APPENDIX A

I. *PICKLO V. UNITED STATES*, NO. 22-11986, 2023 U.S. APP. LEXIS 16346 (11TH CIR. JUNE 28, 2023) (PANEL OPINION AFFIRMING DENIAL OF RELIEF)

II. *PICKLO V. UNITED STATES*, CIVIL ACTION 3:20-CV-00666, DOC. 10 (M.D. FLA. APR. 19, 2022) (DISTRICT COURT DENYING RELIEF)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-11986

ARTHUR PICKLO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:20-cv-00666-HLA-PDB

Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Arthur Picklo is DENIED.

Picklo v. United States

United States Court of Appeals for the Eleventh Circuit

June 28, 2023, Filed

No. 22-11986 Non-Argument Calendar

Reporter
2023 U.S. App. LEXIS 16346 *; 2023 WL 4230891

ARTHUR PICKLO, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 3:20-cv-00666-HLA-PDB.

United States v. Picklo, 190 Fed. Appx. 887, 2006 U.S. App. LEXIS 18924 (11th Cir. Fla., July 27, 2006)

Disposition: AFFIRMED.

Counsel: ARTHUR PICKLO, Petitioner - Appellant, Pro se, OAKDALE, LA.

For UNITED STATES OF AMERICA, Respondent - Appellee: Holly Lynn Gershow, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, U.S. Attorney's Office, TAMPA, FL.

Judges: Before WILSON, ROSENBAUM, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Arthur Picklo, a federal prisoner proceeding *pro se*, appeals the district court's denial of his *28 U.S.C. § 2255* motion to vacate on his claim that his conviction for depriving another of the rights protected by the Constitution and laws of the United States under color of state law by attempting to kill another by the use of a firearm that resulted in bodily injury, under *18 U.S.C. § 242*, could not serve as a valid predicate offense for his conviction under *18 U.S.C. § 924(c)*. He argues that *§ 242* can be violated without the use, attempted use, or threatened use of force, so his *§ 924(c)* sentence should have run consecutively only to his other valid predicate offenses.

The government responds by moving for summary affirmance of the district court's order and argues that any error that the district court made was harmless because **[*2]** Picklo's sentence for his *§ 924(c)* conviction had to run consecutively to all other sentences, so it is irrelevant whether his *§ 924(c)* sentence was imposed consecutively to his *§ 242* conviction or his other two valid predicates.

Summary disposition is appropriate either where time is of the essence, such as where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case,

or where, as is more frequently the case, the appeal is frivolous." Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1161-62 (5th Cir. 1969).[1]

When reviewing the district court's denial of a motion to vacate, we review questions of law de novo and findings of fact for clear error. Thomas v. United States, 572 F.3d 1300, 1303 (11th Cir. 2009). "[T]he scope of our review of an unsuccessful § 2255 motion is limited to the issues enumerated in the [certificate of appealability]." McKay v. United States, 657 F.3d 1190, 1195 (11th Cir. 2011). We review cases on collateral review for harmless error. Granda v. United States, 990 F.3d 1272, 1292 (11th Cir. 2021). Under harmless error, "[t]here must be more than a reasonable possibility that the error was harmful." Davis v. Ayala, 576 U.S. 257, 268, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015) (internal quotation marks omitted).

A prisoner in federal custody may file a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, asserting the right to be released because his "sentence was imposed in violation of the Constitution or laws of the **[*3]** United States, . . . the court was without jurisdiction to impose such sentence, . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Unless the claimed error involves a lack of jurisdiction or a constitutional violation, however, § 2255 relief is limited. United States v. Addonizio, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979).

Section 924(c) provides a mandatory consecutive sentence for anyone that uses or carries a firearm in furtherance of a crime of violence. 18 U.S.C. § 924(c). A "crime of violence," in turn, is a felony offense that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (B) "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." *Id.* § 924(c)(3)(A)-(B). The first prong of that definition is referred to as the "elements clause," while the second prong contains the "residual clause." In re Hammoud, 931 F.3d 1032, 1040 (11th Cir. 2019).

In *Davis*, the Supreme Court held that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 2336, 204 L. Ed. 2d 757 (2019). We have held that the movant "'bear[s] the burden of showing that he is actually entitled to relief on his *Davis* claim, meaning he will have to show that his § 924(c) conviction[s] resulted **[*4]** from application of solely the [now-unconstitutional] residual clause.'" Alvarado-Linares v. United States, 44 F.4th 1334, 1341 (11th Cir. 2022) (quoting In re Hammoud, 931 F.3d at 1041) (second and third alterations in original). We have held that Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause. In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016).

On collateral review, the harmless-error standard mandates that collateral relief for a *Davis* claim is proper only if the court has "grave doubt" about whether an error had a "substantial and injurious effect or influence" in determining the verdict. Granda, 990 F.3d at 1292. In Granda, we explained that a petitioner must show more than a reasonable possibility that the error was harmful, and we would grant relief "only if the error 'resulted in actual prejudice'" to the movant. *Id.* (quoting Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). There, we reasoned that the record did not provoke a grave doubt about whether Granda's § 924(o) conviction rested solely on the invalid predicate because it was inextricably intertwined with other valid predicate offenses. Id. at 1293. We explained that the alternative predicates were inextricably intertwined and that the offenses encompassed a "tightly bound factual relationship" that precluded Granda from establishing actual prejudice. Id. at 1291. We noted that it was proper to look at the record to determine whether the defendant was **[*5]** actually prejudiced by the invalid predicate, in that it led to his conviction as opposed to the jury finding him guilty under a valid predicate. Id. at 1294. We held that "[t]he inextricability of the alternative predicate crimes compels the conclusion that" instructing the jury on a constitutionally invalid predicate as one of several potential alternative predicates was harmless. Id. at 1292.

Section 924(c) states that "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the

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[1] We are bound by decisions of the United States Court of Appeals for the Fifth Circuit issued before October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. § 924(c)(1)(D)(ii). We have held that "[t]he plain language of the statute expressly states that a *term* of imprisonment imposed under section 924(c) cannot run concurrently with any *other term* of imprisonment, period." United States v. Wright, 33 F.3d 1349, 1350 (11th Cir. 1994) (per curiam).

Finally, under the prior panel precedent rule, we are bound by prior published decisions that have not been overruled by the Supreme Court or this Court en banc. United States v. Romo-Villalobos, 674 F.3d 1246, 1251 (11th Cir. 2012) (per curiam).

Here, the government is entitled to summary affirmance because its position is clearly correct as a matter of law. Groendyke Transp., Inc., 406 F.2d at 1161-62. Even assuming **[*6]** that 18 U.S.C. § 242 is not a crime of violence, Picklo failed to demonstrate that he was entitled to relief on his § 2255 motion because he remains convicted of Hobbs Act robbery, which we have held is a valid predicate crime of violence under § 924(c)'s elements clause. Alvarado-Linares, 44 F.4th at 1341; In re Fleur, 824 F.3d at 1340. Under Granda, Picklo's convictions for deprivation of civil rights under color of law, Hobbs Act robbery, and attempted murder were inextricably intertwined because all three charges arose from a single, "tightly bound factual relationship." Granda, 990 F.3d at 1291. As such, Picklo cannot demonstrate that his § 924(c) conviction rested solely on his § 242 conviction in Count 1, and because his convictions were inextricably intertwined, any error that the district court made in "instructing the jury on a constitutionally invalid predicate as one of several potential alternative predicates was harmless." Id. at 1292.

As to the district court's imposition of a consecutive sentence under § 924(c), both the § 924(c) statute and our binding precedent require that a term of imprisonment for a § 924(c) conviction must run consecutively to all other terms of imprisonment. *See* 18 U.S.C. § 924(c)(1)(D)(ii); Wright, 33 F.3d at 1350. Because the district court sentenced Picklo to 360 months' imprisonment on Count 1, and 240 months' imprisonment on each Count 2 and 3 to run concurrently **[*7]** to Count 1, Count 4 had to run consecutively to all other sentences, so it is irrelevant whether Count 4 was predicated on Count 1, 2, or 3, as Picklo's total sentence remains 480 months' imprisonment. Therefore, even if the district court erred when it found that Picklo's § 242 conviction was a valid predicate crime of violence within § 924(c)'s element's clause, any error was harmless because Picklo remains convicted of at least one valid predicate crime of violence, so his consecutive § 924(c) sentence was proper. 18 U.S.C. § 924(c)(1)(D)(ii); Granda, 990 F.3d at 1292; Wright, 33 F.3d at 1350.

Therefore, we GRANT the government's motion for summary affirmance.

AFFIRMED.

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currency" from the victim in violation of 18 U.S.C. § 242; Count Two: did knowingly, willfully, intentionally and unlawfully take and obtain United States currency from the victim "by means of actual and threatened force, violence, and fear of immediate injury to the [victim], in that [Defendant] shot [the victim] with a firearm at close range" in violation of 18 U.S.C. § 1951; Count Three: "did unlawfully attempt to kill [the victim], with intent to prevent [the victim] from communicating information to a law enforcement officer of the United States . . . and the robbery by actual or threatened force . . . from [the victim] in violation of 18 U.S.C. § 1512(a)(1)(C); Count Four: "knowingly used and carried a firearm, which was discharged, during and in relation to and did knowingly possess a firearm in furtherance of crimes of violence" in relation to the charges in Counts One, Two, and Three, in violation of 18 U.S.C. § 924. (Crim. Case, 3:04-cr-304-HLA-PDB, Dkt. 1).

The jury was instructed that Petitioner could be found guilty as to Count 4 only if the jury found that he committed one of the crimes of violence as charged in Counts 1, 2, or 3 of the indictment. (Crim. Case Dkts. 83, pp. 11-22; 136 p. 2). Count 4 references multiple, distinct predicate offenses and the jury's special verdict does not specify which

of those offenses the jury found supported Petitioner's conviction as to Count 4. *See In re Picklo*, No. 20-12072-G (11th Cir. June 26, 2020) (Crim. Case Dkt. 84; 136 p. 7). Petitioner was convicted on all counts through a special jury verdict; however, the verdict did not specify on what offense his § 924(c) conviction was predicated. *Id.* The jury specifically found that the conduct in Count I resulted in bodily injury to the victim and that Petitioner attempted to kill the victim. *Id.*

The Court, therefore, must determine if the three possible predicate offenses support the 924(c) count, or rather, that each predicate count meets the elements provision in that each count "has an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

Following trial, the jury found Petitioner guilty as to Counts One through Four on June 6, 2005. (Crim. Case Dkts. 84, 113-121). The special jury verdict form used at Petitioner's trial did not specify on what offense the § 924(c) conviction was predicated.

On August 25, 2005, the Court sentenced Petitioner to 360 months as to Count One, 240 months as to Counts Two and Three to run concurrently to each other and Count One; and to 120 months as to

Count Four to run consecutively to Counts One, Two, and Three for a total of 480 months of imprisonment followed by a term of five years of supervised release. (Crim. Case Dkts. 98, 99, 122, pp. 71-72). On August 25, 2006, the Eleventh Circuit issued its Mandate affirming Petitioner's conviction. *See United States v. Picklo*, 190 F. App'x 887 (11th Cir. 2006).

On April 2, 2018, Petitioner filed an untimely Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody based on *Dean v. United States*, 137 S. Ct. 1170 (2017), which the Court dismissed as untimely, determining that *Dean* did not announce a new rule of law and did not apply retroactively to cases on collateral review.[1] (Crim. Case Dkt. 134). On April 19, 2018, Petitioner filed a Supplemental Claim in case No. 3:18-cv-442 based on *Fowler v. United States*, 563 U.S. 668 (2011), which the Court also dismissed as untimely. (Crim. Case Dkt. 135).

On May 9, 2018, Petitioner filed a Rule 59(e) motion based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which the Court dismissed

[1] *See Washington v. United States*, 243 F.3d 1299, 1301 (11th Cir. 2001).

in part and otherwise denied. (Case No. 3:18-cv-442, Dkts. 8, 14). Thereafter, the Eleventh Circuit denied Petitioner's certificate of appealability and motion for reconsideration March 13 and May 20, 2019, respectively. (Case No. 3:18-cv-442, Dkts. 22, 23).

Following *United States v. Davis*, 139 S. Ct. 2319 (June 24, 2019), which held that the residual clause of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague, Petitioner filed an application with the Eleventh Circuit to file a second or successive § 2255 motion, which was granted. (Crim Case Dkt. 136). In its opinion regarding the request to file a second or successive § 2255 motion, the Eleventh Circuit determined that Petitioner had made a *prima facie* showing that he is entitled to relief under *Davis*,

> as his § 924(c) conviction may rest on § 924(c)(3)(B)'s now-invalid residual clause. Similar to the applicants in *In re Gomez* and *In re Cannon*, Picklo's § 924(c) charge in Count 4 referenced multiple, distinct predicate offenses. *See In re Cannon*, 931 F.3d at 1243; *In re Gomez*, 830 F.3d at 1227-28. The record before us demonstrates that the jury was instructed that it could find Picklo guilty on Count 4 if it found that he was guilty on any of Counts 1, 2, or 3. However, the jury's special verdict does not specify which of those offenses the jury found supported his conviction on Count 4. Picklo's convictions on

> Count 1, in violation of § 242, and Count 3, in violation of § 1512(a)(1)(C), are for offenses that this Court has not yet determined categorically qualify as crimes of violence under § 924(c)(3)(A)'s elements clause or not. Furthermore, we have not addressed whether all of the predicate offenses for a § 924(c) conviction must qualify as crimes of violence to sustain the defendant's conviction. Thus, Picklo has made a *prima facie* showing that he may have been convicted under § 924(c)(3)(B)'s now-invalid residual clause.

(Crim Case Dkt. 136, p. 7). Thereafter, Petitioner filed a Second or Successive Motion to Vacate under 28 U.S.C. § 2255 and a Motion to Proceed *in forma pauperis* on June 29, 2020 in case number 3:20-cv-666 (Dkts. 1, 3). Petitioner filed a supplemental memorandum in support of his Petition July 20, 2020, and the Government filed its response August 26, 2020 (Dkt. 7).

II. DISCUSSION

In Petitioner's Motion, he alleges that a violation of 18 U.S.C. § 242 does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) and cannot be held as a predicate act for purposes of his § 924(c) conviction following the invalidation of § 924(c)(3)(B)'s residual clause in *Davis*. As a result, Petitioner contends that the sentence as to Count Four should not have been applied

For Petitioner's conviction to be valid, the offense that predicated the § 924(c) conviction must satisfy the elements clause. To determine whether an offense constitutes a "crime of violence" under the elements clause, courts apply a categorical approach and "look to whether the statutory elements of the predicate offense necessarily require, at a minimum, the threatened or attempted use of force." *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (citation omitted). A section 924(c) conviction for a crime of violence remains valid after *Davis* if its predicate felony qualifies as a "crime of violence" under the elements clause. *Id.* Pursuant to 28 U.S.C. § 2255 and Rule 8(a) of the Rules Governing Section 2255 Proceedings, the Court has considered the need for an evidentiary hearing and determines that a hearing is not necessary to resolve the merits of this action. *See Rosin v. United States*, 786 F.3d 873, 877 (11th Cir. 2015).

Count One

"To qualify as a crime of violence, an offense must meet the definition of § 924(c)'s 'elements clause.'" *United States v. Bates*, 960 F.3d 1278, 1285-86 (11th Cir. 2020). "The elements clause defines a crime of violence as a felony offense that 'has as an element the use,

attempted use, or threatened use of physical force against the person or property of another.'" *Id.* (quoting 18 U.S.C. § 924(c)(3)(A)). "The term 'use' means the 'active employment' of physical force." *Id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). "The Supreme Court defines 'physical force' as '*violent* force–that is, force capable of causing physical pain or injury to another person.'" *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

"To determine whether a statute qualifies as a crime of violence, courts employ the 'categorical' approach." *Id.* (quoting *United States v. St. Hubert*, 909 F.3d 335, 348 (11th Cir. 2018), *abrogated on other grounds by Davis*, 139 S. Ct. 2319). Under this approach, courts compare the elements of the crime to the statutory definition, looking "only to the elements of the predicate offense statute" and not "at the particular facts of the defendant's offense conduct." *Id.* However, when a statute is "divisible" (meaning it defines multiple crimes), courts apply the "modified categorical approach" and may look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted." *See United States v. Sharp*, 21 F. 4th 1282,

1285 (11th Cir. 2021) (internal quotation marks and citations omitted); *Hylor v. United States*, 896 F.3d 1219, 1223 (11th Cir. 2018); *Overstreet v. United States*, No. 3:11-cr-009-J-34JBT, 2019 WL 5423348, at *12 (M.D. Fla. Oct. 23, 2019). "If the least of the acts criminalized by the statute of conviction has an element requiring the use, attempted use, or threatened use of physical force against the person of another, then the offense categorically qualifies as a violent felony under the ACCA's elements clause." *See Sharp*, 21 F. 4th at 1285 (internal quotation marks and citation omitted).

Whether a statute qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c) requires a determination of whether it is divisible or indivisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). When a statute is divisible—meaning it defines multiple crimes—a modified categorical approach is applied. *See Bates*, 960 F.3d at 1286 (citing *St. Hubert*, 909 F.3d at 348, *abrogated on other grounds by Davis*, 139 S. Ct. 2319).

Specifically as applied to 18 U.S.C. § 242, some courts have applied the modified categorical approach following the *Davis* decision to this statute in making a determination of whether the offense

qualifies as a crime of violence. *See, e.g., United States v. Rodella*, 852 F. App'x 323, 327-28 (10th Cir. 2021) (unpublished); *Rodella v. United States*, 435 F. Supp. 3d 1222, 1254 (D.N.M. 2020); *United States v. McInerney*, No. 18-cv-20584, 2020 WL 3868499, at *4 (E.D. Mich. July 9, 2020) (unpublished).

Throughout this Circuit, courts have held that attempted crimes of violence, including attempts to kill, qualify as crimes of violence. *See Hylor*, 896 F.3d at 1223 ("It makes no difference that Hylor was convicted of only *attempting* to kill his victim. The elements clause of the Act 'equates actual force with attempted force,' so 'the text of [section] 924(e) . . . tells us that actual force need not be used for a crime to qualify under the [Act].'" (quoting *United States v. St. Hubert*, 883 F.3d 1319, 1334 (11th Cir. 2018))); *Hammoud v. United States*, No. 8:04-CR-2-T-27TGW, 2020 WL 3440649, at *6 (M.D. Fla. June 23, 2020) (recognizing that attempted crimes of violence are themselves crimes of violence); *see also James v. United States*, 550 U.S. 192, 208 (2007) (noting in the ACCA context that attempted murder is a "prototypically violent crime"), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015); *United States v. Smith*, 957 F.3d

590, 596 (5th Cir. 2020) (holding that defendant's "attempted murder conviction is therefore by extension a [crime of violence]"). Because § 242 "has an element the use, attempted use, or threatened use of physical force against the person or property of another," it necessarily qualifies as a crime of violence pursuant to § 924(c)(3)(A).

Thus, Petitioner's conviction as to Count One includes attempting to kill the victim and meets the elements of a crime of violence under 18 U.S.C. § 924(c)(3)(A). Because Petitioner's conviction as to Count One could serve as a predicate offense as to Count Four, this conviction under § 924(c) remains valid.

As Petitioner's § 924(c) conviction was therefore supported by a crime of violence, and Petitioner has not demonstrated that his convictions turn on the validity of the residual clause, Petitioner is not entitled to relief on his *Davis* claim. *See In re Pollard*, 931 F.3d 1318, 1321 (11th Cir. 2019) (concluding that a prisoner's *Davis* claim cannot show he or she was sentenced under § 924(c)'s residual clause if current binding precedent clearly establishes the predicate offense qualifies as a crime of violence under the elements clause).

Count Two

As to Count Two, 18 U.S.C. § 1951(a), the Eleventh Circuit has determined that a Hobbs Act robbery qualifies as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). *See United States v. McCain*, 782 F. App'x 860, 862 (11th Cir. 2019) (unpublished); *In re Cannon*, 931 F.3d at 1242; *St. Hubert*, 909 F.3d at 345-46, 351-52. Thus, Petitioner's conviction as to Count Two meets the elements clause of 924(c)(3)(A) and serves as a predicate conviction as to Count Four post *Davis*.

Count Three

Count Three also includes the element of attempting to kill the victim under 18 U.S.C. § 1512(a)(1)(C). In an unpublished opinion, the Eleventh Circuit affirmed a lower court's denial of a § 2255 motion that challenged the validity of conviction post *Davis* for an attempted killing under § 1512(a)(1)(C) as to whether it qualifies as a crime of violence under § 924(c)'s elements clause. *See Blackman v. United States*, No. 21-11301-J, 2021 WL 5320415, at *1 (11th Cir. Aug. 11, 2021) (affirming district court's order denying § 2255 motion because challenge was procedurally defaulted and finding no evidence of actual

innocence of crimes for which petitioner was convicted); *see also Lukaj v. U.S. Att'y Gen.*, 953 F.3d 1305, 1312 (11th Cir. 2020) (determining that lesser-included offense of attempted murder (aggravated battery) is a crime of violence); *Hammoud v. United States*, No. 8:19-cv-2541-T-27TGW, 2020 WL 3440649, at *5 (M.D. Fla. June 23, 2020) (aligning with the Eleventh Circuit in that 18 U.S.C. § 1513(a)(1), retaliation as supported by attempted killings of witnesses, constitutes a crime of violence under § 924(c)'s elements clause). While binding precedent on this matter has not been determined at this time by the Eleventh Circuit, other circuits have affirmed § 924(c) convictions predicated on a conviction for murder related to witness tampering in violation of § 1512(a)(1)(C). *See United States v. Mathis*, 932 F.3d 242, 264-65 (4th Cir. 2019) (holding that petitioner's predicate crime of violence—witness tampering by murder in violation of Section 1512(a)(1)—is categorically a crime of violence under the force clause of Section 924(c)(3)(A)).

After review, Petitioner's convictions as to Counts One, Two, and Three meet the elements clause of 18 U.S.C. § 924(c)(3)(A) so that Petitioner's conviction as to Count Four is lawful post *Davis* and his

§ 924(c) conviction does not rest on § 924(c)(3)(B)'s invalid residual clause. Petitioner's § 2255 Motion is therefore due to be denied.

Upon consideration of the foregoing, it is **ORDERED**:

1. Petitioner's Second or Successive Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Dkt. 1) is **DENIED**;

2. Petitioner's Motion to Appeal *in Forma Pauperis* (Dkt. 3) is **DENIED**;

3. The Clerk is directed to enter judgment accordingly and then **CLOSE** this case. A copy of this Order shall be filed in the underlying criminal case, Case No. 3:04-cr-304-HLA-TEM.

4. Petitioner is not entitled to a Certificate of Appealability.

DONE AND ORDERED this 19th day of April, 2022.

HENRY LEE ADAMS, JR.
United States District Judge

Copies to:
Petitioner
Frank Talbot, AUSA