, 910 N.E.2d 339, 350 (Mass. 2009) (citing

⁸ Mr. Collins was convicted specifically of violating M.G.L. c. 265 § 18, which states that anyone "being armed with a dangerous weapon, [who] assaults another with intent to rob or murder shall be punished by imprisonment."

Commonwealth v. Johnston, 845 N.E.2d 350, 354 (Mass. 2009)). The presence of a mitigating factor "reduces the crime from assault with intent to murder to assault with intent to kill, a lesser included offense." *Vick*, 910 N.E.2d at 350. A conviction for assault with intent to kill, however, still requires both an armed assault and a specific intent to kill, and further requires only that "a defendant's intent to kill [arises] from the frailty of human nature in the face of certain circumstances." *Id.*

In analyzing constituent elements of this offense using the categorical approach, the First Circuit has recognized that "[s]omeone can commit the Massachusetts crime of simple assault with offensive touching . . . [which] fails the force requirement" of ACCA. *United States v. Edwards*, 857 F.3d 420, 424 (1st Cir. 2017) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*") (holding that "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person.")). Simple assault, then, cannot qualify as a predicate offense under the force clause of ACCA. *Edwards*, 857 F.3d at 424. Armed assault with intent to murder, however, requires proof of additional elements and does qualify as a predicate offense because of the presence of "a specific intent to kill." *Id.* at 425. In a parallel

fashion, while a simple battery could be merely offensive touching, and thus, not involve violent force if committed without murderous intent, it could be said categorically to involve wrongful force if committed with murderous intent. *Id.* Indeed, the intent requirement "makes it implausible that a defendant could be convicted [for assault with intent to murder] based on the offensive-touching approach" to assault and instead appears to require that the defendant threatened violent force against the victim. *Id.* Consequently, the First Circuit has held, armed assault with intent to murder is a violent felony under the force clause of ACCA.

Since a conviction for armed assault with intent to kill, as was the charge at issue here, requires proof of the same "specific intent to kill" as a conviction for armed assault with intent to murder, I conclude Mr. Collins's June 18, 1992 convictions for armed assault with intent to kill is a proper predicate offense under the force clause.⁹

3. Assault with a Deadly Weapon (ADW)

Mr. Collins challenges the classification of his two prior convictions for ADW – on October 15, 2001 and on October 16,

⁹ Because the conviction for armed assault with intent to kill is a predicate offense, Mr. Collins's June 18, 1992 conviction for ABDW cannot separately count as a predicate offense, since the two convictions arose out of the same factual circumstances. See 18 U.S.C. § 924(e)(1).

2008 - as predicate offenses. [PSR ¶¶ 39, 47, 50]. Like armed assault with intent to kill, ADW builds on the Massachusetts common law,¹⁰ which recognizes two theories of simple assault: threatened battery and attempted battery. See *Porro*, 989 N.E.2d at 1163; see also *infra*. "The crime of ADW adds one additional element [to the crime of common law assault], namely that the assault was perpetrated by means of a dangerous weapon." *Commonwealth v. Melton*, 763 N.E.2d 1092, 1096 (Mass. 2002).

The First Circuit has consistently held that "the element of a dangerous weapon imports the 'violent force' required by [*Johnson I*] into an otherwise overbroad simple assault statute" because it has been interpreted to require the Commonwealth to show "that the threat of harm was by means of a dangerous weapon." *United States v. Whindleton*, 797 F.3d 105, 114 (1st Cir. 2015). "Logically, the harm threatened by an assault is far more violent than offensive touching when committed with a weapon that is designed to produce or used in a way that is capable of producing serious bodily harm or death." *Id.* ADW is therefore categorically a violent felony under the force clause of ACCA and may serve as a predicate offense for the sentencing enhancement.

¹⁰ Massachusetts law defines ADW as any assault committed "by means of a dangerous weapon." M.G.L. c. 265 § 15B(b).

