No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRA GREEN

Petitioner

v.

UNITED STATES

Respondent

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

APPENDIX

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67 F.4th 657
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Andra G. GREEN, a/k/a Giz, a/k/a Gizzle, a/k/a A. Gizzle, a/k/a Andra Gabrael Green, a/k/a Andra Gabriel Green, Jr., a/k/a A.J., Defendant - Appellant.

No. 16-7168
|
Argued: January 24, 2023
|
Decided: May 16, 2023

Synopsis

Background: Federal inmate filed motion to vacate, set aside, or correct sentence. The United States District Court for the Eastern District of Virginia, Rebecca Beach Smith, Senior District Judge, 2016 WL 7367178, dismissed motion, and inmate appealed.

Holdings: The Court of Appeals, Gregory, Chief Judge, held that:

[1] motion was timely;

[2] inmate established cause of his procedural default of claim that Hobbs Act robbery did not qualify as predicate "crimes of violence"; but

[3] inmate failed to establish prejudice excusing his procedural default.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (12)

[1] Weapons Crime at Issue

To determine whether offense satisfies Armed Career Criminal Act's (ACCA) elements clause, courts must apply categorical approach, considering only elements of offense in question without regard to individual's conduct in committing crime. 18 U.S.C.A. § 924(c).

[2] Criminal Law Review De Novo

Court of Appeals reviews district court's dismissal of motion to vacate, set aside, or correct sentence de novo. 28 U.S.C.A. § 2255.

[3] Criminal Law Time for proceedings

Where defendant does not file direct appeal, conviction becomes final, and one-year limitations period for motion to vacate, set aside, or correct sentence commences, when appeal period expires. 28 U.S.C.A. § 2255(f).

[4] Criminal Law Time for proceedings

Defendant's motion to vacate, set aside, or correct sentence challenging his convictions for using firearm to commit murder in course of "crime of violence" was timely, even though it was filed more than one year after his convictions became final; motion was filed within one year of Supreme Court's decision in *Johnson v. United States*, which held that residual clause in Armed Career Criminal Act's (ACCA) definition of "violent felony" was unconstitutionally vague, and, after defendant filed motion and while his appeal was pending, Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319, that residual clause definition of "crime of violence" in statute of conviction was unconstitutionally vague, recognizing specific right that defendant asserted in his motion. 18 U.S.C.A. §§ 924(c), 924(j); 28 U.S.C.A. § 2255(f).

2 Cases that cite this headnote

[5] **Criminal Law** Fundamental or constitutional error; innocence

Criminal Law Cause and prejudice in general

To raise defaulted claim on collateral review, defendant must show cause for default and prejudice resulting from it, or he must demonstrate that he is actually innocent. 28 U.S.C.A. § 2255.

[6] **Criminal Law** Cause

To demonstrate cause for procedural default on collateral review, defendant must show there was some external impediment preventing counsel from constructing or raising claim at time of conviction and direct appeal. 28 U.S.C.A. § 2255.

[7] **Criminal Law** Cause

Cause for procedural default of claim on collateral review exists when defaulted claim was so novel that its legal basis was not reasonably available to counsel. 28 U.S.C.A. § 2255.

1 Case that cites this headnote

[8] **Criminal Law** Cause

Defendant established cause of his procedural default of claim that Hobbs Act robbery did not qualify as predicate "crimes of violence" required to support his conviction for use of firearm during and in relation to crime of violence; at time of his conviction, Supreme Court had twice affirmed constitutionality of Armed Career Criminal Act's (ACCA) similar residual clause, and circuit courts had uniformly rejected vagueness challenges to residual clauses. 18 U.S.C.A. §§ 924(c), 1951(a); 28 U.S.C.A. § 2255.

3 Cases that cite this headnote

[9] **Criminal Law** Cause

Weapons Crimes of violence

Hobbs Act robbery constituted "crime of violence" under elements clause of statute prohibiting use of firearm during and in relation to crime of violence, and thus defendant bringing collateral attack on his conviction for use of firearm during and in relation to crime of violence by motion to vacate, set aside, or correct sentence failed to establish prejudice excusing his procedural default in failing to raise on direct appeal claim that his Hobbs Act robbery conviction did not qualify as predicate "crime of violence" based on Supreme Court's retroactively applicable holding in *United States v. Davis*, 139 S. Ct. 2319, that residual clause in statute of conviction was unconstitutionally vague. 18 U.S.C.A. §§ 924(j), 1951(b)(1); 28 U.S.C.A. § 2255.

3 Cases that cite this headnote

[10] **Criminal Law** Prejudice

To establish prejudice required to overcome procedural default of claim, defendant seeking to vacate, set aside or correct sentence must show that default worked to his actual and substantial disadvantage and has constitutional dimensions. 28 U.S.C.A. § 2255.

[11] **Courts** Number of judges concurring in opinion, and opinion by divided court

One panel of Court of Appeals cannot overrule decision issued by another panel.

[12] **Criminal Law** Fundamental or constitutional error; innocence

Actual innocence required to overcome procedural default of claim on collateral review means factual innocence, not mere legal insufficiency, and is not satisfied by showing that

defendant is legally, but not factually, innocent. 28 U.S.C.A. § 2255.

***659** Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Rebecca Beach Smith, Senior District Judge. (4:09-cr-00081-RBS-FBS-7; 4:16-cv-00022-RBS)

Attorneys and Law Firms

ARGUED: Caleb Grant, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Joseph Attias, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. ON BRIEF: Thomas V. Burch, Appellate Litigation Clinic, UNIVERSITY OF GEORGIA SCHOOL OF LAW, Athens, Georgia, for Appellant. Jessica D. Aber, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Before GREGORY, Chief Judge, WYNN, and THACKER, Circuit Judges.

Opinion

Affirmed in part, vacated in part, and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Wynn and Judge Thacker joined.

GREGORY, Chief Judge:

In 2011, Andra Green pled guilty to two counts of using a firearm to commit murder in the course of a "crime of violence," in violation of 18 U.S.C. § 924(j). In 2016, he filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In the motion, he cited the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the "residual clause" in the Armed Career Criminal Act's ("ACCA") definition of "violent felony," 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. Although Green filed his § 2255 ***660** motion within one year of the *Johnson* decision, the district court dismissed the motion as untimely. The court concluded that *Johnson* did not affect the validity of Green's § 924(j) convictions because they rested on predicate "crime[s] of violence" as defined in 18 U.S.C. § 924(c), not on the ACCA definition of "violent felony."

While Green's appeal was pending, the Supreme Court held that the residual clause in § 924(c)'s definition of a "crime of violence" was unconstitutionally vague, recognizing the specific right Green asserted in his § 2255 motion. *See United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2323–24, 204 L.Ed.2d 757 (2019). Because Green filed his motion within one year of *Johnson* and *Davis* extended the Supreme Court's reasoning in *Johnson*, we hold that it was timely. Nevertheless, we affirm the dismissal of Green's motion as to one of his § 924(j) convictions because Green procedurally defaulted his claim challenging the conviction and cannot establish grounds for excusing the default. We vacate Green's conviction and sentence on the other § 924(j) count because the conviction is unsupported by a valid predicate offense, and the Government concedes that he is entitled to relief.

I.

A.

In 2011, a federal grand jury in the Eastern District of Virginia indicted Green and several other individuals on thirty-six counts related to gang activity in Hampton Roads, Virginia. The most serious charges stemmed from the separate killings of John Henry Green and Demareo Dontae Hardy, both of which occurred during drug robberies. For his involvement in the killings, Green was charged with two counts of using a firearm to commit murder during a crime of violence (18 U.S.C. § 924(j)), as well as attempted and completed Hobbs Act robbery (18 U.S.C. § 1951(a)–(b)), conspiracy to commit Hobbs Act robbery, and related firearms charges.

Section 924(j) adopts § 924(c)'s definition of a "crime of violence." That section defines a crime of violence as an offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "elements clause" or "force clause"); or "(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "residual clause"). 18 U.S.C. § 924(c)(3)(A)–(B).

In October 2011, Green pled guilty to the two § 924(j) counts.[1] The first, Count 29, related to the murder of John Henry Green and identified two predicate crimes of violence: conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. The second, Count 34, related to the murder of Hardy and also identified two predicates: conspiracy to commit Hobbs Act robbery and completed Hobbs Act robbery. Neither the indictment nor the plea agreement specified whether these predicate offenses qualified as crimes of violence under the elements clause or the residual clause of § 924(c). As part of the plea agreement, Green waived his right to appeal his convictions or sentence.

The district court accepted the plea and, in January 2012, sentenced Green to concurrent life sentences for Counts 29 and 34. On the Government's motion, the court dismissed the remaining counts of the indictment. ***661** Green did not file a direct appeal.

B.

On April 11, 2016, Green filed a pro se motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The motion, which he submitted on a § 2255 form for incarcerated persons, was sparse on substance. Green sought "[r]elief of my sentence [e]nhancements" and cited the Supreme Court's 2015 decision in *Johnson*. J.A. 101. The motion did not further discuss how *Johnson* affected his convictions or sentence. In the section of the form titled "timeliness of motion," Green wrote: "There are no statutes of limitations on any murder. At any giv[en] time there can be sufficient or insufficient material brought to further the case which could also leave room for error." J.A. 109. Green asked the court to grant the following relief: "That my LIFE sentence be reduced to no less than 240 months and no more than 360 months." J.A. 110.

The following day, the district court issued a show cause order directing Green to explain why his motion, which he filed more than four years after his conviction became final, was not untimely under the Antiterrorism and Effective Death Penalty Act's ("AEDPA") one-year statute of limitations for § 2255 motions. *See* 28 U.S.C. § 2255(f). The court noted that Green's argument about murder offenses having no statute of limitations was irrelevant, as the limitations period for § 2255 motions does not change based on the crime of conviction. The court gave Green thirty days to file a response and warned him it would dismiss the motion if he failed to do so.

Green responded to the show-cause order one week later. He argued that his motion should not be time-barred because the court had not provided "the proper documents to research [his] motion" in a timely manner, the Bureau of Prisons had lost certain relevant documents, and he lacked access to legal assistance while housed in solitary confinement. J.A. 114. The district court found Green's response inadequate because it lacked a certificate of service to the Government and stated it would strike the response from the record unless Green corrected the deficiency within thirty days. Green did not submit a corrected response within the thirty-day window.

On June 7, 2016, the district court dismissed Green's § 2255 motion without requesting a response from the Government. It held the motion was untimely under § 2255(f) because Green did not file it within one year after his conviction became final. The court considered whether the motion was timely under § 2255(f)(3), which permits a petitioner to file a § 2255 motion within one year of "the date on which the right asserted [in the motion] 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." 28 U.S.C. § 2255(f)(3). The court acknowledged that Green's motion cited *Johnson*, which was decided less than a year before he filed the motion, but stated that Green "was not sentenced under the ACCA" and "does not explain how *Johnson* could apply to his conviction or sentence." J.A. 117–18. It therefore concluded that the motion was not timely under § 2255(f)(3). J.A. 118. The district court declined to grant a certificate of appealability.

After the appeal deadline expired, Green filed a request for an extension to respond to the district court's dismissal order. He attached an "affidavit" in which he argued that the residual clause in § 924(c) is "unconstitutionally va[gu]e and do[es] not have a force clause." J.A. 125. Green asserted ***662** that "after the Supreme Court decision in *Johnson*, 135 S. Ct. at 2552 (2015), this residual clause [ ] is no longer valid," and that his "2255(f)(3) is timely" because it was filed within a year of *Johnson*. *Id.* The district court construed Green's request as a motion for an extension of time to file an appeal and granted an extension. Green filed a notice of appeal within the extension period.

C.

[1] We initially placed Green's appeal in abeyance pending decisions from the Supreme Court and this Court that might bear on the validity of Green's § 924(j) convictions. In 2019, the Supreme Court decided *Davis*, which held that the residual clause in § 924(c) is unconstitutionally vague. 139 S. Ct. at 2323–24. We have since held that the rule recognized in *Davis* applies retroactively to cases on collateral review. *In re Thomas*, 988 F.3d 783, 789 (4th Cir. 2021). After *Davis*, an offense qualifies as a crime of violence only if it meets the definition in § 924(c)'s elements clause. To determine whether an offense satisfies that clause, courts must apply the categorical approach, "consider[ing] only the elements of the offense in question without regard to an individual's conduct in committing the crime." *United States v. Melaku*, 41 F.4th 386, 391 (4th Cir. 2022).

[2] We ultimately granted a certificate of appealability on two issues: (1) "whether a § 2255 motion filed within a year of *Johnson v. United States*, but effectively premised on *United States v. Davis*, is timely"; and (2) "if so, whether, following *Davis*, Green's ... convictions are infirm." Dkt. No. 70 (citations omitted). We review the district court's dismissal of Green's § 2255 motion de novo. *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017).

II.

To start, the Government agrees that Green's § 924(j) conviction for Count 29 should be vacated and affirmatively waives any statute-of-limitations or other procedural defenses as to that count. [2] After *Davis* struck down § 924(c)'s residual clause, neither offense underlying Count 29—conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery—is a valid predicate. The Supreme Court recently held that attempted Hobbs Act robbery does not satisfy § 924(c)'s elements clause because "it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property." *United States v. Taylor*, —— U.S. ——, 142 S. Ct. 2015, 2020, 213 L.Ed.2d 349 (2022). This Court has reached the same conclusion for conspiracy to commit Hobbs Act robbery. *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc). Accordingly, Green's conviction for Count 29 can no longer stand.

We therefore reverse the district court's dismissal order as to Count 29 and remand with instructions to vacate that conviction and sentence.

III.

The parties' dispute begins with Count 34, which is predicated on Hobbs Act conspiracy and completed Hobbs Act robbery. Because Hobbs Act conspiracy is not a valid § 924(c) predicate, Green's conviction must rest on the completed Hobbs Act robbery predicate, which is valid only if it qualifies as a crime of violence under the ***663** elements clause. Green contends that Hobbs Act robbery does not satisfy the elements clause, and he further asserts that the elements clause, like the residual clause, is unconstitutionally vague.

Before reaching the merits, though, we must determine whether Green's § 2255 motion was untimely or otherwise procedurally barred. The Government argues that the district court properly dismissed the motion as untimely because Green did not file it within one year of *Johnson*. In the alternative, the Government asserts that the district court's dismissal order should be affirmed because Green procedurally defaulted his claims by failing to raise them during his plea proceedings or on direct appeal. Although Green's motion is not time-barred, we hold that his claims are procedurally defaulted and that his default bars him from obtaining collateral relief. [3]

A.

[3] We first consider whether Green timely filed his § 2255 motion. "Normally, for a motion to be timely under § 2255(f), a petitioner must file for relief within one year of the date that his judgment of conviction becomes final." *Brown*, 868 F.3d at 301 (citing § 2255(f)(1)). Where, as here, a petitioner does not file a direct appeal, a conviction becomes final when the appeal period expires. *See Whiteside v. United States*, 775 F.3d 180, 182 (4th Cir. 2014) (en banc). Green's appeal period expired on February 8, 2012, and he did not file his

§ 2255 motion until April 11, 2016, more than four years later. Because no other statutory extension to the limitations period applies, Green's motion is timely only if it was filed within one year of "the date on which the right asserted [in the motion] was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively available to cases on collateral review." 28 U.S.C. § 2255(f)(3).

Green filed his § 2255 motion less than one year after the Supreme Court struck down the ACCA residual clause in *Johnson*, and his citation to *Johnson* reflects his belief that the decision raised doubts about the constitutionality of § 924(c)'s very similar residual clause. Applying this Court's liberal construction rules for pro se pleadings, *see Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 540 & n.4 (4th Cir. 2017), we read Green's motion as asserting a right not to be convicted and sentenced for § 924 offenses based on § 924(c)'s vague residual clause. [4]

This is precisely the right recognized in *Davis*. *See* 139 S. Ct. at 2323–24. The complicating factor here is that Green filed his § 2255 motion—and the district court dismissed it—prior to the *Davis* decision. Although Green filed the motion within one year of *Johnson*, this Court has previously held that *Johnson* did not "recognize a broad right invalidating all residual ***664** clauses as void for vagueness simply because they exhibit wording similar to ACCA's residual clause." *Brown*, 868 F.3d at 302. Relying on that reasoning, the majority in *Brown* held that a § 2255 motion filed within one year of *Johnson* but challenging a similar residual clause in § 4B1.2(a) of the Sentencing Guidelines was untimely. *Id.* at 300, 302–03. According to the Government, *Brown* prohibits Green from relying on *Johnson* to establish timeliness, and the Supreme Court's later decision in *Davis* does not cure the timeliness problem.

However, *Brown* is not controlling here. At the time of this Court's decision in *Brown*, the Supreme Court had not invalidated the § 4B1.2(a) residual clause. *See id.* at 302 (stating that "the Supreme Court left open the question of whether Petitioner's asserted right exists"). Here, by contrast, *Davis* struck down § 924(c)'s residual clause as unconstitutionally vague while Green's current appeal was pending. In so holding, *Davis* "formally acknowledged" the right Green's motion asserted "in a definite way." *Id.* at 301. *Brown* therefore does not resolve this case.

[4] Instead, the key question is whether *Davis* renders Green's *Johnson*-based motion timely. We hold that it does. For starters, "[t]he *Davis* Court extended the holding[ ] of *Johnson*" to invalidate the "analogous" residual clause in § 924(c). *Thomas*, 988 F.3d at 789. Indeed, in concluding that § 924(c)'s residual clause is unconstitutionally vague, the Supreme Court noted that the clause "bear[s] more than a passing resemblance" to the ACCA residual clause it had struck down in *Johnson*. *Davis*, 139 S. Ct. at 2325–26. *Davis* thus confirmed what Green's motion asserted: that the vagueness analysis in *Johnson* also called into question the constitutionality of § 924(c)'s residual clause.

Further, the text of § 2255(f)(3) does not compel the conclusion that Green's motion is untimely. The statute is silent on how to address this particular scenario, where a petitioner filed a § 2255 motion within a year of a Supreme Court decision recognizing a closely analogous right, and the Supreme Court then recognized the specific right at issue during the pendency of the § 2255 proceedings. Nor do the purposes of the AEDPA statute of limitations support the restrictive interpretation the Government proposes. Section 2255(f)(3) gives petitioners a year to file a § 2255 motion when the Supreme Court recognizes a new right that might undermine the validity of their conviction or sentence. By extending the limitations period in such cases, Congress expressed its judgment that the extension would not interfere with the purpose of the statute of limitations, which is to "curb the abuse of the statutory writ of habeas corpus," *Dunlap v. United States*, 250 F.3d 1001, 1005 (6th Cir. 2001) (quoting H.R. Rep. No. 104-518, at 111 (1996)), including "undue delays," *id.* at 1006. A petitioner certainly does not contribute to "undue delays" by filing a § 2255 motion too *early*. And a petitioner does not "abuse" the writ by raising an argument, based on very persuasive but non-controlling Supreme Court precedent, that the Supreme Court then endorses in a controlling decision.

Interpreting § 2255(f)(3) to bar Green's motion also would lead to nonsensical and even absurd results, which "are to be avoided." *In re Graham*, 61 F.4th 433, 440 (4th Cir. 2023) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982)). For one, there is no question that Green's motion would have been

timely had he waited to file until *after* the Supreme Court's *Davis* decision. Further, if the motion had been fully litigated and dismissed before *Davis*, Green could have obtained authorization ***665** to file a successive § 2255 motion raising the *Davis* claim; this Court has authorized a petitioner to file a second § 2255 motion post-*Davis* where the petitioner's first (pre-*Davis*) motion had relied on *Johnson* and *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), which struck down a similar residual clause in 18 U.S.C. § 16(b). *See Thomas*, 988 F.3d at 786–87.

But if we affirmed the dismissal of Green's pending motion, any future request to file a successive § 2255 motion would be untimely because more than one year has passed since the *Davis* decision.[5] *See Dodd v. United States*, 545 U.S. 353, 359, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) (stating that § 2255(f)'s limitations period applies to successive § 2255 motions). Thus, dismissing the pending motion would threaten to bar Green from asserting a right to collateral relief, solely because the Supreme Court happened to recognize the right while his first § 2255 motion was pending and his appeal was not resolved within a year of that decision. That would "yield the odd result that the Supreme Court's eventual endorsement of the constitutional right argued for in [the § 2255 motion] now precludes him from seeking to vindicate that very right." *Granda v. United States*, 990 F.3d 1272, 1284 (11th Cir. 2021). In addition to making no practical sense, such a result would be highly unfair, trapping Green in a procedural no-man's-land even though *Davis* recognized the precise right he asserted in his motion.

Our sister circuits have treated § 2255 motions as timely under identical or very similar circumstances. In an unpublished decision, the Eleventh Circuit held that a § 2255 motion challenging a § 924(c) conviction was timely where it was filed within one year of *Johnson* and the Supreme Court decided *Davis* while the petitioner's appeal was pending. *Trubey v. United States*, 813 F. App'x 351, 352–53 (11th Cir. 2020). In addition, the Fifth Circuit has held that a request for authorization to file a successive § 2255 motion challenging the residual clause in 18 U.S.C. § 16(b) was timely where the petitioner filed the request "within one year of *Johnson*" but before the Supreme Court struck down the § 16(b) residual clause in *Dimaya*. *United States v. Vargas-Soto*, 35 F.4th 979, 992–93 (5th Cir. 2022).

The Government also asserts that Green's motion was untimely because it relies on an argument that neither *Davis* nor any other Supreme Court decision has endorsed. The Government emphasizes that Green, on appeal, focuses on challenging his conviction under § 924(c)'s *elements clause*, not the residual clause. But that misses the point. After *Davis* invalidated the residual clause, Green's conviction for Count 34 can stand only if Hobbs Act robbery satisfies the elements clause. In other words, Green now focuses on the elements clause precisely because of the right the Supreme Court recognized in *Davis*.

Because Green filed his § 2255 motion within one year of *Johnson*, and *Davis* extended *Johnson*'s reasoning to recognize the right asserted in the motion, the motion was timely under § 2255(f)(3).

B.

The Government next argues that Green procedurally defaulted his challenge to ***666** Count 34 by failing to raise it during his plea proceedings or on direct appeal, and that there are no grounds for excusing the default. Because the district court dismissed Green's § 2255 motion as time-barred without requesting a response from the Government, the court did not consider the procedural default question. Though we generally prefer for the district court to consider an issue in the first instance, we have declined to remand in cases where "no fact-finding is required, the issue has been fully briefed by each side, and the result is obvious." *Bostick v. Stevenson*, 589 F.3d 160, 165 (4th Cir. 2009). Because the procedural default issue here involves purely legal questions, both parties addressed it on appeal,[6] and "the outcome is readily apparent," *Bigelow v. Virginia*, 421 U.S. 809, 826–27, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), we resolve it in the first instance.

[5] Green does not dispute that he procedurally defaulted his challenge to Count 34, but he does argue that the default should be excused. To raise a defaulted claim on collateral review, Green must show "cause" for the default and "prejudice" resulting from it, or he must demonstrate that he is "actually innocent." *Bousley v. United States*, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quoting

Murray v. Carrier, 477 U.S. 478, 485, 495–96, 106 S.Ct. 2678, 91 L.Ed.2d 397 (1986)).

1.

Our analysis begins with the cause-and-prejudice excuse for procedural default. Although Green can show cause for failing to raise a vagueness challenge to § 924(c)'s residual clause at the time of his conviction, we conclude that he was not prejudiced by the default.

a.

[6] **[7]** To demonstrate cause for a procedural default, a petitioner must show there was "some external impediment preventing counsel from constructing or raising the claim" at the time of conviction and direct appeal. *Murray*, 477 U.S. at 492, 106 S.Ct. 2678. As relevant here, cause exists when the defaulted claim was "so novel that its legal basis [was] not reasonably available to counsel." *Bousley*, 523 U.S. at 622, 118 S.Ct. 1604 (quoting *Reed v. Ross*, 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984)).

[8] Green can establish cause because a vagueness challenge to the § 924(c) residual clause was not "reasonably available" to his counsel at the time of his 2012 conviction. This conclusion follows from this Court's recent decision in *United States v. McKinney*, 60 F.4th 188 (4th Cir. 2023). There, the petitioner pled guilty in 2012 to a § 924(c) offense, with conspiracy to commit Hobbs Act robbery identified as the predicate crime of violence. *Id.* at 191. The petitioner waived his right to appeal but later filed a § 2255 motion based on *Davis*. *Id.* The district court dismissed the motion based in part on its conclusion that the petitioner had not shown cause for excusing his procedural default. *Id.*

This Court reversed. We noted that the Supreme Court's decision in *Reed v. Ross* recognized that a claim may be sufficiently "novel" to establish cause when a later Supreme Court decision "disapprov[es] a practice [the Supreme] Court arguably has sanctioned in prior cases." *Id.* at 194 (quoting *Reed*, 468 U.S. at 17, 104 S.Ct. 2901). The petitioner in *McKinney* raised "precisely th[is] type of novel claim" because, at the time of his 2012 conviction, the Supreme Court had twice affirmed the constitutionality of the ACCA residual clause. *Id.*; *see Sykes v. United States*, 564 U.S. 1, 15, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011); *James v. United States*, 550 U.S. 192, 210 n.6, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007). We concluded that those decisions "effectively foreclosed" vagueness challenges to § 924(c)'s similar residual clause until *Johnson* reversed course and struck down the ACCA residual clause in 2015. *McKinney*, 60 F.4th at 194. Relying on *James* and *Sykes*, this Court and other circuits had uniformly rejected vagueness challenges to residual clauses and only "began to reconsider the constitutionality of § 924(c)'s analogous residual clause" after *Johnson*. *Id.* at 194–95 (citing cases). Finally, the *McKinney* Court pointed out that some of our sister circuits have found cause for failing to raise vagueness challenges to residual clauses, including § 924(c)'s, prior to *Johnson*. *Id.* at 195; *see Jones v. United States*, 39 F.4th 523, 525 (8th Cir. 2022); *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017); *United States v. Garcia*, 811 F. App'x 472, 480 (10th Cir. 2020) (unpublished).

Green's case is on all fours with *McKinney*. Like the petitioner in *McKinney*, Green pled guilty before *Johnson* overruled the earlier Supreme Court decisions that upheld the ACCA residual clause. As in *McKinney*, there was "almost certainly ... no reasonable basis upon which an attorney previously could have urged a ... court to adopt the position" the Supreme Court later endorsed in *Johnson*. *McKinney*, 60 F.4th at 195 (quoting ***667** *Reed*, 468 U.S. at 17, 104 S.Ct. 2901). Green therefore can establish cause for his default.

The Government argues that for Green to show cause, he also must demonstrate that an *elements clause* challenge to his Hobbs Act robbery predicate was unavailable in 2012. But it would have been pointless for Green to make that argument at the time, given that there was no reason to doubt the constitutionality of the residual clause. Green apparently conceded that his predicates fell within the more expansive residual clause, and his conviction would have been upheld under that clause alone. As long as a vagueness challenge to the residual clause was unavailable, a separate elements clause argument would have been fruitless; even if successful, it would not have provided him relief.

The Government's position also conflates the defaulted *claim* with the ultimate merits of Green's request for collateral relief. Green's conviction remains valid if Hobbs Act robbery

satisfies the elements clause, but the elements clause is relevant only because *Davis* endorsed Green's defaulted claim and held the residual clause unconstitutional. Under the Government's preferred approach, petitioners could establish cause only by showing that every alternative ground for affirming their conviction or sentence was not open to challenge in a direct appeal. That conflicts with *McKinney*, where we found cause because a vagueness challenge to § 924(c)'s residual clause was unavailable at the time of the petitioner's conviction, without considering whether he could have separately contested the status of his predicate offense under the elements clause. *See* 60 F.4th at 194–95.

b.

[9] Although Green had cause for excusing his procedural default, we hold that he was not prejudiced by the default.

[10] To establish prejudice, a § 2255 petitioner must show that the default ***668** "worked to his *actual* and substantial disadvantage" and has "constitutional dimensions." *Murray*, 477 U.S. at 494, 106 S.Ct. 2678 (emphasis in original). Beyond that general rule, "[t]he Supreme Court has yet to define the exact contours of the prejudice standard in the § 2255 procedural-default context." *McKinney*, 60 F.4th at 195; *see United States v. Frady*, 456 U.S. 152, 168, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Generally speaking, in cases involving guilty pleas, "we ask whether it is likely a defendant, had he known of the error, would not have pled guilty to the count of conviction." *McKinney*, 60 F.4th at 196. The focus is on the petitioner's conviction; "demonstrating prejudice sufficient to excuse procedural default does not require consideration of the charges foregone by the Government in the course of plea bargaining." *Id.* at 197 (internal quotation marks and emphasis omitted).

In *McKinney*, we held that the petitioner suffered prejudice as a result of his defaulted claim because his § 924(c) conviction, which was predicated on an offense that does not satisfy the elements clause (Hobbs Act conspiracy), "subjects him to imprisonment for conduct that the law does not make criminal." *Id.* at 196. Other circuits have similarly found prejudice when a § 924 conviction or sentence is not "authorized by law" in light of invalidated predicates because a legally invalid conviction or sentence "certainly [creates] an 'actual and substantial disadvantage' of 'constitutional dimensions.' " *Snyder*, 871 F.3d at 1127–28 (quoting *Frady*, 456 U.S. at 170, 102 S.Ct. 1584) (ACCA sentence enhancement); *see also Raines v. United States*, 898 F.3d 680, 687 (6th Cir. 2018) (same); *Garcia*, 811 F. App'x at 480 (§ 924(c) conviction).

The inverse of this principle is also true. Where a petitioner collaterally attacks a § 924(c) conviction solely on the ground that a predicate offense is invalid after *Davis*, the petitioner cannot show prejudice if the predicate qualifies as a crime of violence under the elements clause.[7] This is such a case. Contrary to Green's arguments, Fourth Circuit precedent establishes both that Hobbs Act robbery satisfies the elements clause and that the elements clause passes constitutional muster.

First, this Court has squarely held that Hobbs Act robbery falls within the scope of the elements clause because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *United States v. Mathis*, 932 F.3d 242, 263, 265–66 (4th Cir. 2019) (quoting 18 U.S.C. § 924(c)(3)(A)). The Hobbs Act defines robbery as the taking of personal property from another "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property[.]" 18 U.S.C. § 1951(b)(1). In *Mathis*, we rejected the argument that Hobbs Act robbery by "fear of injury" did not necessarily require "physical force." 932 F.3d at 265–66. To reach that conclusion, we compared the Hobbs Act robbery statute's "fear of injury" element to the "intimidation" element in the federal bank robbery statute, 18 U.S.C. § 2113(a), and found "no material difference" between these elements. *Id.* at 266. Because we have held that federal bank robbery requires actual, attempted, or threatened physical force, *see United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016), it follows that Hobbs Act robbery does as well, *Mathis*, 932 F.3d at 266. Accordingly, ***669** we were unpersuaded by the defendant's argument that Hobbs Act robbery could be committed via a threat to injure "intangible" property (e.g., shares of stock), which would not involve physical force. *Id.* at 265–66.

Green claims our holding in *Mathis* is no longer tenable after the Supreme Court's 2022 decision in *Taylor*. *See United States v. Banks*, 29 F.4th 168, 175 (4th Cir. 2022) (stating that a Panel of this Court may depart from a prior

Panel decision that is inconsistent with a Supreme Court decision). According to Green, *Mathis* "effectively adopted" the reasoning in decisions by the First and Second Circuits, which, in holding that Hobbs Act robbery satisfies the § 924(c) elements clause, found no "realistic probability" that the government would prosecute a defendant for Hobbs Act robbery in a case involving a threat to intangible property. Opening Br. 18; *see Mathis*, 932 F.3d at 266 (citing *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018)). In *Taylor*, the Supreme Court clarified that the realistic probability test is an inappropriate way to determine whether a predicate offense satisfies § 924(c)'s elements clause. 142 S. Ct. at 2024. The Court explained that the test "cannot be squared with [the clause's] terms," which "ask[ ] whether the government must prove, as an element of its case, the use, attempted use, or threatened use of force." *Id.*

Nothing about this Court's decision in *Mathis* conflicts with *Taylor*. First and foremost, *Mathis* never applied or even acknowledged the realistic probability test. Rather, it compared the text of the Hobbs Act robbery statute to the text of the elements clause, faithfully applying the categorical approach. *See* 932 F.3d at 266. *Mathis* merely cited *Garcia-Ortiz* and *Hill* to show that other circuits also had held that Hobbs Act robbery satisfies the elements clause, not to endorse every step of the First and Second Circuits' reasoning. *See Kholi v. Wall*, 582 F.3d 147, 152 n.5 (1st Cir. 2009) ("The mere fact that a court cites a case approvingly for one point does not imply the court's wholesale acceptance of each and every proposition for which the cited case stands."). In fact, the portions of *Garcia-Ortiz* and *Hill* that the *Mathis* Court cited do not contain any discussion of the realistic probability test. *See Mathis*, 932 F.3d at 266. And the Court also cited decisions from the Seventh and Eleventh Circuits that never mentioned the realistic probability test.[8] *See id.* (citing *United States v. Rivera*, 847 F.3d 847, 849 (7th Cir. 2017); *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016)).

Moreover, we have reaffirmed our holding in *Mathis* since the Supreme Court decided *Taylor*. We recently held that a district court properly instructed the jury that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause because the "instruction was consistent with [our] holding" in *Mathis*. ***670** *United States v. Ivey*, 60 F.4th 99, 116 (4th Cir. 2023). The defendant in *Ivey* argued that Hobbs Act robbery does not satisfy the elements clause because "putting someone in fear of injury ... does not require an intentional threat of physical force." *Id.* at 117 (citation omitted). We explained that *Mathis* "forecloses this argument" and reiterated that Hobbs Act robbery "is a 'crime of violence' as that term is defined in § 924(c)(3)(A)." *Id.*; *see also Melaku*, 41 F.4th at 394 n.9 (also reaffirming the holding in *Mathis*).

[11] Green also suggests that *Mathis* was wrongly decided on the merits, even if *Taylor* did not undermine its reasoning or holding. But even if we agreed, we "cannot overrule a decision issued by another panel." *McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc).

Second, our precedent cannot support Green's argument that the elements clause is unconstitutionally vague. In contrast to the residual clause, we have stated that "there is no colorable argument that the elements-based categorical approach of § 924(c)(3)(A) suffers from any [ ] indeterminacy." *Simms*, 914 F.3d at 252. The Supreme Court has similarly characterized the application of the elements clause as a "straightforward job" that does not require "an abstract judicial inquiry." *Taylor*, 142 S. Ct. at 2025.

Despite this clear guidance, Green asserts that the clause's reference to "physical force" raises vagueness problems, which he claims this Court's decision in *Melaku* reflects. In *Melaku*, we held that 18 U.S.C. § 1361, which prohibits willfully injuring or committing depredation of certain government property, is not a crime of violence under the § 924(c) elements clause. 41 F.4th at 388. The majority concluded that not all force capable of injuring property qualifies as "physical force" under the clause. Rather, the force must "involve the potential risk of pain or injury to *persons*."[9] *Id.* at 393 & n.4 (emphasis added).

Green contends that the *Melaku* majority's "potential risk of pain or injury" test introduces the same type of risk assessment that made the residual clause unconstitutional. We are unpersuaded. The majority's reasoning mirrors the Supreme Court's interpretation of the phrase "physical force against the person of another" in the ACCA elements clause. *See* 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has held that the ACCA elements clause requires a level of force that is "capable of causing physical pain or injury to another person." *Stokeling v. United States*, —— U.S. ——, 139 S. Ct. 544, 553,

202 L.Ed.2d 512 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). *Melaku* adopted a near-identical definition for "physical force" in § 924(c): asking whether an offense necessarily involves force that creates a "potential risk of pain or injury to persons" is another way of asking whether that force is "capable of causing physical pain or injury to another person." Both are compatible with the categorical approach—and very different than the "substantial risk" language that doomed the residual clause, which asked courts to determine whether, in the abstract "ordinary case," an offense presents "some not-well-specified-yet-sufficiently-large degree of risk." *Dimaya*, 138 S. Ct. at 1215–16.

Any indeterminacy in the meaning of the elements clause's reference to "physical force" is an example of ambiguity, not vagueness. Under the interpretation the ***671** *Melaku* majority adopted, the elements clause requires force capable of causing physical pain or injury to a person, even when that force is directed at property. *See Melaku*, 41 F.4th at 393. Under a different interpretation, force is sufficient if it is capable of causing physical damage to property. *See id.* at 397 (Diaz, J., dissenting). Such ambiguity does not prevent the elements clause from "provid[ing] people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "encourage[ ] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Courts can resolve the ambiguity by construing the statute, which is exactly what this Court did in *Melaku*.

In short, our precedent confirms that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c). Because Green's conviction on Count 34 was predicated on conduct the law continues to make criminal and Green has not alleged any other form of harm, he cannot show that his procedural default caused him "actual and substantial" prejudice. *Murray*, 477 U.S. at 494, 106 S.Ct. 2678. Even if we were to assume that Green was prejudiced by the default, these same reasons would preclude relief on the merits.

2.

[12] Finally, Green cannot excuse his procedural default on account of actual innocence. The Supreme Court has explained that " 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623, 118 S.Ct. 1604. "[T]his standard is not satisfied by a showing that a petitioner is legally, but not factually, innocent." *United States v. Pettiford*, 612 F.3d 270, 282 (4th Cir. 2010) (quoting *United States v. Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999)). In *Pettiford*, we held that the classification of an offense as a "violent felony" for purposes of the ACCA sentence enhancement is a "legal argument" that is "not cognizable as a claim of actual innocence." *Id.* at 284. We explained that "actual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes." *Id.*

We do not need to resolve whether a challenge to the legal classification of a predicate underlying a § 924(c) or (j) conviction also fails to qualify as a claim of "actual innocence." Even if such a claim does so qualify, Green would not prevail. As we have established, Green's conviction on Count 34 remains legally valid after *Davis* because Hobbs Act robbery meets the elements clause's definition of a "crime of violence."

IV.

Green's § 2255 motion was timely, but his claim that Count 34 rested on § 924(c)'s unconstitutional residual clause was procedurally defaulted. Because our precedents establish that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause, Green did not suffer prejudice as a result of his procedural default. Nor can he excuse his default on the basis of actual innocence. For these reasons, we affirm the dismissal of Green's § 2255 motion as to Count 34. However, we vacate the dismissal as to Count 29 and remand with instructions to vacate Green's conviction and sentence on that Count.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

All Citations

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Footnotes

1 Green was also charged and pled guilty under 18 U.S.C. § 2, which provides that an individual who aids or abets a federal offense is punishable as a principal.

2 Even if the Government had not waived a statute-of-limitations defense as to Count 29, Green's motion was timely for the reasons discussed in Part III.A, *infra.*

3 The Government also argues that Green forfeited his claims by failing to develop them in his § 2255 motion. Because we resolve Green's appeal based on the procedural default, we do not need to reach that issue.

4 Admittedly, Green's § 2255 motion was inartful. He appeared not to recognize that the status of the § 924(c) provisions defining "crime of violence" affects the validity of his § 924(j) convictions, instead requesting relief on his "sentence [e]nhancements" and asking for a sentence reduction. J.A. 101. Nonetheless, "courts are obligated to 'liberally construe[ ]' pro se complaints, 'however inartfully pleaded.' " *Booker*, 855 F.3d at 540 (quoting *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)). It is hardly a stretch to interpret Green's citation to *Johnson*—which struck down a residual clause nearly identical to the one in § 924(c)—as a claim that Green's convictions and sentence rested on a similarly unconstitutional statute.

5 If Green sought to file a successive § 2255 motion, the fact that he was diligently appealing the denial of his first motion in the year after *Davis* might support equitably tolling the one-year limitations period. *See Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). Even so, requiring Green to file a second motion would accomplish nothing but a waste of judicial resources.

6 After the Government raised a procedural default defense in its response brief, Green's reply brief devoted almost no attention to the issue. During oral argument, though, both parties discussed whether Green's procedural default should be excused. Because this is not a close question, we see no benefit to remanding it.

7 Admittedly, this analysis shades into the merits of Green's § 2255 motion. But in cases where a petitioner challenges the legal status of § 924(c) predicate offenses, the prejudice analysis necessarily overlaps with the merits. *See McKinney*, 60 F.4th at 196.

8 Green also argues that the *Mathis* Court must have been relying on the realistic probability test because, at one point, it conceded that a defendant can commit Hobbs Act robbery by threatening injury to intangible property. But the *Mathis* Court did no such thing. Green relies on one line from the opinion, which remarked that neither the Hobbs Act robbery statute nor the elements clause "draws any distinction between tangible and intangible property." *Mathis*, 932 F.3d at 266. But that remark immediately followed the Court's conclusion that Hobbs Act robbery *does* require actual, attempted, or threatened physical force. *Id.* Because it is impossible to threaten physical force against intangible property, the Court's reference to intangible property was merely recognizing that neither Hobbs Act robbery nor the elements clause explicitly covers threats to such property.

9 Citing *Mathis*, the *Melaku* majority explained that Hobbs Act robbery satisfies this definition of "physical force" because it "is a crime involving intimidation of a person." *Id.* at 394.

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Eastern District of Virginia
Name (under which you were convicted) Andra G. Green aka Giz aka AJ. aka Gizzle aka Andra Gabreal Green aka A. Gizzle	Docket or Case No.: 4:09-cr-00081-RBS-FBS-7
Place of Confinement: FCC Coleman USP-1 P.O. Box 1033 Coleman, Fl. 33521	Prisoner No.: 75507083
UNITED STATES OF AMERICA v.	Movant (include name under which you were convicted) Andra G. Green a.k.a Giz aka A. Gizzle aka Gizzle aka AJ. aka Andra Gabreal Green Jr.

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

(b) Criminal docket or case number (if you know): 4:09-cr-00081-RBS-FBS-7

2. (a) Date of the judgment of conviction (if you know):

(b) Date of sentencing: January 25th 2012

3. Length of sentence: LIFE

4. Nature of crime (all counts):
18 USC§924(j) and 2 Two Counts
Murder with a Firearm in Relation to a Crime of Violence.

5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☑ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

8. Did you appeal from the judgment of conviction? Yes ☐ No ☑

9. If you did appeal, answer the following:

(a) Name of court:

(b) Docket or case number (if you know):

(c) Result:

(d) Date of result (if you know):

(e) Citation to the case (if you know):

(f) Grounds raised:

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☑

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ❑ No ❑

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ❑ No ❑

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ❑ No ❑

(2) Second petition: Yes ❑ No ❑

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Relief of my Sentence inhancements Johnson V. United States case#: 135-SCT-2551 2015 USSC

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Hurst v. Florida case #: 14-7505 2016 U.S.C

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ❑ No ❑

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ❑ No ❑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ❑ No ❑

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ❑ No ❑

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ❑ No ❑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☑
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Robert Bruce Jones 732 Thimble Shoals blvd Suite 901 Newport News, VA. 23606; Melinda Ruth S. Glaubke 1741 Corporate Landing Pkwy. Suite 103 Virginia Beach, VA. 23454;

(b) At arraignment and plea:
Melinda Ruth S. Glaubke 1741 Corporate Landing Pkwy Suite 103 Virginia Beach, VA 23454
Robert Bruce Jones 732 Thimble Shoals blvd. suite 901 Newport News, VA 23606

(c) At trial:

(d) At sentencing:
Robert Bruce Jones
732 Thimble Shoals Blvd Suite 901
Newport News, VA 23606

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.* There are no statutes of limitations on any Murder. At any giving time there can be sufficient or insufficient material brought to further the case which could also leave room for error.

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* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-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 became 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 such 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.

Therefore, movant asks that the Court grant the following relief: That My LIFE Sentence be reduced to no less than 240 Months and no more than 360 months also to proceed in forma Pauperis.
or any other relief to which movant may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

ANDRA G. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 4:16cv22
[ORIGINAL CRIMINAL NO. 4:09cr81-7]

SHOW CAUSE ORDER

This matter comes before the court on the Petitioner's pro se Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Motion"), filed by the Clerk on April 11, 2016.[1] ECF No. 644. On October 3, 2011, pursuant to a plea agreement, the Petitioner pled guilty to Counts Twenty-nine and Thirty-four of the Third Superseding Indictment, each of which charged him with Murder with a Firearm in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(j) and 2. On January 25, 2012, the court sentenced the Petitioner to a term of life imprisonment. The Petitioner did not appeal.

The instant Motion appears to be untimely. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996), imposes a

[1] However, the court accepts the Motion as effectively filed on the date the Defendant certifies he placed it in the prison's internal mailing system. See Houston v. Lack, 487 U.S. 266, 270-72 (1988) (articulating the "prison mailbox rule"). Here, the Defendant did not provide this date. See Mot. at 14.

one-year statute of limitations on § 2255 motions. Section 2255, as amended by AEDPA, provides in relevant part:

> 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.

28 U.S.C. § 2255(f). The Petitioner's judgment became final on February 8, 2012. See Fed. R. App. P. 4(b) (mandating that a criminal defendant file a notice of appeal within fourteen days after the entry of judgment). Therefore, the one-year period to file a § 2255 motion began on February 8, 2012, more than four years before the instant Motion was filed. 28 U.S.C. § 2255(f)(1).

The Petitioner argues that his Motion should nonetheless be considered because "[t]here are no statutes of limitations on

any murder," and "[a]t any given time there can be sufficient or insufficient material brought to further the case which could also leave room for error." Mot. at 13. However, the one-year limitations period for filing a § 2255 motion is the same regardless of the crime of conviction.

Accordingly, the Petitioner is **WARNED** that the Motion will be dismissed as untimely, unless he can otherwise demonstrate that it was filed within the proper time period under 28 U.S.C. § 2255, as set forth above. See Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002). The Petitioner is granted thirty (30) days from the date of entry of this Show Cause Order to make such a showing.

The Clerk is **DIRECTED** to send a copy of this Order to the Petitioner and to the United States Attorney at Newport News.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

April 12, 2016

April 19, 2016

Andra G. Green

V. Petitioner, Civil Action No. 4:16cv22

UNITED STATES OF AMERICA, [Original Criminal No. 4:09cr81-7]

SHOW CAUSE ORDER RESPONSE

Reason that my §2255 pro se motion should not be time barred for reason that after my sentencing the proper documents to research my motion was not provided to me as I was indigent and the courts would not grant them to me as indigent. Also I had been turned over to the state of Virginia for the aiding of my co-defendant. Upon my return to the BOP in 2013 the documents that I did recieve where lost by the BOP while in transit to another facility. Tort claim was filed about the loss of property for my motion which I am still waiting for a answer for. Also while in solitary confinement, the proper means to legal assistance time was not properly presented. So reason for my motion to be granted stands ~~thus~~ for, as I am able to provide the proper facts and have the times of my mishaps documented.

Respectfully,

April 19, 2016

/s/

Andra G. Green ©

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK/NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA

v.

Civil Case No. 4:16cv22
Criminal Case No. 4:09-cr-00081-7

ANDRA G. GREEN

ORDER STRIKING PLEADINGS

The Clerk has filed your Show Cause Order Response; however, it is deficient in the area(s) checked below:

[ ] Document is not signed. [F.R. Crim. P. 49(d), Civil P. 11(a)]

[ ] Document does not contain an original signature. [F.R. Crim. P. 49(d), Civil P. 11(a)]
[ ] Local attorney has not signed (Local Rule 57.4(F)).
[ ] Attorney not admitted to practice in the Eastern District of Virginia (Local Crim. Rule 57.4 (D)).
[X] **No certificate of service to the United States Attorney, 721 Lakefront Commons, Newport News, VA 23606; or explanation why service is not required (F.R. Crim. P. 49(a) and (b) and F.R.Civ.P. 5(d)).**
[ ] Other:

The defendant is advised that if he wishes the court to consider his submission, it must be resubmitted with the deficiency corrected within thirty (30) days of the date of this order or it will be stricken from the record.

/s/
Rebecca Beach Smith
Chief Judge

CHIEF UNITED STATES DISTRICT JUDGE

Dated: April 22, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

ANDRA G. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL ACTION NO. 4:16cv22
[ORIGINAL CRIMINAL NO. 4:09cr81-7]

DISMISSAL ORDER

This matter comes before the court on the Petitioner's pro se Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence ("Motion"), filed by the Clerk on April 11, 2016. ECF No. 644. The court warned the Petitioner that the Motion appeared to be untimely, and ordered him to show cause, within thirty (30) days, why the court should conclude otherwise. See Show Cause Order of April 12, 2016, ECF No. 645. The court provided the Petitioner with the relevant provisions of 28 U.S.C. § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996), which imposes a one-year statute of limitations on § 2255 motions.

On April 22, 2016, the Petitioner filed a Response subject to defect because it lacked a proper certificate of service to the United States Attorney at Newport News. ECF No. 646. In the Striking Order of April 25, 2016, the Petitioner was advised

that if the defect was not corrected within thirty (30) days of the date of entry of the Striking Order, the submission would be stricken from the record. The defect was not corrected, and accordingly, the Petitioner's Response has been stricken.

There is no basis for considering the Motion timely filed. The Petitioner filed his Motion more than one year after the judgment became final, see Show Cause Order at 2, so the Motion is untimely under 28 U.S.C. § 2255(f)(1). The Petitioner alleges no unlawful governmental action that prevented him from filing the § 2255 Motion, and the court finds none, so 28 U.S.C. § 2255(f)(2) is inapposite. Further, the Petitioner provides no evidence of newly discovered facts that warrant the application of 28 U.S.C. § 2255(f)(4).

Finally, a § 2255 motion is timely if filed within one year of the date on which a right has been newly recognized by the Supreme Court and made applicable to cases on collateral review. See 28 U.S.C. § 2255(f)(3). While the Petitioner does not allege that his Motion is timely under this provision, he does cite Johnson v. United States, 135 S. Ct. 2551 (2015), in ground one of his Motion. Mot. at 4.[1] In Johnson, the Supreme Court struck down the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), in 18 U.S.C. § 924(e)(2)(B)(ii), because it was

[1] In Welch v. United States, 136 S. Ct. 1257 (2016), the Supreme Court held that Johnson applies retroactively on collateral review.

unconstitutionally vague. Johnson, 135 S. Ct. at 2563. However, the Petitioner was not sentenced under the ACCA, and the Petitioner does not explain how Johnson could apply to his conviction or sentence. Therefore, the Motion is not timely pursuant to 28 U.S.C. § 2255(f)(3).

Accordingly, the court finds the Petitioner's Motion to be time-barred. For the reasons stated herein, and for the reasons stated in the Show Cause Order of April 12, 2016, the Motion is **DISMISSED**. The Petitioner is **ADVISED** that he may appeal from this Dismissal Order by filing, within sixty (60) days of the date of entry of this Order, a written notice of appeal with the Clerk of the United States District Court, 2400 West Avenue, Newport News, Virginia 23607. The court declines to issue a certificate of appealability for the reasons stated herein and in the Show Cause Order of April 12, 2016.

The Clerk is **DIRECTED** to send a copy of this Dismissal Order to the Petitioner and to the United States Attorney at Newport News.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

June 7, 2016

Aug 8, 2016

André G. Green,
Petitioner,
v.
United States of America,

Civil Action No. 4:16cv22
Original Criminal No. 4:09cr81-7

Extention to Dismissal Order

I am seeking for a (30) thirty day extention do to the institution currently on lockdown, in response to the Jun. 7, 2016 Dismissal Order. Enclosed is the "Memorandum" from the institution signed by complex captain about the lockdown transition from July 28, 2016 to Aug 5, 2016 confirming there was not movement, which is why I could not respond because I was unable to research the unapparent untimely §2255 (f)(3) motion.

Respectfully,
/s/
x André Green

June 7, 2016

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

August 5, 2016

MEMORANDUM FOR FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Hartlett, Complex Captain

SUBJECT: Lockdown Update

We do appreciate your cooperation. Provided there are no issues, we will continue our transition back to normal operations on Monday, August 8, 2016. There will be no inmate movement this weekend and no visitation. Ensure that cell sanitation is maintained at a high level.

Monday August 8, 2016:

- 4:10 a.m., all inmates listed on the Food Service, Laundry and Commissary wake-up will be released for work call. The morning meal will be delivered to the Housing Units.
- 8:30 a.m., all inmates will be released in the Units for daily activities.
- 10:30 a.m., the noon meal will be served in the Chow Hall. After the noon meal, there will be a recreation move.
- 3:00 p.m., yard recall.
- 4:10 p.m., Stand-up Count.
- 5:00 p.m., Recreation move; Evening meal will be served in the Chow Hall.
- 7:30 p.m., yard recall.
- 9:15 p.m., all inmates will be secured in their assigned cells.

Staff will continue to make rounds throughout the institution addressing any concerns that may arise. Provided there are no issues, we will continue to transition back to normal operations.

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

August 3, 2016

MEMORANDUM FOR FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Bartlett, Complex Captain

SUBJECT: Lockdown Update

As we transition to normal operations, we do appreciate your cooperation. Tomorrow August 4, 2016, we will afford you the opportunity to use the showers, emails, ice machines, microwaves and utilize the telephones, provided beds are made and cells are in good order (i.e., no items in windows, lights covered, items on walls, clothes lines, etc).

Thursday, August 4, 2016:

- Inmates on the bottom tier will be released in the morning for daily activities in the units for 2 ½ hours.
- All inmates will return to their cells and Lunch will be served.
- Inmates on the top tier will be released in the afternoon for daily activities in the units for 2 ½ hours.
- All inmates will be secured in their cells for the 4:00 p.m. stand-up count.

There will be no inmate movement after the 4:00 p.m. stand-up count. Staff will continue to make rounds throughout the institution addressing any concerns that may arise.

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

July 28, 2016

MEMORANDUM FOR: FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Bartlett, Complex Captain

SUBJECT: Lockdown Update

As we continue with the current lockdown, we appreciate your cooperation. On Friday, July 29, 2016, mass interviews will continue. Take this opportunity to ensure cells are in good order (i.e., no items in windows, lights covered, items on walls, clothes lines, etc.).

Staff will continue to make rounds throughout the institution addressing any concerns that may arise.

UNITED STATES DISTRICT COURT
for the Eastern District of Virginia
Newport News Division

ANDRA G. GREEN,
Petitioner,

v.

CRIMINAL NO. 4:09cr81-7
CIVIL ACTION NO. 4:16cv22

UNITED STATES OF AMERICA
Respondent.

ORDER STRIKING PLEADINGS

The Clerk has received your Motion for Extension to Dismissal Order; however, it is deficient in the area(s) checked below:

[ ] Document does not have an address where notice can be served [Local CR Rule 47 (B)]

[ ] Document is not signed. [F.R. Crim. P. 49(d), Civil P. 11(a)]

[ ] Attorney not admitted to practice in Eastern District of Virginia [Local Rule 57.4 (D)]

[ ] Local attorney has not signed [Local Civil Rule 83.1 (3)]

[X] No Certificate of Service on the U.S. Attorney, 721 Lake Front Commons, Suite 300, Newport News, VA 23606; or explanation why service is not required (and F.R. Crim. P. 49(a) and (b) and F.R.Civ.P. 5(d)).

[ ] Other:

The defendant is advised that if he wishes the court to consider his submission, it must be resubmitted with the deficiency corrected within thirty (30) days of the date of this order or it will be stricken from the record.

/s/
Rebecca Beach Smith
Chief Judge

Rebecca Beach Smith, Chief U.S. District Judge

Dated: August 12, 2016

AUG 19, 2016

Andra G. Green
Petitioner,
v.
United States of America,

Civil Action No: 4:16 cv22
Original Criminal No: 4:09 cr 81-7

Extention to Dismissal Order

I am seeking for a (30) thirty day extention do to the institution currently on lockdown in response to the June 7, 2016 Dismissal Order. Enclosed is the "Memorandum" from the institution signed by complex Captain about the lockdown transition from July 28, 2016 to August 5, 2016 confirming there was not movement, which is why I could not respond because I was unable to research the unapparent untimely §2255 (f)(3) motion.

Respectfully,
/s/
x ANDRA G. GREEN ©

Certificate of Service

I hereby certify that a copy of this order has been sent to the clerk of courts for electronic dissemination by regular U.S. Mail postage pre-paid.

/s/
x ANDRA G. GREEN ©

AUG 12 2016 A 10:15

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ANDRA GREEN
AFFIANT,
V.
UNITED STATES OF AMERICA

AFFIDAVIT IN SUPPORT OF 2255(F)(3)

Civil Action No: 4:16 cv 22
original Criminal No: 4:09 cr 81-7

AFFIDAVIT

I ANDRA G. GREEN the affiant, first being duly sworn state that I am competent to make the following statements, have first hand knowledge of the facts stated herein, that they ARE; True, correct, complete, and not meant for the purpose of delay or to mislead and presented in good faith.

1. The affiant has first hand knowledge that the residual clause for "924(C)" and "924(J)" which is the same "crime of Violence" clause used to determine what qualifies as a predicate; Is unconstitutionally Vauge and do not have a Force clause, this residual clause is under "924(c)(B)(3)(A) of the federal statute(s)

2. I ANDRA G. GREEN know that after the Supreme Court decision in "Johnson 135 S.Ct 2552 (2015)," this residual clause 924(c)(B)(3)(A) is no longer valid.

3. That my 2255(F)(3) is timely and was put in the mail by June 26, 2016.

Executed within the United States: I declare (or certify, verify, or State) under the penalty of perjury under 28 U.S.C. § 1746, that the Foregoing is true and correct.

Certificate of Service

I hereby certify that copy of this Affidavit and 2255(F)(3) has been sent to the Clerk of Courts for electronic dissemination by regular U.S. mail postage pre-paid.

AUG 19th 2016 @ 5:18 PM

Respectfully
/s/
x ANDRA GREEN

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

August 5, 2016

MEMORANDUM FOR FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Hartlett, Complex Captain

SUBJECT: Lockdown Update

We do appreciate your cooperation. Provided there are no issues, we will continue our transition back to normal operations on Monday, August 8, 2016. There will be no inmate movement this weekend and no visitation. Ensure that cell sanitation is maintained at a high level.

Monday August 8, 2016:

- 4:10 a.m., all inmates listed on the Food Service, Laundry and Commissary wake-up will be released for work call. The morning meal will be delivered to the Housing Units.
- 8:30 a.m., all inmates will be released in the Units for daily activities.
- 10:30 a.m., the noon meal will be served in the Chow Hall. After the noon meal, there will be a recreation move.
- 3:00 p.m., yard recall.
- 4:10 p.m., Stand-up Count.
- 5:00 p.m., Recreation move; Evening meal will be served in the Chow Hall.
- 7:30 p.m., yard recall.
- 9:15 p.m., all inmates will be secured in their assigned cells.

Staff will continue to make rounds throughout the institution addressing any concerns that may arise. Provided there are no issues, we will continue to transition back to normal operations.

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

August 3, 2016

MEMORANDUM FOR FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Bartlett, Complex Captain

SUBJECT: Lockdown Update

As we transition to normal operations, we do appreciate your cooperation. Tomorrow August 4, 2016, we will afford you the opportunity to use the showers, emails, ice machines, microwaves and utilize the telephones, provided beds are made and cells are in good order (i.e., no items in windows, lights covered, items on walls, clothes lines, etc).

Thursday, August 4, 2016:

- Inmates on the bottom tier will be released in the morning for daily activities in the units for 2 ½ hours.
- All inmates will return to their cells and Lunch will be served.
- Inmates on the top tier will be released in the afternoon for daily activities in the units for 2 ½ hours.
- All inmates will be secured in their cells for the 4:00 p.m. stand-up count.

There will be no inmate movement after the 4:00 p.m. stand-up count. Staff will continue to make rounds throughout the institution addressing any concerns that may arise.

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Pollock, Louisiana

July 28, 2016

MEMORANDUM FOR: FCC POLLOCK INMATE POPULATION (USP)

FROM: J. Bartlett, Complex Captain

SUBJECT: Lockdown Update

As we continue with the current lockdown, we appreciate your cooperation. On Friday, July 29, 2016, mass interviews will continue. Take this opportunity to ensure cells are in good order (i.e., no items in windows, lights covered, items on walls, clothes lines, etc.).

Staff will continue to make rounds throughout the institution addressing any concerns that may arise.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

ANDRA G. GREEN,

Petitioner,

v.

CIVIL ACTION NO. 4:16cv22
[ORIGINAL CRIMINAL NO. 4:09cr81-7]

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter comes before the court on the Petitioner's pro se Motion for "Extention [sic] to Dismissal Order" ("Motion"), filed on August 12, 2016. ECF No. 655. The Motion was filed subject to defect because it lacked a proper certificate of service to the United States Attorney at Newport News. See Striking Order of August 12, 2016, ECF No. 656. The Petitioner resubmitted the Motion with a certificate of service to the "Clerk of Courts," rather than the United States Attorney. ECF No. 657. Therefore, this submission was also filed subject to defect for lack of a certificate of service to the United States Attorney. Regardless, the court **LIFTS** the defect and **DIRECTS** the Clerk to send a copy of the Petitioner's Motion to the United States Attorney at Newport News.

The Motion requests a thirty-day extension of time to file a response to the Dismissal Order of June 7, 2016, because the

institution in which he is housed was on "lockdown" from July 28, 2016, to August 5, 2016, making him "unable to research the unapparent untimely § 2255(f)(3) motion." Mot. at 1.

The Petitioner is not entitled to respond to the Dismissal Order of June 7, 2016. The Dismissal Order dismissed the Petitioner's motion under 28 U.S.C. § 2255, and thus terminated these proceedings. Further, the court notes that the Petitioner did not respond regarding the timeliness of his § 2255 motion when ordered to do so by the court in the Show Cause Order of April 12, 2016, long before the lockdown commenced. See ECF No. 645.

The Petitioner was advised, in the Dismissal Order, that he may appeal from the Dismissal Order within sixty (60) days of its date of entry. Dismissal Order of June 7, 2016, at 3, ECF No. 653. This period has expired. However, the court may extend the time to file a notice of appeal, if "a party so moves no later than 30 days after the time prescribed" for the appeal expires, and the party "shows excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A). The extension granted may not exceed "30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Id. R. 4(a)(5)(C). The Petitioner's prescribed time expired on August 6, 2016, and a thirty-day extension would give the Petitioner until September 5, 2016. The later period is

therefore fourteen (14) days after the entry date of this Order, which would be September 9, 2016. Although the lockdown lasted for only eight (8) days, the court finds the Petitioner has shown "excusable neglect" and **GRANTS** fourteen (14) days from the date of entry of this Order to file an appeal to the Dismissal Order of June 7, 2016.

Accordingly, the Petitioner's Motion, requesting an extension of time to file a response to the Dismissal Order, is **DENIED**. However, the court **GRANTS** the Petitioner an extension of time to file his appeal of the Dismissal Order. The Petitioner is **ADVISED** that he may appeal from the Dismissal Order of June 7, 2016, by filing, within fourteen (14) days of the date of entry of this Order, a written notice of appeal with the Clerk of the United States District Court, 2400 West Avenue, Newport News, Virginia 23607. As previously stated, the court declines to issue a certificate of appealability for the Dismissal Order of June 7, 2016, for the reasons stated in the Dismissal Order and the Show Cause Order of April 12, 2016.

The Clerk is **DIRECTED** to send a copy of this Order to the Petitioner and to the United States Attorney at Newport News.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

August 26, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff, CASE NO.: 21-20252-Cr-**WILLIAMS**

-vs-

FRANCISCO JUNIOR LOUIS,

Defendant.
_____/

MOTION TO DISMISS COUNTS 2, 4, 6, 8, 10 AND 12 PURSUANT TO FED. R. CRIM. P. 12 (b)(2) FOR LACK OF JURISDICTION

COMES NOW the Defendant, **Francisco Junior Louis**, by and through undersigned counsel, and files this Motion to Dismiss Counts 2, 4, 6, 8, 10 and 12 of the Indictment in this cause pursuant to Fed. R. Crim. P. 12(b)(2), and in support thereof, Mr. **Louis**, states as follows:

The Failure of a count in the indictment to charge an "offense against the law of the United States" is a jurisdictional defect under 18 U.S.C. §3231 requiring dismissal.

It is settled law in this Circuit that an indictment's failure to charge ***any*** federal crime is a jurisdictional defect that requires dismissal of the indictment. The reason for that rule is that a district court's subject-matter jurisdiction over criminal cases is conferred by 18 U.S.C. §3231, which provides:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Where an indictment does not actually charge a cognizable offense "against the laws of the United States," there is no statutory basis for any federal court to exercise

"power over a criminal case." In such circumstances, irrespective of a jury verdict or guilty plea, the conviction on those counts is void. Those counts in the indictment must be dismissed.

This rule has been applied in diverse circumstances. In *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), the grand jury's indictment charged a "conspiracy to attempt" to import/distribute marijuana, which was not a federal offense. Because the indictment had effectively charged a violation of a "non-statute," this Court's predecessor held the indictment" did not invoke the district court's jurisdiction to enter judgment or accept a guilty plea." *Id.* at 509-10.

In *United States v. Peter*, 310 F.3d 709 (11th Cir. 2003), the grand jury attempted to charge a violation of the mail fraud statute, 18 U.S.C. §1341, but alleged conduct that fell outside the sweep of that statute. In those circumstances, just as in *Meacham*, the Court held, the indictment effectively charged a "non-offense," which deprived the district court of jurisdiction to adjudicate the defendant guilty and required dismissal of the indictment. 310 F.3d at 715.

Notably, in between *Meacham* and *Peter*, the Supreme Court clarified that not all defects in an indictment are "jurisdictional," and in particular, the omission of a factual allegation necessary to impose an enhanced sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not fall in the "jurisdictional" category. *United States v. Cotton*, 535 U.S. 625, 626, 631-32 (2002). Although the government argued in *Peter* that *Cotton*'s holding was inconsistent with *Meacham*, the Eleventh Circuit disagreed. *Peter*, 310 F.3d at 713-14. To the contrary, it explained, in *Cotton* (unlike *Meacham*), "the charge to which the defendant pled was a valid one." *Id.* at 715. Therefore, the factual omission from the

indictment in *Cotton* was not "jurisdictional." By contrast, the *Peter* Court explained, the indictment before it was analogous to the one in *Meacham*, because even though the grand jury had alleged that the defendant violated the mail fraud statute, the conduct it alleged "was outside the sweep of the charging statute" and therefore "not proscribed" by that statute. *Id.* at 714.

In these circumstances, the Court explained, just as in *Meacham*, "the Government's proof of the alleged conduct, no matter how overwhelming, would have brought it no closer to showing the crime charged than would have no proof at all." *Id.* at 715. "The problem is not that the Government's case left unanswered a question as to whether its evidence would encompass a particular fact or element. Rather, it is that the Government affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute." *Id.*

After *Peter*, the Eleventh Circuit continued to distinguish the non-jurisdictional omission of the sentencing-enhancing element in the *Cotton* indictment, from the clearly jurisdictional defect that occurs whenever an indictment fails to charge ***any*** "offense against the laws of the United States." *See, e.g, United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013) (noting that *Cotton* did not alter "our established precedent recognizing that the failure to allege a crime in violation of the laws of the United States is a jurisdictional defect").

In *United States v. St. Hubert*, 909 F.3d 335, 343 (2018), *reh'g en banc denied*, 918 F.3d 1174 (11th Cir. 2019), the Court noted that several circuits had disagreed with this Circuit's limitation of *Cotton* in *Peter*, but held: "[W]e are bound by our circuit precedent in *Peter.*" *Id.* at 343. As support, the Court cited the then-recent Supreme Court

decision in *Class v. United States*, 138 S.Ct. 798, 802 (2018) (suggesting "that a claim that the facts alleged in the indictment and admitted by the defendant do not constitute a crime at all cannot be waived by a defendant's guilty plea because that kind of claim challenges the district court's power to act"). *St. Hubert*, 909 F.3d at 343-44 (acknowledging that rather than undercutting *Peter*, "*Class* supports *Peter*'s analysis"). Given the denial of rehearing *en banc* in *St. Hubert*, it is now beyond dispute in this Circuit that indictments (like the one in *Cotton*) that sufficiently charge at least ***some*** federal crime, must be distinguished from those like Counts 2, 4, 6, 8, 10 and 12 in the instant one, that charge ***no*** crime, and are jurisdictionally defective.

These counts in the instant indictment fall in the latter category, and render this case directly analogous to both *Meacham* and *Izurieta*, 710 F.3d 1176 (11th Cir. 2013). In *Izurieta*, the indictment charged the defendants under 18 U.S.C. § 545[1] with "unlawful" importation of goods in violation of a Customs regulation, 19 C.F.R. §141.113(c), and a jury found them guilty as charged. On appeal, however, this Court *sua sponte* raised a question as to its own and the district court's subject-matter jurisdiction, and concluded that the indictment did not actually charge a federal "offense" because the "law" violated (making the importation "unlawful") was civil rather than criminal. *Id.* at 1179-80.

While some federal regulations "may fall under the criminal prohibitions in 18 U.S.C. §545," the Court explained, 19 C.F.R. §141.113(c) was merely a civil regulation. It did not impose criminal liability–but rather, only civil and monetary liability–for failure to

[1] Title 18 U.S.C. §545 provides in pertinent part:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law ... [s]hall be fined under this title or imprisoned not more than 20 years, or both.

comply. *Id.* at 1183-84. And since that regulation "fails to qualify as a 'law' for purposes of criminal liability," the Court held, the §545 counts failed to charge "a violation of criminal law." Subject-matter jurisdiction did not exist; the defendants' convictions could not stand; and dismissal of the indictment was mandated. *Id.* at 1184-85.

The same is true here. Just as in *Meacham* and *Izurieta*, and for the reasons stated in St. Hubert, 909 F.3d at 344, it is clear after [*Taylor* and *Jackson*] that Counts 2, 4, 6, 8, 10 and 12 of the indictment failed to charge a cognizable federal criminal offense. These counts of the indictment must be dismissed. The Court is without jurisdiction to impose sentence on Mr. Louis for these counts.

While admittedly, not all new rules of law announced by the Supreme Court in a criminal case apply on collateral review, there is no question that a decision of the Supreme Court announcing "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on *direct review* or not yet final"; and more so in this case wherein the Supreme Court's decision was announced prior to the Defendant being sentenced herein. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (emphasis added); *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016). Indeed, based on the rationale of *Griffith*, even if an issue has not been raised in an opening brief, this Court will permit a party to file a supplemental brief if the Supreme Court "issues a decision that upsets precedent relevant to a pending case and thereby provides an appellant with a new theory or claim." *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (citing *Joseph v. United States*, 135 S.Ct. 705, 706 (2014)).

In the case herein, the Supreme Court decision in *United States v.Taylor*, ___ U.S. ___, 142 S.Ct. 2015 (June 21, 2022) – was handed down prior to the Defendant herein

being sentenced in this cause. Not only Fed. R. Crim. P. 12 (b)(2), but case law confirms that the Motion to Dismiss the wrongful conviction on counts 2, 4, 6, 8, 10 and 12 in violation of Title 18 U.S.C. §924 (c) can be made at any time while the case is pending. As such, if jurisdiction can be challenged (and a request for dismissal raised) for the first time on appeal, as encompassed by the *Griffith* and *Durham* rules, then it clearly can be raised by Mr. Louis post-verdict/pre-sentencing while the case remains in the district court.

A. After *Taylor* and *Jackson*, Hobbs Act robbery is not a qualifying "crime of violence;" *St. Hubert* has been abrogated.

Taylor plainly "upset precedent" relevant to this case, since it explicitly abrogated *United States v. St. Hubert*, 909 F.3d 335, 337, 351-53 (11th Cir. 2018))[1] in two separate respects that now confirm Hobbs Act robbery is *not* a qualifying "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A).

First, the Supreme Court held in *Taylor*, *attempted* Hobbs Act robbery is not a "crime of violence" within §924(c)(3)(A)'s elements clause because no element of the attempted crime "requires proof that the defendant used, attempted to use, or threatened to use force." 142 S.Ct. at 2021, 2025. *See also id.* at 2021-22 (explicitly rejecting the Eleventh Circuit's contrary holding and reasoning in *St. Hubert*, 909 F.3d at 337, 351-53). But that attempt holding is significant for the completed crime as well, since by its terms,

[1] *St. Hubert* now carries a "red flag" in WESTLAW, and a notation that the decision was "abrogated by *Taylor*."

the Hobbs Act robbery statute – 18 U.S.C. §1951(a) – is indivisible as to attempted and completed robberies.[2]

The government, notably, bears the burden of proving divisibility. And where (as here) it cannot meet that burden, the courts must presume the offense is indivisible, Mr. Louis' conviction on Counts 2, 4, 6, 8, 10 and 12 in the Indictment is overbroad, and it does not qualify as a crime of violence. *See Mathis v. United States*, 579 U.S. 500, 519 (2016); *Francisco v. U.S. Attorney General*, 884 F.3d 1120, 1123 (11th Cir. 2018).

But this is not the only reason substantive Hobbs Act robbery cannot be a qualifying §924(c) predicate after *Taylor*. The second reason is that in *Taylor*, the Supreme Court squarely rejected the "realistic probability" methodology that the Eleventh Circuit used in *St. Hubert* to conclude that substantive Hobbs Act robbery does not categorically involve, at minimum, a threat to use physical force. *See* 909 F.3d at 350. In this portion of the *St. Hubert* decision, the panel voiced its agreement with the Second Circuit in *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016) in rejecting the petitioner's argument that one could commit Hobbs Act robbery by "putting in fear" without any physical force or threat of such force. Specifically, the St. Hubert found that there must be a "realistic probability, not a theoretical possibility, "that the statute at issue could be

[2] Title 18 U.S.C. § 1951(a) provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." Section § 1951(b) provides: "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

applied to conduct that does not constitute a crime of violence, and, to that end, "a defendant 'must at least point to his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues.'" *Id.* at 140 (quoting in part *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 [] (2007); *see also* [*United States v.*] *McGuire*, 706 F.3d [1333,] 1337 [(11th Cir. 2013)] (citing *Duenas-Alvarez* and explaining that to determine whether an offense is categorically a crime of violence under §924(c) *St. Hubert* has not pointed to any case at all, much less one in which the Hobbs Act applied to a robbery or attempted robbery that did not involve, at a minimum, a threat to use physical force. Indeed, St. Hubert does not offer a plausible scenario, and we can think of none, in which a Hobbs Act robber could take property from the victim against his will and by putting the victim in fear of injury (to his person or property) without at least threatening to use physical force capable of causing such injury.

St. Hubert, 909 F.3d at 350.

Notably, the government tried to use this same "realistic probability" argument against the defendant in *Taylor*. But the Supreme Court was clear that Taylor's failure to identify a single case in which someone has been prosecuted for attempted Hobbs Act robbery without a communicated threat was legally irrelevant. Putting aside "the oddity of placing a burden on the defendant to present empirical evidence about the government's prosecutorial habits," and "the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases," the Court stated in *Taylor*, there was

an "even more fundamental problem" with the government's (and *St. Hubert*'s) "realistic probability" theory:

> it "cannot be squared with the statute's terms. To determine whether a federal felony qualifies as a crime of violence, §924(c)(3)(A) doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It asks whether the government must prove, as an *element* of its case, the use, attempted use, or threatened use of force. ...
>
> Attempted Hobbs Act robbery does not require proof of *any* of the elements §924(c)(3)(A) demands. That ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise. ...
>
> In §924(c)(3)(A), Congress did not ... mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits.
>
> Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force.

Id. at 2024-25.

Taylor has completely gutted the "realistic probability" rationale of *St. Hubert*. But notably, that was not actually the primary rationale of the decision; it was a *post hoc* justification by the *St. Hubert* panel for why the result it previously reached it *In re St. Fleur*, 824 F.3d 1337 (11th Cir. 2016), accorded with the categorical approach when the *St. Fleur* panel plainly ignored the categorical approach. *See* 909 F.3d at 347-51. The primary basis for the *St. Hubert* panel's holding on substantive Hobbs Act robbery was deference to the prior panel precedent of *St. Fleur*.

In *St. Fleur*, a panel of this Court issued a decision at the authorization stage of a second or successive §2255 motion, holding as a matter of first impression for the Circuit that Hobbs Act robbery was a "crime of violence" under the elements clause in 18 U.S.C. §924(c)(3)(A). *Id.* at 1341. Although that decision was the product of irregular, truncated

procedures in which there is no adversarial briefing and open merits questions are not to be resolved, the *St. Fleur* panel designated for publication its decision. And that decision not only denied the applicant's request to file a successive application; it summarily resolved the merits of the then-still-open issue in the Circuit as to whether Hobbs Act robbery was a qualifying "crime of violence" within the elements clause based simply on the statutory language. *See* 824 F.3d at 1341 (quoting the language of the statute, "as replicated in the indictment, and finding based on that language that the elements of *St.* Fleur's conviction "require the use, attempted use, or threatened use of physical force 'against the person or property of another' "). Indisputably, the St. Fleur panel did *not* determine the least culpable conduct for conviction by reviewing caselaw or jury instructions, as required by the categorical approach. *Cf. Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013); *United States v. Lockett*, 810 F.3d 1262, 1271 (11th Cir. 2016).

But despite that, in *St. Hubert* the Court held that the "law established in published three-judge orders issued pursuant to 28 U.S.C. §2244(b) in the context of applications for leave to file second or successive §2255 motions is binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals." 909 F.3d 335, 346 (11th Cir. 2018) (emphasis in original). And because *Saint Fleur* was "binding" on all subsequent panels, *id.*, it made no difference in *St. Hubert* that the defendant had pressed a new argument that Eleventh Circuit Pattern Instruction 70.3 confirmed that a Hobbs Act robbery conviction did not categorically require the use or threat of violence force against property. The *St. Hubert* panel steadfastly refused to even consider that argument pursuant to the Circuit's "prior panel precedent" rule. At that time, notably, the Court had

stated in multiple cases that the prior panel precedent rule admitted of no "overlooked reason" exception. *See, e.g., In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015).

Had *St. Fleur* not been treated as "binding" and foreclosing consideration of the defendant's new argument based upon the pattern instruction, the *St. Hubert* panel should have reached a different conclusion under both the Supreme Court's and this Court's categorical approach precedents. For indeed, Eleventh Circuit Pattern Instruction 70.3 on Hobbs Act robbery provides:

> It's a Federal crime to acquire someone else's property by robbery ...
>
> The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt.
>
> > (1) the Defendant knowingly acquired someone else's personal property;
> >
> > (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or causing the victim to *fear harm*, either immediately or in the future; ...
>
> "Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.
>
> "Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence*.

(Emphasis added).

According to this instruction, a defendant's taking of intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – is a plausible means of committing a Hobbs Act robbery. Indeed, before *St. Fleur* and *St. Hubert* definitively resolved whether substantive Hobbs Act robbery was a "crime of violence," two members of the Court had specifically opined that an offense might *not* categorically be a "crime of violence," if juries were routinely instructed in Hobbs Act cases, that the

statute could be violated without the use or threat of physical violence, and simply by causing "fear of financial loss." *See Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause; noting that, given Eleventh Circuit Pattern Jury Instruction 070.3, a defendant could be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights"); *In re Hernandez*, 857 F.3d 1162 (11th Cir. 2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting, based on the same definition of "fear" in the pattern Hobbs Act extortion instruction, that "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)).

St. Hubert urged his panel to hold as a matter of first impression that the plain language in Eleventh Circuit Pattern 070.3 confirmed that Hobbs Act robbery could – under *McGuire* – "plausibly" be committed without the use or threat of physical violence. He noted that the plain language of the Eleventh Circuit pattern instruction, was *not even* "minimally forceful." Taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property. Under *McGuire*, the *St. Hubert* panel should have considered that a *completely non-violent* commission of a Hobbs Act robbery was not only "plausible," but "probable," based upon the plain language of its own pattern instruction. But it did not, due to the (misperceived) binding force of *St. Fleur*.

The error in the *St. Hubert* panel's overly-rigid application of the prior panel precedent rule has become clear with the Court's recent decision in *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022). In *Jackson*, the Court acknowledged the statement in *Lambrix* that it had "categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." 36 F.4th at 1305 (citing *Lambrix*, 776 F.3d at 794). However, the Court clarified (citing Supreme Court precedent, and the rule in other circuit courts) that,

> "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 [] (1925). ...
>
> [T]he Supreme Court has recognized that where it has "never squarely addressed [an] issue, and ha[d] at most assumed [the issue], [it is] free to address the issue on the merits" in a later case presenting it. *Brecht v. Abrahamson*, 507 U.S. 619, 631 [] (1993); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 [] (1952) ("The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point." (footnote omitted). Our sister circuits adhere to this principle as well. *See, e.g., Fernandez v. Keisler*, 502 F.3d 337, 343 (4th Cir. 2007) ("We are bound by holdings, not unwritten assumptions."); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("In those cases, this court simply assumed that the commerce clause applied, but the issue was never raised or discussed. Such unstated assumptions on non-litigated issues are not precedential holdings binding future decisions."); *United States v. Norris*, 486 F.3d 1045, 1054 (8th Cir. 2007) (en banc) (Colloton,J., concurring in the judgment) (citing cases finding that *sub silentio* holdings, unstated assumptions, and implicit rejections of arguments by prior panel are not binding circuit precedent).

Jackson, 36 F.4th at 1305.

With this clarification of the prior panel precedent rule, neither *St. Fleur* nor *St. Hubert* is binding precedent precluding this Court from considering Mr. Louis' argument (never considered in either of those cases) that based on the language of the standard

Hobbs Act robbery instruction, the offense is categorically overbroad vis-a-vis §924(c)'s elements clause because it can be committed by causing fear of purely economic harm to non-tangible property. The Court should so hold as a matter of first impression here.

B. The fact that Hobbs Act robbery is not a qualifying §924(c) predicate is an unwaivable jurisdictional defect.

While multiple aspects of *St. Hubert* have now been abrogated by *Taylor*, one portion of *St. Hubert* remains good law and it is directly relevant here. Specifically, the *St. Hubert* panel rightly recognized that *if* either attempted or completed Hobbs Act robbery were not crimes of violence under §924(c)(3)(A), then the §924(c) counts of the indictment relying upon these priors as predicates would not charge "an offense against the laws of the United States." *St. Hubert*, 909 F.3d at 344. And that, the Court noted, would be an unwaivable jurisdictional defect. *Id.*

That holding of *St. Hubert* confirming that the same error here is jurisdictional, is still good law. And that jurisdictional error requires reversal of Mr. Louis' Count 2, 4, 6, 8, 10 and 12 convictions at this time.

C. Because the error is jurisdictional, Rule 12(b)(2) and the interpretative caselaw confirms that a motion to dismiss on jurisdictional grounds can be made at any time that the case remains pending before the District Court

Admittedly, undersigned counsel for the defendant prior to trial did not raise this jurisdictional challenge based upon then existing case law in this Circuit. Undersigned counsel for Mr. Louis, prior to the decision in *Taylor* and *Jackson* – believed itself bound by holdings in *St. Fleur and St. Hubert*, and as such he did not challenge Mr. Louis' §924(c) convictions prior to trial on grounds that substantive Hobbs Act robbery was not categorically a "crime of violence." After the intervening decisions in *Taylor* and *Jackson*,

however, and this Circuit's Standard Jury Instructions on Hobbs Act Robbery, it is now clear that Hobbs Act Robbery is not a "crime of violence" for purposes of Section 924(c). And, in light of the discussion of jurisdictional error in *St. Hubert*, 909 F.3d at 344, this has resulted in a jurisdictional error. Notably, pursuant to Fed. R. Crim. P. 12(b)(2) and relevant caselaw, a jurisdictional error is cognizable so long as the case remains pending.

Where an indictment does not actually charge a recognizable offense "against the laws of the United States," there is no statutory basis for any federal court to exercise "power over a criminal case". In such circumstances, irrespective of a jury verdict or guilty plea, the conviction is void. The indictment must be dismissed.

Indeed, this rule has been applied in diverse circumstances. In *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), the grand jury's indictment charged a "conspiracy to attempt" to import/distribute marijuana, which was not a federal offense. Because the indictment had effectively charged a violation of a "non-statute", this Court's predecessor held the indictment "did not invoke the district court's jurisdiction to enter judgment or accept a guilty plea." *Id*. at 509-10.

In *United States v. Izurieta*, 710 F.3d 1179 (11th Cir. 2013), the indictment charged the defendants under 18 U.S.C. §545 with "unlawful" importation of goods in violation of a Customs regulation, 19 C.F.R. §141.113(c), and a jury found them guilty as charged. On appeal, however, the 11th Circuit Court, *sua sponte*, in *Izurieta* raised a question as to its own and the district court's subject-matter jurisdiction, and concluded that the indictment did not actually charge a federal "offense" because the "law" violated (making the importation "unlawful") was civil rather than criminal. Id. at 1179-80. The Circuit Court determined that the Regulation did not impose criminal liability-but rather, only civil and

monetary liability-for failure to comply. And since that Regulation "fails to qualify as a 'law' for purposes of criminal liability, the Court held, the §545 counts failed to charge "a violation of criminal law". Subject-matter jurisdiction did not exist; the defendants' convictions could not stand; and dismissal of the indictment was mandated. Id. at 1184-85.

As such, the Court herein should vacate the Count 2, 4, 6, 8, 10 and 12 convictions and dismiss the 924(c) charges. Mr. Louis cannot be sentenced on counts that do not charge an "offense against the laws of the United States."

Pursuant to the local rules, undersigned counsel has contacted Yara Dodin, Assistant United Attorney in Charge of this case for the government to ascertain her position vis-à-vis this Motion; and she has informed the undersigned that she objects to the Court granting this Motion to Dismiss.

CONCLUSION

A §924(c) offense predicated upon Hobbs Act robbery is not a "crime of violence" as defined under §924(c)(3), and the 924(c) counts in the Indictment therefore fail to charge an "offense against the laws of the United States." The error of a non-offense in the indictment is a non-waivable jurisdictional defect. As such, Mr. Louis prays that the Court vacate and dismiss all of Mr. Louis' his §924(c) convictions for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was filed with the Clerk of Court using **CM/ECF**; on this 1st day of August 2022.

/s/ Jose' R.E. Batista
Jose' R.E. Batista, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NUMBER 21-CR-20252

UNITED STATES OF AMERICA

vs.

10:12 FRANCISCO LOUIS

SENTENCING PROCEEDINGS HELD 1-13-2023
BEFORE THE HONORABLE KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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01:40 THE COURT: All right. For the record everyone is back in the courtroom. Having had some time to speak with Mr. Louis and Mr. Batista, Mr. Louis does not wish for the Court to discharge Mr. Batista and wishes to go forward at this time with sentencing.

So I am denying Mr. Batista's motion as moot at this time; and we will proceed to sentencing.

All right. We had briefly discussed at our last hearing a new calculation as to the guidelines -- which the probation officer has done with our thanks -- and the Government has filed a written response to the Court's proposal, which I have reviewed, and which I will discuss in a moment.

I will turn to Probation now -- for purposes of this record and with our new calculations -- and ask what the total offense level is as well as the current guideline range?

THE PROBATION OFFICER: Your Honor, it is an offense level 34 with a criminal history Category 1 and a guideline range of 151 to 188 months.

THE COURT: Thank you so much.

THE PROBATION OFFICER: You're welcome.

THE COURT: I will turn to you now, Mr. Batista, and ask whether that is consonant with your understanding of the recalculated guideline range?

MR. BATISTA: Yes, Your Honor.

THE COURT: And do you have any objection to that guideline range as calculated?

MR. BATISTA: No, Your Honor.

THE COURT: Or criminal history?

MR. BATISTA: No, Your Honor.

THE COURT: And are there any factual issues or corrections to the PSI that have not been addressed?

MR. BATISTA: No, Your Honor.

THE COURT: I will turn now to the Government. If you would like to expound or expand on the argument that you have set out in your written motion you may do so at this time.

MS. DODIN: Thank you, Your Honor. I would like to just briefly -- obviously the written motion will have more details -- but I would briefly summarize our objection to what it appears the Court will do in terms of the dismissal of the six 924(c) counts based on the Court's belief that it does not have jurisdiction over those counts based on Rule 34.

THE COURT: All right.

MS. DODIN: It is the Government's position, Your Honor, that jurisdiction arises from the charging document and does not arise from the jury instructions.

And so if there were to be an error in the jury instructions -- which the Government does not believe there was and defense agreed there were not at a previous hearing that we

had...

THE COURT: Slow down, slow down.

MS. DODIN: My apologies to Ms. Sanders.

Your Honor, aside from the harmless error standard, if the Court decided that there was, in fact, an issue big enough to substantially harm the defendant's due process rights then the proper remedy would be under Rule 33, which is a motion for new trial.

Which obviously at this point a motion for new trial is time barred given all the time that has passed since the verdict back in March of 2021.

In short, Your Honor, the Government objects to the Court dismissing any and all of the 924(c) counts. And so the Government would be objecting to the guidelines as calculated.

The Government would object to the guidelines without the seven-year mandatory minimum sentences on each -- as to each of the 924(c) counts for all the reasons previously stated in our filings.

And, Your Honor, the only other thing I noticed is that the most up-to-date PSR has not yet been filed. I am not sure when -- or how that would be handled Your Honor -- so I just wanted to make a note of that as well.

THE COURT: Well, if I make my ruling that those counts are not applicable here then the PSI would have to be filed as the predicate for why I sentenced the way that I did.

MS. DODIN: That's all we have on that issue, Your Honor. Thank you.

THE COURT: Mr. Batista, any rebuttal or anything additional you would like to present at this time on this issue?

MR. BATISTA: If Your Honor would allow Ms. Bryn to address this issue.

THE COURT: All right.

MS. BRYN: Thank you, Your Honor. We obviously agree with the Court that Rule 34 is an appropriate option here. The error we believe is -- for all the reasons that we have stated previously -- we believe it is a jurisdictional error and not because of any error in the jury instruction.

We reaffirm and essentially agree with the Government that the jury instruction is correct, the pattern instruction, that is a correct statement of the law and the elements of the Hobbs Act Robbery, so there was no impropriety there.

But from the face of the indictment in this case -- as we have argued under the St. Hubert decision -- if the offense is categorically overbroad, which it is here according to the jury instructions given not just in this case but the pattern instruction given in every case, every Hobbs Act robbery conviction, then Hobbs Act robbery is not a predicate for 924(c).

And what is charged in the indictment is essentially a non offense. And under the St. Hubert decision the charging of a non offense in the indictment -- and at that time there was no Taylor -- so the Court did not understand that Hobbs Act robbery was categorically overbroad.

But now that the realistic test that the Court used in St. Hubert has been rejected by the Supreme Court -- and so we have the exact situation that the St. Hubert Court -- the 11th Circuit in that case recognized would be a jurisdictional error the charging of a crime as a crime of violence when in fact it is not a crime of violence.

And that is exactly the situation we have here in Rule 34. I guess before 2014 there were two options for the arrest of judgment. One would be if the indictment does not state an offense; and the second one would be if the Court is without jurisdiction.

And the Rule was amended to only permit jurisdictional errors to be the basis for Rule 34 arrest of judgment. However, according to 11th Circuit law the situation that we have here is not the mere omission of an element...

THE COURT REPORTER: Counsel, please keep your voice up.

MS. BRYN: That type of error in an indictment it is -- is the failure of the indictment to charge an offense against

01:51 1 **the United States (sic)**
01:51 2 **And so because Hobbs Act robbery -- our position is**
01:51 3 **after Taylor and in light of the pattern instruction -- it is**
01:26 4 **categorically overbroad and is not a proper predicate and the**
01:51 5 **indictment charges a non offense.**
01:51 6 **And so for that reason the Court would be within its**
01:51 7 **power to dismiss those counts and arrest the judgment of the**
01:51 8 **jury on those counts.**
01:51 9 **THE COURT: All right. As I believe I indicated, I**
01:51 10 **will decline to sentence Mr. Louis on the 924(c) counts for the**
01:52 11 **reasons that Ms. Bryn has just articulated and pursuant to my**
01:52 12 **authority as set out in Rule 34.**
01:52 13 **But let me make a comment about the Government's**
01:52 14 **position, and what I have heard today. Perhaps my thinking is**
01:52 15 **less nuanced than Ms. Bryn's -- or more -- I can never quite**
01:52 16 **tell.**
01:52 17 **First, I do not agree with the Government that I am**
01:52 18 **confined to either a Rule 12 challenge -- which with the**
01:52 19 **amendment to Rule 34 would have been perhaps untimely or Rule**
01:53 20 **33 which has to do with newly discovered evidence or the like.**
01:53 21 **I also do not agree with the Government that I am**
01:30 22 **confined by the 14-day period set out in Rule 34. The language**
01:30 23 **is clear that -- and I think in Section B it talks about the**
01:31 24 **defendant where as in Section A it talks about the Court's**
01:31 25 **capacity sue sponte.**

01:31 1

01:53 2 **As to timeliness and whether or not the defendant**
01:53 3 **brought this up in a timely fashion, Mr. Louis did raise a**
01:54 4 **jurisdictional argument in his motion to dismiss and he did, in**
01:54 5 **fact, bring up the jury instructions.**
01:54 6 **The Government had argued he did not raise it, but he**
01:54 7 **did, and the Government did not, in fact, respond to it when**
01:54 8 **they presented their argument.**
01:54 9 **I think with what I kept referring to as an infirmed**
01:54 10 **jury instruction that expanded the elements required for the**
01:34 11 **jury to find guilt under 924(c), that the crime presented to**
01:34 12 **them was fundamentally overbroad as understood by Taylor, and**
01:34 13 **therefore it is incumbent upon me to find that I do not have**
01:55 14 **jurisdiction to sentence under those counts; and so for that**
01:55 15 **reason I am not going to do so.**
01:55 16 **In my previous comments I mentioned -- as Mr. Louis'**
01:55 17 **motion did -- the Davenport case, and I think the Government**
01:55 18 **fundamentally misunderstands what Ms. Bryn is saying about the**
01:56 19 **jury instruction and the way I read the transcript.**
01:56 20 **I believe in her broader argument about Hobbs Act not**
01:56 21 **being a crime of violence that it was perhaps -- it fit more**
01:56 22 **neatly -- but in this instance as to the instruction, it is not**
01:56 23 **that I gave an instruction that was not given the imprimatur of**
01:56 24 **the 11th Circuit -- I did not mis-recite the pattern -- but**
01:56 25 **based on the charge here in this indictment the instruction I**

01:56 1 **gave expanded and allowed the jury to find guilt where there**
01:56 2 **was, in fact, no offense as Taylor has let us know. So I did**
01:57 3 **not see her comments, or Mr. Batista's, as conceding to the**
01:57 4 **Government the correctness of its argument on the jury**
01:57 5 **instruction.**
01:57 6 **I believe in one of Mr. Louis' pro se pleadings he**
01:57 7 **did, in fact, mention the due process considerations. While it**
01:57 8 **was not particularized in his pro se motion -- which is at**
01:58 9 **docket entry 142 and was filed June 23rd -- in that motion Mr.**
01:58 10 **Louis mentioned the forthcoming Taylor decision. So he was**
01:58 11 **prescient in that regard.**
01:58 12 **In any event, I do not believe on this record in light**
01:58 13 **of the jury's questions about the elements of the crime and the**
01:58 14 **very pitched and vigorous debate that is ongoing about whether**
01:58 15 **Hobbs Act is a crime of violence -- I do not believe that I**
01:58 16 **have jurisdiction to sentence Mr. Louis on those counts and**
01:59 17 **therefore I will not do so.**
01:59 18 **And so I am adopting the alternative PSI calculation,**
01:41 19 **which will be made part of the record, and which finds a total**
01:42 20 **offense level 34, criminal history Category 1 and an advisory**
01:42 21 **guideline range of 151 to 188 months.**
01:59 22 **With that I will turn to you now, Mr. Batista, for any**
01:59 23 **3553(a) presentation on behalf of your client.**
01:59 24 **MR. BATISTA: Thank you, Your Honor.**
01:59 25 **THE COURT: And Mr. Batista, if you would be careful**

01:59 **to speak loudly and clearly as you have on a mask.**

01:59 **MR. BATISTA: Pursuant to 3553, Your Honor, the Court**

01:59 **shall impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth.....**

THE COURT: Mr. Batista, you need to not only speak up you need to slow down as well.

Remember, Ms. Sanders has to make her record.

MR. BATISTA: Yes, Your Honor. My apologies to Ms. Sanders.

THE COURT: That's okay. But she is trying to make an accurate record.

MR. BATISTA: And, Your Honor, in determining the particular sentence to be imposed the Court shall consider the nature and circumstances of the offense as well as the -- must consider the history and characteristics of the defendant.

Also the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense.

To afford adequate deterrence to criminal conduct. To protect the public from further crimes of the defendant...

THE COURT: Slow down; slow down.

02:00 **MR. BATISTA: Your Honor, the weight to be afforded any**

05:24 **given 3553 factors is a matter that is to be committed to the**

02:00 **sound discretion of the Court.**

02:00 **A District Court's unjustified reliance upon any one**

factor may be a symptom of an unreasonable sentence.

A District Court's failure to give mitigating factors the weight the defendant contends they deserve however does not render the sentence unreasonable.

THE COURT: Well, let me stop you there, Mr. Batista, and ask what is the mitigation?

I have declined to give the consecutive sentences, which would take us into the 40 to 50 year range -- so that is obviously fairly significant -- so tell me about the mitigation that the Court needs to consider.

MR. BATISTA: Well first, Your Honor -- fortunately none of the victims were physically harmed or anything like that -- I would submit that is the primary one that I can think of as far as the interaction of the victims when the robberies occurred.

And in terms of his criminal history, Your Honor, Mr. Louis only has one criminal history point for driving with a suspended license. That is all that he has.

And so, Your Honor, I would submit that a sentence of thirteen and a half to fifteen plus years is sufficient but not more than necessary to punish Mr. Louis.

Also after his incarceration -- he will have to do a substantial period of supervised release once he is released -- and so he will have to be in compliance with the law and under supervision as well in terms of his behavior.

And if he behaves while incarcerated -- which I am confident that he will do -- he can try to learn a trade so that he can give himself the possibility of having a skill and have gainful employment once he is released.

Your Honor, Mr. Louis is 36 years of age at this time. And so if the Court were to sentence him to the lower range of the guidelines -- once he is released he would be like 48 to 49 years of age.

And, Your Honor, if he is sentenced to the high end of the guideline range he will be 52 or 53 years of age when he is released from custody.

And as the Court is very well aware -- there are those studies by the Sentencing Commission which reflect that age and criminal history -- it exerts a strong influence as to their recidivism.

And the fact that individuals that are over 40 years of age or, older when they are released from custody tend to be less of a threat of recidivism than those individuals that are younger.

So I would ask Your Honor take that into consideration as well and sentence Mr. Louis to the low end of the guideline range. I believe that, that low end sentence is sufficient but not greater than necessary for Mr. Louis.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Batista.

Ms. Dodin, on behalf of the United States.

MS. DODIN: Thank you, Your Honor. I would first just reiterate our objection to the PSR. The Government believes that the appropriate sentence would be 42 years -- which would encompass the seven-year mandatory minimum sentence on each of the 924(c) counts -- and which we believe would be the lawful sentence

THE COURT: All right. It would be the lawful sentence but do you believe it is the appropriate sentence in this case? Where there is someone with a criminal history category one, an individual who drinks half a pint of Hennessy a day, who smokes three blunts and ingests Lean, you believe that 42 years is the appropriate sentence in that instance?

MS. DODIN: Your Honor, I do think 42 years is an appropriate sentence under the law as it relates to stacking the 924(c) counts because the Government's position has been and continues to be that is the appropriate sentence.

THE COURT: I understand the legal argument -- but I am asking you as a prosecutor handling other cases like bank robberies and offenses involving drugs and guns -- you believe that 42 years is an appropriate sentence?

MS. DODIN: What I will say given the Court's ruling and the new guideline range the recommendation that I would make under those circumstances -- and of course not waiving

anything that we have objected to thus far.

THE COURT: Of course.

MS. DODIN: The sentence I would recommend under those circumstances would be an upward variance of 25 years.

The reason I am asking for that, Your Honor, is for the following reason -- and I know Your Honor made note of the drug and alcohol use -- but the defendant was 33 or 34 at the time of these offenses and should have known better.

And so if the defendant chooses to drink alcohol and consume drugs that is a choice that he himself makes, and that does not make him less culpable for the violent actions that he took. That is a decision that he made.

Anything that he did based on that decision to consume those substances is not somehow less harmful -- I would argue that it is more harmful to the community.

The community is put more at risk when you are taking or using substances that cause you to lose control and commit these types of violent acts.

Again, there are people that choose not to drink or do drugs, and so that is a choice that someone makes and should not absolve them of their behavior.

THE COURT: What would you say to the professionals who work with offenders who are in the throes of addiction -- and I am not saying Mr. Louis -- but that for some people choice is not the term, and it is not the question, because

they are so addicted.

As you say it does not make it any better, and the community is not any more safe, but it is something that can be considered. That it is, in fact, a medical issue that under 3553 can be factored in -- not to justify or excuse it -- but something that can be factored into the other considerations.

MS. DODIN: That is a valid point, Your Honor, however it does not -- obviously one of the purpose of the Criminal Justice System and for sentencing is punishment. So that has to be weighed heavily.

Your Honor has to, of course, consider all of the other factors under 3553, but punishment as well as deterrence is something the Court must address.

And as to his substance abuse -- Mr. Louis can have access to all of the resources that are available to him while he is in custody and also when he is released.

I do not think that is a reason to reduce or sentence him to anything less than what would be appropriate in terms of the punishment to be received and to protect the community from this kind of criminal activity.

We are not, Your Honor, talking about a circumstance where Mr. Louis went on a "spree" for one day -- where he went from one store to the next, down the street from one store to the next, in the span of an hour or so.

THE COURT: You need to slow down, Ms. Dodin.

MS. DODIN: What we are talking about here, Your Honor, was Mr. Louis' conscious decision -- one that he made over the span of a week -- to go into these stores and commit these robberies.

Where Mr. Louis woke up every day and put on his robbery uniform and then went into these places of work during the pandemic -- where people were going to work every day to earn a living had a gun put in their faces and/or were forced to the ground to have property taken that did not belong to him.

You are talking about people who are still to this day terrorized about the experience that they had -- and victims who have left their places of work because of how unsafe they feel having gone through this.

THE COURT: Let me ask you this while I am thinking of it -- since you mentioned the victims -- is there anything in terms of restitution or some sort of an agreed upon amount the parties have been able to reach?

MS. DODIN: We do not have an agreed upon amount. I do know what was taken was cell phones and not money. I would have to get with the agent and see how much is outstanding. But I am sure we can come to some sort of an agreement.

THE COURT: Thank you, Ms. Dodin. And I apologize for interrupting, but I wanted to address the issue of restitution

while I was thinking of it.

MS. DODIN: Of course.

THE COURT: Let me say that I do agree that Mr. Louis did get up each day and decide to do this -- and I know at some point Mr. Batista filed something that characterized this sort of as being akin to a spree, if you will, and that under the guidelines a temporal break does not necessarily eliminate the ability of a Court to look at the events as a spree.

MS. DODIN: I do recall Mr. Batista filed something like that, Your Honor, but I would posit when the term spree is used -- I think legally when you are looking at a temporal break -- I think that you could argue that a temporal break is a matter of hours.

So if you commit a robbery early in the morning and 12 hours has gone by and you commit a robbery again that night I do not think that would be characterized as a spree.

I think that those are two different robberies where someone committed two robberies at vastly different times of the day, and where the person had plenty of opportunity to consider whether that is something they should continue to do or not.

And in this case, Your Honor, you are talking about the span of four to six days in which Mr. Louis committed these robberies -- again, Your Honor, where he decided to get up and put on this robbery uniform and commit these armed robberies

not having any concern for what might happen.

Mr. Batista said that no one was physically injured. Despite the fact that no one was physically harmed, and there was no discharge of a firearm, one of the victims had to have Fire Rescue called out because they were having a panic attack or a heart attack because of what had happened.

Aside from a murder being committed or someone being shot I do not know what is more violent or would cause more trauma than having a gun put in your face and then having your belongings taken.

Mr. Louis did that over and over again, Your Honor, he continued to get up each and every day and go out to rob these stores knowing that there would be people there that would be victimized.

And as to Mr. Louis' criminal history -- while Mr. Louis is a Category 1 on paper he has had numerous contacts and numerous run-ins with the Criminal Justice System.

Since the age of fifteen he has been arrested fifteen time -- between the age of 15 and 34 -- so almost every year he was arrested for crimes that were all over the place.

And while I understand, Your Honor, a lot of the cases were dismissed he still had consistent contact with the System for all these different offenses -- some of which were crimes of violence -- where he was arrested for resisting an officer without violence, for disorderly conduct and for kidnapping.

So you are talking, Your Honor, about offenses that did involve other violent behavior -- and not just someone with a suspended driver's license.

This was not a situation, Your Honor, where Mr. Louis had no contact with the "system" for his entire life and during Covid he made a bad decision out of desperation.

Again, Judge, this is someone who was involved with the Criminal Justice System since being a juvenile where he continued to commit these crimes.

And, Your Honor, I want to talk about statistics for just a moment if I could. Mr. Batista talked about statistics regarding recidivism and a defendant aging out from committing crimes.

Typically, however, people in their early to late twenties -- that is normally when you see male defendants committing these types of violent crimes -- and here Mr. Louis committed the most violent crimes since he began committing crimes at the age of fifteen years old to the age of 33 or 34.

Based upon that and all of the 3553(a) factors the Government's position in light of the Court's ruling and the new PSR is that an upward variance of 25 years would be the appropriate sentence.

And finally, Your Honor, the victims were notified about the sentencing today and elected not to be here.

However, there was one victim who wrote a letter that I would like to read to Your Honor.

THE COURT: Yes, of course.

MS. DODIN: This is from Daniel Rodriguez. And he says the reason for this letter is to expose the aftermath of the events that occurred in the robbery of the PCS Metro Store in which I, Daniel Rodriguez, was a victim.

The experience of the event itself was devastating due to the fact that the person who robbed the store pointed a weapon at me. Anything could have gone wrong. I could have been seriously injured.

However, the fear and dread this inflicted in me might affect my life in a profound way causing a constant feeling of insecurity, fear; and for which reason I had to change jobs and eventually change cities to feel fully safe due to the events fearing that this person could get out of jail and go against me.

I have had to work on my safety through psychological therapy as a consequence of this situation. In the same way, every time I see someone with a similar description to the attacker I have fear, anxiety and it immediately generates a feeling of fear from me reliving said situation again from the past.

I hope that the person pays for a long time as a

consequence of his actions, as well as for putting the lives of many people at risk, and that we will have to live in fear of the situation.

Thank you, Your Honor.

THE COURT: All right. Ordinarily when there is a request to depart upward from a guideline there has to be notice given.

We have kind of a strange circumstance here where basically everyone has been on notice of a much higher sentence for much longer.

So let me turn first to the United States and ask whether you believe there is any difficulty in considering your suggestion without a particularized filing.

Ms. Dodin.

MS. DODIN: Your Honor, I believe the parties were put on notice from the beginning that -- everyone up until the Court's most recent ruling was operating under the assumption that Mr. Louis would have to be sentenced to 42 years.

That was contemplated pretrial. And the Government's position has continued to be that the 42 years is what the Court should impose.

And so at this juncture I am technically asking for less than that. So I do not believe there would be any need for or any reason that the defense would need to be put on notice that the Government would be asking for an upward variance from

02:18 1 **the amended PSR.**
02:18 2 **THE COURT: Thank you, Ms. Dodin.**
02:18 3 **Mr. Batista, any rebuttal or anything that you would**
02:18 4 **like to add before I turn to your client?**
02:18 5 **MR. BATISTA: Yes, Your Honor. I wanted to try to**
02:18 6 **explain -- if I could -- how it was that Mr. Louis had some of**
02:18 7 **the problems he did as a young man.**
02:18 8 **He was brought to this country when he was three or**
02:18 9 **four years old. His mom was a single mom -- and her husband was**
02:18 10 **not his father; so Mr. Louis is one of six or seven siblings to**
04:44 11 **the mom.**
04:44 12 **Also, Your Honor, Mr. Louis was raised in a high crime**
04:44 13 **neighborhood -- in Little Haiti -- where he had literally no**
02:19 14 **supervision over him, which unfortunately allowed him to hang**
02:19 15 **out with the wrong individuals.**
02:19 16 **I am not trying to lessen Mr. Louis' involvement at**
02:19 17 **all Your Honor -- I am just trying to explain or give the Court**
02:19 18 **some background.**
02:19 19 **And, Your Honor, when I was first appointed to**
02:19 20 **represent Mr. Louis I contacted the AUSA at the time that was**
02:19 21 **handling the matter for the Government to try to work the case**
02:19 22 **out.**
02:19 23 **At the time I ran by her the possibility of resolving**
02:19 24 **the matter, and I had suggested a potential sentence of 11 and**
02:20 25 **a half to 14 and a half years.**

She indicated to me that she would be willing to speak with her supervisors towards that end, but Mr. Louis wanted a trial in his case.

And, Your Honor, in terms of that -- unless a person has been in jail they cannot appreciate all the restrictions and the type of punishment that an individual has to deal with during the time that individual will be in prison.

And if Your Honor is not inclined to sentence Mr. Louis to the low end of the guideline range I would submit to Your Honor that a sentence of 188 months followed by a minimum five years supervised release is just punishment for Mr. Louis and his actions.

Mr. Louis' mom and sister -- who you have seen here at some of the other hearings -- they could not be here today due to their work schedule.

But his sister is very supportive of Mr. Louis and is willing to take him in when he gets out so that he has a place to live -- as well as assist him in trying to get a job when he gets released.

Mr. Louis is going to spend a sentence that is lengthy regardless of what Your Honor imposes in this case, and it is going to be a substantial sentence no matter what.

He wants to learn a trade while he is inside so that he can try to get a decent job and make a living when he comes

04:58 1 **out.**
04:58 2 **So that is how he wants to spend his time while he is**
04:58 3 **serving his sentence, Your Honor.**
02:22 4 **He has a boy and a girl -- he does not have contact**
02:22 5 **with the mother of the little girl but he does have contact**
02:22 6 **with his son, and so he would like to try to keep some sort of**
02:22 7 **relationship with his children.**
02:23 8 **And so I would ask Your Honor to sentence Mr. Louis to**
02:23 9 **188 months, which we would submit to Your Honor is sufficient**
02:23 10 **but not greater than necessary to punish Mr. Louis for his**
02:23 11 **actions and of which the jury convicted him.**
02:23 12 **Thank you for your time.**
02:23 13 **THE COURT: Thank you, Mr. Batista.**
02:23 14 **All right. Mr. Louis, we have obviously been moving**
02:23 15 **towards this point. We have had a number of hearings in this**
02:23 16 **matter. I know that Mr. Batista has spoken with you about the**
02:23 17 **issues we have been discussing these last several months.**
02:23 18 **I also know that he would have prepared you for today**
02:23 19 **and told you at some point I would turn to you and ask you if**
02:24 20 **there was anything you wished to say to me directly about your**
02:24 21 **case or anything about yourself that you think I should know.**
02:24 22 **You can take all the time you need. You can confer**
02:24 23 **with Mr. Batista at any time while you are speaking with me.**
02:24 24 **But if you have something to say now would be the time.**
02:24 25 **THE DEFENDANT: I would like to say thank you for your**

patience and your awareness during this whole event.

I would like to apologize to the United States and to the Court for this whole ordeal.

I would also like to bring to your awareness that the prosecutors did not take heed to what you said when you asked them to negotiate, and when you had asked them what was the plea -- and you asked them to negotiate -- and they were not negotiating.

I would like to say also that I feel like that was kind of like misconduct on their behalf for not taking heed to the verbal order that you gave them.

That's all I have.

THE COURT: Thank you, Mr. Louis.

All right. The Court has considered the statements, as well as the recommendations of the parties, the newly adopted presentence report, which contains the guidelines as they have been recalculated, and the statutory factors as set forth in 18 United States Code Section 3553(a).

We do have the outstanding issue of restitution that may or may not be resolved, but because we do not yet have an agreement I will set a hearing date not to exceed 90 days from today.

As to the 3553(a) factors, the Court will start with what you just said, Mr. Louis, about the Government not heeding my order. It was not an order. I can cannot compel the United

States to take any sort of action.

They have the authority to enforce laws and prosecute crimes and my suggestion -- because it was no more than that -- was to find a way to balance the important interests that are set out in what you have heard us refer to now as the 3553(a) factors.

And I have to consider the seriousness of the crime, which is hugely serious, no matter the fact that I have made a decision about the appropriateness of applying the enhancements when the law is unclear.

Because the one thing the Supreme Court is clear about is how narrowly this needs to be construed.

Setting aside all of that, Mr. Louis, these are very serious crimes. People were put in fear for their lives, and as Mr. Rodriguez indicated, they are still suffering from your actions.

And let me say this; the law enforcement effort here was nothing short of superlative in terms of the investigation and putting together a package to submit to the United States Attorney's Office.

And both sides have been both professional and erudite in addressing the issues of this case.

But it all comes down to sufficient but not greater than necessary. And in this instance I have to take into account not only the seriousness of the offense but the other

matters that I alluded to.

I must consider the substance abuse issues, and even as his sister noted in the PSI, some mental health issues.

That, however, does not excuse or justify your walking into a mobile phone store and threatening someone with a gun for some cell phones.

But considering the record, the arguments, as well as the 3553(a) factors, it is the judgment of the Court that the defendant Francisco Louis is comitted to the Bureau of Prisons to be imprisoned for a term of 218 months.

And this term consists of 218 months as to each of Counts 1, 3, 5, 7, 9 and 11, and all of the counts are to be served concurrently with each other.

The Court has upwardly departed from the guideline range based upon the considerations that I have pointed out. And I believe -- as was discussed by Ms. Dodin -- there was sufficient notice of this upward variance.

Upon release from imprisonment Mr. Louis shall be placed on supervised release for a term of five years. This term is as to Counts 1, 3, 5, 7, 9 and 11 all of which are to run concurrently with each other.

Within 72 hours of release Mr. Louis shall report in person to the Probation Office in the district where he is released.

While on supervised release the defendant shall comply

with the mandatory and the standard conditions of supervised release; including not committing any crimes, being prohibited from possessing a firearm or other dangerous device or weapon, not unlawfully possessing a controlled substance -- which includes marijuana -- as well as cooperation in the collection of DNA.

The defendant shall also comply with the following special conditions: Financial disclosure requirement, no new debt, mental health treatment and substance abuse treatment, permissible search and payment of restitution, fines and any other applicable special assessments.

The defendant shall also immediately pay to the United States a special assessment of $100 as to each of Counts 1, 3, 5, 7, 9 and 11 for a total of $600.

Total sentence 218 months imprisonment, restitution to be determined at a later date, three years of supervision and a $600 special assessment.

It is further ordered that defendant's right, title and interest in the firearm is forfeited. The United States shall submit a proposed order of forfeiture if it has not already done so.

Now that sentence has been imposed, does the defendant or counsel object to the Court's findings of fact or the manner in which sentence was pronounced?

MR. BATISTA: No, Your Honor.

THE COURT: Mr. Louis, you have the right to appeal your conviction and sentence. Any notice must be filed within 14 days after the entry of judgment.

If you cannot afford to pay for the appeal you may apply for leave to appeal in forma pauperis, which means the Court will appoint an attorney to represent you.

All right. Is there any recommendation, Mr. Batista, as to designation or any facility?

MR. BATISTA: We would just ask if Your Honor could recommend a facility as close to South Florida as possible and that he be allowed to learn a trade or any other educational programs.

I would also ask that Mr. Louis be allowed to have counseling for substance abuse treatment.

THE COURT: I don't know whether he is eligible for R-DAP -- or at least all of the benefits that go with it -- but he can be enrolled in those classes.

MR. BATISTA: Thank you.

THE COURT: Is there anything further I can take up on behalf of the United States or Mr. Louis?

MS. DODIN: No, Your Honor.

MR. BATISTA: No, Your Honor.

THE COURT: Good luck to you, Mr. Louis. We are adjourned.

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

/S/PATRICIA SANDERS

_____ _____

DATE FILED PATRICIA SANDERS, RPR