NO. _____

SUPREME COURT OF THE UNITED STATES

**GARY DUANE HARRIS** **PETITIONER,**

**vs.**

**UNITED STATES OF AMERICA,** **RESPONDENT.**

## MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

Comes the petitioner, Gary Duane Harris, by counsel, and respectfully moves the Court for leave to file the accompanying Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of fees or costs and to proceed in *forma pauperis* pursuant to Supreme Court Rule 39.

In support of this motion, petitioner states that he was found to be indigent by the United States District Court for the Western District of Kentucky. Counsel from the Office of the Federal Community Defender for the Western District of Kentucky was appointed, pursuant to 18 U.S.C. § 3006(a), to represent petitioner in the district court and on appeal to the United States Court of Appeals for the Sixth Circuit.

**Wherefore**, the petitioner, Gary Duane Harris, by counsel, respectfully moves the Court to grant him leave to proceed in *forma pauperis*.

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Counsel for Petitioner

No. _____

**SUPREME COURT OF THE UNITED STATES**

**GARY DUANE HARRIS** **PETITIONER,**

**vs.**

**UNITED STATES OF AMERICA,** **RESPONDENT.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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# PETITION FOR A WRIT OF CERTIORARI

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## Questions Presented

I. Whether petitioner's sentence under 18 U.S.C. §924(c) must be vacated because the record is silent on whether he was sentenced under the statute's unconstitutionally vague residual clause (18 U.S.C. §924(c)(3)(B)) or its elements clause (18 U.S.C. §924(c)(3)(A)).

II. Whether aiding and abetting attempted robbery under 18 U.S.C. §2111 is a crime of violence under the elements clause of 18 U.S.C. §924(c)(3)(A).

## Parties to the Proceeding

The only parties to this proceeding are those listed in the caption of the case.

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## Opinions Below

The Sixth Circuit's opinion and judgment were filed on December 1, 2021. The opinion is reproduced in the Appendix (App.) at pp.1a-13a. *See Harris v. United States*, 19 F.4th 863 (6th Cir. 2021). The court's mandate was issued on January 24, 2022.

A Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky is reproduced at App. 14a-25a. *See Harris v. United States*, 2020 WL 7769094 (W.D. Ky. 2020) (unpublished).

## Jurisdiction

The United States Court of Appeals for the Sixth Circuit granted petitioner's motion to file a second or successive motion under 28 U.S.C. §2255. The district court had jurisdiction under 28 U.S.C. §2255.

The Sixth Circuit had jurisdiction pursuant to 18 U.S.C. §3742 and 28 U.S.C. §1291 and issued its opinion on December 1, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is filed in conformance with the Court's Miscellaneous Order issued on March 19, 2020. *See* 589 U.S. _____.

## Constitutional and Statutory Provisions Involved

**Fifth Amendment of the U.S. Constitution provides in relevant part:**

> No person shall be ... deprived of life, liberty, or property, without due process of law ...

**18 U.S.C. §924 - Penalties - provides in relevant part:**

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence ... (including a crime of violence ... that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence ...
(i) be sentenced to a term of imprisonment of not less than 5 years ...
(3) For purposes of this subsection the term 'crime of violence' means 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 or property of another may be used in the course of committing the offense.

**18 U.S.C. § 2111 - Robbery**

Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

## Statement of the Case

This case began as a botched robbery at Fort Campbell, Kentucky on April 1, 1996, in which a soldier, Michael Alonso Caravia, was shot and killed by the co-defendant, 17-year old Anthony Charles Gaines, Jr. (District Court Record (R.) 135, Presentence Investigation Report (PSR), ¶14).[1] Mr. Gaines, and petitioner, Gary

[1] The PSR is sealed in the record and Page ID#s are unavailable. Reference to the PSR is made to the numbered paragraphs therein.

Duane Harris, who was also 17-years old, were originally charged by information on November 6, 1996. (App. 41a-42a). They were transferred to adult status (18 U.S.C. §5032), which made them eligible for punishment as adults.

A superseding indictment was returned on December 4, 1996, and charged that petitioner and Mr. Gaines aided and abetted by the other did, with malice aforethought, unlawfully kill a human being in violation of 18 U.S.C. §2 and §1111 (Count 1); aided and abetted by the other attempted to take a thing of value from the person of another by force and violence, and by intimidation in violation of 18 U.S.C. §2 and §2111 (Count 2); and aided and abetted by the other, did use and carry a firearm during and in relation to a crime of violence as set out in "Count[s] 1 and 2" in violation of 18 U.S.C. §924(c) (Count 3). (App. 36a -37a).

Petitioner declined a plea offer of 25 years (300 months). (R.199, Opinion at 216). The case proceeded to trial and after the jury was sworn on October 19, 1998, petitioner and Mr. Gaines pleaded guilty without a plea agreement to all charges in the indictment. (App. 34a-35a; R.199, Opinion at 216; R.246, Transcript (TR) Guilty Plea at 577-80). The district court found that the indictment charged petitioner with second-degree murder because it did not allege that the killing occurred during a robbery. (App. 51a-53a; R.246, TR Sentencing at 629). The district court found that the indictment charged petitioner with second-degree murder because "[t]here is no allegation in Count One that the killing occurred during the course of a robbery."

(App. 51a). The court further found that petitioner pleaded guilty to second-degree murder. *Id.*

Using the 1998 guidelines, the district court found that the guideline range was 360 months to life based on a total offense level of 41 and a criminal history category of III. That finding was predicated on the court's decision to apply the guideline for first-degree murder (U.S.S.G §2A1.1) despite petitioner's conviction for second degree murder. (App. 51a-53a; R.246, TR Sentencing at 629-33). The court also applied §2B3.1(c)(1) which provides: "If a victim was killed under circumstances that would constitute murder under 18 U.S.C. §1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder)." Application Note 1 to that guideline says it applies "when death results from the commission of certain felonies." (App. 51a-52a). Although petitioner was convicted of second-degree murder, he was sentenced under §2B3.1(c) as if he had been convicted of first degree murder. *Id.* at 52a.[2]

On June 4, 1999, petitioner was sentenced to concurrent terms of 420 months on aiding and abetting second-degree murder (Count 1) and 180 months on aiding and abetting attempted robbery (Count 2). He was also sentenced to a consecutive

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[2] If petitioner had been sentenced under the second-degree murder guideline his base offense level would have been 33 rather than 43. With a two level reduction for acceptance of responsibility (U.S.S.G §3E1.1), his total offense level would have been 31 and with a criminal history category of III, his guideline range would have been 135 to 168 months. (R.135, PSR ¶¶ 29, 35, 43).

term of 60 months on the §924(c) charge (Count 3) for a total of 480 months (40 years) imprisonment and a 5-year term of supervised release. (App. 46a-47a).[3]

On direct appeal, petitioner's conviction and sentence were affirmed by a divided panel of the Sixth Circuit. *United States v. Harris*, 238 F.3d 777 (6th Cir. 2001). The primary issue was whether he could be sentenced under the first-degree murder guideline even though he was convicted of second-degree murder. *Id.* at 778-79. The majority noted that the indictment did not specify whether petitioner was charged with first or second-degree murder. *Id.* The district court's use of the higher offense level was based on the cross-reference found in U.S.S.G. §2B3.1(c)(1) and mandated by Sixth Circuit precedent. *Id.* at 799.

The dissent "point[ed] out the injustice inherent in sentencing a defendant charged with second-degree murder using the first-degree murder guidelines." *Harris*, 238 F.3d at 779 (Merritt, J., dissenting). The dissent argued that "the government should not have been able to cure its charging error simply by convincing a judge outside the normal rules of evidence that the preponderance of the evidence indicated that Harris and Gaines committed first-degree murder." *Id.*

On March 18, 2019, the Sixth Circuit granted petitioner authorization to file a second or successive motion under 28 U.S.C. §2255. (R.195, Order at 152-55).

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[3] The co-defendant, Mr. Gaines, was also sentenced to 480 months (offense level 41 and criminal history category III). (R. 246, TR Sentencing at 660).

Petitioner contended that his §924(c) sentence should be vacated in light of *Johnson v. United States*, 576 U.S. 591 (2015) which held that the Armed Career Criminal Act's (ACCA) residual clause (§924(e)(2)(B)(ii)) is unconstitutionally vague.

The Sixth Circuit authorized a successive §2255 motion because *Johnson* and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) "cast considerable doubt on the validity of §924(c)'s residual clause" and there is no "binding Sixth Circuit precedent that definitively establishes that either 18 U.S.C. §1111 or §2111 is a categorical crime of violence under the elements clause[.]" (R.195, Order at 155).[4] While petitioner's §2255 motion was pending, the Court held in *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019) that §924(c)(3)(B)'s residual clause was unconstitutionally vague.[5] Petitioner's argued in his §2255 motion that; 1) his §924(c) conviction and sentence must be vacated because he was likely sentenced under the residual clause; and 2) aiding and abetting second degree murder and aiding and abetting attempted robbery - the predicate offenses for the §924(c) sentence - are not categorically crimes of violence (COV). (R.222, §2255 Motion at 320, 326, 334, and 350).

A Magistrate Judge recommended that the §2255 motion be denied because petitioner's conviction for attempted robbery (18 U.S.C. §2111) is a COV under

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[4] A prior §2255 motion, which raised issues unrelated to this petition was denied on January 21, 2003. (R.146, Opinion; R.147, Order Denying Motion to Vacate).
[5] The Sixth Circuit has held that *Davis* is retroactive. *See In re Franklin*, 950 F.3d 909, 911 (6th Cir. 2020).

§924(c)(3)(A)'s elements clause. (App. 26a-33a). He also recommended that a certificate of appealability (COA) be denied. *Id.* at 29a.

Petitioner objected to the Magistrate Judge's recommendations. He argued that he should have been given the benefit of the doubt whether he was sentenced under §924(c)(3)(A)'s elements clause or the statute's residual clause (§924(c)(3)(B)) because the record is silent on that issue. Moreover, he showed he was likely sentenced under the residual clause. (R.235, Objections at 407-14).[6]

The Magistrate Judge's recommendations were adopted in part and rejected in part. The district court rejected petitioner's silent record argument and adopted the Magistrate Judge's reasoning that relief under *Davis* is precluded if the sentencing court could have relied on the elements clause in imposing the §924(c) sentence. (App. 20a). The court also rejected petitioner's argument that he should prevail if he showed it was likely that the district court relied on the residual clause to sentence him. *Id.* at 516.

The district court agreed with the Magistrate Judge's conclusion that only one predicate crime must be a COV for conviction and sentencing under §924(c)'s elements clause. The court also agreed that petitioner could properly be sentenced

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[6] Petitioner also objected to the finding that the second-degree murder conviction "is not of case-dispositive significance" because attempted robbery is a COV. He argued that neither second-degree murder nor attempted robbery is categorically a COV. (App. 27a-28a, n.1; R.235, Objections at 415-22).

under that §924(c)'s elements clause because attempted robbery is a COV. Thus, it did not matter whether second-degree murder is a COV. (App. 21a-22a).

The district court granted a COA on the following issues:

> (1) What is the standard for granting a §2255 motion to vacate a sentence based on §924(c) where the record is silent but it is possible or likely that the district court relied on the statute's residual clause at sentencing, and
> (2) Are second-degree murder (18 U.S.C. §1111) and attempted robbery (18 U.S.C. §2111) categorically crimes of violence under the elements clause of §924(c).

(R.242, Order at 520).

Petitioner argued on appeal that his §924(c) sentence must be vacated because the district court likely imposed that punishment under §924(c)(3)(B)'s unconstitutionally vague "residual clause." (App. 2a). Petitioner contended that his sentence could not be saved under §924(c)(3)(A)'s "elements clause" "because neither his conviction for aiding and abetting second-degree murder nor his conviction for aiding and abetting attempted robbery could have been considered a 'crime of violence' under caselaw existing at the time of sentencing." *Id.*

The Sixth Circuit affirmed. (App. 2a). The court held that petitioner could possibly show that "his sentence is constitutionally suspect" but to obtain relief under §2255, he had to "identify not only constitutional error but also harm that he suffered from that error." *Id.* The Sixth Circuit acknowledged that petitioner could show that "the record of his sentencing is silent as to whether the district court relied

upon §924(c)(3)'s elements clause or residual clause when imposing punishment upon him" but he "still must establish that he could not have been sentenced" ... under §924(c)(3)'s elements clause." *Id.* The court concluded that he could not do so because aiding and abetting attempted robbery (18 U.S.C. §2111) "necessarily constitutes a crime of violence under the elements clause" of §924(c)(3)(A). *Id.*[7]

**Reasons for Granting the Petition**

I. The record is silent on whether petitioner was sentenced under the residual clause of 18 U.S.C. §924(c)(3)(B) or the elements clause of §924(c)(3)(A). The district court found that if the elements clause would have supported the §924(c) sentence ***in theory***, then it is irrelevant that the sentencing court may have relied on the residual clause to support the §924(c) sentence ***in fact***. The court determined that petitioner's attempted robbery conviction was enough to support his §924(c) sentence because he could have been properly sentenced on the §924(c) charge by relying on the elements clause.

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[7] The Sixth Circuit found that it did not have to reach the question of whether second degree murder (18 U.S.C. §1111) was a COV. The court reasoned that because a district court "may enhance the prison term under §924(c) for the use or carrying of a firearm during and in relation to even ***one*** offense that can be considered a 'crime of violence," the district court's judgment could be affirmed "as long as [petitioner's] conviction for aiding and abetting attempted robbery involves the use, attempted use, or threatened use of physical force against the person or property of another." (App. 11a). (emphasis original).

The Sixth Circuit recognized the possibility that the district court relied on §924(c)(3)(B)'s residual clause in sentencing. Nevertheless, the court held that a silent record is not enough to determine if petitioner is entitled to relief. He must also show that neither of his predicate offenses qualified for enhanced sentencing under §924(c)(3)'s elements clause.

The Sixth Circuit thus condones the likelihood of an unconstitutional conviction and the test it has articulated conflicts with the test used by several other circuits. The silent record should be construed in the petitioner's favor and this Court should hold that in such circumstances a petitioner proceeding under 28 U.S.C. §2255 need only show that the district court likely or may have relied on §924(c)(3)(B)'s residual clause in sentencing.

II. Aiding and abetting attempted robbery under 18 U.S.C. §2111 is not a COV under the elements clause of 18 U.S.C. §924(c)(3)(A). Section 2111 criminalizes conduct broader than the generic definition of robbery and thus does not qualify as a predicate offense under §924(c). The generic offense requires that the circumstances involve *immediate* danger to the person. Section 2111 does not.

The Sixth Circuit also ruled that §2111 is a COV for purposes of §924(c)(3)(A) because intimidation involves the threat to use physical force. But, as shown below, intimidation can occur without "the use, attempted use, or threatened use of physical force against the person or property of another."

## Arguments

### I. A sentence under 18 U.S.C. §924(c) must be vacated where it may have been based on the statute's unconstitutionally vague residual clause (18 U.S.C. §924(c)(3)(B)).

Several matters are undisputed. First, petitioner was convicted and sentenced under §924(c), in that he aided and abetted the use and carrying of a firearm during and in relation to a crime of violence. Second, the residual clause of §924(c)(3)(B) is unconstitutionally vague. *See Davis, supra.* Third, the record is silent on whether petitioner was sentenced under the elements clause of §924(c)(3)(A) or the residual clause of §924(c)(3)(B).

At bottom, the question presented is how to determine in the face of a silent record whether petitioner was sentenced under §924(c)'s elements clause or its residual clause. The Sixth Circuit's conclusion that he was sentenced under the elements clause is flawed because it condones the likelihood that his sentence is based on the unconstitutional residual clause.

In *Potter v. United States*, 887 F.3d 785 (6th Cir. 2018), the defendant was authorized to file a second §2255 petition based on *Johnson's* holding that the ACCA's residual clause was unconstitutionally vague. The district court's denial of the petition was affirmed because the judge who reviewed Potter's §2255 motion was the same judge who originally sentenced him. The Sixth Circuit concluded that judge "was in a better position than anyone else to know why he applied the [ACCA]

and because at all events Potter did not meet his burden of showing that the court used the residual clause to increase his sentence." *Id.* at 786.[8]

> *Potter* stands for the proposition that a 28 U.S.C. §2255 movant seeking relief under *Johnson* must show evidence that the district court relied only on the residual clause in making the ACCA determination under attack if (1) the movant is bringing a second or successive motion ***and*** (2) there is evidence that the movant was sentenced under a clause other than the residual clause, such as the sentencing judge's averment that the movant was indeed sentenced under another clause.

*Raines v. United States,* 898 F.3d 680, 686 (6th Cir. 2018) (internal quotation marks omitted) (emphasis added). "*Raines's* second condition" limits *Potter* "to cases in which there is affirmative evidence that the sentencing court sentenced the movant under a clause other than the residual clause, the situation confronted in *Potter* itself," *i.e.,* the judge who ruled on the §2255 motion was the judge who originally sentenced the defendant. *Williams v. United States*, 927 F.3d 427, 440 n.7 (6th Cir. 2019). *See Potter*, 887 F.3d at 788. In petitioner's case, however, the Sixth Circuit has gone beyond those limits to the point of allowing a sentence to be upheld even if it is likely that it is based on an unconstitutional statute.

It is not just a matter of the Sixth Circuit construing its own precedent or developing its own jurisprudence, the larger problem and the one that should attract this Court's attention is that the Sixth Circuit's analysis in petitioner's case conflicts with decisions of this Court. As then Chief Judge Cole stated in his concurring

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[8] The district judge who originally sentenced petitioner died in 2013. (App. 9a).

opinion in *Raines*, 898 F.3d at 690, "if *Potter's dicta* that a second-or successive habeas petitioner must show that a sentence was based only on the residual clause were read as law, then it would collide with *Welch v. United States*, --- U.S. --- , 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016)."

> [I]f *Potter* were read to require a [§2255] petitioner to show that an [ACCA] enhancement was imposed solely under the residual clause, then for many habeas petitioners in this circuit, tantalize is all that *Johnson* and *Welch* will do. It is a 'tall order" for a petitioner to show which ACCA clause a district court applied when the sentencing record is silent—a burden all the more unjust considering that silence is the norm, not the exception.

*Raines*, 898 F.3d at 690-91 (Cole, C.J., concurring). The Sixth Circuit acknowledged as much in petitioner's case. *See* App. 10a quoting *Raines*, 898 F.3d at 690-91 (Cole, C.J., concurring). Yet, the test it applied would deny §2255 relief even if the district court relied on §924(c)(3)(B)'s residual clause at sentencing.

In petitioner's case, the Sixth Circuit framed the appropriate test as follows.

> [D]eciding whether an enhanced sentence relied upon the residual clause or the elements clause of §924(c)(3) does not, by itself, determine whether [petitioner] is entitled to the relief he seeks. [Petitioner] also must establish that he suffered prejudice from an improper sentencing calculation. Consequently, even despite the possibility that the district court relied upon the residual clause of §924(c)(3)(B) in sentencing [petitioner], [he] also must show that neither of his predicate offenses qualified for enhanced sentencing under §924(c)(3)'s elements clause.

*Harris v. United States*, 19 F.4th at 871; App. 10a. This two-prong test violates due process because it allows a sentence to be upheld regardless of whether it is based on an unconstitutional statute.

There is no "affirmative evidence" in the record to show that petitioner "was sentenced under a clause other than the residual clause." *Raines*, 898 F.3d at 686; *Williams*, 927 F.3d at 440 n.7. Indeed, there is no evidence that shows he was sentenced under the elements clause. The record is completely silent on the matter. An offender should not be penalized "for a court's discretionary choice not to specify under which clause of [the ACCA's] Section 924(e)(2)(B) an offense qualified as a violent felony." *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (abrogated on other grounds in *United States v. White*, 987 F.3d 340 (4th Cir. 2021), The same standard should apply in §924(c)'s cases and a silent record should be construed in a §2255 movant's favor especially since the constitutional validity of a §924(c) sentence hinges on it. Moreover, it is unlikely that the district court sentenced petitioner under §924(c)'s elements clause.

The district court at sentencing would have been aware of the categorical approach, which was adopted in 1990. *Taylor v. United States*, 495 U.S. 575 (1990). If the district court relied on the elements clause as the basis of petitioner's §924(c) sentence, it would have had to apply the categorical approach to the second-degree

murder and attempted robbery convictions to determine if they were COVs under §924(c)(3)(A). The record does not show that the court made any such analysis.

Until the Sixth Circuit issued its decision in petitioner's case, there was no binding circuit precedent that either second degree murder or attempted robbery is categorically a COV under §924(c)(3)(A)'s elements clause. Consequently, there would have been no need for the district court to resolve that issue by using the categorical approach when the statute's residual clause provided a much easier path to support the §924(c) sentence. That approach is based on the principle that the simplest explanation is most likely the correct one. The residual clause (§924(c)(3)(B)) requires that the district court only ask whether a predicate offense involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Intuitively, the answer would seem to be "Yes," and that would end the court's legal analysis. Thus, if the residual and the elements clauses are balanced against each other, it is more likely that petitioner was sentenced under the residual clause.

In petitioner's case, the district court found that

> as long as the elements clause would have supported the §924(c) sentence **in theory**, it is irrelevant that the sentencing court may have relied on the residual clause to support the §924(c) sentence ***in fact***. ... [T]he fact that a sentencing court could have properly relied upon the elements clause in imposing the §924(c) sentence precludes relief under *Davis*.

(App. 20a) (emphasis added). The district court determined that petitioner's attempted robbery conviction was enough to support his §924(c) sentence because the judge "***could have*** properly sentenced [him] on the §924(c) charge by relying on the elements clause." (App. 20a) (emphasis added). The Sixth Circuit followed that reasoning and held that a silent record is not enough to determine if petitioner is entitled to relief. He "must also show that neither of his predicate offenses qualified for enhanced sentencing under §924(c)(3)'s ***elements*** clause." (App. 10a) (emphasis original).

The lower courts' analyses are constitutionally flawed because they not only ignore the well-established rule that a defendant gets the benefit of a silent record, *see e.g., Boykin v. Alabama*, 395 U.S. 238, 243 (1969), but they also result in upholding petitioner's §924(c) sentence even if it was based on that statute's residual clause. Reliance on §924(c)'s elements clause does not make a sentence that is unconstitutional *ab initio* any less unconstitutional. No fair system of justice would uphold a sentence that is valid ***in theory*** but unconstitutional ***in fact***. Yet, that is precisely the result of the test articulated by the Sixth Circuit in petitioner's case and that result is in conflict with *Stromberg v. California*, 283 U.S. 359, 367-68 (1931).

In *Stromberg*, 283 U.S. at 367-68, a jury was instructed that guilt could be predicated on any one of three clauses of a particular statute. One of those clauses, however, was found to be unconstitutional. The Court held that the instruction was

prejudicial because it could not be ascertained from the general verdict that the defendant was not convicted under the invalid clause. *Id.*

*Stromberg* remains viable. "[T]he Supreme Court has explained that 'where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.'" *Raines*, 898 F.3d at 693 (Cole, C.J., concurring) (citation omitted). "If a defendant's sentence ***may*** have rested on a particular ground that the Constitution forbids, then it is an easy extension of *Stromberg* to see that a sentence is invalid also." *Id.* (emphasis original) (citation and internal quotation marks omitted).

General verdict cases present an apt analogy to the consequences of the silent record in petitioner's case because one must guess at what the factfinder specifically found. For example, in *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016), the general verdict form did not show the particular predicate upon which the §924(c) conviction rested. *Id.* The court held that a "crime of violence" finding cannot be predicated on an ambiguous verdict. *See also In re Cannon*, 931 F.3d 1236, 1241–42 (11th Cir. 2019) (noting that it was unclear in *Gomez* which crime or crimes served as the predicate offense for the §924(c) conviction). Other courts have reached a similar conclusion. *See e.g., United States v. Lettiere*, 2018 WL 3429927, at *4 (D. Mont. 2018); *United States v. McCall*, 2019 WL 4675762, at *6-7 (E.D. Va. 2019). *See also United States v. Jones*, 935 F.3d 266, 271-72, 274 (5th Cir. 2019)

(reliance on an invalid §924(c) predicate can be plain error); *In re Hernandez*, 857 F.3d 1162, 1165, 1167 (11th Cir. 2017) (Martin and Pryor, JJ., concurring in result) citing *Gomez*, 830 F.3d at 1227, a general verdict made it "impossible to tell ... whether the jury unanimously agreed that each §924(c) conviction related to any one particular underlying offense." The ambiguity presented by the silent record in petitioner's case is no less ambiguous than the general verdicts at issue in the aforementioned cases.

Like those general verdict cases and the flawed instruction in *Stromberg*, the silent record in petitioner's case only allows one to guess whether his §924(c) sentence is based on the statute's residual clause or its elements clause. Where one's liberty is at stake, guessing whether a sentence is constitutionally valid is a denial of due process. In petitioner's case, the district court observed that in §924(e) cases the Sixth Circuit asked "whether it is ***more likely than not*** that the district court relied solely on the residual clause at sentencing ..." (App. 19a, n.1) (emphasis added). The district court further noted that "[w]hile the residual clauses of §924(c) and §924(e) are largely similar, it appears that the Sixth Circuit has not extended the 'more likely than not' standard to challenges based on §924(c)'s residual clause." *Id. Johnson* and *Davis* analyzed the "largely similar" residual clauses of §924(e) and §924(c) and held that they are both unconstitutionally vague. There is no rational basis for applying different tests to determine whether a person has been sentenced

under the residual clause of §924(c) or the residual clause of §924(e). Yet, the Sixth Circuit has now rejected the 'more likely than not' standard in favor of requiring a §2255 movant to show in spite of a silent record that his predicate offenses do not qualify "for enhanced sentencing under §924(c)'s ***elements*** clause." (App. 10a) (emphasis original).

Other courts only require that a §2255 movant show that a sentence may have rested on the residual clause. *See e.g., United States v. Geozos*, 870 F.3d 890, 896 (9th Cir. 2017) (emphasis added) (abrogated on other grounds in *Stokeling v. United States*, 139 S.Ct. 544 (2019) ("when it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it ***may have***, the defendant's §2255 claim 'relies on' the constitutional rule announced in *Johnson*[.]"); *Winston*, 850 F.3d at 682 (emphasis added) ("when [a defendant's] sentence ***may have been predicated*** on application of the now-void residual clause and, therefore, may be an unlawful sentence under the holding in *Johnson* II, the [defendant] has shown that he 'relies on' a new rule of constitutional law."); *United States v. Peppers*, 899 F.3d 211, 221 (3d Cir. 2018) (emphasis added) (to show that a sentence is unconstitutional under *Johnson*, a §2255 petitioner is only required to show that he ***may have been sentenced*** under the ACCA's residual clause); and *Thrower v. United States*, 234 F.Supp.3d 372, 378 (E.D.N.Y. 2017) (emphasis original), reversed and remanded on other grounds, 914 F.3d 770 (2d Cir.

2019) ("a [§2255] petitioner can meet his burden of proving constitutional error by demonstrating that his sentence ***may have been based*** on the residual clause."). Unlike the Sixth Circuit's present test, the test articulated in the aforementioned cases not only gives proper weight to a silent record but it also comports with due process requirement underlying the Court's decision in *Stromberg*.

Accordingly, this Court should grant the petition and rule that a §2255 movant can prove constitutional error by showing that he or she ***may have been sentenced*** under §924(c)'s unconstitutional residual clause.

## II. Aiding and abetting attempted robbery under 18 U.S.C. §2111 is not a crime of violence (COV) under the elements clause of 18 U.S.C. §924(c)(3)(A).

In addition to the §924(c) charge, petitioner pleaded guilty to second-degree murder (18 U.S.C. §1111) and aiding and abetting attempted robbery (18 U.S.C. §2111). The district court ruled that "as long as the elements clause would have supported the §924(c) sentence in theory, it is irrelevant that the sentencing court may have relied on the residual clause to support the §924(c) sentence in fact." (App. 20a). Moreover, only one of petitioner's predicate offenses must be a COV for conviction and sentencing under the elements clause of §924(c) and that the attempted robbery conviction supported the §924(c) sentence. *Id.* at 22a. Thus, neither the district court nor the Sixth Circuit found it necessary to decide if second

degree murder is a COV under §924(c)'s elements clause. (App. 11a, 21a-22a, 27a-28a, n.1).

Section 2111 provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.[9]

To determine whether aiding and abetting attempted robbery is a COV under §924(c)(3)(A), the categorical approach is requires that the elements of §2111 be compared to the elements of generic robbery which is defined as "the 'misappropriation of property under circumstances involving immediate danger to the person.'" *United States v. Camp*, 903 F.3d 594, 601 (6th Cir. 2018) quoting *United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017). *See also LaFave, Substantive Criminal Law*, §20.3(d) (2d ed. 2003). "'[R]obbery requires that the

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[9] For purposes of §924(c)(3)(A), "physical force" means "***violent*** force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis original). *See e.g., United States v. Rafidi,* 829 F.3d 437, 445 (6th Cir. 2016) (applying *Johnson's* definition of "physical force" to the definition of "crime of violence" in §924(c)(3)(A)). *See also Stokeling v. United States*, 139 S.Ct. 544, 554 (2019) holding that "force is 'capable of causing physical injury' within the meaning of *Johnson* when it is sufficient to overcome a victim's resistance. Such force satisfies ACCA's elements clause." Even under *Stokeling's* definition of "physical force," a robbery that can be committed with *de minimis* force cannot be a crime of violence. An example of *de minimis* force is where a purse or a shoulder bag is taken from the victim's person and the perpetrator flees before the victim is able to react. Since there are degrees of force that can be applied to commit a robbery, §2111 robbery is not categorically a crime of violence.

taking be done by means of ***violence*** or intimidation.'" *Yates*, 866 F.3d at 733 quoting *LaFave* at §20.3(d)(2) (emphasis original). *See also Camp*, 903 F.3d at 600.

Under the categorical approach, an offense qualifies as a predicate offense "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013). If a statute criminalizes conduct broader than the generic definition, then a conviction under that statute does not qualify as a prior conviction under §924. *See generally Quarles v. United States*, 139 S.Ct. 1872, 1876 (2019); *Yates*, 866 F.3d at 733. Section 2111 is broader than generic robbery because under the statute intimidation does not have to involve "immediate danger to the person."

The Sixth Circuit, however, found that "the legal background in 1999 offers no real support for [petitioner's] argument" because his conviction "for aiding and abetting attempted robbery fell squarely within the parameters of §924(c)(3)'s elements clause, justifying imposition of a §924(c)(1)(A) sentence." (App. 8a-9a). The court's conclusion was based on its determination that by 1993, "the concept of 'intimidation' required proof of 'conduct and words calculated to create the impression that any resistance or defiance by the [victim] would be met by force.'" (App. 8a) (citations and internal quotation marks omitted). The Sixth Circuit further stated that '[b]ecause 'intimidation involves the threat to use physical force" and "even ***attempts*** to take anything of value from a person ... by intimidation constitute

§2111 violations ... §2111 is a crime of violence for purposes of §924(c)(3)(A)." (App. 12a) (citation omitted; emphasis original). The Sixth Circuit's conclusion, however, conflicts not only with the generic offense of robbery but it also conflicts with the fact that intimidation can be accomplished without the use or threatened use of force.

"Intimidation" is "conduct and words ... calculated to create the impression that any resistance or defiance ... would be met by force." *United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002) (citations and internal quotations marks omitted). Intimidation is established "by an objective test: whether an ordinary person ... could reasonably infer a threat of bodily harm from the defendant's acts." *Id.* (citations omitted). Although *Gilmore* involved bank robberies under 18 U.S.C. §2113(a), the Sixth Circuit's definition of intimidation applies to §2111 because the statutes' language is identical. Thus, generic robbery requires that the victim must be put in "immediate danger" by force or by intimidation. The same is not true under §2111.

Section 2111 does not require that a taking by intimidation place the victim in fear of immediate or imminent danger of physical force. The intimidation could be directed to the future and does not have to involve a threat of physical force or harm. For example, the perpetrator could tell the victim that if he or she did not give him money in two weeks he would post compromising photos of or information about

the victim on social media. The conduct constitutes intimidation and falls within the scope of §2111 even though there was no use or threatened use of physical force or "circumstances involving immediate danger to the person." Thus, §2111 is broader than generic robbery.

Section 2111 is broader than generic robbery in another respect. The statute allows a conviction for an "attempt[] to take from the person or presence of another anything of value[.]" Generic robbery, on the other hand, requires "the misappropriation of property," *i.e.,* a completed taking, and it plainly does not encompass an attempt to misappropriate or take of something of value.

As noted, generic robbery requires that victim be put in "immediate danger" by force or by intimidation. But even under *Stokeling's* definition of "physical force," a robbery committed with *de minimis* force cannot be a COV. A purse snatch in which the perpetrator flees before the victim can react is an example of *de minimis* force. Since there are degrees of force that can be used to commit a robbery or an attempted robbery, an offense under §2111 is not categorically a COV.

An attempt does not categorically require the attempted or threatened use of physical force. "The two requisite elements of an attempt are (1) an intent to engage in criminal conduct and (2) the performance of one or more overt acts which constitute a substantial step towards the commission of the substantive offense." *United States v. Williams*, 704 F.2d 315, 321 (6th Cir.1983) (citations omitted).

"[W]e require that the substantial step consist of objective acts that mark the defendant's conduct as criminal in nature." *United States v. Wesley*, 417 F.3d 612, 618-19 (6th Cir. 2005) (citations omitted). "This objective conduct must unequivocally corroborate the required subjective intent to engage in the criminal conduct. *Id.* at 619. *See also United States v. Suarez*, 617 Fed.Appx. 537, 542 (6th Cir. 2015). Indeed, Sixth Circuit Pattern Criminal Jury Instructions on attempt requires the government to prove that "the defendant did some overt act that was a substantial step towards committing the crime ..." *Id.* at 5.01 – Attempt – Basic Elements. Pattern Instructions in other circuits define attempt in a similar manner.[10]

The essential elements of attempt and the pattern instructions show that not all "attempts" meet §924(c)(3)(A)'s definition of a COV because an overt act that is a substantial step towards committing the intended offense does not necessarily involve the "attempted use ... of physical force[.]" "When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not 'categorically' a [COV] under the force clause." *United States v.*

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[10] *See e.g.,* First Circuit, Pattern Criminal Jury Instructions (2019 Revisions), §4.18.00; Third Circuit, Model Criminal Jury Instructions (2018 Revisions), §7.01; Fifth Circuit, Pattern Jury Instructions (Criminal Cases) (2019 Ed.), §1.34; Seventh Circuit, Pattern Criminal Jury Instructions (2020 Ed.), §4.09; Eighth Circuit, Manual of Model Criminal Jury Instructions (2021 Ed.), §801; Ninth Circuit Manual of Model Criminal Jury Instructions (2010 Ed. updated 6/2021), §5.3; Tenth Circuit, Pattern Jury Instructions – Criminal (2021), §1.32; Eleventh Circuit Criminal Pattern Jury Instructions (March 2022 Revisions), §S11.

*Simms*, 914 F.3d 229, 233 (4th Cir. 2019). So even if robbery is a COV, attempted robbery is not because the 'substantial step' necessary to prove the attempt does not have to involve the use, or threatened use of physical force. *See e.g., United States v. Null*, 234 F.3d 1270 (6th Cir. 2000) (Table – unpublished).

In *Null*, 234 F.3d at *1-3, the defendant was under FBI surveillance as a suspect in the robberies of Brink's vehicles. On the day of his arrest, he had been waiting for a Brink's vehicle to arrive at a certain location. The FBI warned off the Brink's vehicle and arrested Null, who was charged with several offenses including attempted bank robbery (18 U.S.C. §2113). *Id.*

The evidence showed that before Null and a co-defendant were arrested they engaged in a lengthy surveillance of Brink's vehicles. Null took detailed notes about the Brink's trucks, their routes, their drivers, and their contents. Both defendants were armed and had disguises on the day of the robbery attempt. That evidence was sufficient for an attempted robbery conviction. *Null*, 234 F.3d at *3-7. Moreover, it showed numerous overt acts which were substantial steps towards committing the robbery. Yet, at the time of their arrest, the defendants had not engaged in any conduct that constituted "the use, attempted use, or threatened use of physical force against the person or property of another." The attempted robbery would not be a COV under §924(c)(3)(A).

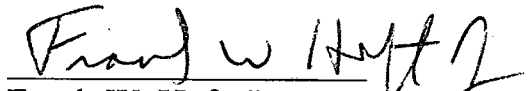
Other cases also show that a person can be convicted of attempt because the overt act/substantial step does not require attempted force or intimidation. *See e.g., United States v. Turner*, 501 F.3d 59, 68-69 (1st Cir. 2007) (attempted Hobbs Act robbery upheld where defendant and coconspirators planned robbery, surveilled target, prepared vehicles, and gathered at designated meeting point); *United States v. Villegas*, 655 F.3d 662, 669 (7th Cir. 2011) (evidence of attempted Hobbs Act robbery sufficient where defendant had discussed robbery with codefendant the day before and arrived at pre-arranged meeting place, where he gave codefendant tools for getaway); *United States v. Wrobel*, 841 F.3d 450, 453-55 (7th Cir. 2016) (defendants made plans to travel from Chicago to New York to commit a robbery but were arrested before they reached New York); *United States v. Holland*, 503 Fed.Appx. 737, 740-41 (11th Cir. 2013) (upholding conviction for attempted Hobbs Act robbery of stash house where defendant was arrested at warehouse before arriving at planned location of robbery).

Although the foregoing cases involved Hobbs Act robberies, they apply with equal force to petitioner's case because they show that neither attempted robbery nor the "substantial step" element necessarily involved conduct that constitutes the "attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A). Thus, neither robbery nor attempted robbery under §2111 is categorically a COV under §924(c)(3)(A)'s elements clause.

## Conclusion

For the foregoing reasons, the Court should grant this petition.

Respectfully submitted,



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No. _____

**SUPREME COURT OF THE UNITED STATES**

**GARY DUANE HARRIS,** **PETITIONER,**

**vs.**

**UNITED STATES OF AMERICA,** **RESPONDENT.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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# APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0273p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY DUANE HARRIS,

*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

No. 21-5040

Appeal from the United States District Court for the Western District of Kentucky at Paducah.
Nos. 5:19-cv-00046; 5:96-cr-00024-2—Thomas B. Russell, District Judge.

Argued: October 26, 2021

Decided and Filed: December 1, 2021

Before: DAUGHTREY, COLE, and CLAY, Circuit Judges.

## COUNSEL

**ARGUED:** Frank W. Heft, Jr., OFFICE OF THE FEDERAL DEFENDER, Louisville, Kentucky, for Appellant. Terry M. Cushing, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee. **ON BRIEF:** Frank W. Heft, Jr., Scott T. Wendelsdorf, OFFICE OF THE FEDERAL DEFENDER, Louisville, Kentucky, for Appellant. Terry M. Cushing, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee.

## OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Petitioner Gary Duane Harris appeals from the district court's denial of his second or successive 28 U.S.C. § 2255 motion to vacate, set

aside, or correct a portion of the 480-month sentence he presently is serving. After pleading guilty to aiding and abetting second-degree murder, aiding and abetting attempted robbery, and aiding and abetting using or carrying a firearm during and in relation to a crime of violence, the district court sentenced Harris to concurrent sentences of 420 months and 180 months for the second-degree-murder and attempted-robbery convictions, respectively. The district court also imposed a consecutive 60-month sentence for the firearm conviction.

Harris argues that the consecutive 60-month sentence must be vacated because it is possible that the district court imposed that punishment pursuant to the unconstitutionally vague "residual clause" of 18 U.S.C. § 924(c)(3)(B). Furthermore, Harris insists that the 60-month sentence cannot be saved under the so-called "elements clause" of 18 U.S.C. § 924(c)(3)(A) because neither his conviction for aiding and abetting second-degree murder nor his conviction for aiding and abetting attempted robbery could have been considered a "crime of violence" under caselaw existing at the time of sentencing.

Although it is possible that Harris could demonstrate that his sentence is constitutionally suspect, our inquiry does not end there. To justify relief under § 2255, Harris must identify not only constitutional error but also harm that he suffered from that error. At best, Harris can show that the record of his sentencing is silent as to whether the district court relied upon § 924(c)(3)'s elements clause or residual clause when imposing punishment upon him. Thus, even if the record's utter silence is sufficient to show that Harris's sentence is constitutionally suspect, Harris still must establish that he could not have been sentenced to the consecutive 60-month prison term under § 924(c)(3)'s elements clause. Because the 18 U.S.C. § 2111 crime of aiding and abetting attempted robbery necessarily constitutes a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), we affirm the judgment of the district court.

## FACTUAL AND PROCEDURAL BACKGROUND

In April 1996, two seventeen-year-olds, Gary Duane Harris and Anthony Charles Gaines, Jr., approached two soldiers near a convenience store on the United States Army base in Fort Campbell, Kentucky. In an attempt to rob the soldiers, Gaines pulled a handgun from his

clothing. As Gaines attempted to transfer the weapon to his other hand, the gun discharged, and a bullet struck Private First Class Michael Alonso-Caravia in the neck, killing him.

Following their arrests, both Harris and Gaines pleaded guilty to charges of aiding and abetting second-degree murder, in violation of 18 U.S.C. §§ 2 and 1111; aiding and abetting attempted robbery, in violation of 18 U.S.C. §§ 2 and 2111; and aiding and abetting using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c). The district court sentenced Harris to concurrent prison terms of 420 months and 180 months for the second-degree-murder and attempted-robbery convictions and to a consecutive 60-month prison term for the § 924(c) conviction. We affirmed the convictions and sentence on direct appeal. *United States v. Harris (Harris I)*, 238 F.3d 777 (6th Cir. 2001) (*per curiam*).

Harris's initial collateral attempts to vacate, set aside, or correct his sentence proved unsuccessful. *See Harris v. United States (Harris II)*, No. 04-5196 (6th Cir. May 4, 2004) (order); *In re Gary Duane Harris (Harris III)*, No. 16-5469 (6th Cir. Sept. 23, 2016) (order). In March 2019, however, a panel of this court granted Harris authorization to file a second or successive § 2255 motion challenging the legitimacy of the § 924(c) conviction and sentence. *In re Gary Duane Harris (Harris IV)*, No. 18-6172 (6th Cir. Mar. 18, 2019) (order). In that motion, Harris argued that his § 924(c) conviction and sentence cannot withstand constitutional scrutiny because, in enhancing his sentence, the district court *may have* relied upon the residual clause of 18 U.S.C. § 924(c)(3)(B), a clause whose continued vitality at that time had been called into question.

Indeed, in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the Supreme Court concluded that § 924(c)(3)(B)'s residual clause was so vague as to violate principles of due process. Harris thus asserted that his § 924(c) sentence must be vacated because it was likely that the district court improperly relied upon the invalidated residual clause to support his enhanced sentence. The district court disagreed, *Harris v. United States (Harris V)*, No. 5:96-CR-24-TBR, 2020 WL 7769094 (W.D. Ky. Dec. 30, 2020), but did grant Harris a certificate of appealability on the following issues:

> (1) the standard for granting a motion to vacate a sentence based on § 924(c) where the record is silent but it is possible or likely that the district court relied on

> the residual clause at sentencing, and (2) whether either of Harris's predicate offenses under 18 U.S.C. §§ 1111 or 2111 is a categorical crime of violence under the elements clause of § 924(c).

*Id.*, 2020 WL 7769094, at *5.

## DISCUSSION

**Standard of Review and Requirements for § 2255 Relief**

We review *de novo* the denial of a § 2255 motion. *Nagi v. United States*, 90 F.3d 130, 134 (6th Cir. 1996) (citation omitted). We also review *de novo* the legal question of whether an offense constitutes a "crime of violence" under 18 U.S.C. § 924(c). *United States v. Rafidi*, 829 F.3d 437, 443 (6th Cir. 2016) (citing *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013)).

An initial § 2255 motion "must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001) (citing *United States v. Addonizio*, 442 U.S. 178, 185–86 (1979)). But when seeking relief pursuant to a second or successive § 2255 motion, the movant faces a more onerous burden and must base the request for relief on either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Harris cannot point to any newly discovered evidence to support his claim for collateral relief. Rather, he alleges that, in light of the new rule of constitutional law set forth in *Davis*, the district court improperly relied upon the residual clause of § 924(c)(3) to justify his enhanced sentence for aiding and abetting the use or carrying of a firearm.

**Basis for Harris's 18 U.S.C. § 924(c) Sentence**

By pleading guilty to Count 3 of the superseding indictment returned against him, Harris admitted that he aided and abetted his co-defendant in using or carrying a firearm during and in relation to two crimes—aiding and abetting second-degree murder and aiding and abetting attempted robbery. Consequently, he was subject to sentencing pursuant to the provisions of 18 U.S.C. § 924(c)(1)(A)(i)[1], which provides:

> [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 . . . shall, in addition to the punishment provided for such crime of violence . . . be sentenced to a term of imprisonment of not less than 5 years.

(Emphasis added.)

The term "crime of violence" in § 924(c)(1)(A) is explicitly defined in 18 U.S.C. § 924(c)(3) to mean a felony that:

> (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 or property of another may be used in the course of committing the offense.

Section 924(c)(3)(A) is known as the statute's "elements clause," while § 924(c)(3)(B) is known as the "residual clause."

**Challenges to Statutory Residual Clauses**

In 2015, the United States Supreme Court ruled in *Johnson v. United States*, 576 U.S. 591 (2015), that a sentence imposed pursuant to a "residual clause" in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)[2], could be challenged as a violation of due process.

---

[1]Although Harris was convicted of three *aiding and abetting* offenses, "[w]hoever commits an offense against the United States *or aids, abets,* counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (emphasis added).

[2]The residual clause of the ACCA defined a "violent felony," in part, as "any crime punishable by imprisonment for a term exceeding one year" that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

According to the Court, "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 576 U.S. at 597. Because invalidation of that clause "changed the substantive reach of the Armed Career Criminal Act," the Court later recognized that *Johnson*'s holding must be applied retroactively to other cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Even so, because of the difference in language between the residual clause of the ACCA and its definition of a "violent felony" and § 924(c)(3)(B)'s residual clause's definition of a "crime of violence," questions persisted as to whether *Johnson*'s holding also applied to enhanced sentences for using or carrying a firearm during or in relation to such a crime of violence.

Approximately three years after *Johnson*, the Supreme Court offered some indication of the ultimate answer to those questions in its ruling in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court considered a challenge to the constitutionality of a residual clause contained in 18 U.S.C. § 16's general definition of the term "crime of violence." *Id.* at 1210. In 18 U.S.C. § 16(b), Congress, as it did in § 924(c)(3)(B), defined a "crime of violence" to be, in part, "any other offense that is a felony and that, 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." And in *Dimaya*, as in *Johnson*, the Court concluded that the residual clause at issue "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Dimaya*, 138 S. Ct. at 1223 (quoting *Johnson*, 576 U.S. at 598).

Finally, in *Davis*, the Supreme Court addressed head-on the contention that the residual clause in 18 U.S.C. § 924(c)(3)(B) faced the same vagueness problems as did the provisions of 18 U.S.C. § 924(e)(2)(B)(ii) and 18 U.S.C. § 16(b). Doing so, the Court, not surprisingly, agreed "that § 924(c)(3)(B) is unconstitutionally vague" and cannot serve to define a "crime of violence" for purposes of conviction and sentencing. *Davis*, 139 S. Ct. at 2336. Moreover, given the similarities between the statutory language at issue in *Johnson* and in *Davis*, we have held that *Davis* applies retroactively. *In re Franklin*, 950 F.3d 909, 911 (6th Cir. 2020) (order) (*per curiam*) (relying upon *Welch*).

**Determination of the Basis for the Crime-of-Violence Finding**

In this appeal, Harris relies upon *Davis*'s invalidation of § 924(c)'s residual clause to support his claim that his conviction for using or carrying a firearm during and in relation to a crime of violence, as well as the resulting, consecutive, 60-month sentence, must be vacated. According to Harris, nothing in the record of his conviction and sentence indicates that the district court *did not* rely upon the unconstitutional residual clause of § 924(c)(3)(B) in finding that Harris had committed a crime of violence; therefore, he insists that the residual clause actually *must have been* the basis for the district court's finding.

To support that contention, Harris cites our decision in *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019), and analyzes the five factors that case identified as aids in determining whether a particular sentence was imposed pursuant to an unconstitutional residual clause. After examining the sentencing record, the legal background at the time of sentencing, the presence of informed decisionmakers, the nature of the predicate offense, and later, predictable, legal developments, Harris concludes that those factors "establish that it is possible or likely that he was sentenced under § 924(c)(3)(B)'s residual clause," and that the otherwise silent record "must be construed in [his] favor." (Appellant's Br. at 9, 25.)

Engaging in an examination of the *Williams* factors yields little benefit to Harris in this case, however. First, the sentencing record is silent as to the district court's basis for finding Harris worthy of enhanced punishment.

Second, consideration of the legal background at the time of sentencing does not give a definitive answer to the relevant question raised by Harris in this collateral challenge. In 1999, no binding Sixth Circuit precedent established definitively that either aiding and abetting second-degree murder or aiding and abetting attempted robbery categorically was a crime of violence. Furthermore, by that time, the Supreme Court had explained that courts should determine whether an offense was a "crime of violence" or a "violent felony," not by examining the circumstances surrounding the commission of the crime, but rather by engaging in a categorical-approach analysis. *See Taylor v. United States*, 495 U.S. 575, 602 (1990).

As we explained in our *en banc* decision in *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019):

> The categorical approach prohibits federal sentencing courts from looking at the particular facts of the defendant's previous state or federal felony convictions; rather, federal sentencing courts "may 'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses." *Descamps [v. United States]*, 570 U.S.[254, 261 (2013)] (quoting *Taylor*, 495 U.S. at 600 . . .). The question for the sentencing court in the elements-clause context is whether every defendant convicted of that state or federal felony *must have* used, attempted to use, or threatened to use physical force against the person of another *in order to have been convicted*, not whether the particular defendant *actually* used, attempted to use, or threatened to use physical force against the person of another *in that particular case*.

(Citations omitted.) Because the district court did not engage in an explicit categorical-approach analysis at sentencing, Harris contends that the district judge must have relied upon the residual clause in § 924(c)(3)(B) to justify the consecutive, 60-month sentence he imposed. Even at that time, however, it would have been clear to the district court that the federal crime of attempted robbery contained, by definition, the element of force, making it unnecessary to engage in a categorical-approach analysis. Indeed, a conviction under 18 U.S.C. § 2111 *requires* a taking or an attempted taking from a person "*by force and violence, or by intimidation.*"[3] (Emphasis added.)

Moreover, by 1993, we had recognized that even the concept of "intimidation" required proof of "conduct and words calculated to create the impression that any resistance or defiance by the [victim] would be met by force." *United States v. Perry*, 991 F.2d 304, 310 (6th Cir. 1993) (quoting *United States v. Jones*, 932 F.2d 624, 625 (7th Cir. 1991)); *see also United States v. Henry*, 722 F. App'x 496, 500 (6th Cir. 2018) ("[I]ntimidation is all it takes to satisfy § 924(c)(3)(A)'s elements clause, which defines crimes involving the 'threatened use of physical force' as crimes of violence.") (citing *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016)). Thus, the legal background in 1999 offers no real support for Harris's argument; if anything, an examination of that legal background indicates that Harris's conviction for aiding

[3]In its entirety, 18 U.S.C. § 2111 provides that "[w]hoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years."

and abetting attempted robbery fell squarely within the parameters of § 924(c)(3)'s elements clause, justifying imposition of a § 924(c)(1)(A) sentence.

Third, Harris cannot rely upon information provided by a decisionmaker familiar with the basis for the sentencing decision. Unfortunately, the sentencing judge died in 2013, years before Harris first raised his challenge to his sentence based upon the Supreme Court's decision in *Davis*. This factor, therefore, "casts no affirmative light on the question at hand." *Williams*, 927 F.3d at 444.

Fourth, an examination of the nature of the predicate offenses also does little to aid Harris's cause. In fact, such an analysis lends credence to the belief that the district court relied upon § 924(c)(3)'s elements clause in enhancing Harris's sentence because the predicate offense of aiding and abetting attempted robbery requires a finding of a taking or an attempted taking *by force and violence*. 18 U.S.C. § 2111.

Fifth, any consideration of legal developments occurring *after* sentencing sheds little light on the district court's actual sentencing rationale. Nevertheless, Sixth Circuit decisions rendered after Harris was sentenced establish that statutory language virtually identical to that found in 18 U.S.C. § 2111, the federal prohibition on robbery and attempted robbery, satisfies the elements clause of 18 U.S.C. § 924(c)(3)(A). *See, e.g.*, *United States v. Jackson*, 918 F.3d 467, 484–86 (6th Cir. 2019) (finding that carjacking is a crime of violence under the elements clause of § 924(c) because a conviction under 18 U.S.C. § 2119 requires the taking of a motor vehicle "from the person or presence of another by force and violence or by intimidation, or attempts to do so"); *McBride*, 826 F.3d at 295–96 (concluding that bank robbery under 18 U.S.C. § 2113, which requires a taking or an attempt to take certain property "from the person or presence of another" "by force and violence, or by intimidation," constitutes a crime of violence under § 4B1.2(a) of the United States Sentencing Guidelines).

Harris concedes that examination of the *Williams* factors does not conclusively establish that the sentencing judge relied upon § 924(c)'s residual clause when sentencing him. Indeed, he notes that "the record [in this matter] is silent on whether the § 924(c) sentence is based on the

statute's residual clause or its elements clause." (Appellant's Br. at 26.) He nevertheless argues that such silence should lead us to conclude that his § 924(c) sentence is unconstitutional.

"It is a 'tall order' for a petitioner to show which . . . clause a district court applied when the sentencing record is silent—a burden all the more unjust considering that silence is the norm, not the exception." *Raines v. United States*, 898 F.3d 680, 690–91 (6th Cir. 2018) (Cole, C.J., concurring). But even engaging in a *Williams*-factors analysis does little to aid Harris. As the district court noted when denying Harris relief on his second or successive § 2255 motion, "In the part of the *Williams* opinion that Harris relies on, the [Sixth Circuit] was considering whether Williams was entitled to raise a second or successive motion under § 2255 in the first place, not whether a motion to vacate should prevail." *Harris V*, 2020 WL 7769094, at *3 (citing *Williams*, 927 F.3d at 439). "Although the [Sixth Circuit] found that Williams was entitled to bring a second § 2255 motion, it still had to answer the question of whether Williams's predicate offense qualified under the ACCA's elements clause before deciding if the § 924(e) sentence should be vacated." *Id.*; *Williams*, 927 F.3d at 445 (citing *Van Cannon v. United States*, 890 F.3d 656, 661 (7th Cir. 2018) ("To win § 2255 relief, Van Cannon had to establish a *Johnson* error *and* that the error was *harmful*. The government confessed the *Johnson* error .... The only remaining dispute concerned the question of prejudice.")). Thus, deciding whether an enhanced sentence relied upon the residual clause or the elements clause of § 924(c)(3) does not, by itself, determine whether Harris is entitled to the relief he seeks. Harris also must establish that he suffered prejudice from an improper sentencing calculation. Consequently, even despite the possibility that the district court relied upon the residual clause of § 924(c)(3)(B) in sentencing Harris, Harris also must show that neither of his predicate offenses qualified for enhanced sentencing under § 924(c)(3)'s *elements* clause. *See, e.g.*, *Porter v. United States*, 959 F.3d 800, 801–02 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1060 (2021).

**Determination of Whether Harris's Predicate Convictions Are Crimes of Violence**

**Aiding and Abetting Second-Degree Murder**

Squelching any inclination to presume that a second-degree murder conviction necessarily involves the use, attempted use, or threatened use of physical force against the person

of another, the Supreme Court recently held that an offense requiring a *mens rea* of simple recklessness does not qualify as a violent felony under the elements clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(i), a clause that is essentially identical to § 924(c)(3)(A). *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). Consequently, the question presents itself whether second-degree murder prohibited by 18 U.S.C. § 1111 can be committed with mere recklessness such that it does not necessarily involve the application of force and violence against the person of another. We need not resolve that question in this case, however. Because a district court may enhance the prison term under § 924(c) for the use or carrying of a firearm during and in relation to even *one* offense that can be considered a "crime of violence," we may affirm the district court's judgment as long as Harris's conviction for aiding and abetting attempted robbery involves the "use, attempted use, or threatened use of physical force against the person or property of another."

**Aiding and Abetting Attempted Robbery**

In arguing that a conviction under 18 U.S.C. § 2111 does *not* meet that standard, Harris cites *United States v. Camp*, 903 F.3d 594, 601 (6th Cir. 2018), and *United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017), for the proposition that, pursuant to a categorical-approach analysis, "the elements of § 2111 must be compared to the elements of generic robbery which is defined as 'the "misappropriation of property under circumstances involving immediate danger to the person."'" (Appellant's Br. at 40 (quoting *Camp*, 903 F.3d at 601).) *Camp* and *Yates*, however, were not concerned with whether the crimes at issue in those cases—Hobbs Act robbery (*Camp*) and Ohio's robbery statute, Ohio Rev. Code Ann. § 2911.02(A)(3) (*Yates*)—were crimes of violence under 18 U.S.C. § 924(c)(3)(A).[4] Rather, the issue in those cases required an examination of whether the crimes met the generic definition of robbery as listed in the *enumeration clause* of § 4B1.2(a)(2) of the United States Sentencing Guidelines.[5]

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[4]In fact, in *Camp*, we recognized that the plain text of the Hobbs Act may be sufficient to categorize robbery as a crime of violence under the use-of-force clause of 18 U.S.C. § 924(c). *Camp*, 903 F.3d at 600.

[5]The provisions of § 4B1.2(a) of the Guidelines, like the relevant provisions of the ACCA, 18 U.S.C. § 924(e)(2)(B), previously contained *three* clauses defining the terms "crime of violence" in the Guidelines or "violent felony" in the ACCA. In addition to the equivalents of an elements clause and a residual clause, § 4B1.2(a) of the Guidelines and 18 U.S.C. § 924(e)(2)(B) contained what are known as enumeration clauses that list specific

Unlike the involved analysis that must be undertaken to determine whether an individual's prior conviction constitutes an enumerated, generic offense under § 4B1.2(a)(2) of the Guidelines or an enumerated, generic offense under § 924(e)(2)(B)(ii) of the ACCA, an analysis under § 924(c)(3)(A) requires only that the predicate offense for which a defendant was convicted necessarily "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See In re Franklin*, 950 F.3d at 911 (explaining the relevant inquiry to determine whether arson, 18 U.S.C. § 844(i), constitutes a crime of violence under the elements clause of § 924(c)(3)(A)).

Even so, Harris continues to argue that 18 U.S.C. § 2111 cannot be considered a crime of violence because its language "is broader than generic robbery because: 1) under the statute intimidation does not have to involve 'immediate danger to the person;' and 2) unlike generic robbery, § 2111 includes attempted robbery." (Appellant's Br. at 42.) Again, however, under the elements clause of § 924(c)(3)(A), the government need not establish that every element of a § 2111 violation is included in the definition of generic robbery. Instead, the government need show only that even "the least of th[e] acts criminalized" by § 2111 requires the use, attempted use, or threatened use of force. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (alteration in original) (internal quotation marks and citation omitted). Because "intimidation" "involves the threat to use physical force," *McBride*, 826 F.3d at 296, and because even *attempts* to take anything of value from a person "by force and violence, or by intimidation" constitute § 2111 violations, 18 U.S.C. § 2111 is a crime of violence for purposes of § 924(c)(3)(A). *See, e.g.*, *United States v. Fultz*, 923 F.3d 1192, 1193, 1195 (9th Cir.), *cert. denied*, 140 S. Ct. 668 (2019) (finding that robbery on a government reservation under § 2111 is a crime of violence for purposes of § 924(c)(3)(A)); *United States v. Shirley*, 808 F. App'x 672, 677 (10th Cir. 2020) (robbery under § 2111 meets the requirements of the elements clause of § 924(c)(3)(A)); *United States v. Ben*, 783 F. App'x 443, 443 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 1547 (2020) (same).

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crimes that meet the respective definitions of a "crime of violence" and a "violent felony." *See* U.S.S.G. § 4B1.2(a)(2) (now listing "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material . . . ."); 18 U.S.C. § 924(e)(2)(B)(ii) (listing crimes involving burglary, arson, extortion, or use of explosives).

## CONCLUSION

Because 18 U.S.C. § 2111 has, as an essential element, "the use, attempted use, or threatened use of physical force against the person or property of another," it is a crime of violence for purposes of § 924(c)(3)(A)'s elements clause. Harris thus has failed to establish any prejudice from the imposition of his § 924(c) sentence. Consequently, we AFFIRM the judgment of the district court denying Harris's second or successive § 2255 motion.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**PADUCAH DIVISION**
**CRIMINAL ACTION NO. 5:96-CR-24-TBR**

**GARY DUANE HARRIS** **PETITIONER**

**V.**

**UNITED STATES OF AMERICA** **RESPONDENT**

**MEMORANDUM OPINION & ORDER**

Before the Court is Petitioner Gary Duane Harris's Motion to Vacate pursuant to 28 U.S.C. § 2255. [DN 198]. Harris filed a Brief in Support of the Motion. [DN 222]. Harris claims that this Court must vacate his conviction for using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) because the conviction was rendered unconstitutional by *United States v. Davis*, 139 S.Ct. 2319 (2019). [DN 222 at 5]. The United States responded, and Harris replied. [DN 226, 227]. The Magistrate Judge issued a Findings, Conclusion, and Recommendation ("FCR"), recommending that the Court deny the motion to vacate, and that the Court deny a certificate of appealability. [DN 230]. Harris filed Objections to the FCR. [DN 235]. Harris then filed a Motion for a Hearing to Allow Counsel to Address the Court. [DN 236]. The United States responded. [DN 237]. Each of these matters is ripe for adjudication. For the reasons set forth below, Harris's motion to vacate, DN 198, is DENIED. The Magistrate Judge's FCR, DN 230, is ADOPTED IN PART and REJECTED IN PART. Harris's Motion for a Hearing to Allow Counsel to Address the Court, DN 236, is DENIED.

## I. Background

In 1996, Harris and his co-defendant shot and killed a United States soldier as they prepared to rob a convenience store located on the grounds of the United States Army base at Fort Campbell, Kentucky. *In re Harris*, No. 18-6172 (6th Cir. 2019), DN 195 at 1. As a result of this

conduct, Harris pled guilty—without a plea agreement—to aiding and abetting second-degree murder in violation of 18 U.S.C. § 1111, aiding and abetting attempted second-degree robbery in violation of 18 U.S.C. § 2111, and using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). *Id.* This Court sentenced Harris to 420 months in prison for murder, 180 months for robbery, and 60 months for using a firearm. [DN 226 at 1-2 referencing Judgment at DN 115]. This Court ordered the 420 and 180 months to run concurrently, and the 60 months to run consecutively, for a total sentence of 480 months. *Id.* The Sixth Circuit affirmed on direct appeal. *In re Harris*, No. 18-6172 (6th Cir. 2019), DN 195 at 1 (citing *United States v. Harris*, 238 F.3d 777, 779 (6th Cir. 2001)).

**II. Motion to Vacate**

In 2019, the Sixth Circuit granted Harris's motion for authorization to file the present § 2255 motion. *Id.* at 4. Harris contends in his motion and its supporting brief that his 60-month sentence on the § 924(c) conviction must be vacated because part of § 924(c) was deemed unconstitutional in *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019), and it is likely that he was sentenced under the part of the statute that is now unconstitutional. [DN 222]. The § 924(c) charge, set out in Count 3 of the superseding indictment, states that Harris and his co-defendant "did use and carry a firearm during and in relation to a crime of violence as set out in Count 1 and 2 of this Indictment." [DN 199 at 8]. As stated above, Harris pled guilty to all charges, including the § 924(c) charge, without a plea agreement. [DN 199 at 14]. However, "[t]he record is silent on whether Mr. Harris was sentenced under the residual clause of § 924(c)(3)(B) or the elements clause of § 924(c)(3)(A)." [DN 222 at 11]. Importantly, although *Davis* declared the residual clause of § 924(c) unconstitutional, it left the elements clause of § 924(c) intact. Harris argues that because it is likely that he was sentenced under the now unconstitutional residual

clause, his sentence on the § 924(c) conviction must be vacated. *Id.* The Sixth Circuit has explained the functions of the two clauses and their status after *Davis* as follows:

> Federal law creates minimum sentences for criminals who use or possess firearms "during or in relation to" or "in furtherance of" a "crime of violence." § 924(c)(1)(A). That means that conviction under § 924(c) requires not only the firearm use, but also a predicate offense that qualifies as a crime of violence. The law defines a "crime of violence" as any felony which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or a felony "that 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." § 924(c)(3). The first definition is known as the "elements clause," and the second as the "residual clause." Last year, the Supreme Court invalidated the residual clause on constitutional grounds . . . Thus, only crimes that satisfy the elements clause can be predicate offenses for a § 924(c) conviction.

*United States v. Nixon*, 825 F. App'x 360, 364 (6th Cir. 2020).

Harris argues that it is likely he was sentenced under § 924(c)'s residual clause, making his sentence under Count 3 unconstitutional. [DN 235 at 2-9]. Harris further argues that even if he was sentenced under § 924(c)'s elements clause, his sentence still must be vacated because neither of the charges in Count 1 or Count 2 constitute crimes of violence under the elements clause. *Id.* at 10-17. The government contends that Harris's 60-month sentence under § 924(c) must stand because Harris has not shown that *Davis* applies to his case, and second-degree murder and attempted robbery as set out in counts 1 and 2 of the superseding indictment are crimes of violence under the elements clause of § 924(c). [DN 226 at 12].

The Magistrate Judge concluded in the FCR that Harris's motion to vacate is without merit. [DN 230 at 12]. The Judge found that because violence is an element of at least one of the predicate offenses in Count 1 and Count 2, both of which Harris pled guilty to, Harris's conviction and sentence under § 924(c) should stand. *Id.* at 2-4. Essentially, the Judge reasoned that because Harris could properly be convicted of the § 924(c) charge since attempted second-degree robbery is a crime of violence under the elements clause, it does not matter that a

conviction under §924(c)'s residual clause would be unconstitutional; Harris would have been properly convicted and sentenced either way.

Harris filed objections to the Magistrate Judge's FCR. [DN 235]. Harris's primary objection and argument is that the Magistrate Judge wrongly ignored the possibility that Harris's §924(c) conviction and sentence were grounded in the residual clause. [DN 235 at 1-9]. In short, Harris argues that where the record is silent on whether the district court relied on the elements clause or the residual clause in imposing a sentence for a § 924(c) conviction, the court must construe the record's silence in the defendant's favor and assume that the residual clause was applied in imposing the sentence. *Id.* at 4. Moreover, Harris contends that this Court cannot uphold the § 924(c) sentence where it is more likely than not that the residual clause was relied upon in imposing the sentence, even if the elements clause would have provided a sufficient basis for the § 924(c) sentence.

Harris also objects to the Magistrate Judge's determination that the issue of whether second-degree murder under 18 U.S.C. §1111 is a crime of violence under § 924(c)(3)(A) is not of case-dispositive significance. [DN 235 at 10]. Additionally, Harris objects to the Magistrate Judge's determination that attempted second-degree robbery under 18 U.S.C. § 2111 is a crime of violence under § 924(c)(3)(A). *Id.* at 12.

**a. Standards**

"A judge of the court shall make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Grounds for a motion to vacate under § 2255 are set forth in the statute as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. 2255(a). "'To warrant relief under section 2255, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict.'" *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005) (quoting *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003)). Harris claims that this Court must vacate his conviction of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) because the conviction was rendered unconstitutional by *United States v. Davis*, 139 S.Ct. 2319 (2019). [DN 222 at 5]. *Davis* invalidated the residual clause on constitutional grounds, and the Sixth Circuit has settled that *Davis* announced a new rule of constitutional law that applies retroactively to cases on collateral review. *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2020).

**a. Discussion**

Harris contends that because the record is silent on which clause the court relied upon in imposing his § 924(c) sentence, that silence should be construed in his favor to the effect that his § 924(c) sentence is vacated. [DN 235 at 4]. As explained above, the Magistrate Judge concluded that the record's silence regarding which clause the court relied on at sentencing is effectively irrelevant, because even if the court did rely on the residual clause, it could have properly sentenced Harris on the § 924(c) charge by relying on the elements clause.

Harris relies in large part on *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019), to argue that if he can "'show that it is more likely than not that the district court relied only on the residual clause in sentencing him,'" his § 924(c) sentence must be vacated. [DN 235 at 5

(quoting *Williams*, 927 F.3d at 439)]. Harris goes on to argue that he satisfies this standard because he can show that *it is more likely than not* that the district court relied only on the residual clause of § 924(c) at sentencing. *Id.* at 5-9. However, Harris's argument fails.

Harris's contention that his *Davis* claim turns on whether it is more likely than not that the district court relied on the residual clause in sentencing him invokes a misinterpretation of *Williams*. In the part of the *Williams* opinion that Harris relies on, the court was considering whether Williams was entitled to raise a second or successive motion under § 2255 in the first place, not whether a motion to vacate should prevail. 927 F.3d at 439. And, indeed, whether Williams could raise a second § 2255 motion depended on whether he could show "that it [was] more likely than not 'that the district court relied only on the residual clause in sentencing' him." *Id.* (quoting *Raines v. United States*, 898 F.3d 680, 685 (6th Cir. 2018)). Although the court found that Williams was entitled bring a second § 2255 motion, it still had to answer the question of whether Williams's predicate offense qualified under the ACCA's elements clause before deciding if the § 924(e) sentence should be vacated. *Id.* at 445 ("Williams's conviction under Ohio Rev. Code § 2903.11(A) can no longer qualify as an ACCA predicate under the residual clause . . . The only question left is whether it can nevertheless qualify as an ACCA predicate under the elements clause."). Thus, Harris's belief that his motion to vacate should prevail if he can show it is more likely than not that the district court relied only on the residual clause in sentencing him is incorrect.[1]

[1] Even if Harris were correct in contending that the question this Court must ask and answer at this stage is whether it is more likely than not that the district court relied solely on the residual clause at sentencing, the Sixth Circuit has not applied that standard outside of the § 924(e) residual clause context. The Court here is considering a § 2255 motion related to the residual clause of § 924(c), not the residual clause of § 924(e). While the residual clauses of § 924(c) and § 924(e) are largely similar, it appears that the Sixth Circuit has not extended the "more likely than not" standard to challenges based on § 924(c)'s residual clause.

Contrary to Harris's position, the Sixth Circuit cases to date apply the same approach used by the Magistrate Judge in the FRC: as long as the elements clause would have supported the § 924(c) sentence in theory, it is irrelevant that the sentencing court may have relied on the residual clause to support the § 924(c) sentence in fact. *See Alvarez v. United States*, No. 20-3597, 2020 WL 7232200, at *2 (6th Cir. Nov. 23, 2020) (holding that defendant's § 924(c) conviction was "unaffected by *Davis*'s invalidation of § 924(c)(3)(B)" where the predicate offense constituted a crime of violence under the elements clause); *see also Overton v. United States*, No. 19-3407, 2019 WL 5606089, at *2 (6th Cir. Sep. 26, 2019) (holding that defendant's predicate offense qualified "as a crime of violence under § 924(c)'s elements clause . . . [and thus] *Davis*, which invalidated only the residual clause, provides no relief"); *see also Porter v. United States*, 959 F.3d 800, 801-02 (6th Cir. 2020) (finding that, in a defendant's post-*Davis* challenge to conviction under § 924(c), the question for the court is whether the conviction still qualifies as a crime of violence based solely on the elements clause). Put differently, the fact that a sentencing court could have properly relied upon the elements clause in imposing the § 924(c) sentence precludes relief under *Davis*. Accordingly, Harris's objection to the Magistrate Judge's denial of his § 2255 motion must be overruled. The Magistrate Judge was not incorrect in relying on the sufficiency of the elements clause to uphold the § 924(c) sentence.

Harris also objects to the Magistrate Judge's determination that the issue of whether second-degree murder under 18 U.S.C. §1111 is a crime of violence under § 924(c)(3)(A) is not of case-dispositive significance. [DN 235 at 10]. Harris further objects to the Magistrate Judge's determination that attempted second-degree robbery under 18 U.S.C. § 2111 is a crime of violence under § 924(c)(3)(A). *Id.* at 12. We consider these objections in reverse order, and for the reasons that follow, these objections are also overruled.

The Magistrate Judge concluded that second-degree robbery in violation of 18 U.S.C. § 2111 is a crime of violence, and "[t]o the extent second-degree robbery is a 'crime of violence' as defined by § 924(c)(3)(A), so is attempted second-degree robbery." [DN 230 at 3 (citing § 924(c)(3)(A))]. Harris objects to this conclusion, arguing that "[a]ttempted robbery is not a [crime of violence] . . . attempted robbery can be committed by non-violent conduct that places the offense outside of §924(c)(3)(A)'s definition of a COV." [DN 235 at 12]. Though Harris does not concede that second-degree robbery in violation of 18 U.S.C. § 2111 is a crime of violence under § 924(c)'s elements clause, he does not argue that point in his objections. Instead, Harris argues that *attempted* second-degree robbery does not involve a crime of violence as required for conviction under § 924(c)(3)(A) because criminal liability for attempted second-degree robbery attaches at the point of a "substantial step" toward committing second-degree robbery, and a substantial step will not always involve "the use, attempted use, or threatened use of physical force against the person or property of another." [DN 235 at 14 (citing § 924(c)(3)(A))]. As did the Magistrate Judge, this Court disagrees with Harris's interpretation of § 924(c)(3)(A). At the point that liability for *attempted* second-degree robbery attaches, the "attempted use . . . of physical force" has occurred such that the elements clause of § 924(c) is satisfied. It does not matter that the defendant's substantial step toward committing the robbery may not involve an act of force, violence, or intimidation, because he still attempted the use of such force as contemplated by § 924(c). The Court finds that the Magistrate Judge reached the correct legal conclusion on this issue as well. Harris's objection is overruled.

Harris also objects to the Magistrate Judge's determination that the issue of whether second-degree murder under 18 U.S.C. §1111 is a crime of violence under § 924(c)(3)(A) is not of case-dispositive significance. [DN 235 at 10]. Again here, the Court agrees with the

Magistrate Judge's conclusion in the FRC. Only one of Harris's predicate crimes must be a crime of violence for proper conviction and sentencing under the elements clause of § 924(c). Because attempted second-degree robbery in violation of 18 U.S.C. § 2111 is a crime of violence, Harris could properly be sentenced under the elements clause of § 924(c), and it does not matter in this case whether second-degree murder under 18 U.S.C. §1111 is a crime of violence. The Magistrate Judge was correct in concluding that the issue of whether second-degree murder under 18 U.S.C. § 1111 is a crime of violence under § 924(c)(3)(A) is not of case-dispositive significance. Harris's objection to this finding is overruled.

**III. Certificate of Appealability**

In the event Harris appeals this Court's decision, he is required to obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b). A district court must issue or deny a certificate of appealability and can do so even though the movant has yet to make a request for such a certificate. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002).

> A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

*Neil v. Forshey*, No. 20-3491, 2020 WL 6498732, at *2 (6th Cir. Oct. 30, 2020). "To make this showing on claims resolved on the merits, [the petitioner] must demonstrate that jurists of reason would find the district court's assessment of his claims debatable." *Oden v. Turner*, No. 20-3131, 2020 WL 4493255, at *2 (6th Cir. July 7, 2020).

The Magistrate Judge recommended that this Court deny Harris a certificate of appealability on the grounds that reasonable jurists would not debate that Harris's claim is without merit. [DN 230 at 4]. Harris objects to the Magistrate Judge's recommendation for denial

of the certificate of appealability, arguing (1) that his case presents issues of first impression, (2) that the Magistrate Judge failed to address the issue of whether Mr. Harris could have been sentenced under the residual clause, and (3) that second degree murder and attempted robberies are not crimes of violence. [DN 235 at 17-23]. As to the certificate of appealability, Harris's objection is sustained, and the Court rejects the Magistrate Judge's recommendation to deny a certificate of appealability.

Few of the issues Harris raised in his motion, brief, and objections are governed by well-settled law in the Sixth Circuit. This is particularly true of whether Harris's predicate offenses constitute crimes of violence under § 924(c)'s elements clause. As observed by the Sixth Circuit in its opinion granting Harris leave to file a second § 2255 motion, there is no "binding Sixth Circuit precedent that definitively establishes that either 18 U.S.C. §§ 1111 or 2111 is a categorical crime of violence under the elements clause." [DN 195 at 4]. Although the law is clearer as regards analysis of a motion to vacate a § 924(c) sentence after *Davis*, room for clarity remains on that issue as well. The Court believes reasonable jurists can disagree on these matters. As such, Harris's objection is sustained. This Court grants a certificate of appealability on the issues of (1) the standard for granting a motion to vacate a sentence based on § 924(c) where the record is silent but it is possible or likely that the district court relied on the residual clause at sentencing, and (2) whether either of Harris's predicate offenses under 18 U.S.C. §§ 1111 or 2111 is a categorical crime of violence under the elements clause of § 924(c).

**IV. Motion for a Hearing to Allow Counsel to Address the Court**

Harris has moved for a hearing to allow counsel to address the Court pursuant to 28 U.S.C. § 2255(b). [DN 236]. The statute provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the

> United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255(b). However, Harris goes on to state that "Petitioner is not seeking an evidentiary hearing. Counsel merely requests an opportunity to be heard and address the Court on the merits of the issues presented by the §2255 motion." [DN 236 at 2 (emphasis in original)]. Thus, Harris concedes that that the hearing he requests is not the kind of evidentiary hearing contemplated by § 2255(b). *See, e.g.*, *Monea v. United States*, 914 F.3d 414, 422 (6th Cir. 2019) ("[T]he evidence in the record 'conclusively shows' that Monea is not entitled to relief, and an evidentiary hearing is therefore not necessary. 28 U.S.C. § 2255(b)."). As the government also points out, "Harris asks the Court to allow a hearing—essentially oral argument—on his second or successive 28 U.S.C. § 2255 motion . . . [and] the Court has broad discretion in conducting its de novo review of the magistrate judge's report . . . to hold an oral argument on Harris's objections." [DN 237 at 1 (citing *United States v. Raddatz*, 447 U.S. 667, 675-77 (1980))].

The issues Harris has raised are issues of law. As such, an evidentiary hearing under 28 U.S.C. § 2255(b) is unnecessary. *United States v. Rogers*, NO. 3:05-CR-58-TBR-CHL, 2018 WL 1917177, at *3 (6th Cir. Feb. 2, 2018) (citing *Ray v. United States*, 721 F.3d 758, 761 (6th Cir. 2013) ("[A]n evidentiary hearing is unnecessary because there is no factual dispute.")). As this Court stated in *Borden v. United States*, NO. 1:18-CV-00138-GNS, NO. 1:15-CR-00004-GNS-HBB-1, 2019 WL 5063830, at *5 (W.D. Ky. Oct. 9, 2019), "[Petitioner] has provided no explanation whatsoever in his motions for what additional information this Court could glean by holding a hearing on this matter." The Court agrees with the government in its statement that

"[t]he parties have thoroughly briefed the issues, and . . . [o]ral argument would add nothing that the Court would need to resolve the purely legal issues Harris's § 2255 motion raises." [DN 237 at 2]. Accordingly, Harris's motion for a hearing to allow counsel to address the court, DN 236, is DENIED.

**V. Conclusion**

For the reasons discussed herein, IT IS HEREBY ORDERED:

(1) Harris's motion to vacate, DN 198, is DENIED.

(2) The Magistrate Judge's Findings, Conclusion, and Recommendation, DN 230, is ADOPTED IN PART and REJECTED IN PART.

(3) Harris's Motion for a Hearing to Allow Counsel to Address the Court, DN 236, is DENIED.

(4) A Certificate of Appealability is GRANTED as to the motion to vacate, as detailed above.

Thomas B. Russell

**Thomas B. Russell, Senior Judge**
**United States District Court**

December 30, 2020

cc: counsel

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**PADUCAH DIVISION**
**CRIMINAL ACTION NO. 5:96-CR-00024-TBR-LLK-2**

**GARY DUANE HARRIS** **MOVANT/DEFENDANT**

**v.**

**UNITED STATES OF AMERICA** **RESPONDENT/PLAINTIFF**

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION**

This matter is before the Court on Movant's motion to vacate under 28 U.S.C. § 2255 and supporting brief, to which the United States responded in opposition, and Movant replied. [DN 198, 222, 226, 227.] The Court referred the case to the undersigned Magistrate Judge "pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matter." [DN 228.]

Western Kentucky Federal Community Defender Scott T. Wendelsdorf represents Movant. Movant claims that this Court must vacate his conviction of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) because the conviction was rendered unconstitutional by *United States v. Davis*, 139 S.Ct. 2319 (2019). [DN 222 at 5.] Because the claim is without merit, the RECOMMENDATION will be that the Court DENY Movant's § 2255 motion. [DN 198.]

**Procedural History**

In 1996, Movant and his co-defendant shot and killed a United States soldier as they prepared to rob a convenience store located on the grounds of the United States Army base at Fort Campbell, Kentucky. *In re Harris*, No. 18-6172 (6th Cir. 2019), DN 195 at 1. As a result of this conduct, Movant pled guilty to aiding and abetting second-degree murder in violation of 18 U.S.C. § 1111, aiding and abetting attempted second-degree robbery in violation of 18 U.S.C. § 2111, and using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). *Id.* This Court sentenced Movant to 420 months in prison for murder, 180 months for robbery, and 60 months for using a firearm. [DN 226 at 1-2 referencing Judgment

at DN 115.] This Court ordered the 420 and 180 months to run concurrently, and the 60 months to run consecutively, for a total sentence of 480 months. *Id.* The Sixth Circuit affirmed on direct appeal. *Id.* (citing *United States v. Harris*, 238 F.3d 777, 779 (6th Cir. 2001)).

In 2004, the Sixth Circuit affirmed this Court's denial of Movant's first § 2255 motion. *Id.* (citing *Harris v. United States*, No. 04-5196 (6th Cir. 2004)). In 2016, the Sixth Circuit denied Movant's motion for authorization to file a second or successive § 2255 motion. *Id.* (citing *In re Harris*, No. 16-5469 (6th Cir. 2016)). In 2019, the Sixth Circuit granted Movant's motion for authorization to file the present § 2255 motion. *Id.* at 4.

**Discussion**

Movant claims that this Court must vacate his conviction of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) because the conviction was rendered unconstitutional by *United States v. Davis*, 139 S.Ct. 2319 (2019). [DN 222 at 5.]

Under § 924(c), defendants face an additional sentence for using a firearm during a "crime of violence." *United States v. Bricker*, No. 1:05-CR-113, 2020 WL 377820, at *3 (N.D. Ohio Jan. 22, 2020). Prior to *Davis*, a "crime of violence" was defined two distinct ways. *Id.* First, the "elements" clause defines a "crime of violence" as a crime in which violence is an element of the offense. *Id.* (citing § 924(c)(3)(A)). A "crime of violence" was also defined as a crime that, by its nature, involves a substantial risk of use of physical force. *Id.* (citing § 924(c)(3)(B)). *Davis* invalidated § 924(c)(3)(B) as unconstitutionally vague. *Id.* Therefore, for purposes of § 924(c), the sole definition of a "crime of violence" after *Davis* is a crime in which violence is an element of the offense. *Id.*

*Davis* may indeed apply to second-degree murder in violation of 18 U.S.C. § 1111 because violence is not an element of the offense.[1] However, as noted above, Movant also pled guilty to attempted second-

[1] This report declines to speculate on the question of how the Sixth Circuit might weigh in on the current controversy of whether § 1111 is a "crime of violence" as defined by § 924(c)(3)(A). *Compare United States v. Begay*, 934 F.3d 1033, 1038 (9th Cir. 2019) ("Second-degree murder does not constitute a crime of violence under

degree robbery in violation of 18 U.S.C. § 2111. To the extent second-degree robbery is a "crime of violence" as defined by § 924(c)(3)(A), so is attempted second-degree robbery. *See* § 924(c)(3)(A) ("For purposes of this subsection the term 'crime of violence' means an offense that is a felony and ... has as an element the use, **attempted** *(emphasis added)* use, or threatened use of physical force against the person or property of another.").

Every court to consider the matter that the undersigned has discovered has concluded that second-degree robbery in violation of § 2111 is a "crime of violence." *See United States v. Shirley*, No. 18-2071, 2020 WL 1845275, at *4 (10th Cir. 2020) ("Shirley's underlying offense, § 2111 Robbery, meets the requirements of the elements clause of § 924(c)(3)(A)."); *United States v. Fultz*, 923 F.3d 1192, 1197 (9th Cir. 2019) ("Robbery in violation of 18 U.S.C. § 2111 is a 'crime of violence' under the elements clause of § 924(c)(3)(A)."); *United States v. Ben*, 783 F. App'x 443 (5th Cir. 2019) (rejecting Ben's argument that "his conviction should be vacated because the predicate crime of robbery, 18 U.S.C. § 2111, is no longer 'a crime of violence' under § 924(c)(1)"); *Roberts v. United States*, No. 5:09-CR-324-FL-1, 2020 WL 838243, at *2 (E.D.N.C. Feb. 19, 2020) ("The predicate offense underlying [Roberts'] § 924(c) conviction is robbery within a special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. § 2111. ... [Roberts'] predicate offense is a crime of violence under § 924(c)(3)'s force clause and he is not entitled to habeas relief.")

In the present case, as in *Bricker*, "because violence is an element of at least one of the predicate crimes contained in the § 924(c) count, [in this case, attempted second-degree robbery], *Davis* does not

---

the elements clause – 18 U.S.C. § 924(c)(3)(A) – because it can be committed recklessly" as opposed to intentionally.); *Thompson v. United States*, 924 F.3d 1153, 1159 (11th Cir. 2019) ("[S]econd-degree murder under § 1111(a) categorically qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause.").

While the parties devote a great deal of attention to this controversy [DN 222, 226, 227], it is not of case-dispositive significance. Additionally, the Supreme Court will likely soon decide the matter. In *Begay*, the Ninth Circuit is holding rehearing in abeyance pending the Supreme Court's decision in *United States v. Walker* (U.S. No. 19-373; cert. granted November 15, 2019). 2019 WL 7900329, at *1. In *Thompson*, as of April 10, 2020, the petition for writ of certiorari is ripe for ruling. U.S. No. 19-7217.

apply and the § 924(c) conviction remains undisturbed." *Bricker*, 2020 WL 377820, at *3; *see also Moore v. United States*, No. 3:13-CR-00173-MOC-1, 2020 WL 597430, at *4 (W.D.N.C. Feb. 6, 2020) ("Because [Moore] plainly pleaded guilty to § 924(c) based on both conspiracy to commit armed bank robbery and substantive armed bank robbery, the Court must address whether at least one of these predicates is a crime of violence for § 924(c) purposes.").[2]

**The Court should deny Movant a certificate of appealability.**

In the event Movant appeals this Court's decision, he is required to obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b). A district court must issue or deny a certificate of appealability and can do so even though the movant has yet to make a request for such a certificate. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002). A certificate of appealability may only be issued if the movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). For claims rejected on the merits, this means that the movant must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Movant claims that this Court must vacate his conviction of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) because the conviction was rendered unconstitutional by *United States v. Davis*, 139 S.Ct. 2319 (2019). [DN 222 at 5.] The undersigned is satisfied reasonable jurists would not debate that this claim is without merit. Therefore, the Court should deny Movant a certificate of appealability.

[2] To the extent Movant's position is that he is entitled to relief because the United States has failed to prove that he pled guilty to § 924(c) based on **both** second-degree murder and attempted second-degree robbery, "[n]ot only would [Movant's] approach flip the normal burdens in cases seeking collateral relief, it also would create strange incentives." *Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 2018).

**RECOMMENDATION**

For the foregoing reasons, the Magistrate Judge RECOMMENDS that the Court DENY Movant's motion to vacate under 28 U.S.C. § 2255 [DN 198] and DENY a certificate of appealability.

April 23, 2020

**Lanny King, Magistrate Judge**
**United States District Court**

**NOTICE**

Therefore, under the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and FED. R. CIV. P. 72(b) and FED. R. CRIM. P. 59(b)(2), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 474 U.S. 140, 147 (1985).

April 23, 2020

**Lanny King, Magistrate Judge**
**United States District Court**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**PADUCAH DIVISION**
**CRIMINAL ACTION NO. 5:96-CR-00024-TBR-LLK-2**

**GARY DUANE HARRIS** **MOVANT/DEFENDANT**

**v.**

**UNITED STATES OF AMERICA** **RESPONDENT/PLAINTIFF**

**ORDER**

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, objections having been filed thereto, and the Court having considered the same,

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Movant/Defendant's motion to vacate under 28 U.S.C. § 2255 (Docket # 198) IS DENIED.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED as to each claim asserted in the motion to vacate.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**PADUCAH DIVISION**
**CRIMINAL ACTION NO. 5:96-CR-00024-TBR-LLK-2**

**GARY DUANE HARRIS** **MOVANT/DEFENDANT**

**v.**

**UNITED STATES OF AMERICA** **RESPONDENT/PLAINTIFF**

**ORDER**

The above matter having been referred to the United States Magistrate Judge, who has filed his Findings of Fact and Conclusions of Law, no objections having been filed thereto, and the Court having considered the same,

IT IS HEREBY ORDERED that the Court adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS FURTHER ORDERED that Movant/Defendant's motion to vacate under 28 U.S.C. § 2255 (Docket # 198) IS DENIED.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED as to each claim asserted in the motion to vacate.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**PADUCAH DIVISION**
**CRIMINAL ACTION NO. 5:96-CR-00024-TBR-LLK-2**

**GARY DUANE HARRIS** **MOVANT/DEFENDANT**

**v.**

**UNITED STATES OF AMERICA** **RESPONDENT/PLAINTIFF**

**JUDGMENT**

In accordance with the Order of the Court, it is hereby ORDERED AND ADJUDGED as follows:

(1) The motion to vacate, set aside or correct sentence (Docket # 198) is DISMISSED with prejudice, and judgment is entered in favor of Respondent/Plaintiff.

(2) A Certificate of Appealability is DENIED as to each claim asserted in the motion to vacate; and

(3) This is a FINAL judgment, and the matter is STRICKEN from the active docket of the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

UNITED STATES OF AMERICA — PLAINTIFF

VS. — CRIMINAL ACTION NO.: 5:96CR-24-J

ANTHONY CHARLES GAINES, JR. -01
GARY DUANE HARRIS -02 — DEFENDANTS

# ORDER

This matter was called for jury trial on October 19, 1998.

APPEARANCES:

| | |
|---|---|
| For the United States: | Mr. A. Duane Schwartz, Assistant United States Attorney<br>Mr. David J. Hale, Assistant United States Attorney |
| For Defendant Gaines: | Mr. Len W. Ogden, Court-Appointed Counsel<br>Ms. Jill L. Giordano, Court-Appointed Counsel |
| For Defendant Harris: | Mr. Scott T. Wendelsdorf, Federal Public Defender |
| Court Reporter: | Mr. Jerome F. Roppel, Jr. |

A jury was selected and sworn to try the case. Thereafter, the jury was permitted to recess to the jury room, at which time counsel for the defendants informed the Court that the defendants desired to change their pleas from not guilty to guilty.

The defendants, ANTHONY CHARLES GAINES and GARY DUANE HARRIS, withdrew their previously-entered pleas of NOT GUILTY and entered pleas of GUILTY to the charges contained in the Indictment without a plea agreement.

After complying with Rule 11, Federal Rules of Criminal Procedure, as is disclosed by the records of the official court reporter, the Court accepted the defendants' pleas of guilty.

**IT IS ORDERED:**

1) Sentencing proceedings will be conducted on **January 19, 1999 at 1:15 p.m.**, prevailing local time.

2) The probation officer, defendant and counsel shall promptly confer and establish a plan for compliance with Rule 32(c) of the Federal Rules of Criminal Procedure. In the event they fail to promptly agree on a plan, they shall immediately initiate a joint telephone conference with the Court to resolve their disagreement.

3) The jury in this matter shall remain impaneled until further order of the Court.

4) The defendants are remanded to the custody of the United States Marshal pending sentencing.

This 22nd day of October 1998.

EDWARD H. JOHNSTONE, SENIOR JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel
U. S. Attorney
U. S. Marshal
U. S. Probation

ENTERED
OCT 23
JEFFREY A. ATHERTON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'96 DEC -4 P1:22

UNITED STATES OF AMERICA

SUPERSEDING INDICTMENT

NO. 5:96CR-24-J

18 U.S.C. 2
18 U.S.C. 924(c)
18 U.S.C. 1111
18 U.S.C. 2111

vs.

ANTHONY CHARLES GAINES, JR.
GARY DUANE HARRIS

US DISTRICT COURT FILED '96 DEC -4 P1:21
WESTN. DIST. KENTUCKY

The Grand Jury charges:

COUNT 1

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants **ANTHONY CHARLES GAINES, JR.** and **GARY DUANE HARRIS**, each aided and abetted by the other, did, with malice aforethought, unlawfully kill a human being.

In violation of Title 18, United States Code, Sections 2 and 1111.

The Grand Jury further charges:

COUNT 2

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants **ANTHONY CHARLES GAINES, JR.** and **GARY DUANE HARRIS**, each

aided and abetted by the other, did attempt to take a thing of value from the person of another by force and violence, and by intimidation.

In violation of Title 18, United States Code, Sections 2 and 2111.

The Grand Jury further charges:

COUNT 3

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants **ANTHONY CHARLES GAINES, JR.** and **GARY DUANE HARRIS**, each aided and abetted by the other, did use and carry a firearm during and in relation to a crime of violence as set out in Count 1 and 2 of this Indictment.

In violation of Title 18, United States Code, Sections 2 and 924(c).

A TRUE BILL.

[redacted]
FOREPERSON

MICHAEL TROOP
UNITED STATES ATTORNEY

MT:ADS:JTC:mla:961202

UNITED STATES OF AMERICA V. ANTHONY CHARLES GAINES, JR.
GARY DUANE HARRIS

## PENALTIES

Count 1: NM LIFE/$250,000/both/NM 5 yrs. Supervised Release
Count 2: NM 15 yrs/$250,000/both/NM 5 yrs. Supervised Release
Count 3: 5 yrs consecutive/$250,000/both/NM 3 yrs. Supervised Release

## NOTICE

**ANY PERSON CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES SHALL BE SUBJECT TO SPECIAL ASSESSMENTS, FINES, RESTITUTION & COSTS.**

### SPECIAL ASSESSMENTS

18 U.S.C. § 3013 requires that a special assessment shall be imposed for each count of a conviction of offenses committed after November 11, 1984, as follows:

| | | | |
|---|---|---|---|
| Misdemeanor: | $ 25 per count/individual<br>$125 per count/other | Felony: | $100 per count/individual<br>$400 per count/other |

### FINES

In addition to any of the above assessments, you may also be sentenced to pay a fine. Such fine is due immediately unless the court issues an order requiring payment by a date certain or sets out an installment schedule. You shall provide the United States Attorney's Office with a current mailing address for the entire period that any part of the fine remains unpaid, or you may be held in contempt of court. 18 U.S.C. § 3571, 3572, 3611, 3612

**Failure to pay fine as ordered may subject you to the following:**

1. **INTEREST** and **PENALTIES** as applicable by law according to last date of offense.

   For offenses occurring after December 12, 1987:

   No **INTEREST** will accrue on fines under $2,500.00.

   **INTEREST** will accrue according to the Federal Civil Post-Judgment Interest Rate in effect at the time of sentencing. This rate changes monthly. Interest accrues from the first business day following the two week period after the date a fine is imposed.

   **PENALTIES** of:

   10% of fine balance if payment more than 30 days late.

   15% of fine balance if payment more than 90 days late.

2. Recordation of a **LIEN** shall have the same force and effect as a tax lien.

3. Continuous **GARNISHMENT** may apply until your fine is paid.

18 U.S.C. §§ 3612, 3613

If you **WILLFULLY** refuse to pay your fine, you shall be subject to an **ADDITIONAL FINE** of not more than the greater of $10,000 or twice the unpaid balance of the fine; or **IMPRISONMENT** for not more than 1 year or both. 18 U.S.C. § 3615

### RESTITUTION

If you are convicted of an offense under Title 18, U.S.C., or under certain air piracy offenses, you may also be ordered to make restitution to any victim of the offense, in addition to, or in lieu of any other penalty authorized by law. 18 U.S.C. § 3663

APPEAL

If you appeal your conviction and the sentence to pay your fine is stayed pending appeal, the court shall require:

1. That you deposit the entire fine amount (or the amount due under an installment schedule during the time of your appeal) in an escrow account with the U.S. District Court Clerk, or

2. Give bond for payment thereof.

18 U.S.C. § 3572(g)

PAYMENTS

If you are ordered to make payments to the U.S. District Court Clerk's Office, certified checks or money orders should be made payable to the Clerk, U.S. District Court and delivered to the appropriate division office listed below:

LOUISVILLE:
Clerk, U.S. District Court
450 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202
502/582-5156

BOWLING GREEN:
Clerk, U.S. District Court
120 Federal Building
241 East Main Street
Bowling Green, KY 42101
502/781-1110

OWENSBORO:
Clerk, U.S. District Court
210 Federal Building
423 Frederica
Owensboro, KY 42301
502/683-0221

PADUCAH:
Clerk, U.S. District Court
322 Federal Building
501 Broadway
Paducah, KY 42001
502/443-1337

If the court finds that you have the present ability to pay, an order may direct imprisonment until payment is made.

FORM OBD-34
APR. 91

No. 5:96CR-24-J

# UNITED STATES DISTRICT COURT

*Western* District of *Kentucky*

*Paducah* Division

THE UNITED STATES OF AMERICA

*vs.*

*Anthony Charles Gaines, Jr.*

*Gary Duane Harris*

## SUPERSEDING INDICTMENT

*Title 18, U.S.C. §§ 2, 1111, 2111 & 924(c); Aiding & Abetting; Murder; Theft by Force Within the Special Maritime & Territorial Jurisdiction of the United States; & Use of Firearm During Crime of Violence*

*A true bill.*

[redacted]

*Foreman*

*Filed in open court this* _____ *day,*

*of* _____ *A.D. 19* _____

*Clerk*

*Bail, $* _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH



UNITED STATES OF AMERICA

INFORMATION

NO. 5:96CR-24-J

18 U.S.C. 2
18 U.S.C. 924(c)
18 U.S.C. 1111
18 U.S.C. 2111

vs.

JUVENILE MALE (ACG)
JUVENILE MALE (GDH)

The United States Attorney charges:

COUNT 1

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants ACG and GDH, each aided and abetted by the other, did, with malice aforethought, unlawfully kill a human being.

In violation of Title 18, United States Code, Sections 2 and 1111.

The United States Attorney further charges:

COUNT 2

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants ACG and GDH, each aided and abetted by the other, did

attempt to take a thing of value from the person of another by force and violence, or by intimidation.

In violation of Title 18, United States Code, Sections 2 and 2111.

The United States Attorney further charges:

COUNT 3

On or about the 1st of April, 1996, in the Western District of Kentucky, at Fort Campbell, Christian County, Kentucky, within the special maritime and territorial jurisdiction of the United States, defendants ACG and GDH did use or carry a firearm during and in relation to a crime of violence for which they may be prosecuted in a court of the United States.

In violation of Title 18, United States Code, Section 924(c).

MICHAEL TROOP
UNITED STATES ATTORNEY

MT:ADS:JTC:mla:961104

UNITED STATES OF AMERICA V. JUVENILE MALE (ACG)
JUVENILE MALE (GDH)

## P E N A L T I E S

Count 1: NM LIFE/$250,000/both/NM 5 yrs. Supervised Release
Count 2: NM 15 yrs/$250,000/both/NM 5 yrs. Supervised Release
Count 3: NL 5 yrs/$250,000/both/NM 3 yrs. Supervised Release

## N O T I C E

**ANY PERSON CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES SHALL BE SUBJECT TO SPECIAL ASSESSMENTS, FINES, RESTITUTION & COSTS.**

SPECIAL ASSESSMENTS

18 U.S.C. § 3013 requires that a special assessment shall be imposed for each count of a conviction of offenses committed after November 11, 1984, as follows:

| | | | |
|---|---|---|---|
| Misdemeanor: | $ 25 per count/individual<br>$125 per count/other | Felony: | $100 per count/individual<br>$400 per count/other |

FINES

In addition to any of the above assessments, you may also be sentenced to pay a fine. Such fine is due immediately unless the court issues an order requiring payment by a date certain or sets out an installment schedule. You shall provide the United States Attorney's Office with a current mailing address for the entire period that any part of the fine remains unpaid, or you may be held in contempt of court. 18 U.S.C. § 3571, 3572, 3611, 3612

**Failure to pay fine as ordered may subject you to the following:**

1. **INTEREST** and **PENALTIES** as applicable by law according to last date of offense.

   For offenses occurring after December 12, 1987:

   No **INTEREST** will accrue on fines under $2,500.00.

   **INTEREST** will accrue according to the Federal Civil Post-Judgment Interest Rate in effect at the time of sentencing. This rate changes monthly. Interest accrues from the first business day following the two week period after the date a fine is imposed.

   **PENALTIES** of:

   10% of fine balance if payment more than 30 days late.

   15% of fine balance if payment more than 90 days late.

2. Recordation of a **LIEN** shall have the same force and effect as a tax lien.

3. Continuous **GARNISHMENT** may apply until your fine is paid.

18 U.S.C. §§ 3612, 3613

If you **WILLFULLY** refuse to pay your fine, you shall be subject to an **ADDITIONAL FINE** of not more than the greater of $10,000 or twice the unpaid balance of the fine; or **IMPRISONMENT** for not more than 1 year or both. 18 U.S.C. § 3615

RESTITUTION

If you are convicted of an offense under Title 18, U.S.C., or under certain air piracy offenses, you may also be ordered to make restitution to any victim of the offense, in addition to, or in lieu of any other penalty authorized by law. 18 U.S.C. § 3663

APPEAL

If you appeal your conviction and the sentence to pay your fine is stayed pending appeal, the court shall require:

1. That you deposit the entire fine amount (or the amount due under an installment schedule during the time of your appeal) in an escrow account with the U.S. District Court Clerk, or

2. Give bond for payment thereof.

18 U.S.C. § 3572(g)

PAYMENTS

If you are ordered to make payments to the U.S. District Court Clerk's Office, certified checks or money orders should be made payable to the Clerk, U.S. District Court and delivered to the appropriate division office listed below:

LOUISVILLE:
Clerk, U.S. District Court
450 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202
502/582-5156

BOWLING GREEN:
Clerk, U.S. District Court
120 Federal Building
241 East Main Street
Bowling Green, KY 42101
502/781-1110

OWENSBORO:
Clerk, U.S. District Court
210 Federal Building
423 Frederica
Owensboro, KY 42301
502/683-0221

PADUCAH:
Clerk, U.S. District Court
322 Federal Building
501 Broadway
Paducah, KY 42001
502/443-1337

If the court finds that you have the present ability to pay, an order may direct imprisonment until payment is made.

# United States District Court

## Western District of Kentucky

PADUCAH DIVISION

UNITED STATES OF AMERICA
V.
GARY DUANE HARRIS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 5:96CR24-2-J

Counsel For Defendant: Scott T. Wendelsdorf, Federal Public Defender
Counsel For The United States: A. Duane Schwartz & David J. Hale, Asst. U.S. Attys.
Court Reporter: Mr. Jerome F. Roppel, Jr.

THE DEFENDANT:

[X] pleaded guilty to counts 1, 2 and 3 of the Superseding Indictment on October 19, 1998 without a plea agreement.

[ ] pleaded nolo contendere to count(s) which was accepted by the court.

[ ] was found guilty on count(s) after a plea of not guilty

| Title & Section Number(s) | Nature of Offense | Date Offense Concluded | Count |
|---|---|---|---|
| 18 U.S.C. 1111 and 2 | Murder, Second Degree, Aiding and Abetting | 04/01/1996 | 1 |
| 18 U.S.C. 2111 and 2 | Robbery Within a Special Maritime and Territorial Jurisdiction, Aiding and Abetting | 04/01/1996 | 2 |
| 18 U.S.C. 924(c) and 2 | Use of a Firearm During a Crime of Violence, Aiding and Abetting | 04/01/1996 | 3 |

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

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: [redacted]
Defendant's Date of Birth: [redacted]
Defendant's USM Number: [redacted]

Defendant's Residence Address:
[redacted]

Defendant's Mailing Address:
[redacted]

6-4-99
Date of Imposition of Judgment

Signature of Judicial Officer

ENTERED
JUN 10 1999
JEFFREY APPERSON, CLERK
BY [signature] DEPUTY CLERK

Date: 6/10/99

DEFENDANT: HARRIS, GARY DUANE
CASE NUMBER: 5:96CR24-2-J

# IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 420 months as to Count 1 of the Indictment and 180 months as to Count 2 of the Indictment. Said terms of imprisonment shall be served concurrently, for a term of imprisonment of 420 months. IT IS FURTHER ORDERED that the defendant is hereby committed to the custody of the United States Bureau of Prisons for a term of 60 months as to Count 3 of the Indictment, which shall be served consecutively to the sentence imposed as to Counts 1 and 2 of the Indictment, for a total term of imprisonment of 480 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

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

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

- ☐ at a.m. / p.m. on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall continue under the terms and conditions of his / her present bond pending surrender to the institution.

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

- ☐ before 2:00 p.m. on the date indicated as notified by the United States Marshal.
- ☐ before 2:00 p.m. on
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.
- ☐ The defendant shall continue under the terms and conditions of his / her present bond pending surrender to the institution.

# RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: HARRIS, GARY DUANE
CASE NUMBER: 5:96CR24-2-J

# SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years as to Count 1 of the Indictment and three years as to Counts 2 and 3 of the Indictment. Said terms shall run concurrently, for a total term of supervised release of five years.

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

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

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ **The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

☐ The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: HARRIS, GARY DUANE
CASE NUMBER: 5:96CR24-2-J

# CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals: | $150.00 | $ | $ |

☐ If applicable, restitution amount ordered pursuant to plea agreement ..... $

## FINE

☒ The fine and the costs of incarceration and supervision are waived because the defendant does not have the ability to pay.

The above fine includes costs of incarceration and/or supervision in the amount of $

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

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

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

## RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until . An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | ** Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| | | | |
| Totals: | $ | $ | |

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: HARRIS, GARY DUANE
CASE NUMBER: 5:96CR24-2-J

# SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ; or

D [ ] in installments to commence day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in *(e.g. equal, weekly, monthly, quarterly)* installments of $ over a period of year(s) to commence day(s) after the date of this judgment.

The U.S. District Court Clerk will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

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

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

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

DEFENDANT: HARRIS, GARY DUANE
CASE NUMBER: 5:96CR24-2-J

# STATEMENT OF REASONS

☐ The Court adopts the factual findings and guideline application in the presentence report.

OR

☒ The Court adopts the factual findings and guideline application in the presentence report except: (See attached)

Guideline Range Determined by the Court:

| | |
|---|---|
| Total Offense Level: | 41 |
| Criminal History Category: | III |
| Imprisonment Range: | 360 months to life imprisonment |
| Supervised Release Range: | 5 years |
| Fine Range: | $25,000.00 to $250,000.00 |

☒ Fine waived or below the guideline range because of inability to pay.

Total amount of Restitution: $N/A

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ Restitution is ordered pursuant to 18 U.S.C. § 3663A.

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): The nature of the offense and the defendant's criminal history score of 5, which includes prior crimes of violence, do not justify a sentence at the bottom of the Guideline range.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

IT IS HEREBY ORDERED that the presentence report be returned to the United States Probation Office, and shall be available to counsel on appeal. IT IS FURTHER ORDERED that the sentencing recommendation be returned to the United States Probation Office, and shall not be available to counsel on appeal.

The Court finds the indictment charges Second degree murder. There is no allegation in Count One that the killing occurred during the course of a robbery. Without this essential element, and without an express reference in other counts in the indictment, count one only alleged elements sufficient enough to charge second degree murder. There is nothing in the face of the indictment to show that the robbery and the murder occurred simultaneously. With a bare reading of the indictment, the robbery could have occurred during the morning and the murder at some other time.

The Court must take the indictment on its face as returned by the grand jury. Facts were subsequently fleshed out but the indictment was never amended to charge a murder during the course of a robbery. The Court cannot interpret the grand jury's indictment in light of facts subsequently established. Therefore, the Court finds that the grand jury charged the defendants in count one of the indictment with second degree murder. This is the charge to which the defendants entered their pleas of guilty.

Accordingly the statutory provisions as to count one of the indictment for each Defendant shall be any term of years up to life imprisonment, not more than five years supervised release and a fine not more than $250,000. The Court rejects

that portion of paragraph 58 in Defendant Harris' guideline range for imprisonment and paragraph 60 in Defendant Gaines' guideline range for imprisonment which indicates the guideline term is life imprisonment. Based on an offense level of 41 and a criminal history category III, the guideline range for imprisonment shall be 360 months to life imprisonment followed by a mandatory consecutive five year term of imprisonment as to count three. The guideline term for supervised release is three to five years and the guideline fine range is $25,000 to $250,000. All remaining findings of fact and application of the guidelines as set out in the pre-sentence report are adopted.

The Court's determination is based on the rationalization and finding found in Paragraph 27 in each defendants' pre-sentence report. As noted in paragraph 27, section 2B3.1(c)(1), states: "If a victim was killed under circumstances that would constitute Murder under
18 U.S. C. 1111, had such killing taken place within the territorial or maritime jurisdiction of the United States, apply Section 2A1.1 (First Degree Murder)." The cross reference section 2B3.1(c)(1) does not state "if the victim was killed under circumstances that would constitute First Degree Murder" to use Section 2A1.1. Section 1B1.2(a) directs the court to use the offense section in Chapter Two which is most applicable to the offense of conviction. As is provided in application Note 1

to Section 1B1.2, when a statute proscribes a variety of conduct that might constitute different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct. Section 1B1.3 addresses the issue of relevant conduct and states that the base offense level where the guideline specifies more than one offense level, and cross references, shall be determined based upon all acts committed, aided, abetted, or willfully caused by the defendant. The commentary to Section 2A1.1, Application Note 1 states "This guideline also applies when death results from the commission of certain felonies." Furthermore, the statutory language in 18 U.S.C. 1111 clearly indicates that since the murder occurred during the commission of a robbery while armed with a firearm, murder first degree is the appropriate guideline section.