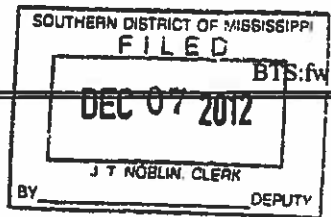


APPENDIX 1

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT Southern District of Mississippi

UNITED STATES OF AMERICA
V.
JAMES DEAN COKER

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:12cr70TSL-LRA-001

USM Number: 16721-043

Michael L. Scott, 200 S. Lamar Street, Suite 200-N, Jackson, MS 39201

Defendant's Attorney:

THE DEFENDANT:

☒ pleaded guilty to count(s) single-count Indictment☐ pleaded nolo contendere to count(s)
which was accepted by the court.☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 924(e)	Felon in Possession of a Firearm/Armed Career Criminal	05/03/12	1

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

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

November 29, 2012

Date of Imposition of Judgment


Signature of Judge

The Honorable Tom S. Lee

Senior U.S. District Court Judge

Name and Title of Judge

Date

12/8/12

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 6

DEFENDANT: JAMES DEAN COKER
CASE NUMBER: 3:12cr70TSL-LRA-001

IMPRISONMENT

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

180 months

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

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ by ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JAMES DEAN COKER
CASE NUMBER: 3:12cr70TSL-LRA-001**SUPERVISED RELEASE**

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

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

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

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

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: JAMES DEAN COKER
CASE NUMBER: 3:12cr70TSL-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

- A. The defendant shall participate in a program of testing and/or treatment for alcohol/drug abuse as directed by the probation officer. If enrolled in an alcohol/drug treatment program, the defendant shall abstain from consuming alcoholic beverages during treatment and shall continue abstaining for the remaining period of supervision. The defendant shall contribute to the cost of treatment in accordance with the probation office co-payment policy.
- B. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
- C. The defendant shall provide the probation office with access to any requested financial information.
- D. The defendant shall submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media and effects, upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: JAMES DEAN COKER
CASE NUMBER: 3:12cr70TSL-LRA-001

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$1,500.00	

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

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

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

DEFENDANT: JAMES DEAN COKER
CASE NUMBER: 3:12cr70TSL-LRA-001

SCHEDULE OF PAYMENTS

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

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 50.00 over a period of 30 month(s) (e.g., months or years), to commence 60 day(s) (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk of Court, P. O. Box 23552, Jackson, MS 39225-3552.

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

☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Jimenez Arms, model J.A. Nine, 9mm pistol, Serial Number: 101037, and any ammunition.

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

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

VS.

CIVIL ACTION NO. 3:16CV504TSL
CRIMINAL NO. 3:12CR70TSL

JAMES DEAN COKER

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant James Dean Coker for habeas relief pursuant to 28 U.S.C. § 2255. Having considered the motion, together with the government's opposition, the court concludes that the motion is not well taken and should be dismissed.

Armed Career Criminal Act and Johnson:

By his motion, Coker, who was sentenced to a fifteen-year mandatory minimum sentence pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), seeks to be resentenced in light of the Supreme Court decision in Johnson v. United States (Johnson II), -U.S.-, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Generally, a defendant found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) is subject to a maximum term of imprisonment of ten years. 18 U.S.C. § 924(a)(2). However, under the ACCA, a defendant convicted as a felon in possession of a firearm under § 922(g) is subject to a sentence enhancement, requiring a fifteen-year minimum sentence, if the government proves that he has three or more previous convictions

for "violent felonies." 18 U.S.C. § 924(e)(2)(B). As the ACCA was enacted, "violent felony" was defined as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (use of force clause); (2) "is burglary, arson, or extortion, [or] involves the use of explosives" (enumerated offenses clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause). 18 U.S.C. § 924(e)(2)(B).

The Supreme Court in Johnson II held that the residual clause was unconstitutionally vague, so that imposing an enhanced sentence based thereon violated due process. Johnson II, 135 S. Ct. at 2557-58. In its opinion, the Court clarified that its holding with regard to the residual clause did not call into question application of the Act's other definitions of "violent felony." Johnson II, 135 S. Ct. at 2563 (stating its ruling "does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Close on the heels of Johnson II, the Supreme Court held that Johnson II announced a new substantive rule that is retroactively applicable to cases on collateral review. See Welch v. United States, -- U.S. --, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).

Relevant Facts and Procedural History

On June 18, 2012, a federal grand jury returned a one-count indictment against Coker, charging him with being a felon in possession of a firearm in violation of 18 U.S.C. § 924(g). In an obvious effort to bring defendant within the ambit of the ACCA, the indictment further recited that Coker had been previously convicted in state court of three separate instances of armed robbery, crimes which were punishable by a prison term in excess of one year. On August 16, 2012, Coker entered an open plea. At sentencing, the court, having concluded that Coker was an armed career offender pursuant to 18 U.S.C. § 924(e)(1), sentenced him to the statutory minimum fifteen years of incarceration and a three-year term of supervised release.¹ Almost four years later, on June 24, 2016, Coker filed this first § 2255 motion, by which he seeks to be resentenced in light of the Supreme Court's decision in Johnson II. Coker asserts he is entitled to relief because under Johnson II, the residual clause is unconstitutionally vague, and because his Mississippi state armed robbery convictions do not qualify as "violent felonies" under the

¹ Defendant's petition erroneously recites that the armed career offender finding resulted in two sentence enhancements: (1) "an increase in the adjusted offense level from 28 to 34. Compare PSR, p.6 ¶25 with p.6, ¶26" and (2) "[a]n increase in the criminal history category from III to VI. *Id.* at p.11, ¶41." Through former counsel, defendant objected to the enhancement and to the criminal history categorization. The objections were sustained and as a result, defendant's adjusted offense level was 33 and his criminal history category was IV.

two remaining, valid definitions. The government contends in opposition that Coker's motion is time barred and that, in any event, his state armed robbery convictions qualify as "violent felonies" under § 924(e)(2)(B)(i), the use of force clause. While the court is not persuaded that Coker's motion is time barred, it does agree that it is without merit.

Legal Standard:

Pursuant to 28 U.S.C. § 2255, a federal prisoner "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). There are four bases for relief under the statute: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum sentence; or (4) the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

Analysis: Statute of Limitations

Coker asserts in his motion that his prior alleged ACCA convictions for armed robbery did not qualify as "violent felonies" under the ACCA's force or enumerated offenses clauses and that they were therefore necessarily designated as "violent felonies" under the residual clause, thus entitling him to be resentenced based on the Court's holding in Johnson II. The government asserts that pursuant to 28 U.S.C. § 2255(f)(1),

§ 2255's one-year statute of limitations² on this claim began to run in December 2012, when Coker's conviction became final, see Fed. R. App. 4(b)(1)(A) (stating defendant's notice of appeal must be filed . . . within 14 days after entry of judgment), and United States v. Scruggs, 691 F.3d 660, 669 (5th Cir. 2012) (observing "[w]hen a defendant does not file a direct appeal, his conviction becomes final on the day when the time for filing a direct appeal expires"), and thus, Coker's motion, filed in June 2016, is time barred by more than two years. The government acknowledges § 2255(f)(3), which provides that the one-year limitation period "shall run from the latest of 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"; but it argues this provision is inapplicable since Coker has no claim under Johnson II as he has "made no effort to show that the ACCA's residual clause played any role at his sentencing." In this vein, the government contends that Coker has failed to demonstrate that the court relied on the residual clause in sentencing. In the court's opinion, the government's position is not well founded.

² See 28 U.S.C. § 2255(f)(1) ("A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . . the date on which the judgment of conviction became final.")

The language of § 2255(f)(3) cannot fairly be interpreted to impose a burden on a defendant sentenced under the ACCA to prove that the court necessarily applied the residual clause in order for his claim to be considered timely. The issue of the timeliness of his motion is separate from the issue of the merits of his motion. Cf. United States v. Williams, 402 Fed. Appx. 943 (5th Cir. Nov. 23, 2010) (indicating that question of merits of § 2255 claim was separate from issue of timeliness and holding, without reaching the merits, that § 2255(f)(3) applied so that limitations period commenced on date of Supreme Court decision that provided the basis for the petitioner's claim for relief); see also United States v. Turner, 3:08cr141-DPJ-LRA, 2016WL5887760 (S.D. Miss. Oct. 7, 2016) (indicating that court would deny as untimely motion to amend § 2255 to add Johnson-based claim where record clearly demonstrated that defendant was not sentenced under the ACCA and stating that "[t]here is no question that Johnson and Welch would collectively trigger § 2255(f)(3) for inmates sentenced under the ACCA.").

The government does not dispute that Coker was in fact sentenced under the ACCA. Moreover, it is not apparent that the court did not rely on the residual clause in imposing sentence. If it were manifest that the court did not rely on the residual clause in sentencing Coker and that it relied, instead, on one of the still-valid definitions of "violent felony", or if the court

could conclude that binding precedent dictated that the prior armed robbery convictions categorically qualified as predicates under one of the two remaining, valid clauses, the court would likely find Coker's claim to be time-barred. Cf. In re Leonard, No. 16-13528-J, 2016 WL 3885037, at *3 (11th Cir. July 13, 2016) (court would deny application for successive petition under § 2255(h)(2) only if it were clear that motion would not assert Johnson claim because "(1) the sentencing court record demonstrate[d] that the sentencing court specifically identified three prior convictions as qualifying as ACCA predicates under the elements or enumerated crimes clauses ... and/or (2) under binding precedent, it is clear that the prior convictions the sentencing court identified categorically qualify as ACCA predicates under the elements or enumerated crimes clauses...."). There is nothing in the record to show which clause the court relied on to find that Coker's prior armed robbery convictions were "violent felonies". Nor has the court found binding precedent to the effect that defendant's Mississippi armed robbery convictions categorically qualify as violent felonies under the elements or enumerated crimes clauses. For these reasons, the court concludes that Coker's motion falls within the plain language of § 2255(f)(3): Within one year of the Court's decision in Johnson II, Coker filed this first § 2255 motion asserting a constitutional right, initially recognized in Johnson II, and made

retroactive to cases on collateral review by Welch.³ Accordingly, the court concludes his motion was timely brought.⁴ The motion fails, however, for lack of merit.

Analysis: Armed Robbery as a Violent Felony

Following the Supreme Court's invalidation of the residual clause in Johnson II, an offense of conviction can only qualify as a "violent felony" under the ACCA if the offense "has as an element the use ... of physical force" or if it "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. §§ 924(e)(2)(B)(i) and (ii). Neither party contends that the

³ The government cites United States v. Jeffries, No. 14-51250, 2016WL3895247, at *1 (5th Cir. July 18, 2016), for the proposition that to be timely under § 2255(f)(3), Coker must demonstrate that Johnson II's holding applies to the facts of his case. In Jeffries, a defendant on direct appeal argued for an extension of Johnson II to a guideline provision dealing with career offenders (as opposed to armed career offenders), which contained a residual clause with language similar to the ACCA language considered in Johnson II. In its order denying Jeffries' petition for panel rehearing, the Fifth Circuit, assuming arguendo that Johnson II applied to the guideline provision, concluded that Jeffries was not entitled to relief because he failed to demonstrate that he was sentenced under the pertinent residual clause. The case did not purport to address timeliness under § 2255(f)(3) but rather was a decision based on the merits of the motion.

⁴ This is not a case in which the defendant is asking the court to extend the holding in Johnson II to a similarly-worded statute or guideline provision. Were that the situation, it is likely that a different result would obtain. See In re Fields, 826 F.3d 785, 786-87 (5th Cir. 2016) (observing that Johnson did not address section 924(c)(3)(B)) and United States v. Gonzalez-Longoria, 831 F.3d 760 (5th Cir. Aug. 5, 2016) (holding that 18 U.S.C. § 16(b), which is worded identically to § 924(c)(3)(B), is not unconstitutionally vague).

enumerated offenses clause applies in this case. The issue, then, is whether the Mississippi offense of armed robbery set forth in Mississippi Code Annotated § 97-3-79 qualifies as a "violent felony" under the ACCA's use of force clause.

To determine whether a prior conviction qualifies as a violent felony under the use of force clause, courts generally employ a categorical approach by which they look to the statutory definition of the offense in question, as opposed to the particular facts underlying the conviction, to determine whether the statutorily-defined offense necessarily fits within the ACCA definition of "violent felony." See Descamps v. United States, 133 S. Ct. 2276, 2283, 186 L. Ed. 2d 438 (2013). Under this approach, if a conviction under the Mississippi statutory definition of the crime of armed robbery would "necessarily require[] a finding that the defendant used, attempted to use, or threatened to use physical force against the person of another," then it follows that an armed robbery conviction in Mississippi constitutes a violent felony. See United States v. Ceron, 775 F.3d 222, 227 (5th Cir. 2014) (citing United States v. Herrera-Alvarez, 753 F.3d 132, 134 (5th Cir. 2014))⁵ ; see also

⁵ United States v. Ceron, 775 F.3d 222, 227-28 (5th Cir. 2014), involved application of the categorical approach to U.S.S.G. § 2L1.2(b)(1)(A)(ii), which provides for a sentence enhancement "if the defendant has a prior conviction for a crime of violence and the prior conviction receives criminal history points." The commentary to this guideline defines a "crime of

United States v. Carrasco-Tercero, 745 F.3d 192, 198 (5th Cir. 2014) (categorical approach assumes that the defendant committed the least culpable act to satisfy the count of conviction and asks whether such conduct qualifies as a violent felony). Put another way, the offense of armed robbery under the Mississippi statute satisfies the ACCA's definition of "violent felony" under the use of force clause if conviction for that offense could not be sustained without proof of "the use, attempted use, or threatened use of physical force against the person of another." See United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006).

While the categorical approach generally applies, if the criminal statute has disjunctive subsections giving rise to multiple, alternative versions of the crime, at least one of which does not describe a violent felony, the court may apply a "modified categorical approach" to determine under which

violence," in pertinent part, as "any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another." See U.S.S.G. § 2L1.2, cmt. n. 1(B)(iii). Because of the similarities between this definition and the ACCA's definition of "violent felony", the Fifth Circuit "often treat[s] cases dealing with these provisions interchangeably." United States v. Herrera-Alvarez, 753 F.3d 132, 136 (5th Cir. 2014) (internal quotation marks and citation omitted); see also United States v. Wilson, 622 F. App'x 393, 404 (5th Cir. 2015), cert. denied, 136 S. Ct. 992, 194 L. Ed. 2d 13 (2016) (evaluating career offender enhancement set out in U.S.S.G. § 4B1.1 and stating that "our precedent regarding the ACCA's definition of a violent felony is directly applicable to the guideline's definition of a crime of violence").

subsection the defendant was convicted. United States v. Lopez-Euceda, 599 F. App'x 552, 553 (5th Cir. 2015) (citing Descamps, -- U.S. --, 133 S. Ct. 2276, 2283-85, 186 L. Ed. 2d 438 (2013)). Under this approach, courts may look beyond the statutory definition to certain conclusive records made or used in adjudicating guilt, e.g., the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented", to determine under which subsection the defendant was charged; the court then applies the categorical approach to that version of the crime. Shepard v. United States, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005); Ceron, 775 F.3d at 222. Cf. Rodriguez v. Holder, 705 F.3d 207, 210 (5th Cir. 2013) (stating that "[i]f the statute of conviction defines multiple offenses, at least one of which does not describe an aggravated felony, we apply a modified categorical approach.").

Coker's indictment in this case recited, and Coker acknowledged at his change of plea hearing, that he had been previously convicted in Mississippi state court of three separate instances of armed robbery. Mississippi's armed robbery statute provides as follows:

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a

deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

Miss. Code Ann. § 97-3-79 (emphasis added).

In this case, the government argues, and defendant does not dispute, that since a defendant may be convicted for robbing a person either by "violence to his person" or "by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon," the statute is divisible and that the modified categorical approach thus applies. The court questions whether the subject statute qualifies as "divisible."⁶

⁶ As one court has noted, A crime is not divisible simply because it may be accomplished through alternative means, but only when alternative elements create distinct crimes. [*Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014)]. Alternative elements of a crime, as opposed to alternative means of committing a crime, are "factual circumstances of the offense that the jury must find unanimously and beyond a reasonable doubt." *Id.* (citation and internal quotations omitted). Therefore, when determining the divisibility of a crime, we may consider how "courts generally instruct juries with respect to that offense." See *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013). *United States v. Gardner*, 823 F.3d 793, 802-03 (4th Cir. 2016) (finding that since North Carolina common law robbery may be committed by the alternate means of "violence or by putting the person in fear," and that these were not different elements of distinct crimes, then it "is an indivisible offense, in which the modified categorical approach 'has no role to play.'" (quoting *Descamps*, 133 S. Ct. at 2285)). The Mississippi armed robbery statute similarly provides alternate means of committing the crime of armed robbery: taking property from another "by violence to

Ultimately, however, it makes no difference to the outcome which approach applies since under either approach, the conclusion is the same: armed robbery in Mississippi, in either form, is a "violent felony" within the contemplation of the ACCA's use of force clause.

In United States v. Johnson (Johnson I), 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010), the Supreme Court considered the meaning of the term "physical force" under the ACCA's use of force clause. The Court observed, first, that "[t]he adjective 'physical' is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies--distinguishing physical force from, for example, intellectual force or emotional force." Id. at 138, 130 S. Ct. at 1270. As for the term "force," the Court found that in the context of the ACCA's statutory definition of "violent felony," the term "force" could not sensibly be interpreted to include the common law definition of force, i.e., the slightest offensive touching. Id. at 139-40, 130 S. Ct. at 1270. Instead, it held, "the phrase 'physical force' means violent force--that is, force capable of causing physical pain or injury to another person." Id. at 140, 130 S. Ct. at 1271.

his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon."

Under the Mississippi armed robbery statute, robbing a person by "violence to his person" involves the use of actual violent, physical force through the use of a deadly weapon as the means to take the personal property of another. See Clark v. State, 756 So. 2d 730, 732 (Miss. 1999) ("proof of the crime of armed robbery must necessarily include that the exhibition of the deadly weapon, causing violence or fear of immediate injury, was the means by which the personal property of another was taken.") (emphasis added); see also Brown v. State, 102 So. 3d 1087, 1091-92 (Miss. 2012) (robbery statute's elements "necessarily involve the 'use of physical force ... unlawfully exercised with the intent to harm.'" (quoting Black's Law Dictionary 1705 (9th ed. 2009))). Coker does not deny that this would satisfy the ACCA's use of force definition of "violent felony."⁷ Thus, the issue (under

⁷ That armed robbery is involved here, in which the violent force involves the use of a deadly weapon, distinguishes this from other cases in which the statutes did not define the degree of force or violence required to sustain conviction or the statutes, as interpreted, allowed for conviction upon application of *de minimis* force. See, e.g., United States v. Gardner, 823 F.3d 793, 802 (4th Cir. 2016) (where interpretation of statute suggested that even *de minimis* contact could constitute the "violence" necessary for a common law robbery conviction under North Carolina law, and such conduct would not rise to the level of "physical violence" as defined in Johnson I, offense did not qualify categorically as a "violent felony" under the ACCA); United States v. Parnell, 818 F.3d 974 (9th Cir. 2016) (concluding that defendant's conviction under Massachusetts' armed robbery statute did not qualify as "violent felony"). As one court has recently observed:

We have little difficulty, then, in concluding that Maryland armed robbery - a crime that differs from

either a categorical or modified categorical approach) is whether robbing a person "by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon" involves the "use, attempted use, or threatened use of physical force against the person...."⁸ Coker argues that merely "'putting a victim in fear' does not meet the physical force requirement of § 924(e)(2)(B)(I)," as defined by the Court in Johnson I. His reasoning, while not entirely clear, seems to be that the commission of armed robbery "by putting [the victim] in fear" involves, or can involve, the use of emotional or intellectual force, rather than the use or threatened use of *physical* force, and thus is insufficient under Johnson I. See Johnson I, 559 U.S. 138, 130 S. Ct at 1270 ("'physical' ... 'plainly refers to force

simple robbery in its requirement that the defendant commit the crime with the use of a dangerous or deadly weapon - contains "as an element the use, attempted use, or threatened use of physical force against the person of another." Common law robbery itself is, after all-- and has always been--a crime against a person. Certainly the additional element of "use" of a dangerous or deadly weapon supplies at minimum a "threat" of physical force against the person of another. And because the means employed is a "dangerous or deadly weapon," the required degree of force--that is, "violent force" - is present.

United States v. Redrick, No. 14-3053, 2016 WL 6595973, at *5 (D.C. Cir. Nov. 8, 2016).

⁸ Defendant acknowledges that his prior convictions were for armed robbery by "putting the victim in fear of immediate injury by displaying a deadly weapon."

exerted by and through concrete bodies-distinguishing physical force from, for example, intellectual force or emotional force").

Defendant's argument fails, however, because the armed robbery offense under the statute is not merely to rob by "putting [a] person in fear"; rather, the offense is robbery by "putting [a] person in fear of *immediate injury to his person by the exhibition of a deadly weapon.*" Miss. Code Ann. 97-3-79 (emphasis added). It bears emphasis that under the statute, as interpreted by the Mississippi Supreme Court,⁹ "proof of the crime of armed robbery must necessarily include that the exhibition of the deadly weapon, *causing violence or fear of immediate injury*, was the means by which the personal property of another was taken." Clark, 756 So. 2d at 732 (emphasis added). Moreover, the "fear" to which the statute refers is not some generalized emotion of fear but rather the fear of imminent, personal injury: "The fear element does not require the victim to be frightened or terrified, but [it] is fulfilled if the victim expects and anticipates that *personal injury* may result if he does not follow the assailant's instruction made while threatening the use of a deadly weapon." Evans v. State. 957 So. 2d 430, 436 (Miss. Ct. App. 2007) (emphasis added). Thus, under the statute, the display of the

⁹ Mathis v. United States, 579 U.S. ----, 136 S. Ct. 2243, 2256-57, 195 L. Ed. 2d 604 (2016) (directing that court should look to state court decisions interpreting state criminal statutes).

deadly weapon by the defendant carries an implicit threat to his victim that the defendant will use violent, and even deadly, force to accomplish his crime. So interpreted, the court concludes that a conviction under Mississippi Code Annotated § 97-3-39 for armed robbery, accomplished through fear of immediate injury, qualifies as a violent felony conviction pursuant to § 924(e)(2)(B)(I). See United States v. Seabrooks, No. 15-10380, 2016 WL 6090860, at *13 (11th Cir. Oct. 19, 2016) (explaining that the fear or intimidation contemplated by the Florida armed robbery statute is the fear of bodily harm, and finding it “inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force” so that the offense was a “violent felony” under ACCA’s use of force clause) (citing United States v. Lockley, 632 F.3d 1238, 1245 (11th Cir. 2013)); United States v. Mitchell, 743 F.3d 1054, 1059 (6th Cir. 2014) (relying on Johnson I and concluding that “the commission of a robbery through fear, which in Tennessee reduces to the fear of bodily injury from physical force offered or impending, directly corresponds to § 924(e)(2)(B)(i)’s ‘use . . . or threatened use of physical force’”); United States v. Duncan, 833 F.3d 751, 755 (7th Cir. 2016) (holding that robbery by “putting any person in fear” is Indiana’s equivalent of taking property from the person of another by threat of physical injury, so it falls under the still-valid ACCA use of force clause).

Conclusion

As Coker has failed to demonstrate that his armed robbery convictions are not violent felonies, his motion is denied. It is further ordered that defendant is not entitled to a certificate of appealability. Defendant has failed to make a substantial showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this 26th day of January, 2017.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60045
USDC No. 3:16-CV-504
USDC No. 3:12-CR-70-1



A True Copy
Certified order issued Oct 31, 2017

Styl W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES DEAN COKER,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

ORDER:

James Dean Coker, federal prisoner # 16721-043, has applied for a certificate of appealability (COA) to appeal the district court's denial, on the merits, of his 28 U.S.C. § 2255 motion. The motion sought to vacate his sentence for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), as enhanced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). In seeking a COA, Coker argues that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his prior armed robbery convictions underlying his § 924(e) enhancement no longer qualify as violent felonies under the ACCA.

No. 17-60045

This court may issue a COA only if Coker has “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where, as here, the district court has denied the claims on the merits, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong” or that “the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

Because Coker has not met this standard, his COA motion is DENIED.

/s/Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT JUDGE