

APPENDIX 1

UNITED STATES DISTRICT COURT

Southern

District of

Mississippi

UNITED STATES OF AMERICA

V.

ANDERSON ALEXANDER

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:06cr34WHB-JCS-001

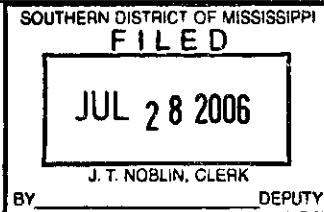
USM Number: 08919-043

Defendant's Attorney: William Andy Sumrall, Attorney at Law
P. O. Box 1068
Jackson, MS 39215-1068

THE DEFENDANT:

 pleaded guilty to count(s) single count Indictment pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:



Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§922(g)(1) and 924(e)	Felon in Possession of a Firearm	03/18/05	1

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

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

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 21, 2006

Date of Imposition of Judgment

Signature of Judge

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

Date

7/26/06

DEFENDANT: ALEXANDER, Anderson
CASE NUMBER: 3:06cr34WHD-JCS-001**IMPRISONMENT**

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

One hundred eighty (180) months

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

The Court recommends the defendant be incarcerated at close to Jackson, MS, as possible.

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

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

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

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

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALEXANDER, Anderson
CASE NUMBER: 3:06cr34WHD-JCS-001**SUPERVISED RELEASE**

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

Three (3) years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

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

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ALEXANDER, Anderson
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SPECIAL CONDITIONS OF SUPERVISION

- A. The defendant shall submit to random urinalysis testing and shall participate in a drug aftercare treatment program as directed by the supervising U. S. Probation Officer, to include inpatient treatment, if necessary.**
- B. The defendant shall undergo a mental health evaluation and, if deemed necessary, shall participate in an approved mental health treatment program as directed by the supervising U. S. Probation Officer.**
- C. The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U. S. Probation Officer.**

DEFENDANT: ALEXANDER, Anderson
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CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

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

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS \$ _____ \$ _____

Restitution amount ordered pursuant to plea agreement \$ _____

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

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

the interest requirement is waived for the fine restitution.

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

DEFENDANT: ALEXANDER, Anderson
CASE NUMBER: 3:06cr34WHB-JCS-001**SCHEDULE OF PAYMENTS**

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

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court, P. O. Box 23552, Jackson, MS 39225-3552.

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

Joint and Several

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

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

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

APPENDIX 2

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

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:06-cr-34-WHB-ALL
CIVIL ACTION NO. 3:16-cv-507-WHB-ALL

ANDERSON ALEXANDER

OPINION AND ORDER

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

I. Factual Background and Procedural History

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

¹ The Fifth Circuit authorized the filing of this successive Motion to Vacate. See In re Anderson Alexander, No. 15-60352, slip Op. (5th Cir. Aug. 30, 2016).

his sentence be calculated from an Adjusted Offense Level of 33 pursuant to U.S.S.G. § 4B1.4(b)(3)(B). The prior felony convictions used to support the armed career criminal designation included a state court conviction for aggravated assault, and two state court drug convictions, one for delivery of marijuana, and the other for possession of cocaine with the intent to distribute. Following a three-level reduction for acceptance of responsibility, Alexander's Total Offense Level was 30, which, when considered in conjunction with his Criminal History Level of IV, resulted in a Sentencing Guideline Range of 135 to 168 months. Because of his three prior convictions, however, Alexander was subject to a statutory 15-year term of imprisonment pursuant to 18 U.S.C. § 924(e), which provides, in relevant part, that a person who violates Section 922(g)(1) and who has three previous convictions "shall be ...imprisoned not less than fifteen years." Alexander was sentenced to a 180-month term of imprisonment in July of 2006.

Relying on Johnson v. United States, 576 U.S. ---, 135 S.Ct. 2552 (2015), Alexander filed the subject Motion to Vacate. In his Motion, Anderson argues that under Johnson, his aggravated assault conviction should not have been considered for the purposes of either sentencing him as a career offender under 18 U.S.C. § 924(e), or for the purpose of applying the enhancements under U.S.S.G. § 4B1.4 when calculating his sentence. In response, the Government argues that Alexander's Motion to Vacate should be

dismissed on the grounds that it is either barred by the applicable statute of limitations, or that his aggravated assault conviction was properly considered at sentencing. The Court now considers Alexander's Motion to Vacate.

II. Discussion

In Johnson v. United States, 576 U.S. ---, 135 S.Ct. 2552 (2015), the United States Supreme Court considered a due process challenge to the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e). This statute provides, in relevant part:

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

(2) As used in this subsection -

...

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

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

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

18 U.S.C. § 924(e). The specific issue raised to the Court was

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

In his Motion to Vacate, Alexander argues that following Johnson, his state court aggravated assault conviction can no longer be considered a "violent felony" under the residual clause of Section 924(e)(2)(B)(ii) of the ACCA for the purposes of enhancing his sentence.² Alexander further argues that his aggravated assault conviction cannot be considered a "violent felony" under the elements provision of Section 924(e)(2)(B)(i) of the ACCA, which defines the term "violent felony" to include certain crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another." Contrary to Alexander's argument, courts have found that a conviction for aggravated assault under Mississippi law is properly

² Alexander does not challenge whether his prior state court drug convictions were properly considered when his sentence was imposed. See Mot. to Vacate [Docket No. 61], 4 ("The two drug related crimes are not at issue.").

considered a "violent felony" based on its elements.

In United States v. Beckworth, 2016 WL 4203510 (N.D. Miss. Aug. 9, 2016), for example, the court considered whether a conviction of aggravated assault under Mississippi law was a violent felony under the elements provision of U.S.S.G. § 4B1.2(a)(1), the language of which is identical to the elements provision of Section 924(e)(2)(B)(i) of the ACCA. The court began its discussion by citing Johnson v. United States, 559 U.S. 133 (2010), in which the Supreme Court clarified that for a conviction to qualify as a violent felony under the elements provision of the ACCA, the criminal statute underlying that conviction "must have an element of 'physical force,' that is, 'violent force' capable of causing physical pain or injury to another person." Beckworth, 2016 WL 4203510, at *4 (quoting Johnson, 559 U.S. at 140). After considering Johnson, the Court held:

Aggravated assault is a crime of violence under Mississippi law. See Davis v. State, 680 So. 2d 848, 851 (Miss. 1996) (noting also that federal sentencing guidelines consider aggravated assault a crime of violence). The Court has already noted that Mississippi's [aggravated assault] statute essentially mirrors that of the Model Penal Code. It notes that under either provision, a conviction of aggravated assault requires an assault (carried out or threatened) with an intent to cause a serious bodily injury. See United States v. Ocampo-Cruz, 561 F. App'x 361, 363 (5th Cir. 2014) (noting Model Penal Code definition of aggravated assault describes a necessary mental state greater than simple recklessness or negligence); see also United States v. Forrest, 611 F.3d 908, 911 (8th Cir. 2010) ((noting "[a] threat that creates a fear 'of imminent serious bodily injury' is a threat of physical force."). Mississippi's aggravated assault statute does not encompass behavior

outside of the ordinary meaning of the offense, and therefore, it is sufficient to meet the elements clause.

Beckworth, 2016 WL 4203510, at *4.

Having considered the applicable law and statutes, the Court finds that regardless of whether Alexander's conviction for aggravated assault under Mississippi law would qualify as a "violent felony" under the residual clause of Section 924(e) (2) (B) (ii) of the ACCA, that conviction constitutes a "violent felony" under the elements provision of Section 924(e) (2) (B) (i) of that statute. As such, the Court finds the decision of the Supreme Court in Johnson, which held that only the residual clause of the ACCA was void as unconstitutionally vague, is not applicable in this case. Additionally, as Alexander's aggravated assault conviction satisfies the elements clause of the ACCA, it was proper to consider this conviction when determining whether he was a career offender under that statute. Because Alexander had three qualifying convictions for the purpose of sentencing him as a career offender under Section 924(e), i.e. one violent felony conviction stemming from the aggravated assault conviction and two prior convictions for serious drug offenses, the Court finds he has failed to show that it erred when sentencing him to the minimum sentence imposed by that statute. Accordingly, the Court finds Alexander's Motion to Vacate is not well taken and

should be denied.³

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that Defendant's Motion to Vacate Conviction and Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 [Docket No. 61] is hereby denied. A Final Judgment dismissing this case with prejudice shall be entered this day.

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

SO ORDERED this the 25th day of April, 2017.

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

³ Because the statutory minimum sentence in this case (180-months imprisonment) was greater than the proposed Sentencing Guideline Range (135 to 168-months imprisonment), the Court finds Alexander's challenge to the manner in which his guideline range was calculated, i.e. application of the armed career criminal enhancement under U.S.S.G. § 4B1.4, is moot. Even if not moot, the argument is foreclosed by the decision in Beckles v. United States, --- U.S. ---, 137 S. Ct. 886 (2017), a case in which the Supreme Court held that provisions of the Sentencing Guidelines are not subject to due process vagueness challenges.

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

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:06-cr-34-WHB-ALL
CIVIL ACTION NO. 3:16-cv-507-WHB-ALL

ANDERSON ALEXANDER

FINAL JUDGMENT

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

SO ORDERED this the 25th day of April, 2017.

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

APPENDIX 3

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 13, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ANDERSON ALEXANDER,

Defendant – Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:16-CV-507
USDC No. 3:06-CR-34-1

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

PER CURIAM:*

In July 2006, Anderson Alexander pleaded guilty to possessing a firearm as a felon. Based on three prior convictions—two for drug offenses and one for aggravated assault—he received a sentencing enhancement under the Armed Career Criminal Act (“ACCA”). Alexander says an intervening Supreme Court decision means his sentence violated the Constitution. But we lack jurisdiction to reach the merits of his appeal. So we dismiss.

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

I.

On March 18, 2005, a police officer in Jackson, Mississippi, was driving his patrol car down a local street. Alexander was driving toward the officer and came close to causing a head-on collision. Then Alexander swerved—avoiding a wreck and landing on the curb. The officer approached the car on the curb. He spotted a 32-ounce can of Miller Lite between Alexander’s legs. A subsequent search of the car uncovered a .22-caliber firearm as well as suspected marijuana and crack cocaine under the driver’s seat. Jackson police ran a criminal history check on Alexander. That search uncovered Alexander’s prior felony convictions.

Alexander pleaded guilty to possessing a firearm as a felon. *See* 18 U.S.C. § 922(g). ACCA provides sentencing enhancements for “a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense” committed on separate occasions. *Id.* § 924(e)(1). Alexander’s criminal record at the time of sentencing included three felony convictions, all in Mississippi: (1) a 1977 conviction for delivering marijuana, (2) a 1980 conviction for aggravated assault, and (3) a 2000 conviction for possession of cocaine with intent to distribute. The judge determined that Alexander’s first and third convictions qualified as serious drug offenses and that the second conviction qualified as a violent felony. Because those convictions triggered an ACCA-enhanced sentence, the judge sentenced Alexander to a fifteen-year mandatory minimum sentence and a three-year term of supervised release.

As part of his guilty plea, Alexander agreed to waive the right to contest his conviction and sentence through a motion under 28 U.S.C. § 2255. Nevertheless, in the years following his conviction, Alexander filed three

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unsuccessful § 2255 motions. The district court denied and dismissed the first two motions. This appeal arises from Alexander’s third.¹

In this § 2255 motion, Alexander argues that he should get the benefit of the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that ACCA’s residual clause is unconstitutionally vague.² *See id.* at 2562–63. Alexander says his conviction for aggravated assault could constitute a “violent felony” under ACCA only by virtue of the (now-unconstitutional) residual clause. That means, Alexander says, his sentence is unconstitutional.

The district court held otherwise. It found that Alexander’s conviction for aggravated assault qualified as a violent felony under ACCA’s force clause, and so *Johnson* was irrelevant to Alexander’s sentence. The court then denied his motion and dismissed his case with prejudice. Alexander timely appealed, and this court granted a certificate of appealability to consider whether the district court erred in addressing the *Johnson* question.

¹ The Government did not attempt to enforce Alexander’s waiver before filing a Rule 28(j) letter almost *seven months after* the parties completed briefing on the merits. As we have said before, if the Government does not care enough about the waiver to enforce it, we generally will ignore it too. *See, e.g., United States v. Wiese*, 896 F.3d 720, 722 n.1 (5th Cir. 2018); *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006); *cf. United States v. St. John*, 625 F. App’x 661, 670 (5th Cir. 2015) (per curiam) (“[T]his court will not consider an issue raised for the first time in a Rule 28(j) letter.”).

² ACCA defines a violent felony as:

[A]ny crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). As relevant here, the first clause of this provision is known as the “force clause” or the “elements clause” because it describes offenses that have the use of force as an element. And the third clause of this provision (“or otherwise involves”) is known as the “residual clause” because it served as a catchall for offenses that would not otherwise qualify as violent felonies. *See, e.g., Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

II.

We review *de novo* questions of law in the denial of a § 2255 motion. *United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019). But “[i]f the district court did not have jurisdiction to reach the merits, naturally, we cannot reach the merits on appeal.” *Wiese*, 896 F.3d at 723.

A.

We begin and end with jurisdiction. As ever, “[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.” *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998); *MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019).

In 28 U.S.C. §§ 2244(b) and 2255(h), Congress set strict jurisdictional requirements for second or successive § 2255 motions. *See Clay*, 921 F.3d at 554. First, a prisoner must persuade this Court to grant him permission to file a successive motion. *Id.* Alexander did that.

Second, a “prisoner must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence.” *Wiese*, 896 F.3d at 723. To do so under the rule in *Johnson*, a prisoner “must show that it was more likely than not that he was sentenced under the residual clause.” *Clay*, 921 F.3d at 559. When “determining potential reliance on the residual clause by the sentencing court,” a court can look to the sentencing record and the background legal environment at the time of the sentencing court’s decision, as well as the presentence investigation report (PSR) and other relevant materials that were before that court. *Wiese*, 896 F.3d at 725. “Where a prisoner fails to make the requisite showing before the district court, the district court lacks jurisdiction . . .” *Clay*, 921 F.3d at 554. In such

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cases, “our jurisdiction extends not to the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” *Id.* (internal quotation marks omitted).

B.

Alexander has failed to “show that it was more likely than not that he was sentenced under the residual clause.” *Id.* at 559. That is so because Mississippi’s aggravated-assault statute is divisible, and the district court could have determined Alexander’s violation of the relevant portion of the state law was a violent felony under the force clause.

First, the relevant statute of conviction is divisible. A statute is divisible if it “list[s] elements in the alternative, and thereby define[s] multiple crimes.” *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *see also United States v. Lerma*, 877 F.3d 628, 633–34 (5th Cir. 2017). Mississippi’s relevant statute said someone committed aggravated assault if he:

- (a) attempt[ed] to cause serious bodily injury to another, or cause[d] such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempt[ed] to cause or purposely or knowingly cause[d] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

1974 Miss. Laws 557 (codified as amended at MISS. CODE ANN. § 97-3-7(2)). The plain text thus contains disjunctive statutory alternatives describing different crimes. Likewise, Mississippi courts long have recognized the different crimes contained in the statute. *See, e.g., Ward v. State*, 479 So. 2d 713, 715 (Miss. 1985). Therefore, the statute is “divisible.”

Second, where a statute of conviction is divisible, “courts may look beyond the statute to certain conclusive records made or used in adjudicating guilt in order to determine which particular statutory alternative applies to

the defendant's conviction." *United States v. Bonilla-Mungia*, 422 F.3d 316, 320 (5th Cir. 2005) (internal quotation marks omitted). These conclusive records include the "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson v. United States*, 559 U.S. 133, 144 (2010). For example, we considered the indictment in *United States v. Montgomery*, 402 F.3d 482, 486 (5th Cir. 2005). The question presented in that case was whether a conviction for retaliation qualified for an ACCA enhancement under the force clause. To answer that question, the court examined "the indictment only to 'pare down' the statute—that is, to decide under which branch of a disjunctive statute a defendant's conviction falls." *Id.*

Here, materials that were before the district court indicate Alexander was convicted for using a deadly weapon to cause serious bodily injury. The PSR said, "according to the Indictment, on October 1, 1979, the defendant caused bodily injury to Robert E. Vance by use of a pistol." The sentencing judge confirmed with Alexander that he had read and reviewed his PSR, and that Alexander affirmed the facts within it as "true and correct." In so doing, Alexander affirmed the PSR's recounting of his aggravated assault indictment. That is sufficient to "pare down" the relevant statute to its second subsection—the one that involves the use of a "deadly weapon." *See* MISS. CODE ANN. § 97-3-7(2)(b). And that, in turn, is sufficient to justify Alexander's ACCA enhancement under the force clause. *See United States v. Torres-Diaz*, 438 F.3d 529, 538 (5th Cir. 2006); *United States v. Martinez*, 962 F.2d 1161, 1168 (5th Cir. 1992).

Third, the rest of the sentencing record is no help to Alexander. At the sentencing hearing, the judge did not say anything to suggest he relied on ACCA's residual clause. Nor did the judge explain whether he was applying

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the categorical approach or the modified categorical approach. That is insufficient to carry Alexander's burden to prove it is more likely than not that the sentencing judge relied on the residual clause—and hence that Alexander's § 2255 motion relies on *Johnson*.

We have said before that jurisdiction requires more than a “theoretical possibility” that a district court relied on the residual clause. *Wiese*, 896 F.3d at 726; *see also*, e.g., *United States v. Hernandez*, 779 F. App'x 195, 199 (5th Cir. 2019) (per curiam). In this case, however, Alexander has produced only theoretical possibilities.

DISMISSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60360

D.C. Docket No. 3:16-CV-507

United States Court of Appeals
Fifth Circuit

FILED
April 13, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANDERSON ALEXANDER,

Defendant - Appellant

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

Before ELROD, WILLETT, and OLDHAM, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

APPENDIX 4

808 Fed.Appx. 234

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.

Anderson ALEXANDER, Defendant – Appellant.

No.

17

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60360

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FILED April 13, 2020

Synopsis

Background: Defendant filed second or successive motion to vacate sentence, relating to enhancement of his sentence for possessing a firearm as a felon, based on Armed Career Criminal Act (ACCA). The United States District Court for the Southern District of Mississippi denied the motion. Defendant appealed.

[Holding:] The Court of Appeals held that defendant did not show that it was more likely than not that his sentence enhancement was based on ACCA's unconstitutional residual clause defining violent felony.

Appeal dismissed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (2)

[1] Criminal Law  Plea of Guilty or Nolo Contendere

110 Criminal Law

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026.10 Waiver or Loss of Right

110k1026.10(2) Plea of Guilty or Nolo

Contendere

110k1026.10(2.1) In general

Court of Appeals would not consider whether defendant's negotiated guilty plea waived his right to file a motion to vacate sentence challenging enhancement, under Armed Career Criminal Act (ACCA), of his sentence for possessing a firearm as a felon, where government did not attempt to enforce defendant's waiver until it filed a letter with citation of supplemental authorities almost seven months after completion of parties' appellate briefing on the merits.  18 U.S.C.A. § 924(e) (2)(B); Fed. R. App. 28(j);  28 U.S.C.A. § 2255.

[2] Criminal Law  Particular issues and cases

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1666 Effect of Determination

110k1668 Successive Post-Conviction Proceedings

110k1668(3) Particular issues and cases

Defendant did not show that it was more likely than not, as would be required for district court's jurisdiction for second or successive motion to vacate sentence relying on new rule of constitutional law that the Supreme Court had made retroactive to cases on collateral review, that sentence enhancement for possessing a firearm as a felon, based in part on prior Mississippi felony conviction for aggravated assault, occurred under residual clause of definition of violent felony in Armed Career Criminal Act (ACCA), which clause the

Supreme Court's  *Johnson v. United States* decision found unconstitutionally vague under due process principles; Mississippi's aggravated assault statute was divisible, and under modified categorical approach, indictment for aggravated assault indicated that defendant had used a pistol to cause serious bodily injury, so that sentence enhancement could have been based

on force clause of ACCA's definition of violent felony. [U.S. Const. Amend. 5](#);  [18 U.S.C.A. § 924\(e\)\(2\)\(B\)](#);  [28 U.S.C.A. §§ 2244\(b\)\(2\)\(A\), 2255\(h\)](#);  [Miss. Code Ann. § 97-3-7\(2\)](#).

West Codenotes

Recognized as Unconstitutional

 [18 U.S.C.A. § 924\(e\)\(2\)\(B\)\(ii\)](#)

***235** Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 3:16-CV-507, USDC No. 3:06-CR-34-1

Attorneys and Law Firms

[Gaines H. Cleveland](#), Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Mississippi, Gulfport, MS, [Gregory Layne Kennedy](#), Esq., Assistant U.S. Attorney, David Harrison Fulcher, U.S. Attorney's Office Southern District of Mississippi, Jackson, MS, for Plaintiff - Appellee

[Michael L. Scott](#), Esq., [Thomas Creager Turner, Jr.](#), Esq., Federal Public Defender's Office, Southern District of Mississippi, Jackson, MS, for Defendant - Appellant

Before [ELROD](#), [WILLETT](#), and [OLDHAM](#), Circuit Judges.

Opinion

PER CURIAM: *

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

In July 2006, Anderson Alexander pleaded guilty to possessing a firearm as a felon. Based on three prior convictions—two for drug offenses and one for aggravated assault—he received a sentencing enhancement under the Armed Career Criminal Act (“ACCA”). Alexander says an intervening Supreme Court decision means his sentence violated the Constitution. But we lack jurisdiction to reach the merits of his appeal. So we dismiss.

*236 I.

On March 18, 2005, a police officer in Jackson, Mississippi, was driving his patrol car down a local street. Alexander was driving toward the officer and came close to causing a head-on collision. Then Alexander swerved—avoiding a wreck and landing on the curb. The officer approached the car on the curb. He spotted a 32-ounce can of Miller Lite between Alexander's legs. A subsequent search of the car uncovered a .22-caliber firearm as well as suspected marijuana and crack cocaine under the driver's seat. Jackson police ran a criminal history check on Alexander. That search uncovered Alexander's prior felony convictions.

Alexander pleaded guilty to possessing a firearm as a felon.

See  [18 U.S.C. § 922\(g\)](#). ACCA provides sentencing enhancements for “a person who violates  [section 922\(g\)](#) of this title and has three previous convictions ... for a violent felony or a serious drug offense” committed on separate occasions. *Id.* § 924(e)(1). Alexander's criminal record at the time of sentencing included three felony convictions, all in Mississippi: (1) a 1977 conviction for delivering marijuana, (2) a 1980 conviction for aggravated assault, and (3) a 2000 conviction for possession of cocaine with intent to distribute. The judge determined that Alexander's first and third convictions qualified as serious drug offenses and that the second conviction qualified as a violent felony. Because those convictions triggered an ACCA-enhanced sentence, the judge sentenced Alexander to a fifteen-year mandatory minimum sentence and a three-year term of supervised release.

[1] As part of his guilty plea, Alexander agreed to waive the right to contest his conviction and sentence through a motion under  [28 U.S.C. § 2255](#). Nevertheless, in the years following his conviction, Alexander filed three unsuccessful  [§ 2255](#) motions. The district court denied and dismissed the first two motions. This appeal arises from Alexander's third.¹

¹ The Government did not attempt to enforce Alexander's waiver before filing a Rule 28(j) letter almost *seven months after* the parties completed briefing on the merits. As we have said before, if the Government does not care enough about the waiver to enforce it, we generally will ignore it too. *See*,

e.g.,  *United States v. Wiese*, 896 F.3d 720, 722 n.1 (5th Cir. 2018);  *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006); *cf. United States v. St. John*, 625 F. App'x 661, 670 (5th Cir. 2015) (per curiam) (“[T]his court will not consider an issue raised for the first time in a Rule 28(j) letter.”).

In this  § 2255 motion, Alexander argues that he should get the benefit of the Supreme Court’s decision in  *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015).  *Johnson* held that ACCA’s residual clause is unconstitutionally vague.² See  *id.* at 2562–63. Alexander says his conviction for aggravated assault could constitute a “violent felony” under ACCA only by virtue of the (now-unconstitutional) residual clause. That means, Alexander *237 says, his sentence is unconstitutional.

² ACCA defines a violent felony as:

[A]ny crime punishable by imprisonment for a term exceeding one year ... that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

 18 U.S.C. § 924(e)(2)(B). As relevant here, the first clause of this provision is known as the “force clause” or the “elements clause” because it describes offenses that have the use of force as an element. And the third clause of this provision (“or otherwise involves”) is known as the “residual clause” because it served as a catchall for offenses that would not otherwise qualify as violent felonies.

See, e.g.,  *Welch v. United States*, — U.S. —, 136 S. Ct. 1257, 1263, 194 L.Ed.2d 387 (2016).

The district court held otherwise. It found that Alexander’s conviction for aggravated assault qualified as a violent felony under ACCA’s force clause, and so  *Johnson* was irrelevant to Alexander’s sentence. The court then denied his motion and dismissed his case with prejudice. Alexander timely appealed, and this court granted a certificate of appealability to consider whether the district court erred in addressing the  *Johnson* question.

II.

We review *de novo* questions of law in the denial of a  § 2255 motion.  *United States v. Clay*, 921 F.3d 550, 554 (5th Cir. 2019). But “[i]f the district court did not have jurisdiction to reach the merits, naturally, we cannot reach the merits on appeal.”  *Wiese*, 896 F.3d at 723.

A.

We begin and end with jurisdiction. As ever, “[a]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.”  *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338 (1934); *see also*  *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *MidCap Media Fin., L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019).

In  28 U.S.C. §§ 2244(b) and  2255(h), Congress set strict jurisdictional requirements for second or successive  § 2255 motions. See  *Clay*, 921 F.3d at 554. First, a prisoner must persuade this Court to grant him permission to file a successive motion.  *Id.* Alexander did that.

Second, a “prisoner must actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence.”  *Wiese*, 896 F.3d at 723. To do so under the rule in  *Johnson*, a prisoner “must show that it was more likely than not that he was sentenced under the residual clause.”  *Clay*, 921 F.3d at 559. When “determining potential reliance on the residual clause by the sentencing court,” a court can look to the sentencing record and the background legal environment at the time of the sentencing court’s decision, as well as the presentence investigation report (PSR) and other relevant materials that were before that court.  *Wiese*, 896 F.3d at 725. “Where a prisoner fails to make the requisite showing before the district court, the district court lacks jurisdiction....”  *Clay*, 921 F.3d at 554. In such cases, “our jurisdiction extends not to the merits but merely for the purpose of

correcting the error of the lower court in entertaining the suit.”  *Id.* (internal quotation marks omitted).

B.

[2] Alexander has failed to “show that it was more likely than not that he was sentenced under the residual clause.”

 *Id.* at 559. That is so because Mississippi’s aggravated-assault statute is divisible, and the district court could have determined Alexander’s violation of the relevant portion of the state law was a violent felony under the force clause.

First, the relevant statute of conviction is divisible. A statute is divisible if it “list[s] elements in the alternative, and thereby define[s] multiple crimes.”  *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016); *see also*  *United States v. Lerma*, 877 F.3d 628, 633–34 (5th Cir. 2017). Mississippi’s relevant statute said someone committed aggravated assault if he:

- (a) attempt[ed] to cause serious bodily injury to another, or cause[d] such *238 injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
- (b) attempt[ed] to cause or purposely or knowingly cause[d] bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

1974 Miss. Laws 557 (codified as amended at  [MISS. CODE ANN. § 97-3-7\(2\)](#)). The plain text thus contains disjunctive statutory alternatives describing different crimes. Likewise, Mississippi courts long have recognized the different crimes contained in the statute. *See, e.g.*, *Ward v. State*, 479 So. 2d 713, 715 (Miss. 1985). Therefore, the statute is “divisible.”

Second, where a statute of conviction is divisible, “courts may look beyond the statute to certain conclusive records made or used in adjudicating guilt in order to determine which particular statutory alternative applies to the defendant’s conviction.”  *United States v. Bonilla-Mungia*, 422 F.3d 316, 320 (5th Cir. 2005) (internal quotation marks omitted). These conclusive records include the “charging documents, plea agreements, transcripts of plea colloquies, findings of

fact and conclusions of law from a bench trial, and jury instructions and verdict forms.”  *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). For example, we considered the indictment in *United States v. Montgomery*, 402 F.3d 482, 486 (5th Cir. 2005). The question presented in that case was whether a conviction for retaliation qualified for an ACCA enhancement under the force clause. To answer that question, the court examined “the indictment only to ‘pare down’ the statute—that is, to decide under which branch of a disjunctive statute a defendant’s conviction falls.” *Id.*

Here, materials that were before the district court indicate Alexander was convicted for using a deadly weapon to cause serious bodily injury. The PSR said, “according to the Indictment, on October 1, 1979, the defendant caused bodily injury to Robert E. Vance by use of a pistol.” The sentencing judge confirmed with Alexander that he had read and reviewed his PSR, and that Alexander affirmed the facts within it as “true and correct.” In so doing, Alexander affirmed the PSR’s recounting of his aggravated assault indictment. That is sufficient to “pare down” the relevant statute to its second subsection—the one that involves the use of a “deadly weapon.” *See*  [MISS. CODE ANN. § 97-3-7\(2\)\(b\)](#). And that, in turn, is sufficient to justify Alexander’s ACCA enhancement under the force clause. *See* *United States v. Torres-Diaz*, 438 F.3d 529, 538 (5th Cir. 2006);  *United States v. Martinez*, 962 F.2d 1161, 1168 (5th Cir. 1992).

Third, the rest of the sentencing record is no help to Alexander. At the sentencing hearing, the judge did not say anything to suggest he relied on ACCA’s residual clause. Nor did the judge explain whether he was applying the categorical approach or the modified categorical approach. That is insufficient to carry Alexander’s burden to prove it is more likely than not that the sentencing judge relied on the residual clause—and hence that Alexander’s  [§ 2255](#) motion relies on  *Johnson*.

We have said before that jurisdiction requires more than a “theoretical possibility” that a district court relied on the residual clause.  *Wiese*, 896 F.3d at 726; *see also*, *e.g.*, *United States v. Hernandez*, 779 F. App’x 195, 199 (5th Cir. 2019) (per curiam). In this case, however, Alexander has produced only theoretical possibilities.

DISMISSED.

All Citations

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