

**In The
Supreme Court of The United States**

YAHKI JAMAR JACKSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A PRIOR CONVICTION FOR NORTH CAROLINA COMMON LAW ROBBERY CAN SERVE AS A PREDICATE OFFENSE FOR CAREER OFFENDER STATUS UNDER THE FEDERAL SENTENCING GUIDELINES.

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OPINION BELOW

The Court of Appeals for the Fourth Circuit decided this case on January 11, 2018 in an unpublished per curiam opinion, United States v. Jackson, No. 15-4404 (4th Cir. 2018). The opinion appears in the Appendix herein, p. A-1.

JURISDICTION

The case in the Court of Appeals was decided on January 11, 2018. This petition is timely filed within 90 days, pursuant to Rule 13.1 of the Rules of this Court.

STATEMENT OF THE CASE

On November 24, 2014 Yahki Jamar Jackson was charged in the Middle District of North Carolina in an indictment with distribution of crack cocaine on April 1, 2014, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(c). The indictment, in Count Two, further charged Jackson with distribution of heroin on August 26, 2014, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. (b)(1)(c). Both offenses occurred in Durham County, North Carolina.

Pursuant to a plea agreement filed March 3, 2015 Jackson entered a plea to the crack cocaine charge in Count One of the November 24, 2014 indictment. On June 16, 2015 he was sentenced to a term of 151 months. Judgment was entered July 6, 2015, notice of appeal having been filed on July 1, 2015.

The underlying offense, as noted above, was a felony controlled substance offense, and Yahki Jackson was 32, i.e. 18 or older, when the offense was

committed. In addition, he had two prior state felony convictions for either a crime of violence or a controlled substance offense:

- A. Felony Common Law Robbery, offense date April 22, 1999, convicted October 14, 1999, No. 99 CRS 5433 (Craven County, North Carolina).
- B. Felony Possession With Intent to Manufacture, Sell or Deliver Schedule II (cocaine), offense dates June 27, 2012 and December 12, 2012, convicted January 9, 2013, No. 12 CRS 7710 (Durham County)

Accordingly he was sentenced in the District Court as a career offender.

The Court of Appeals affirmed the conviction and sentence on January 11, 2018, United States v. Jackson, No. 15-4404 (4th Circuit). This certiorari petition is thus timely filed.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

Criminal sentencing in the federal courts was once a relatively simple process, but the Sentencing Reform Act of 1984 changed that radically. And since Johnson v. United States, 576 U.S. 192 ,135 S.Ct. 2551, 569 L.Ed.2d____ (2015), the career offender cases have muddied the waters significantly, to the point where little is clear anymore. Only this Court can clear up the confusion faced in these cases nationwide by all those participants in the District Courts, judges, counsel on both sides, and probation officers. This case would be an appropriate vehicle for that.

ARGUMENT

On October 14, 1999 Yahki Jackson was convicted in Craven County, North Carolina of the crime of Felony Common Law Robbery. That conviction served as a predicate conviction for career offender status at sentencing in this case.

Jackson was sentenced in this case on June 16, 2015 when the North Carolina offense of common law robbery was indeed a crime of violence or a violent felony for career offender purposes under Section 4B1.1(a), Federal Sentencing Guidelines. That is true no more though, not since May 18, 2016 when the Fourth Circuit decided United States v. Gardner, 823 F.3d 793, (4th Cir. 2016). The holding in Gardner was that common law robbery in North Carolina is not a violent felony for enhancement purposes, as a result of Johnson v. United States, 576 U.S. ____, 135 S.Ct. 2551, 192 L.Ed.2d 569(2015).

On March 6, 2017 this Court decided Beckles v. United States, ____ U.S. ____, 136 S.Ct. 2510, 195 L.Ed.2d 838 (2017). In Beckles, the Court held that unlike the identically worded residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(6), which was held unconstitutionally vague in Johnson, the residual clause in the Federal Sentencing Guidelines, Section 4B1.2(a), is not subject to vagueness challenge under the due process clause of the Fifth Amendment. We of course prefer the reasoning of Justices Kennedy, Ginsburg, and Sotomayor, in their separate concurring opinions, to that of Justice Thomas for the majority in Beckles, but they did not carry the day and he did.

Beckles effectively defeats our reliance on United States v. Gardner, 823 F.3d 793 (4th Cir. 2016) and on United States v. White, 836 F.3d 437 (4th Cir. 2016), as both are ACCA cases. Hill v. Masters, 836 F.3d 591 (6th Cir. 2016) however is not an ACCA case, but rather a case of a career offender enhancement under Section 4B1.2(a) of the Guidelines similar to the case at hand. Judge Stranch for the Sixth Circuit did note that:

To require that Hill serve an enhancement sentence as a career offender, bearing the stigma of a “repeat violent offender” and all its accompanying disadvantages, is a miscarriage of justice where he lacks the predicate felonies to justify such a characterization.

Of course Hill’s plight then was the plight of Yahki Jackson now. Will Hill survive Beckles? Who knows, but as confused as this area of the law has been these past two years, surely there will be yet more judicial guidance to come.

Career offender status under Section 4B1.1(a) requires that the instant offense be a felony that is either a crime of violence or a controlled substance offense. Distribution of crack cocaine in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(c) certainly qualifies as a controlled substance offense. The defendant must also be at least 18 at the time of the offense, and Yahki Jackson was 32, so that criteria is met as well. There is more though, for to be a career offender, the defendant must also have at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Jackson does have two prior felony convictions for a controlled substance offense. On January 9, 2013 Jackson was convicted of Felony Possession of Schedule II Controlled Substance (Cocaine) in Durham County, North Carolina. And on the same day in Durham County he was convicted of Felony Possession With Intent to Manufacture, Sell, or Deliver Schedule II Controlled Substance (Cocaine). They were separate cases, with separate offense dates. The first was on July 16, 2011 and the second on December 12, 2012. But, Jackson entered pleas of guilty and was convicted in both cases on the same day, January 9, 2013 and the cases were consolidated for judgment i.e. one judgment was entered encompassing both cases. The Fourth Circuit held however in United States v. Davis, 720 F.3d 215 (4th Cir. 2013) that:

A consolidated sentence under North Carolina law is a single sentence for purposes of the career offender enhancement. 720 F.3d at 216.

Parenthetically, at sentencing in this case Davis apparently went unnoticed by the District Court, Jackson's counsel, the Government, and the Probation Office.

On April 7, 2017, a month after Beckles, Judge Flanagan held in United States v. Ormond, No. 5:16 CR 80-FL (EDNC), that assault with a deadly weapon inflicting serious injury in North Carolina is not a crime of violence under Section 4B1.2 of the Guidelines, and accordingly may not be used as a predicate offense for a career offender enhancement. A copy of her opinion is attached as Appendix B for now, Ormond was good news for Yahki Jackson and very much in support of our position in this case.

We disagree with the Government's position that the decision of this Court in Beckles conclusively puts this case to an end, in favor of the Government. We are not here challenging the Constitutional vagueness of the residual clause of Section 4B1.2(a), Federal Sentencing Guidelines. We have to concede that in Beckles this Court shut that argument down. What we are challenging here is the conclusion of the District Court that the predicate offense of common law robbery is in this context a crime of violence. Yahki Jackson was convicted on October 14, 1999 in Craven County, North Carolina of Common Law Robbery, stealing \$43 and a pizza by threatening to assault the victim. Does the reference to "robbery" in Application Note 1 of the Commentary to Section 4B1.2 mean ipso facto that common law robbery is a crime of violence? If so, then we are indeed out of luck.

In United States v. Riley, 856 F.3d.326 (4th Cir. 2017), the Maryland statutory crime of robbery with a dangerous weapon was held to be a crime of violence for career offender purposes. Robbery with a dangerous weapon though in Maryland is different from common law robbery in North Carolina. Nor is the result below in this case mandated by United States v. Gattis, 877, F.3d 150 (4th Cir. 2017).

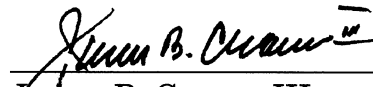
We continue to rely on Hill v. Masters, 836 F.3d 591 (6th Cir. 2016) and Judge Flanagan's opinion in United States v. Ormond, No. 5:16 CR 80-FL (EDNC). See also Judge Sullivan's opinion in United States v. Brown, No. 1:09 CR 358 (D. Columbia), filed April 12, 2017. Both Ormond and Brown are post-Beckles decisions too. A copy of Brown is attached and incorporated herein in Appendix A.

CONCLUSION

For all the reasons set forth above, the writ should be granted, the judgments below should be vacated, and the case remanded for resentencing without the career offender enhancement applied previously.

This 6th day of February 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James B. Craven III", is written over a horizontal line.

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Appendix A

United States v. Yahki Jamar Jackson, No. 15-4404

Unpublished Opinion
of the United States Court of Appeal for the Fourth Circuit

Decided January 11, 2018

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 15-4404

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

YAHKI JAMAR JACKSON, a/k/a AB,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:14-cr-00425-WO-1)

Submitted: December 27, 2017

Decided: January 11, 2018

Before SHEDD, AGEE, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James B. Craven, III, Durham, North Carolina, for Appellant. Sandra Hairston, Acting United States Attorney, Kyle D. Pousson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Yahki Jamar Jackson pleaded guilty to distribution of cocaine base and received a 151-month sentence. Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there were no meritorious issues, but questioning whether Jackson's sentence was substantively reasonable, whether he qualified as a career offender due to his age at the time of the predicate felony common law robbery offense, and whether he received ineffective assistance of counsel due to counsel allegedly not visiting him in prison to explain the presentence report to him. Jackson argued in his pro se supplemental brief that he no longer qualifies as a career offender in light of *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), which declared the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2012), unconstitutionally vague.

Following a review of the record pursuant to *Anders*, the court directed the parties to file supplemental briefs addressing whether Jackson's prior conviction for felony common law robbery was a qualifying conviction under the career offender guideline. We first conclude that the issues raised in the original *Anders* brief are without merit. *See U.S. Sentencing Guidelines Manual* § 4B1.1(a) (2014) (defendant must be at least 18 years old at the time of the *instant* offense to qualify as a career offender); *United States v. Helton*, 782 F.3d 148, 151 (4th Cir. 2015) (presumption of reasonableness for sentence within the Sentencing Guidelines range); *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016) (on direct appeal, attorney's ineffectiveness must conclusively appear on the record). However, the issue of whether a North Carolina felony common law robbery

conviction is a valid predicate conviction under the Sentencing Guidelines career offender residual clause warrants further discussion.

Because Jackson had North Carolina convictions for felony common law robbery and felony possession with intent to manufacture cocaine, the probation officer determined that Jackson qualified as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1(a), (b)(3) (2014). At sentencing, Jackson did not object to the determination that he qualified as a career offender. Under the Sentencing Guidelines, a defendant is a career offender if (1) he was at least eighteen years old at the time he committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) he has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1(a).

At the time of Jackson's sentencing, § 4B1.2 defined a "crime of violence" as any offense under federal or state law, 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, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

USSG § 4B1.2(a) (emphasis added to the "residual clause"). Section 4B1.2(a)(1) involves the "force clause" and § 4B1.2(a)(2) involves the residual clause. Further, the commentary to § 4B1.2 enumerated "robbery" as a crime of violence. USSG §4B1.2, cmt. n.1.

Although Jackson acknowledged that, at the time of his sentencing, the contested conviction was considered to be a crime of violence for sentencing purposes, on appeal he contends that this is no longer true, relying on *Johnson* and *United States v. Gardner*, 823 F.3d 793, 801-04 (4th Cir. 2016) (North Carolina common law robbery does not qualify as a violent felony under the ACCA). In *Johnson*, the Supreme Court held that the residual clause of the ACCA's definition of "violent felony," which includes any offense that "involves conduct that presents a serious potential risk of physical injury to another" was void for vagueness. *Id.* at 2563. The Supreme Court subsequently decided in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause and therefore § 4B1.2(a)(2)'s residual clause is not void for vagueness. *Accord, United States v. Mack*, 855 F.3d 581, 585 (4th Cir. 2017). In light of the holding in *Beckles*, we may rely on the residual clause in deciding that North Carolina common law robbery is a crime of violence under the career offender guideline.

Because Jackson did not object to his career offender status in the district court, this issue is reviewed for plain error. *United States v. Price*, 777 F.3d 700, 711 (4th Cir. 2015). To satisfy plain error review, Jackson must show "that (1) an error was committed, (2) the error was plain, and (3) the error affected [his] substantial rights." *Id.* (internal quotation marks omitted). An error is plain if, "at the time of appellate consideration, . . . the settled law of the Supreme Court or this [C]ircuit establishes that an error has occurred." *United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014) (internal quotation marks omitted). However, even if Jackson makes the requisite

showing, correction of the error lies within this court's discretion, which we exercise only if "the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Price*, 777 F.3d at 711 (brackets and internal quotation marks omitted).

The threshold question is whether a North Carolina felony conviction for common law robbery qualifies as a crime of violence under the residual clause of the career offender guidelines. USSG § 4B1.2 cmt. n.1 ("Crime of violence includes . . . robbery"). We recently held that "North Carolina common law robbery categorically qualifies as 'robbery,' as that term is used within § 4B1.2(a)(2)." *United States v. Gattis*, ___ F.3d ___, ___, No. 16-4663, 2017 WL 6001522, at *4 (4th Cir. Dec. 4, 2017). Because we have now held that North Carolina common law robbery categorically qualifies as an enumerated offense under the career offender guideline, Jackson's claim challenging his career offender enhancement on this basis is meritless.* There was no error, let alone plain error.

In accordance with *Anders*, we have reviewed the entire record in this case and have found no other meritorious issues for appeal. We therefore affirm Jackson's conviction and sentence. This court requires that counsel inform Jackson, in writing, of

* Robbery is now an enumerated offense under USSG § 4B1.2. Effective August 1, 2016, the definition of a "crime of violence" has been amended to expressly include robbery as an enumerated offense in § 4B1.2(a)(2) itself rather than relegating this crime to the commentary. It was not an enumerated offense within the text of the guideline at the time Jackson was sentenced. However, as *Gattis* explains, although robbery is now included in the enumerated offenses clause in USSG § 4B1.1(a)(2), the Guidelines still do not define robbery. *Gattis*, ___ F.3d at ___, 2017 WL 6001522, at *4. Thus, *Gattis*'s holding applies equally to the 2014 commentary at issue here.

the right to petition the Supreme Court of the United States for further review. If Jackson requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Jackson.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

United States v. William Lachlan Ormond, III, No. 5:16-cr-80-FL-1

Memorandum Opinion

United States District Court for the Eastern District of North Carolina

Filed April 7, 2017

NO. 5:16-CR-80-FL-1

MEMORANDUM OPINION

BACKGROUND

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As relevant here, the probation office calculated defendant's total offense level by beginning with base offense level 22, determined pursuant to U.S.S.G. §2K2.1(a)(3). That provision applies if the defendant previously has been convicted of either a "crime of violence" or "controlled substance offense." The probation office determined that defendant's prior conviction under North Carolina law for "Assault With a Deadly Weapon Inflicting Serious Injury" (AWDWISI) qualified as a "crime of violence." (PSR ¶14 and p. 16).

Defendant objected to application of base offense level 22, under § 2K2.1(a)(3), contending his base offense level should be 20, because his prior AWDWISI conviction does not qualify properly as a "crime of violence" under § 2K2.1(a), as the term is defined in § 4B1.2(a). The court sustained defendant's objection at his original sentencing hearing in this matter, on October 6, 2016. At a second sentencing hearing held December 8, 2016, the court reversed course and accepted the recommendation in the PSR, on the basis that the court had reflected on "ever evolving" developments in the law, particularly in conjunction with an advisory guidelines calculation determined on the same date, in the case United States v. Hakeem Johnson, No. 7:15-CR-54-FL-1, 2016 WL 7168064 (E.D.N.C. Dec. 8, 2016) (hereinafter "Hakeem Johnson"). The court continued the sentencing hearing, however, for further development of the record concerning the government's motion for upward departure. Ultimately, at final sentencing hearing held April 5, 2017, the court again reconsidered the base offense level determination, calculating a base offense level 20, over the objection of the government. This memorandum opinion explains the court's basis for reaching that conclusion.

COURT'S DISCUSSION

The court begins its analysis by using the Guidelines Manual in effect on the date that the defendant was sentenced, the most current, 2016, version of the Guidelines Manual. See U.S.S.G. § 1B1.11(a). As noted above, § 2K2.1(a) provides for a heightened base offense level where a defendant has a prior conviction for a “crime of violence.” See, e.g., § 2K2.1(a)(3). Section 2K2.1 does not itself define the term “crime of violence”; rather, it cross references § 4B1.2(a). See § 2K2.1 n.1 (“‘Crime of violence’ has the meaning given that term in § 4B1.2 (a) and Application Note 1 of the Commentary to § 4B1.2.”). Section 4B1.2(a) defines the phrase “crime of violence” as follows:

The term “crime of violence” means any offense under federal or state law, 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, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material. . . .

§ 4B1.2(a). Hereinafter, the court refers to subsection (1) of this definition as the “use of force” provision, and subsection (2) of this definition as the “enumerated offense” provision. The government suggests that defendant’s prior AWDWISI conviction qualifies as a crime of violence either under the use of force provision or as an enumerated offense of aggravated assault. The court addresses each in turn.

With respect to the use of force provision, the Supreme Court, interpreting the identically worded provision in 18 U.S.C. §924(e)(2)(B)(I), has held that “[u]se of physical force” against another requires “a higher degree of intent than negligent or merely accidental conduct.” Leocal v.

Ashcroft, 543 U.S. 1, 9 (2004). Likewise, the Fourth Circuit has held that mere “[r]ecklessness, like negligence, is not enough to support a determination that a crime is a ‘crime of violence.’” United States v. Vinson, 805 F.3d 120, 125 (4th Cir. 2015) (quotations omitted); see also United States v. Travis, 149 F. Supp. 3d 596, 599 (E.D.N.C. 2016) (“defendant must have purposefully or knowingly applied the requisite force against his victim; negligently or recklessly applied force falls outside the scope of the ‘use of physical force’ provision”). In addition, “the phrase ‘physical force’ means violent force – that is, force capable of causing physical pain or injury to another person.” Johnson v. United States, 559 U.S. 133, 140 (2010).

This court previously has held that the offense of AWDWISI does not meet the threshold intent required to qualify as a crime of violence under the use of force clause. See United States v. Geddie, 125 F. Supp. 3d 592, 599-601 (E.D.N.C. 2015) (holding that N.C. Gen. Stat. § 14-32(b), is not a violent felony under the ACCA, because such offense lacks a specific intent element, and requires only “culpable or criminal negligence” for a conviction). Absent binding or persuasive authority to the contrary, the court continues to adhere to its ruling in Geddie on this issue. Therefore, AWDWISI does not qualify as a crime of violence under the use of force clause of § 4B1.2(a)(1).

With respect to the enumerated offense of “aggravated assault,” the Fourth Circuit has held that the generic “aggravated assault” offense requires more than a mens rea of recklessness. See United States v. Barcenas-Yanez, 826 F.3d 752, 756 (4th Cir. 2016) (interpreting enumerated offense of “aggravated assault” as appearing in the definition of “crime of violence” in § 2L1.2 cmt. n. 1(B)(iii), which is identical to the operative language in § 4B1.2(a)). Thus, the court’s ruling in Geddie again forecloses application of the enumerated offense provision to AWDWISI. As such,

AWDWISI does not qualify as a crime of violence under the enumerated offense provision of § 4B1.2(a)(2).

The government suggests that AWDWISI is a crime of violence under the use of force provision, based upon the Fourth Circuit's decision in United States v. Orozco, 579 Fed. App'x. 172 (4th Cir. 2014). There, the court concluded without analysis, and upon counsel's concession, that North Carolina "assault with a deadly weapon inflicting serious bodily injury" under N.C. Gen. Stat. § 14-32 (which includes AWDWISI), qualifies as a crime of violence under the analogous use of force clause in 18 U.S.C. § 16(a). Because Orozco includes no analysis at all, much less discussion of the authorities discussed above, including the subsequent opinion in Vinson, 805 F.3d at 125, the court does not find it persuasive to the instant analysis.

The government also suggests that AWDWISI is a crime of violence on the basis of this court's decision in Hakeem Johnson, 2016 WL 7168064. In Hakeem Johnson, however, the court did not address application of AWDWISI under the use of force provision, and the court noted that AWDWISI may not qualify as a crime of violence under the enumerated offenses provision, in light of Barcenas-Yanez, 826 F.3d at 756. See 2016 WL 7168064 at * 2, n.3. Instead, the court concluded that, applying the 2013 version of the guidelines, AWDWISI qualifies as a crime of violence under the "residual clause" in effect in 2013. Id. at *2.

The court's determination in Hakeem Johnson to apply the 2013 version of the guidelines was in error. Because Hakeem Johnson was sentenced in December 2016, and the prior version of the guidelines containing the residual clause was less favorable to him with respect to his AWDWISI prior offense, the court should have applied the 2016 version of the guidelines. See U.S.S.G. § 1B1.11; see id. comment. (backg'd) (noting that prior guideline version should apply only where

the new version “provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense”) (quoting Peugh v. United States, 133 S.Ct. 2072, 2078 (2013)). As noted above, there is no basis to find AWDWISI as a crime of violence under the current 2016 version of the guidelines. As a result, the court rejects that erroneous portion of Hakeem Johnson pertaining to classification of AWDWISI as a crime of violence for purposes of determining the advisory guidelines range. See 2016 WL 7168064 *2.

In sum, the court applies the 2016 version of the guidelines because it is more favorable to defendant based upon the analysis above. While AWDWISI properly still qualifies as a crime of violence for defendants sentenced prior to August 1, 2016, it will not qualify for the instant defendant or for any defendants sentenced in this court going forward, absent future persuasive or controlling authority to the contrary.

CONCLUSION

For the foregoing reasons, the court SUSTAINS defendant’s objection to counting his prior conviction for AWDWISI as a crime of violence for purposes of determining base offense level under U.S.S.G. §2K2.1(a).

SO ORDERED, this the 7th day of April, 2017.


LOUISE W. FLANAGAN
United States District Judge

Appendix C

United States v. Kedrick Brown

Criminal Action No. 09-358 (EGS), Civil Action No. 16-1186 (EGS)

Memorandum Opinion

Of the United States District Court for the District of Columbia

Filed April 21, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal Action No. 09-358 (EGS)
	)	
KEDRICK BROWN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Pending before the court is defendant Kedrick Brown's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 in light of the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Welch v. United States*, 136 S. Ct. 1257 (2016). Upon consideration of Mr. Brown's motion, the response and reply thereto, the relevant law, and for the reasons discussed below, the Court **GRANTS** Mr. Brown's motion and will schedule a resentencing.

I. Background

On March 2, 2010, Mr. Brown pleaded guilty to one count of possession of a firearm by a prior convicted felon, in violation of 18 U.S.C. § 922(g)(1). Plea Agreement, ECF No. 18. Generally a defendant convicted of a violation of 18 U.S.C. § 922(g) is subject to a maximum of 10 years imprisonment, 18 U.S.C. § 924(a)(2), but under the Armed Career Criminal Act ("ACCA"), a defendant convicted of a violation of 18 U.S.C. § 922(g) is

subject to a mandatory minimum of 15 years imprisonment as an armed career criminal if the sentencing court determines that the defendant has three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). Based on three prior convictions—two "serious drug offense" convictions in the District of Columbia, and one conviction in North Carolina for assault with a deadly weapon with intent to kill ("AWDWIK") under N.C. Gen. Stat. § 14-32(c), Presentence Investigation Report ("PSR"), ECF No. 22 ¶¶ 25-26, 28—at his sentencing on July 29, 2010 the Court accepted the agreement of the parties that Mr. Brown was an armed career criminal and thus subject to a mandatory minimum of 15 years imprisonment. Sentencing Hrg. Tr., ECF No. 40 at 3:3-7, 5:15-20, 8:9-13, 12:16-19. The Court sentenced him to that mandatory minimum term. *Id.* at 8:9-13; Judgment, ECF No. 30. On August 2, 2010, Mr. Brown filed a notice of appeal, Notice of Appeal, ECF No. 28, and on April 19, 2011, the D.C. Circuit dismissed Mr. Brown's appeal. Order, ECF No. 35.

ACCA defines a "violent felony" as any felony that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) "is burglary, arson, or extortion, [or] involves use of explosives"; or (3) "otherwise involves conduct that presents a serious potential

risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). “These are known respectively as the ‘elements clause,’ the ‘enumerated clause,’ and the ‘residual clause.’” *United States v. Booker*, Nos. 04-49, 16-1107, 2017 WL 829094, at *2 (D.D.C. Mar. 2, 2017). In *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (hereinafter “*Johnson* (2015)”), the Supreme Court held that the residual clause is unconstitutionally vague and violates due process. The Supreme Court then held in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) that the holding in *Johnson* (2015) announced a new, substantive constitutional rule that applied retroactively to cases on collateral review. On June 2, 2016, the Chief Judge for the United States District Court for the District of Columbia issued a Standing Order appointing “the Office of the Federal Public Defender for the District of Columbia to represent any defendant previously determined to have been entitled to appointment of counsel, or who is now indigent, to determine whether that defendant may qualify to seek to vacate a conviction or to seek a reduction of sentence and to present any motions to vacate a conviction and/or for reduction of sentence in accordance with *Johnson* [(2015)] and *Welch*.”

Pursuant to the procedures set forth in that Standing Order, on June 20, 2016 Mr. Brown, through the Federal Public

Defender, filed an abridged § 2255 motion—his first—to vacate, set aside, or correct his sentence on the basis of *Johnson* (2015), see Def.'s Abridged Mot., ECF No. 41, and on October 26, 2016 he filed a supplemental motion fully briefing the issues presented in the earlier-filed abridged motion. See Def.'s Suppl. Mot., ECF No. 43. On December 30, 2016 the government filed its opposition to Mr. Brown's § 2255 motion, see Gov't's Opp., ECF No. 45, and on February 16, 2017 Mr. Brown filed his reply. See Def.'s Reply, ECF No. 50. Mr. Brown's § 2255 motion is now ripe and ready for the Court's adjudication.

II. Analysis

A federal prisoner may file a motion to vacate, set aside, or correct a sentence that "was imposed in violation of the Constitution or laws of the United States . . . [or] was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Mr. Brown argues that he no longer qualifies as an armed career criminal because his prior conviction for North Carolina AWDWIK no longer qualifies as a "violent felony." Def.'s Suppl. Mot., ECF No. 43 at 2. That is because, Mr. Johnson argues, the far-reaching residual clause—which almost certainly would have categorized North Carolina AWDWIK as a "violent felony"—no longer applies after *Johnson* (2015), and North Carolina AWDWIK does not qualify

as a "violent felony" under ACCA's still-valid enumerated and elements clauses. *Id.* With only two remaining ACCA predicate convictions—the two District of Columbia drug offenses that qualify as "serious drug offenses"—Mr. Brown asserts that he can no longer be deemed an armed career criminal. *Id.* at 7-8; see 18 U.S.C. § 924(e)(1) (requiring three prior "violent felony" or "serious drug offense" convictions). If Mr. Brown is no longer an armed career criminal, then his current 15-year term of imprisonment is in excess of the applicable 10-year statutory maximum imposed by 18 U.S.C. § 924(a)(2). See Def.'s Suppl. Mot., ECF No. 43 at 6. If the Court agrees with Mr. Brown, it "shall . . . resentence him." 28 U.S.C. § 2255(b).

In response to Mr. Brown, the government argues that this Court should not even reach the merits of his § 2255 claim because, the government maintains, Mr. Brown's § 2255 claim is untimely, Gov't's Opp., ECF No. 45 at 8-10, and that claim has been procedurally defaulted. *Id.* at 10-12. If the Court does reach the merits, the government argues that North Carolina AWDWIK is a "violent felony" under ACCA's still-valid elements clause, so Mr. Brown remains an armed career criminal subject to ACCA's 15-year mandatory minimum sentence. *Id.* at 12-14.

The Court will first address the government's statute of limitations and procedural default arguments. Finding those

arguments unavailing, the Court will proceed to a consideration of the merits of Mr. Brown's § 2255 claim. For the reasons discussed below, the Court ultimately determines that Mr. Brown is entitled to the relief that he seeks.

A. Statute of Limitations

There is a one-year statute of limitations applicable to § 2255 motions. 28 U.S.C. § 2255(f). The limitation period runs from the latest of four statutorily-specified dates, including, as relevant here, "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." *Id.* § 2255(f)(3). The government concedes that "*Johnson* (2015) triggered the exception to the one-year statute of limitations set forth in 28 U.S.C. § 2255(f)(3)," but it argues that Mr. Brown "has not shown that the claim in his § 2255 motion is in fact predicated on *Johnson* (2015)." Gov't's Opp., ECF No. 45 at 8-9. Instead of being based on *Johnson* (2015), the government maintains that the claim in Mr. Brown's § 2255 motion is predicated on *Curtis Johnson v. United States*, 559 U.S. 133 (2010) (hereinafter "*Johnson* (2010)") and is thus untimely. *Id.* at 9-10. In *Johnson* (2010), the Supreme Court examined ACCA's elements clause—not the residual clause that was at issue in

Johnson (2015)—and held that in the elements clause “the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.” 559 U.S. at 140. The government makes two arguments to support its view that Mr. Brown’s motion is based on *Johnson* (2010), not *Johnson* (2015), and is thus barred by § 2255(f)’s one-year limitation period. Neither argument is persuasive.

First, the government argues that Mr. Brown has the burden of showing that this Court relied upon ACCA’s residual clause, rather than the elements clause, when it determined that his prior conviction for North Carolina AWDWIK qualified as an ACCA “violent felony.” Gov’t’s Opp., ECF No. 45 at 9. The government’s theory seems to be that if Mr. Brown does not carry that burden, then the Court must conclude that it did not rely upon the residual clause and thus must conclude that Mr. Brown is not asserting a claim based on the ruling in *Johnson* (2015) that the residual clause is unconstitutionally vague. See *id.*

Although two panels of the Eleventh Circuit have suggested that it is the petitioner’s burden to establish that the sentencing court relied upon the residual clause, see *In re Moore*, 830 F.3d 1268, 1273 (11th Cir. 2016); *In re Hires*, 825 F.3d 1297, 1299 (11th Cir. 2016), a “subsequent panel of the Eleventh Circuit and numerous district courts . . . have

rejected that same argument.” *Booker*, 2017 WL 829094, at *4 (citing *In re Chance*, 831 F.3d 1335, 1340–41 (11th Cir. 2016); *United States v. Britto*, No. 04–143, 2017 WL 515007, at *1–2 (N.D. Okla. Feb. 8, 2017); *United States v. Mims*, Nos. 05–20079–01, 16–2332, 2017 WL 477091, at *3 (D. Kan. Feb. 6, 2017); *Shabazz v. United States*, No. 16–1083, 2017 WL 27394, at *5 (D. Conn. Jan. 3, 2017); *Diaz v. United States*, Nos. 16–323, 11–381, 2016 WL 4524785, at *5 (W.D.N.Y. Aug. 30, 2016)). Thus, a majority of courts that have considered the issue “have held that—when unclear on which ACCA clause the sentencing judge rested a predicate conviction—the petitioner’s burden is to show only that the sentencing judge may have used the residual clause.” See *United States v. Winston*, No. 01–79, 2016 WL 4940211, at *6 (W.D. Va. Sept. 16, 2016) (collecting cases), *vacated on other grounds*, 850 F.3d 677 (4th Cir. 2017). This reduced burden makes sense for a number of reasons, including the fact that there was no practical reason for judges to identify whether they were relying upon the elements or residual clause prior to June 26, 2015, when the Supreme Court decided in *Johnson* (2015) that the residual clause was void for vagueness, because “[p]rior convictions that were not violent felonies under the elements clause often fell under the residual clause.” *Booker*, 2017 WL 829094, at *3 (citing *United States v. Redrick*,

841 F.3d 478, 480 (D.C. Cir. 2016)). Accordingly, this Court adopts the majority position taken by courts that have addressed this issue and only requires that Mr. Brown demonstrate that this Court at sentencing *may* have relied upon the residual clause. Mr. Brown has met that burden. See Def.'s Reply, ECF No. 50 at 7 (explaining that "[t]he record is certainly unclear in Mr. Brown's case").

Second, the government argues that the claim in Mr. Brown's § 2255 motion is grounded in *Johnson* (2010) rather than *Johnson* (2015) because the "bulk of [Mr. Brown's] motion is devoted to arguing that AWDWIK does not qualify as a violent felony under the *elements clause* because it can be committed without the use of violent physical force as defined in *Johnson* (2010)." Gov't's Opp., ECF No. 45 at 10. Because Mr. Brown's argument relies on precedent "over a year old," the government asserts that Mr. Brown's claim is untimely under § 2255(f). *Id.*

But, as other courts have adequately explained, even if an argument "engages with the [*Johnson* (2010)] holding, the availability of that argument . . . is wholly a product of the new rule announced in [*Johnson* (2015)]." *Shabazz*, 2017 WL 27394, at *6. Before the new rule announced in *Johnson* (2015), Mr. Brown "would not have had a viable challenge to his predicate [North Carolina AWDWIK] conviction[] because the [r]esidual

clause would have picked up wherever the [e]lements clause left off." *Id.* In other words, because Mr. Brown's North Carolina AWDWIK conviction almost certainly would have qualified as an ACCA predicate under the residual clause, it "is only as a result of [*Johnson* (2015)'s] voiding of the residual clause that [Mr. Brown] could reasonably argue" that North Carolina AWDWIK is not a "violent felony" under the still-valid elements clause and thus "argue that he is no longer eligible for the ACCA enhancement." *Diaz*, 2016 WL 4524785, at *5 (internal quotation marks omitted). That Mr. Brown necessarily relies on current precedent, including *Johnson* (2010), interpreting ACCA and the elements clause to demonstrate that his North Carolina AWDWIK conviction is not a "violent felony" under the elements clause thus "does not convert his *Johnson* [(2015)] motion into a habeas motion based on older cases." *Booker*, 2017 WL 829094, at *4.

Thus, contrary to the government's arguments otherwise, Mr. Brown's § 2255 motion is predicated on *Johnson* (2015) and, accordingly, that motion is timely.

B. Procedural Default

"The procedural default rule generally precludes consideration of an argument made on collateral review that was not made on direct appeal, unless the defendant shows cause and prejudice." *United States v. Hughes*, 514 F.3d 15, 17 (D.C. Cir.

2008). The government argues that Mr. Brown "never argued that the ACCA's residual clause was unconstitutionally vague or that AWDWIK did not qualify as a violent felony under the elements clause," Gov't's Opp., ECF No. 45 at 10, and that he cannot establish the cause and prejudice required to excuse his failure to make these arguments on direct appeal. *Id.* at 10-12.

The government's procedural default argument is unavailing because Mr. Brown has demonstrated both cause and prejudice to excuse any default. "[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim" *Reed v. Ross*, 468 U.S. 1, 16 (1984). Well before Mr. Brown was sentenced on July 29, 2010, the Supreme Court, in *James v. United States*, 550 U.S. 192 (2007), had already "rejected arguments made in dissent that the residual clause was void for vagueness." *Redrick*, 841 F.3d at 481 n.4. Thus, at the time of Mr. Brown's sentencing and on his direct appeal "it is fair to say that no one . . . could reasonably have anticipated *Johnson* [(2015)]," *id.* at 480, and, consequently, "[u]ntil the Supreme Court announced its new rule in *Johnson* [(2015)], [Mr. Brown] did not have a reasonable basis upon which to challenge the constitutionality of ACCA's residual clause." *Booker*, 2017 WL 829094, at *5 (internal quotation marks omitted). Without the

availability of the basis upon which to challenge the constitutionality of the broad-sweeping residual clause, see *Redrick*, 841 F.3d at 480, Mr. Johnson would have had no reason to argue that his North Carolina AWDWIK conviction was not a "violent felony" under the elements clause. See *Shabazz*, 2017 WL 27394, at *6. Thus it would have been futile for Mr. Brown to have argued on direct appeal that "ACCA's residual clause was unconstitutionally vague" and that "AWDWIK did not qualify as a violent felony under the elements clause." See Gov't's Opp., ECF No. 45 at 10. Because of this futility, Mr. Brown has demonstrated cause.

Mr. Brown has also demonstrated prejudice. To establish prejudice, Mr. Brown must demonstrate that "there is a reasonable probability that, but for the errors, the result of the proceeding would have been different." *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003) (internal quotation marks and alteration omitted). "[T]he possibility of a sentence reduction if [Mr. Brown] is no longer ACCA-eligible establishes prejudice." *United States v. Cruz*, No. 05-30044, 2017 WL 603176, at *1 (D. Mass. Feb. 14, 2017); see also *United States v. Bryant*, No. 12-62, 2017 WL 635498, at *5 (W.D. Va. Feb. 15, 2017) (explaining that an "alleged error" in sentencing is an "actual and substantial disadvantage sufficient to

establish prejudice"). Mr. Brown was sentenced to 15 years imprisonment upon this Court's finding that he was an armed career criminal. Def.'s Suppl. Mot., ECF No. 43 at 3. If the Court finds that, in light of *Johnson* (2015), Mr. Brown can no longer be deemed an armed career criminal, he will be subject to a maximum of 10 years imprisonment. *Id.* The possibility that Mr. Brown's sentence will be reduced by at least five years if this Court concludes that North Carolina AWDWIK is not a "violent felony" and, consequently, concludes that he is no longer an armed career criminal establishes prejudice.

Having concluded that Mr. Brown's § 2255 motion is timely and that he has demonstrated cause and prejudice sufficient to excuse any procedural default, the Court will proceed to the merits of his § 2255 claim.

C. Merits of Mr. Brown's § 2255 Motion

To determine whether a prior conviction under a state statute qualifies as a "violent felony" under ACCA, "courts use what has become known as the 'categorical approach.'" *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). This approach requires a court to "ask simply whether the *elements* of the prior crime meet [ACCA's] definitions of a violent felony." *Redrick*, 841 F.3d at 482. "If a prior conviction is based on a statute that sweeps more broadly than this federal definition .

. . . such a conviction cannot qualify as a violent felony under the [elements] clause.” *Id.* When a prior conviction statute is “divisible” such that it lists alternative elements that, in effect, create several different crimes, a court is “to employ the ‘modified categorical approach’ to determine which alternative crime the defendant committed.” *Id.* This modified categorical approach permits a court to assess “‘a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, [the] defendant was convicted of.’” *Id.* (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)). The modified categorical approach is “simply a ‘tool’ to implement the categorical approach, not an exception to the elements-based approach.” *Id.* (quoting *Descamps*, 133 S. Ct. at 2285).

North Carolina AWDWIK under N.C. Gen. Stat. § 14-32(c) consists of a single, indivisible set of elements: “(1) an assault; (2) with a deadly weapon; (3) with the intent to kill.” *State v. Garris*, 663 S.E.2d 340, 349 (N.C. Ct. App. 2008) (internal quotation marks and alteration omitted). As explained above, following *Johnson* (2015)’s invalidation of the residual clause, a prior conviction only qualifies as an ACCA “violent felony” if it falls within the still-valid enumerated or elements clauses. There is no dispute that North Carolina AWDWIK

does not fall within the offenses captured by the enumerated clause. See 18 U.S.C. § 924(e)(2)(B)(ii) (describing burglary, arson, extortion, and use of explosives). The dispute thus narrows to whether North Carolina AWDWIK qualifies as a "violent felony" under the elements clause.

Mr. Brown argues that North Carolina AWDWIK does not qualify as a "violent felony" under the elements clause because it does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. § 924(e)(2)(B)(i). According to Mr. Brown, North Carolina AWDWIK lacks this element for two independent reasons. First, under *Johnson* (2010), for a crime to be a "violent felony" under the elements clause it must require "physical force," which is "'violent force'—that is, force 'capable of causing physical pain or injury to another person.'" Def.'s Suppl. Mot., ECF No. 43 at 11 (quoting 559 U.S. at 140). Mr. Brown argues that a defendant can be convicted of North Carolina AWDWIK even in the absence of the "violent force" required by *Johnson* (2010), such as when a defendant uses poison in an attempt to kill someone. *Id.* at 13 (citing *State v. Jones*, 283 S.E.2d 546, 547 (N.C. Ct. App. 1981)). Second, Mr. Brown argues that in order to be a "violent felony" under the elements clause, a crime must require the intentional or purposeful "use,

attempted use, or threatened use" of physical force, not just the reckless or negligent "use, attempted use, or threatened use" of physical force. Def.'s Reply, ECF No. 50 at 27-35. Because a conviction for North Carolina AWDWIK can be sustained upon a finding of just culpable or criminal negligence, such a conviction, Mr. Brown maintains, cannot qualify as a "violent felony" conviction. *Id.* at 35-37.¹

The government argues that Mr. Brown's first argument—that North Carolina AWDWIK cannot be a "violent felony" under the elements clause because it does not require the "violent force" described by the Supreme Court in *Johnson* (2010)—is foreclosed by *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016). Gov't's Opp., ECF No. 45 at 12-13. There, the D.C. Circuit concluded that Maryland armed robbery—a crime that requires "the use of a dangerous or deadly weapon"—"contains 'as an

¹ Mr. Brown raised this mens rea argument for the first time in his reply. "Generally, new arguments raised for the first time in reply may be disregarded due to concern that the opposing party would lose an opportunity to respond." *Caul v. U.S. Capitol Police*, No. 15-1243, 2016 WL 2962194, at *12 n.6 (D.D.C. May 19, 2016). The Court will not disregard the argument raised for the first time in reply here because Mr. Brown indicated that he only became aware of the mens rea argument after his supplemental motion was filed; he notified the government of his new argument; and he made clear that he does not oppose any request by the government to respond to the new argument. See Def.'s Reply, ECF No. 50 at 24 n.9. Accordingly, and particularly because of the notice provided to the government, the Court is confident that the government has not unfairly lost an opportunity to respond and, thus, will not disregard the mens rea argument made for the first time in reply.

element the use, attempted use, or threatened use of physical force against the person of another,'" and, accordingly, counts as an ACCA "violent felony." 841 F.3d at 484. The court explained that Maryland armed robbery's "element of 'use' of a dangerous or deadly weapon supplies at minimum a 'threat' of physical force against the person of another," and explained that "because the means employed is a 'dangerous or deadly weapon,' the required degree of force—that is, 'violent force'—is present." *Id.*

At first blush, it does seem like the government is correct that *Redrick* forecloses the conclusion that North Carolina AWDWIK does not require the "violent force" described by *Johnson* (2010). It would seem to be the case that North Carolina AWDWIK's element of assault "with a deadly weapon," just like Maryland armed robbery's element of use of a "dangerous or deadly weapon," includes "the required degree of force—that is, 'violent force.'" See *id.*

But that first impression is deceiving. After explaining that Maryland armed robbery's element of use of a "dangerous or deadly weapon" includes the "required degree of force" of violent force, the *Redrick* court explained that "[i]n that respect our case is different than a recent Ninth Circuit decision, *United States v. Parnell*, 818 F.3d 974 (9th Cir.

2016), holding that a prior Massachusetts armed robbery conviction was not a violent felony under the [elements] clause." *Id.* The court explained that the cases were different because "Massachusetts armed robbery does not require 'use' of the dangerous or deadly weapon: the victim does not even need to be aware of the presence of the weapon." *Id.* In drawing this distinction, the *Redrick* court thus indicated that if a conviction for a crime that has an element involving a "dangerous or deadly weapon" can be obtained even in the absence of the victim's awareness of the weapon, then that crime does not necessarily require the "violent force" that *Johnson* (2010) requires of a "violent felony" under the elements clause.

A defendant can be convicted of North Carolina AWDWIK even when the victim is not aware of the presence of the weapon: Mr. Brown points to a case where a defendant was convicted of North Carolina AWDWIK based on that defendant's attempts to kill his wife by secretly poisoning her. Def.'s Suppl. Mot., ECF No. 43 at 13 (citing *State v. Jones*, 283 S.E.2d 546, 547 (N.C. Ct. App. 1981)). Poisoning is the quintessential sort of criminal activity where "the victim does not even need to be aware of the presence of the weapon." See *Redrick*, 841 F.3d at 484. Accordingly, North Carolina AWDWIK does not categorically require "violent force." Consequently, Mr. Brown's North

Carolina AWDWIK conviction does not qualify as an ACCA "violent felony."

To be sure, the *Redrick* court did consider and reject the argument "that even if [Maryland armed robbery] includes the dangerous or deadly weapon component as an element, it still sweeps too broadly, because a weapon such as poison, an 'open flame,' or 'lethal bacteria' could be used and those dangerous weapons would not supply the requisite 'physical force against the person of another.'" *Id.* at 484. But neither of the *Redrick* court's bases for rejecting this argument directs this Court to abandon its conclusion that North Carolina AWDWIK, unlike Maryland armed robbery, does not require "violent force" and thus is not a "violent felony."

First, the *Redrick* court stated that it "doubt[ed] that these weapons [referring to poison, an open flame, and lethal bacteria] could be administered without at least some level of physical force" and supported that statement by citing *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014) for the proposition that "poison and other 'indirect' causes of physical harm require common-law 'force.'" *Id.* But this Court does not read the *Redrick* court's statement here as a holding that common-law force meets the *Johnson* (2010) threshold for "violent force" precisely because the Supreme Court explained in

Castleman that in *Johnson* (2010) the Court “declined to read the common-law meaning of ‘force’ into ACCA’s definition of a ‘violent felony.’” 134 S. Ct. at 1410. Thus the Supreme Court in *Castleman* reiterated and reaffirmed—and did not alter—its holding from *Johnson* (2010) that in ACCA “the phrase physical force must mea[n] violent force,” not common-law force. *Id.* (internal quotation marks omitted) (quoting *Johnson* (2010), 559 U.S. at 140). Accordingly, this Court takes the *Redrick* court’s statement that poison and other indirect causes of physical harm “could [not] be administered without at least some level of physical force” as an observation that common-law force is not absent when poison and other indirect causes of harm are used as a crime’s “dangerous or deadly weapon” rather than as a holding that in this Circuit common-law force can be equated with *Johnson* (2010)-style “violent force.” Understood properly in this manner, the *Redrick* court’s statement about “some level of physical force” does not require this Court to conclude that North Carolina AWDWIK—which can be committed through the secret use of poison—is a “violent felony.”

Second, the *Redrick* court stated that the hypotheticals concerning poison, an open flame, and lethal bacteria in the context of Maryland armed robbery were “too farfetched” to give it any pause. 841 F.3d at 484-85. The court explained that the

Supreme Court “has cautioned against excessive ‘legal imagination,’” *id.* (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013)), and thus in “determining whether a state statute qualifies as a violent felony, we focus on ‘realistic probabilities,’ not ‘theoretical possibilities’ that Maryland ‘would apply its law to conduct that falls outside’ the [elements] clause.” *Id.* (alterations omitted) (citing *Duenas-Alvarez*, 549 U.S. at 193). Accordingly, because it had been pointed to no Maryland case in which a Maryland armed robbery conviction had actually been obtained based on the use of poison, an open flame, or lethal bacteria, the *Redrick* court would not contemplate concluding that Maryland armed robbery did not require “violent force.” *Id.* In the context of North Carolina AWDWIK, however, a conviction based on secret poisoning is hardly a figment of the legal imagination. As Mr. Brown has demonstrated, such a conviction is grounded in a realistic rather than a theoretical possibility: At least one North Carolina AWDWIK conviction has been obtained based on secret poisoning. See Def.’s Suppl. Mot., ECF No. 43 at 13 (citing *State v. Jones*, 283 S.E.2d 546, 547 (N.C. Ct. App. 1981)). Thus, under the categorical approach, North Carolina AWDWIK—unlike

Maryland armed robbery—does not require “violent force” and, accordingly, does not qualify as an ACCA “violent felony.”

In any event, even if this Court has misunderstood *Redrick*, Mr. Brown’s alternative argument—that in order to be a “violent felony” under the elements clause, a crime must require the intentional or purposeful “use, attempted use, or threatened use” of physical force and North Carolina AWDWIK merely requires culpable or criminal negligence—demands the conclusion that North Carolina AWDWIK is not a “violent felony” under the elements clause. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Supreme Court interpreted 18 U.S.C. § 16, which is in relevant part identical to ACCA’s elements clause, and concluded that the “key phrase in § 16(a)—the ‘use . . . of physical force against the person or property of another’—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.” 543 U.S. at 9. Although the Court expressly indicated that it was not deciding whether a crime that merely requires reckless conduct would be sufficient under § 16(a), *id.* at 13, courts have appropriately extended *Leocal* to conclude that a crime must require intentional or purposeful conduct, not just reckless or negligent conduct, to qualify as a “violent felony” under ACCA’s elements clause. Indeed, “most decisions to address the question have found that a conviction that requires a mens

rea of only recklessness does not satisfy ACCA's [elements] clause." *Bennett v. United States*, Nos. 94-11, 16-251, 2016 WL 3676145, at *3 (D. Me. July 6, 2016) (citing *Parnell*, 818 F.3d at 981 & n.5; *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015); *United States v. Holloway*, 630 F.3d 252, 261-62 (1st Cir. 2011); *United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011); *Cutshaw v. United States*, Nos. 09-70, 16-106, 2016 WL 3212269, at *2 (E.D. Tenn. June 7, 2016)). This Court adopts that prevailing approach: A crime for which a conviction can be obtained based on a showing of mere reckless or negligent conduct cannot be a "violent felony" under ACCA's elements clause.

The Supreme Court's recent ruling in *Voisine v. United States*, 136 S. Ct. 2272 (2016) does not require a contrary conclusion. There, the Court considered a statute that prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. 136 S. Ct. at 2276 (citing 18 U.S.C. § 922(g)(9)). A "misdemeanor crime of domestic violence" includes any misdemeanor that "'has, as an element, the use or attempted use of physical force.'" *Id.* (quoting 18 U.S.C. § 921(a)(33)(A)(ii)). The question before the Court was "whether misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the

statutory firearms ban.” *Id.* The Court held that they do, as it concluded that offenses requiring only a recklessness mens rea qualify as “misdemeanor crimes of domestic violence.” *Id.*

Even though the statutory language in § 921(a)(33)(A)(ii) at issue in *Voisine* largely mimics that of ACCA’s elements clause, compare ACCA, 18 U.S.C. § 924(e)(2)(B)(i) (“has as an element the use, attempted use, or threatened use of physical force against the person of another”), with 18 U.S.C. § 921(a)(33)(A)(ii) (“has, as an element, the use or attempted use of physical force”), this Court follows the lead of various other District Courts in concluding that that linguistic similarity should not mean that recklessness is a sufficient mens rea for purposes of ACCA’s elements clause. See, e.g., *United States v. Lattanzio*, No. 93-30017, 2017 WL 519241, at *5-6 (D. Mass. Feb. 8, 2017); *United States v. Sabetta*, Nos. 00-135, 00-142, 03-69, 04-50, 06-45, 12-8, 13-36, 2016 WL 6157454, at *8-9 (D.R.I. Oct. 24, 2016); *Bennett*, 2016 WL 3676145, at *3-4. Among the various well-reasoned justifications those courts have already articulated for not understanding *Voisine* to mean that recklessness is a sufficient mens rea in the context of ACCA’s elements clause, the Court finds particularly persuasive the fact that the “Supreme Court had previously defined terms that are used identically in the ACCA and the Misdemeanor

Domestic Violence Act to have different meanings.” *Sabetta*, 2016 WL 6157454, at *9. As explained above, in *Johnson* (2010) the Court held that the term “physical force” in ACCA means “violent force—that is, force capable of causing physical pain or injury to another person,” 559 U.S. at 140, but in *Castleman* the Court held that “Congress incorporated the common-law meaning of ‘force’—namely, offensive touching—in § 921(a)(33)(A)’s definition of a ‘misdemeanor crime of domestic violence.’” 134 S. Ct. at 1410. The primary reason for the difference between the holdings in *Johnson* (2010) and *Castleman* seems to be that the Supreme Court has concluded that “when Congress defines a misdemeanor, it intends a lower bar for culpability than when it defines a felony, even when it uses some of the same words to describe both types of offenses.” *Sabetta*, 2016 WL 6157454, at *9; see also *Bennett*, 2016 WL 3676145, at *3 (“[T]he logic and language of the Supreme Court’s 2014 decision in *Castleman* make clear that the statutory interpretation of § 921(a)(33)([A]) and § 924(e)(2)(B)(i) must be undertaken separately.”). Thus, “the lower mens rea sufficient for a predicate *misdemeanor* is not necessarily sufficient for a violent *felony*.” *Sabetta*, 2016 WL 6157454, at *9. Accordingly, even after *Voisine*, this Court concludes that the prevailing position that it has adopted—that

a crime that requires a mens rea of only recklessness or less does not satisfy ACCA's elements clause—should not be altered.²

Because a North Carolina AWDWIK conviction can be obtained by a mere showing of culpable or criminal negligence, it does not qualify as a "violent felony" under ACCA's elements clause. In *State v. Jones*, 538 S.E.2d 917 (N.C. 2000), the North Carolina Supreme Court explained that "culpable or criminal negligence may be used to satisfy the intent requisites for certain dangerous felonies," including North Carolina AWDWIK. 538 S.E.2d at 923. It further explained that "culpable or criminal negligence" is defined as "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.* (internal quotation marks omitted). Because the mens rea required for a North Carolina AWDWIK conviction is less than intent or

² The Eighth Circuit, in *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), concluded that, after *Voisine*, reckless conduct "constitutes a 'use' of force under the ACCA because the [elements] clauses in 18 U.S.C. § 921(a)(33)(A)(ii) and the ACCA both define qualifying predicate offenses as those involving the 'use . . . of physical force' against another." 836 F.3d at 956. This Court does not adopt the *Fogg* view because, as already explained, sheer linguistic similarity between the elements clauses of § 921(a)(33)(A)(ii) and ACCA does not adequately account for the appropriately differing treatment of those two similarly worded statutes that has been underscored by the Supreme Court's disparate holdings in *Johnson* (2010) and *Castleman*.

purpose—indeed, it is less than even recklessness, see *United States v. Peterson*, 629 F.3d 432, 437 (4th Cir. 2011) (“‘Thoughtless disregard,’ . . . is less than ‘conscious disregard,’ which is the definition of recklessness under the Model Penal Code.”)—that crime is not a “violent felony” under ACCA’s elements clause.

This Court thus parts ways with the District Court in *Jackson v. United States*, Nos. 07-110, 16-353, 2017 WL 455395 (E.D.N.C. Feb. 2, 2017), which held that because North Carolina AWDWIK has the element of “specific intent to kill,” that crime’s mens rea is sufficient for purposes of ACCA’s elements clause to qualify it as a “violent felony.” 2017 WL 455395, at *3. In a case decided by the same District Court the same day as *Jackson* that similarly concluded that North Carolina assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”) can qualify as an ACCA “violent felony” because of its element of specific intent, *Goins v. United States*, Nos. 10-107, 16-95, 2017 WL 455400, at *3 (E.D.N.C. Feb. 2, 2017), the District Court provided three reasons as to why it was of the view that the North Carolina Supreme Court’s statements in *Jones* were “inapposite”: (1) the statement in *Jones* concerning culpable or criminal negligence’s applicability to North Carolina AWDWIK and AWDWIKISI was dicta; (2) North

Carolina Supreme Court cases prior to *Jones* state unequivocally that AWDWIK and AWDWIKISI require specific intent to kill rather than carelessness, culpable negligence, or recklessness; and (3) in *Jones*, the North Carolina Supreme Court qualified its earlier statement in dicta by stating more specifically that AWDWIK and AWDWIKISI "have required *actual intent* on the part of the perpetrator." *Id.* at *4 (internal quotation marks omitted). Thus, the *Jackson-Goins* District Court is of the view that "*Jones* does not detract from the conclusion that [AWDWIK and] AWDWIKISI meet[] the mens rea requirements for a violent felony under the ACCA." *Id.*

This Court respectfully disagrees. First, that the North Carolina Supreme Court in *Jones* said in dicta that a North Carolina AWDWIK conviction requires only culpable or criminal negligence is of little moment, as dicta can be authoritative. *Cf. United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) ("[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.") (internal quotation marks omitted). Second, in light of the North Carolina Supreme Court's authoritative statement in *Jones*, this Court will not understand North Carolina AWDWIK's mens rea requirement in the manner it may have been understood prior to *Jones*. And third, the North Carolina

Supreme Court in *Jones* did not “qualif[y] its earlier statement in dicta.” See *Goins*, 2017 WL 455400, at *4. Instead, when the *Jones* Court stated that North Carolina AWDWIK “required actual intent on the part of the perpetrator,” it made clear that that greater mens rea of actual intent is required *only* when AWDWIK is serving as an underlying felony for purposes of the felony murder rule. 538 S.E.2d at 925 (“Although a showing of culpable negligence can satisfy the intent requirement for certain aforementioned crimes, [including AWDWIK,] it has not formed the basis of intent for a first-degree murder conviction.”). Thus, when North Carolina AWDWIK is charged as a stand-alone crime, a showing of culpable or criminal negligence is all that is required. Accordingly, North Carolina AWDWIK is not a “violent felony” under ACCA’s elements clause.

III. Conclusion

Because North Carolina AWDWIK is not a “violent felony” under ACCA, Mr. Brown no longer has the three prior convictions necessary for him to be designated an armed career criminal under ACCA. Accordingly, the 15-year term of imprisonment that he is currently serving pursuant to ACCA is in excess of the now-applicable statutory maximum of 10 years. Mr. Brown has thus demonstrated that he is serving a sentence that is in excess of the maximum authorized by law. Accordingly, the Court **GRANTS** Mr.

Brown's § 2255 motion to correct his sentence and will schedule his resentencing forthwith. An appropriate Order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
April 12, 2017