No. 23-

IN THE
Supreme Court of the United States

DWAUN JABBAR GUIDRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX VOLUME

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 11, 2023
Lyle W. Cayce
Clerk

No. 21-50365

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DWAUN JABBAR GUIDRY,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:20-CV-831

Before GRAVES, HIGGINSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

Dwaun Jabbar Guidry appeals the district court's order denying his successive habeas petition challenging his conviction under 18 U.S.C. § 924(c) in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). For the reasons stated herein, we AFFIRM.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I.

While working as a police officer in Balcones Heights, Texas, Guidry was charged in two separate incidents while on duty. Those events were the sexual assault of five women at the police station and the rape of another woman in his patrol car after a traffic stop. Guidry was convicted by a jury in 2005 of (1) deprivation of rights under color of law by kidnapping in violation of 18 U.S.C. § 242; (2) deprivation of rights under color of law by aggravated sexual abuse in violation of 18 U.S.C. § 242; (3) carrying a firearm during and in relation to aggravated sexual abuse in violation of 18 U.S.C. § 924(c)(1)(A)(i); and (4) conspiring to deprive persons of their rights under color of law in violation of 18 U.S.C. § 241. Guidry was sentenced to a total of 465 months imprisonment: 405 months on each of counts one and two, to be served concurrently; 60 months on count three, to be served consecutively to the sentence imposed on counts one, two and four; and 120 months on count four to be served concurrently with counts one and two. He was also sentenced to a total of five years of supervised release, five years concurrent on each of the first three counts, and three years concurrent on count four, restitution of $45,638, and a $400 mandatory assessment.

On direct appeal, this court affirmed Guidry's conviction on all four counts. *See United States v. Guidry*, 456 F.3d 493 (5th Cir. 2006). Guidry's initial habeas petition, which raised claims of ineffective assistance of counsel, was denied in 2008. Guidry later timely sought and was denied leave to file a successive petition in light of *Johnson v. United States*, 576 U.S. 591, 597-98 (2015), and *Welch v. United States*, 578 U.S. 120, 135 (2016).

Of particular relevance here, this court granted Guidry permission in 2020 to file a successive 28 U.S.C. § 2255 motion to challenge his count three conviction under 18 U.S.C. § 924(c) in light of *Davis*, 139 S. Ct. 2319. ECF 19-51147, 17. The district court denied Guidry's motion in part and dismissed without prejudice in part. The district court also granted a certificate of appealability (COA) as to Guidry's § 924(c) claim. Guidry then filed this appeal.

II.

Guidry asserts that the district court erred in denying his challenge to his conviction under 18 U.S.C. § 924(c)(3)(A) based on *Davis*, 139 S. Ct. 2319. Guidry asserts that his conviction under § 924(c)(1)(A)(i) of carrying a firearm during and in relation to aggravated sexual abuse should be vacated for essentially two reasons: Because *Davis* concluded that the residual clause of § 924(c)(3)(B) is unconstitutionally vague; and because his predicate crime did not qualify as a COV under the elements clause of § 924(c)(3)(A).[1] However, Guidry's argument is foreclosed by the law of the case doctrine. *See Tollett v. City of Kemah*, 285 F.3d 357, 363 (5th Cir. 2002) (citation omitted) ("Under the law of the case doctrine, an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal.").

In denying Guidry's motion for authorization to file a successive habeas petition in 2016, a panel of this court relied on *United States v.*

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[1] Guidry also asserts that he was convicted under § 242, not § 2241(a).

Williams, 343 F.3d 423, 432 & n.5 (5th Cir. 2003) in concluding that "the crime charged in count two satisfied the requirements for a crime of violence as set out in § 924(c)(3)(A) without requiring resort to the residual clause of § 924(c)(3)(B)." ECF 16-50208, 47-2. Further, Guidry fails to argue for any exception to the law of the case doctrine. Thus, we will not reexamine this issue.

Accordingly, the order of the district court is AFFIRMED; and Guidry's pro se motion to correct the brief that was carried with the case is DENIED as moot.

APPENDIX B

(W.D.TX. Ref: 245B)(Rev. 02/05) - Judgment in a Criminal Case

FILED

JUN 22 2005

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

v.

DWAUN JABBAR GUIDRY

Defendant.

Case Number SA-04-CR-254 (01)-XR
USM Number 43363-180

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, DWAUN JABBAR GUIDRY, was represented by Mr. Jack Carter, Assistant Federal Public Defender.

The defendant was found guilty on Count(s) One (1), Two (2), Three (3), and Four (4) of the Indictment by a Jury Verdict on January 27, 2005 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 242	Deprivation of Rights Under Color of Law	December 19, 2002	One (1) & Two (2)
18 USC § 924(c)(1)(A)(i)	Carrying a Firearm During the Commission of a Crime of Violence	December 19, 2002	Three (3)
18 USC § 241	Conspiracy Against Rights	November 24, 2002	Four (4)

As pronounced on June 16, 2005, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 22nd day of June, 2005.

XAVIER RODRIGUEZ
United States District Judge

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Defendant: DWAUN JABBAR GUIDRY
Case Number: SA-04-CR-254 (01)-XR

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a **TOTAL TERM OF FOUR HUNDRED SIXTY FIVE (465) MONTHS.** This term consists of terms of four hundred five (405) months on each of counts one and two, to be served concurrently. On count three, the defendant is sentenced to a term of sixty (60) months, to be served consecutively to the sentence imposed on counts one, two, and four. On count four, the defendant is sentenced to a term of one hundred twenty (120) months, to be served concurrently with counts one and two.

The Court makes the following recommendation to the Bureau of Prisons:
(1) That the defendant be placed in a Federal Correctional Institution as close as possible to San Antonio, Texas.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: DWAUN JABBAR GUIDRY
Case Number: SA-04-CR-254 (01)-XR

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a **TOTAL TERM OF FIVE (5) YEARS**. This term consists of terms of five years on each of counts one, two, and three. On count four, the defendant is placed on supervised release for a term of three years, all said terms to run concurrently.

While on supervised release, the defendant shall comply with the mandatory and standard conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment.

Defendant: DWAUN JABBAR GUIDRY
Case Number: SA-04-CR-254 (01)-XR

CONDITIONS OF SUPERVISION

Mandatory Conditions:

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

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

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S. C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: DWAUN JABBAR GUIDRY
Case Number: SA-04-CR-254 (01)-XR

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042 (c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

Defendant: DWAUN JABBAR GUIDRY
Case Number: SA-04-CR-254 (01)-XR

CRIMINAL MONETARY PENALTIES/ SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 655 East Durango Boulevard, Room G-65, San Antonio, Texas 78206.

	Assessment	Fine	Restitution
TOTAL:	$400.00	$0	$45,638.00

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each of counts one, two, three, and four for a **TOTAL OF $400.00**. Payment of this sum shall begin immediately.

Fine

The fine is waived because of the defendant's inability to pay.

Restitution

The defendant shall pay restitution in the amount of **$45,638.00** through the Clerk, U.S. District Court, for distribution to the payee(s). Payment of this sum shall begin immediately.

Name of Payee	Amount of Restitution
	$45,638.00

The Court directs the United States Probation Office to provide personal identifier information of victims by submitting a "reference list" under seal "Pursuant to E-Government Act of 2002" to the District Clerk within ten (10) days after the criminal judgment has been entered.

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

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

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

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAUN JABBAR GUIDRY, #43363-180,	§	
	§	
	§	SA-20-CV-831-XR
V.	§	SA-04-CR-254-XR-1
	§	
UNITED STATES OF AMERICA	§	

ORDER

Before the Court is Movant Dwaun Jabbar Guidry's "Motion for Reconsideration of his § 2255 Motion to Vacate Pursuant [to] Federal Rules of Civil Procedure 60(b)(6)." (ECF No. 190). On March 24, 2021, this Court denied in part and dismissed without prejudice in part Guidry's *pro se* Motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. (ECF No. 188). Judgment was entered on March 25, 2021. (ECF No. 189).

Specifically, the Court denied Guidry's challenge to his 18 U.S.C. § 924(c) conviction but granted a certificate of appealability as to the § 924(c) claim. The Court further dismissed without prejudice Guidry's claims of ineffective assistance of counsel and lack of jurisdiction because the claims were outside of the scope of the Fifth Circuit's authorization to file a successive § 2255 motion, which was limited to claims challenging Guidry's § 924(c) conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019).

In the pending motion, Guidry seeks reconsideration of the Court's order denying and dismissing without prejudice his § 2255 Motion. Although Guidry titles his post-judgment motion as seeking relief under Rule 60(b), the Court construes the motion as a motion under Rule 59(e). A motion asking the court to reconsider a prior ruling is evaluated either as a motion to 'alter or amend a judgment' under Rule 59(e) or as a motion for 'relief from a final judgment, order, or proceeding' under Rule 60(b), depending on when the motion was filed. *See In re Franklin*, 832 F. App'x 340, 341 (5th Cir. 2020) (internal quotation marks and citation omitted). Such a motion

is construed as one under Rule 59(e) if filed within 28 days of the judgment being challenged and as one under Rule 60(b) if filed more than 28 days after the challenged judgment. *Id.* Here, the Judgment was entered on March 25, 2021, and the Clerk received and docketed Guidry's motion for reconsideration on April 12, 2021. Accordingly, because the motion was filed within 28 days of the Judgment, the Court construes the motion as a Rule 59(e) motion.

To prevail on a Rule 59(e) motion, the movant must show at least one of the following: 1) an intervening change in controlling law; 2) new evidence not previously available; 3) the need to correct a clear or manifest error of law or fact or to prevent manifest injustice. *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002). Rule 59(e) gives a district court the chance "to rectify its own mistakes in the period immediately following" its decision. *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982)). "[F]ederal courts generally have [used] Rule 59(e) only" to "reconsider[ ] matters properly encompassed in a decision on the merits." *Banister*, 140 S. Ct. at 1703 (quoting *White*, 455 U.S. at 451)).

In his Rule 59(e) Motion, Guidry asserts that the Court's order denying and dismissing without prejudice his § 2255 Motion failed to address the individual claims he asserted pursuant to *United States v. Conley*, 349 F.3d 837 (5th Cir. 2003) (holding that counsel was ineffective for failing to challenge the trial court's error in sentencing defendant in excess of the maximum sentence); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (a fact that increases the statutory maximum punishment must be alleged in the indictment and found by a jury); *Alleyne v. United States*, 570 U.S. 99, 103 (2013); (extending the *Apprendi* holding to facts that increase the statutory mandatory minimum sentence).

Guidry presented these arguments for the first in his Reply, and they were imbedded in his rebuttal to the Government's challenge to his § 924(c) claim. For that reason, the Court did not

construe these arguments as individual § 2255 claims. Nevertheless, insofar as Guidry intended to assert a claim of ineffective assistance of counsel pursuant to *Conley* and a claim alleging district court error based on a violation of *Apprendi/Alleyne*, these claims are subject to dismissal without prejudice.

A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section. 28 U.S.C. § 2244(b)(4). Because Guidry's initial § 2255 Motion was denied on the merits in 2009, any successive § 2255 claims on which Guidry can proceed must be authorized by the Fifth Circuit based on either newly discovered evidence or a new rule of constitutional law made retroactive and previously unavailable. 28 U.S.C. § 2255(h). These claims fall outside of the scope of the Fifth Circuit's authorization, which was limited to successive § 2255 claims challenging his § 924(c) conviction based on *Davis*.

Accordingly,

IT IS ORDERED that Movant Dwaun Jabbar Guidry's Motion to Alter or Amend Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (ECF No. 190) is **DENIED**. **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

SIGNED this the 20th day of April, 2021.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAUN JABBAR GUIDRY, #43363-180 Movant, v. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § § §	SA-20-CV-831-XR SA-04-CR-254-XR-1

FINAL JUDGMENT

The Court considered the Judgment to be issued in the above styled and numbered cause. Pursuant to the Order denying in part and dismissing without prejudice in part Movant Dwaun Jabbar Guidry's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 of even date herewith,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 176) is **DENIED IN PART** and **DISMISSED WITHOUT PREJUDICE IN PART. IT IS FURTHER ORDERED** that all pending motions related to this motion, if any, are **DISMISSED AS MOOT.**

IT IS FURTHER ORDERED that a **CERTIFICATE OF APPEALABILITY IS GRANTED** as to Guidry's 18 U.S.C. § 924(c) claim and **DENIED** as to his remaining claims. **IT IS FINALLY ORDERED** that this case is **DISMISSED** and **CLOSED.**

It is so **ORDERED.**

SIGNED this 24th day of March, 2021.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DWAUN JABBAR GUIDRY, #43363-180 Movant, v. UNITED STATES OF AMERICA, Respondent.	§ § § § § § § § § § §	SA-20-CV-831-XR SA-04-CR-254-XR-1

ORDER

Before the Court is Movant Dwaun Jabbar Guidry's *pro se* Motion pursuant to 28 U.S.C. § 2255 ("Section 2255 Motion") to vacate, set aside, or correct his sentence and memorandum in support (ECF No. 176); the Government's Response in opposition thereto (ECF No. 181); and Guidry's Reply (ECF No. 187). For the following reasons, the Section 2255 Motion is **DENIED IN PART** and **DISMISSED WITHOUT PREJUDICE IN PART**.

BACKGROUND

Guidry was a police officer in Balcones Heights, Texas.[1] He typically worked the night shift from 10:00 p.m. to 6:00 a.m., when often there were only two patrol officers on duty. The two incidents giving rise to the charges for which Guidry was convicted occurred while Guidry was on duty. First, Guidry sexually assaulted five female arrestees at the Balcones Heights Police Station. About a month later, he raped Denise Limon in the backseat of his patrol vehicle after a routine traffic stop.

[1] The factual background is derived from the Fifth Circuit's opinion affirming Guidry's conviction and sentence. *United States v. Guidry*, 456 F.3d 493, 498-99 (5th Cir. 2006).

The facts regarding the rape of Denise Limon are as follows. On December 19, 2002, between 1:00 a.m. and 3:00 a.m., Denise Limon and her fiancé Ricardo Alvarez were arguing while driving home from a friend's party. Alvarez pulled the car over, and the two got out of the car and continued arguing. They got back in the car to continue their drive home and noticed a police vehicle was following them. Alvarez was nervous because he had outstanding traffic warrants, did not have his driver's license, and had been drinking. The officer signaled for Alvarez to pull over, and Alvarez complied. When the officer approached the car, Alvarez gave him a copy of his license. The officer looked at it and gave it back to him without further investigation. The officer told Alvarez that he received a report of a domestic dispute and that Limon could not remain in the car. He took Limon and put her in the back of his patrol car. The officer told Alvarez "to go home and to wait by the phone" for Limon's phone call.

The officer drove Limon to a dark, wooded area, parked the car, unzipped his pants, pulled his penis out, and opened the driver's side back door. He pushed Limon down, removed her pants, and raped her. The officer wore his gun belt throughout the rape. Limon heard the gun hitting the side of the car while the officer was raping her. The officer stood up, turned away from her, "moaning and grabbing himself." Limon quickly collected her clothes and ran home. She told Alvarez and Alvarez's mother that the officer had raped her. Limon refused to call the police that night, fearing the officer who raped her would come to her house. The next day Limon reported the crime to the police. Limon later identified Guidry as the officer who raped her.

A federal grand jury returned a four-count Indictment charging Guidry with four offenses: (1) deprivation of civil rights while acting under color of law by kidnapping Denise Limon, in violation of 18 U.S.C. § 242 (Count One); (2) deprivation of civil rights while acting under color of law by the aggravated sexual abuse of Denise Limon, also in violation of 18 U.S.C. § 242 (Count

Two); (3) carrying a firearm during and in relation to a federal crime of violence (deprivation of civil rights by the aggravated sexual abuse of Denise Limon, as charged in Count Two), in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Three); and (4) conspiracy to violate the civil rights of five women at the Balcones Heights Police Station by violating their due process rights to bodily integrity, in violation of 18 U.S.C. § 241 (Count Four). (ECF No. 3). Assistant Federal Public Defender Jack Carter was appointed to represent Guidry. (ECF No. 6).

A jury convicted Guidry of all four counts. (ECF No. 70). The Court sentenced Guidry to a total 405-month concurrent sentence for Counts One, Two, and Four, and a statutorily required sixty-month consecutive sentence for Count Three—the § 924(c) conviction. (ECF No. 94). On appeal, the Fifth Circuit Court of Appeals affirmed Guidry's conviction and sentence. *Guidry*, 456 F.3d at 493. On January 2, 2008, Guidry filed a timely Section 2255 motion alleging various grounds of ineffective assistance of trial counsel. (ECF No. 106). This Court denied the Section 2255 motion on January 29, 2009. (ECF No. 127). Guidry then filed a motion for post-conviction DNA testing and a motion to modify the restitution order, both of which the Court denied. (ECF Nos. 144, 155 & 170).

On June 24, 2019, the United States Supreme Court struck down § 924(c)'s residual clause as unconstitutionally vague in *United States v. Davis*. 139 S. Ct. 2319 (2019). On December 10, 2019, Guidry mailed an "Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255(h)(2) and Fifth Circuit Rule 2" to the Fifth Circuit Court of Appeals. *In re Guidry*, No. 19-51147 (5th Cir. 2019). Guidry included in the mailing a proposed Section 2255 motion asserting his *Davis* claims, along with a memorandum and supporting exhibits. On January 15, 2020, the Fifth Circuit granted Guidry's motion for authorization to file a successive Section 2255 motion. (ECF No. 183).

Guidry did not file the authorized Section 2255 motion in the district court, and the Fifth Circuit did not transfer the proposed motion to the district court upon granting authorization. On March 9, 2020, the district court Clerk received and docketed a letter from Guidry. (ECF No. 171). In the letter—dated March 4, 2020—Guidry acknowledged that the Fifth Circuit mailed him a copy of its order granting authorization to file a successive Section 2255 motion pursuant to *Davis*. Guidry further stated as follows:

> The purpose of this letter is to check the status of my proceeding. For example, whether the court has appointed counsel from the Federal Public Defender's Office or ordered the Government to respond to my petition. Please update my current mailing address and forward a copy [of] my second successive § 2255 docket history sheet for confirmation.

(*Id.*). On March 10, 2020, the Clerk wrote a letter back to Guidry advising him that "once the Fifth Circuit grants authorization to file a Section 2255 motion, it is the defendant's responsibility to file the Section 2255 motion accompanied by the Fifth Circuit's Order. This Court cannot proceed further until you have filed these documents." (ECF No. 172). On June 22, 2020, the Clerk received and docketed a second letter from Guidry. (ECF No. 173). In the letter, dated June 16, 2020, Guidry stated he did not receive a response to his March 4 letter, nor did he receive any correspondence from the Clerk after the Fifth Circuit authorized him to file a successive Section 2255 motion. He again asked for an update regarding the status of his proceedings. (*Id.*).

On July 1, 2020, the Clerk sent Guidry a letter in response via certified mail. (ECF No. 174). The Clerk again advised Guidry that it is his responsibility to file the Section 2255 motion accompanied by the Fifth Circuit's Order granting authorization. The Clerk included a copy of the March 10 letter in the mailing. On July 13, 2020, the Clerk received and docketed the pending Section 2255 Motion.

In the motion, Guidry asserts three primary grounds for relief. First, he alleges that his § 924(c) conviction cannot stand after *Davis* because § 924(c)'s residual clause is unconstitutionally vague, and Guidry's predicate conviction does not otherwise meet the definition of "crime of violence." In his second ground for relief, Guidry alleges ineffective assistance of trial and appellate counsel for failing to challenge the jury instruction as to Count Two. In his third ground for relief, Guidry asserts that the Government failed to prove the jurisdictional element of aggravated sexual abuse in Count Two of the Indictment.

The Government filed a Response in opposition. (ECF No. 181). The Government asserts that the Section 2255 Motion is untimely because it was filed more than one year from the *Davis* decision. The Government further asserts that Guidry's vagueness challenge is procedurally barred because he failed to raise it on direct appeal, and Guidry's challenge to his § 924(c) conviction fails on the merits because the predicate offense still qualifies as a "crime of violence" after *Davis*. The Government further asserts that Guidry's remaining claims for ineffective assistance of counsel and lack of jurisdiction are not cognizable and unrelated to the *Davis* claim, which served as the basis for the grant of authorization.

Thereafter, Guidry filed a Reply. (ECF No. 187). In it, he argues that his Section 2255 Motion is timely under § 2255(f)(2) & (3) and that the statute of limitations should be equitably tolled in this case. He further argues that he has demonstrated cause excusing his failure to raise the residual cause challenge on direct appeal and actual prejudice. He further argues that his ineffective assistance of counsel and jurisdictional claims are not subject to procedural default and that the Government's § 924(c) argument is flawed. The Section 2255 motion has been fully briefed and is therefore ripe for review.

LEGAL STANDARDS

A federal defendant may move to vacate, set aside, or correct his sentence if: (1) the imposition of the sentence was in violation of the Constitution or the laws of the United States; (2) the District Court that imposed the sentence lacked jurisdiction; (3) the sentence imposed was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Thus, § 2255 post-conviction relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal and, if left unaddressed, would result in a complete miscarriage of justice. *See, e.g., United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996).

DISCUSSION

1. Ground One

The Court turns first to Ground One, Guidry's challenge to his § 924(c) conviction. Title 18 U.S.C. § 924(c)(1)(A) provides for enhanced statutory penalties in cases where, among other things, the defendant uses or carries a firearm during and in relation to any "crime of violence or drug trafficking crime." Relevant here, § 924(c)(3) defines "crime of violence" as any felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The first clause "(A)" is called the "elements clause," and the second clause "(B)" is the "residual clause."

In *Davis*, the Supreme Court extended its holdings in *Johnson v. United States* (*Johnson II*), 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), to § 924(c) and held

that § 924(c)(3)(B)'s residual clause, like the residual clauses in § 924(e)(1) (the Armed Career Criminal Act ("ACCA")) and 18 U.S.C. § 16(b), is unconstitutionally vague. Therefore, Guidry's § 924(c) conviction can stand only if his Count Two conviction for violating 18 U.S.C. § 242—the predicate offense—qualifies as a crime of violence under the elements clause—that is, if it has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

Section 242, which criminalizes the deprivation of rights under color of law, provides as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 (2021).[2] Because aggravated sexual abuse is not defined in § 242, the statute necessarily requires reference to the federal aggravated sexual abuse statute, 18 U.S.C. § 2241. *See United States v. Simmons*, 470 F.3d 1115, 1120 (5th Cir. 2006). Under § 2241(a), an individual commits aggravated sexual abuse if he "knowingly causes another person to engage in a sexual

[2] This version of the statute was in effect at time of Guidry's crime and conviction.

act[3]—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping."[4]

Guidry asserts that § 242 does not require, as an element, the use of physical force against the person or property of another because "no mention of intentional use of force is included in the statute or any relevant case law," and § 242 "encompasses a wide range of conduct, including non-violent conduct and inaction." (ECF No. 176-1 at 4-6). Guidry further asserts that the facts of his case do not "support that [Guidry] did intentionally or actively employ[] physical force against the victim." (*Id.* at 5).

Additionally, Guidry alleges that the Court improperly instructed the jury as to aggravated sexual abuse. He contends that the Court misstated the law and "relaxed the Government's burden" by permitting "the jurors to find 'force,' even if they concluded that the petitioner only used psychological coercion or implied threat based on his size or status as a Balcones Heights Police Officer," which Guidry argues "eliminated the heightened degree of serious bodily injury [] required to support a conviction for 'aggravated sexual abuse.'" (*Id.* at 7, 8).

According to Guidry, the jury instruction "more closely resembled that of [non-aggravated sexual abuse under] § 2242(1)," which criminalizes "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any other person will be subjected to death, serious bodily injury, or kidnapping)." Thus, Guidry argues that the Court's instruction effectively "made § 2241(a)(1) &

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[3] The term "sexual act" means: (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. 18 U.S.C. § 2246.

[4] The quoted portion of the statute is identical to the version in effect at the time of Guidry's crime and conviction.

§ 2242(1) identical," and the jury note demonstrates that the jurors were confused as to the degree of force necessary to support a conviction for aggravated sexual assault. (*Id.* at 7-8). Nevertheless, Guidry argues that "neither charge supports the § 924(c) enhancement," and Guidry's predicate § 242 conviction found support only in the now unconstitutional residual clause. (*Id.* at 8).

In response, the Government argues that the indictment and jury instructions make clear that Guidry's violation of § 242 was based on aggravated sexual abuse, which clearly qualifies as a crime of violence under § 924(c)(3)(A) because it has as an element the use, attempted use, or threatened use of physical force against the person or property of another. (ECF No. 181 at 7-10) (citing *Jackson v. United States*, 2020 WL 1542348, *1, *5 (W.D.N.C. Mar. 31, 2020) (The offense of aggravated sexual abuse "clearly qualifies as a crime of violence" under § 924(c)(3)(A)).

In his Reply, Guidry argues that he was convicted of violating § 242, not § 2241, and § 242 does not support the § 924(c) conviction. (ECF No. 187 at 14). Guidry further argues that it is unclear from the indictment, jury instructions, and "general" verdict form which sub-section of § 242 formed the basis of his Count Two conviction. (ECF No. 187 at 18-19).

The first step in determining whether Guidry's predicate conviction qualifies as a crime of violence is ascertaining whether the statute of conviction is "divisible" or "indivisible." Section 242 is a "divisible" statute, meaning that it "sets forth multiple separate offenses or sets forth one or more elements of an offense in the alternative," not all of which may qualify as a crime of violence. *United States v. Herrera-Alvarez*, 753 F.3d 132, 134 (5th Cir. 2014).[5] In order to determine whether a conviction under a divisible statute constitutes a crime of violence, we apply the "modified categorical approach." *Descamps v. United States*, 570 U.S. 254, 257 (2013). Under the modified categorial approach, the court's task is to determine which of the statute's alternative

[5] By contrast, a statute is "indivisible" when it sets out a single or indivisible set of elements to define a single crime.

bases for committing the crime formed the basis of the defendant's conviction. *Id.* at 262. This entails looking beyond the statute to certain "extra-statutory" records to isolate the actual elements underlying the defendant's conviction and then assessing—from the narrowed elements—whether the defendant's crime constitutes a crime of violence under the applicable enhancement provision. *United States v. Hernandez-Hernandez*, 817 F.3d 207, 212 (5th Cir. 2016) (applying the modified categorical approach to determine whether defendant's conviction under 18 U.S.C. § 111 for assaulting a federal officer constitutes a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii)). These extra-statutory documents—called *Shepard* documents—include, for example, the indictment, jury instructions, or plea agreement and colloquy. *See Shepard v. United States*, 544 U.S. 13, 26 (2005); *Mathis v. United States*, 136 S. Ct. 2243 (2016).

Once the elements comprising the underlying conviction have been identified, the court applies the categorical approach to the crime of conviction, meaning that it analyzes the elements of the crime of conviction to ascertain whether the crime of conviction necessarily "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See United States v. Smith*, 957 F.3d 590 (5th Cir. 2020) (applying the modified categorical approach to determine whether a conviction for aggravated bank robbery qualifies as a crime of violence after *Davis*), *cert. denied, Smith v. United States*, 2020 WL 6551848, *1 (U.S. Nov. 9, 2020) . This is because the modified categorical approach "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute." *Descamps*, 570 U.S. at 260-63.

When determining whether an offense is a crime of violence under the elements clause, we "look[ ] only to the statutory definitions—i.e., the elements—of a defendant's offense, and not to the particular facts underlying the convictions." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir.

2017). Instead, we ascribe to the defendant the least culpable conduct that could have given rise to his conviction and determine whether that conduct, at a minimum, would require the use of force under § 924(c)(3)(A). *United States v. Torres*, 923 F.3d 420, 424 (5th Cir. 2019) (citing *Gomez-Perez v. Lynch*, 829 F.3d 323, 327-28 (5th Cir. 2016)).

Turning to the *Shepard* documents, the Indictment set forth the following charge in Count Two:

> Dwaun Jabbar Guidry, then a law enforcement officer with the Balcones Heights Police Department, while acting under color of law, did sexually assault D.L., and thereby did willfully deprive D.L. of a right secured to her by the Constitution and laws of the United States, that is, the right not to be deprived of liberty without due process of law, which includes the right to bodily integrity, such assault involving aggravated sexual abuse and resulting in bodily injury to D.L., in violation of Title 18, United States Code, Section 242.

(ECF No. 3 at 2). The jury instructions clearly instructed "Deprivation of Civil Rights—Aggravated Sexual Abuse" as to Count Two. (ECF No. 75 at 11). The instructions provided that, in order to find Guidry guilty of Count Two, the jury must be convinced that the Government proved, beyond a reasonable doubt, the following: (1) that Guidry deprived the victim of a right secured by the Constitution of the United States by committing one or more of the acts charged in the Indictment; (2) that Guidry acted willfully; (3) that Guidry acted under color of law; and (4) that Guidry committed aggravated sexual abuse against the victim. (*Id.* at 11-12).

The jury instructions defined "aggravated sexual abuse" as "knowingly causing another person to engage in a sexual act by using force against that other person." (*Id.* at 13). The jury instructions further provided: "To find that the defendant used force, you need not find that the defendant was violent. A defendant uses force within the meaning of 'aggravated sexual abuse' when he employs restraint sufficient to prevent the victim from escaping sexual conduct. Force

can also be implied from a disparity in size and coercive power between the defendant and the victim." (*Id.*).

The record reflects that, during deliberations, the jury sent a note asking the following questions: (1) For sexual assault to be considered "aggravated," does the weapon need to be present and/or used?; and (2) What is the difference between aggravated sexual abuse and sexual abuse? (ECF No. 68). The Court sent the following response:

> Members of the jury: I have received your note number 1 which is attached hereto. "Aggravated sexual abuse" means knowingly causing another person to engage in a sexual act by using force against that other person. To find that the defendant used force, you need not find that the defendant was violent. A defendant uses force within the meaning of "aggravated sexual abuse" when he employs restraint sufficient to prevent the victim from escaping sexual conduct. Force can also be implied from a disparity in size and coercive power between the defendant and the victim. The presence and/or use of a weapon is one factor, although not a required factor, that you may consider in determining whether force was used within the above definition. With regard to your second question, you should not concern yourself with the differences (if any) between sexual abuse and aggravated sexual abuse."

(ECF Nos. 69, 85). Here, the *Shepard* documents clearly reflect that Guidry was convicted of violating § 242 based on aggravated sexual abuse by use of force, as set forth in § 2241(a)(1). Guidry's contention that the Court's jury instructions impermissibly reduced the Government's burden of proof by describing a violation of sexual abuse by threat or fear under § 2242(1) instead of aggravated sexual abuse by force under § 2241(a)(1) is unsupported by the record. The Court clearly instructed the jury on a finding of aggravated sexual abuse by force, rather than by fear or threat, and the Court's definition of force was consistent with prevailing case law.

Now that the Court has ascertained what crime formed the basis of Guidry's § 924(c) conviction, it must determine whether the predicate offense constitutes a crime of violence under the elements clause. Section 2241(a)(1), which provides that an individual commits aggravated sexual abuse if he "knowingly causes another person to engage in a sexual act . . . by using force

against that other person," clearly requires the Government to prove force as an element. *Lockhart v. United States*, 136 S. Ct. 958, 964 n. 1 (2016) (Section 2241(a) "prohibits *forced* sexual acts against 'another person.'") (emphasis supplied). What is less clear is whether the "force" required for a conviction under § 2241(a)(1) meets the definition of "physical force" under § 924(c)(3)(A).

Section 924(c) does not define physical force, however the phrase "physical force" in the ACCA's identically worded elements clause, § 924(e)(2)(B)(i), "means violent force—that is, force capable of causing physical pain or injury to another person." *United States v. Smith*, 957 F.3d at 593 (quoting *Johnson v. United States* ("*Johnson I*"), 559 U.S. 133, 140 (2010)). *Johnson I* concerned the degree of force necessary for battery under Florida law, which did not require resistance or even physical aversion on the part of the victim. Rather, the "slightest offensive touching" would qualify. *Id.* at 139. The Supreme Court held that the felony offense of battery was not a predicate "violent felony" under the ACCA's elements clause.

In *Stokeling v. United States*, 139 S. Ct. 544 (2109), the Supreme Court addressed the degree of force required for a robbery conviction to qualify as an ACCA predicate. There, the Supreme Court reaffirmed the holding in *Johnson I* but clarified that a robbery offense that has as an element the use of force "sufficient to overcome a victim's resistance" necessitates the use of "physical force" to qualify as an ACCA predicate under the elements clause. *Id.* at 550.

Regarding the definition of force under § 2241(a)(1), the Fifth Circuit explained in *United States v. Lucas* that "[a] defendant uses force within the meaning of § 2241 when he employs restraint sufficient to prevent the victim from escaping the sexual conduct." 157 F.3d 998, 1002 (5th Cir. 1998) (citations omitted). The defendant in *Lucas* (a county jail warden) summoned the victim (a pretrial detainee) to a relatively secluded location, locked the door so that she could not escape his advances, pressed her against a table in such a way that she could not leave, and then

raped her. (*Id.*). The court explained that force can be implied from a disparity in size and coercive power between the defendant and his victim, as for example when the defendant is an adult male and the victim is a child. (*Id.*) (citation omitted). In the case of *Lucas*, the Fifth Circuit held that the disparity in power between a jail warden and an inmate, combined with physical restraint, is sufficient to satisfy the force requirement of § 2241. (*Id.*)

In *Simmons*, the Fifth Circuit upheld a challenge to the sufficiency of evidence for a conviction of § 242 based on aggravated sexual abuse by force. 470 F.3d at 1115. The court reiterated the definition of force within the meaning of § 2241 as "restraint sufficient to prevent the victim from escaping the sexual conduct" and reiterated that force "can be implied from a disparity in size and coercive power between the defendant and his victim." *Id.* at 1121. The Fifth Circuit held that the evidence was sufficient to sustain a conviction in *Simmons* where the victim's testimony established that the defendant (a male police officer) forced a female arrestee to perform oral sex by pulling her head; she was unable to avoid doing so because of "the pressure he had on [her] neck"; and she was unable to escape defendant penetrating her anally and vaginally because he pinned her between his body and his police vehicle. *Id.*

Additionally, the Fifth Circuit Pattern Jury Instructions provide as follows regarding force within the meaning of § 2241:

> To find that the defendant used force, you need not find that the defendant was violent. A defendant uses force within the meaning of "aggravated sexual abuse" when defendant employs restraint sufficient to prevent the alleged victim from escaping sexual conduct, or the use of a threat of harm sufficient to coerce or compel submission by the alleged victim. Force can also be implied from a disparity in size and coercive power between the defendant and the alleged victim. It is not necessary to find that the defendant used actual violence against the defendant's alleged victim. Consent that is the product of official intimidation, harassment, or coercion is not true consent at all.

See FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (Criminal Cases) § 2.12 (2019). Using *Johnson I* and *Stokeling* as guideposts, the Court finds that "restraint sufficient to prevent the victim from escaping the sexual conduct" is closer in kind to the force "sufficient to overcome a victim's resistance" described in *Stokeling* than the nominal "slightest offensive touching" described in *Johnson I*. Accordingly, the Court finds that the force required for a conviction under § 2241(a)(1) meets the definition of "physical force" under § 924(c)(3)(A) and therefore qualifies as a crime of violence. Given the nature of forced sexual acts, common sense compels this conclusion. As the Court in *Jackson* noted, "[i]t is difficult to fathom how a 'forced sexual act' does not involve the use of force sufficient to satisfy § 924(c)(3)(A)." 2020 WL 1542348, at *5.

Nevertheless, the Court is to ascribe to the defendant the least culpable conduct that could give rise to his conviction and determine whether that conduct, at a minimum, would require the use of force under § 924(c)(3)(A). Accordingly, because this Circuit's definition of force in the context of § 2241(a)(1) does not require proof of actual violence and permits an inference of force based on a disparity in size and coercive power between the defendant and the victim, the question of whether deprivation of rights under color of law based on aggravated sexual abuse by the use of force abuse qualifies as a crime of violence under § 924(c)(3)(A) is sufficiently debatable that reasonable minds could differ, warranting a certificate of appealability.

Finally, because the Court finds that Guidry's *Davis* claim is without merit, it is not necessary to address the Government's timeliness or procedural default arguments.

2. Guidry's remaining claims

In Ground Two, Guidry asserts that counsel rendered ineffective assistance by failing to object to the Court's jury instructions, which Guidry alleges constructively amended the indictment as to Count Two by allowing the jury to convict Guidry on a charge of aggravated

sexual abuse, even though the jury was instructed on sexual abuse, which requires a lesser degree of proof. In Ground Three, Guidry alleges that the Government failed to prove the federal jurisdictional element of aggravated sexual abuse alleged in Count Two because "at no time during the case did the Government allege that the offense in Count Two took place on federal property, federal prison, or any other federal enclave defined in 18 U.S.C. § 7." (ECF No. 176-1 at 14). In response, the Government asserts that neither claim is cognizable for relief, nor are the claims related to the claim under *Davis,* which was the basis of the Fifth Circuit's grant of authorization.

A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section. 28 U.S.C. § 2244(b)(4). Because Guidry's initial Section 2255 Motion was denied on the merits in 2009, any successive § 2255 claims on which Guidry can proceed must be authorized by the Fifth Circuit based on either newly discovered evidence or a new rule of constitutional law made retroactive and previously unavailable. 28 U.S.C. § 2255(h). Grounds Two and Three fall outside of the scope of the Fifth Circuit's authorization, which was limited to successive § 2255 claims challenging his § 924(c) conviction based on *Davis*. Accordingly, because the Court does not have jurisdiction to entertain Grounds Two and Three, they are dismissed without prejudice.

EVIDENTIARY HEARING

An evidentiary hearing on a § 2255 motion is required "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). A district court's decision not to hold an evidentiary hearing is reviewed for abuse of discretion. *United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) (quoting *Cervantes*, 132

F.3d at 1110). Because the issues presented in this case can be resolved on the basis of the record, the Court finds an evidentiary hearing is not required.

CONCLUSION

Guidry's challenge to his § 924(c) conviction based on *Davis* is without merit, however a certificate of appealability is warranted. The Court lacks jurisdiction over Guidry's remaining claims.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings, the District Court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where the Court rejects a movant's constitutional claims on the merits, "the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

In this case, reasonable jurists could debate the denial of Guidry's § 924(c) claim. A certificate of appealability is therefore issued as to this claim.

Accordingly,

IT IS ORDERED that Movant Dwaun Jabbar Guidry's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 176) is **DENIED IN PART** and **DISMISSED WITHOUT PREJUDICE IN PART**.

IT IS FURTHER ORDERED that all pending motions, if any, are **DISMISSED AS MOOT**, and this case is now **CLOSED**.

FINALLY, IT IS ORDERED that a certificate of appealability is **GRANTED** as to Guidry's § 924(c) claim and **DENIED** as to his remaining claims.

SIGNED this 24th day of March, 2021.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE