Appendix

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT WEHMHOEFER, Defendant-Appellant.	No. 18-55830 D.C. No. 2:16-cv-04622-TJH 2:98-cr-00682-RAP-1 Central District of California, Los Angeles ORDER

Before: FERNANDEZ, and LEE, Circuit Judges, and ORRICK,* District Judge..

The panel has voted unanimously to deny the petition for panel rehearing. Judge Lee has voted to deny the petition for rehearing en banc, and Judges Fernandez and Orrick have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable William Horsley Orrick, United States District Judge for the Northern District of California, sitting by designation.

NOT FOR PUBLICATION

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NOV 17 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT WEHMHOEFER, Defendant-Appellant.	No. 18-55830 D.C. Nos. 2:16-cv-04622-TJH 2:98-cr-00682-RAP-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted June 1, 2020
Submission Vacated June 5, 2020
Resubmitted November 13, 2020
Pasadena, California

Before: FERNANDEZ and LEE, Circuit Judges, and ORRICK,** District Judge.
Dissent by Judge ORRICK

Scott Wehmhoefer collaterally attacks his sentence via a 28 U.S.C. § 2255 motion. He claims that he was sentenced to life in prison under the residual clause

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William H. Orrick, United States District Judge for the Northern District of California, sitting by designation.

of the federal three strikes law, 18 U.S.C. § 3559(c)(2)(F)(ii), and asserts that the clause's statutory language is similar to language held void for vagueness by the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He also claims actual innocence of his sentence under a 28 U.S.C. § 2241 habeas petition. The district court found Wehmhoefer's § 2255 motion untimely. But the district court proceeded to address his claim under the actual innocence exception to § 2255 that excuses untimeliness or procedural default. The district court held that Wehmhoefer's prior convictions for aggravated robbery in violation of Texas Penal Code § 29.03 constituted serious violent felonies for purposes of the federal three strikes law, 18 U.S.C. § 3559, under the federal provision's force clause. The district court thus rejected his claim of actual innocence and denied habeas relief. Wehmhoefer timely appealed. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review the district court's denial of habeas corpus de novo, *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003), and we affirm.

1. Timeliness: The district court properly denied Wehmhoefer's 28 U.S.C. § 2255 motion as untimely. *See United States v. Blackstone*, 903 F.3d 1020, 1024–29 (9th Cir. 2018). *Blackstone* holds that we lack authority under the Antiterrorism and Effective Death Penalty Act of 1996 to expand retroactive rights for purposes of habeas because a "right that a movant asserts must be 'initially recognized by the Supreme Court.'" 903 F.3d at 1027 (quoting 28 U.S.C. § 2255(f)(3)). The Supreme

Court has not squarely addressed the question of whether the residual clause of 18 U.S.C. § 3559(c) is void for vagueness. Because Wehmhoefer's conviction became final upon denial of certiorari by the Supreme Court in 2002, *see Wehmhoefer v. United States*, 534 U.S. 1095 (2002), and Wehmhoefer filed the present motion in 2016, his motion is 13 years late. *See* 28 U.S.C. § 2255(f)(1).

2. Actual innocence: Federal prisoners seeking to challenge the legality of their confinement "must generally rely on a § 2255 motion to do so." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). But one exception is allowed. Under the "escape hatch" provided by § 2255(e), "a federal prisoner may file a § 2241 petition if, and only if, the remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention.'" *Id.* at 1192 (quoting *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006)). A remedy under § 2255 is inadequate, and therefore a § 2241 habeas petition appropriate, where a prisoner "(1) makes a claim of actual innocence, and (2) has not had an 'unobstructed procedural shot' at presenting that claim." *Stephens*, 464 F.3d at 898. Claims of actual innocence may sound in both legal and factual insufficiency. *See Allen v. Ives*, 950 F.3d 1184, 1190 (9th Cir. 2020). To determine what constitutes an "unobstructed procedural shot," we consider "(1) whether the legal basis for petitioner's claim 'did not arise until after he had exhausted his direct appeal and first § 2255 motion;' and (2) whether the law changed 'in any way relevant' to petitioner's claim after that first § 2255 motion."

Harrison v. Ollison, 519 F.3d 952, 960 (9th Cir. 2008) (quoting *Ivy*, 328 F.3d at 1060). "If an intervening court decision after a prisoner's direct appeal and first § 2255 motion 'effect[s] a material change in the applicable law[,]' then the prisoner did not have an unobstructed procedural shot to present his claim." *Allen*, 950 F.3d at 1190 (quoting *Alaimalo v. United States*, 645 F.3d 1042, 1047–48 (9th Cir. 2011)).

Wehmhoefer claims legal innocence of his life sentence, not factual innocence of his underlying aggravated robbery convictions. He argues that his prior convictions under Texas Penal Code § 29.03 are not serious violent felonies for purposes of 18 U.S.C. § 3559. *Allen* held that claims sounding in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) are retroactively applicable. *See Allen*, 950 F.3d at 1190–91. Until *Allen*, Wehmhoefer did not have an unobstructed procedural shot to assert this claim. *See id.* at 1191 (holding that the "legal basis for this argument arose only after [petitioner] had appealed and after he had filed his § 2255 motion"). We thus proceed to the merits of Wehmhoefer's argument.

3. Merits: Convictions for aggravated robbery under Texas Penal Code § 29.03 constitute enumerated felonies under the federal three strikes law, 18 U.S.C. § 3559.[1] The enumerated clause of § 3559(c)(2)(F)(i) begins with a broad prefatory

[1] Aggravated robbery under Texas Penal Code § 29.03 incorporates the elements of standard robbery under § 29.02. *See* Tex. Penal Code Ann. § 29.03(a) ("A person commits an offense if he commits robbery as defined in Section 29.02, and he . . .

statement defining serious violent felony as "a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in [18 U.S.C. §§] 2111, 2113, or 2118)." 18 U.S.C. § 3559(c)(2)(F)(i). To determine whether Texas robbery qualifies as a predicate conviction for purposes of 18 U.S.C. § 3559, we must engage in either a categorical or modified categorical analysis. *See Mathis*, 136 S. Ct. at 2248. Under the categorical approach, we consider whether the elements of the state crime match, or are narrower than, the federal offense. *See id.* But if the statute is divisible, we deploy the modified categorical approach. *See id.* at 2249. Under that analysis, we look to a limited class of documents in the record, like an "indictment, jury instructions, or a plea agreement and colloquy," to determine the crime (and its attendant elements) for which the defendant was convicted. *See id.* If the defendant's conviction and its elements are narrower than or coextensive with the federal offense, then the overall offense qualifies as a strike. *See id* at 2250–51.

Texas law is not a categorical match with federal law because, unlike federal law, defendants in Texas may be convicted of robbery involving reckless conduct. *Compare* Tex. Penal Code § 29.02(a)(1) (robbery occurs if during commission of theft defendant "intentionally, knowingly, or recklessly causes bodily injury to

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uses or exhibits a deadly weapon."). Therefore, if Texas robbery constitutes a serious violent felony (as we conclude), then Texas aggravated robbery is necessarily a serious violent felony.

another"), *with* 18 U.S.C. §§ 2111, 2113, 2118 (robbery does not encompass reckless behavior). But Texas Penal Code § 29.02 is a divisible statute.[2] TPC § 29.02 provides: "A person commits an offense if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; *or* (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code § 29.02(a) (emphasis added). Robbery-by-injury (§ 29.02(a)(1)) is possible where a defendant is found to have been reckless, but robbery-by-threat (§ 29.02(a)(2)) *only* occurs when a jury finds that a defendant acts either knowingly or intentionally. Differing mens rea requirements are a hallmark of divisibility. *See Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) (citing *Descamps*, 133 S. Ct. at 2285) (noting that it is "black-letter law that a statute is divisible only if it contains multiple alternative *elements*, as opposed to multiple alternative *means*"). Further, "indivisible statutes are indivisible precisely because the jury need not agree on anything past the fact that the statute was violated. As long as the defendant's conduct violates the statute, the jury can disagree as to how[.]" *Id*. at 1085. (citing

[2] Although the Texas Court of Appeals in *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017) held that "causing bodily injury or threatening the victim are different methods of committing the same offense," it does not undermine our conclusion that Texas Penal Code § 29.03 is divisible. *See United States v. Lerma*, 877 F.3d 628, 634 n. 4 (5th Cir. 2017) (explaining that "[i]t is unclear whether the [Burton] court was referring to the elements of a crime, the means of satisfying a single element, or the crimes set forth by a statute under a *Mathis* analysis").

Descamps, 133 S. Ct. at 2290)).

Because the statute is divisible, we employ the modified categorical approach to assess whether Wehmhoefer's robbery convictions qualify as strikes. The parties agree — and his multiple indictments reflect — that Wehmhoefer was convicted in Texas of robbery-by-threat (§ 29.02(a)(2)). Texas robbery-by-threat matches federal law. *Compare* Tex. Penal Code § 29.02(a)(2), *with* 18 U.S.C. §§ 2111, 2113, 2118. Because the Texas robbery statute is divisible and the provision for which Wehmhoefer was convicted parallels federal law, his convictions were properly held to be a serious violent felonies for purposes of federal three strikes. Any error resulting from the district court's conclusion that robbery in Texas is a serious violent felony under the force clause is harmless; the result does not differ.

AFFIRMED.

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NOV 17 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

USA v. Wehmhoefer, No. 18-55830

ORRICK, District Judge, dissenting:

I respectfully dissent. Texas law establishes that Texas Penal Code § 29.02 is indivisible, meaning that the modified categorical approach applied by my colleagues is not appropriate. Not only do indictments in Texas charge both robbery-by-injury and robbery-by-threat in a single count, but juries can and do lawfully convict defendants under Section 29.02 without unanimously deciding that they committed either. These facts should end our inquiry. Because Texas robbery is not a categorical match with federal law and the statute is indivisible, I would find that Wehmhoefer is actually innocent of his three-strikes sentence.

As this Court has described, "The critical distinction [between indivisible and divisible statutes] is that while indivisible statutes may contain multiple, alternative means of committing the crime, only divisible statutes contain multiple, alternative elements of functionally separate crimes." *Rendon v. Holder*, 764 F.3d 1077, 1084–85 (9th Cir. 2014) (citing *Descamps v. United States*, 570 U.S. 254, 264 n.2 (2013)). According to the Supreme Court, an indictment and jury instructions that list statutory alternatives in a single count is "as clear an indication as any" that each is a means of commission rather than a different element that must be proven. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). Further, "[I]f a jury could return a conviction *without* agreeing on which particular statutory

alternative applied, then the statute is indivisible . . . ." *United States v. Robinson*, 869 F.3d 933, 938 (9th Cir. 2017).

While the text of Section 29.02 gives the appearance of divisibility, Texas law shows otherwise. In *Cooper*, the Texas Court of Criminal Appeals, that state's highest criminal court, determined that it was a violation of double jeopardy for the same conduct to give rise to two robbery convictions, one by bodily injury and a second by threat. *Cooper v. State*, 430 S.W.3d 426, 427 (Tex. Crim. App. 2014). In two concurring opinions, a majority of the court expressed its agreement that "the 'threat' and 'bodily' injury elements of robbery are simply alternative methods of committing a robbery." *Id.* at 434 (Keller, P.J., concurring); *see id.* at 439 (Cochran, J., concurring) ("agree[ing] with Presiding Judge Keller" that robbery-by-threat and robbery-by-injury are alternative methods); *see also Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017) ("The two concurring opinions issued by the [*Cooper*] court agreed that aggravated robbery causing bodily injury and aggravated robbery by threat are alternative methods of committing the offense of aggravated robbery."); *Martin v. State*, No. 16-cr-00198, 2017 WL 5985059, at *3 (Tex. App. Dec. 1, 2017) (describing an indictment in which one count included both injury and threat alternatives).

In *Burton*, the court relied on *Cooper* to reject a defendant's contention that it was error not to require the jury to reach unanimous agreement on which type of

robbery he committed. *Burton*, 510 S.W.3d at 235–37. In that case, the defendant was indicted for one count of aggravated robbery, with the first paragraph referencing bodily injury and a second referencing threatening the victim. *Id.* at 236. The court determined that it was not error for the trial court to instruct the jury in the disjunctive because although Texas law entitles defendants to a unanimous verdict, a general verdict is acceptable "where alternative theories involve the commission of the 'same offense.'" *Id.* at 237 (quoting *Rangel v. State*, 199 S.W.3d 523, 540 (Tex. App. 2006)) (internal quotation marks omitted); *see also Landrian v. State*, 268 S.W.3d 532, 533 (Tex. Crim. App. 2008) ("The jury did not have to be unanimous on the aggravating factors of whether it was a 'serious' bodily injury or whether appellant used a deadly weapon."). The conviction could stand because under *Cooper*, "causing bodily injury or threatening the victim are different methods of committing the same offense." *Burton*, 510 S.W.3d at 237.[1]

Texas law is clear that defendants can be—and are—charged, tried, and convicted without unanimous agreement over whether they committed robbery-by-injury or robbery-by-threat. As a result, Section 29.02 is indivisible. *See Mathis*,

[1] My colleagues approvingly cite *United States v. Lerma*, 877 F.3d. 628, 634 n.4 (5th Cir. 2017), which complains that *Burton*'s statement of the law is unclear. I do not find it so; its central holding is consistent with *Cooper*, with the other Texas cases cited above, and with the analysis in this dissent.

136 S. Ct. at 2257; *Robinson*, 869 F.3d at 938. The parties' agreement that Wehmhoefer was convicted of robbery-by-threat is immaterial; the modified categorical approach does not apply. *See Mathis*, 136 S. Ct. at 2251 ("How a given defendant actually perpetrated the crime . . . makes no difference.") (internal citation omitted); *Descamps*, 570 U.S. at 265 ("Whether Descamps *did* break and enter makes no difference."). For that reason, I respectfully dissent.

United States District Court
Central District of California
Western Division

SCOTT WEHMHOEFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-04622 TJH
CR 98-00682 RAP

Order

The Court has considered Petitioner Scott Wehmhoefer's request for a certificate of appealability.

This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing requires the petitioner to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in original, emphasis omitted). Petitioner has made such a showing.

The issue, here, is whether robberies in violation of Texas Penal Code § 29.03 are serious violent felonies pursuant to 18 U.S.C. § 3559(c) in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015).

Accordingly,

It is Ordered that a certificate of appealability be, and hereby is, **Granted**.

It is Further Ordered that the Clerk of Court shall convey a copy of this order to the Ninth Circuit Court of Appeals.

Date: June 21, 2018

Terry J. Hatter, Jr.
Senior United States District Judge

United States District Court
Central District of California
Western Division

SCOTT WEHMHOEFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-04622 TJH
CR 98-00682-RAP

Order

JS-6

The Court has considered Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 or, in the alternative, petition for writ of *habeas corpus* under 28 U.S.C. § 2241, together with the moving and opposing papers.

In 1985, Petitioner Scott Wehmhoefer pled guilty to committing three aggravated robberies, in violation of Texas Penal Code ["TPC"] § 29.03. In 1989, Wehmhoefer pled guilty to committing nine first degree robberies, in violation of TPC § 29.03. In 1992, Wehmhoefer pled guilty to committing five aggravated robberies, in violation of TPC § 29.03. In conjunction with the 1992 state case, Wehmhoefer was, also, convicted of one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).

In 1998, Wehmhoefer was indicted and charged with (1) Assault with intent to commit murder, in violation of 18 U.S.C. § 113(a)(1); (2) Assault with a dangerous

weapon with intent to do bodily harm, in violation of 18 U.S.C. § 113(a)(3); and (3) Assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6). Then-District Court Judge Richard Paez presided over Wehmhoefer's jury trial. The jury found him guilty of all counts. At sentencing, the Court found Wehmhoefer's new conviction to be a serious violent felony, and further found that at least two of his prior convictions were, also, serious violent felonies. Accordingly, the Court sentenced Wehmhoefer to a mandatory life imprisonment, pursuant to 18 U.S.C. § 3559(c). The Ninth Circuit affirmed Wehmhoefer's conviction, *United States v. Wehmhoefer*, 17 Fed. Appx. 979 (9th Cir. 2001), and the Supreme Court denied *certiorari*, *Wehmhoefer v. United States*, 534 U.S. 1095 (2002).

Wehmhoefer, now, challenges his life sentence, arguing that his prior TPC § 29.03 convictions were not serious violent felonies in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

A § 2255 motion must be filed, *inter alia*, within one year of: (1) The date the conviction became final; or (2) The date the Supreme Court initially recognized a right that was retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f). Here, Wehmhoefer's conviction became final when the Supreme Court denied his petition for a writ of *certiorari* in 2002. *See Clay v. United States*, 537 U.S. 522, 524-525 (2003). Wehmhoefer failed to identify, and the Court could not find, any Supreme Court precedent that recognized a retroactive right upon which he may bring this challenge. Accordingly, Wehmhoefer's § 2255 is untimely.

Untimeliness, however, does not bar *habeas* petitions based on actual innocence. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1932 (2013). Here, Wehmhoefer argued that he is "actually innocent" because his prior convictions fell outside of 18 U.S.C. § 3559's definition of a serious violent felony. 18 U.S.C. § 3559(c)(2)(F).

A serious violent felony can be defined three ways: (1) A federal or state offense… consisting of, *inter alia*, robbery ["the Enumerated Offense Clause"]; (2) Any other offense that has an element the use, attempted use, or threatened use of

physical force against the person of another ["the Force Clause"] and; (3) Any offense 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 ["the Residual Clause"].

Wehmhoefer argued that his prior convictions were serious violent felonies pursuant only to the Residual Clause. Because *Johnson* held a similarly worded residual clause in the ACCA to be void for vagueness, § 3559's Residual Clause – and any serious violent felonies defined within it – should, also, be void for vagueness. However, Wehmhoefer's argument would fail if his state convictions were serious violent felonies under either the Enumerated Offense Clause or the Force Clause. Whether Wehmhoefer's state convictions fell under either the Enumerated Offense Clause or the Force Clause requires a categorical or modified categorical analysis. *See Mathis v. United States*, 136 S. Ct. 2243, 2248(2016).

Under the categorical approach, the Court must consider whether the elements of the state crimes match, or are narrower, than the federally proscribed offense. *See Mathis*, 136 S. Ct. at 2251. A state crime cannot qualify as a predicate offense if any part of the state statute's elements are broader than the federal statue's. *See Mathis*, 136 S. Ct. at 2251.

However, if the state statute is divisible – the statute lists elements in the alternative, thereby defining multiple crimes – the Court may analyze the state statute under the modified categorical approach. *Mathis*, 136 S. Ct. at 2249. The modified categorical approach permits the Court to consider a small class of documents – like the defendant's state indictment, jury instructions, or plea agreement and colloquy – to determine what crime, and with what elements, the defendant was actually convicted of, and whether those, particularized elements match or are narrower than the federally proscribed offense. *Mathis*, 136 S. Ct. at 2249.

TPC § 29.03 expressly incorporates, as a predicate offense, robbery as defined by TPC § 29.02. At the time relevant to Wehmhoefer's convictions, a person committed a robbery, pursuant to TPC § 29.02, if he, in the course of committing

theft, either: (1) intentionally, knowingly, or recklessly caused bodily injury to another; or (2) intentionally or knowingly threatened or placed another in fear of imminent bodily injury or death. *See Lewis v. Procunier*, 746 F.2d 1073, 1074 (5th Cir. 1984). A person committed an aggravated, or first degree, robbery if he committed a § 29.02 robbery and either: (1) Caused serious bodily injury to another; (2) Used or exhibited a deadly weapon; or (3) As of 1989, caused bodily injury to an elderly or disabled person. *See* TPC § 29.03.

In *United States v. Palacios-Gomez*, 643 Fed. Appx. 614 (9th Cir. 2016), the Ninth Circuit applied the categorical and modified categorical approach to determine whether TPC § 29.03 was a crime of violence under 18 U.S.C. § 16's Force Clause, which is notably identical to § 3559's Force Clause. *See Palacios-Gomez*, 643 Fed. Appx. at 615. The petitioner argued that his prior TPC § 29.03 convictions were not categorically crimes of violence because TPC § 29.02 proscribed reckless conduct, whereas § 16's Force Clause requires a *mens rea* higher than recklessness. *See Palacios-Gomez*, 643 Fed. Appx. at 615. The Ninth Circuit agreed that TPC § 29.02 criminalized more acts than § 16's Force Clause, and held that TPC §§ 29.02 and 29.03 could not be crimes of violence under the categorical approach. *Palacios-Gomez*, 643 Fed. Appx. at 615. However, the Ninth Circuit, also, held that TPC §§ 29.02 and 29.03 are divisible statutes. *Palacios-Gomez*, 643 Fed. Appx. at 615. Thus, it applied the modified categorical approach, and considered petitioner's indictment and plea colloquy, which confirmed that he acted with, at least, knowledge. *Palacios-Gomez*, 643 Fed. Appx. at 615. Accordingly, the Ninth Circuit held that the petitioner's conviction under TPC § 29.03 was a crime of violence pursuant to § 16's Force Clause. *Palacios-Gomez*, 643 Fed. Appx. at 615.

Welmhoefer was convicted under a version of TPC §§ 29.02 and 29.03 that list elements in the alternative to define multiple crimes – *see Mathis*, 136 S. Ct. at 2249 – and are, indeed, identical to the versions of TPC §§ 29.02 and 29.03 contemplated by the Ninth Circuit in *Palacios-Gomez*. Accordingly, the Court will apply the

modified categorical approach and consider Welmhoefer's guilty plea documents to determine what crime, and with what elements, he was convicted. *See Mathis*, 136 S. Ct. at 2249. Wehmhoefer's 1985 and 1989 guilty plea documents confirm that he acted with intent or knowledge. Accordingly, Wehmhoefer's convictions fell within § 3559's Force Clause and are serious violent felonies. *See Palacios-Gomez*, 643 Fed. Appx. at 615.

Thus, the Court need not reach Wehmhoefer's argument that the Residual Clause is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Alternatively, Wehmhoefer asked the Court to construe his § 2255 motion as a § 2241 motion. Although a § 2255 motion is the most proper avenue to attack the legality of a sentence, the savings clause of § 2255 allows a petitioner to file a § 2241 motion where his remedy under § 2255 would be "inadequate or ineffective to test the legality of his detention." *See Hernandez v. Campbell*, 204 F.3d 861, 864-865 (9th Cir. 2000). A § 2255 motion is inadequate or ineffective where a petitioner makes a claim of actual innocence and has not had an unobstructed procedural shot at presenting that claim. *Alaimalo v. United States*, 645 F.3d 1042, 1047-1048 (9th Cir. 2011). However, because Wehmhoefer has not established his "actual innocence" with regard to his sentence, the Court cannot grant relief under § 2241.

Accordingly,

It is Ordered that the motion be, and hereby is, **Denied**.

Date: June 6, 2018

Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
Senior United States District Judge