APPENDIX 1A:

"Third Circuit Order in USCA No. 20-1907 Dated November 2, 2020, Denying Martin's Petition for Panel Rehearing"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1907

UNITED STATES OF AMERICA

v.

ROBERT EARL MARTIN,
Appellant

(E.D. Pa. No. 2:98-cr-00178-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: November 2, 2020
Lmr/cc: Mary E. Crawley
Robert Earl Martin

APPENDIX 1B:

"Judgment in Civil Case No. 2:98-cr-00178-MAK-1, Dated February 28, 2020, Denying Martin's § 2255 Motion"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 98-178**
	:	
ROBERT EARL MARTIN	:	

MEMORANDUM

KEARNEY, J. **February 28, 2020**

The Honorable Norma L. Shapiro sentenced Robert Earl Martin to a life sentence under Congress's sentencing mandate following three convictions of serious violent felonies including his armed bank robbery leading to his 2001 life sentence. Judges and lawyers describe this mandate as the "three-strikes" statute. In 2015, the Supreme Court struck language in the residual clause in another sentencing statute, the Armed Career Criminal Act, as unconstitutional. Mr. Martin, through the Federal Defender, filed a second *habeas* petition arguing our Court of Appeals should extend the Supreme Court's 2015 holding under the Armed Career Criminal Act to his conviction under the three-strikes statute. Our Court of Appeals rejected this extension. In 2019, the Supreme Court held Congress's use of "crime of violence" in another residual clause of the Armed Career Criminal Act is unconstitutionally vague. Citing this 2019 holding, Mr. Martin now *pro se* returns for his third attempt at *habeas* relief arguing his sentence under the Armed Career Criminal Act is unconstitutional. But Judge Shapiro did not sentence him under this Act; she sentenced him under the three-strikes statute and our Court of Appeals affirmed the conviction. Our Court of Appeals already held we cannot extend the Supreme Court holdings striking residual clauses under the Armed Career Criminal Act to similar language in the three-strikes statute. We see nothing in the 2019 Supreme Court decision to distinguish Mr. Martin's renewed *pro se*

argument we should apply precedent under the Armed Career Criminal Act to his sentence. But even if we did, our Court of Appeals already held his charged crime of armed bank robbery is a crime of violence under the elements clause of the Armed Career Criminal Act. So even if we applied the Armed Career Criminal Act to a sentence under the three-strikes statute, the Supreme Court's 2019 holding relating to the residual clause does not warrant *habeas* relief. And even if we went one step further and assumed we could apply 2019 Supreme Court precedent affecting the Armed Career Criminal Act to Judge Shapiro's three-strikes statutory sentence, his earlier convictions appear to qualify as predicate crimes under the elements clause of the three-strikes clause. The Supreme Court's 2019 holding does not apply. We deny and dismiss Mr. Martin's petition for *habeas* relief.

I. Background

Our grand jury returned a two-count indictment against Robert Earl Martin in April 1998.[1] The grand jury charged Mr. Martin with armed bank robbery under 18 U.S.C. § 2113(d) and using and carrying a firearm during and in relation to the armed bank robbery under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(c). The grand jury charged Mr. Martin used a sawed-off double-barreled shotgun while committing the bank robbery.

On July 1, 1998, a jury found Mr. Martin guilty on both counts.[2] At sentencing, the United States sought life imprisonment under 18 U.S.C. § 3559(c), the "three-strikes statute," based on Mr. Martin's two earlier convictions: (1) a 1974 guilty plea to second-degree murder under 18 Pa.C.S.A. § 2505(b); and (2) a 1988 guilty plea to armed bank robbery and carrying a firearm in relation to the bank robber in violation of 18 U.S.C. § 2113(d) and § 924(c).[3] The Honorable Norma L. Shapiro denied Mr. Martin's challenge to the application of the three-strikes statute and sentenced him to life imprisonment under 18 U.S.C. § 3559(c).[4] Judge Shapiro applied the life

sentence under the three-strikes statute based on the armed bank robbery charged by the grand jury.

Mr. Martin's first motion under 28 U.S.C. § 2255.

On March 11, 2004, Mr. Martin moved under 28 U.S.C. § 2255 attacking the validity of his sentence, arguing ineffective assistance of counsel. After making findings of fact adduced at an evidentiary hearing, Judge Shapiro denied Mr. Martin's section 2255 motion.[5] Mr. Martin appealed from Judge Shapiro's Order. Our Court of Appeals affirmed Judge Shapiro's denial of the section 2255 motion.[6]

Mr. Martin's second or successive § 2255 motion seeking relief under Johnson v. United States.[7]

In June 2016, after reassignment of the case to our calendar, we granted Mr. Martin's motion to appoint the Federal Community Defender Office for the Eastern District of Pennsylvania ("Federal Defender") to represent him for the purpose of moving for relief under *Johnson v. United States.*[8] In *Johnson*, the Supreme Court held the term "violent felony" in the "residual clause" of ACCA, § 924(e)(2)(B)(ii), is unconstitutionally vague. Mr. Martin, through the Federal Defender, argued the Supreme Court in *Johnson* invalidated the residual clause definitions of "serious violent felony" in the three-strikes statute, 18 U.S.C. § 3559, and "crime of violence" in ACCA, § 924(c)(3).[9]

On May 10, 2018, the United States Court of Appeals for the Third Circuit, No. 16-2623, denied Mr. Martin's application under 28 U.S.C. §§ 2244 and 2255 to file a second or successive § 2255 motion.[10] The Court of Appeals found "[e]ven if those residual clause definitions were invalid under *Johnson,* however, [Mr. Martin] has not made a *prima facie* showing that his convictions of armed bank robbery under 18 U.S.C. § 2113(d) would not remain 'serious violent felonies' or 'crimes of violence' under the 'elements clause' definitions contained in those

statutes."[11] After the mandate from our Court of Appeals denied Mr. Martin leave to file a second or successive petition, we denied his section 2255 motion.[12]

Mr. Martin's second or successive § 2255 motion seeking relief under Sessions v. Dimaya.[13]

On December 10, 2018, Mr. Martin *pro se* requested permission from our Court of Appeals to file a second or successive section 2255 application under *Sessions v. Dimaya*. In *Dimaya*, the Supreme Court held the definition of "crime of violence" in the residual clause of the Immigration and Nationality Act, 18 U.S.C. § 16(b), is unconstitutionally vague.

On December 20, 2018, our Court of Appeals denied Mr. Martin's application for leave to file a second or successive § 2255, rejecting his argument *Dimaya* invalidated the residual clauses of ACCA, 18 U.S.C. § 924(c), and the three-strikes statute, 18 U.S.C. § 3559(c) and, without the residual clauses, his armed bank robberies do not constitute "crimes of violence" supporting his § 924(c) conviction or "serious violent felonies" supporting his § 3559(c) sentence. The Court of Appeals noted Mr. Martin's previous application seeking relief under *Johnson* and found nothing in *Dimaya* "causes us to reach a different conclusion here."[14]

Mr. Martin's second or successive § 2255 motion seeking relief under United States v. Davis.[15]

On August 27, 2019, Mr. Martin *pro se* requested permission from our Court of Appeals to file a second or successive § 2255 under *United States v. Davis*. In *Davis*, the Supreme Court held the definition of "crime of violence" in the residual clause of ACCA, § 924(c)(3)(B) is unconstitutionally vague. The Supreme Court reviewed ACCA in a Hobbs Act robbery; it did not address armed bank robbery. After the Supreme Court's decision in *Davis*, our Court of Appeals authorized approximately two hundred previously stayed applications as second or successive §

2255 motions under § 924(c)(3)(B).[16] Our Court of Appeals directed the Clerk of the Court to transfer Mr. Martin's application back to us.[17]

II. Analysis

Mr. Martin seeks relief under *Davis* arguing his sentence for armed bank robbery violates due process because second-degree murder is not categorically a "crime of violence" under the elements clause of section 924(c)(3)(A) or under the residual clause of section 924(c)(3)(B) because it is unconstitutionally vague.[18] We ordered the United States to reply to Mr. Martin's motion.[19] The United States responds Mr. Martin is arguing the wrong statute: Judge Shapiro sentenced him to life under the three-strikes statute; there is no new precedent to change our Court of Appeals' 2016 finding of no basis to find language in the three-strikes statute is unconstitutional; and, even if we interpreted *Davis* as applying to the three-strikes statute, his earlier offenses satisfy the elements clause of the three-strikes statute.

Mr. Martin specifically challenges his sentence based on the Supreme Court's holding in *Davis* as applied to an ACCA sentence. But Judge Shapiro specifically sentenced him under the three-strikes statute. The law has not changed as to three strikes statute.

Even though it does not apply, we will address Mr. Martin's challenge under ACCA. We need to address two statutes (1) bank robbery 18 U.S.C. § 2113(d) and (2) ACCA, 18 U.S.C. § 924(c).

Armed bank robbery, 18 U.S.C. § 2113(d).

Armed robbery under section 2113(d) is defined as "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both."[20]

The Armed Career Criminal Act, 18 U.S.C. § 924(c).

Section 924(c) of the ACCA provides for mandatory sentences for "[a]ny person who, during and in relation to any ***crime of violence*** ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm ...."[21] Section 924(c)(3) defines the term "crime of violence" as "an offense that is a felony and – (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense."[22]

Section 924(c)(3)(A) is known as the "elements clause" and subsection (B) is known as the "residual clause."[23] In *Davis*, the Supreme Court held section 924(c)(3)(B)—the residual clause—is unconstitutionally vague based on the reasoning of its earlier decisions in *Johnson* and *Dimaya* finding similarly-worded residual clauses unconstitutional.[24] After *Davis*, our Court of Appeals held whether a "petitioner['s] crimes fall under the elements clause or the challenged residual clause is itself a merits inquiry" to be determined by the district court.[25]

A. Armed robbery under 18 U.S.C. § 2113(d) is a crime of violence under the elements clause of 18 U.S.C. § 924 (c)(3)(A).

Mr. Martin argues his sentence violates due process because second-degree murder is not categorically a "crime of violence" under the elements clause of § 924(c)(3)(A) and cannot constitute a crime of violence under the residual clause of § 924(c)(3)(B) because the Supreme Court in *Davis* found it unconstitutionally vague.[26]

The United States opposes Mr. Martin's motion for relief under § 2255.[27] It argues Mr. Martin's challenge to his conviction under § 924(c) fails on the merits. The United States argues Mr. Martin is mistaken; the predicate for his crime under § 924(c) is armed robbery, not second-degree murder. We agree. A review of the grand jury's indictment of Mr. Martin shows two

counts: (1) armed robbery of a bank under 18 U.S.C. § 2113(d); and (2) using a firearm during and in relation to a crime of violence in violation of § 2113(d).[28] Second-degree murder is not the predicate for the § 924(c) charge.

It is true *Davis* held the residual clause of § 924(c)(3)(B) is unconstitutional. But the crime of bank robbery under § 2113(d) is a crime of violence under the elements clause of § 924(c)(3)(A). In *United States v. Johnson*, our Court of Appeals explained armed bank robbery under § 2113(d) "provides penalties for any person who, 'in committing ... an offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device."[29] "And 'assault[ing]' someone or putting a life in 'jeopardy ... by the use of a dangerous weapon,' ... meets the elements clause: it 'has as an element the use, attempted use, or threatened use of physical force. ... One cannot assault a person, or jeopardize his or his life with a dangerous weapon, unless one uses, attempts to use, or threatens physical force."[30]

Because a jury convicted Mr. Martin of armed bank robbery under § 2113(d), and our Court of Appeals held in *Johnson* § 2113(d) is a crime of violence under the elements clause of § 924(c), Mr. Martin is not entitled to relief under *Davis*.[31]

B. Mr. Martin's sentence is also valid under the three strikes statute.

Returning to the reality of Judge Shapiro's sentence under the three-strikes statute, the United States additionally argues Mr. Martin's three-strikes sentence under 18 U.S.C. § 3559(c) remains valid. The United States is correct. Our Court of Appeals directs the *Johnson* precedent applied in the ACCA sentencing paradigm does not apply to his sentence.[32] For many of the same reasons, the Supreme Court's 2019 holding in *Davis* does not apply to Mr. Martin's sentence.

The Supreme Court has not changed the law on the three-strikes statute applied by Judge Shapiro. *Davis* is a challenge to the ambiguity in the residual clause of ACCA. This 2019 decision does not affect Mr. Martin's sentence under the three-strikes statute. If the Supreme Court finds the residual clause of the three-strikes statute is also unconstitutional, we may face different arguments.

But even if the Supreme Court held the residual clause of the three-strikes statute is unconstitutional (and we can see how it may given similar statutory language), Mr. Martin's crimes may fall within the elements clause of the three-strikes statute. The authorizing statute identifies armed bank robbery as a predicate offense.[33] The second-degree state court murder conviction also qualifies under the then-existing Pennsylvania law. Judge Shapiro correctly held Mr. Martin's criminal history warranted the life sentence under the three-strikes statute.

C. We deny Mr. Martin's request for appointment of counsel.

Having found no possible merit in Mr. Martin's challenge to his sentence under *Davis*, we deny Mr. Martin's request for appointment of counsel.

D. There is no basis for a certificate of appealability.

A petitioner bringing a habeas corpus under § 2255 may not appeal without a certificate of appealability which we will not issue unless "the applicant has made a substantial showing of the denial of a constitutional right."[34] He fails to do so. We decline to issue a certificate of appealability.

III. Conclusion

We deny Mr. Martin's section 2255 petition and his motion for appointment of counsel. We decline to issue a certificate of appealability.

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[1] ECF Doc. No. 119-1.

[2] ECF Doc. No. 131 at 1.

[3] *United States v. Martin*, No. 98-178, 2001 WL 493199 at * 1 (E.D. Pa. May 7, 2001).

[4] Mr. Martin appealed from the judgment of conviction and sentence. The United States Court of Appeals for the Third Circuit affirmed the judgment of conviction and sentence. *See United States v. Martin*, 46 F. App'x 119 (3d Cir. 2002).

[5] *United States v. Martin*, No. 98-178, 2005 WL 1168383 (E.D. Pa. May 16, 2005).

[6] *United States v. Martin*, 262 F. App'x 392 (3d Cir. 2008).

[7] *Johnson v. United States*, --- U.S. ---, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

[8] ECF Doc. No. 125.

[9] ECF Doc. No. 126.

[10] ECF Doc. No. 127; *In re Robert Earl Martin*, No. 16-2623.

[11] *Id.* (citing *United States v. Wilson*, 880 F.3d 80, 88 (3d Cir. 2018), *petition for cert. filed*, No. 17-8601 (Apr. 17, 2018). Our Court of Appeals declined to further stay the case pending the outcome of the certiorari petition in Wilson. The Supreme Court denied *certiorari* on May 29, 2019. *United States v. Wilson*, --- U.S. ---, 138 S.Ct. 2586, 201 L.Ed.2d 303 (2018).

[12] ECF Doc. No. 128.

[13] --- U.S. ---, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2019).

[14] ECF Doc. No. 129.

[15] --- U.S. ---, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019).

[16] *In re Matthews*, 934 F.3d 296, 298 n.2 (3d Cir. 2019).

[17] *Id.*

[18] *Id.* at 5.

[19] ECF Doc. No. 132. The Federal Defender moved to withdraw as counsel for Mr. Martin. The Federal Defendant stated Mr. Martin informed its office he no longer wishes for it to represent him in his current § 2255 motion and intended to request new counsel. We granted the Federal Defender's motion to withdraw. Mr. Martin then moved for appointment of counsel, highlighting a disagreement with the Federal Defender's office regarding his claim for relief under *Davis*.

[20] 18 U.S.C. § 2113(d). Subsections (a) and (b) provide:

> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both."

[21] 18 U.S.C. § 924(c)(1)(A) (emphasis added).

[22] 18 U.S.C. § 924(c)(3).

[23] *Davis*, 139 S.Ct. at 2324.

[24] *Id.* at 2326-28.

[25] *In re Matthews*, 934 F.3d at 300 (citing *United States v. Peppers*, 899 F.3d 211, 226-27 (3d Cir. 2018).

[26] ECF Doc. No. 131.

[27] ECF Doc. No. 136.

[28] ECF Doc. No. 119-1.

[29] 899 F.3d 191, 203-04 (3d Cir. 2018). This case does not involve the same plaintiff as the Supreme Court's 2015 *Johnson v. United States* decision. *See Johnson*, 899 F.3d at 201, n.4.

[30] *Id.* at 204 (citing 18 U.S.C. § 2113(d), § 924(c)(3)(A)).

[31] We note two cases currently pending in the United States Court of Appeals for the Third Circuit. In *United States v. Harris*, No. 17-1861, our Court of Appeals granted a certificate of appealability on the question whether "Appellant's due process rights were violated by the use of his Pennsylvania robbery and aggravated assault convictions to enhance his sentence under the Armed Career Criminal Act," citing *Johnson*, 135 S.Ct. at 2557; *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016); *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). In *United States v. Copes*, No. 19-1494, our Court of Appeals will determine whether Hobbs Act robbery, 18 U.S.C. § 1951(a) is a crime of violence for purposes of § 924(c) after the Supreme Court's decision in *Davis*. Unlike *Harris* and *Copes*, our Court of Appeals already determined in *Johnson* armed bank robbery under § 2113(d) is a crime of violence under the elements clause of § 924(c)(3)(A).

[32] *United States v. Green*, 898 F.3d 315 (3d Cir. 2018).

[33] 18 U.S.C. § 3559 (c) (2)(F)(i).

[34] 28 U.S.C. § 2253(c)(2).

APPENDIX 1C:

"Third Circuit Order in USCA No. 20-1907 Dated August 27, 2020, Denying Martin's Certificate of Appealability"

BLD-287 August 27, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-1907

UNITED STATES OF AMERICA

v.

ROBERT EARL MARTIN, Appellant

(E.D. Pa. No. 2-98-cr-00178-001)

Present: AMBRO, GREENAWAY, JR., and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1), which includes a request for appointment of counsel, in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's application for a certificate of appealability is denied, for reasonable jurists would not debate the District Court's denial of Appellant's authorized, successive 28 U.S.C. § 2255 motion as meritless. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). More specifically, reasonable jurists would not debate the conclusion that Appellant's challenge to his 18 U.S.C. § 924(c) conviction is foreclosed by United States v. Johnson, 899 F.3d 191, 203–04 (3d Cir. 2018). Furthermore, assuming for the sake of argument that the rule in United States v. Davis, 139 S. Ct. 2319 (2019), applies to the residual clause in 18 U.S.C. § 3559(c)(2)(F)'s definition of "serious violent felony," see 18 U.S.C. § 3559(c)(2)(F)(ii), Appellant has not shown that reasonable jurists would debate the conclusion that Appellant's federal armed bank robbery convictions and Pennsylvania murder conviction each still qualifies as a "serious violent felony" under

§3559(c)(2)(F)'s *enumerated* clause, see 18 U.S.C. §3559(c)(2)(F)(i). Appellant's request for appointment of counsel is denied. See 18 U.S.C. §3006A(a)(2).

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: September 9, 2020
Lmr/cc: Mary E. Crawley
Robert Earl Martin

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Additional material from this filing is available in the Clerk's Office.