Mr. Collins has two convictions for ADW under Massachusetts law, [PSR ¶¶ 39, 47], and these two convictions arose out of actions committed on occasions different from one another and from the actions that gave rise to Mr. Collins's conviction for Armed Assault with Intent to kill. [PSR ¶ 35].¹¹

4. Assault and Battery with a Deadly Weapon (ABDW)

Mr. Collins spends the bulk of his petition arguing that Massachusetts ABDW is not categorically a violent felony under the force clause of ACCA. As a theoretical proposition, his argument has some force. Massachusetts law punishes anyone who "commits an assault and battery upon another by means of a dangerous weapon," but provides no further clarification regarding what constitutes "assault and battery." M.G.L. c. 265 § 15A. Instead, the exact contours of this offense, as with assault, come from the common law, which attributes "two separate aspects to the crime of ABDW." *United States v. Tavares*, 843 F.3d 1, 12 (1st Cir. 2016). Assault and battery under the common law includes both "the intentional and unjustified use of force upon the person of another, however slight" and "the intentional commission of a wanton or reckless

¹¹ As a practical matter, my analysis may end here then, since I have identified the requisite three predicate offense committed by Mr. Collins sufficient to support his classification as an armed career criminal under ACCA. For the sake of completeness, however, I will address the remaining offenses that Mr. Collins has challenged.

act causing physical or bodily injury to another.” *Id.* Because ABDW may be committed in either way, the First Circuit has assumed that ABDW “is divisible between its intentional and reckless forms.”¹² *United States v. Faust*, 853 F.3d 39, 57 (1st Cir. 2017) (citing *Tavares*, 843 F.3d at 13).

The intentional form of ABDW – which requires “the intentional and unjustified use of force upon the person of another, no matter how slight” – “constitutes a crime of violence under § 4B1.2(a)(1) of the [Sentencing Guidelines]” because ADW is a lesser-included offense of this form of ABDW and ADW is, itself, a violent felony. *Tavares*, 843 F.3d at 13. Consequently, the First Circuit has determined that the intentional form of ABDW may be treated as a violent felony under the force clause of ACCA. *Faust*, 853 F.3d at 57 (“[W]e have previously found that the terms ‘crime of violence’ under the career offender guideline and ‘violent felony’ under the

¹² The First Circuit’s holding by Judge Kayatta in *United States v. Tavares*, 843 F.3d 1, 13 (1st Cir. 2016) seems to state definitively that ABDW is divisible, but in a subsequent decision for the court, Judge Kayatta later appeared to qualify this holding, saying that “[i]n *Tavares*, [the First Circuit] attempted to predict how the Massachusetts Supreme Judicial Court would rule,” since the question of divisibility ultimately must be decided by the SJC to be definitive. *United States v. Kennedy*, 881 F.3d 14, 20 (1st Cir. 2018). To date, that issue has not yet been definitively resolved by the SJC and, as explained below, I need not explore it here.

ACCA are nearly identical in meaning, so that decisions construing one term inform the construction of the other.”).

The reckless form of ABDW, however, is not categorically a violent felony under ACCA because “it does not require that the defendant intend to cause injury . . . or even be aware of the risk of serious injury that any reasonable person would perceive.” *United States v. Windley*, 864 F.3d 36, 38 (1st Cir. 2017) (per curiam); see also *United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018). To affirm Mr. Collins’s conviction, I must find “both that Massachusetts ABDW is divisible into its intentional and reckless forms, and that [Mr. Collins] pled guilty to the intentional form.” *Kennedy*, 881 F.3d at 19-20. In determining the latter question, I may look to both his guilty plea and to the original charging documents. See *Shepard v. United States*, 544 U.S. 13, 19 (2005); *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

These documents, however, have not been provided to me, so I cannot reasonably determine Mr. Collins was convicted of the intentional or reckless version of ABDW. Consequently, I do not rely on the March 6, 1990, June 18, 1992, July 2, 1996 and August 12, 1992 convictions for ABDW as predicate offenses to classify Mr. Collins as an armed career criminal.

5. Breaking and Entering at Night

Finally, Mr. Collins challenges his conviction for Breaking

and Entering a building at nighttime. This conviction was not included as one of his predicates in the PSR but it was raised summarily in the Government's sentencing memorandum. The Government again only summarily mentions this conviction in a footnote in its response to the petition now before me.

Under ACCA, a violent felony, by definition, includes "burglary" in the generic sense in which the term is now used in the criminal codes of most states. *Taylor v. United States*, 495 U.S. 575, 598 (1990). It therefore applies to any state statute that criminalizes "an unlawful on unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.*; see also *United States v. Stitt*, 139 S. Ct. 399, 405-06 (2018). Massachusetts law, however, separates the generic crime of "burglary" between two statutes - one which criminalizes entry into "a dwelling house in the nighttime, with intent to commit a felony," M.G.L. c. 266 § 14; and one which criminalizes entry into "a building, ship, vessel or vehicle, with intent to commit a felony." M.G.L. c. 266 § 16. Mr. Collins was convicted under the latter provision, [PSR ¶ 41], and was specifically convicted of breaking and entering a building.

In such circumstances, Mr. Collins's conviction constitutes a predicate offense even if the underlying statute - M.G.L. c. 266 § 16 - criminalizes conduct that falls outside the generic

definition of burglary; the Massachusetts statute is divisible and Mr. Collins was convicted of an offense that satisfies the generic definition of burglary. See *Descamps v. United States*, 570 U.S. 254, 257 (2013) (A divisible statute “sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile.”); *Shepard*, 544 U.S. at 16-17 (holding that a sentencing court may look to “statutory elements, charging documents, and jury instructions to determine whether an earlier conviction [here, under M.G.L. c. 266 § 16] after trial was for generic burglary” and implying that the Massachusetts statute was divisible); *Taylor*, 495 U.S. at 602 (“[I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find entry of a building to convict,” this conviction was a predicate offense).

Mr. Collins’s conviction was specifically for breaking and entering into a building, and so is a valid predicate offense for the purpose of the ACCA enhancement.

B. Predicate Offenses Not Challenged in the Petition

Finally, Mr. Collins was also convicted on October 15, 2001 of armed robbery, armed assault with intent to rob, and kidnapping. [PSR ¶ 39]. The three convictions all arose out of

the same set of factual circumstances, were accompanied by a conviction for ADW, and were listed as predicate offenses in the Presentence Report. [PSR ¶¶ 39, 50].

Mr. Collins has not challenged the classification of these convictions as predicate offenses in his habeas petition, [See generally Dkt. No. 52], although he has a legal basis to do so. See generally, e.g., *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (holding that Massachusetts armed robbery is not a violent felony under the force clause); *Commonwealth v. Benitez*, 985 N.E.2d 102 (Mass. 2013) (holding that armed assault with intent to rob is a lesser included offense of armed robbery, suggesting in light of *Starks* that armed assault with intent to rob is not a violent felony); *Commonwealth v. Rivera*, 949 N.E.2d 916 (Mass. 2011) (holding that an individual can be convicted of kidnapping if he confines a person by trick and without the use of force); *United States v. Lattanzio*, 232 F. Supp. 3d 220 (D. Mass. 2017) (suggesting that because a defendant may be guilty in Massachusetts of kidnapping if he abducts someone through trick, kidnapping is not categorically a violent felony).

However, an argument that any of these three offenses is not, in fact, a violent felony has not been raised in this petition, and such an argument would be supererogatory given the status of the October 15, 2001 conviction for ADW as an ACCA predicate arising from the same occasion on which the other

three unchallenged October 15, 2001 convictions relied. I therefore decline to classify any of them as violent felonies, providing a predicate offense for application of the ACCA as to Mr. Collins. *See generally supra* note 5.

IV. CONCLUSION

For the foregoing reasons, I DENY the motion [Dkt. No. 52] under 28 U.S.C. § 2255. The Clerk is directed to terminate this matter.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE