# APPENDIX

APPENDIX A: United States District Court for the Southern District of Iowa, Case No. 4:16-cv-00132-RGE, Order granting in part and denying in part 28 U.S.C. § 2255 Motion (Sept. 30, 2019)

APPENDIX B: Judgment of the 8th Circuit Court of Appeals Affirming District Court Decision, 8th Cir. Case No. 19-3541 (April 7, 2021)

APPENDIX C: Judgment of the 8th Circuit Court of Appeals denying panel and en banc rehearing, 8th Cir. Case No. 19-3541 (August 3, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| BENJAMIN JOSEPH LANGFORD,<br><br>Movant,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | **No. 4:16-cv-00132-RGE**<br>(Crim. No. 3:04-cr-00091-REL)<br><br>**ORDER RULING ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255** |

Benjamin Joseph Langford brings this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Langford is represented by counsel and challenges his conviction in *United States v. Langford*, No. 3:04-cr-00091-REL (S.D. Iowa) ("Crim. Case").

## I. BACKGROUND AND PROCEDURAL HISTORY

In 2005, a jury found Langford guilty of bank robbery, a violation of 18 U.S.C. § 2113(a), (d) (Count Three); possession of a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c) (Count Four); and being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1) (Count Five). J. 1, Crim. Case, ECF No. 83. Prior to his arrest on these charges, Langford had been convicted of, among other crimes, Iowa robbery with aggravation (1975), Iowa robbery in the first degree (1989), and attempted breaking and entering (1974). Sealed Presentence Investigation Report ¶¶ 43, 47, 48, 51, Crim. Case, ECF No. 86.

The district court[1] sentenced Langford to a mandatory life sentence on the bank robbery conviction (Count Three) pursuant to the enhanced penalties under 18 U.S.C. § 3559(c)(1).

[1] The Honorable Ronald E. Longstaff, then Chief Judge of the United States District Court for the Southern District of Iowa. Crim. Case, ECF No. 83.

Sentencing Hr'g Tr. 7, Crim. Case, ECF No. 88; *see also* Info. & Notice Prior Convictions, Crim. Case, ECF No. 17 (notifying defendant he was subject to mandatory life sentence based on two prior serious violent felonies). The Court also sentenced Langford to a concurrent term of life imprisonment on the felon in possession conviction (Count Five), pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). Sentencing Hr'g Tr. 13, Crim. Case, ECF No. 88. Finally, for possessing and brandishing a firearm during a crime of violence (Count Four) Langford was sentenced to a seven-year consecutive sentence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). *Id.* at 7, 13.

The conviction and sentence were affirmed on appeal. *United States v. Langford*, 155 F. App'x 936 (8th Cir. 2005) (per curiam).

With the assistance of counsel, Langford filed this Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. ECF No. 1. Upon direction from the Court, Langford submitted a brief to the Court showing cause why his case should not be dismissed. Mov't's Show Cause Br., ECF No. 4. The Government responded, resisting Langford's arguments. Gov't's Resist. Show Cause, ECF No. 9. Langford replied to the Government's response. Mov't's Reply Gov't's Resist. Show Cause, ECF No. 12. Upon request from the Court, the Government has submitted relevant exhibits pertaining to Langford's prior convictions. ECF No. 16 (submitting qualifying documents pursuant to *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The matter is now fully submitted and ready for ruling.

## II. LEGAL STANDARD

A federal inmate may file a motion under 28 U.S.C. § 2255 for release "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

That statute gives "federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011). The scope of remedy is limited, however, and "an error of law does not provide a basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)).

A movant "is entitled to an evidentiary hearing on a section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) ("No hearing is required, however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)). Here, the underlying record is undisputed, and the parties only argue the correct application of law to the record. Thus, no evidentiary hearing is needed.

## III. ANALYSIS

Langford received enhanced penalties pursuant to both the ACCA and § 3559 based on his prior convictions. *See* J. 2, Crim. Case, ECF No. 83; Sentencing Hr'g Tr. 7, ECF No. 88 (finding § 851 Notice of Prior Convictions appropriate and requires the court to impose life sentence); Info. & Notice Prior Convictions, Crim. Case, ECF No. 17; *Langford*, F. App'x at 938 (discussing the ACCA as applied to Count Five). Because of a change in the legal landscape, Langford argues none of his prior convictions now qualify as violent felonies under either the ACCA or § 3559, and as such, the sentencing enhancements he received pursuant to each of these statutes are illegal. ECF No. 4 at 2 (relying on Supreme Court's decisions in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016)).

### A. ACCA

"The ACCA applies only when a defendant is convicted under § 922(g) and has three prior convictions for violent felonies or serious drug offenses." *United States v. Lindsey*, 827 F.3d 733, 738 (8th Cir. 2016); *see also* 18 U.S.C. § 924(e)(1). When Langford was sentenced in 2005, violent felony was defined as "'any crime punishable by imprisonment for a term exceeding one year' that (1) 'has as an element the use, attempted use, or threatened use of physical force against the person of another' (the elements clause or force clause); (2) 'is burglary, arson, or extortion, [or] involves use of explosives' (the enumerated-offense clause); or (3) 'otherwise involves conduct that presents a serious potential risk of physical injury to another' (the residual clause). *Dembry v. United States*, 914 F.3d 1185, 1186 n.2 (8th Cir. 2019) (alteration in original) (quoting 18 U.S.C. § 924(e)(2)(B) (2007)).

Since Langford was sentenced, the Supreme Court has held the residual clause of the ACCA unconstitutionally vague. *Samuel Johnson*, 135 S. Ct. at 2563. Convictions previously considered violent felonies based on the residual clause no longer qualify as predicate offenses under the ACCA, although convictions falling within the force clause or enumerated-offense clause continue to qualify. *Id.* The Court subsequently held *Samuel Johnson* applied retroactively to collateral challenges to sentences already imposed. *See Welch*, 136 S. Ct. at 1265.

### B. 18 U.S.C. § 3559 or Three Strikes Law

Langford also challenges the validity of his sentence under 18 U.S.C. § 3559(c). ECF No. 4 at 2. Commonly referred to as the three strikes law, § 3559 mandates a life sentence for a person convicted of a serious violent felony if he or she has two or more prior convictions for serious violent felonies. 18 U.S.C. § 3559(c)(1)(A)(i); *see also United States v. Farmer*, 73 F.3d 836, 839 (8th Cir. 1996) (referring to statute as the "three-strikes law").

The Supreme Court struck down the residual clause of the ACCA because it was concerned about the "grave uncertainty about how to estimate the risk posed by a crime," as well as "how much risk it takes for a crime to qualify as a violent felony." *Samuel Johnson*, 135 S. Ct. at 2557–58. The Court found "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Id.* at 2557.

The Court has now extended that reasoning to other statutes that contain identical or substantially similar language. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Court struck the residual clause of 18 U.S. C. § 16(b), as incorporated into the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), because the two features make the ACCA's residual clause unconstitutionally vague—the "grave uncertainty about how to estimate the risk posed by a crime" and the unclear "threshold level of risk made any given crime a 'violent felony'"—were also present in the residual clause of § 16(b). *Id.* at 1213–14.

For the same reasons, the Supreme Court held the nearly identical residual clause of 18 U.S.C. § 924(c)(3)(B) (using or carrying a firearm in furtherance of any crime) to be unconstitutionally vague. *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019) ("For years, almost everyone understood § 924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and § 16.").

Although some minor differences exist between the residual clauses of each statute, it is the reference to risk of physical injury to another which is overly vague and is present in all three statutes. *See id.* at 2325–26 (noting minor differences and substantive similarities between the ACCA, § 16(b), and § 924(c)(3)(B)); *see also* 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" as one which "involves conduct that presents a serious potential *risk of physical injury* to another") (emphasis added); 18 U.S.C. § 16(b) (defining "crime of violence" to include offense

"that, by its nature, involves a substantial *risk that physical force* against the person or property of another *may be used*") (emphasis added); 18 U.S.C. § 924(c)(3)(B) (defining "crime of violence" as one "by its nature, involves a *substantial risk that physical force* against the person or property of another *may be used* in the course of committing the offense") (emphasis added).

The residual clause of § 3559 contains the same problematic language, defining a "serious violent felony" to include one "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." 18 U.S.C. § 3559(c)(2)(F)(ii) (emphasis added). This language "require[s] courts 'to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." *Davis*, 139 S. Ct. at 2326 (quoting *Dimaya*, 138 S. Ct. at 1216).

To date, neither the Supreme Court nor the United States Court of Appeals for the Eighth Circuit have explicitly ruled as to whether the residual clause of § 3559 is also unconstitutionally vague. Given the reasoning set forth in *Samuel Johnson*, *Dimaya*, and *Davis*, this Court finds the nearly identical language contained in § 3559 is also unconstitutionally vague. *See United States v. Goodridge*, No. 96-30015, 2019 WL 3306956, at *10 (D. Mass. July 23, 2019) (holding residual clause of § 3559(c) is unconstitutionally vague "because it 'denies fair notice to defendants and invites arbitrary enforcement by judges.'" (quoting *Samuel Johnson*, 135 S. Ct. at 2557)); *United States v. Minjarez*, 374 F. Supp. 3d 977, 992 (E.D. Cal. 2019) ("The residual clause in the three-strikes law 'possesses the exact same two features' that rendered the residual clauses in [*Samuel Johnson* and *Dimaya*] void for vagueness." (quoting *Dimaya*, 138 S. Ct. at 1223)).

Given this finding, any previous convictions of Langford which qualified as predicate felonies based only the residual clause can no longer be used to enhance his sentence under

§ 3559(c). Convictions qualifying under either the enumerated-offense clause or the force clause remain predicate offenses for the enhanced penalties. *Samuel Johnson*, 135 S. Ct. at 2563 ("decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony").

### C. Procedural Default

Before reaching the merits of the § 2255 motion, the Court must first address the Government's argument that Langford's claims are procedurally defaulted. Gov't's Br. 3–5, ECF No. 9. Generally, where a defendant fails to raise a claim on direct appeal, he procedurally defaults the claim for purposes of collateral review unless he can demonstrate cause and prejudice for failing to do so. *Bousley v. United States*, 523 U.S. 614, 622 (1998). The Supreme Court has excused procedural default where a claim was so novel that a legal basis was not reasonably available at the time of appeal. *Reed v. Ross*, 468 U.S. 1, 13 (1984). The Government argues the requisite novelty requires more than a showing that circuit precedent foreclosed the claim. ECF No. 9 at 4.

Any argument suggesting Langford's previous convictions did not qualify as predicate offenses under the force clause would have been futile at the time of Langford's direct appeal. It was not until *Samuel Johnson* explicitly overruled a long standing and widespread practice of applying the residual clause that the claim was available. *See United States v. Snyder,* 871 F.3d 1122, 1127–28 (10th Cir. 2017) (concluding *Samuel Johnson* claim not reasonably available to movant at the time of direct appeal and provides cause and prejudice to overcome procedural default); Order 5, *Gathings v. United States*, No. 4:16-cv-00245-JEG (S.D. Iowa Aug. 14, 2019), ECF No. 29 ("Until the residual clause was invalidated by *Johnson*, however, Gathings could not have raised a plausible challenge to use of his robbery conviction as a predicate offense because the residual clause provided an alternative basis for use as a predicate offense.");

Order 2, *Robinson v. United States*, No. 4:15-cv-449-JAJ (S.D. Iowa July 3, 2017), ECF No. 13 (finding no procedural default because "[i]f Robinson is not allowed to bring his claim now, then the Supreme Court's designation of the rule as retroactive has little substance.").

The Court finds that the legal basis for Langford's claims was not reasonably available at the time of direct appeal, and Langford should not be faulted for failing to make "an argument that would have had no practical effect whatsoever given the then-viable residual clause." *Chaney v. United States*, 917 F.3d 895, 900 (6th Cir. 2019). His claims are not procedurally barred.

**D. Discussion**

As stated above, felonies based on the residual clause can no longer be used to enhance Langford's sentence under either the ACCA or § 3559(c). For the convictions to qualify as predicate offenses, they must fall within either the enumerated-offense clause or the force clause of these statutes. *See Samuel Johnson*, 135 S. Ct. at 2563 ("decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). The Court now considers whether Langford's convictions for first-degree robbery, robbery with aggravation, or breaking and entering fall within either of those two clauses of the ACCA or § 3559(c).

In order to prevail on his claim Langford must show by a preponderance of the evidence the sentencing court relied on the residual clause to apply the sentencing enhancements. *See Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018) (considering issue in context of second or successive § 2255 motion); *Garcia-Hernandez v. United States*, 915 F.3d 558, 559–60 (8th Cir. 2019) (applying same to initial § 2255). Whether the sentencing court relied on the residual clause to establish the predicate felonies for the sentencing enhancements is a fact question to be resolved by the district court. *Lofton v. United States*, 920 F.3d 572, 574 (8th Cir. 2019).

The district court may consider "'comments or findings by the sentencing judge,' unobjected-to statements in the PSR, or 'concessions by the prosecutor' [to] show which ACCA clause was the basis of an enhancement." *Golinveaux v. United States*, 915 F.3d 564, 568 (8th Cir. 2019) (quoting *Beeman v. United States*, 871 F.3d 1215, 1224 n.4 (11th Cir. 2017)).

No record was made by either party or in the presentence investigation report to demonstrate which clause of the ACCA or § 3559(c)(2)(F) the sentencing court used to enhance Langford's penalties. Mov't's Br. 4, ECF No. 4. Where the record is inconclusive, the Court must then inquire as to the relevant background legal environment at the time of sentencing to determine whether the sentencing court more likely than not relied upon the residual clause in classifying the prior convictions as violent felonies. *Lofton,* 920 F.3d at 574. Even if Langford can demonstrate it was equally likely the sentencing court relied on another clause as an alternative basis for the enhancement, that is insufficient to show the enhancement was based on the residual clause. *See id.* at 575.

To determine whether the sentencing court could have considered Langford's robbery convictions under the enumerated-offense clause or the force clause of either the ACCA or § 3559(c)(2)(F), the Court applies a "categorical approach," which compares the Iowa robbery statutes with the federal statute to see if the crime is sufficiently similar. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this approach, the court is to "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the crime as federally defined], while ignoring the particular facts of the case." *Id.* The court is to consider only "the elements of the statute in question," and "[a] defendant's real world conduct is of no relevance to [the] review." *United States v. Libby*, 880 F.3d 1011, 1014 (8th Cir. 2018).

If a statute sets out a single set of elements to define a single crime, and those elements criminalize conduct beyond what was intended by the federal statute, then a conviction under the

indivisible statute cannot serve as a predicate felony to enhance a defendant's sentence. *Mathis*, 136 S. Ct. at 2248–49. When the elements of the statute are set out as alternatives defining multiple crimes, however, then the statute is deemed divisible, and courts are to apply a modified categorical approach to determine whether the charged offense is encompassed by the definition intended by the federal statute. *Id.* at 2249. A court applying the modified categorical approach may "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

**1. Force Clause**

The force clauses of both the ACCA and § 3559 define a violent or serious violent felony as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 3559(c)(2)(F)(ii). "[I]n the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010); *see also Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (reaffirming *Curtis Johnson* definition of physical force).

**a. Iowa Robbery in the First Degree**

Langford was convicted in 1989 of robbery in the first degree. *See* Presentence Investigation Report ¶ 51, Crim. Case, ECF No. 86. At the time Langford was convicted of this crime,[2] robbery was defined as "having the intent to commit a theft," the defendant does one of the following acts: "1. Commits an assault upon another; 2. Threatens another with or purposely

[2] The charging complaint alleges Langford did "commit a robbery as defined in section 711.1 being armed with a dangerous weapon, to wit: .45 caliber handgun." Gov't's Ex. 2 at 1, ECF No. 16-2. The complaint describes how Langford "aimed a .45 caliber handgun at the pharmacist and demanded that the pharmacist give him specified drugs." *Id.*

puts another in fear of immediate serious injury; [or] 3. Threatens to commit immediately any forcible felony. Iowa Code § 711.1 (1987). First-degree robbery in Iowa occurs when a person perpetrating a robbery "purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." Iowa Code § 711.2 (1987).

The Court assumes without deciding, that the statute is divisible. The jury instructions demonstrate Langford was convicted under the "armed with a dangerous weapon" element as opposed to the element for purposeful infliction or attempt to inflict serious injury. Gov't's Ex. 2 at 27, ECF No. 16-2 (setting forth Jury Instruction No. 16, elements of first-degree robbery).

The Government argues being armed with a dangerous weapon necessarily "requires the perpetrator to purposely inflict or attempt to inflict serious injury." ECF No. 9 at 11. A review of decisions from the Iowa courts demonstrate first-degree robbery does not require such conduct. *See State v. Farni*, 325 N.W.2d 107, 108 (Iowa 1982) (affirming first-degree robbery conviction of defendant who kept gun under sweatshirt while robbing victim even though he did not use or display firearm); *State v. Law*, 306 N.W.2d 756, 760 (Iowa 1981) (explaining assault requires the intentional pointing or displaying of a firearm but one may be 'armed' under the robbery statute without necessarily "pointing a firearm or displaying a dangerous weapon in a threatening manner"), *overruled on other grounds by State v. Wales*, 325 N.W.2d 87 (Iowa 1982); *State v. Sharkey*, 311 N.W.2d 68, 72 (Iowa 1981) ("legislature believed that merely being armed with a dangerous weapon in the course of a robbery is itself sufficient to warrant the increased sanction associated with first-degree robbery"); *c.f. State v. Ray,* 516 N.W.2d 863, 865 (Iowa 1994) (finding the phrase "going armed" as used in Iowa's assault statute means "the conscious and deliberate keeping of a [dangerous weapon] on or about the person, available for immediate use" (quoting *State v. Alexander*, 322 N.W.2d 71, 72 (Iowa 1982)).

Whether Iowa Code § 711.2 is an indivisible or divisible statute is irrelevant because the statute under either approach encompasses conduct that does not necessarily involve the violent force required under the force clause of the ACCA or § 3559. Because it is possible Langford was convicted of first-degree robbery for merely being armed with a dangerous weapon, the conviction does not have the requisite force to be a predicate crime under the force clause of either the ACCA or § 3559(c)(2)(F)(ii).

**b. 1975 Iowa Robbery with Aggravation**

Robbery with aggravation was the precursor to Iowa's current first-degree robbery statute. *See Sharkey*, 311 N.W.2d at 71 ("[N]ew criminal code is primarily a restatement of prior law and that changes made by the revision of a statute will not be construed as altering the law in the absence of a clear and unmistakable legislative intent to change the law."); *Emery v. Fenton*, 266 N.W.2d 6, 7 (Iowa 1978) (discussing Iowa legislature's enactment of complete revision of Iowa criminal law effective January 1, 1978).

At the time of Langford's conviction[3] for robbery with aggravation, the statute required the commission of a robbery where the offender "is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed." Iowa Code § 711.2 (1973). This older statute required that the defendant be both armed with a dangerous weapon, and have the requisite "intent, if resisted, to kill or maim the person robbed." *Id.* The "intent to kill or maim" element is no longer an element for first degree robbery. *Sharkey*, 311 N.W.2d at 72 ("Apparently the legislature believed that merely being armed with a

[3] Langford was charged with robbing a gas station and "at the time of such robbery being armed with a dangerous weapon with intent if resisted to kill or maim." Gov't's Ex. 1 at 2, ECF No. 16-1.

dangerous weapon in the course of a robbery is itself sufficient to warrant the increased sanction associated with first-degree robbery.").

Langford contends the intent element does not require that the defendant display, point, or employ the weapon in any way, and therefore, like first-degree robbery, is not sufficient to satisfy the force clause. ECF No. 4 at 20 (citing *Law*, 306 N.W.2d at 760).

The force clause "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 3559(c)(2)(F)(ii). "Physical force" is that "force capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140. At the time of Langford's conviction, Iowa aggravated robbery required a threat of bodily harm, that is, the robber must have the requisite "intent, if resisted, to kill or maim the person robbed." Iowa Code § 711.2 (1973). "A threat of bodily harm requires a threat to use violent force because 'it is impossible to cause bodily injury without using force "capable of" producing that result.'" *United States v. Harper*, 869 F.3d 624, 626 (8th Cir. 2017). Because the crime of aggravated robbery in Iowa could not have been committed at the time of Langford's conviction without a threat to use violent force, it is not overbroad and qualifies as a predicate felony under the force clause of either the ACCA or § 3559(c)(2)(F)(ii).

**c. Attempting to Break and Enter**

In addition to his convictions for first-degree robbery and robbery with aggravation, the Presentence Investigation Report also listed a 1974 Iowa conviction for attempting to break and enter as a qualifying offense for enhanced penalties under the ACCA. Presentence Investigation Report ¶ 43, Crim. Case, ECF No. 86 (listing predicate crimes for Chapter Four Enhancements); *id.* at ¶ 47 (setting out details of conviction).

At the time of Langford's state conviction, the crime of attempting to break and enter was defined where:

> any person, with intent to commit any public offense, shall attempt to break and enter any dwelling house, at any time, or to enter any dwelling house in the nighttime without breaking, or at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit.

Iowa Code § 708.10 (1973).

Given the legal landscape of state law at the time of his federal conviction, Langford acknowledges the parties may have considered attempting to break and enter as a lesser offense of burglary. *See* ECF No. 4 at 21–22 (citing *State v. Billings*, 242 N.W.2d 726, 733 (Iowa 1976) ("[W]e hold breaking and entering a dwelling house under § 708.8 is a necessarily included offense of burglary.")); *United States v. Cornelius*, 931 F.2d 490, 494 (8th Cir. 1991) (holding voluntary statement at sentencing regarding breaking and entering charge which admitted all elements of generic burglary qualified as the ACCA predicate because it was "functionally indistinguishable from" generic burglary), *superseded by statute as recognized in Stinson v. United States*, 508 U.S. 36, 39n.1 (1993). Burglary is one of the enumerated crimes listed in the ACCA statute. 18 U.S.C. § 924(e)(2)(B)(ii) (defining violent felony to include "burglary, arson, or extortion, [or] involves use of explosives"). The Court therefore concludes the relevant background legal environment at the time of sentencing shows the sentencing court more likely than not relied on the enumerated clause, not the residual clause, in classifying Langford's attempting to break and enter conviction as a violent felony.

Langford argues his attempting to break and enter conviction does not qualify as a predicate felony under the enumerated clause because it encompasses behavior broader than generic burglary.[4] ECF No. 4 at 22. Generic burglary is defined as "an unlawful or unprivileged

[4] The Government makes no response to Langford's argument that his conviction for attempting to break and enter does not count as a predicate felony under the ACCA. *See* ECF No. 9.

entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). Iowa's indivisible burglary statute can be violated by attempting to break and enter railroad cars and boats as well as buildings and structures. *Mathis*, 136 S. Ct. at 2250. "Because the elements of Iowa's burglary law are broader than those of generic burglary," the conviction cannot be used to enhance a defendant's penalties under the ACCA. *Id.* at 2257. Similarly, Iowa's 1973 attempting to break and enter statute also includes the breaking and entering of railroad cars, boats, or vessels. Iowa Code § 708.10. For the same reasons as given in *Mathis*, Langford's conviction for attempting to break and enter is also overbroad and cannot serve as a predicate felony for an ACCA sentencing enhancement.

The result would be the same even if Iowa's attempting to break and enter statute is a divisible statute. Langford suggests, and the Court agrees, the first element of the statute would be intent and attempt, and the second element would be either to a) "break and enter any dwelling house, at any time;" or b) "to enter any dwelling house in the nighttime without breaking," or c) "at any time to break and enter any office, shop, store, warehouse, railroad car, boat, vessel, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit." Iowa Code § 708.10.

The Presentence Investigation Report states Langford attempted to break into a car wash.[5] Presentence Investigation Report ¶ 47, Crim. Case, ECF No. 86. A car wash is not a dwelling

[5] Although no *Shepard's* documents for this conviction were submitted by the parties, the Presentence Investigation Report states its description of the crime was obtained from "court documents, the Windsor Heights Police report, and NCIC." Presentence Investigation Report 11, ¶ 47(a), Crim. Case, ECF No. 86. Langford did not object to this underlying fact at sentencing, and the Government was relieved of its obligation "to introduce at sentencing the documentary evidence *Taylor* or *Shepard* requires." *United States v. McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc), *abrogated in other part by Samuel Johnson*, 135 S. Ct. at 2563. It is not clear which source established the attempt to break and enter was to a car wash. Because such information is not prejudicial to Langford, however, the Court accepts this information for the limited purpose of discussing the modified categorical approach as it applies to § 708.10.

house, therefore, Langford's conviction must have been the burglary of an "office, shop, store, warehouse, railroad car, boat, vessel," or other building where valuable things are kept. Iowa Code § 708.10. As in *Mathis*, the individually listed locations were not alternative elements but instead "alternative ways of satisfying a single locational element." *Mathis*, 136 S. Ct. at 2250. Only some of the multiple means of fulfilling the locational element meet the generic definition of burglary, and therefore, the statute is overbroad. *See id.* at 2257. For this reason, Langford's conviction for the 1973 attempting to break and enter cannot serve as a predicate violent felony to enhance his sentence under the ACCA.

**d. Conclusion**

The ACCA applies only where the defendant has three qualifying convictions. 18 U.S.C. § 924(e)(1). The three-strikes law applies only where the defendant has two qualifying convictions. 18 U.S.C. § 3559(c)(1)(A)(i). Because only Langford's aggravated robbery conviction qualifies as a predicate felony under the force clause of either statute, the Court must now consider whether Langford's other convictions remain predicate offenses under the remaining alternative—the enumerated-offense clause.

**2. Enumerated-Offense Clause**

The enumerated offenses of the ACCA are "burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). Neither of Langford's robbery convictions qualify as any of the ACCA's enumerated offenses.

The enumerated-offense clause of § 3559(c), however, differs significantly from the ACCA's enumerated-offense clause. It specifically includes in its definition of "serious violent felony," "a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111 [special maritime and territorial jurisdiction robbery], 2113 [bank robbery and incidental crimes], or 2118 [robbery and burglary involving controlled

substances.]" 18 U.S.C. § 3559(c)(2)(F)(i). All three of the designated federal robbery statutes require the taking or attempted taking from the person or presence of another anything of value must be done "by force and violence, or by intimidation." 18 U.S.C. §§ 2111, 2113, 2118.

In considering the force clause, the Eighth Circuit has concluded the robberies enumerated in the three-strikes act qualify as predicate felonies because intimidation involves a threatened use of force. *United States v. Harper*, 869 F.3d 624, 626 (8th Cir. 2017) (finding bank robbery under § 2113(a) is crime of violence under § 4B1.1(a) of Sentencing Guidelines). Specifically, "robbery by intimidation requires proof that the victim 'reasonably could infer a threat of bodily harm' from the robber's acts. A threat of bodily harm requires a threat to use violent force because 'it is impossible to cause bodily injury without using force "capable of" producing that result.'" *Id.* (quoting *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017)); *see also Kidd v. United States*, 929 F.3d 578, 581 (8th Cir. 2019) (holding § 2118 robbery qualifies under the ACCA force clause "even when the offense is committed by means of intimidation.").

The robbery statutes enumerated in § 3559, however, are not confined only to those crimes which employ *Curtis Johnson*-type force. Rather, they are "serious violent felonies" because Congress has specifically set them apart as serious violent felonies. The least violative robbery under these statutes would at least require intimidation. Intimidation, as used in these statutes, applies an objective standard, that is, a reasonable person would believe the conduct is calculated to put another in fear. *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003). To qualify as a predicate offense under the enumerated-offense clause of this statute, Iowa's first-degree and aggravated robbery must be no broader than robbery with intimidation.

As noted above, robbery at the time of Langford's convictions required that the theft be accomplished by 1) an assault upon another; 2) a threat or fear of immediate serious injury; or 3) a threat to commit immediately any forcible felony. Iowa Code § 711.1 (1987). First-degree

robbery also required purposeful infliction of serious injury or that the defendant be armed with a dangerous weapon. Iowa Code § 711.2 (1987). Aggravated robbery specifically required an "intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed." Iowa Code § 711.2 (1973). Intimidation is part of either of these two Iowa statutes.

It is not necessary that Iowa statute's use the exact language of the federal statute. By defining "serious violent felony to include "a Federal or State offense, by whatever designation and wherever committed," Congress intended "to capture a wide variety of state and federal offenses." *United States v. Willie Johnson*, 915 F.3d 223, 229 (4th Cir. 2019), *petition for cert. filed*, No. 19-5087 (Jul. 2, 2019). Further, § 3559(c)(2)(F)(i) refers to robbery as "described" not "defined" in § 2111, § 2113, or § 2118, again, suggesting Congress intended a broad and inclusive reading of the robbery statute. *Id.* (citing Black's Law Dictionary to distinguish "define" and "describe"). This most serious type of robbery in Iowa certainly contains the essence of the robberies enumerated under the three-strikes law.

The Court's reading of this statute is further supported by considering other offenses listed in the enumerated-offense clause. For example, Congress designated generic extortion as one offense in the enumerated-offense clause of § 3559(c)(2)(F)(i). Yet, "[a]t common law, extortion was a property offense committed by a public official who took any money or thing of value that was not due to him under the pretense that he was entitled to such property by virtue of his office." *James v. United States*, 550 U.S. 192, 220 (2007) (Scalia, J., dissenting) (internal quotation marks omitted) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003)). Even though generic extortion can be committed without force capable of causing physical pain or injury to another person, Congress still designated it as a "serious violent felony" under the three strikes statute. 18 U.S.C. § 3559(c)(2)(F)(i).

The generic definition of robbery is "aggravated larceny, or the misappropriation of property under circumstances involving immediate danger to a person." *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016). The essence of both the federal robbery statutes and Iowa's first-degree and aggravated robbery is that the theft be committed using force and violence or by intimidation. First-degree and aggravated robbery under Iowa law are precisely the type of robberies Congress intended to cover when it included robberies in the enumerated offense clause of the three-strikes law.

Because Langford's robbery convictions counted under the enumerated-offense clause, the sentencing court could have used it to establish two predicate strikes.[6] Langford, therefore, has failed to demonstrate by a preponderance of the evidence that the sentencing court more likely than not relied upon the residual clause in classifying Langford's robbery convictions as predicate felonies under § 3559(c). The Court concludes both of Langford's Iowa robbery convictions qualify as "serious violent felonies" under the enumerated-offense clause of § 3559(c)(2)(F)(i). Langford's claims as to his sentence under § 3559(c)(1)(A)(i) are denied.

## V. SUMMARY AND CONCLUSION

Based on the discussion above, Langford's convictions for first-degree robbery and breaking and entering are not violent felonies under the force clause of the ACCA, and Langford is entitled to sentencing relief on Count Five, being a felon in possession of a firearm.

[6] Langford acknowledges robbery is an enumerated offense under § 3559 as to the qualifying robberies as defined in 18 U.S.C. §§ 2111, 2113, and 2118. ECF No. 4 at 4. He states "it is equally as plausible to believe that the parties and the court determined that petitioner's prior offenses qualified as § 3559(c) predicates under either the force clause or the residual clause in § 3559(c)(2)(F)(ii) as it is to believe the determination was made under the enumerated[-offense] clause in § 3559(c)(2)(F)(i)." *Id.* at 5. As previously noted, however, it is not enough for Langford to demonstrate it was equally likely the court relied on the residual clause as opposed to the enumerated-offense clause. *Lofton,* 920 F.3d at 575.

Langford's Iowa convictions for robbery in the first degree and robbery with aggravation do qualify as predicate offenses under the enumerated-offense clause of § 3559(c)(2)(F)(i). As such, it was not error for the sentencing court to impose a mandatory life sentence with respect to bank robbery, Count Three. Langford's claim for § 2255 relief on this count is denied.

The Motion to Vacate, Set Aside, or Correct Sentence, brought pursuant to 28 U.S.C. § 2255 as to Count Three in *United States v. Langford*, No. 3:04-cr-00091-RGE, is **DENIED**. The motion to vacate as to Count Five is **GRANTED.** The criminal sentence shall be vacated in part, as to Count Five. All other aspects of the sentence remain unchanged. By no later than **October 30, 2019**, the parties shall submit briefing on the necessity of resentencing in light of the sentences upheld in this Order.

**IT IS SO ORDERED.**

Dated this 30th day of September, 2019.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

# United States Court of Appeals
## For the Eighth Circuit

No. 19-3541

Benjamin Joseph Langford

*Petitioner - Appellant*

v.

United States of America

*Respondent - Appellee*

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 13, 2021
Filed: April 7, 2021

Before GRUENDER, BENTON, and STRAS, Circuit Judges.

BENTON, Circuit Judge.

Benjamin Joseph Langford moved to vacate, set aside, or correct his concurrent life sentences under 18 U.S.C. §§ 924(e)(1) and 3559(c)(1). The district court[1] denied his request to vacate the sentence under section 3559, determining that

[1]The Honorable Rebecca Goodgame Ebinger, United States District Judge for the Southern District of Iowa.

his prior Iowa robbery convictions were serious violent felonies. Langford appeals. Having jurisdiction under 28 U.S.C. §§ 2255(d) and 1291, this court affirms.

I.

Langford was convicted of bank robbery, possession of a firearm during a crime of violence, and felon-in-possession of a firearm. *See* **18 U.S.C. §§ 2113(a)**, **924(c)**, **922(g)(1)**. He had three prior convictions in Iowa state court: attempted breaking and entering in 1974, robbery with aggravation in 1975, and first-degree robbery in 1989. *See* **Iowa Code §§ 708.10** (1973), **711.2** (1975), **711.2** (1987).

On January 7, 2005, the sentencing court[2] imposed a mandatory life sentence for the bank robbery conviction, ruling that it was a "serious violent felony" and that Langford had at least two prior "serious violent felony" convictions. **§ 3559(c)(1)** (also called the "Three-Strikes Law"). A conviction is a "serious violent felony" if it is at least one of three types:

- it is "a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118)" [the enumerated-offense clause];
- it "has as an element the use, attempted use, or threatened use of physical force against the person of another" [the force clause];
- it "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].

**§ 3559(c)(2)(F)(i)**, **(ii)** (brackets added). The sentencing court did not specify whether the prior convictions were under section 3559's enumerated-offense, force, or residual clauses.

[2]The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa, now retired.

The sentencing court also imposed a concurrent life sentence for the felon-in-possession conviction, determining that the three prior convictions were violent felonies under the Armed Career Criminal Act. *See* **§ 924(e)(1)**. A "violent felony" is:

> any crime punishable by imprisonment for a term exceeding one year that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another (the elements clause or force clause); (2) is burglary, arson, or extortion, [or] involves use of explosives (the enumerated-offenses clause); or (3) otherwise involves conduct that presents a serious potential risk of physical injury to another (the residual clause).

***Dembry v. United States***, 914 F.3d 1185, 1186 n.2 (8th Cir. 2019) (alteration in original) (internal quotations omitted), *quoting* **§ 924(e)(2)(B)(i)**, **(ii)**. The sentencing court did not specify whether the prior convictions were under the ACCA's enumerated-offense, force, or residual clauses.

On direct appeal, this court affirmed the convictions and sentences. *See* ***United States v. Langford***, 155 Fed. Appx. 936 (8th Cir. 2005) (per curiam), *cert. denied*, 547 U.S. 1011 (2006).

In 2015, the Supreme Court invalidated the ACCA's residual clause. ***Johnson v. United States***, 576 U.S. 591, 606 (2015) (holding that the ACCA's residual clause is unconstitutionally vague). The Court later held that *Johnson*'s rule applies retroactively on collateral review. ***Welch v. United States***, 136 S. Ct. 1257, 1265 (2016).

In 2016, Langford moved to vacate, set aside, or correct his life sentences. *See* **28 U.S.C. § 2255(a)** (authorizing collateral attack "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack") (alteration added). He argued that the prior

Iowa convictions were necessarily based on the ACCA's unconstitutional residual clause and on section 3559's residual clause.

The district court agreed in part. It vacated the life sentence under the ACCA, ruling that the first-degree robbery and breaking-and-entering convictions were necessarily (and unconstitutionally) based on the residual clause.

The court did not vacate the mandatory life sentence under section 3559. Applying *Johnson*, it ruled that section 3559's residual clause is unconstitutional. The life sentence, however, survived because the sentencing court did not necessarily rely on that clause. Rather, the district court said, the prior aggravated robbery and first-degree robbery convictions were serious violent felonies under section 3559's enumerated-offense clause (and the aggravated robbery conviction was also a serious violent felony under the force clause).

Langford appeals the district court's ruling that the prior robbery convictions are serious violent felonies under section 3559.

II.

According to Langford, the prior robbery convictions are necessarily based on section 3559's residual clause. He asserts that the residual clause is unconstitutional, and thus the mandatory life sentence is invalid. *See* ***Johnson***, 576 U.S. at 606. The Government agrees that the residual clause in section 3559(c)(2)(F)(ii) is unconstitutionally vague, but counters that the convictions are serious violent felonies based on section 3559's enumerated-offense and force clauses.

This court reviews de novo the denial of a section 2255 motion, and for clear error any findings of fact. ***Walker v. United States***, 900 F.3d 1012, 1013 (8th Cir. 2018) (citation omitted); ***Garcia-Hernandez v. United States***, 915 F.3d 558, 560 (8th Cir. 2019) (citation omitted). The movant "bears the burden of showing that he is entitled to relief under § 2255." ***Walker***, 900 F.3d at 1015 (citation omitted).

Whether the sentencing court relied on the residual clause is "a factual question for the district court." ***Id.*** (analyzing an ACCA enhancement) (citation omitted). Langford must show "by a preponderance of the evidence" that the residual clause led the sentencing court to apply the enhancement. ***Id.*** The "mere possibility" that the sentencing court relied on the residual clause is "insufficient to satisfy this burden." ***Id.*** If it is "just as likely that the sentencing court relied on the [force] or enumerated offenses clause, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." ***Id.*** (alteration added) (citation omitted). To be invalidated, the enhancement must be "necessarily based on the residual clause." ***Id.***

The district court did not clearly err in finding that the record does not show which clause the sentencing court used to enhance Langford's sentence. If the record is inconclusive, "the district court may consider 'the relevant background legal environment at the time of . . . sentencing' to ascertain whether the movant was sentenced under the residual clause." ***Id.*** (alteration in original), *quoting* ***United States v. Washington***, 890 F.3d 891, 896 (10th Cir. 2018). This analysis is a "snapshot" of "what the controlling law was *at the time of sentencing*." ***Id.*** (emphasis added), *quoting* ***United States v. Snyder***, 871 F.3d 1122, 1129 (10th Cir. 2017).

In 2005, this court used the categorical approach to determine whether a conviction fell within the enumerated-offense clause. *See* ***Taylor v. United States***, 495 U.S. 575, 598–602 (1990) (considering an ACCA enhancement). A state conviction falls within the enumerated-offense clause if it has the "basic elements" of an offense enumerated in section 3559(c)(2)(F)(i). *See* ***id.*** at 599. Under this approach, the sentencing court normally may not delve into particular facts disclosed by the record of conviction, requiring it to "look only to the fact of conviction and the statutory definition of the prior offense." ***Id.*** at 602.

III.

According to Langford, the aggravated robbery and first-degree robbery convictions are not enumerated offenses under section 3559. Section 3559 enumerates "robbery"—"as described in section 2111, 2113, or 2118," by "whatever designation and wherever committed"—as a serious violent felony. **§ 3559(c)(2)(F)(i)**.

Langford asserts that the convictions, though labeled "robbery," are not enumerated offenses because they are not similar to robbery as described in sections 2111, 2113, or 2118. Those sections criminalize robbery within the United States' special maritime and territorial jurisdiction, *18 U.S.C. § 2111*; bank robbery and incidental crimes, *18 U.S.C. § 2113*; or robbery and burglary involving controlled substances, *18 U.S.C. § 2118*. Each requires as elements: the taking or attempted taking of anything of value, "from the person or presence of another," by "force and violence, or by intimidation." **§§ 2111**, **2113**. *See also* **§ 2118**. "Intimidation means the threat of force." ***United States v. Harper***, 869 F.3d 624, 626 (8th Cir. 2017) (stating that section 2113 robbery is a "crime of violence"), *quoting* ***United States v. Wright***, 957 F.2d 520, 521 (8th Cir. 1992).

To be a section 3559 enumerated offense, it is not necessary for "every detail of the federal offense, including its jurisdictional elements," to be "replicated in the state offense." ***United States v. Johnson***, 915 F.3d 223, 229 (4th Cir. 2019), *quoting* ***United States v. Wicks***, 132 F.3d 383, 386–87 (7th Cir. 1997). Congress's use of "broad language" in section 3559(c)(2)(F)(i)—a "serious violent felony" includes "a Federal or State offense, by whatever designation and wherever committed"—was "no doubt meant to capture a wide variety of state and federal offenses." ***Id.*** The "structure of section 3559 . . . classifies all robberies as serious violent felonies." ***United States v. Davis***, 260 F.3d 965, 969 (8th Cir. 2001) (acknowledging that section 3559(c)(3)(A) "allows a defendant to prove the prior robbery convictions are

nonqualifying by proving certain facts") (alteration added).[3] *See also* ***United States v. Gray***, 260 F.3d 1267, 1278 (11th Cir. 2001) (section 3559(c)(3)(A) "carves out a narrow exception to the broad rule that all robberies are 'serious violent felonies' for purposes of § 3559(c)(1)"). A "straightforward interpretation" requires looking to "the essential nature of a crime, not to minor definitional tweaks or wrinkles in individual jurisdictions." ***Johnson***, 915 F.3d at 229.

To determine whether Langford's prior convictions mirror the essential nature of robbery described in sections 2111, 2113, or 2118, this court must compare the convictions to the federal robbery statutes.

A.

At the time of Langford's aggravated robbery conviction in 1975, the Iowa Code stated:

> If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if, being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term of twenty-five years.

**§ 711.2** (1975).

The offense of aggravated robbery included the offense of simple robbery. **§§ 711.1**, **711.2** (1975). *See* ***State v. Masters***, 196 N.W.2d 548, 551 (Iowa 1972)

[3]Section 3559 excludes "robbery" as a basis for sentencing enhancement "if the defendant establishes by clear and convincing evidence" that no firearm or other dangerous weapon was used or threatened to be used in the offense, and the offense did not result in death or serious bodily injury to any person. **§ 3559(c)(3)(A)**. *See* ***United States v. Dobbs***, 449 F.3d 904, 913 (8th Cir. 2006). Langford has not made this showing.

(stating that robbery is "defined by section 711.1; it is only the Degree which is fixed by [section 711.2]" (alteration added)). Section 711.1's simple robbery provision stated:

> If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in sections 711.2 and 711.3.

**§ 711.1** (1975). Langford, convicted of aggravated robbery, necessarily met the elements of simple robbery in section 711.1 (1975).

Langford's aggravated robbery conviction is a serious violent felony under section 3559's enumerated-offense clause. The essential nature of Iowa's 1975 robbery statutes mirrors federal robbery described in sections 2111, 2113, or 2118. At the time of sentencing, the district court likely relied on Iowa courts' holdings that robbery necessarily included elements of a taking from another by force and violence or intimidation. *See* ***State v. Parham***, 220 N.W.2d 623, 628 (Iowa 1974) (considering a conviction for aggravated robbery and stating that one of its "essential elements" is that the "taking was with force or violence or that such taking was by putting [the victim] in fear" (alteration added)); ***State v. Williams***, 155 N.W.2d 526, 529 (Iowa 1968) (stating that under the identical 1962 versions of sections 711.1 and 711.2, "robbery" is "an offense involving violence or the threat of violence"), *quoting* ***State v. Fonza***, 118 N.W.2d 548, 551 (Iowa 1962). *See also* ***State v. Burt***, 249 N.W.2d 651, 653 (Iowa 1977) ("robbery" is "in essence" larceny from the person "with additional elements including force or violence or fear thereof"); ***State v. Lewis***, 154 N.W. 432, 433 (Iowa 1915) (the "force in robbery is that necessary to overcome resistance or overcome the person robbed"); ***State v. Taylor***, 118 N.W. 747, 748 (Iowa 1908) (holding that force and violence are an essential element of robbery); ***State v. Miller***, 49 N.W. 90, 91 (Iowa 1891) (rejecting the trial court's ruling that robbery can be committed with "no putting in fear and no resistance, without the use of any force or violence other than that required to take and remove the property"); ***State v. Carr***, 43 Iowa 418, 423 (Iowa 1876) (recognizing that

robbery requires force, violence, or putting in fear). Langford cannot show that at the time of sentencing, the district court necessarily relied on section 3559's residual clause in ruling that the aggravated robbery conviction was a serious violent felony.

B.

At the time of Langford's first-degree robbery conviction in 1989, a person committed "robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." **§ 711.2** (1987).

Robbery is "defined" in the simple robbery statute, section 711.1. **§ 711.1** (1987) (defining "robbery" as used in section 711.2). *See* ***State v. Boley***, 456 N.W.2d 674, 677 (Iowa 1990) (describing a first-degree robbery conviction as a violation of sections 711.1 and 711.2 (1987)); ***State v. Hendrickson***, 444 N.W.2d 468, 468 (Iowa 1989) (same). Under section 711.1,

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.
>
> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> 3. Threatens to commit immediately any forcible felony.

**§ 711.1** (1987).

Langford's first-degree robbery conviction is a serious violent felony under section 3559's enumerated-offense clause. The essential nature of Iowa's 1987 robbery statutes mirrors federal robbery described in sections 2111, 2113, or 2118.

The sentencing court likely relied on this court's holding in *Farmer* that Iowa first-degree robbery is a serious violent felony under section 3559's enumerated-offense clause. *See* ***United States v. Farmer***, 73 F.3d 836, 843 (8th Cir. 1996) (addressing the identical 1979 version of Iowa's robbery statutes). This court held that Iowa first-degree robbery is a serious violent felony because "robbery" is "specifically listed as [a] predicate felon[y] in paragraph (F)(i)" of section 3559. ***Id.*** (alterations added). *See* ***United States v. Rosario-Delgado***, 198 F.3d 1354, 1357 (11th Cir. 1999) (agreeing with *Farmer* to support its holding that a conviction under Puerto Rico's robbery statute was an enumerated serious violent felony). *Cf.* ***United States v. House***, 825 F.3d 381, 387 (8th Cir. 2016) (same, analyzing Illinois's comparable aggravated robbery statute). *See generally* ***State v. Terry***, 544 N.W.2d 449, 451 (Iowa 1996) ("The distinguishing characteristic of robbery is the force or intimidation employed to accomplish the crime.").

Langford cannot show that at the time of sentencing, the district court necessarily relied on section 3559's residual clause in ruling that the first-degree robbery conviction was a serious violent felony.

Langford's convictions for aggravated robbery and first-degree robbery qualify under section 3559's enumerated-offense clause. The district court properly refused to vacate the mandatory life sentence under section 3559.

* * * * * * *

The judgment is affirmed.

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**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No: 19-3541

Benjamin Joseph Langford

Appellant

v.

United States of America

Appellee

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Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:16-cv-00132-RGE)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 03, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans