

No.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Appellee,

v.

ARTHUR CHARLES SMTH,

Appellant.

Appeal from the United States Circuit Court
for the Sixth Circuit
No. 16-6720

WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Sixth Circuit determined that North Carolina common law robbery qualifies as a predicate for application of the career offender enhancement under United States Sentencing Guideline (“U.S.S.G.”) 4B1.2. The questions presented are:

1. **WHETHER COMMON LAW ROBBERY, AS DEFINED UNDER NORTH CAROLINA LAW, IS A “VIOLENT FELONY” UNDER THE “RESIDUAL CLAUSE” OF THE CAREER OFFENDER GUIDELINE.**
2. **WHETHER *ALMENDAREZ-TORRES* AND ITS PROGENY SHOULD BE OVERRULED**

PARTIES TO THE PROCEEDINGS

All Parties are listed in the caption on the cover page.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
INDEX OF APPENDICES	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. FACTUAL BACKGROUND	2
B. PROCEEDINGS BELOW	4
REASONS FOR GRANTING THE PETITION	5
I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW, AND THE SIXTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT ON THE SAME IMPORTANT MATTER	5
II. COMMON LAW ROBBERY, AS DEFINED UNDER NORTH CAROLINA LAW, IN NOT A “VIOLENT FELONY” UNDER THE “RESIDUAL CLAUSE” OF THE CAREER OFFENDER GUIDELINE	5
A. A Court cannot rely on the residual clause to calculate the guideline range accurately	6
B. North Carolina common law robbery does not satisfy the residual clause	11

III.	ALMENDAREZ-TORRES AND ITS PROGENY SHOULD BE OVERRULED	17
A.	The constitutional holding of Almendarez-Torres--that it does not violate the Sixth Amendment to let a judge decide sentencing factors based on prior convictions— should no longer be good law	18
CONCLUSION.....		20

INDEX OF APPENDICES

APPENDIX A

First Judgment of the United States District Court, Eastern District of Tennessee
Entered October 4, 2013.

APPENDIX B

First Opinion of the United States Court of Appeals for the Sixth Circuit, Entered
September 16, 2014.

APPENDIX C

Memorandum Opinion from November 21, 2016.

APPENDIX D

Second Judgment of the United States District Court, Eastern District of Tennessee
Entered November 21, 2016.

APPENDIX E

Second Opinion of the United States Court of Appeals for the Sixth Circuit,
Entered February 7, 2018

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)	17
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	17, 18
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	18, 19
<i>Beckles v. United States</i> , __ S. Ct. __, 2017 WL 855781 (Mar. 6, 2017) (No. 15-8544)	5, 7, 8
<i>United States v. Begay</i> , 553 U.S. 137 (2008)	9, 11
<i>Descamps v. United States</i> , __ U.S. __, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)	11, 12, 13
<i>Gall v. United States</i> , 552 U.S. 38, 49 (2007)	9, 10
<i>In re Clayton</i> , 829 F.3d 1254 (11th Cir. 2016)	10
<i>Johnson v. United States</i> , -- U.S. --, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)	passim
<i>North Carolina v. Moore</i> , 279 N.C.455, (1971)	16
<i>Rex v. Donnally</i> , 1 Leach 193 (1779)	15
<i>Rex v. J. & E. Astley</i> , 2 East P.C. 729 (1792)	15
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	7, 8

<i>Shepard v. United States</i> , 544 U.S. 13, 125 S. Ct. 1254 (2005)	18, 19
<i>State v. Buckom</i> , 328 N.C. 313, 401 S.E.2d 362 (1991)	15
<i>State v. Chance</i> , 191 N.C.App. 252, 662 S.E.2d 405, 2008 WL 2415981 (N.C.Ct.App. June 17, 2008)	13
<i>State v. Divine</i> , 622 S.E.2d 523 (N.C. App. 2005)	12
<i>State v. Eldridge</i> , 197 N.C.App. 402, 677 S.E.2d 14 (N.C.Ct.App. June 2, 2009)	13
<i>State v. Hammonds</i> , 28 N.C. App. 583, 222 S.E.2d 4 (1976)	14
<i>State v. Henry</i> , 57 N.C. App. 168; 290 S.E.2d 775 (1982)	14
<i>State v. Lawrence</i> , 262 N.C. 162, 163, 136 S.E.2d 595 (1964)	11
<i>State v. Lawrence</i> , 262 N.C. 162, 136 S.E.2d 595 (1964)	15
<i>United States v. Matchett</i> , 837 F.3d 1118 (11th Cir. 2016)	10
<i>State v. Robertson</i> , 138 N.C.App. 506, 531 S.E.2d 490 (2000)	13
<i>State v. Sawyer</i> , 224 N.C. 61, 29 S.E.2d 34 (1944)	11
<i>State v. Smith</i> , 2011 N.C. App. LEXIS 250	7, 912, 14
<i>United States v. Carthorne</i> , 726 F.3d 503 (4th Cir. 2013)	8

<i>United States v. Chambers</i> , 555 U.S. 122 (2009)	9, 11
<i>United States v. Gardner</i> , 823 F.3d 793 (6 th Cir. 2016)	12
<i>United States v. James</i> , 550 U.S. 192 (2007)	9, 16
<i>United States v. Lee</i> , 821 F.3d 1124 (9 th Cir. 2016)	9, 10
<i>United States v. Matchett</i> , 837 F.3d 1118 (11 th Cir. 2016)	10
<i>United States v. McDonald</i> , 592 F.3d 808 (7 th Cir. 2010)	8
<i>United States v. Sykes</i> , 564 U.S. 1 (2011)	9
<i>United States v. Whitson</i> , 597 F.3d 1218 (11 th Cir. 2010)	8
<i>United States v. Williams</i> , 559 F.3d 1143 (10 th Cir. 2009)	8
Rules and Statutes	
8 U.S.C. § 1326	17
18 U.S.C. 924(e)	2
28 U.S.C. 1254(1)	1
Fed. R. Crim. P. 11	2
U.S.S.G. §4B1.1	1, 2, 4
U.S.S.G. §4B1.2	1, 2, 9
U.S.S.G. §4B1.2(a)(1)	3, 6
U.S.S.G. §4B1.2(a)(2)	3, 4, 11

Other Authorities

Wayne R. LaFave, Criminal Law, § 20.3(d)(2) (4th ed., student ed. 2003) § 20.3(d)(2)	15
N.C.P.I., Crim. 208.40	15, 16

PETITION FOR WRIT OF CERTIORARI

Arthur Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals Panel (App., *infra*, E) is reported at 881 F.3d 954 (6th Cir. 2018). The ruling of the district court (App., *infra*, D) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 7, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4B1.1 of the Federal Sentencing Guidelines states:

§4B1.1. PART B - CAREER OFFENDERS AND CRIMINAL LIVELIHOOD Career Offender

1. (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant 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) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2, defining crime of violence states:

§4B1.2. Definitions of Terms Used in Section 4B1.1

1. (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --
1. (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
2. (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.

STATEMENT OF THE CASE

A. Factual Background

Arthur Charles Smith was indicted for pharmacy robbery, brandishing a firearm during the commission of a felony and being a felon in possession of a firearm on January 15, 2013. After some deliberation, Mr. Smith entered a plea to the Indictment without the benefit of a plea agreement on April 23, 2013. During the Rule 11 plea colloquy, Mr. Smith stated that he believed there were issues with the application of the Armed Career Criminal Act and the career offender guideline.

After his change of plea, Mr. Smith's Presentence Report was released and probation agreed that he did not qualify for treatment under the Armed Career Criminal Act, 18 U.S.C. 924(e). However, probation recommended and the court found that he qualified for an enhanced guideline range of 262- 327 up from 194-221 pursuant to the career offender guideline §4B1.1 and §4B1.2. Mr. Smith objected to one of the two predicate offenses - a North Carolina conviction for common law

robbery entered pursuant to an *Alford* plea - that probation used to meet the career offender standard

At sentencing, the district court agreed with Mr. Smith that his conviction for common law robbery did not qualify as a predicate offense under U.S.S.G. §4B1.2(a)(1). However, the Court turned its attention to the U.S.S.G. §4B1.2(a)(2), the “otherwise clause.” The government presented no evidence that common law robbery, as a categorical matter, presents a serious potential risk of physical injury to another, and instead relied on the judge’s findings based on case law.

Mr. Smith disagreed with the court’s career offender analysis. The district court rejected Mr. Smith’s arguments finding that common law robbery, as defined in North Carolina, is a “violent felony” pursuant to the “otherwise clause.” The court applied the career offender guideline and found an enhanced guideline range of 262-327 months; 41 months above the top of the guideline range applicable absent the career offender enhancement.

The Sixth Circuit affirmed the district court’s ruling.

Subsequently, Mr. Smith filed Writ for Certiorari with the United States Supreme Court. The case was granted, vacated and remanded to the Sixth Circuit in light of *Johnson v. United States*, -- U.S. --, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). The Sixth Circuit then remanded the case to the district court for re-sentencing.

On remand, the district court determined that the North Carolina common law robbery qualifies as a crime of violence under the career offender guideline.

Mr. Smith timely appealed the decision and Judgment and the Sixth Circuit affirmed.

B. Proceedings Below

On April 23, 2013, Mr. Smith entered a plea to a three count Indictment without a plea agreement. At sentencing the district court found, over Mr. Smith's objection, that he qualified for sentencing enhancement pursuant to the otherwise clause of the career offender guideline, U.S.S.G. 4B1.2(a)(2). Judgment was entered on October 4, 2013, sentencing Mr. Smith to an increased sentence of 262 months, the low end of the federal sentencing guideline range pursuant to U.S.S.G. §4B1.1. On October 4, 2013, Mr. Smith timely appealed that Judgment.

The Sixth Circuit affirmed the lower court's ruling on September 16, 2014. This Court granted, vacated and remanded the case. The Sixth Circuit remanded the case to the district court for resentencing.

At resentencing, the district court determined that the North Carolina common law robbery qualifies as a predicate offense under the career offender guideline.

Mr. Smith timely appealed the decision and Judgment and the Sixth Circuit affirmed on February 7, 2018

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW, AND THE SIXTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT ON THE SAME IMPORTANT MATTER.

This case presents an important question of law – the application of the career offender guideline – and is presented under a current inter and intra-circuit split. Despite this Court’s holding in *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781 (Mar. 6, 2017) (No. 15-8544), that *Johnson* does not apply to the guidelines, there are multiple reasons why the North Carolina Common Law Robbery conviction here should not qualify as a predicate offense under the career offender guideline.

Here the Sixth Circuit relied on its’ previous holding in *Smith I*, 13-6322, to determine that North Carolina common law robbery is a crime of violence under the residual clause. Because it determined that common law robbery met that definition, it did not reach the question of whether it qualifies under the force or enumerated offense clause.

II. COMMON LAW ROBBERY, AS DEFINED UNDER NORTH CAROLINA LAW, IS NOT A “VIOLENT FELONY” UNDER THE “RESIDUAL CLAUSE” OF THE CAREER OFFENDER GUIDELINE.

Prior to the United States Supreme Court decision in *Johnson v. United States*, -- U.S. -- , 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), and the subsequent decision in *Beckles*, the district court agreed with the Appellant that his North Carolina conviction for common law robbery did not qualify as a career offender

predicate under §4B1.2(a)(1). However, the Sixth Circuit, in an issue of first impression, found that North Carolina common law robbery qualifies under the “otherwise” clause of the career offender guideline prior to this Court’s previous remand. Now, as then, we argue that NC common law robbery does not satisfy the otherwise clause of the career offender guidelines.

A. A Court cannot rely on the residual clause to calculate the guideline range accurately.

In this Court’s decision to hold that the residual clause under the advisory guidelines is not void for vagueness, overruling all courts of appeals but one, this Court gave no guidance on some serious problems that the lower courts must now confront. The residual clause, though not “void for vagueness,” is still impossible to interpret correctly, and the lower courts cannot rely on overruled case law to apply it.

The court below addressed this issue stating:

This wholesale attack on the residual clause must be rejected. *Beckles* recently affirmed the residual clause's validity, and we have since approved of several post-*Beckles* Guidelines calculations that relied on the residual clause. See *United States v. Patterson*, 853 F.3d 298, 305–06 (6th Cir. 2017); *United States v. Goodrich*, No. 16-1795, 2017 WL 4350896, at *2 (6th Cir. Oct. 2, 2017); *United States v. Jackson*, 704 Fed.Appx. 484, 488 (6th Cir. 2017). Indeed, as we recently noted, “post-*Beckles*, every decision issued by the Sixth Circuit involving this question has concluded that the residual clause can provide an alternative basis for affirmance.” *United States v. Johnson*, No. 16-2033, 2017 WL 5625720, at *2 n.2 (6th Cir. Nov. 22, 2017).

Smith I at 959. However, this Court made no such finding in *Beckles*. This Court held “only that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause,” *Beckles v. United States*, __ S. Ct. __, 2017 WL 855781, at *9 (2017), and only because “the advisory Guidelines do not fix the permissible range of sentences,” *id.* at *6. “That something is vague as a general matter,” Justice Kennedy explained, “does not necessarily mean that it is vague within the well-established legal meaning of that term.” *Id.* at *11 (Kennedy, J., concurring). In other words, the advisory guidelines’ residual clause is indeed hopelessly vague; it’s just not “void for vagueness” under the Due Process Clause.

Justice Sotomayor further explaining the issues with the residual clause in the constitution context stated in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207–08 (2018):

[The] residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a speculative hypothesis about the crime’s “ordinary case,” but provided no guidance on how to figure out what that ordinary case was. 576 U.S., at —, 135 S.Ct., at 2557. Compounding that uncertainty, ACCA’s residual clause layered an imprecise “serious potential risk” standard on top of the requisite “ordinary case” inquiry. The combination of “indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony,” *id.*, at —, 135 S.Ct., at 2558, resulted in “more unpredictability and arbitrariness than the Due Process Clause tolerates,” *id.*, at —, 135 S.Ct., at 2558.

This Court did not deny the inaccuracy of that “advice,” nor did it dispute Justice Sotomayor’s reminder that the guideline range must be calculated “correctly” and that it is impossible to correctly interpret the “inscrutably vague” residual clause. *See id.* at **15-16 (Sotomayor, J., concurring in the judgment).

Nor did *Beckles* change the fact that prior caselaw interpreting the residual clause has been overruled. The Court explained in *Johnson* that its efforts and those of the lower courts “to derive meaning from the residual clause” was a “failed enterprise,” and “could only be guesswork.” *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015); *id.* at 2558-60 (discussing its prior decisions interpreting the ACCA’s residual clause and lower court decisions interpreting the clause in the ACCA and the career offender guideline¹). The Court described its own four decisions interpreting the clause as “repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause that confirm its hopeless indeterminacy,” *id.* at 2558, and decisions of the courts of appeals as further proof that the residual clause was “nearly impossible to apply consistently,” *id.* 2560 (citation omitted). The Court concluded that there was “no reliable way” to “estimate the risk posed by a crime,” *id.* at 2557–58, or to determine “how much risk it takes for a crime to qualify as a violent felony,” *id.* at 2558.

¹ The Court analyzed four guidelines cases in reaching the conclusion that the residual clause is impossible to apply consistently. *See Johnson*, 135 S. Ct. at 2560 (analyzing *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013), *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010), *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010), and *United States v. Williams*, 559 F.3d 1143 (10th Cir. 2009)).

For these reasons, the Court expressly overruled *United States v. Sykes*, 564 U.S. 1 (2011), and *United States v. James*, 550 U.S. 192 (2007), and implicitly overruled *United States v. Begay*, 553 U.S. 137 (2008), *United States v. Chambers*, 555 U.S. 122 (2009), and lower court decisions relying on those decisions. *Johnson*, 135 S. Ct. at 2557-60. Before *Johnson*, the courts of appeals relied on the Supreme Court's decisions interpreting the ACCA's residual clause to interpret the identical residual clause in § 4B1.2. "In overturning these cases, *Johnson* necessarily overruled the [circuit] cases that relied on them." *United States v. Lee*, 821 F.3d 1124, 1132 (9th Cir. 2016) (Ikuta, J., dissenting).

The Sixth Circuit found:

However, we have already rejected this contention, explaining that *James*, "while no longer valid for analyzing the residual clause of the ACCA, [remains] good law for purposes of the Guidelines." *United States v. Goodson*, 700 Fed.Appx. 417, 423 (6th Cir. 2017). The fact that *Smith I* relied in part on *James*, see *Smith I*, 582 Fed.Appx. at 597–98, does not undermine the reasoning of that decision.

Smith I at 959.

Yet, district courts must "begin all sentencing proceedings by correctly calculating the Guidelines range," *Gall v. United States*, 552 U.S. 38, 49 (2007), and "improperly calculating" the Guidelines range is "significant procedural error," *id.* at 51. The residual clause is impossible to interpret correctly; it has no correct interpretation. See *Johnson*, 135 S. Ct. at 2558-60, 2562-63. To believe that while the residual clause and its' interpretation in one context is "hopelessly vague", while keeping those same precedents in place to interpret the identically vague – albeit, not constitutionally void – residual clause in the guidelines is pure legal fiction. Thus, it is procedural error and an abuse of discretion to calculate the guideline range based on an attempt to interpret the residual clause.

Moreover, the courts cannot look to prior caselaw to apply the residual clause. As several appellate judges recognized, courts cannot rely on cases expressly or implicitly overruled by this Court in *Johnson*. See *Lee*, 821 F.3d at 1131-32 (Ikuta, J., dissenting) (explaining that the Supreme Court had overruled its own decisions and “necessarily” overruled circuit decisions that had relied on them); *id.* at 1136 (“The one thing we cannot do . . . is rely on precedent that has been overruled and effectively rendered non-existent by the Supreme Court.”); *United States v. Matchett*, 837 F.3d 1118, 1142 (11th Cir. 2016) (Wilson, J., joined by Jill Pryor, J., dissenting from denial of rehearing en banc) (criticizing *Matchett*’s instruction to adhere to overruled decisions); *In re Clayton*, 829 F.3d 1254, 1262–63 (11th Cir. 2016) (Martin, J., joined by Jill Pryor, J., concurring in the result) (same).

In sum, applying the residual clause “could only be guesswork.” *Johnson*, 135 S. Ct. at 2560. A “district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall*, 552 U.S. at 49 (citation omitted), but this cannot be accomplished by relying on the “black hole of confusion” that is the residual clause. *Johnson*, 135 S. Ct. at 2562. Thus, Mr. Smith cannot qualify as a career offender using the residual clause.

B. North Carolina common law robbery does not satisfy the residual clause.

This Court expressly overruled *Sykes* and *James*, and implicitly overruled *Begay*, *Chambers*, and lower court decisions relying on those decisions. *Johnson*, 135 S. Ct. at 2557-60. With that in mind, the Court here is left without guidance as to how to interpret North Carolina common law robbery under the residual clause. Assuming that the old test applies, which it should not, the Court still erred in determining that North Carolina common law robbery meets the crime of violence definition through the residual clause.

United States Sentencing Guideline §4B1.2(a)(2) (“the residual clause,” “otherwise clause,” or “catch-all clause”) defines “crime of violence” to mean “any offense . . . [that] otherwise involves conduct that presents a serious risk of physical injury to another.”

North Carolina defines common law robbery as, “the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or *putting him in fear*.” *State v. Lawrence*, 262 N.C. 162, 163, 136 S.E.2d 595, 596-597 (1964)(emphasis added). “It is not necessary to prove both violence and putting in fear-proof of either is sufficient.” *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E.2d 34, 37 (1944).

After determining the definition of NC common law robbery, a court must look to the elements of the conviction as defined by the relevant statute—not to the particular facts underlying the conviction, see *Descamps v. United States*, —U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)—and compare those to the elements of

the crime described in the guideline's definition. The court below applied the traditional categorical approach², under which it looked only to the “definition of the state crime and the fact of conviction to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a violent felony. *See Descamps at 2283.*

“To determine whether a past conviction is for [a crime of violence],” courts can employ the “categorical approach,” in which they “compare the elements of the statute forming the basis of the defendant's conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.” *Descamps v. United States*, __ U.S. __, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). “The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.” *Ibid.*

Because North Carolina common law robbery encompasses a theft where an offender only uses *de minimus* force, *see United States v. Gardner*, 823 F.3d 793, 803-04 (6th Cir. 2016), North Carolina common law robbery is broader than generic robbery and does not qualify as a crime of violence. Additionally, North Carolina courts have determined that cases of “snatching” satisfy the common law robbery elements under North Carolina Law. *See e.g. State v. Smith*, 2011 N.C. App. LEXIS 250 (robbery conviction upheld in case involving no threat or actual force where defendant snatched purse which was laying on a table near the victim); *State v. Divine*, 622 S.E.2d 523 (N.C. App. 2005)(robbery conviction upheld

² However, if this Court determines a modified categorical approach is required, Mr. Smith’s conviction cannot qualify because it was entered as an Alford Plea.

for purse snatching); *but see State v. Robertson*, 138 N.C.App. 506, 509, 531 S.E.2d 490, 493 (2000). Therefore, North Carolina common law robbery is broader than generic robbery and may not be used under *Descamps*.

Even if this Court disagrees under *Descamps*, under North Carolina law, convictions for non-violent, non-forceful common law robberies are regularly prosecuted and upheld in the North Carolina state courts. Therefore, the North Carolina crime of common law robbery cannot be a career offender predicate under the force clause. Moreover, even when force is used or threatened, North Carolina law recognizes and permits that the force may be *de minimis*, and it is not necessarily the degree or kind of force that is required by United States Supreme Court precedent to trigger the ACCA's force clause.

The concept of "fear" under North Carolina robbery law is viewed expansively and is in no way tethered to the career offender's force clause jurisprudence. The North Carolina Court of Appeals has gone so far as to uphold a conviction where the victim's only "fear" during the course of a robbery was the fear of an unwanted touching. *See e.g., State v. Chance*, 191 N.C.App. 252, 662 S.E.2d 405, 2008 WL 2415981, at *3–4 (N.C.Ct.App. June 17, 2008) (unpublished)(defendant's act of pushing the victim's hand off of a carton of cigarettes was sufficient "actual force" to uphold a common law robbery conviction); *State v. Eldridge*, 197 N.C.App. 402, 677 S.E.2d 14 (N.C.Ct.App. June 2, 2009) (unpublished)(defendant pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television).

In the published opinion *State v. Henry*, 57 N.C. App. 168; 290 S.E.2d 775 (1982), the North Carolina Court of Appeals upheld a robbery conviction where a victim, who had previously been robbed by the defendant, testified that she gave the defendant money on a later occasion because “I was afraid he was going to touch me.” *See also State v. Smith*, 2011 N.C. App. LEXIS 250 (robbery conviction upheld in case involving no threat or actual force where defendant snatched purse which was laying on a table near the victim).

In another published opinion, *State v. Hammonds*, 28 N.C. App. 583, 585; 222 S.E.2d 4 (1976), the defendant entered a convenience store, stared at the clerk, and told her to open the register. Though the defendant used no force and made no threats of physical harm, the clerk testified that she gave him the money because she was afraid. The North Carolina Court of Appeals upheld the defendant’s conviction for common law robbery, holding that a perpetrator need not threaten imminent physical harm to satisfy the “by violence or putting in fear” element of common law robbery. In the words of the court, “Putting the victim in fear could be accomplished by means other than an actual ‘threatened immediate use of force.’” *Id.* The court went on to state: “Moreover, actual fear need not be strictly and precisely proved, since the law will presume fear if there appears to be just grounds for it. And the mere fact that the victim complied with the assailant’s demands is itself indicative of fear.” *Id.* at 584.

These broad, contemporary interpretations of common law robbery are consistent with the long-acknowledged understanding, at common law, that a

robbery could be committed through certain non-violent, non-forceful, non-physical threats. *See, e.g., Rex v. J. & E. Astley*, 2 East P.C. 729 (1792) (obtaining money under threat to raze victim's home sufficient to constitute robbery); *see also Rex v. Donnally*, 1 Leach 193 (1779); Wayne R. LaFave, *Criminal Law*, § 20.3(d)(2) (4th ed., student ed. 2003) § 20.3(d)(2) ("a mere threat, unaccompanied by physical force, to accuse the property owner of the crime of sodomy . . . was a sufficient threat for robbery").³

To further illustrate the point, North Carolina's "pattern jury instructions describe the elements for assault in a slightly different way than they describe the same elements in the instructions for common law robbery." *Id.* at 206. The "simple assault" pattern instructions include language to the effect that a defendant's "show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." N.C.P.I., Crim. 208.40. The pattern instructions on common law robbery, however, include as element six only "that the taking was by violence or by putting the person in fear." N.C.P.I., Crim. 217.10.

³ These historical precedents are important because they are the bedrock foundation of North Carolina's understanding of common law robbery. *See, e.g., State v. Lawrence*, 262 N.C. 162, 163, 136 S.E.2d 595, 597 (1964) ("Common law robbery has been repeatedly and consistently defined by this Court in accordance with the Blackstone definition.") (citations omitted). Moreover, "[t]he General Assembly of North Carolina has declared that so much of the common law as has not been abrogated or repealed by statute or become obsolete is in full force and effect in this state. N.C.G.S. § 4-1." *State v. Buckom*, 328 N.C. 313, 316, 401 S.E.2d 362, 364 (1991) (citations omitted). "The 'common law' referred to in N.C.G.S. § 4-1 is the common law of England as of the date of the signing of the Declaration of Independence." *Id.*

Thus, the assault pattern instruction is more descriptive in regard to the necessity that the victim have a *reasonable* fear of *immediate* bodily harm. *Id.* at 206 (emphasis added).

All this is to say that North Carolina's unremarkable view that robbery can be committed *without* the use or threatened use of physical force and that, if physical force *is* used, the degree of force employed is "immaterial", is deeply established both in the common law and in the state's case law.

Based on North Carolina's definition of common law robbery, fear may be exerted through external forces of fear not present at the scene of the robbery. For instance, fear for the safety of family members, fear of losing a job, fear of financial ruin, or other "menaces" or "other means" of inflicting fear do not pose a risk of purposeful, violent or aggressive conduct. Those instruments of inflicting fear on a person, while the taking may be from their presence, does not entail any threat or danger of physical violence at the scene of the taking.

While robbery is generally charged in a case involving immediate physical violence, North Carolina law allows for the robbery to involve acts other than fear of physical violence no matter how "slight". *See North Carolina v. Moore*, 279 N.C.455, (1971). Thus, it is more than a "theoretical possibility" that the statute covers conduct that does not present a serious potential risk of physical injury, North Carolina clearly states that common law robbery can be accomplished through the most remote fear, regardless of what the fear is based on. *See James* at 208; *See also Moore* at 204-205.

North Carolina common law robbery does not qualify as a career offender predicate. Wherefore, this Court should grant certiorari to decide this important question.

III. *ALMENDAREZ-TORRES* AND ITS PROGENY SHOULD BE OVERRULED

Mr. Smith acknowledges that current case law forecloses this argument but appeals to preserve his future ability to challenge the law in this area. Mr. Smith also submits that in addition to the argument below, the recent opinion in *Alleyne v. United States*, 133 S. Ct. 2151, 136 L. Ed. 2d 314 (2013) has called the issue of judge determined sentencing enhancements into question.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Supreme Court considered the felony and aggravated felony enhancements in subsections (b)(1) and (b)(2) of 8 U.S.C. § 1326. There were two holdings in the case. In the first holding, interpreting the statute, the Court determined that the proper interpretation of the statute--and the meaning Congress intended--was that the fact of the prior conviction is a "sentencing factor" to be found by a judge at sentencing, not a jury at trial. *See Almendarez-Torres*, 523 U.S. at 228-35. The second holding, called into question by subsequent decisions, was that such a statute is not unconstitutional; the Court held that it does not violate the Sixth Amendment to let a judge decide such "sentencing factors." *See Id.* at 239-47.

A. The constitutional holding of *Almendarez-Torres*—that it does not violate the Sixth Amendment to let a judge decide sentencing factors based on prior convictions—should no longer be good law.

The second holding, addressing the constitutional issue, has been severely undercut by the Supreme Court's subsequent decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005), and it should no longer be viewed as good law. First, the majority in *Apprendi*, which established the general rule that facts which increase the penalties for crimes must be submitted to a jury and proven beyond a reasonable doubt, questioned the validity of *Almendarez-Torres*. See *Id.* at 490. The Court acknowledged that "it is arguable that *Almendarez-Torres* was incorrectly decided, (footnote omitted) and that a logical application of our reasoning today should apply if the recidivist issue were contested," *Apprendi*, 530 U.S. at 489. Justice Thomas spoke even more strongly in a concurring opinion. He noted that the consequence of the *Apprendi* rule for *Almendarez-Torres* "should be plain enough," *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring), characterized the *Almendarez-Torres* decision as "an error to which I succumbed," *id.* at 520 (Thomas, J., concurring), and explained:

If a fact is by law the basis for imposing or increasing punishment--for establishing or increasing the prosecution's entitlement--it is an element.... When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres*, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the

traditional understanding of what an element is any less applicable to the fact of a prior conviction.

Apprendi, 530 U.S. at 521 (Thomas, J., concurring) (citations omitted).

The more recent discussion in *Shepard* contains comparable suggestions from all of the justices. Justice Thomas continued to express his view strongly and directly, stating:

Almendarez-Torres, like *Taylor v. United States*, 495 U.S. 575 (1990)], has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolutely fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements."

Shepard, 544 U.S. at 27-28 (Thomas, J., concurring in part and concurring in judgment) (citations omitted). The dissenting justices joined in, opining that "today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now had been safe from such formalism." *Shepard*, 544 U.S. at 37 (O'Connor, J., dissenting). Regarding the dissent's charge that *Shepard* "may portend the extension of *Apprendi* to proof of prior convictions," the plurality stated that "[i]t is up to the future to show whether the dissent is good prophesy."

_____ *Shepard*, at 26, n.5.

In light of all this, the second holding in *Almendarez-Torres* should not be viewed as good law. The use of the fact of a prior conviction to increase a sentence

must be treated just like the use of any other fact to increase a sentence, that is, it must be alleged in the indictment and proven to a jury beyond a reasonable doubt.

Thus, Mr. Smith appeals the scoring of any prior conviction as a qualifying prior felony pursuant to U.S.S.G. §4B1.1 on the basis that the government has not proved the prior conviction beyond a reasonable doubt, it was not contained in the Indictment, and was not admitted by the Defendant.

CONCLUSION

Based on the forgoing, the writ for certiorari should be granted.

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

CRIMINAL MINUTES - SENTENCING AND JUDGMENT

U.S.A. vs. ARTHUR CHARLES SMITH

Date: September 30, 2013

Case No. 3:13-cr-5-003

At: Knoxville

PROCEEDINGS: Sentencing Hearing – Court convenes and finds that defense counsel would like additional time to review the PSR with the defendant. The case is reset to the end of the Court's docket. Court hears argument as to sentencing. The plea agreement is accepted. Court pronounces judgment. The clerk is directed to file an appeal on behalf of the defendant. **Order to follow.**

Present: HONORABLE AMUL R. THAPAR, UNITED STATES DISTRICT JUDGE

Angela Archer
Deputy Clerk

Lynda Clark
Court Reporter

Cynthia F Davidson
Assistant US Atty

Bradley L Henry
Attorney(s) for Deft

Amanda Latham/Joe Thomas
Probation Officer

Others present: USM, CSO, Agent

☐ Defendant is sworn

☐ Defendant is given opportunity to speak and ☐ speaks; ☐ declines to speak

☐ Govt moves for downward departure ☐ granted ☐ denied

☐ Dft moves for downward variance ☐ granted ☐ denied

☐ Govt moves for third point reduction for acceptance of responsibility ☐ granted ☐ denied

[X] COURT PRONOUNCES JUDGMENT: 262 months imprisonment, this term consists of 178 months as to Count One and 120 months as to Count Three, to be served concurrent, and 84 months as to Count Two to be served consecutively, followed by 5 years supervised release, with special conditions, as to Count 1, 2 and 3 of the Indictment.

[X] Restitution: \$15,010.68 i/s

[X] Special Assessment: \$300.00

[X] Defendant remanded to custody ☐ Released on probation conditions

☐ Defendant to self-report as notified by the U.S. Marshal

Time 1:15 to 1:20
4:15 to 5:10

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**File Name: 14a0724n.06****No. 13-6322****UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****FILED**Sep 16, 2014
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR THE
	)	EASTERN DISTRICT OF TENNESSEE
ARTHUR CHARLES SMITH, aka Marvon	)	
Anderson	)	
	)	
Defendant - Appellant.	)	

Before: BOGGS and DONALD, Circuit Judges; and HOOD, District Judge.*

BOGGS, Circuit Judge. This case presents the question whether a conviction for common-law robbery under North Carolina law is categorically a “crime of violence” under § 4B1.2 of the Guidelines Manual. Arthur Smith pleaded guilty to multiple counts relating to his armed robbery of a CVS pharmacy in Sevierville, Tennessee. The district court sentenced Smith as a career offender, under § 4B1.1(c) of the Guidelines Manual, to 262 months of imprisonment. It relied on Smith’s prior conviction for North Carolina common-law robbery. Smith argues that: 1) his past conviction cannot serve as a predicate offense because it does not constitute a “crime of violence” under the Guidelines Manual; and 2) judicial fact-finding of prior convictions violates the Sixth Amendment. Because the district court correctly held both that

* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

North Carolina common-law robbery qualifies as a “crime of violence” and that Supreme Court precedent forecloses Smith’s Sixth Amendment claim, we affirm the district court’s sentence.

I

On April 23, 2013, Arthur Smith pleaded guilty, without a plea agreement, to: robbing a pharmacy, in violation of 18 U.S.C. § 2118(a); brandishing a firearm during and in relation to a crime of violence, in violation of § 924(c)(1); and being a felon in possession of a firearm, in violation of § 922(g)(1).

A. Presentence Report

Smith’s presentence report¹ determined that U.S.S.G. § 2B3.1(a) provided a base offense level of 20 for the pharmacy-robbery conviction. Because Smith took controlled substances from the pharmacy during the robbery, the presentence report increased his offense level by one, under § 2B3.1(b)(6). And because the loss resulting from Smith’s robbery was more than \$10,000, the presentence report increased his offense level by one additional level, under § 2B3.1(b)(7)(B). The presentence report assigned Smith a total offense level of 22 for the pharmacy-robbery conviction.

Additionally, the presentence report determined that § 2K2.1 provided the base offense level for the sentencing of offenses under 18 U.S.C. § 922(g). Because Smith had at least two prior felony convictions for controlled-substance offenses or for what the Manual refers to as “crimes of violence,” his base offense level was 24, under § 2K2.1(a)(2).

The presentence report noted that § 2K2.4 applies to the sentencing of offenses under § 924(c), the statute proscribing brandishing a firearm during a crime of violence. The report

¹ The United States Probation Office prepared the report using the 2012 edition of the United States Sentencing Commission Guidelines Manual.

noted that, under § 2K2.4(b), the guideline sentence for a § 924(c) conviction is the minimum term of imprisonment required by statute. The report further noted that the statutory minimum in Smith's case was seven years, consecutive to the punishment for the underlying crime.

The presentence report determined that Smith's criminal history qualified him as a "career offender" under § 4B1.1(a). Specifically, the report found that Smith was at least eighteen years old at the time he committed the robbery, that one of Smith's current convictions was for either a crime of violence or a controlled-substance offense, and that Smith had at least two prior felony convictions for controlled-substance offenses or crimes of violence. Ordinarily, a career offender's offense level, if greater than the offense level otherwise applicable, derives from the career-offender table in § 4B1.1(b). The report, however, noted that this table was not applicable because § 4B1.1(c) specifically contains a separate method of calculating the guideline range for career offenders convicted of violating § 924(c), i.e., possessing a firearm during a crime of violence. In particular, the Guidelines Manual instructs that the guideline range for a § 924(c) defendant, who also has other counts of conviction, is the greater of: (A) the sum of the mandatory minimum penalty under § 924(c) and the minimum and maximum of the otherwise applicable guideline range for the non-§ 924(c) counts; or (B) the guideline range determined using the special § 924(c) career-offender table in § 4B1.1(c)(3). The presentence report ultimately determined that Smith's guideline range was 262–327 months, which results from the special § 924(c) career-offender table. Although the presentence report did not "show its math," it presumably determined that this guideline range was greater than the sum of seven years—i.e., Smith's mandatory minimum penalty under § 924(c)—and the guideline range for Smith's non-§ 924(c) counts.

The presentence report detailed Smith's extensive criminal history, noting dozens of prior convictions, pending charges, and other arrests. The report noted that most prior convictions did not qualify for criminal-history points, largely because they were too old or insubstantial according to the Guidelines Manual. Importantly, the presentence report identified two prior convictions qualifying Smith as a "career offender" under § 4B1.1(a): 1) a January 9, 2008, controlled-substances conviction, from Greenville, South Carolina; and 2) a February 9, 2009, common-law robbery conviction, from Buncombe County, North Carolina. The North Carolina robbery conviction forms the basis of Smith's present appeal.

Smith objected to the presentence report's classification of him as a career offender. Specifically, Smith argued that his North Carolina conviction for common-law robbery did not qualify as a "crime of violence" within the meaning of § 4B1.2(a) of the Guidelines Manual. The probation officer considered Smith's objection and concluded that the robbery conviction properly qualified. The officer also stated that Smith's guideline range would be 110–137 months if the court determined that Smith was not a career offender.

B. Sentencing

On September 30, 2013, United States District Judge Amul R. Thapar held a sentencing hearing. At sentencing, Smith renewed his previously raised objection to the career-offender designation. Smith argued that his North Carolina robbery conviction was not a "crime of violence" under the Manual. After extensive oral argument on the issue, the district court overruled Smith's objection. The district court also issued a cogent written opinion on the issue, ordering the clerk to docket an appeal on Smith's behalf once judgment issued.² *See United*

² At the close of sentencing, Judge Thapar told Smith: "I think you're going to want to appeal, and I frankly think you should because your attorney has raised a couple nonfrivolous arguments. . . . I'm going to direct the clerk to file [a notice of appeal] on your behalf so that

States v. Smith, Crim. No. 13-5-(3)-ART (E.D. Tenn. Sept. 30, 2013), ECF No. 74. First, the court held that North Carolina common-law robbery is not categorically a “crime of violence” under § 4B1.2(a)(1), the “physical-force clause.” *Smith*, Crim. No. 13-5-(3)-ART, slip op. at 3. Second, the court held that North Carolina common-law robbery *does* qualify as a “crime of violence” under § 4B1.2(a)(1), the “residual clause.” *Smith*, Crim. No. 13-5-(3)-ART, slip op. at 5. The district court, after discussion with counsel and the government, agreed that Smith’s guideline range was 262–327 months.

The district judge conducted a thorough discussion with counsel about the § 3553 factors and about whether a below-guidelines variance was warranted. The government argued that Smith was “the epitome of a career offender” and that his case presented “basically no redeeming qualities.” Smith’s counsel emphasized Smith’s age and poor health. The district court, noting Smith’s “37 arrests” and “multiple robberies,” declined to vary below the bottom end of the guideline range. But in light of “the combination of [Smith’s] upbringing, his poor health, [and] his age,” the district court imposed a sentence of 262 months of imprisonment, the bottom end of the guideline range.

On appeal, Smith argues that North Carolina common-law robbery does not constitute a “crime of violence” under § 4B1.1(a) of the Guidelines Manual and that he lacks the predicate offenses to qualify as a career offender. He also argues, as he did below, that the Sixth Amendment requires that the fact of prior conviction, if it increases the penalty, must be charged in the indictment and submitted to a jury and that the Supreme Court’s decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), should be overruled.

your rights can be protected.” Smith’s notice of appeal notes that it was “prepared and entered as directed by Judge in open Court.”

The crime-of-violence issue is important because were Smith not sentenced as a career offender, his sentence would be significantly lower than the 262-month sentence that he received.

II

We review de novo a district court's legal conclusions underlying the guideline range chosen. *United States v. Bolds*, 511 F.3d 568, 579 (6th Cir. 2007); *see, e.g., United States v. Rodriguez*, 664 F.3d 1032, 1035 (6th Cir. 2011) (de novo review of whether aggravated assault, under Ohio law, qualified as a "crime of violence").

III

A. Career Offender

The Guidelines Manual instructs sentencing courts, when calculating a defendant's guideline range, to determine the offense-guideline section applicable to the offense of conviction. § 1B1.1(a)(1). The presentence report correctly determined that § 2B3.1 is the guideline section applicable to convictions under 18 U.S.C. § 2118(a), § 2K2.1 is the section applicable to convictions under 18 U.S.C. § 922(g), and § 2K2.4 is the section applicable to convictions under § 924(c). Ordinarily, the Manual establishes the total offense level for a defendant convicted of multiple counts using the rules specified in Part D of Chapter Three. § 1B1.1(a)(4). The Manual, however, provides an alternate method of establishing the offense level for defendants who meet certain criteria and who qualify as what the Manual refers to as "career offender[s]." §§ 1B1.1(a)(6), 4B1.1. Defendants deemed career offenders generally are assigned an offense level not from the offense-guideline section applicable to the offense of conviction but according to the specific rules of § 4B1.1. To qualify as a career offender, a defendant must meet three criteria: 1) the defendant must be at least 18 at the time of the instant

offense; 2) the instant conviction must be a felony either for a crime of violence or a controlled-substance offense; and 3) the defendant must have at least two prior felony convictions for either a crime of violence or a controlled-substance offense. § 4B1.1(a).

At issue in this case is the third condition—whether Smith has two prior felony convictions that count as predicate offenses. Smith’s presentence report lists numerous prior criminal convictions, two of which served as predicate offenses for career-offender purposes. In 2008, Smith was convicted in South Carolina state court of possession of a controlled substance, with the intent to distribute; possession of methamphetamine; and possession of heroin. In 1999, Smith was convicted in North Carolina state court of common-law robbery.

Smith argues that the North Carolina conviction cannot count as a predicate offense because it is not a “crime of violence” within the meaning of the Guidelines Manual. He does not dispute that his South Carolina conviction is a controlled-substance offense and a first predicate offense for career-offender purposes. At issue is whether Smith has a second.

At sentencing, the district court overruled Smith’s objection to counting the North Carolina conviction because the district court concluded that the offense qualified as a “crime of violence” under § 4B1.2(a)(2), the “residual clause.” *See Smith*, Crim No. 13-5-(3)-ART, slip op. at 5. On appeal, Smith identifies this conclusion as error and argues that his prior North Carolina conviction does not qualify as a “crime of violence.” The district court observed that whether North Carolina common-law robbery is a “crime of violence” is a “matter of first impression” in this circuit.

B. “Crime of Violence”

The Guidelines Manual itself defines “crime of violence.” A “crime of violence” is any crime punishable by a term of imprisonment greater than 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 [3] otherwise involves conduct that presents a serious potential risk of physical injury to another.” § 4B1.2(a).

The Manual’s definition of “crime of violence” closely tracks the definition of “violent felony” in the Armed Career Criminal Act (ACCA). See § 924(e)(2)(B). The one difference is that the Manual’s enumerated-offense clause expressly refers to “burglary of a dwelling,” whereas the ACCA refers only to “burglary.”³ Despite the nearly identical definitions between the Manual and the ACCA, the Manual expressly states that “the definition[n] of ‘violent felony’ . . . in 18 U.S.C. § 924(e)(2) [is] not identical to the definition[n] of ‘crime of violence’ . . . used in [the Guidelines Manual].” § 4B1.4 cmt. n.1. Notwithstanding this directive from the Sentencing Commission, we have previously determined that we decide whether an offense is a “crime of violence” under the Manual in the same way as we decide whether an offense is a “violent felony” under the ACCA “because both share essentially the same definitions.” *United States v. Gibbs*, 626 F.3d 344, 352 n.6 (6th Cir. 2010); see *Johnson v. United States*, 559 U.S. 133, 140 (2010) (construing “violent felony” under § 924(e) by reference to the statutory definition of “crime of violence” in 18 U.S.C. § 16).

Under North Carolina law, common-law robbery is “the felonious, non-consensual taking of money or personal property from the person or presence of another *by means of violence or fear*.” *State v. Bell*, 603 S.E.2d 93, 117 (N.C. 2004) (emphasis added); accord *State v. Smith*, 292 S.E.2d 264, 270 (N.C. 1982); *State v. Lawrence*, 136 S.E.2d 595 (N.C. 2004). The North Carolina Supreme Court has held that a state court may convict for common-law robbery by

³ The Supreme Court has interpreted “burglary” in the ACCA to refer to burglary of “a building or structure.” *Taylor v. United States*, 495 U.S. 575, 599 (1990).

proving *either* violence or fear. *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944) (“[I]t is not necessary to prove both violence and putting in fear[—]proof of either is sufficient.”).

North Carolina common-law robbery is not “burglary of a dwelling, arson, or extortion, [and it does not] involve[e the] use of explosives.” § 4B1.2(a)(2). We determine, then, whether the statute falls within the Guidelines Manual’s “physical-force clause”—i.e., “has as an element the use, attempted use, or threatened use of physical force against the person of another”—or whether the crime falls within the Manual’s “residual offense”—i.e., “otherwise involves conduct that presents a serious potential risk of physical injury to another.” § 4B1.2(a). Because the district court determined that North Carolina common-law robbery is a “crime of violence” under the residual clause, we begin there.

C. The Residual Clause

1

A prior conviction qualifies as a “crime of violence” under the Manual if it “involves conduct that presents a serious risk of physical injury to another.” § 4B1.2(a)(2). We must determine whether common-law robbery under North Carolina law meets this criterion.

In order to determine whether an offense qualifies as a predicate under the residual clause, courts must compare the elements of the prior offense of conviction with the elements contained in the residual clause. Courts must ask “whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of the particular offender.” *James v. United States*, 550 U.S. 192, 202 (2007) (emphasis in original). Here, the “pivotal question” is whether taking money or property from the person or presence of another by means of violence or fear is conduct that presents a serious risk of physical injury to another. *Id.* at 203.

Certain penal laws are what the Supreme Court calls “divisible” offenses because they “se[t] out one or more elements of the offense in the alternative.” *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). When a state “list[s] potential offense elements in the alternative,” it “renders opaque which element played a part in the defendant’s conviction.” *Id.* at 2283. The Court gave, as an example of a “divisible” statute, one “stating that burglary involves entry into a building or an automobile.” *Id.* at 2281.

Under this understanding, common-law robbery under North Carolina law is a divisible offense because it “comprises multiple, alternative versions of the crime.” *Id.* at 2284; see *United States v. Covington*, 738 F.3d 759, 764 (6th Cir. 2014) (Michigan prison-escape statute divisible under *Descamps* because it “lists several, alternative ways to violate the statute”); *United States v. Hockenberry*, 730 F.3d 645, 669 (6th Cir. 2013) (Pennsylvania burglary statute divisible under *Descamps* because it “lists alternative elements in the statutory text”). A person commits common-law robbery in North Carolina when he non-consensually takes “money or personal property from the person or presence of another by means of *violence or fear*.” *Bell*, 603 S.E.2d at 117 (emphasis added). Because the crime has alternative elements, common-law robbery under North Carolina law, is, as the district court correctly concluded, a divisible offense.

In order to compare the elements of an offense to those in the residual clause, courts employ what the Supreme Court has “labeled (not very inventively) the ‘modified categorical approach.’”⁴ *Decsamps*, 133 S. Ct. at 2281. This approach is a two-step process. First, courts

⁴ Since the Supreme Court decided *Descamps* last year, we have repeatedly applied the modified categorical approach to divisible statutes when conducting a residual-clause analysis. See *United States v. Mitchell*, 743 F.3d 1054, 1060–67 (6th Cir. 2014) (convictions under Tennessee robbery statutes are categorically violent felonies under the residual clause); *United States v. Covington*, 738 F.3d 759, 764–65 (6th Cir. 2014) (convictions under Michigan prison-escape statute are not

determine whether “one alternative (say, a building) matches [the] element[s]” in the residual clause” but whether “the other (say, an automobile) does not.” *Ibid.* (parentheticals in original). If that is the case, then courts can “consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction.” *Ibid.* Only then can the court “do what the categorical approach demands: compare the elements of the crime of conviction . . . with the elements” contained within the residual clause. *Ibid.*

As explained above, common-law robbery under North Carolina law is a divisible offense. Consider two alternatives of the elements provided by the North Carolina Supreme Court. One version requires taking money or property from a person by means of violence. Another requires taking money or property from a person by means of fear. In order for North Carolina common-law robbery categorically to be a “crime of violence” under the Guidelines Manual, we must conclude that *both* alternative sets of elements—taking by means of violence and taking by means of fear—present a serious risk of physical injury to another. *See, e.g., United States v. Mitchell*, 743 F.3d 1054, 1065 –66 (6th Cir. 2014). Smith does not argue that taking money or property by means of violence does not present a serious risk of physical injury to another. Our focus, then, is whether accomplishing the robbery *by means of fear* presents a serious risk of physical injury to another.

categorically violent felonies under the residual clause); *United States v. Denson*, 728 F.3d 603, 608–10 (6th Cir. 2013) (convictions under Ohio inciting-violence statute are not categorically crimes of violence under the residual clause but defendant’s conviction was a crime of violence in light of *Shepard* documents); *United States v. Johnson*, 530 F. App’x 528, 532–33 (6th Cir. 2013) (convictions under Tennessee robbery are not categorically violent felonies under the residual clause but defendant’s robbery conviction was a violent felony in light of *Shepard* documents).

The North Carolina Supreme Court has interpreted the word “fear” as an element of robbery. In *State v. Moore*, the defendant in a robbery case argued that the evidence was insufficient to support his conviction because the victim testified “that he ‘was not scared or in fear of (his) life.’” 183 S.E.2d 546, 547 (N.C. 1971). The North Carolina Supreme Court interpreted “fear” expansively: it noted that the word “fear” in the definition of common-law robbery “is not confined to fear of death” and that common-law robbery does not require “the use or threatened use of a firearm or other dangerous weapon.”⁵ Although fear of death is not necessary, the state supreme court has contemplated that “fear” refers to fear of bodily injury:

No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property *for the sake of his person*, the victim is put in fear.

State v. Sawyer, 29 SE.2d 34, 37 (N.C. 1944) (emphasis added) (internal quotation marks omitted); *accord State v. Elkins*, 702 S.E.2d 744, 748 (N.C. App. 2011).

Based on the North Carolina Supreme Court’s interpretation of “fear,” Smith argues that North Carolina common-law robbery covers conduct that does not present a serious risk of physical injury. Surely Smith is correct that the offense definition *could* cover *some* conduct that does not present a serious risk of physical injury. One can imagine a robbery that reasonably places a person in fear yet does not present a serious risk of physical injury. Smith argues that “fear does not have to be [fear] of physical injury.”⁶ Yet the law is just the opposite: a person

⁵ This statement, technically, was dicta, as the defendant in *Moore* was charged not with common-law robbery but under N.C. Gen. Stat. § 14-87, “Robbery with firearms or other dangerous weapons.” Nonetheless, we defer to the North Carolina Supreme Court on the interpretation of North Carolina law.

⁶ For this proposition, Smith’s citation is “*See Moore* at 204-205.” *State v. Moore* does not appear on pages 204–05 of *South Eastern Reporter Second* or of *North Carolina Reports*. In the context of his brief, Smith appears to attempt to cite *Smith v. White*, 142 N.C. App. 201, 204–05,

must be in fear “for the sake of his person.” *Sawyer*, 29 S.E.2d at 37. Taking money or property from the person or presence of another by placing that person in fear of bodily injury, then, does generally present a serious risk of physical injury to another.

Our conclusion would not be different even if Smith were correct that the element of fear in North Carolina common-law robbery did not require fear of physical injury. He, cleverly, offers examples of robbery by means of “fear of losing a job” and “fear of financial ruin.” These kinds of robberies are, indeed, conceivable: “Give me your money, or else I’ll tell my uncle to fire you!” and “Give me your money, or else I’ll expose your Ponzi scheme!” These hypotheticals, though perhaps the stuff of law-school exams, are not the basis of the analysis. There are, of course, ways of committing robbery that do not “pose a realistic risk of confrontation or injury to anyone.” *James*, 550 U.S. at 207. But the Supreme Court has held that analysis under the residual clause, even when the analysis addresses a portion of a divisible statute, rests on “inherently probabilistic concepts.” *Ibid.* “[T]he proper inquiry . . . is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another.” *Id.* at 208 (emphasis added). We think that, *in the ordinary case*, robbing someone by means of placing him in fear for his person *does* present a serious risk of physical injury. Here, the mere possibility that a person could, conceivably, commit the offense without creating a serious risk of physical injury to another is insufficient to move North Carolina common-law robbery outside the residual clause.

Additionally, focusing on exceptional, hypothetical cases is a misapplication of the modified categorical approach. We have sometimes said that “[i]f it is possible to violate the

542 S.E.2d 265, 268 (N.C. App. 2001). Nothing in *White* suggests that “fear does not have to be [fear] of physical injury.” *White*, in fact, contains the same quotation from *State v. Sawyer* offered above. See *White*, 542 S.E.2d at 268.

statute in a way that would constitute a crime of violence and in a way that would not, the court may consider the indictment, guilty plea, or similar documents to determine whether they necessarily establish the nature of the prior conviction.” *Gibbs*, 626 F.3d at 352. In light of recent Supreme Court decisions, we clarify that this is not quite right. “One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury.” *James*, 550 U.S. at 208. Accordingly, the inquiry is not whether it is possible for a defendant to commit a crime in a way that would not be a violent felony. As the Supreme Court said last year, the sentencing court must “look only to the fact that the defendant ha[s] been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Descamps*, 131 S. Ct. at 2286. Here, the mere fact that Smith was convicted of North Carolina common-law robbery—regardless under which version of elements—is sufficient to make that offense a “crime of violence” under the Guidelines Manual. We need not consider whether the offense also qualifies as a crime of violence under the physical-force clause.

2

In light of the difficulties presented by analysis under the residual clause,⁷ our circuit has at times reached varying results about whether various state theft offenses qualify as crimes of violence. In *United States v. Mekediak*, we held that the crime of unarmed robbery under Mich. Comp. Laws § 750.530—a felony committed without a weapon “by force and violence, or by assault or putting in fear”—“fits comfortably within the residual clause of ‘crime of violence.’” 510 F. App’x 348, 353 (6th Cir. 2013). Similarly, we have held that larceny and attempted larceny under Mich. Comp. Laws § 750.530— a felony committed “by stealing from the person

⁷ See *Sykes*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

of another”—falls within the residual clause and, therefore, is a “crime of violence” under the Guidelines Manual. *United States v. Payne*, 163 F.3d 371, 375 (6th Cir. 1998) (larceny); *United States v. Taylor*, 696 F.3d 628, 631 (6th Cir. 2012) (attempted larceny). Our decision rested on the observation that Michigan interprets its larceny statute “narrowly to require that the property be taken from the possession of the victim or be taken from within the immediate presence or area of control of the victim.” *Payne*, 163 F.3d at 375. The Michigan decisions are squarely on point, given that § 750.530 contains the same violence-or-fear language as the North Carolina statute.

Our analysis of Tennessee’s robbery laws, however, has produced contradictory results in recent years. In a series of cases, we have interpreted two Tennessee robbery statutes—both of which list violence or fear as alternative elements—to determine whether convictions under them may serve as predicate offenses under the Manual and under the ACCA: Tenn. Code. Ann. § 39-13-401(a)—prohibiting “the intentional or knowing theft of property from the person of another by violence or putting the person in fear” and the now-repealed Tenn. Code. Ann. § 39-2-501(a)—prohibiting “the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.”

First, in *United States v. Gloss*, a published opinion, we held that facilitation of aggravated robbery under Tennessee law—which requires that the crime be accomplished “with a deadly weapon or by display of an article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon” or where “the victim suffers serious bodily injury”—is a “violent felony” under the ACCA. 661 F.3d 317, 318–19 (6th Cir. 2011). That decision rested squarely on the physical-force clause—not the residual clause. *See id.* at 318, 320 (“not decid[ing] whether the [offense] also qualifies under the residual clause”). Second, in *United*

States v. Fraker, an unpublished opinion, we held that robbery under § 39-13-401(a), the current Tennessee law, is not a violent felony. 458 F. App'x 461, 463 (6th Cir. 2012). In *Fraker*, we said that an offense qualifies as a predicate offense if it is a felony “that has an element the use, attempted use, or threatened use of physical force against the person of another.” *Ibid.* We concluded that Tennessee’s “robbery statute includes criminal activity outside the scope of the ACCA because a defendant can violate the statute *by employing only fear*, rather than physical violence or force.” *Ibid.* (emphasis added). *Fraker* did not address or refer to the enumerated-offense clause or the residual clause in any way, but our holding that Tennessee robbery is not a violent felony necessarily determined that the offense does not qualify under any of the three possible avenues.⁸

The following year, in *United States v. Johnson*, another unpublished opinion, we considered convictions under the substantively identical but now-repealed § 39-2-501(a). 530 F. App'x 528, 531–32 (6th Cir. 2013). *Johnson* “follow[ed] the reasoning of *Fraker*,” rather than *Gloss*, and declined to hold that a robbery conviction under § 39-2-501(a) “is categorically a violent felony” because “the robbery . . . within [the] statute of conviction can be violated by employing only fear and not violence.” *Id.* at 532.⁹ Earlier this year, in a published opinion, we held, “[c]ontrary to *Fraker* and *Johnson*,” that robbery under both Tennessee’s repealed statute and its current statute qualify as violent felonies. *United States v. Mitchell*, 743 F.3d 1054, 1058–63 (6th Cir. 2014); accord *United States v. Huntley*, -- F. App'x --, No. 14-5097, 2014 WL 3015020 (6th Cir. July 7, 2014) (robbery under Tenn. Code. Ann. § 39-13-401 also a “crime of

⁸ In *Fraker*, the court proceeded to affirm the defendant’s sentence under the ACCA because the *Shepard* analysis revealed that the defendant admitted to robbery by means of violence. *Fraker*, 458 F. App'x at 464.

⁹ In *Johnson*, as in *Fraker*, the court ultimately affirmed the defendant’s sentence under the ACCA because “application of the modified categorical approach resolve[d] the matter in the government’s favor.” *Johnson*, 530 F. App'x at 532.

violence” under the Guidelines Manual). We concluded that robbery under Tennessee law categorically is a violent felony under *both* the physical-force clause and the residual clause. *Mitchell*, 743 F.3d at 1060. We declined to follow *Fraker* and *Johnson* because we said that those decisions “turned to the colloquial understanding of fear” and “failed to apply the definition of ‘fear’ enunciated by the Tennessee Supreme Court.” *Id.* at 1059–60. Relevant to the *Mitchell* court was that the Tennessee Supreme Court interpreted “fear” in its robbery statutes to refer to “fear of bodily injury and of present personal peril from violence offered or impending.” *Id.* at 1059 (quoting *State v. Taylor*, 771 S.W.2d 387, 398 (Tenn. 1989)).

These prior decisions do not control whether common-law robbery under North Carolina law is a crime of violence. But the decision we reach is generally consistent with our own prior published decisions. We note that North Carolina’s definitions of robbery and of “fear” are similar to Tennessee’s. Our holding is limited to construing the offense of common-law robbery under North Carolina law. Every state statute, for better or worse, presents a different case when determining whether it qualifies as a crime of violence under the residual clause. ACCA decisions do not control beyond the specific statute under consideration in the jurisdiction issuing the ruling.

3

The decision we reach is also consistent with opinions from other circuits, including the circuit encompassing North Carolina. Two circuits have held that common-law robbery under North Carolina law is a crime of violence under the Guidelines Manual. *See United States v. Carmichael*, 408 F. App’x 769, 771 (4th Cir. 2011); *United States v. Moore*, 223 F. App’x 422, 424 (5th Cir. 2007) (per curiam) (with minimal analysis); *see also United States v. Ellis*, 564 F.3d 370, 377–79 (5th Cir. 2009) (not plain error to count attempted common-law robbery

under North Carolina law as a predicate offense). Additionally, the Seventh Circuit has reached the same result when analyzing Indiana's robbery statute, which has elements nearly identical to the North Carolina offense. See *United States v. Lewis*, 405 F.3d 511, 514 (7th Cir. 2005) (robbery under Ind. Code 35-42-5-1 is a crime of violence under the residual clause because "fear" under Indiana law "is fear of physical injury rather than of defamation").

The district court may have incorrectly suggested that that we are bound by the Fourth Circuit's determination about whether a conviction under the law of a state within its jurisdiction qualifies as a crime of violence. At sentencing, the district court asked Smith's counsel: "And you agree that the Fourth Circuit [opinion in *Carmichael*] is controlling unless the Supreme Court says otherwise?"; and "Why isn't [the Fourth Circuit] binding at the very least[?]" We clarify that whether an offense qualifies as a crime of violence under the Manual or as a violent felony under the ACCA "is a question of federal law, not state law." *Johnson*, 559 U.S. at 138; accord *Mitchell*, 743 F.3d at 1058; *United States v. Rede-Mendez*, 680 F.3d 552, 225 (6th Cir. 2012) ("[W]hether a crime is a crime of violence is a question of federal law."). Just as we are not bound by a state high court's interpretation of federal law, so too are we not bound by another circuit's decision. A circuit opinion concerning a state law from within its jurisdiction may be especially instructive, though reason might also suggest taking a different course. To be sure, "[w]e are, however, bound by the [North Carolina] Supreme Court's interpretation of state law, including its determination of the elements" of common-law robbery. *Johnson*, 559 U.S. at 138; accord *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (No "federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.").

IV

Smith also argues, as he did below, that the Sixth Amendment prohibits judicial fact-finding of a defendant's prior convictions for the purpose of increasing a sentence. Smith correctly acknowledges that Supreme Court law forecloses his argument. "[T]he Constitution does not impose th[e] requirement . . . that [a defendant's] recidivism must be treated as an element of his offense." *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). The fact of prior conviction, even if it increases the maximum penalty for a crime, does not need to be "charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. United States*, 530 U.S. 466, 476 (2000). Smith argues that *Almendarez-Torres* should be overruled. "[W]e must follow [*Almendarez-Torres*] until the Supreme Court expressly overrules it." *United States v. Mack*, 729 F.3d 594, 609 (6th Cir. 2013).

Smith states that he raises the *Almendarez-Torres* claim solely to preserve the issue. It is so preserved.

V

The North Carolina Supreme Court interprets "fear" in its robbery statute to refer to fear of bodily injury. Apart from this, the conduct encompassed by robbery by means of fear, in the ordinary case, involves fear of bodily harm. In light of this, we conclude that common-law robbery under North Carolina presents a serious risk of physical injury to another and, thus, categorically is a crime of violence under § 4B1.2 of the Guidelines Manual. Smith's Sixth Amendment claim fails under *Almendarez-Torres*. We, therefore, AFFIRM the district court's sentence.

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

Deborah S. Hunt
Clerk

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Filed: September 16, 2014

Ms. Cynthia F. Davidson

Mr. Bradley L. Henry

Mr. Luke A. McLaurin

Re: Case No. 13-6322, *USA v. Arthur Smith*
Originating Case No. : 3:13-cr-00005-3

Dear Counsel,

The Court issued the enclosed Opinion today in this case.

Sincerely yours,

s/Louise Schwarber
Case Manager
Direct Dial No. 513-564-7015

cc: Ms. Debra Poplin

Enclosure

Mandate to issue

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:13-CR-5-TAV-CCS-3
	)	
ARTHUR CHARLES SMITH,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This criminal matter is before the Court to expand on its oral rulings at the defendant's resentencing hearing on Tuesday, November 15, 2016. During that hearing, the Court overruled the defendant's objection to the Presentence Investigation Report [Doc. 100] and held that the defendant is a career offender as defined in U.S.S.G. § 4B1.1. The Court issues this opinion to provide further basis for that determination.

I. Background

On April 23, 2013, the defendant appeared before the Honorable Amul R. Thapar, United States District Judge, and pleaded guilty, without a plea agreement, to robbing a pharmacy, in violation of 18 U.S.C. §§ 2118(a) and 2 (count one); using, carrying, and brandishing a firearm during and in relation to that robbery, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (count two); and possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1) (count three) [Doc. 79 pp. 27].

The Presentence Investigation Report ("PSR") classified the defendant as a career offender, concluding that he had two qualifying convictions under U.S.S.G. § 4B1.1(a)

[Doc. 74 p. 1]. Under § 4B1.1(a), a defendant may qualify as a career offender if he has previously sustained two felony convictions “of either a crime of violence or a controlled substance offense.” U.S.S.G. § 4B1.1(a). One of the two qualifying convictions was for felony common law robbery under North Carolina law, which the PSR concluded was a crime of violence [*Id.*]. The defendant objected to this classification, arguing that his North Carolina robbery conviction is not a crime of violence [*Id.*]. Judge Thapar overruled this objection finding that the North Carolina common law robbery conviction qualifies as a crime of violence under the residual clause of the career offender guideline [*Id.* at 4–5]. As such, Judge Thapar determined that the defendant was properly classified as a career offender and sentenced him to 262 months’ imprisonment [Doc. 74 p. 5; Doc. 75].

The defendant appealed his career-offender classification, and the Court of Appeals for the Sixth Circuit affirmed the defendant’s sentence. *United States v. Smith*, 582 F. App’x 590, 598 (6th Cir. 2014). The Sixth Circuit concluded that North Carolina common law robbery qualifies as a crime of violence under § 4B1.2(a)’s residual clause and declined to address whether the offense otherwise qualifies as a crime of violence under § 4B1.2(a)’s enumerated-offense or use-of-force clauses. *Id.*

Nine months later, the Supreme Court held “that imposing an increased sentence under the residual clause of the Armed Career Criminal Act [(“ACCA”), 18 U.S.C. § 924(e),] violates the Constitution’s guarantee of due process.” *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). The Supreme Court subsequently granted certiorari in this

case, vacated the Sixth Circuit's judgment, and remanded the case for further consideration in light of *Johnson*. *Smith v. United States*, 135 S. Ct. 2930 (2015).

On May 13, 2016, the Sixth Circuit determined that the “rationale of *Johnson* applies equally to the residual clause” of the career offender guideline. *United States v. Pawlak*, 822 F.3d 902, 911 (6th Cir. 2016). As such, the court held that the residual clause in the guidelines is also invalid as “unconstitutionally vague.” *Id.*

As a result, in this matter, the Sixth Circuit determined that the defendant “must be resentenced because the district court based his § 4B1.1 enhancement upon § 4B1.2(a)(2)’s unconstitutional residual clause” [Doc. 89 p. 3]. The Sixth Circuit vacated the judgment and remanded this case “for further consideration in light of *Mitchell* and *Pawlak*” [*Id.* at 3–4].

The United States Probation Office prepared a revised PSR in this matter, again classifying the defendant as a career offender under § 4B1.1 [Doc. 98 ¶ 39]. The defendant objected to this classification [Doc. 100], and the government responded in opposition to the objection [Doc. 104].

II. Resentencing Procedure

As an initial matter, the Court addresses the resentencing procedure. Pursuant to 18 U.S.C. § 3742(g), when a case is remanded for sentencing, a district court shall resentence a defendant in accordance with § 3553 and with such instructions as may have been given by the court of appeals, except that the court must apply the version of the guidelines “that were in effect on the date of the previous sentencing of the defendant

prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date.” 18 U.S.C. § 3742(g)(1). Pursuant to the mandate rule, “a district court is bound to the scope of the remand issued by the court of appeals,” which may be limited or general pursuant to 28 U.S.C. § 2106.² *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999); accord *United States v. Moore*, 131 F.3d 595, 597 (6th Cir. 1997). On a general remand, the district court may resentence a defendant *de novo*. *Moore*, 131 F.3d at 597. On a limited remand, however, a district court’s authority is constrained “to the issue or issues remanded.” *Id.* at 598.

To constitute a limited remand, the appellate court “must convey clearly [its] intent to limit the scope of the district court’s review.” *Campbell*, 168 F.3d at 267. A limited remand must “explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate.” *Id.* at 265. The limiting language defining the scope of an appellate court’s mandate may be found “anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable language[,]” and “should be, in effect, unmistakable.” *Id.* at 267–68; see also *United States v. O’Dell*, 320 F.3d 674, 678 (6th Cir. 2003) (finding a limited remand

² That section provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106.

where the appellate court stated, “we VACATE the judgment of the sentence entered by [the] district court and REMAND for re-sentencing without application of the safety valve”); *United States v. Santonelli*, 128 F.3d 1233, 1237 (6th Cir. 1997) (finding a limited remand when the Sixth Circuit stated “[b]ecause the sentence may have been affected by this incorrect information, we vacate [the defendant’s] sentence and remand the case to the district court for resentencing”); *Moore*, 131 F.3d at 598–600 (comparing limited remands where the court of appeals sets forth limiting language for resentencing and general remands where the court of appeals simply remands for resentencing). Absent limitation, a “remand order is presumptively a general one.” *Moore*, 131 F.3d at 598.

Neither party addressed this issue in their briefings, but the government argued at the resentencing hearing that this case is before the Court on a general remand because the Sixth Circuit remanded the case for “resentencing.” In circumstances where the Sixth Circuit remands a case for “resentencing,” that instruction does not necessarily prescribe *de novo* review. *See, e.g., United States v. Miles*, F. App’x 148, 150 (6th Cir. 2007) (finding that remands “for re-sentencings in light of *Booker*” are limited remands); *O’Dell*, 320 F.3d at 678 (finding a limited remand the Sixth Circuit remanded the case “for re-sentencing without application of the safety valve”); *Santonelli*, 128 F.3d at 1237 (finding a limited remand where the Sixth Circuit remanded the case for resentencing “[b]ecause the sentence may have been affected by [] incorrect information”).

Here, Sixth Circuit’s opinion provides: “Smith must be resentenced because the district court based his § 4B1.1 enhancement upon § 4B1.2(a)(2)’s unconstitutional residual clause. For this reason, we VACATE the judgment of the district court and REMAND this case to the district court for further consideration in light of *Mitchell* and *Pawlak*” [Doc. 89 pp. 3–4]. Furthermore, the Sixth Circuit opinion addressed only the career offender issue [*See generally* Doc. 89].

In addition, the Court notes that in situations where an appeals court has addressed the same case several times, as is here, “issuing limited remands on sentencing cases, leaving open for resolution only the issue found to be in error on the initial sentencing,” is an avenue that avoids “wast[ing] judicial resources.” *Santonelli*, 128 F.3d at 1238. As the Sixth Circuit has already seen this case on two occasions, a limited remand here would prevent “giving the parties additional bites of the litigation apple.” *Id.* at 1239.

As the Sixth Circuit included limiting language in its opinion, and because a limited remand here prevents the unnecessary determination of issues already decided, the Court finds that the Sixth Circuit intended a limited remand.¹ As such, the Court’s authority is constrained to the determination of whether the defendant is a career offender.

¹ As the Court indicated at the hearing, out of an abundance of caution, the Court heard and discussed matters outside the scope of the career offender issue during the resentencing. The Court finds that even if the Sixth Circuit intended a general remand, its determination on all issues would have remained the same.

II. Categorization as a Career Offender

To qualify as a career offender under U.S.S.G. § 4B1.1, the defendant (1) must have been at least eighteen years old at the time he committed the instant offense of conviction, (2) the instant offense must be a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant must have at least two prior felony convictions of either a crime of violence or a controlled substance offense. Here, the only issue is whether the defendant satisfies the third element. While the parties do not dispute that the defendant has at least one predicate offense, the defendant argues that his 2009 North Carolina robbery conviction does not qualify as a crime of violence.

The sentencing guidelines define “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” (the “use-of-force clause”); (2) “is burglary of a dwelling, arson, or extortion, [or] involves use of explosives” (the “enumerated-offense clause”); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). U.S.S.G. § 4B1.2(a). At the defendant’s sentencing in 2013, Judge Thapar ruled that the defendant’s North Carolina robbery conviction qualified as a crime of violence under the residual clause [Doc. 74 pp. 4–5]. The Sixth Circuit subsequently ruled that the residual clause of the guidelines is unconstitutionally vague. *Pawlak*, 822 F.3d at 911. The Court must, therefore, determine if the defendant’s

North Carolina robbery conviction otherwise constitutes a crime of violence under one of the unaffected provisions of § 4B1.2.

To determine whether a particular offense qualifies as a violent felony under the prongs of the above definition, courts must first identify the precise crime of conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). They do so by employing a “categorical approach,” which looks “only to the statutory definitions—*i.e.*, the elements—of a defendant’s prior offenses, and *not* to the particular facts underlying [each] conviction[.]” *Id.* at 2283. When the conviction involves violation of a “divisible” statute—one which comprises multiple, alternative versions of the crime—courts resort to the “modified categorical approach” under which they “consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction.” *Id.* at 2281. Here, both the government and the defendant ask that the Court apply the traditional categorical approach in making its determination, which the Court does.²

The government argues that the North Carolina common law robbery conviction is a crime of violence because it qualifies under the use-of-force clause and it is an enumerated offense by way of Application Note 1 to U.S.S.G. § 4B1.2. The defendant

² The Court notes that the defendant entered an Alford Plea for his North Carolina common law robbery conviction. The defendant argued at the resentencing that the robbery conviction could not qualify as a predicate offense under the modified categorical approach due to the Alford Plea. As the Court is applying the traditional categorical approach, the fact that the defendant entered into an Alford Plea does not affect the Court’s disposition because the particular facts of the conviction are not relevant. *United States v. McMurray*, 653 F.3d 367, 382 (6th Cir. 2011) (providing that convictions based on Alford pleas can be predicate offenses “if the qualifying crime is inherent in the fact of the prior conviction—*i.e.*, if the statute of conviction is categorically a ‘violent felony’”).

disputes both arguments. The defendant also argues that *Almendarez-Torres* is no longer good law and that the defendant's prior conviction may not increase his sentence as it was not alleged in the indictment and proven to a jury beyond a reasonable doubt. The Court will address each of these arguments in turn.

A. Use-of-Force Clause

To qualify as a crime of violence under the use-of-force clause, an offense must have “as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1). The force involved must be “*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). It is sufficient that the force be capable of causing any injury, “regardless of [the injury’s] gravity or duration.” *United States v. Evans*, 699 F.3d 858, 863 (6th Cir. 2012).

In determining whether the defendant's North Carolina common law robbery conviction falls under the use-of-force clause, the Court must first decipher the elements of the offense. *Descamps*, 133 S. Ct. at 2283. To do so, the Court is constrained by the North Carolina Supreme Court's interpretation of state law. *Johnson*, 559 U.S. at 138; *see also United States v. Garner*, 823 F.3d 793, 803 (4th Cir. 2016) (determining that after the North Carolina Supreme Court, the decisions of North Carolina's intermediate appellate court “constitute the next best indicia of what state law is”). The Court must look to the “minimum conduct criminalized” to determine whether a North Carolina

common law robbery conviction categorically constitutes a crime of violence under the use-of-force clause. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

North Carolina common law robbery is defined as “the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.” *State v. Lawrence*, 136 S.E.2d 595, 596–97 (N.C. 1964). “[T]he element of force in the offense of robbery may be actual or constructive.” *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944). Where actual force is used, “the degree of force is immaterial, so long as it is sufficient to compel the victim to part with his property.” *Id.*; see also *State v. Robertson*, 531 S.E.2d 490, 493 (N.C. Ct. App. 2000) (finding that mere purse snatching is not sufficient force). Constructive force is sufficient if “the person robbed is put in fear sufficient to suspend the exercise of his free will or prevent resistance to the taking.” *Id.* If a perpetrator “create[s] an apprehension of danger and induce[s] a man to part with his property for the sake of his person, the victim is put in fear.” *Id.* In determining whether North Carolina common law robbery is “a felony which by definition involves the use or threat of violence,” the North Carolina Supreme Court has twice held that “the use, or threatened use, of violence is an element of common law robbery.” *State v. Jones*, 451 S.E.2d 826, 853–54 (N.C. 1994); accord *State v. Bell*, 603 S.E.2d 93, 117 (N.C. 2004).

The defendant argues that common law robbery cannot qualify as a crime of violence because it can be committed with *de minimis* force [Doc. 100 p. 4]. To support his contention, the defendant primarily relies on decisions of the North Carolina Court of

Appeals and the Fourth Circuit. The Court notes that it is constrained by the North Carolina Supreme Court's interpretation of state law, not the North Carolina Court of Appeals' interpretation nor the Fourth Circuit's. See *Johnson*, 559 U.S. at 138. As articulated by the North Carolina Supreme Court, common law robbery requires force sufficient to "compel the victim to part with his property," *Sawyer*, 29 S.E.2d at 37, and to "overpower the party robbed or prevent his resisting," *State v. John*, 50 N.C. (5 Jones) 163, 169 (1857). Such a requirement necessitates more than *de minimis* force.

Although the Court determines that the North Carolina Supreme Court's interpretation requiring more than *de minimus* force controls, the Court has reviewed the North Carolina Court of Appeals and Fourth Circuit decisions the defendant cited and finds them unconvincing.

The defendant cites *State v. Henry*, 290 S.E.2d 775 (N.C. Ct. App. 1982), to support the contention that a fear of unwanted touching is sufficient to satisfy the fear element of North Carolina common law robbery. In *Henry*, while the victim did state, "I was afraid he was going to touch me," she also testified that she was "afraid the defendant would hurt her." *Id.* at 776. As such, this case does not stand for the proposition that unwanted touching is sufficient fear to sustain a conviction for common law robbery. Instead, as the victim was afraid that the defendant would hurt her, this case supports finding that the defendant threatened "force capable of causing physical pain or injury to another person," and, consequently, that North Carolina common law robbery is a predicate offense under the use-of-force clause. See *Johnson*, 559 U.S. at 140.

The defendant also cites to *State v. Hammonds*, 222 S.E. 2d 4 (N.C. Ct. App. 1976). In *Hammonds*, the victim testified that the defendant scared her when he entered her store and ordered her to open the register. *Id.* at 5. She stated that he was “standing in [her] face staring at [her] as [if] she had done something wrong.” *Id.* The tone and manner in which the defendant spoke to the victim was sufficient to “create an apprehension of danger to induce [the victim] to part with [the] property for the sake of [her] person.” *Id.* (emphasis added). The North Carolina Court of Appeals determined that the victim was “not required to wait for [the] defendant to commit a battery upon her” and she “parted with the money because of fear for her safety.” *Id.* The implied nature of the threat in this case does not make the threat nonviolent.

The defendant also points the Court to the Fourth Circuit decisions in *United States v. Garner*, 823 F.3d 793 (4th Cir. 2016) and *United States v. Carmichael*, 408 F. App’x 769 (4th Cir. 2011), where the court found that North Carolina common law robbery does not qualify under the ACCA’s use-of-force clause. First, the Court notes that it is not bound by the Fourth Circuit’s decisions. Rather, the Court must look to how the North Carolina Supreme Court interprets North Carolina law to determine whether the robbery conviction constitutes a predicate offense. *Johnson*, 559 U.S. at 138. The Court also notes that *Garner* and *Carmichael* conflict with at least two prior decisions from the Fourth Circuit which held that North Carolina common law robbery categorically qualifies as a violent felony under the ACCA. *United States v. Bowden*,

975 F.2d 1080, 1082 (4th Cir. 1992); *United States v. Hutchinson*, 149 F. App'x 214, 216 (4th Cir. 2005).

Looking at *Carmichael* further, the court provided no explanation or reasoning for its one-sentence conclusion that common law robbery does not fall under the use-of-force clause. See 408 F. App'x at 770. As such, *Carmichael* is entitled to little weight as it provides no persuasive reasoning upon which this Court can rely.

The court in *Garner* does provide reasoning for its conclusion, though, as the government contends herein, its reasoning is flawed. There, the court concluded that the force element in North Carolina common law robbery is insufficient to satisfy the use-of-force clause under the ACCA primarily relying on two unpublished decisions from the North Carolina Court of Appeals. *Garner*, 823 F.3d at 803–04. The court read these decisions as holding that common law robbery can be committed by “even minimal contact.” *Id.* In the first case, the North Carolina Court of Appeals upheld a conviction where the defendant pushed the victim’s shoulder causing her to fall into some shelves. *State v. Eldridge*, No. COA08-1219, 2009 WL 1525333, at *2 (N.C. Ct. App. June 2, 2009). In the second, the defendant pushed the victim’s hand off a box of cigarettes with such force that caused the victim to let go of the box. *State v. Chance*, No. COA07-1491, 2008 WL 2415981, at * 4 (N.C. Ct. App. June 17, 2008). This Court does not find that such use of force constitutes minimal contact. Rather, the Court finds that this type of force is “capable of causing pain or injury” and, consequently, qualifies as violent force for the purposes of § 4B1.2(a)(1). *Johnson*, 559 U.S. at 133; see also *United States v.*

Duncan, 833 F.3d 751, 756 (7th Cir. 2016) (“the case law rejects” the position that “putting someone in fear of something as minor as a bruise or simple physical pain cannot qualify as a violent felony”); *see also Evans*, 699 F.3d at 863 (finding that it is sufficient that the force be capable of causing any injury “regardless of its gravity or duration”).

Also, the Court finds that the Fourth Circuit in *Garner* incorrectly placed more weight on the North Carolina Court of Appeals decisions than the decisions of the North Carolina Supreme Court. The Fourth Circuit does not acknowledge the North Carolina Supreme Court’s determination that “the use, or threatened use, of violence is an element of common law robbery,” *Jones*, 451 S.E.2d at 853–54, and that the force used must “overpower the party robbed or prevent his resisting,” *John*, 50 N.C. (5 Jones) at 169. Instead, the Fourth Circuit relied on the holdings in unpublished North Carolina Court of Appeals cases.

Furthermore, although not dispositive, the Court notes that the Fourth Circuit’s decision in *Garner* is an outlier among federal courts of appeals’ decisions considering whether similar state robbery offenses involve the use of force. All federal courts of appeals which have considered robbery offenses that, like North Carolina robbery, require more force than mere purse snatching have concluded that such offenses qualify as either crimes of violence or violent felonies under the use-of-force clause. *See Duncan*, 833 F.3d 754–57 (Indiana robbery); *United States v. Jenkins*, 651 F. App’x 920, 927 (11th Cir. 2016) (Florida robbery); *United States v. Maxwell*, 823 F.3d 1057, 1061

(7th Cir. 2016) (Minnesota robbery); *United States v. Lamb*, 638 F. App'x 575, 577 (8th Cir. 2016) (Michigan unarmed robbery); *United States v. Elliott*, 757 F.3d 492, 496 (6th Cir. 2014) (Kentucky first-degree robbery); *United States v. Wiggan*, 530 F. App'x 51, 57 (2d Cir. 2013) (Connecticut first-degree robbery); *United States v. Nigg*, 667 F.3d 929, 937 (7th Cir. 2012) (Arizona robbery); *United States v. Forrest*, 611 F.3d 908, 911 (8th Cir. 2010) (Colorado robbery); *United States v. Brown*, 437 F.3d 450, 452 (5th Cir. 2006) (Louisiana simple robbery); *United States v. Thomas*, 280 F.3d 1149, 1159 (7th Cir. 2002) (Georgia robbery); *United States v. Tirrell*, 120 F.3d 670, 680 (7th Cir. 1997) (Michigan attempted unarmed robbery); *United States v. Cornish*, 103 F.3d 302, 309 (3d Cir. 1997) (Pennsylvania third-degree robbery); *United States v. Dickerson*, 901 F.2d 579, 584 (7th Cir. 1990) (Illinois robbery).

In sum, the Court finds that North Carolina common law robbery categorically qualifies as a crime of violence under the use-of-force clause. Although the determination that the defendant's North Carolina common law robbery offense falls under the use-of-force clause is sufficient to classify him as a career offender, the Court will also address whether the robbery conviction qualifies an enumerated offense.

B. Enumerated Crimes of Violence in Application Note 1

Application Note 1 to § 4B1.2 provides that “robbery” is a crime of violence. U.S.S.G. § 4B1.2, cmt. n.1. The Sixth Circuit has consistently held that the offenses listed in Application Note 1 are categorically crimes of violence. *E.g.*, *United States v. Cooper*, 739 F.3d 873, 878 (6th Cir. 2014). To determine whether a particular state

offense qualifies as robbery as included in Application Note 1, the Court must consider whether that offense “fall[s] within the generic definition of the crime, which is found by surveying how the crime is described across jurisdiction, as well as consulting the Model Penal Code.” *United States v. Rede-Mendez*, 680 F.3d 552, 556 (6th Cir. 2012). In analyzing whether North Carolina common law robbery falls within the generic definition of the crime, courts have held that it does and, thus, held that the robbery is categorically a crime of violence. *See United States v. Moore*, 223 F. App’x 422, 424 (5th Cir. 2007); *United States v. Woods*, 169 F. App’x 790, 791 (4th Cir. 2006).

The defendant does not appear to dispute that North Carolina common law robbery qualifies as generic robbery [Doc. 100 pp. 8–9]. Instead, the defendant asserts that the application note is not authoritative because it expands the scope of the guidelines [*Id.* at 8]. He argues that the commentary including robbery as a crime of violence was only consistent with the language of the guidelines when the residual clause was intact. Consequently, the defendant asserts that, post-*Johnson*, Application Note 1 is no longer consistent with the guidelines.

The Supreme Court has determined that the commentary may only be authoritative if it is consistent with the actual language of the guidelines. *Stinson v. United States*, 508 U.S. 36, 38 (1993). The Sixth Circuit, however, has provided that because *Johnson* left intact the career offender application notes, “[t]here is no escaping [the] language [of the application notes] or its binding application.” *United States v. Stevens*, 561 F. App’x 445, 448 (6th Cir. 2016) (determining that a Tennessee attempted aggravated burglary is

a crime of violence because it is enumerated in Application Note 1); *see also United States v. Morris*, 641 F. App'x 457, 461 (6th Cir. 2016) (finding that an Ohio aggravated assault conviction still qualified as a crime of violence post-*Johnson* because it qualified as “one of the enumerated crimes of violence listed in Application Note 1 to the career offender guideline”); *In re Kenneth Smith*, No. 16-5888 (6th Cir. Oct. 27, 2016) (finding that a prior Tennessee aggravated assault conviction still qualifies as a crime of violence following *Johnson* and *Pawlak* because it qualified as “generic aggravated assault”—an enumerated crime of violence in Application Note 1) [Doc. 104-1]. The Court is bound by this rule of law until and unless the Sixth Circuit provides otherwise.

The government also points out that the reasoning behind the Supreme Court’s invalidation of the residual clause in *Johnson* does not apply here. The Supreme Court concluded in *Johnson* that “the wide-ranging inquiry required by the residual clause” was so “indetermina[te]” that it “denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges.” 135 S. Ct. at 2257. In contrast, Application Note 1 to § 4B1.2 specifically lists out offenses that qualify as crimes of violence. U.S.S.G. § 4B1.2, cmt. n.1 (providing that a conviction is a crime of violence if it is “murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extensions of credit, and burglary of a dwelling”). Application Note 1, therefore, provides an “ascertainable standard” for its application, it is not unconstitutionally vague. *United States v. Shultz*, 733 F.3d 616, 622 (6th Cir. 2013)

(citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). The concerns the Supreme Court raised in *Johnson*, therefore, are not present here.

Furthermore, because the Court has already determined that the defendant's North Carolina common law robbery conviction falls under the use-of-force clause, the Court finds that the official commentary is not expanding the scope of the guideline.

In sum, as the defendant's North Carolina common law robbery offense falls within the generic definition of the crime, a point the defendant not does not dispute, the conviction qualifies as an enumerated offense pursuant to the application notes.

C. *Almendarez-Torres*

The defendant's final argument is that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) is no longer good law in light of the Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Shepard v. United States*, 544 U.S. 13 (2005). As the Sixth Circuit already explained on appeal, the defendant's claim that *Almendarez-Torres* is no longer good law is without merit. *Smith*, 582 F. App'x at 600. Indeed, the Sixth Circuit has repeatedly found that "*Almendarez-Torres* is still good law and will remain so until the Supreme Court explicitly overrules it." *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014). This Court cannot overrule binding Supreme Court precedent that the Sixth Circuit has adopted. The Court, therefore, declines to address the constitutionality of *Almendarez-Torres*.

III. Conclusion

For the reasons discussed herein, the Court finds that the defendant's North Carolina common law robbery conviction constitutes a predicate offense under the career offender guideline. As such, the defendant's objection [Doc. 100] is **OVERRULED**.

IT IS SO ORDERED.

s/ Thomas A. Varlan
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

United States District Court

Eastern District of Tennessee

UNITED STATES OF AMERICA
v.
ARTHUR CHARLES SMITH

JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: 3:13-cr-00005-TAV-CCS-003
Bradley Henry
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): 1-3 of the 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.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Violation Concluded	Count
18 U.S.C. §§ 2118(a) and 2	Aided and Abetted by Another, Pharmacy Robbery	December 17, 2012	1
18 U.S.C. §§ 924(c)(1) and 2	Aided and Abetted by Another, Using, Carrying, and Brandishing a Firearm During a Crime of Violence	December 17, 2012	2
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm and Ammunition	December 17, 2012	3

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 and 18 U.S.C. 3553.

- ☐ The defendant has been found not guilty on count(s).
☐ All remaining counts as to this defendant in this case are dismissed on the motion of the United States.

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

November 15, 2016

Date of Imposition of Judgment

s/ Thomas A. Varlan

Signature of Judicial Officer

Thomas A Varlan, United States District Judge

Name & Title of Judicial Officer

November 21, 2016

Date

DEFENDANT: Arthur Charles Smith
CASE NUMBER: 3:13-cr-00005-TAV-CCS-003

Judgment - Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **262 Months.**

This term consists of 178 months as to Count One and 120 months as to Count Three, to be served concurrent, and 84 months as to Count Two to be served consecutively for an effective sentence of 262 months.

- ☒ The court makes the following recommendations to the Bureau of Prisons: That the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program. It is further recommended that the defendant be designated to FCC Allenwood.
- ☒ 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:
 - ☐ before 2 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: Arthur Charles Smith
CASE NUMBER: 3:13-cr-00005-TAV-CCS-003

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years. This term consists of three years as to Count One, five years as to Count Two, and three years as to Count Three to all run concurrently.

The defendant shall 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 illegally 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 a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area 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 probation office;
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/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 narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the Court;
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 at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within 72 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;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his/her criminal record or personal history of characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Arthur Charles Smith
CASE NUMBER: 3:13-cr-00005-TAV-CCS-003

Judgment - Page 4 of 6

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
2. The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release.
3. The defendant shall provide the probation officer with access to any requested financial information.
4. The defendant shall not incur new credit charges or apply for additional lines of credit without permission of the probation officer until restitution has been paid in full. In addition, the defendant shall not enter into any contractual agreements which obligate funds without permission of the probation officer.
5. The defendant shall submit his or her person, property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,) or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his/her supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: Arthur Charles Smith
CASE NUMBER: 3:13-cr-00005-TAV-CCS-003

Judgment - Page 5 of 6

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. 3013.

	Assessment	Fine	Restitution
Totals:	\$ 300.00	\$	\$ 15,010.68

- ☐ The determination of restitution is deferred until __. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☒ The defendant shall make restitution (including community restitution) to the following payees in the amounts 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, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
CVS Attn: Steve Burd 718 Winfield Dunn Parkway Sevierville, TN 37876		\$15,010.68	
TOTALS:	\$__	\$ <u>15,010.68</u>	

- ☐ If applicable, restitution amount ordered pursuant to plea agreement \$__
- ☐ The defendant shall pay interest on any fine or restitution of more than \$2500, unless the fine or restitution is paid in full before the fifteenth day after the date of 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 and/or ☒ restitution.
- ☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

DEFENDANT: Arthur Charles Smith
CASE NUMBER: 3:13-cr-00005-TAV-CCS-003

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$15,310.68 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, ☐ F below); or
- C ☐ Payment in equal __ installments of \$__ over a period of __, to commence __ after the date of this judgment; or
- D ☐ Payment in equal __ installments of \$__ over a period of __, to commence __ after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within __ after release from imprisonment. The court will set the payment plan based on as assessment of the defendant's ability to pay at the time; or
- F ☒ Special instruction regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if the judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 800 Market Street, Suite 130, Knoxville, TN 37902**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

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

☒ Joint and Several

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

Michael Daniels; 3:13-CR-005-001; \$15,010.68
Randall Norris; 3:13-CR-005-002; \$15,010.68

- ☐ 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:

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 E

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

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: February 07, 2018

Mr. Bradley L. Henry
Breeding & Henry
900 S. Gay Street, Suite 1950
Knoxville, TN 37902

Mr. Luke A. McLaurin
Office of the U.S. Attorney
800 Market Street, Suite 211
Knoxville, TN 37902

Re: Case No. 16-6720, *USA v. Arthur Smith*
Originating Case No. : 3:13-cr-00005-3

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Debra Poplin

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0027p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR CHARLES SMITH, aka Marvon Andersen,

Defendant-Appellant.

No. 16-6720

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:13-cr-00005-3—Thomas A. Varlan, District Judge.

Argued: November 30, 2017

Decided and Filed: February 7, 2018

Before: NORRIS, ROGERS, and BUSH, Circuit Judges.

COUNSEL

ARGUED: Bradley L. Henry, BREEDING & HENRY, LLC, Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Bradley L. Henry, BREEDING & HENRY, LLC, Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

ROGERS, Circuit Judge. Arthur Smith was sentenced as a career offender based in part on his prior North Carolina state conviction for common-law robbery. In this appeal, he

No. 16-6720

United States v. Smith

Page 2

contends that North Carolina common-law robbery does not qualify as a “crime of violence” within the meaning of § 4B1.1(a) of the United States Sentencing Guidelines. This is the second time Smith has asked us to resolve this question. In 2014, another panel of this court heard Smith’s case and concluded that North Carolina common-law robbery indeed qualifies as a crime of violence under the Guidelines’ so-called residual clause. The Supreme Court vacated that decision, however, after its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which cast the constitutionality of the Guidelines’ residual clause into doubt. Since then, another Supreme Court decision, *Beckles v. United States*, 137 S. Ct. 886 (2017), has clarified that the Guidelines’ residual clause remains valid even after *Johnson*. We therefore reaffirm our prior conclusion that North Carolina common-law robbery is a crime of violence within the meaning of the Guidelines’ residual clause. Accordingly, Smith was properly classified as a career offender.

The United States Sentencing Guidelines (“USSG” or “Guidelines”) provide longer sentences for defendants who qualify as “career offenders.” A defendant qualifies as a career offender if “(1) the defendant was at least eighteen years old at the time the defendant 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) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” USSG § 4B1.1(a). At issue here is the final requirement that Smith have at least two qualifying prior convictions.

On April 23, 2013, Smith pleaded guilty to three federal counts stemming from his armed robbery of a CVS pharmacy in Sevierville, Tennessee. The government contended that Smith qualified as a career offender based on two prior state-court convictions: one for drug trafficking under South Carolina law and the other for common-law robbery under North Carolina law. Smith admitted that the South Carolina drug-trafficking conviction was a predicate offense, but maintained that the North Carolina common-law robbery conviction was not.

No. 16-6720

United States v. Smith

Page 3

When Smith was originally sentenced on September 30, 2013, the applicable version of the Guidelines (the 2012 edition) defined “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 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) (2012). Subsection (1) is commonly known as the “elements” clause. Subsection (2) is generally divided into the “enumerated-offense” clause (“is burglary of a dwelling, arson, or extortion, involves use of explosives”) and the “residual” clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”).¹

At Smith’s original sentencing hearing, the district court concluded that North Carolina common-law robbery qualifies as a crime of violence under the residual clause. The court thus applied the career-offender enhancement, which increased Smith’s Guidelines range from 194–221 months up to 262–327 months. The district court opted for the bottom of the range, and Smith was sentenced to 262 months’ imprisonment.

Smith appealed, and we affirmed his sentence in an unpublished opinion that relied on the residual clause. *United States v. Smith (Smith I)*, 582 F. App’x 590 (6th Cir. 2014). After our decision in *Smith I*, however, the Supreme Court invalidated the Armed Career Criminal Act’s identically worded residual clause, finding that it was void for vagueness. *Johnson*, 135 S. Ct. at 2563. In light of *Johnson*, the Supreme Court vacated our judgment in *Smith I* and remanded for reconsideration. *Smith v. United States*, 135 S. Ct. 2930 (2015).

While the remand in Smith’s case was pending, we extended the reasoning of *Johnson* to hold the Guidelines’ residual clause void for vagueness as well. *United States v. Pawlak*,

¹In 2016, the U.S. Sentencing Commission removed the residual clause and replaced it with a fuller list of enumerated offenses. The 2016 version of USSG § 4B1.2(a)(2) provides that an offense is a crime of violence if it “is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).”

No. 16-6720

United States v. Smith

Page 4

822 F.3d 902, 911 (6th Cir. 2016). Thus, when we took up Smith's case on remand, the Guidelines' residual clause was not available as a basis to determine that North Carolina common-law robbery qualifies as a crime of violence. We accordingly sent his case back to the district court for resentencing in light of *Pawlak*. *United States v. Smith*, 667 F. App'x 536, 537 (6th Cir. 2016).

Smith was resentenced on November 15, 2016. Because *Pawlak* was binding precedent at the time, the district court did not consider the residual clause, and instead held that North Carolina common-law robbery qualifies as a crime of violence under the elements clause and the enumerated-offense clause. However, several months after Smith's resentencing, the Supreme Court decided *Beckles*, 137 S. Ct. at 886. *Beckles* held that the advisory Guidelines are not subject to void-for-vagueness challenges, and that therefore the Guidelines' residual clause "is not void for vagueness." *Id.* at 892. In so holding, the Supreme Court effectively abrogated our decision in *Pawlak* and reinstated the Guidelines' residual clause as a basis on which to conclude that offenses qualify as crimes of violence.

Smith I held that North Carolina common-law robbery categorically qualifies as a crime of violence under the residual clause. Because the residual clause is valid post-*Beckles*, we may reach the same conclusion in this case so long as *Smith I*'s reasoning has not been otherwise undermined.² A thorough examination of both *Smith I* and the reasons Smith offers to depart from it shows that the logic of *Smith I* remains sound, and therefore North Carolina common-law robbery is a crime of violence under the Guidelines' residual clause.

Under North Carolina law, common-law robbery is "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Bell*, 603 S.E.2d 93, 117 (N.C. 2004) (quoting *State v. Moss*, 418 S.E.2d 213, 217 (N.C. 1992)). *Smith I* correctly applied the categorical approach to determine that North Carolina common-law robbery qualifies as a crime of violence under the residual clause. *See generally United States v. Yates*, 866 F.3d 723, 728 (6th Cir. 2017) (explaining the

²We apply the version of the Guidelines in effect when Smith was originally sentenced. 18 U.S.C. § 3742(g)(1); *United States v. Taylor*, 648 F.3d 417, 424 (6th Cir. 2011). When Smith was first sentenced on September 30, 2013, the 2012 Guidelines (which contain the residual clause) were in effect, and so govern this case.

No. 16-6720

United States v. Smith

Page 5

categorical approach). Its analysis turned on the final part of the offense definition—that the taking must be accomplished “by means of violence or fear.” Smith conceded that robbery committed by means of violence does present a “serious risk of physical injury to another” as required by the residual clause, but contended that robbery committed by means of fear does not. *Smith I*, 582 F. App’x at 596. We disagreed, observing that, under North Carolina Supreme Court precedent, the fear element requires that the victim be induced to part with his property “for the sake of his person,” see *State v. Sawyer*, 29 S.E.2d 34, 37 (N.C. 1944), which means the victim must be placed in fear of bodily injury. *Smith I*, 582 F. App’x at 597. This, we reasoned, “does generally present a serious risk of physical injury to another.” *Id.* Smith responded that fear “for the sake of one’s person” could possibly include threats of things other than physical injury, such as a threat to fire or financially ruin the victim. We rejected this argument, however, explaining that, even if it were theoretically possible to commit common-law robbery through threats of something other than physical injury (like a threat to terminate the victim’s employment), the relevant inquiry is how North Carolina common-law robbery is committed in the “ordinary case,” and “*in the ordinary case*, robbing someone by means of placing him in fear for his person *does* present a serious risk of physical injury.” *Id.* (emphasis in original). Having thus held that North Carolina common-law robbery qualifies as a crime of violence under the residual clause, we declined to consider whether it might also qualify under the elements or enumerated-offense clause. *Id.* at 598.

On this appeal, Smith reprises his argument that the fear element can be satisfied by threats of harm other than physical violence—such as threats to the safety of family members, threats of being fired, or threats of financial ruin—and that, committed this way, common-law robbery does not pose a “serious potential risk of physical injury to another” as required by the residual clause. This argument fails for the same reason it failed in *Smith I*. “[T]he inquiry is not whether it is possible for a defendant to commit a crime in a way that would not be a violent felony.” *Id.* Rather, the question is “whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another.” *Id.* at 597 (quoting *James v. United States*, 550 U.S. 192, 208 (2007) (emphasis added in *Smith I*)). Smith’s hypotheticals, “though perhaps the stuff of law-school exams,” *id.*, do not represent the ordinary case of North Carolina common-law robbery. Tellingly, Smith does not cite any case in which

No. 16-6720

United States v. Smith

Page 6

North Carolina common-law robbery has been applied based on a threat to injure the victim's family, terminate the victim's employment, financially ruin the victim, or the like. This is presumably because no such cases exist. As the Supreme Court has cautioned, the categorical approach "is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

Smith contends that we should depart from our holding in *Smith I* because, after *Johnson* and *Beckles*, even though the advisory Guidelines are not subject to void-for-vagueness challenges, the Guidelines' residual clause is still so difficult to interpret that district courts commit procedural error if they rely on it to calculate a Guidelines range. In other words, he argues that, because a sentence is procedurally unreasonable if the district court improperly calculates the Guidelines range, *Gall v. United States*, 552 U.S. 38, 51 (2007), and because the residual clause is so vague that it is impossible to interpret correctly, district courts interpreting the residual clause will always reach an improper calculation and thus commit procedural error. This wholesale attack on the residual clause must be rejected. *Beckles* recently affirmed the residual clause's validity, and we have since approved of several post-*Beckles* Guidelines calculations that relied on the residual clause. See *United States v. Patterson*, 853 F.3d 298, 305–06 (6th Cir. 2017); *United States v. Goodrich*, No. 16-1795, 2017 WL 4350896, at *2 (6th Cir. Oct. 2, 2017); *United States v. Jackson*, 704 F. App'x 484, 488 (6th Cir. 2017). Indeed, as we recently noted, "post-*Beckles*, every decision issued by the Sixth Circuit involving this question has concluded that the residual clause can provide an alternative basis for affirmance." *United States v. Johnson*, No. 16-2033, 2017 WL 5625720, at *2 n.2 (6th Cir. Nov. 22, 2017). Smith's argument amounts to an attempt to revisit *Beckles*' holding that the advisory Guidelines are not subject to vagueness challenges. We decline to do so.

Smith also argues that the Supreme Court's pre-*Johnson* residual-clause caselaw, such as *James v. United States*, 550 U.S. 192 (2007), cannot be used to interpret the Guidelines' residual clause, because this caselaw was developed in the context of the residual clause of the Armed Career Criminal Act ("ACCA"), and thus was overruled by *Johnson*. However, we have already

No. 16-6720

United States v. Smith

Page 7

rejected this contention, explaining that *James*, “while no longer valid for analyzing the residual clause of the ACCA, [remains] good law for purposes of the Guidelines.” *United States v. Goodson*, 700 F. App’x 417, 423 (6th Cir. 2017). The fact that *Smith I* relied in part on *James*, see *Smith I*, 582 F. App’x at 597–98, does not undermine the reasoning of that decision.

Finally, Smith cites a decision of the Fourth Circuit, *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), which holds that North Carolina common-law robbery does not qualify as a violent felony under the ACCA. However, *Gardner* is not on point. *Gardner* was an ACCA case decided after *Johnson*, and therefore it could not consider the ACCA’s residual clause; instead, it was decided solely under the ACCA’s elements clause. See *id.* at 803–04. Whether North Carolina common-law robbery “has as an element the use, attempted use, or threatened use of physical force against the person of another,” as the ACCA’s elements clause requires, see 18 U.S.C. § 924(e)(2)(B)(i), has no bearing on the dispositive question in this case, which is whether North Carolina common-law robbery necessarily “involves conduct that presents a serious potential risk of physical injury to another.” Moreover, since *Gardner* the Fourth Circuit has recognized that North Carolina common-law robbery does qualify as a crime of violence under the Guidelines, albeit under the enumerated-offense clause rather than under the residual clause. *United States v. Gattis*, 877 F.3d 150, 156–60 (4th Cir. 2017).

For these reasons, the district court correctly concluded that North Carolina common-law robbery is a crime of violence as that term is used in the Guidelines.

Smith also argues that his sentence is substantively unreasonable. A sentence is substantively unreasonable if the district court “selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor.” *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008) (citing *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005)). Smith not only bears the burden to show substantive unreasonableness, *United States v. Woodard*, 638 F.3d 506, 510 (6th Cir. 2011) (citing *United States v. Houston*, 529 F.3d 743, 756 (6th Cir. 2008)), but because his sentence was within the Guidelines range, he must also overcome a rebuttable presumption that it is reasonable, *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

No. 16-6720

United States v. Smith

Page 8

Smith does not meet this burden. He does not point to any way in which the district court selected his bottom-of-the-Guidelines sentence arbitrarily, based it on impermissible factors, or unreasonably applied the proper factors. He instead argues only that the career-offender guideline is generally unreasonable, because, in his view, it arbitrarily over-punishes those defendants who qualify, without sufficient evidence that it deters crime or protects the public. But the career-offender guideline is on the books, and “the mere fact that a sentencing court has the discretion to disagree with the guidelines on policy grounds does not mean that it is required to do so.” *United States v. Ekasala*, 596 F.3d 74, 76 (1st Cir. 2010) (internal citation omitted). Thus, Smith has not identified anything to rebut the presumption that his within-Guidelines sentence is substantively reasonable.

Smith’s final argument is that his Sixth Amendment right to a jury trial was violated when the district court used the fact of his prior convictions to enhance his sentence, even though the fact of those convictions was neither charged by indictment nor proven to a jury beyond a reasonable doubt. This argument is foreclosed by Supreme Court precedent. In *Almendarez-Torres v. United States*, 523 U.S. 224, 239–247 (1998), the Court held that a sentencing court may use the fact of a defendant’s recidivism to increase his sentence even if the defendant’s prior convictions are neither alleged in the indictment nor found by a jury beyond a reasonable doubt. The Supreme Court has since declined to revisit *Almendarez-Torres* on several occasions. See *Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 489–90 (2000). Smith argues that *Apprendi*, *Alleyne*, and *Shepard v. United States*, 544 U.S. 13 (2005), have called *Almendarez-Torres* into question such that it is no longer viable. However, “*Almendarez-Torres* is still good law and will remain so until the Supreme Court explicitly overrules it.” *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014) (quoting *United States v. Anderson*, 695 F.3d 390, 398 (6th Cir. 2012)).

For the foregoing reasons, we affirm Smith’s sentence.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-6720

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ARTHUR CHARLES SMITH, aka Marvon Andersen,
Defendant - Appellant.

FILED
Feb 07, 2018
DEBORAH S. HUNT, Clerk

Before: NORRIS, ROGERS, and BUSH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that Arthur Smith's sentence is
AFFIRMED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk