NO. _____

In the Supreme Court of the United States

MICHAEL DEWAYNE VICKERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION APPENDIX

J. Matthew Wright
Counsel of Record
FEDERAL PUBLIC
DEFENDER'S OFFICE
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Matthew_Wright@fd.org

Counsel for Petitioner

July 13, 2022

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 14, 2022
Lyle W. Cayce
Clerk

No. 18-10940

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

MICHAEL DEWAYNE VICKERS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-3912

Before SMITH, HIGGINSON, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

This panel's prior decision, found at 967 F.3d 480 (5th Cir. 2020), returns to us on remand from the Supreme Court. *See Vickers v. United States*, 141 S. Ct. 2783 (2021). In turn, we REMAND this case to the district court for further consideration in light of *Borden v. United States*, 141 S. Ct. 1817 (2021). On remand, the district court should first determine whether

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

there is jurisdiction to consider Vickers's successive 28 U.S.C. § 2255 petition in light of our decisions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019).

United States Court of Appeals for the Fifth Circuit

No. 18-10940

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

MICHAEL DEWAYNE VICKERS,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CV-3912

ORDER:

The Appellee's motion for stay of the mandate pending petition for writ of certiorari is GRANTED through June 13, 2022.

STEPHEN A. HIGGINSON
United States Circuit Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 08, 2022

TO COUNSEL LISTED BELOW:

No. 18-10940 USA v. Vickers
USDC No. 3:15-CV-3912

Dear Counsel,

The oral argument panel directs that counsel file letter briefs of not more than 5 pages addressing whether this court has appellate jurisdiction. Specifically, the letters should discuss whether Mr. Vickers's claim is constitutional and whether he met the requirement in 28 U.S.C. § 2244(b)(4) for a second or successive habeas petition. See United States v. Clay, 921 F.3d 550 (5th Cir. 2019); United States v. Wiese, 896 F.3d 720 (5th Cir. 2018). The letter briefs should be filed on or before noon of February 23, 2022.

Your letter brief should be in letter form addressed to the Clerk of Court. See FRAP 32 (a) (4), (5), and (6) for format guidelines. When electronically filing the brief, either ECF Appellant's Supplemental Brief Filed or ECF Appellee's Supplemental Brief Filed should be selected and the docket text should be edited to reflect that it is a 'supplemental letter' brief. Paper copies are not required for this type of filing. The following link provides instructions on filing a brief in a Fifth Circuit case: http://www.ca5.uscourts.gov/cmecf/file%20a%20brief.pdf

Sincerely,

LYLE W. CAYCE, Clerk

Pam Trice

By: _____
Pamela F. Trice, Deputy Clerk
504-310-7633

Ms. Amy Jeannine Mitchell
Mr. James Matthew Wright

cc: Mr. Kevin Joel Page
Ms. Leigha Amy Simonton

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2020
Lyle W. Cayce
Clerk

No. 18-10940

UNITED STATES OF AMERICA,

Plaintiff - Appellant

v.

MICHAEL DEWAYNE VICKERS,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, HIGGINSON, and ENGELHARDT, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

The government appeals the district court's grant of Michael Dewayne Vickers's motion under 28 U.S.C. § 2255 and its subsequent judgment resentencing Vickers to 98 months in prison. The district court vacated Vickers's original sentence because it found that his Texas conviction for murder no longer qualified as a predicate offense for a career offender sentence enhancement under the Armed Career Criminal Act (ACCA) after *Johnson v. United States*, 135 S. Ct. 2551 (2015). Applying the categorical approach, we hold that the statute under which Vickers was convicted meets the ACCA's definition of a violent felony and VACATE the judgment below.

I.

On July 25, 2006, Vickers was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He proceeded to trial and was convicted by a jury. In anticipation of sentencing, the probation officer prepared a presentence investigation report (PSR), in which the officer assigned Vickers a base offense level of 33 under the United States Sentencing Guidelines after concluding that he was an ACCA career offender. The PSR relied on Vickers's prior Texas felony convictions for murder, burglary of a habitation, and unlawful delivery of a controlled substance as predicate offenses for the career offender enhancement. On July 5, 2007, the district court sentenced Vickers to 190 months in prison, which the court then adjusted to 168 months to give him credit for 22 months of time served in Texas state prisons for a related state offense. This court affirmed the conviction and sentence on direct appeal. *See United States v. Vickers*, 540 F.3d 356, 359 (5th Cir. 2008).

On December 8, 2015, Vickers filed the instant § 2255 motion alleging that his prior convictions no longer qualify as predicate offenses under the ACCA in light of *Johnson*. The district court appointed counsel and allowed Vickers to seek authorization from this court to pursue a successive § 2555 motion. This court granted authorization for Vickers to challenge his sentence based on his argument that his Texas murder conviction no longer qualifies as a predicate offense but denied his request to challenge his sentence based on the argument that his Texas burglary conviction no longer qualifies.

Vickers filed an amended § 2255 motion in the district court. Relying on our court's case law distinguishing between direct and indirect force, which has since been overruled by *United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018) (en banc), the magistrate judge recommended granting the

motion. The government filed objections to the magistrate judge's findings and recommendations. The district court overruled the objections, adopted the magistrate judge's conclusions, and vacated Vickers's sentence. The court held a new sentencing hearing on June 27, 2018.

The government timely appealed from the criminal judgment after Vickers was resentenced.

II.

A. Jurisdiction to Review the Court's § 2255 Order

As an initial matter, Vickers argues that the government did not properly appeal the district court's order granting Vickers's § 2255 motion because it filed its notice of appeal from the criminal judgment after his resentencing rather than from the district court order granting the motion and vacating his original sentence. The district court first entered a judgment vacating Vickers's original sentence on June 5, 2018. It then resentenced Vickers and entered another judgment on June 27, 2018. The government filed its notice of appeal on July 17, 2018. Vickers asserts that, because the notice of appeal is timely only as to the second judgment and was filed in the criminal docket, it applies only to the resentencing, meaning that the government cannot challenge the district court's order vacating his original sentence.

We disagree. The government's notice of appeal refers to both the criminal and civil cases, and it appeals from "the final judgment and sentence imposed after granting Section 2255 relief." Further, the government could not have appealed directly from the civil judgment vacating Vickers's sentence. In a § 2255 case, when "what was appropriately asked and appropriately granted was the resentencing of the petitioner[], it is obvious that there could be no final disposition of the § 2255 proceedings until the petitioner[] [has been] resentenced." *Andrews v. United States*, 373 U.S. 334, 340 (1963); *see also*

United States v. Hayes, 532 F.3d 349, 352 (5th Cir. 2008) (explaining that *Andrews* held that "when a § 2255 petitioner is granted a resentencing, the government may not appeal that finding until *after* the resentencing occurs"). Thus, the government had no choice but to wait until Vickers was resentenced to appeal the district court's order granting the § 2255 motion. *See* 28 U.S.C. § 1291 (granting this court jurisdiction over appeals from "final decisions").

Vickers does not cite a single instance in which this court has required the government to file separate notices of appeal from the criminal and civil judgments in order to challenge the grounds for granting a § 2255 motion. Indeed, this court has considered both a revised criminal sentence and the issues raised in the § 2255 motion leading to the revised sentence based on a single notice of appeal filed after the defendant was resentenced. *See Hayes*, 532 F.3d at 352–53. Accordingly, the government's notice of appeal was proper, and we may review both the order vacating the original conviction and the district court's new sentence.

B. Vickers's Texas Murder Conviction

The government seeks reversal of the district court's holding that Vickers's Texas murder conviction does not qualify as a violent felony. Because the government properly objected below, we review the district court's order *de novo*. *United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006). We agree with the government that, in light of our 2018 en banc decision in *Reyes-Contreras*, which was decided while this appeal was pending, the district court's holding no longer reflects the law of this circuit.

Title 18 U.S.C. § 922(g)(1), the federal statute under which Vickers was convicted, provides, "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." *Id.* §

922(g)(1). A person with three qualifying convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another" who violates § 922(g) is subject to a mandatory minimum sentence of fifteen years in prison. 18 U.S.C. § 924(e)(1). Vickers received this sentencing enhancement because he was previously convicted of the Texas state crimes of murder, burglary of a habitation, and delivery of a controlled substance.

To determine whether a crime falls within the federal definition of a violent felony, we employ the categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the categorical approach, courts "'look only to the statutory definitions'—*i.e.*, the elements—of [an offense], and *not* 'to the particular facts underlying those convictions.'" *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis*, 136 S. Ct. at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). "[T]he prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Id.* at 2247. The "generic offense" is "the offense as commonly understood," provided in the ACCA. *Id.* "[I]f the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA [predicate]—even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Id.* at 2248.

To prevail, a defendant must show that the state offense is broader than the generic federal offense, and "[h]e must also show 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.'" *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Merely pointing to plausible interpretations of the statutory text in a vacuum is not enough. *Id.* Thus, a

defendant must point to case law from the relevant state courts actually applying the state law in a manner that is broader than the federal definition. *Id*. at 222–23.

A "violent felony" under the ACCA includes any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[1] 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has defined the term "physical force" as "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 omitted). Texas Penal Code § 19.02 provides that a person commits murder when he:

> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code Ann. § 19.02.[2] Vickers argues that felony murder, as defined in § 19.02(3), which occurs when a person commits "an act clearly dangerous

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[1] In *Johnson*, the Supreme Court held that the so-called "residual clause" of the definition, which includes any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague. 135 S. Ct. at 2557. To prevail, therefore, the government now must argue that Texas murder qualifies as a violent felony under § 924(e)(2)(B)(i), quoted above, known as the force clause. *See United States v. Montgomery*, 402 F.3d 482, 486 (5th Cir. 2005) (defining this clause as the "Force Clause").

[2] "[T]his court examines the statutory elements as they existed at the time the defendant committed the offense," *United States v. Clay*, 921 F.3d 550, 557 n.2 (5th Cir. 2019), *as revised* (Apr. 25, 2019), which for Vickers was 1982. Texas Penal Code § 19.02 was the same in 1982 as it is today, except that in 1982 the statute referred to "voluntary or

to human life that causes the death of an individual," does not have as an element the use of physical force against another person. The district court agreed because it found that felony murder involves only indirect force, which, at that time, was outside of the federal definition of "physical force."

In *Reyes-Contreras*, our en banc court announced an expanded reading of the term "force" for an identically worded federal definition appearing in § 2L1.2 of the Sentencing Guidelines. 910 F.3d at 182. We held that "for purposes of identifying a conviction as a [crime of violence], there is no valid distinction between direct and indirect force." *Id*. Thus, actions such as assisting in suicide are crimes of violence under *Reyes-Contreras*. *Id*. We also clarified that, based on *Voisine v. United States*, 136 S. Ct. 2272 (2016), "the 'use of force' . . . can include knowing or reckless conduct." *Reyes-Contreras*, 910 F.3d at 183. Finally, we held that bodily contact is not required to show a use of force, meaning that causing injury or creating a risk of injury can be a use of force. *Id*. at 183–84. Therefore, under the broad conception of force described in *Reyes-Contreras*, even felony murder involves "physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

Vickers argues that, despite *Reyes-Contreras*, felony murder still does not involve the "use" of force because the term "use" requires an active and knowing application of force, and a person could be convicted of felony murder for applications of force that are accidental or unknowing. The Supreme Court has held that knowing or intentional applications of force qualify as uses of force. *United States v. Castleman*, 572 U.S. 157, 169–70 (2014). It has also held that reckless conduct can be a use of force. *Reyes-Contreras*, 910 F.3d at 183; *Voisine*, 136 S. Ct. at 2279 ("[T]he word 'use' does not exclude from § 922(g)(9)'s

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involuntary manslaughter" in the definition of felony murder. *See Ex parte Easter*, 615 S.W.2d 719, 720 (Tex. Crim. App. 1981) (quoting the 1981 version of the statute).

compass an act of force carried out in conscious disregard of its substantial risk of causing harm."). Conversely, negligent or merely accidental conduct does not qualify as a use of force. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). A person uses force only when he or she has "the understanding that [the action] is substantially likely to [cause harm]." *Voisine*, 136 S. Ct. at 2279; *see also United States v. Aguilar-Alonzo*, 944 F.3d 544, 550 (5th Cir. 2019) ("In a variety of criminal statutory contexts, we have consistently interpreted the ordinary and natural meaning of the verb 'use' to require active employment of something, as has the Supreme Court.").

Vickers relies on *Lomax v. State*, 233 S.W.3d 302 (Tex. Crim. App. 2007) to argue that felony murder includes negligent or accidental uses of force. In *Lomax*, the Texas Court of Criminal Appeals held that the felony murder statute evinces a "clear legislative intent to plainly dispense with a culpable mental state" based on the "historical purpose of the felony-murder rule . . . to make a person guilty of an 'unintentional' murder when he causes another person's death during the commission of some type of a felony." *Id.* at 305. Thus, under *Lomax*, Vickers contends that Texas felony murder covers negligent or accidental conduct that would not be a "use" of force. *See Leocal*, 543 U.S. at 9.

Lomax is inapplicable here because it was decided in 2007, more than 20 years after Vickers's conviction. We consider only the state law as it existed at the time of Vickers's 1982 murder conviction. The Supreme Court has held that "[t]he only way to answer th[e] backward-looking question" of whether a defendant's prior conviction is a qualifying predicate under the ACCA "is to consult the law that applied at the time of that conviction." *McNeill v. United States*, 563 U.S. at 820; *see also Descamps*, 570 U.S. at 295 n.5 (Alito, J., dissenting) ("The majority suggests that California law is ambiguous as to this requirement, but any confusion appears to have arisen after petitioner's 1978

conviction and is therefore irrelevant for purposes of this case." (citation omitted)). In *McNeill*, the defendant argued that the court should apply the state law as it existed at the time of the federal sentencing, and the Supreme Court rejected this approach because that "argument overlooks the fact that ACCA is concerned with convictions that have already occurred." 563 U.S. at 820. Thus, we must apply the state court interpretation at the time of Vickers's conviction.

The Texas Court of Criminal Appeals' interpretation of Texas's felony murder statute at the time of Vickers's conviction is provided by *Rodriquez v. State*, 548 S.W.2d 26 (Tex. Crim. App. 1977), in which the Court of Criminal Appeals held that "because § 19.02(a)(3) is silent as to, and does not plainly dispense with, the culpable mental state required for the underlying felony committed or attempted . . . the culpable mental state shall . . . be one of intent, knowledge, or recklessness." *Id.* at 28. Thus, until 2007, when *Lomax* changed the prevailing standard, felony murder in Texas required a mental state of recklessness or higher, meaning that all defendants convicted under this statute would have taken active steps to "use" physical force—as required by the ACCA federal definition. *Aguilar-Alonzo*, 944 F.3d at 550 (explaining the federal definition of "use"). Indeed, the *Lomax* opinion states explicitly that it is announcing a *change* in the law: "we decide to overrule . . . the holding in *Rodriquez* that a culpable mental state is required for 'the act of murder' in a felony-murder prosecution and that the mental state of the underlying felony supplies this culpable mental state." 233 S.W.3d at 307. The Court of Criminal Appeals makes clear that before this change, *Rodriquez* was the prevailing law.

For these reasons, Vickers's Texas murder conviction qualifies as a violent felony for purposes of the career offender enhancement.

C. Vickers's Burglary and Delivery of a Controlled Substance Convictions

Finally, Vickers contends that even if his murder conviction was a violent felony, his convictions for burglary and delivery of a controlled substance do not qualify as predicate offenses. We decline to consider these arguments because Vickers did not receive authorization to include them in a successive § 2255 petition.

Vickers had to apply for authorization to file a successive § 2255 motion raising the claims made in this appeal. He requested authorization to challenge his sentence enhancement based on both his Texas murder and Texas burglary convictions. This court authorized the challenge only as it related to his Texas murder conviction; it denied authorization to argue that his Texas burglary conviction did not qualify as a predicate offense. In his amended filing before the district court after counsel was appointed, Vickers argued only that his murder conviction was not a violent felony. Thus, the district court had no opportunity to consider whether Vickers's other convictions qualify as predicate offenses, and indeed it had no subject matter jurisdiction to consider such unauthorized successive claims even if Vickers had raised them. *Crone v. Cockrell*, 324 F.3d 833, 838 (5th Cir. 2003) (holding that the district court "did not have subject matter jurisdiction over Crone's [successive § 2255] application because Crone did not obtain an order from this Court authorizing the district court to consider the successive application"). Vickers cannot now ask us to consider his challenges to his other convictions in the first instance. *United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), *as revised* (Aug. 14, 2018) ("If the district court did not have jurisdiction to reach the merits, naturally, we cannot reach the merits on appeal."); *see also* 28 U.S.C. § 2244(b)(4) (requiring the dismissal of any claim presented in a

second or successive § 2255 petition "unless the applicant shows that the claim satisfies the requirements of this section").

III.

Because Vickers's Texas murder conviction qualifies as a violent felony under the ACCA, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

MICHAEL DEWAYNE VICKERS

JUDGMENT ON RESENTENCING IN A CRIMINAL CASE

Case Number: **3:06-CR-00229-B(1)**
USM Number: **35401-177**
James Matthew Wright
Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**Count 1 of the one-count Indictment filed July 25, 2006**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. §§ 922(g)(1) & 924(a)(2) - Felon in Possession of a Firearm	08/30/2005	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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

June 27, 2018
Date of Imposition of Judgment

Signature of Judge

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 27, 2018
Date

18-10940.264

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

IMPRISONMENT

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

98 MONTHS. This term consists of 120 months as to Count 1, to be adjusted pursuant to USSG §5G1.3(b)(1) to account for 22 months served in state custody for relevant conduct to the instant offense, which will not be credited to the defendant, for an adjusted total sentence of **98 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 surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide to the probation officer any requested financial information.

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

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

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** 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, but before April 23, 1996.

DEFENDANT: MICHAEL DEWAYNE VICKERS
CASE NUMBER: 3:06-CR-00229-B(1)

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

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

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

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

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL DEWAYNE VICKERS	§	
	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 3:15-CV-3912-B-BH
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

ORDER OVERRULING GOVERNMENT'S OBJECTIONS
AND ADOPTING THE FINDINGS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before the Court is the Government's Objection, Doc. 22, to the United States Magistrate Judge's Findings, Conclusions, and Recommendation, Doc. 21.The Court **OVERRULES** the Government's objection.

I.

BACKGROUND

The Magistrate Judge's Report and Recommendation provides the history of this case, and the Court will not reproduce a detailed here. Suffice it to say that Vickers petitioned the Court under 28 U.S.C. § 2255 to resentence him, the Magistrate Judge agreed and recommended that the Court resentence Vickers, and the Government timely objected to the Magistrate Judge's Report and Recommendation.

II.

ANALYSIS

Rule 72(b) of the Federal Rules of Civil Procedure provides that within fourteen days after

being served a copy of the Magistrate Judge's recommendation, a party may file specific written objections. Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1). "The district court must then 'make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made' before accepting, rejecting, or modifying those findings or recommendations." *Habets v. Waste Mgmt., Inc.*, 363 F.3d 378, 381 (5th Cir. 2004) (quoting 28 U.S.C. § 636(b)(1)).

The Court originally gave Vickers an enhanced sentence under 18 U.S.C. § 924(e) based on three of Vickers's prior felony convictions. Doc. 21, R & R, 2. One of those convictions was for murder under Texas law. *Id.* at 1.

Section 924(e)(1) imposes a mandatory minimum sentence on convicts who have already been convicted of three violent felonies. Section 924(e)(2)(B) defines "violent felony" in part as "any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another." The Court will refer to this clause of the definition as "the force clause." Although the statute formerly defined violent felony additionally to include crimes involving "conduct that presents a serious potential risk of physical injury to another," the Supreme Court struck down that part of the definition as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

Vickers argues that he should be resentenced. Doc. 14, Mot. to Vactate. He contends that after *Johnson* his Texas murder conviction no longer fits the definition of violent felony because Texas murder does not fall under the force clause. *Id.*

The Magistrate Judge agreed with Vickers. Doc. 21, R & R, 14. The Magistrate Judge found that the force clause does not encompass Texas murder because Texas law defines murder as causing

the death of another human being,[1] and a jury can convict a defendant of murder without finding that the defendant used physical force. *Id.* at 10–14. Although the Government argued that the Supreme Court case *United States v. Castleman*, 134 S. Ct. 1405, 1410 (2014) requires courts to find that crimes involve the use of physical force even when only indirect force will support a conviction, Doc. 22, Objection, 4, the Magistrate Judge recognized that the Fifth Circuit has continued to distinguish between crimes involving direct force and those involving indirect force after *Castleman* and continued to exclude crimes involving only indirect force from the definition of violent felony, Doc. 21, R & R, 10–14.

The Magistrate Judge correctly applied Fifth Circuit law. Even after *Castleman*, the Fifth Circuit has continued to exclude crimes involving only indirect force from § 924(e)'s definition of violent felony. *See United States v. Rico-Mejia*, 859 F.3d 318, 322–23 (5th Cir. 2017). The Court notes however that the Fifth Circuit is alone in taking this approach; the rest of the circuits to consider the matter have held that *Castleman* abolished the distinction between direct and indirect force in force-clause cases and have begun to include crimes involving the use of indirect force in the definition of violent felony.[2] Whatever the other circuits' approaches, though, the Court follows the

[1] Tex. Penal Code § 19.02(a).

[2] See *United States v. Ontiveros*, 875 F.3d 533, 538–39 (10th Cir. 2017); *United States v. Chapman*, 866 F.3d 129, 133 (3d Cir. 2017) (applying *Castleman* to USSG § 4B1.2); *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (applying *Castleman* to USC § 924(e)(1)); *United States v. Jennings*, 860 F.3d 450, 458–60 (7th Cir. 2017) (same); *United States v. Rice*, 813 F.3d 704, 705–06 (8th Cir.) (applying *Castleman* to USSG § 4B1.2), cert. denied, —— U.S. ——, 137 S.Ct. 59, 196 L.Ed.2d 59 (2016); *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016) (implicitly applying reasoning of *Castleman* to 18 U.S.C. § 16(a)), cert. denied sub nom. *Hernandez v. Sessions*, —— U.S. ——, 137 S.Ct. 2180, 198 L.Ed.2d 232 (2017); *United States v. Hill*, 832 F.3d 135, 143 (2d Cir. 2016) (applying *Castleman* to 18 U.S.C. § 924(c)(3)(A)); *United States v. Haldemann*, 664 Fed.Appx. 820, 822 (11th Cir. 2016) (unpublished) (applying *Castleman* to USSG § 4B1.2).

Fifth Circuit and therefore overrules the Government's objection, adopts the Magistrate Judge's Report and Recommendation, and vacates Vicker's sentence.

III.

CONCLUSION

The Court **OVERRULES** the Government's objection, **ADOPTS** the Magistrate Judge's Report and Recommendation, and **VACATES** Vicker's sentence.

SO ORDERED.

Dated: June 5, 2018.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL DEWAYNE VICKERS,	)	
Movant,	)	
vs.	)	**No. 3:15-CV-3912-B-BH**
	)	**No. 3:06-CR-0229-B**
UNITED STATES OF AMERICA,	)	
Respondent.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order 3-251*, this habeas case has been automatically referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the amended *Motion Under 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* should be **GRANTED**, the sentence should be vacated, and the movant should be re-sentenced.

I. BACKGROUND

Michael Dewayne Vickers (Movant) challenges his federal conviction and sentence in Cause No. 3:06-CR-229-B. The respondent is the United States of America (Government).

By indictment filed on July 25, 2006, Movant was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1). (*See* doc. 1.)[1] He pleaded not guilty and was convicted by a jury. (*See* doc. 52.) On March 22, 2007, the United States Probation Office (USPO) filed a Presentence Report (PSR) that applied the 2006 United States Sentencing Guidelines Manual (USSG). (*See* doc. 61 at 4, ¶ 14.) It found that Movant was an armed career criminal because his federal conviction under § 924(e) subjected him to an enhanced sentence based on his prior violent felony convictions for murder, burglary of a habitation, and unlawful delivery of a

[1] Unless otherwise indicated, all document numbers refer to the docket number assigned in the underlying criminal action, 3:06-CR-229-B.

controlled substance, resulting in an offense level of 33. (*See id*. at 4-5, ¶¶ 10, 15, 16.) With a criminal history category of four, the resulting guideline range was 188-235 months. (*See id*. at 12, ¶ 56.) On July 5, 2007, Movant was sentenced to 190 months' imprisonment, which was then adjusted to 168 months to account for 22 months he had served on his related state case that would not be credited by the Bureau of Prisons. (*See* doc. 52.) The judgment was affirmed on appeal. (*See* doc. 64); *United States v. Vickers*, No. 07-10767 (5th Cir. Aug. 12, 2008).

Movant filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255, and it was denied on January 12, 2011. (*See* No. 3:09-CV-1777, docs. 8, 9.) He filed a second § 2255 motion on December 8, 2015, and amended it on January 12, 2016. (*See* 3:15-CV-3912, docs. 1, 5.) After being appointed to investigate and pursue any potentially meritorious claims, the Federal Public Defender filed an unopposed motion to transfer the case to the United States Court of Appeals for the Fifth Circuit for authorization to file a second or successive §2255 motion, which was granted on April 26, 2016. (*See* docs. 9, 10, 11.) On May 27, 2016, the Fifth Circuit authorized Movant to file a successive § 2255 motion challenging the enhancement of his sentence for possession of a firearm by a felon under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). (*See* doc. 12); *In re Vickers*, No. 16-10509 (5th Cir. May 27, 2016). He filed his amended § 2255 motion on June 26, 2016. (*See* doc. 14.)

Movant contends that the use of his 1982 Texas murder conviction to enhance his sentence under § 924(e) violated his right to due process under *Johnson* because it can only be a violent felony under § 924(e)'s residual clause, since "it is not enumerated [in that statute] and lacks force as an element, because it is a species of injury causation." (*See* doc. 14 at 7.) The Government filed a response on October 13, 2016. (*See* doc. 19.)

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that "a collateral challenge may not do service for an appeal." *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

A failure to raise a claim on direct appeal may procedurally bar an individual from raising the claim on collateral review. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Defendants may only collaterally attack their convictions on grounds of error omitted from their direct appeals upon showing "cause" for the omission and "actual prejudice" resulting from the error. *Shaid*, 937 F.2d at 232. However, "there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal" because "requiring a criminal defendant to bring [such] claims on direct appeal does not promote the[] objectives" of the procedural default doctrine, "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 503-04 (2003). The Government may also waive the procedural bar defense. *Willis*, 273 F.3d at 597.

III. ARMED CAREER CRIMINAL ACT

As the Supreme Court of the United States noted in *Johnson*,

> Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," [Section 924 of the Armed Career Criminal Act] increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Curtis Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176

L.Ed.2d 1 (2010). The Act defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*. § 924(e)(2)(B) (emphasis added).

135 S.Ct. at 2555-56. Subsection (i) is known either as the force clause, *United States v. Lerma*, 877 F.3d 628, 630 (5th Cir. 2017), or as the elements clause, *United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017). The four offenses listed in subsection (ii) are referred to as the "enumerated offenses," *see United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007), or as the "enumerated offenses clause," *Taylor*, 873 F.3d at 477 n.1. The remainder of the subsection is known as the "residual clause," *Johnson,* 135 S.Ct. 2555-56.

Johnson held that the imposition of an increased sentenced under ACCA's residual clause violates the Constitution's guarantee of due process because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.[2] After *Johnson*, a crime is a violent felony under ACCA only if it is one of the enumerated offenses, or if it qualifies under the force clause. *United States v. Moore*, 711 F. App'x 757, 759 (5th Cir. 2017) (per curiam).

Here, the offense of which Movant was convicted, murder, is not an enumerated offense. Neither the Fifth Circuit Court of Appeals nor any district court within the circuit appears to have considered whether it qualifies as a violent felony under ACCA's force clause because it has as an element the use, attempted use, or threatened use of physical force.

[2] This holding is retroactively available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

IV. TEXAS MURDER STATUTE

The version of Texas Penal Code § 19.02(a) in effect at the time of Movant's murder conviction in 1982 provided:

> (a) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that
>
> (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code § 19.02 (1974); *see* Act of June 14, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 913.

A. Applicable Approach

To determine whether a crime is a violent felony under the force clause, courts use either the categorical approach or the modified categorical approach, depending on whether the statute setting out the offense is indivisible or divisible. *See Lerma*, 877 F.3d at 631; *United States v. Howell*, 838 F.3d 489, 494-95 (5th Cir. 2016). An indivisible statute sets out "a single set of elements [defining]", or "various means of committing," a single crime or offense. *Lerma*, 877 F.3d at 631; *Howell*, 838 F.3d at 497. A divisible statute "lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

"Elements are the constituent parts of a crime's legal definition", i.e., what the prosecution must prove and the jury must find beyond a reasonable doubt to convict the defendant, or what the defendant must admit when he pleads guilty. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016).

"An element of a crime must be distinguished from the means of satisfying a single element." *Lerma*, 877 F.3d at 631. The test for determining whether a statute alternatively sets out elements or means of satisfying an element is whether a jury must agree on one of the statutory alternatives in reaching a verdict. *Howell*, 838 F.3d at 497.

> Elements must be agreed upon by a jury. When a jury is not required to agree on the way that a particular requirement of an offense is met, the way of satisfying that requirement is a means of committing an offense not an element of the offense.

Id. at 498 (quoting *United States v. Hinkle*, 832 F.3d 569, 574-75 (5th Cir. 2016)).

If a statute is indivisible because it sets out a single set of elements, the sentencing court must apply the "categorical approach." *Mathis,*136 S.Ct. at 2248. It "requires the sentencing court, when determining whether a crime qualifies as a violent felony under the elements [or force] clause, to focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another." *Lerma*, 877 F.3d at 630. "The sentencing court is not permitted to review the particular facts of the case." *Id*.

If a statute is divisible because it lists alternative elements, the sentencing court must use the "modified categorical approach" to determine the elements under which the defendant was convicted. *Mathis*, 136 S.Ct. at 2253. Under this approach, the court looks "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of [committing]." *Id*. at 2249 (citations omitted). "The court can then determine, in deciding whether the crime satisfies the elements [or force] clause, if one of those elements included the use, attempted use, or threatened use of physical force against the person of another." *Lerma*, 877 F.3d at 630.

To determine whether a statute is divisible or indivisible, courts may consider several sources, including the statutory text and state court decisions. *United States v. Reyes-Contreras*, 882

F.3d 113, 119 (5th Cir. 2018). The Texas Court of Criminal Appeals has held that the text of the current Texas murder statute contains three subsections setting out alternative means of committing the same offense.[3] *See Ex parte Rogers*, 2017 WL 5476353 at *1 (Tex. Crim. App. Nov. 15, 2017) (murder under § 19.02(b)(1) and § 19.02(b)(2) are alternate means of committing murder); *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011) (noting murder is a "result of conduct" offense "because it punishes the intentional killing of someone regardless of the specific manner ... of causing the person's death"); *Aguirre v. State*, 732 S.W.2d 320, 325–26 (Tex. Crim. App. 1982) (opinion on rehearing) (holding when indictment contained two paragraphs, the first alleging murder under § 19.02(b)(1) and the second alleging murder under § 19.02(b)(3), the allegations were merely two different manners and means of committing same offense). A jury is not required to reach unanimous agreement about which subsection of the murder statute a defendant violated, because the three methods of committing murder set forth in the statute are different manners and means of committing the same offense, not distinct and separate offenses. *Smith v. State*, 436 S.W.3d 353, 378 (Tex. App. – Houston [14th Dist.] 2014).

Because the three subsections of the Texas murder statute set out three alternative means of committing murder by causing the death of an individual, and a jury is not required to agree by which of the three means a defendant committed murder, the statute is indivisible. *See Lerma*, 877 F.3d at 631; *Howell*, 838 F.3d at 497. The applicable approach for determining whether the offense of murder qualifies as a violent felony under ACCA's force clause is therefore the "categorical approach." *See Mathis,*136 S.Ct. at 2248. The Court must therefore "focus solely on whether the

[3] The only difference between the current version of the murder statute and the one under which Movant was convicted is that the current version refers to "manslaughter," rather than "voluntary or involuntary manslaughter," in the subsection that describes murder in the course of committing a felony.

elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another." *See Lerma*, 877 F.3d at 630.

B. Use of Physical Force

"The phrase 'physical force' [in § 924(e)(2)(B)(i)] means violent force—that is, force capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010). As noted, neither the Fifth Circuit nor any district court within it appears to have considered whether Texas murder (which makes it a crime to cause the death of an individual) includes the use of physical force as an element for purposes of determining whether it qualifies a violent felony under ACCA's force clause.[4] The Fifth Circuit has, however, considered whether assault (which makes it a crime to cause bodily injury) includes the use of physical force as an element for purposes of deciding whether it qualifies as a "crime of violence" under the force clause in 18 U.S.C. § 16(a), which is almost identical to the one in ACCA.[5] *See United States v. Villegas–Hernandez*, 468 F.3d 874 (5th Cir. 2006). Its analysis in that case is therefore instructive.[6]

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[4] Two district courts have held that attempted murder under Texas law is a violent felony under ACCA. *See Joiner v. United States*, No. A-12-CR-0014-SS, A-16-CV-01069-SS, 2018 WL 814021 at *4-5 (W.D. Tex. Feb. 9, 2018) (finding that under either the categorical or modified categorical approaches, attempted murder by shooting a gun is a violent felony for purposes of ACCA); *United States v. Gonzales*, No. 2:11-CR-801 (2:14-CV-388), 2017 WL 978700 at (S.D. Tex. Mar. 13, 2017) (finding that attempted murders by stabbing with a knife, a deadly weapon, and by shooting were violent felonies under ACCA because courts in other jurisdictions had concluded that other states' attempted murder convictions were proper predicate offenses under its force clause). Neither case analyzed the statutory elements of the offense as required under the categorical approach, however. *See Lerma*, 877 F.3d at 630.

[5] Section 16(a) defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another." 18 U.S.C. § 16(a) (2000) (*emphasis added*). ACCA refers only to the use of physical force against the person of another.

[6] Courts analyzing issues arising under the force clause of either § 16(a) or ACCA rely on cases under both statutes, as well as on identically worded sentencing guidelines regarding crimes of violence. *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (relying on case law under § 16 in an analysis of the elements of a crime under the force clause of § 924(e); *United States v. Paniagua*, 481 F. App'x 162, 166 (5th Cir. 2012) (relying on case law under § 924(e) in an analysis of the elements of a crime under the force clause of § 16); *United States v. Johnson*, 880 F.3d 226, 234 (5th Cir. 2018) ("precedent regarding ACCA's definition of a violent felony is directly applicable to the Guidelines definition of a crime of violence").

1. Villegas-Hernandez and Progeny

In *Villegas–Hernandez,* the Fifth Circuit began its analysis of the Texas assault statute under the categorical approach by first explaining that "the term 'force' has a specific meaning and, 'when used in the statutory definition of a 'crime of violence,' is 'synonymous with destructive or violent force.'" *Id.* at 878-79 (quoting *United States v. Landeros–Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001)). Because use of force must be "an element" of the offense, assault would satisfy the definition of "crime of violence" in § 16(a) "only if a conviction for that offense could not be sustained without proof of the use of 'destructive or violent' force." *Id.* at 879. The court noted that the "bodily injury" required by the assault statute "could result from any of a number of acts, without use of 'destructive or violent force', [such as] making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* Because the prosecution would not need to show use of physical force to convict under these scenarios, the Fifth Circuit concluded that use of force was not a element of the offense, so assault did not qualify as a "crime of violence" under § 16(a). *Id.* In so finding, the Fifth Circuit recalled its prior *en banc* holdings in *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (*en banc*), that "'[t]here is ... a difference between a defendant's causation of injury and the ... use of [physical] force,'" and that "'the intentional causation of injury does not necessarily involve the use of force.'" *Id*. at 880-81.

The Fifth Circuit subsequently considered whether a California terroristic threat statute had as an element the threatened use of physical force and was therefore a "crime of violence" for purposes of § 2L1.2 of the Sentencing Guidelines, which is in relevant part identical to ACCA's force clause. *See United States v. De La Rosa–Hernandez*, 264 F. App'x 446, 447-49 (5th Cir.

2008). Citing *Villegas–Hernandez,* it began its analysis by reiterating that its "rule is clear: if the defendant may be found guilty of an offense under a set of a facts not involving the actual, attempted use of physical force against another, the offense is *not* a [crime of violence]." *Id.* at 448-49 (*emphasis original*). Applying the categorical approach, the court found that "[a]s in *Villegas*, a defendant could violate [the California statute, which criminalized threatening to commit a crime that would result in death or great bodily injury to another person], by threatening either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve 'force', as that term is defined by our court." *Id*. at 449. Because it was possible to obtain a conviction under the statute without proof of the threatened use of physical force, the Fifth Circuit found that it was not an element of the offense, so it was not a crime of violence. *Id*.

More recently, in *United States v. Rico-Mejia*, 859 F.3d 318, 321 (5th Cir. 2017), the Fifth Circuit again considered whether a "terroristic threatening" statute had the threatened use of physical force as an element and was a crime of violence under § 2L1.2. The court found that even if the district court correctly resorted to the modified categorical approach in analyzing the Arkansas "terroristic threatening" statute, which made it an offense to threaten to cause death or serious bodily injury to another person, the offense could not constitute a crime of violence under *Villegas–Hernandez* and *De La Rosa–Hernandez* because a person could cause physical injury without using physical force. *Id.* at 322-23.

2. Castleman

The Government argues that the Supreme Court's decision in *United States v. Castleman*, 134 S.Ct. 1405 (2014), undermined *Villegas-Hernandez* and the other Fifth Circuit cases that held that a statutory element of causing injury or threatening to cause the death of a person does not necessarily include the use or threatened use of physical force. (*See* doc. 19 at 5-9.) This argument

has recently been expressly rejected by the Fifth Circuit, however:

> The Government responds that [*Villegas-Hernandez* and its progeny] have been overruled by *United States v. Castleman*, ___ U.S. ___, 134 S.Ct. 1405, 1414, 188 L.Ed.2d 426 (2014), which held that a defendant's guilty plea to having "intentionally or knowingly cause[d] bodily injury" to the mother of his child constituted "the use of physical force" required for a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)(A). The Government points out that as part of the Supreme Court's reasoning in that decision, it applied a definition of "use of physical force" that was much broader than that described in the above cases – one that could involve harm caused both directly and indirectly and that would include administering poison or similar actions. *Id*. at 1413–15. ...
>
> The Government's contention regarding *Castleman* must be rejected. By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which "suggests a category of violent, active crimes" that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context. 134 S.Ct. at 1411 n.4 (noting that "Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence' " and clarifying that "[n]othing in today's opinion casts doubt on these holdings, because ... 'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter"). Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence, and [the Arkansas terroristic threat statute] cannot constitute a crime of violence ... because it lacks physical force as an element.

Rico-Mejia, 859 F.3d at 322-23.

Subsequently, in *Reyes-Contreras*, the Fifth Circuit noted the Government's argument that "indirect force is sufficient, [and that *Castleman* had] overruled Fifth Circuit precedent requiring destructive or violent force by interpreting the use-of-force clause in 18 U.S.C. § 921(a)(33)(A)(ii) to encompass the common-law definition, which includes offensive touching and indirect applications of force." 882 F.3d at 123. It also noted, however, its prior holdings in *Rico-Mejia* as well as *United States v. Calderon-Pena*, 383 F.3d 254, 260 (5th Cir. 2004), "in which the *en banc* court expressly held that an offense that can be committed without 'any bodily contact (let alone violent or forceful contact)'" does not have physical force as an element." *Id*. As the Fifth Circuit

acknowledged,

> [t]he government rightly points out that many circuits have rejected this view and have expanded *Castleman* to state that indirect causation of bodily injury may warrant a [crime of violence] enhancement. But *Castleman* does not on its own terms make this expansion, and a previous panel [in *Rico-Mejia*] declined to interpret it as doing so, thus binding us.

Id. This court is likewise bound by *Rico-Mejia*'s rejection of the Government's reliance on *Castleman*.[6]

3. Howell

The Government also argues that in *United States v. Howell*, 838 F.3d 489 (5th Cir. 2016), the Fifth Circuit held that causation of bodily injury requires the use of force, so causation of death also requires the use of force, since death is a higher level of bodily injury. (*See* doc. 19 at 7-8.) The Texas statute at issue in *Howell* was assault by causing bodily injury to a family member by "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." *Id*. at 490-91. Holding that the offense was a crime of violence under the force clause, the court explained:

> It is difficult to conceive of how applying pressure to either a person's throat or neck in a manner that resulted in "impeding the normal breathing or circulation" could not involve the use of physical force. The same is true of blocking a person's nose or mouth resulting in "impeding the normal breathing or circulation of the blood of the person." ... The operative language in the statute is "by applying pressure to the person's throat" or "by blocking the person's nose or mouth," indicating affirmative action on the part of the defendant that is more direct [than the hypotheticals argued by Howell].

Id. at 502.

In addition to the element of causing bodily injury, the assault statute in *Howell* had as an element the use of physical force by either impeding breathing or circulation of the blood by

[6] The Government filed a motion for rehearing *en banc* in *Reyes-Contreras* on April 5, 2018.

applying pressure to the throat or by blocking the nose or mouth.[7] By contrast, the statutes at issue in *Villegas-Hernandez* and *De La Rosa-Hernandez* only had as an element the causing of bodily injury or the threat to cause death; they did not have any additional element regarding the use or threatened use of physical force. *Howell* is therefore distinguishable.

In conclusion, the Court finds that the Fifth Circuit's rationale in *Villegas-Hernandez* for finding that a person can cause bodily injury without the use of physical force, which was reaffirmed in *De La Rosa–Hernandez* and *Rico-Mejia*, applies equally to the determination of whether a person may cause the death of another under the Texas murder statute without the use of physical force. In those cases, the court repeatedly noted that there are any number of actions, including poisoning and deception, that do not require the use of destructive or violent force in order to cause bodily injury, or to threaten to commit a crime that would result in death or great bodily injury to another person. These same types of actions could also cause the death of a person. Because there is a set of facts that would support a conviction for Texas murder without proof of the use of force, and the use of force is not a fact necessary to support a conviction under that statute, the use of force is not an element of Texas murder. Applying the Fifth Circuit's clear rule in *Villegas–Hernandez* to the Texas murder statute, the Court finds that the offense is not a violent felony under ACCA's force

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[7] The Fifth Circuit later relied on *Howell* in considering whether a Minnesota unintentional murder statute was a crime of violence for purposes of § 2L1.2. *See United States v. Herrera-Serrano*, 703 F. App'x 342 (5th Cir. 2017). Under the statute, a person commits an offense if he "causes the death of a human being, without intent to effect the death of any person, while committing a felony offense ... with force or violence or a drive-by shooting." *Id*. at 344. The court noted that Minnesota required the jury to be instructed as to the elements of the underlying felony, and that an element of the underlying felony in that case, assault, was the infliction of "great bodily harm." *Id*. at 344-45. Applying the modified categorical approach, the Fifth Circuit held that the Minnesota offense was a crime of violence because it had as an element the use of physical force. *Id.* It specifically noted its holding in *Howell* "that intentional, knowing, or reckless causing of bodily injury to another (the Texas offense of domestic abuse by impeding breathing or circulation) has as an element the use of force." *Id.* As in *Howell*, the statute in *Herrera-Serrano* had as an element the use of physical force in addition to the element of injury causation.

clause.[8]

Movant's sentence was enhanced under ACCA, in part, based on the murder offense. Because murder is no longer a violent felony after *Johnson*, the enhancement under the ACCA and increase in Movant's offense level as a career armed criminal does not survive.

V. RECOMMENDATION

The motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 should be **GRANTED**, the sentence should be vacated, and Movant should be re-sentenced.

SO RECOMMENDED this 7th day of May, 2018.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

[8] Even if the modified categorical approach was used, the result would be the same. As discussed, under this approach, courts look to documents such the indictment, jury instructions, or plea agreement, to determine the offense and elements of conviction. *Mathis*, 136 S.Ct. at 2249. Once the statutory elements are determined by resorting to court documents, it is those elements, rather than the underlying conduct, that are used to determine whether the offense is a violent felony under the elements clause. *See United States v. Godoy-Castaneda*, 614 F. App'x 768, 770 (5th Cir. 2015). Here, the indictment alleged that Movant caused the death of an individual by "striking the deceased with bottles and boards." (*See*, 3:15-CV-3912-B, doc. 20 at 3.) The Texas Court of Criminal Appeals has explained that the allegation of the "manner and means [of causing death] is a description of how the offense was committed," and it includes the defendant's actions and the instrument of death. *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012). The jury does not need to unanimously agree on the manner and means of causing death, only that the defendant caused the death. *See id*. at 773-74 (jury not required to unanimously agree on whether the defendant cause the death by one of several possible ways of asphyxiating the deceased). Because jury unanimity is not required for the manner and means of causing the death of an individual, the manner and means in Movant's case, i.e., "striking the deceased with bottles and boards," are not elements of the offense. *See Howell*, 838 F.3d at 497. The relevant element of murder under the modified categorical approach is causing the death of an individual. As discussed, the element of causing the death of an individual does not make murder a violent felony under the force clause.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10509

In re: MICHAEL DEWAYNE VICKERS,

Movant.

A True Copy
Certified order issued May 27, 2016

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an Order Authorizing
the United States District Court
for the Northern District of Texas
to Consider a Successive 28 U.S.C. § 2255 motion

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

Michael Vickers, federal prisoner # 35401-177, moves for authorization to file a successive 28 U.S.C. § 2255 motion challenging the enhancement of his sentence for possession of a firearm by a felon under the Armed Career Criminal Act ("ACCA"). *See* 18 U.S.C. § 924(e)(2)(B)(ii); *see United States v. Vickers*, 540 F.3d 356, 363 (5th Cir. 2008) (noting that Vickers's prior convictions of murder, burglary of a habitation, and unlawful delivery of a controlled substance were used as predicate offenses under § 924(e)). Vickers contends that *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the ACCA as unconstitutionally vague, established a new

rule of constitutional law made retroactive to cases on collateral review. *See* § 2255(h)(2). If granted authorization, Vickers would challenge the enhancement based on his convictions of burglary of a habitation and murder.

Because Vickers's conviction of burglary of a habitation is an enumerated offense under *United States v. Herrold*, 813 F.3d 595, 597–98 (5th Cir. 2016), *Johnson* does not provide a basis for authorization as to that conviction. Consequently, the motion for authorization is DENIED in part.

Vickers has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court" with regard to his conviction of murder. *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (internal quotation marks and citation omitted); *see Welch v. United States*, 136 S. Ct. 1257, 1265, 1268 (2016). Accordingly, the motion for authorization is GRANTED in part as to that conviction.

Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Vickers has failed to make the showing required to file such an application. *See* 28 U.S.C. § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. We express no opinion as to what decisions the district court should make.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 12, 2008

Charles R. Fulbruge III
Clerk

No. 07-10767
Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MICHAEL DEWAYNE VICKERS

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

Michael Dewayne Vickers was convicted, after a jury trial, of being a felon in possession of a firearm in violation of federal law. Vickers timely appeals and challenges both his conviction and sentence. We AFFIRM.

I. BACKGROUND

On August 5, 2005, at approximately 3:00 p.m., the Dallas Police Department received a 911 call reporting a burglary. The caller described the burglar as a black male dressed in a red T-shirt and a dark-colored pair of shorts, and stated that the perpetrator might still be in the area. Vickers was walking down the street of his neighborhood in Dallas, Texas. The Dallas Police Department dispatched officers to investigate.

The first officer to arrive at the scene observed a black male wearing a red T-shirt and dark shorts walking on the sidewalk near the house that had been burglarized. It was Vickers. The officer stepped out of his patrol car and ordered Vickers to put his hands on the hood of the police vehicle. Vickers initially complied, but as the officer began to pat him down, Vickers said, "I can't go to jail," and attempted to flee. Vickers ran only a few steps before he was subdued and handcuffed.

After Vickers was subdued, the officers completed the search and discovered a .38 caliber pistol in the front left pocket of Vickers's pants. After Vickers's arrest, the person who had placed the 911 call approached and told the officers they "had the wrong guy." It is now undisputed that Vickers was not involved in the burglary that prompted the 911 call. Vickers's arrest was based solely on possession of the weapon found as a result of the search.

Vickers was charged with being a felon in possession of a firearm. See 18 U.S.C. §§ 922(g)(1) & 924(e)(1). Vickers's prior felony convictions justifying the charge included murder, burglary of a habitation, and unlawful delivery of a controlled substance. At his trial, Vickers presented no defense. His counsel informed the jury in closing arguments that the trial essentially "pertain[ed] to Mr. Vickers' right to appeal." After brief deliberations, the jury returned a verdict of guilty.

At sentencing, the district court adopted the recommendation of the Presentence Report. The PSR determined that Vickers's three prior felony convictions constituted either a "violent felony" or a "serious drug offense," and designated Vickers as an Armed Career Criminal for purposes of sentencing. This designation mandated the imposition of a minimum sentence of fifteen years. Vickers objected to the characterization of his prior state conviction for delivery of a controlled substance as a "serious drug offense." The district court overruled the objection. The district court also denied Vickers's request for a two-level reduction in his sentence for acceptance of responsibility.

The final calculation placed Vickers's offense level at 33 with a Criminal History Category of IV. This resulted in a Sentencing Guideline range of 188 - 235 months. The district court sentenced Vickers to 190 months' imprisonment and three years of supervised release. The court adjusted the sentence from 190 months to 168 months to account for 22 months of incarceration by the state of Texas that would not be credited to his sentence by the U.S. Bureau of Prisons.

On appeal, Vickers challenges both his conviction and sentence.

II. DISCUSSION

A. Motion to Suppress

Vickers's first argument is that the district court erred in denying his motion to suppress. In evaluating a refusal to suppress evidence, we review questions of law de novo and factual findings for clear error. United States v. Mata, 517 F.3d 279, 284 (5th Cir. 2008). In addition, where, as here, the police acted without a warrant, the burden is on the Government to prove that the search was valid. United States v. Waldrop, 404 F.3d 365, 368 (5th Cir. 2005).

Vickers argues that the initial police action – pulling up in marked police vehicles and immediately instructing Vickers to place his hands on the police car – constituted an unconstitutional seizure under the Fourth Amendment because the officers had neither a warrant nor probable cause. The Government, on the other hand, characterizes the officers' actions as a permissible "stop and frisk" because the officers had reasonable suspicion that Vickers was involved in the reported burglary based on the information provided in the 911 call.

The Fourth Amendment provides these relevant protections:

> The Fourth Amendment prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops by persons or vehicles that fall short of traditional arrest. Because the balance between the public interest and the individual's right to personal security tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity may be afoot.

United States v. Arvizu, 534 U.S. 266, 273 (2002) (internal quotes and citations omitted). The legality of a "stop and frisk" requires this analysis: were the officer's initial actions justified when they occurred, and was there a reasonable relation between subsequent actions and the circumstances that supported the stop? United States v. Brigham, 382 F.3d 500, 506 (5th Cir. 2004) (en banc).

(a) The initial stop

The initial stop in a situation such as this is proper when "the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." United States v. Hensley, 469 U.S. 221, 227 (1985) (emphasis and citation omitted). Reasonable suspicion requires less information and certainty than the probable cause needed to make an arrest. United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000). Whether an officer has reasonable suspicion to stop is answered from the facts known to the officer at the time.

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry [v. Ohio, 392 U.S. 1 (1968),] recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 145-46 (1972).

The record shows that the police received an emergency phone call, in which the caller reported that his own home had just been burglarized. The victim provided his name, address, telephone number, as well as other personal information. In response to the call, the following dispatch was sent: "Burglary just occurred by unknown black male last seen wearing red shirt, blue or black shorts. Suspect near location." Upon arriving at the location, the officers discovered Vickers – about 75 to 100 yards from the burglarized home – wearing clothing that met the description of the reported burglar. Considering the

totality of the circumstances in this case, we find that the officers had a "particularized and objective basis" to believe that a crime had been committed and that Vickers was involved. Arvizu, 534 U.S. at 277.

Vickers argues that the 911 call was nothing more than an unreliable anonymous tip, which did not provide reasonable suspicion. Vickers is factually and legally incorrect. This was not anonymously-provided information; an identified citizen had been victimized by a crime and was reporting it. The question of whether a 911 call has a sufficient indicia of reliability to provide reasonable suspicion to justify a stop is evaluated based on the circumstances of each case. A good starting point is the presumption of "the reliability of an eyewitness 911 call reporting an emergency situation for purposes of establishing reasonable suspicion, particularly when the caller identifies" who he or she is. United States v. Drake, 456 F.3d 771, 775 (7th Cir. 2006); see also United States v. Burbridge, 252 F.3d 775, 778-79 (5th Cir. 2001) ("when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.") (citation omitted).

In this case, a burglary victim not only gave his name, he also provided several other pieces of information to identify himself and the burglar. The 911 call in this case was sufficiently detailed that the police were justified in relying on it to establish reasonable suspicion.

(b) Scope of the stop

Though the police had reasonable suspicion to stop Vickers, the officers' actions must not exceed the permissible scope of the stop. United States v. Dortch, 199 F.3d 193, 198 (5th Cir. 1999). The question is whether the police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." United States v. Sharpe, 470 U.S. 675, 686 (1985).

The means of investigation pursued here was a frisk, which the Supreme Court has held is appropriate when the officer fears that the suspect is armed and poses a danger to the officer or others. Terry, 392 U.S. at 24. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27. The responding officer testified that he immediately frisked Vickers because Vickers fit the description provided by the 911 caller and Vickers was near where the burglary occurred. The officer also testified, based on seventeen years of experience, that burglary suspects are often armed. He felt his own safety required a pat-down of Vickers. The reasonableness of police conduct includes consideration of "the specific reasonable inferences that the officer is entitled to draw from the facts in light of his experience and training." United States v. Sanders, 994 F.2d 200, 203 (5th Cir. 1993). Based on the totality of the circumstances, the district court did not err in finding that the officer's pat-down was reasonable.

The question of whether the officer should have pursued less intrusive means (for example engaging in conversation with Vickers before commencing the frisk) does not factor into our analysis. The Supreme Court has instructed that, once an officer has established reasonable suspicion, appellate courts are limited in reviewing how the police choose to alleviate that suspicion if the intrusion is no longer than necessary to dispel the suspicion:

> The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police's ability to make swift, on-the-spot decisions . . . and [ ] would require courts to indulge in unrealistic second-guessing.

United States v. Sokolow, 490 U.S. 1, 11 (1989) (internal quotes and citations omitted). In that case, the defendant's argument that officers were obligated to engage in conversation prior to detaining defendant was rejected. Id.

Vickers argues that two factors weigh against a finding that the officers had a reasonable basis to stop and frisk him. First, he cites to a discrepancy in police documentation regarding the time that the police were dispatched and the time of Vickers's arrest. Specifically, the arrest report indicated that Vickers was arrested at 2:57 p.m., even though the dispatch related to the burglary occurred at 2:59 p.m. Vickers argues that, if the times as reported are true, the officers lacked reasonable suspicion to stop Vickers, because they had not learned of the burglary at the time of the stop. The officers testified that the time discrepancy was a clerical mistake by a data entry clerk. The district court accepted that testimony. There was no clear error in that factual conclusion. United States v. Jordan, 232 F.3d 447, 448 (5th Cir. 2000).

Vickers's second argument is that any reasonable suspicion for a Terry stop and frisk was tainted by the arresting officer's subjective belief that he was going to arrest Vickers at the time of the initial stop. Courts "are precluded from giving weight to the subjective intent of police officers" in evaluating the constitutionality of a stop. United States v. Holloway, 962 F.2d 451, 458 (5th Cir. 1992). The standard we apply to the reasonableness of a stop is an objective one – were the officers objectively authorized to act as they did viewing the totality of the circumstances. Id. at 458 n.19. The officers' actions were objectively reasonable regardless of their subjective intent.

In sum, reasonable suspicion existed to believe that Vickers was engaged in a recently completed burglary, which gave the officers the right to stop him. Furthermore, the officers did not exceed the permissible scope of the stop when the officers sought to pat down Vickers. True, the police were incorrect in their initial suspicion that Vickers was involved in the burglary that prompted the police response. That hindsight does not change the Fourth Amendment analysis of whether the stop and frisk of Vickers was reasonable. Therefore, the district court did not err in denying Vickers's motion to suppress.

B. Lack of Nexus Between Interstate Commerce

Vickers's other challenge to his conviction is that the Government failed to sustain its burden that the gun found on Vickers "affect[ed] interstate commerce" – an essential element of the statute Vickers was charged with violating. This court has held that evidence similar to what was presented in this case is sufficient to establish the "interstate commerce" element of Section 922(g)(1). United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988). To the extent Vickers challenges the constitutionality of this section, this argument has been foreclosed in this Circuit. Vickers has preserved the issue should that later be relevant. See United States v. Daugherty, 264 F.3d 513, 518 (5th Cir. 2001).

C. Armed Career Criminal Act enhancement

Vickers also challenges his sentence. The first issue is whether the district court properly found him subject to the Armed Career Criminal Act (ACCA). See 18 U.S.C. § 924(e). The designation caused a fifteen-year mandatory minimum sentence. An armed career criminal is a felon in possession of a firearm who has three prior convictions for a "violent felony" or a "serious drug offense." Id. For a "serious drug offense" to qualify under the enhancement, it must also have a possible sentence of ten years or more. 18 U.S.C. 924(e)(2)(A)(i).[1]

The district court found that three of Vickers's prior convictions satisfied these statutory requirements. Vickers does not challenge the findings on two of the three convictions – murder and burglary of a habitation. However, he alleges that the third conviction – delivery of a controlled substance – is not a "serious drug offense" under the ACCA.

A "serious drug offense" under the ACCA is "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture

[1] The parties do not dispute that Vickers's prior drug conviction was a first degree felony punishable by a maximum prison term of 99 years. Tex. Pen. Code Ann. § 12.32(a). Therefore, that conviction meets the minimum penalty requirement of the ACCA.

or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(ii). The Texas statute supporting Vickers's conviction applied to a person who "knowingly manufactures, delivers, or possesses with intent to deliver" a controlled substance. Tex. Health & Safety Code Ann. § 481.112 (2003). The Texas statute defines delivery to include actual or constructive transfer or "offering to sell" the substance. Tex. Health & Safety Code § 481.002(8) (2003).

We review application of the armed career criminal enhancement de novo. United States v. Munoz, 150 F.3d 401, 419 (5th Cir. 1998). In determining whether an offense satisfies the ACCA, a court is limited to "examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13, 16 (2005).

We have noted that the Texas statute could be violated by a range of conduct between an offer to sell to actual delivery of a controlled substance. The charging document and state court judgment do not inform us what Vickers was accused of doing. The charging document states that Vickers

> did knowingly and intentionally deliver, to-wit: actually transfer, constructively transfer, and offer to sell a controlled substance, to-wit: COCAINE in an amount . . . of less than 28 grams, to CS Shields.

The state court judgment adds no useful detail. It does not reflect whether the judge found that Vickers: (1) actually transferred; (2) constructively transferred; (3) offered to sell; or (4) offered to sell and then actually or constructively transferred the cocaine. The Government concedes that conviction could be based on any one of the alternatives. Therefore, nothing negates the possibility that Vickers was convicted solely for offering to sell a controlled substance.

Vickers relies on a precedent in which the defendant was convicted of reentry by a removed alien. United States v. Gonzales, 484 F.3d 712, 714 (5th Cir.), cert. denied, 127 S. Ct. 3031 (2007). At sentencing, the Government sought to enhance Gonzales's sentence under the Sentencing Guidelines as a prior "drug trafficking offense."[2] The ACCA was not discussed. The only relevance of Gonzales is that the prior conviction was under the Texas statute that is at issue here. We held that Gonzales's conviction under the Texas statute for offering to sell a controlled substance was not a "drug trafficking offense." For the enhancement to be applicable, the offense must be one that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense." Id. at 715 n.1 (quoting U.S.S.G. § 2L1.2, cmt. n.1(B)(iv)). Our question was whether an offer to sell could be considered any of those actions. It could not be, and we found the enhancement inapplicable. Gonzales, 484 F.3d at 716.

Unlike the Gonzales court, we are not faced with interpreting the "drug trafficking" enhancement under the Sentencing Guidelines. Our interpretive issues arise from the Armed Career Criminal Act. If the definition in the ACCA of a "serious drug offense" were identical to the definition of a "drug trafficking offense" in the Guidelines, then the Gonzales holding would be relevant. The two definitions are not identical. The drug trafficking enhancement lists specific convictions (e.g., manufacture, import) that support the enhancement. The ACCA applies to convictions "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

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[2] The Sentencing Guidelines (§ 2L1.2) provide for a 16-level enhancement for a defendant convicted of unlawfully reentering the United States if the defendant has a prior felony conviction for a "drug trafficking offense."

The word "involving" is an exceedingly broad term for a statute. One of our precedents has addressed this part of the ACCA. United States v. Winbush, 407 F.3d 703 (5th Cir. 2005). There, one of the underlying felonies justifying imposition of the ACCA enhancement was a conviction for attempted possession of cocaine with intent to distribute under a Louisiana statute. Id. at 704. Winbush argued that the inchoate crime of attempt to possess did not qualify as a "serious drug offense" to justify the ACCA enhancement. Id. at 705. The court held that the inclusion of the word "involving" in the ACCA demonstrated that Congress intended the category of convictions considered a "serious drug offense" to be expansive:

> [t]he word 'involving' has expansive connotations, and we think it must be construed as extending the focus of § 924(e) beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct.

Id. at 707 (quoting United States v. King, 325 F.3d 110, 113 (2d Cir.), cert denied, 540 U.S. 920 (2003)). In Winbush, the court concluded that an attempted possession of cocaine was of a type "involving" possession.

Vickers correctly points out that the Louisiana statute in Winbush is not identical to the Texas delivery statute. The Louisiana attempt statute requires a showing that the defendant took steps toward obtaining possession of the controlled substance with the specific intent to commit the offense of possession with intent to distribute. State v. Harris, 846 So. 2d 709, 713 (La. 2003). The Texas delivery statute requires less: "The offense is complete when by words or deed, a person knowingly or intentionally offers to sell what he states is a controlled substance." Stewart v. State, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986). The intentional offer to sell a controlled substance is the crime; the accused need not have any drugs to sell or even intend ever to obtain the drugs

he is purporting to sell. Francis v. State, 890 S.W.2d 510, 513 (Tex. App. 1994) (statute requires neither possession nor actual/constructive transfer of a controlled substance at the time of an offer to sell).

Despite the statutory differences, our issue is whether a Texas conviction for offering to sell a controlled substance is one "involving" distribution of a controlled substance under the ACCA. We begin with the presumption that Congress "says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The plain meaning of the term "involving" means "related to or connected with." Winbush, 407 F.3d at 707 (quoting King, 325 F.3d at 113). The ACCA is intended to cover those individuals whose prior convictions indicate an "increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." Begay v. United States, 128 S. Ct. 1581, 1587 (2008). The expansiveness of the word "involving" supports that Congress was bringing into the statute's reach those who intentionally enter the highly dangerous drug distribution world. Being in the drug marketplace as a seller – even if, hypothetically, the individual did not possess any drugs at that time – is the kind of self-identification as a potentially violent person that Congress was reaching by the ACCA.

We have discussed that there is no evidence of how Vickers participated in the drug marketplace. It is the nature of the jurisprudence surrounding some sentencing enhancements based on prior convictions, when the details of those prior convictions do not appear in usable documentation, to have to discuss speculative possibilities. We find nothing illogical, unreasonable or unfair about interpreting this part of the ACCA in its most straightforward way. The offenses specified by the Texas statute – from the offer to sell, to attempted delivery, to actual delivery – are all offenses which are "related to or connected with" the

distribution of drugs. Winbush, 407 F.3d at 707 (quoting King, 325 F.3d at 113). Therefore, we hold that the district court did not err in concluding that Vickers's Texas conviction for delivery of a controlled substance was a "serious drug offense" for purposes of the ACCA.[3]

D. Sentence Reduction for Acceptance of Responsibility

Vickers's final argument is that the district court erred in denying his request for a reduction in sentence for acceptance of responsibility. The Sentencing Guidelines provide that if a defendant "clearly demonstrates acceptance of responsibility" for the offense, his sentence can be reduced two levels. U.S.S.G. § 3E1.1. Because the district judge is well-positioned to evaluate the appropriateness of a reduction in sentence based on acceptance of responsibility, the standard to review a denial is extremely deferential. United States v. Chapa-Garza, 62 F.3d 118, 122 (5th Cir. 1995).

Vickers argues that the district court erred in failing to find the following to be decisive: (1) Vickers went to trial solely to preserve his ability to appeal questions of law; (2) the defense presented no evidence at trial; (3) at trial counsel only cross examined one of the Government's witnesses; (4) Vickers stipulated to the fact that he had previously been convicted of a felony; (5) in closing argument counsel all but conceded guilt – by telling the jury Vickers was proceeding to trial to preserve issues for appeal; and (6) Vickers pled guilty to

[3] We recognize that this holding means that an offense could be found to satisfy the ACCA requirements, while the same offense would not be sufficient to trigger an enhancement under the Sentencing Guidelines. For example, in Gonzales as well as United States v. Price, 516 F.3d 285 (5th Cir. 2008), we held that "delivery" under this Texas statute does not constitute either a "drug trafficking offense" (Gonzales) or a "controlled substance offense" (Price) for sentencing purposes. These cases, however, are based on the specific language of those two enhancements. Here we are faced with a statute whose language encompasses offenses "involving" distribution – broad enough language to cover an offer to sell.

essentially the same crime in state court based on the same underlying events – indicating an admission of guilt.

Vickers placed these same facts before the district court and the court found them unconvincing. Vickers had rejected a conditional guilty plea offered by the Government, put the Government to its burden of proof in a jury trial, sought a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, and in closing argument urged the jury to find that the Government had not proven its case beyond a reasonable doubt. Based on this record we cannot find that the district court abused its broad discretion in denying Vickers's request for a reduction in sentence for acceptance of responsibility.

AFFIRMED.

ORIGINAL

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 1 TXND Mod - 09/28/04

UNITED STATES DISTRICT COURT

Northern District of Texas - Dallas Division

UNITED STATES OF AMERICA
V.

MICHAEL DEWAYNE VICKERS

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:06-CR-229-B(01)**

USM Number: **35401-177**

John M. Nicholson Assistant Federal Public Defender
Defendant's Attorney

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 11 2007
CLERK, U.S. DISTRICT COURT
By Deputy

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) **Count 1 of the Indictment filed on July 25, 2006.** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §§ 922(g)(1) & 924 (e)(1)	Felon in Possession of a Firearm	August 30, 2005	1

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

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

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

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

July 5, 2007
Date of Imposition of Judgment

Signature of Judge

Jane J. Boyle
United States District Judge
Name and Title of Judge

July 10, 2007
Date

18-10940.158

Vickers v. United States
Petition Appendix

DEFENDANT: **MICHAEL DEWAYNE VICKERS**
CASE NUMBER: **3:06-CR-229-B(01)**

IMPRISONMENT

Pursuant to the Sentencing Reform Act of 1984, but taking the Guidelines as advisory pursuant to United States v. Booker, and considering the factors set forth in 18 U.S.C. Section 3553(a), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **ONE HUNDRED NINETY (190) MONTHS. However, the Court adjusts this term of imprisonment to 168 months, pursuant to USSG § 5G1.3(b), to account for a 22-month period of imprisonment that will not be credited by the Bureau of Prisons. (see attachment "A")**

☑ The court makes the following recommendations to the Bureau of Prisons:
An FCI close to Dallas, Texas

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before _____ on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

18-10940.159

ATTACHMENT "A"
3:06-CR-229-B
MICHAEL DEWAYNE VICKERS

"The Court finds that a term of imprisonment of 190 months is appropriate. However, the Court adjusts this term of imprisonment to 168 months, pursuant to USSG § 5G1.3(b), to account for a 22-month period of imprisonment that will not be credited by the Bureau of Prisons. The 22-month adjustment fully accounts for the period of imprisonment that the defendant has already served in state custody on the term of imprisonment imposed in state case # F-0556626, which is for the same offense (i.e., "relevant conduct") to the instant offense of conviction. Also pursuant to USSG § 5G1.3(b), the 168-month term of imprisonment in this case is to run concurrently to the remainder of any undischarged term of imprisonment imposed in state case # F-0556626."

DEFENDANT: **MICHAEL DEWAYNE VICKERS**
CASE NUMBER: **3:06-CR-229-B(01)**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
THREE (3) YEARS

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

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

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

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

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

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

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

STANDARD CONDITIONS OF SUPERVISION

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

AO 245B (Rev. 12/03) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: **MICHAEL DEWAYNE VICKERS**
CASE NUMBER: **3:06-CR-229-B(01)**

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide to the U.S. Probation Officer any requested financial information.

DEFENDANT: **MICHAEL DEWAYNE VICKERS**
CASE NUMBER: **3:06-CR-229-B(01)**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ N/A	$ N/A

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

☐ The defendant must make restitution (including community restitution), payable to the U.S. District Clerk to be disbursed to the following payee(s) in the amount(s) listed below.

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

Name of Payee	Restitution Ordered	Priority or Percentage

TOTALS $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

☑ the interest requirement is waived for the ☑ fine ☑ restitution.

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

18-10940.163

DEFENDANT: **MICHAEL DEWAYNE VICKERS**
CASE NUMBER: **3:06-CR-229-B(01)**

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

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

F ☑ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the defendant shall pay to the United States a special assessment of $100, for Count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk, 1100 Commerce Street, 14th Floor, Dallas, Texas 75242.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

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

☐ The defendant shall forfeit the defendant's interest in the following property to the United States: See Sheet 6B.

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

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) 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.

(b) 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.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

(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. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable

factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be

filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the

United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

18 U.S.C. § 924(e) (the Armed Career Criminal Act)

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection-

(A) the term "serious drug offense" means-

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

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

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

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

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Texas Penal Code § 19.02 (West eff. Jan. 1, 1974 –Aug. 31, 1994):

§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

FEDERAL PUBLIC DEFENDER
FOR THE NORTHERN DISTRICT OF TEXAS

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J. MATTHEW WRIGHT
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Via ECF
February 23, 2022

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130

Re: *United States v. Vickers*, No. 18-10940: Appellate Jurisdiction

Dear Mr. Cayce:

This Court has appellate jurisdiction under 18 U.S.C. § 3742(b) because the Government only appealed the June 27, 2018 criminal judgment. If the Government had perfected an appeal of the June 5, 2018 civil judgment, the Court would have appellate jurisdiction under 28 U.S.C. §§ 1291 and 2253. Mr. Vickers satisfies the "gatekeeping" requirements for 28 U.S.C. § 2255(h)(2) motions because the district court relied on the ACCA's residual clause at sentencing. Over six years of litigation in three courts, the Government has never yet argued otherwise.

This Court granted pre-filing authorization because Mr. Vickers's successive motion contained the new rule announced in *Johnson v. United States*, 576 U.S. 591 (2015). ROA.868–869. Mr. Vickers also satisfies the judicially crafted gatekeeping

standard adopted in *United States v. Wiese*, 849 F.3d 1313 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). Under "the relevant background legal environment that existed at the time of the defendant's sentencing," *Wiese*, 896 F.3d at 725, there was no way his Texas murder conviction could satisfy the ACCA's elements clause. As in *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017), the residual clause was necessary because pre-sentencing precedent ruled out the elements clause for the third predicate. Unlike *Taylor*, the district court here correctly reached the merits and granted relief on the constitutional claim. ROA.950–953.

To evaluate whether the district court historically "relied on" the residual clause, this Court "looks to the law at the time of sentencing." *Clay*, 921 F.3d at 556 (quoting *Wiese*, 896 F.3d at 724) (cleaned up). When Mr. Vickers was sentenced, on July 5, 2007, entrenched Fifth Circuit precedent not only "suggest[ed]," but, *insisted* "that [Vickers's] third predicate conviction" for Texas murder "could have applied only under the residual clause." *Taylor*, 873 F.3d at 482.

First, *United States v. Calderon-Pena* strictly limited the inquiry to "the *elements* of the crime, not to the defendant's actual conduct in committing it."383 F.3d 254, 257 (5th Cir. 2004). Even where "the actual conduct described in the indictments could be construed to involve the use of physical force against the person of another," these allegations were "irrelevant for purposes of" applying the elements clause. *Id.*

Second, this Court had repeatedly and unambiguously held that Texas result-oriented crimes—defined by the *result* or *harm* the defendant inflicted—did not satisfy

the elements clause. *See United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (recognizing a distinction "between a defendant's causation of an injury and the defendant's use of force"). That reasoning would exclude all three forms of Texas murder,[1] which are defined by the *result*. The victim's death could be caused by "any of a number of acts, without use of 'destructive or violent force,'" such as "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006).

Third, shortly before Mr. Vickers's sentencing, this Court applied the ACCA's residual clause to hold that another of Texas's result-oriented crimes was a violent felony under the residual clause, not the elements clause. *See United States v. Davis*, 487 F.3d 282 (5th Cir. 2007). Texas robbery, like murder and assault, could not satisfy the *Vargas-Duran* and *Calderon-Pena* interpretation of the elements clause because "it does not define 'robbery' in terms of the use or threat of force." *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 & n.3 (5th Cir. 2006). *Davis* held that Texas robbery could nonetheless satisfy the ACCA's residual clause because the conduct described by the elements, "in the ordinary case, presents a serious potential risk of physical injury to another." 487 F.3d at 286–287. The same is true of murder.

[1] Tex. Penal Code § 19.02(a)(1)–(3) in 1982; (b)(1)–(3) today.

Years later, the jurisprudential landscape changed. In 2014, the Supreme Court held that deploying poison against a family member is a use of physical force against the victim, at least for purposes of 18 U.S.C. § 922(g)(9). *United States v. Castleman*, 572 U.S. 157, 170 (2014). In 2018, this Court extended *Castleman*'s reasoning to overrule *Villegas-Hernandez*, *Vargas-Soto*, *Calderon-Pena*, and a host of other cases. *See United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018).

Those intervening decisions matter to the current-law merits of this appeal, but not to the historical-law gatekeeping inquiry required by *Wiese* and *Clay*. Appellate decisions in 2014–2018 are "of no consequence to determining the mindset of a sentencing judge" in 2007. *Wiese*, 896 F.3d at 725. The legal landscape in 2007 establishes, by a preponderance of the evidence, that the district court relied on the ACCA's residual clause in when it sentenced Mr. Vickers. Mr. Vickers's motion thus contains and relies on the new rule in *Johnson*, which is exactly the type of successive motion Congress authorized in § 2255(h)(2).

Should the Court disagree, Mr. Vickers preserves for further review: (a) the district-court gatekeeping procedure in § 2244(b)(4) does not apply to § 2255(h) motions;[2] (b) the *Wiese-Clay* framework deviates from the text of § 2255(h)(2);[3] and

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[2] Section 2255(h) requires prefiling authorization "as provided in section 2244." *Reyes-Requena v. United States*, 243 F.3d 895 (5th Cir. 2001), held that § 2255(h) implicitly incorporated additional aspects of the state-prisoner § 2244 procedure, including the district-court gatekeeping step found in § 2244(b)(4). This is when the *Wiese-Clay* inquiry is supposed to be performed.

[3] Section 2244(b)(2)(A) sets the new-constitutional-rule standard for state prisoners, while § 2255(h)(2) sets the standard for federal prisoners. The provisions are not the same. *United States v.*

(c) any gatekeeping requirement is, at most, a claims-processing issue that the Government long ago waived.[4] "[I]t would be passing strange if, after a [prefiling authorization] has issued, each court of appeals adjudicating an appeal were dutybound to revisit the threshold showing and gauge" the strength of the evidence about a judge's reconstructed state-of-mind from a long-ago sentencing hearing "to verify its jurisdiction." *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012).

The Government has, for six years, consistently asked for a merits determination applying current federal sentencing law to Mr. Vickers's *Johnson* claim. ROA.856–861. Party-presentation is the heart of our adversarial judicial system. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578–79 (2020); *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008). The Court should affirm.

Respectfully,

/s/ J. Matthew Wright
Assistant Federal Public Defender

MacDonald, 641 F.3d 596, 609 (4th Cir. 2011). A state prisoner must show that his proposed claim "relies on" the new rule; a federal prisoner need only show that his proposed motion "contains" the new rule. *Id.*; *see also In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017). "This 'difference in language'—in one section, what a claim requires; in the other, what a motion requires—'demands a difference in meaning.'" *Raines v. United States*, 898 F.3d 680, 692 (6th Cir. 2018) (Cole, C.J., concurring); *accord In re Bradford*, 830 F.3d 1273, 1276 n.1 (11th Cir. 2016) (§ 2255(h) "cannot incorporate § 2244(b)(2)."). Even under § 2244(b)(2)(A), though, the *claim* must "rely on" the new rule. Neither statute discusses reliance by, or the "mindset" of, the original *decisionmaker* who committed the as-yet-unknown error. *Contra Wiese*, 896 F.3d at 725.

[4] The Government agrees that the substantive gatekeeping requirements are waivable, non-jurisdictional, claims-processing rules. *Williams v. United States*, 927 F.3d 427, 439 (6th Cir. 2019).

Certificate of Service

I filed this letter via the Court's ECF system. Opposing Counsel is a registered filer and is considered served.

/s/ J. Matthew Wright

Certificate of Compliance

1. This letter complies with the five-page limit set by the Court's February 8, 2022 order.

2. The letter complies with the format guidelines of Fed. R. App. P. 32(a)(4)–(6). The document has been prepared in MS Word 16, using double-spaced 14-point Garamond typeface. The body of the letter including footnotes contains 1,249 words.

/s/ J. Matthew Wright

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February 23, 2022

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: Government's Supplemental Letter Brief Regarding *Wiese* & *Clay*
United States v. Michael Dewayne Vickers, No. 18-10940

Mr. Cayce:

Please accept this letter brief in satisfaction of the Court's February 8, 2022 directive. As the government previously noted, the district court's underlying decision preceded this Court's now-applicable jurisdictional[1] decisions in *United States v. Wiese*, 896 F.3d 720 (5th Cir. 2018), and *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019). (Gov't 9/3/2021 Ltr. at 5-6.) While the government originally suggested that a remand might clarify this matter, (*id.* at 6), a careful review of the record and relevant case law confirms that Vickers cannot meet his burden to demonstrate "that the relief he seeks relies . . . on a new, retroactive rule of constitutional law," *Wiese*, 896 F.3d at 723. If the district court had applied these standards, it should have dismissed his motion.[2]

[1] The government's nationwide position is it that 28 U.S.C. § 2244(b)(2)(A)'s gatekeeping provision is not jurisdictional, but this Court has treated it as such in *Wiese* and *Clay*. Because this Court treats it as a jurisdictional issue, it can dismiss Vickers's motion.

[2] Any suggestion by Vickers that this Court can only review his sentence (but not the Section 2255 order itself) is meritless. *See United States v. Vickers*, 967 F.3d 480, 483 (5th Cir. 2020), *vacated on other grounds by* 141 S. Ct. 2783 (2021).

A prisoner filing "[a] second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application." *Id.* (citing 28 U.S.C. §§ 2244(b) & 2255(h)). The prisoner first must receive this Court's permission to file a second or successive motion by:

> mak[ing] a "prima facie showing" that the motion relies on a new claim resulting from either (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (2) newly discovered, clear and convincing evidence that but for the error no reasonable fact finder would have found the defendant guilty.

Id. (quoting 28 U.S.C. §§ 2244(b) & 2255(h)). If, as here, the Court grants permission, "the prisoner must [next] actually prove at the district court level that the relief he seeks relies either on a new, retroactive rule of constitutional law or on new evidence." *Id.* (citations omitted).

To prove that his successive motion relies on the constitutional rule established in *Johnson v. United States*, 576 U.S. 591 (2015), Vickers must show that, at his 2007 sentencing, it was "more likely than not" that the court relied on the residual clause in the Armed Career Criminal Act (ACCA) to find that his prior Texas murder conviction was a violent felony, *see Clay*, 921 F.3d at 559. In analyzing that issue, this Court "look[s] to the law at the time of sentencing," and may consider: "(1) the sentencing record for direct evidence of a sentence . . . [;] and (2) the relevant background legal environment that existed at the time of the defendant's sentencing and the [PSR] and other relevant materials before the district court." *Wiese*, 896 F.3d at 724-25. Vickers cannot satisfy his burden for two reasons.

First, unlike in some cases applying *Wiese* and *Clay*, the record below is silent as to whether the court relied on ACCA's elements clause or residual clause. Neither the PSR nor any materials referenced the residual clause, and the sentencing transcript is also silent. That is because, in 2007, Vickers did not dispute that his murder conviction was an ACCA predicate; instead, he objected only to counting his "Delivery of a Controlled Substance" conviction as an ACCA predicate. (ROA.696-97.) Thus, at sentencing, the court's only comments about Vickers's murder conviction concerned admitting documents under *Shepard v. United States*, 544 U.S. 13 (2005). (ROA.613-14, 617.)

Because nothing in the record itself suggests that the district court relied on the residual clause in counting Vickers's prior murder conviction as an ACCA predicate, it is—at best—speculation on Vickers's part that the court relied on the residual clause. This uncertainty is fatal to his claim for relief because, for the district court to grant relief, there had to be more than a theoretical possibility that the sentencing court relied on the residual clause at Vickers's original sentencing.[3] Indeed, in *Clay*, this Court held that the "more likely than not" standard was not satisfied where a prisoner "failed to put forward any evidence suggesting explicit reliance on the residual clause." *United States v. Medina*, 800 F. App'x 223, 226 (5th Cir. 2020) (citing *Clay*), *cert. denied*, 141 S. Ct. 1048 (2021).[4]

[3] *See United States v. Hernandez*, 779 F. App'x 195, 199-200 (5th Cir. 2019) (holding that the "more likely than not" standard was not met where the defendant only showed "that the sentencing court *might have* relied on the residual clause").

[4] *See also United States v. Alexander*, 808 F. App'x 234, 238 (5th Cir. 2020) (finding a defendant had not carried his burden where, "[a]t the sentencing hearing, the judge did not say anything to suggest he relied on ACCA's residual clause"—let alone, "explain whether he was applying the categorical or modified categorical approach"), *cert. denied*, 141 S. Ct. 1083 (2021).

Second, and contrary to Vickers's prior claim, Fifth Circuit precedent did not "foreclose[] any suggestion that Texas murder might satisfy" ACCA's elements clause in 2007. (Vickers's 9/17/2021 Ltr. at 4 (citing *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc), and *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006).)[5] While *Vargas-Duran* noted that there was "a difference between a defendant's causation of an injury and the defendant's use of force," 356 F.3d at 606, these cases did not construe the Texas murder statute, did not conclude that a Texas murder conviction fell outside of ACCA's elements clause, and—most importantly—did not prevent a court, in 2007, from relying on the elements clause to conclude that a Texas murder conviction was a violent felony.[6]

In 2007 and prior to *Mathis v. United States*, 579 U.S. 500 (2016), statutes like the Texas murder statute routinely were narrowed through the use of *Shepard* documents.[7] And from the *Shepard* documents here, we know that Vickers was convicted under Tex. Penal Code § 19.02(a)(1)[8] for "knowingly and intentionally" killing a man. (ROA.865, 873-85.) Even so, the government expects Vickers to argue that Texas intentional murder could not be a violent felony under the elements clause until this Court, in *Reyes-Contreras*, broadened its view of the elements clause and abrogated the distinction between direct and

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[5] *Vargas-Duran* and *Villegas-Hernandez* are no longer good law. *See United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc).

[6] Even this Court noted that applying *Vargas-Duran* to offenses involving death would be an "exten[sion]" of that case *eight years* after Vickers was sentenced. *United States v. Garcia-Perez*, 779 F.3d 278, 284 (5th Cir. 2015), *overruled by Reyes-Contreras*, 910 F.3d at 169.

[7] *See United States v. Godoy-Castaneda*, 614 F. App'x 768, 771 (5th Cir. 2015) (using the modified categorical approach to review a New York murder conviction before *Mathis*).

[8] Vickers's offense now exists in Section 19.02(b)(1) but has identical statutory language.

indirect force. But Vickers is wrong because courts held that prior murder (or attempted murder) convictions were violent felonies under the elements clause before *Reyes-Contreras* and before this Court reached that conclusion in this case. *See United States v. Gonzalez*, No. 2:14-CV-388, 2017 WL 978700, at *3-5 (S.D. Tex. Mar. 13, 2017); *Joiner v. United States*, No. A-16-CV-1069-SS, 2018 WL 814021, at *4-5 (W.D. Tex. Feb. 9, 2018), *vacated*, 142 S. Ct. 57 (2021).[9] Given these decisions, courts also have found that defendants could not show—in 2011-2012, when relevant Fifth Circuit law was effectively the same as in 2007—that courts relied on the residual clause in holding that Texas murder (or attempted murder) convictions were violent felonies/crimes of violence. *See Chavez v. United States*, No. 5:16-CV-173, 2021 WL 765764, at *4-5 (S.D. Tex. Feb. 25, 2021); *Richardson v. United States*, No. 3:16-CV-1779-K, 2019 WL 3338263, at *5-6 (N.D. Tex. July 15, 2019). The Court should reach the same conclusion here.

In sum, because: (1) the sentencing record here is silent as to whether the district court relied on the residual clause or the elements clause in determining that Vickers's prior Texas murder conviction was a violent felony; and (2) Fifth Circuit law did not prevent a district court, in 2007, from concluding that a Texas murder conviction was a violent felony under the elements clause, Vickers cannot meet his burden of showing that it was "more likely than not" that the district court relied on the residual clause to conclude that his prior Texas murder conviction was a violent felony. And because Vickers cannot make that showing, the district court should have dismissed his successive Section 2255 motion.

[9] Other circuits recognized that "[c]ommon sense dictate[d] that murder" qualified as a violent felony under the elements clause. *In re Irby*, 858 F.3d 231, 237 (4th Cir. 2017).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of this Court's February 8, 2022 supplemental briefing order because it is five pages. This document contains 1,487 words.

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s/ Amy J. Mitchell
Amy J. Mitchell
Assistant United States Attorney
Date: February 23, 2022