APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXITH CIRCUIT

XAVIER DEMETRIUS PORTER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 18-5091

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
Nos. 3:13-cr-00164-1; 3:16-cv-00813
Thomas B. Russell, District Judge.

Argued: May 8, 2020

Decided and Filed: May 20, 2020

Before SILER, GIBBONS, and THAPAR, Circuit Judges.

OPINION

THAPAR, Circuit Judge.

Xavier Porter has committed more than a few armed robberies during his lifetime. He now argues that those robberies don't qualify as "violent felonies" or "crimes of violence" under federal law. The district court rejected his arguments. We affirm.

Over a six-week period, Porter robbed nine different businesses around Louisville, Kentucky—often with some assistance from a pistol-grip shotgun. He wasn't at large for long. Porter eventually pled guilty to nine counts of Hobbs Act robbery, one count of brandishing a firearm during and in relation to a crime of violence, and one count of being a felon in possession of a firearm. *See* 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(ii), 1951(a). The district court sentenced him to 30 years' imprisonment.

That sentence depended on two provisions of the Armed Career Criminal Act. Section 924(c) creates the substantive offense of brandishing a firearm during and in relation to a "crime of violence." Section 924(e) creates a sentencing enhancement for those who possess a firearm after three prior convictions for a "violent felony." As relevant here, these provisions use nearly identical pairs of clauses—each with an elements clause and a residual clause—to define the terms "crime of violence" and "violent felony." *Id.* §§ 924(c)(3), 924(e)(2)(B).

In earlier proceedings, the district court found that both § 924(c) and § 924(e) applied to Porter because of his convictions for Hobbs Act robbery and because he had three prior convictions for Georgia armed robbery. But since then the Supreme Court has held

that the residual clauses in both § 924(c) and § 924(e) are unconstitutionally vague. *See United States v. Davis*, ––– U.S. ––––, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019); *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015). So the question for us is whether his convictions still qualify as "violent felonies" or "crimes of violence" based solely on the elements clauses in § 924(c) and § 924(e).

To start, both parties claim that the other party has forfeited or waived various arguments. But since it doesn't change the outcome—and simplifies the analysis—we'll just cut to the merits. *See United States v. Sharp*, 689 F.3d 616, 618 (6th Cir. 2012).

As for the merits, Porter argues that Georgia armed robbery doesn't qualify as a "violent felony" under the elements clause in § 924(e). That provision requires the underlying felony to have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). To determine whether a felony qualifies, we look to its statutory elements and judicial interpretations of those elements—not the facts underlying the conviction. *See Mathis v. United States*, ––– U.S. ––––, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016); *United States v. Harris*, 853 F.3d 318, 320 (6th Cir. 2017).

At the time of Porter's convictions, a person committed Georgia armed robbery when he took "property of another from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon" with the "intent to

commit theft." Ga. Code Ann. § 16-8-41(a) (1995).[1] According to the Georgia Supreme Court, an "offensive weapon" is the same as a "deadly weapon." *Long v. State*, 287 Ga. 886, 700 S.E.2d 399, 402 (2010).

Both history and common sense suggest that robbery with a deadly weapon involves an element of physical force. *Cf. Stokeling v. United States*, ––– U.S. ––––, 139 S. Ct. 544, 550–52, 202 L.Ed.2d 512 (2019). Precedent holds the same. *See, e.g.*, *United States v. Harris*, 790 F. App'x 770, 774–75 (6th Cir. 2019) (Kentucky armed robbery); *Reliford v. United States*, 773 F. App'x 248, 251–53 (6th Cir. 2019) (Michigan armed robbery); *United States v. Patterson*, 853 F.3d 298, 302–05 (6th Cir. 2017) (Ohio aggravated robbery); *United States v. Gloss*, 661 F.3d 317, 318–19 (6th Cir. 2011) (Tennessee aggravated robbery). In fact, our circuit has said that "[a]ny robbery accomplished with a real or disguised deadly weapon ... necessarily involves the use, attempted use, or threatened use of physical force against the person of another." *Gloss*, 661 F.3d at 319 (cleaned up). So Georgia armed robbery would seem to qualify.

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[1] The parties argue about whether this statute is divisible between "armed robbery" and "robbery by intimidation." But the statute expressly says that robbery by intimidation is a "lesser included offense" of armed robbery. Ga. Code Ann. § 16-8-41(a). By definition, then, armed robbery involves a separate and distinct crime from robbery by intimidation (*i.e.*, a person can commit the latter crime without committing the former). Here the parties agree that Porter committed armed robbery. And neither party argues that armed robbery is further divisible.

Even still, Porter offers some reasons why the Georgia offense might be different.

First, Porter argues that a person can commit Georgia armed robbery by the mere "possession" of a weapon. That would be surprising given that the statute expressly mentions the "use" of a weapon. Ga. Code Ann. § 16-8-41(a). And what the statutory text suggests the case law confirms. *See, e.g.*, *Bates v. State*, 293 Ga. 855, 750 S.E.2d 323, 326 (2013); *Sheely v. State*, 287 Ga.App. 92, 650 S.E.2d 762, 764 (2007). True, a defendant satisfies the "use" element so long as he makes his victim aware of the weapon in a way that facilitates the robbery—even if he never *displays* the weapon. *See, e.g.*, *Sheely*, 650 S.E.2d at 764; *McCluskey v. State*, 211 Ga.App. 205, 438 S.E.2d 679, 681 (1993). But that's enough under our precedent. *See Gloss*, 661 F.3d at 318–19. And this element distinguishes Georgia armed robbery from other offenses found not to be violent felonies. *Cf. United States v. Parnell*, 818 F.3d 974, 982 (9th Cir. 2016) (Watford, J., concurring) (noting the "oddity" of a law under which a person could commit armed robbery "even if the victim never learns of the gun's presence, and even if the gun plays no role in facilitating the crime").

Porter also points out that a person can commit Georgia armed robbery without a real weapon. The statute covers not just the use of an "offensive weapon" but also the use of "any replica, article, or device having the appearance of such weapon." Ga. Code Ann. § 16-8-41(a). Based on this language, Georgia courts have upheld convictions for armed robbery when the defendant used a toy gun, a sock-

covered pipe, or even just a hand inside a jacket to create the appearance of a weapon. *See Price v. State*, 289 Ga.App. 763, 658 S.E.2d 382, 384–85 (2008) (toy gun); *Faulkner v. State*, 260 Ga.App. 794, 581 S.E.2d 365, 367 (2003) (sock-covered pipe); *Joyner v. State*, 278 Ga.App. 60, 628 S.E.2d 186, 188 (2006) (hand inside jacket). But again, that's enough to satisfy the elements clause. *See Harris*, 790 F. App'x at 775; *Gloss*, 661 F.3d at 318–19. After all, if you threaten to shoot someone, you've clearly threatened the use of physical force. And the elements clause doesn't require that you have the ability to carry through on that threat. *See Lassend v. United States*, 898 F.3d 115, 128–130 (1st Cir. 2018) (collecting cases).

Porter next argues that Georgia armed robbery can involve the use of force against "property" rather than a "person." But he hasn't identified any case in which that's happened. Indeed, Georgia courts typically say that armed robbery requires "the use of actual force or intimidation (constructive force) *against another person*." *Johnson v. State*, 288 Ga. 771, 707 S.E.2d 92, 95 (2011) (citation omitted; emphasis added). To be sure, there's some loose language in a few cases suggesting that a defendant can simply threaten a person's "property" or "character." *Green v. State*, 304 Ga. 385, 818 S.E.2d 535, 540 (2018) (citation omitted). But as far as we can tell—or Porter has shown—Georgia courts have never upheld a conviction for armed robbery based on this language. And why would they need to? Recall that Georgia armed robbery requires that the defendant make his victim aware of the deadly weapon and that he commit the crime in the victim's "immediate presence." Ga. Code § Ann. 16-8-41(a).

It's hard to imagine a scenario where that wouldn't involve a threat—at least an implied one—to use physical force against that person. *Cf. Patterson*, 853 F.3d at 302–03.

Porter primarily points to a single case to establish such a scenario. *See Maddox v. State*, 174 Ga.App. 728, 330 S.E.2d 911 (1985). But in that case, the court merely noted that a defendant need not directly point a firearm at a victim to threaten his person. *Id*. at 913–14. It was enough that the defendant made his victim aware of the weapon to accomplish the robbery. *See id*. at 913 (noting that "merely seeing a shotgun being carried into a place of business has an intimidating effect on the proprietor"). Given all this, Porter hasn't shown a "realistic probability" that Georgia would apply its statute to cases in which a defendant threatens only a victim's property. *Perez v. United States*, 885 F.3d 984, 990 (6th Cir. 2018) (citation omitted).

Finally, Porter points out that the Georgia statute doesn't use the word "force" or a synonym like "violence." But the same has been true of past offenses found to satisfy the elements clause. *See, e.g.*, *Harris*, 790 F. App'x at 774–75; *Patterson*, 853 F.3d at 302–03. Legislatures don't need to use magic words—like "force" or "violence"—to create a "violent felony." Instead, the Armed Career Criminal Act simply asks whether the offense includes an element of physical force. And Georgia armed robbery surely does. *See Gloss*, 661 F.3d at 319; *see also United States v. Thomas*, 280 F.3d 1149, 1159 (7th Cir. 2002) (holding that Georgia robbery by intimidation—a lesser-included offense of armed

robbery—satisfies the elements clause). So this argument fares no better than the rest.

In sum, Georgia armed robbery qualifies as a "violent felony" under § 924(e).

Porter also argues that Hobbs Act robbery doesn't qualify as a "crime of violence" under the elements clause in § 924(c). But our circuit has repeatedly rejected this argument. *See, e.g.*, *United States v. Camp*, 903 F.3d 594, 597 (6th Cir. 2018); *United States v. Gooch*, 850 F.3d 285, 290–92 (6th Cir. 2017). And every other circuit to address the question has done the same. *See United States v. Bowens*, 907 F.3d 347, 354 n.11 (5th Cir. 2018) (collecting cases).

We affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

XAVIER DEMETRIUS PORTER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

NO. 18-5091

November 13, 2018

ORDER

Xavier Demetrius Porter, a federal prisoner proceeding pro se, appeals the district court's judgment denying his amended 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. He has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b)(1), a motion for leave to proceed in forma pauperis ("IFP") on appeal, *see* Fed. R. App. P. 24(a)(5), and two motions to supplement the record. Porter has also requested that this court stay his case pending the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

In 2014, Porter pleaded guilty to one count of attempted robbery and eight counts of robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The presentence report designated Porter an armed career criminal under the Armed Career Criminal Act ("ACCA"), *see* 18 U.S.C. § 924(e), which imposes a mandatory minimum sentence of 180 months on any defendant found guilty of possessing a firearm after having been convicted of three or more "serious drug offense[s]" or "violent felon[ies]." *Id.* § 924(e)(1). The presentence report identified as ACCA predicate offenses three 1996 Georgia convictions for armed robbery and recommended a sentencing guidelines range of 264 months of imprisonment. In 2015, the district court adopted the presentence report without modification and imposed an above-guidelines sentence of 360 months. Porter did not appeal.

In 2016, Porter filed an amended § 2255 motion. Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the ACCA's "residual clause" as unconstitutionally vague, Porter sought relief from his § 924(c) conviction. *See id.* at 2563; *see also Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) (holding that *Johnson* announced a new, "substantive rule that has retroactive effect in cases on collateral review"). After the government filed a response, the magistrate judge entered a report recommending that Porter's amended § 2255 motion be denied on

the merits. In his objections to the magistrate judge's report and recommendation, Porter raised an additional claim that, in light of *Johnson*, his Georgia convictions for armed robbery no longer qualify as ACCA predicate offenses. Porter also argued that his ACCA predicate offenses were charged in the same indictment. The district court adopted the magistrate judge's report and recommendation as to Porter's *Johnson* challenge to his § 924(c) conviction. The district court declined, however, to consider Porter's *Johnson* challenge to his ACCA designation, explaining that Porter improperly raised this claim for the first time in his objections to the report and recommendation.[1] Accordingly, the district court denied Porter's amended § 2255 motion and declined to issue a COA.

In his COA application, Porter reasserts the merits of his *Johnson* challenges to his § 924(c) conviction and ACCA designation. Porter also argues that the district court erred in determining that review of his ACCA claim was procedurally barred. In his motions to supplement the record, Porter provides a record of his 1996 Georgia armed robbery convictions and argues that his ACCA predicate offenses were charged in the same indictment. Because "this Court on appeal may take judicial notice of facts contained in state court documents pertaining to [a defendant]'s prior conviction so long as those facts can be accurately and readily determined," Porter's motions to supplement the record will be granted. *See United States v. Davy*,

[1] The district court did not directly address Porter's claim that his ACCA predicate offenses were charged in the same indictment.

713 F. App'x 439, 444 (6th Cir. 2017) (citing *United States v. Ferguson*, 681 F.3d 826, 834-35 (6th Cir. 2012)).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard when the district court has denied a § 2255 motion on the merits, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied a § 2255 motion on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Section 924(c) Claim. The district court concluded that Porter's *Johnson* challenge to his § 924(c) conviction was foreclosed by this court's holding in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 1976 (2018). In *Taylor*, this court held that *Johnson* did not invalidate § 924(c)'s residual clause. *Id.* at 379. In its recent decision in *Dimaya*, however, the Supreme Court held that *Johnson* invalidated the residual clause in 18 U.S.C. § 16(b), which contains language similar to that of § 924(c). *See Dimaya*, 138 S. Ct. at 1211, 1223. Under these circumstances, reasonable jurists could debate the continuing validity of *Taylor*.

See Johnson v. United States, 138 S. Ct. 2676 (2018) (mem.) (granting certiorari, vacating decision applying *Taylor*, and remanding for consideration in light of *Dimaya*). And, although Porter may have been sentenced under the use-of-force clause in § 924(c)(3)(A), rather than the residual clause in § 924(c)(3)(B), it would exceed the scope of the COA inquiry for this court to consider the issue here in the first instance. A COA is therefore warranted as to this claim.

Section 924(e) Claims. Reasonable jurists could not disagree that Porter forfeited his *Johnson* challenge to his ACCA designation by raising this claim for the first time in his objections to the magistrate judge's report and recommendation. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). But reasonable jurists could debate whether the district court should have overlooked his forfeiture, *see Thomas v. Arn*, 474 U.S. 140, 155 (1985); *cf. Moore v. Prevo*, 379 F. App'x 425, 428 (6th Cir. 2010) (concluding that, where plaintiff was pro se and magistrate judge sua sponte recommended dismissal, additional claims raised in plaintiff's objections to report and recommendation should have been considered), or whether "compelling reasons" justified the presentation of this new issue, *Murr*, 200 F.3d at 902 n.1. Porter's ACCA claim, moreover, arguably "relate[s] back" to his § 924(c) challenge and may therefore be timely. *Cf. Mayle v. Felix*, 545 U.S. 644, 649-50 (2005). And, because this court has yet to decide whether a Georgia conviction for armed robbery constitutes a violent felony without reference to the ACCA's residual clause, reasonable jurists could debate the merits of Porter's

underlying claim. *See Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam). A COA is therefore warranted as to this claim.

Porter also argued, again for the first time in his objections to the report and recommendation, that he was improperly sentenced under the ACCA because his prior Georgia armed robbery convictions were charged in a single, three-count indictment. "Section 924(e) specifies that the prior offenses should have been 'committed on occasions different from one another.' " *United States v. Roach*, 958 F.2d 679, 684 (6th Cir. 1992) (quoting 18 U.S.C. § 924(e)(1)). "[T]he language of section 924(e)(1)," however, "does not require that a defendant's three criminal predicate offenses be punctuated by intervening convictions." *Id.* And Porter has failed to argue that the underlying robberies—which the presentence report indicates were committed against three different victims on two different days—otherwise "constitute[d] a single criminal episode." *Id.*; *see United States v. Bradyl*, 988 F.2d 664, 669 (6th Cir. 1993) (en banc) ("Consistent with the holdings of our sister circuits, we believe that offenses committed by a defendant at different times and places and against different victims, although committed within less than an hour of each other, are separate and distinct criminal episodes and that convictions for those crimes should be counted as separate predicate convictions under § 924(e)(1)."). This claim therefore does not deserve encouragement to proceed further.

Finally, to the extent that Porter's objections sought to add a challenge to his ACCA designation under *Alleyne v. United States*, 570 U.S. 99 (2013), he has forfeited review of this issue by failing to

argue it in his COA application. *See Elzy v. United States*, 205 F.3d 882, 885-86 (6th Cir. 2000); *see also Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam). In any event, "*Alleyne* does not stand for the proposition that a defendant's prior convictions must be submitted to a jury and proven beyond a reasonable doubt, even when the fact of those convictions increases the mandatory minimum sentence for a crime." *United States v. Nagy*, 760 F.3d 485, 488 (6th Cir. 2014). This claim therefore does not deserve encouragement to proceed further.

Accordingly, the COA application is **GRANTED** as to Porter's claims that, in light of *Johnson*, he was improperly convicted under § 924(c) and improperly designated an armed career criminal under § 924(e). The COA application is otherwise **DENIED**. The IFP motion is **GRANTED** for the purposes of this appeal, the motions to supplement the record are **GRANTED**, and the request for a stay is **DENIED** as moot. The clerk is directed to issue a briefing schedule.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISON

XAVIER DEMETRIUS PORTER,

Movant / Defendant

v.

UNITED STATES OF AMERICA,

Respondent / Plaintiff

CRIMINAL ACTION NO. 3:13-CR-164-TBR

Signed: November 16, 2017

Filed: November 17, 2017

MEMORANDUM OPINION

Thomas B. Russell, Senior Judge

This matter is before the Court on Petitioner Xavier Demetrius Porter's Amended Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. [DN 87.] The United States filed a Response, [DN 89], and the Magistrate Judge issued Findings of Fact and Conclusions of Law and a

Recommendation, [DN 90.] Porter filed Objections to the Magistrate Judge's report, and the United States did not respond. Fully briefed, this matter is now ripe for adjudication. Having reviewed Porter's objections, the Court **ADOPTS** the Magistrate Judge's Findings of Fact and Conclusions of Law and **ADOPTS** the Magistrate Judge's Recommendation that Porter's § 2255 motion be denied. For the reasons that follow, Porter's Objections are **OVERRULED**. The Court will enter a separate Order and Judgment consistent with this Memorandum Opinion.

DISCUSSION

In 2014, Xavier Porter pled guilty to eleven out of eighteen charges included in his Indictment.[1] [DN 65 (Plea Agreement).] One of the counts to which Porter pled guilty, Count 17, charged Porter with violating 18 U.S.C. § 924(c)(1)(A)(ii), which prohibits brandishing a firearm in furtherance of a crime of violence. [DN 1 at 9–10 (Indictment)]; 18 U.S.C. § 924(c)(1)(A)(ii). Section 924(c)(3) defines "crime of violence" as used in § 924(c) to mean a felony "(A) [that] has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). Subsection (A) is known as the

[1] The other seven counts in the Indictment were dismissed. [DN 77 at 1 (Judgment and Commitment Order).]

"force clause," while subsection (B) is known as the "residual clause." [DN 90 at 4.]

In the instant motion, Porter argues that his conviction under § 924(c)(1)(A)(ii) is invalid based on the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held unconstitutional the "residual clause" of 18 U.S.C. § 924(e)(2)(B) which, in part, defines "violent felony" as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. 2551, 2557–58 (2015) (citing 18 U.S.C. § 924(e)(2)(B)). In doing so, the Court held that this "residual clause" is unconstitutionally vague. *Id.* at 2557.

According to Porter, because the residual clause of § 924(c)(3)(B) is similarly worded to the residual clause of § 924(e)(2)(B)(ii), which the Supreme Court held unconstitutional in *Johnson*, his conviction under § 924(c) is invalid. However, as the Magistrate Judge explained in his Report, "[a]lthough the 'residual clauses' in these two statutes are similar, the Sixth Circuit has explicitly rejected Porter's argument that the 'residual clause' of § 924(c)(3)(B) is unconstitutionally vague based on the reasoning of the Supreme Court in *Johnson*." [DN 90 at 4–5.] Indeed, the Sixth Circuit addressed this very argument in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016). In that case, the court engaged in a lengthy analysis in which it discussed many "factors [that] distinguish the ACCA residual clause from § 924(c)(3)(B)." *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016). In detail, the court explained, in part:

> First, the statutory language of § 924(c)(3)(B) is distinctly narrower, especially in that it deals with physical force rather than physical injury. Second, the ACCA residual clause is linked to a confusing set of examples that plagued the Supreme Court in coming up with a coherent way to apply the clause, whereas there is no such weakness in § 924(c)(3)(B). Third, the Supreme Court reached its void-for-vagueness conclusion only after struggling mightily for nine years to come up with a coherent interpretation of the clause, whereas no such history has occurred with respect to § 924(c)(3)(B). Finally, the Supreme Court was clear in limiting its holding to the particular set of circumstances applying to the ACCA residual clause, and only some of those circumstances apply to § 924(c)(3)(B).

Id. at 376. Ultimately, the court concluded that, "[b]ecause § 924(c)(3)(B) is considerably narrower than the statute invalidated by the Court in *Johnson*, and because much of *Johnson's* analysis does not apply to § 924(c)(3)(B)," *Johnson* does not compel the invalidation of the residual clause in § 924(c)(3)(B). *Id.* at 375–76. Accordingly, the Magistrate Judge concluded that "*Taylor* controls the only issue Porter raises for relief," [DN 90 at 5], and the Court agrees.

In his Objections, Porter fails to address why he believes the Magistrate Judge's reliance on *Taylor* and his conclusions based on that case are erroneous. Rather, Porter reiterates his argument that *Johnson* applies to this case and requires the invalidation of § 924(c)(3)(B)'s residual clause, which is insufficient.

[*See* DN 92 at 1–2.] Porter also makes a new argument, that "he is actually innocent of § 924(e)" because he does not meet the requirement of having "three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). However, Porter did not raise this ground in his petition for habeas relief, in which the sole argument he made was that the "[a]pplication of U.S.C. (924)(c) is unconstitutional in this case" based on *Johnson*. [DN 87 at 4.]

"While the Magistrate Judge Act, 28 U.S.C. § 631 *et seq.*, permits de novo review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate." *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000). "[I]ssues raised for the first time in objections to magistrate judge's report and recommendation are deemed waived." *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998) (citing *Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996)).

Roach v. Hoffner, No. 1:13-CV-42, 2016 WL 386151, at *2 (W.D. Mich. Feb. 2, 2016). Porter has not given any reason why he did not raise this argument as a ground for relief in his habeas petition such that the United States could have responded and the Magistrate Judge could have considered the issue. Accordingly, the Court will not consider this argument here, and Porter's Objections, [DN 92], are overruled.

CONCLUSION

In sum, the Court has "ma[d]e a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). For the reasons set forth above, Porter's Objections, [DN 92], are **OVERRULED** and the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation, [DN 90], are **ADOPTED**. Porter's § 2255 motion, [DN 87], is **DENIED** and a certificate of appealability is **DENIED** as to all grounds raised therein.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISON

XAVIER DEMETRIUS PORTER,

Movant

v.

UNITED STATES OF AMERICA,

Respondent

CRIMINAL ACTION NO. 3:13-CR-164-TBR

CIVIL ACTION NO. 3:16CV-00813-TBR

Signed April 24, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Dave Whalin, Magistrate Judge

This matter is before the Court on Xavier Demetrius Porter's ("Porter") motion to vacate, set aside, or correct sentence pursuant to 28 U.S. § 2255. (DN 87). Porter challenges his sentence in light of the Supreme Court's recent decision in *Johnson v.*

United States, 135 S. Ct. 2551 (2015). (*Id.*). The United States has filed a response (DN 89), and the time for Porter to file a reply has expired. The District Judge has referred this matter to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact and recommendations on any dispositive matters. (DN 88). For the following reasons, the Court recommends Porter's motion be **DENIED.**

FINDINGS OF FACT

In October of 2013, a federal grand jury in the Western District of Kentucky returned an 18-count Indictment against Xavier Porter. (DN 1). The Indictment alleged four counts of attempted robbery and five counts of robbery in violation of 18 U.S.C. § 2 and § 1951(a) ("Hobbs Act Robbery"), eight counts of brandishing a firearm during and in relation to attempted robbery or robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(e). (*Id.*).

In December of 2014, Porter entered into a Rule 11(c)(1)(A) and (C) plea agreement with the United States where he pled guilty to charges 1, 3, 5, 6, 8, 10, 12, 14, 16, 17, and 18 in the Indictment. (DN 65 at ¶ 3). At sentencing, the Court imposed a total term of 360 months imprisonment to be followed by five years of supervised release. (DN 77, at pp. 3-4). The Court entered the Judgment on March 26, 2015. (DN 77). Porter did not directly appeal his sentence.

Porter filed a letter on June 27, 2016, seeking relief under the Supreme Court's decision in *Johnson*

v. United States.[1] (DN 85). The Court ordered Porter to either withdraw the filing or amend it in compliance with a Court-approved § 2255 motion form. (DN 86). Porter filed the instant amended § 2255 motion on December 19, 2016. (DN 87).

CONCLUSIONS OF LAW

A. Standard of Review

Under 28 U.S.C. § 2255, a prisoner in custody may move the court that imposed the sentence to vacate, set aside, or correct that sentence on grounds that:

> [T]he sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by

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[1] The United States briefly discusses the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act ("AEDPA") for filing for § 2255 relief, particularly asserting that Porter's judgment of conviction became final on April 9, 2015, and the limitations period expired one year later on April 9, 2016. (DN 89, at p. 3). However, because Porter seeks relief under *Johnson v. United States*, which the Supreme Court has ruled is retroactively applicable to cases of collateral review, the statute of limitations period expired one-year after that ruling on June 26, 2016. *See* 28 U.S.C. § 2255(f)(3). Although Porter's "letter" stating his belief that he had a *Johnson* claim was not filed in the record until the day after the statute of limitations expired, the letter is dated June 22, 2016 and was postmarked June 23, 2016, which satisfies the prison mailbox rule. *See United States v. Koch*, No. 01-CR-83-JMH, 2016 WL 5955533, at *1 n. 1 (E.D. Ky. Oct. 13, 2016) (citing *Houston v. Lack*, 487 U.S. 266, 275 (1988) (holding that prison mailbox rule considers a motion filed when it is handed to prison authorities)). As a result, the Court will not recommend dismissal based on the timeliness of Porter's motion.

> law, or is otherwise subject to collateral attack[.]

28 U.S.C. § 2255(a). Where the prisoner alleges constitutional error, the error must be one of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings to warrant relief. *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L.E d.2d 353 (1993) (citation omitted); *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005). Non-constitutional errors, on the other hand, are generally outside the scope of § 2255 relief and only merit relief if the prisoner establishes a "fundamental defect which inherently results in a complete miscarriage of justice." *Reed v. Farley*, 512 U.S. 339, 348, 114 S. Ct. 2291, 129 L.Ed. 2d 277 (1994); *United States v. Cofield*, 233 F.3d 405, 407 (6th Cir. 2000).

B. Porter's *Johnson* Claim

Porter argues that he is entitled to relief under *Johnson v. United States*, 135 S. Ct. 1551 (2015). Porter alleges that the Supreme Court's holding in *Johnson* renders invalid his conviction under § 924(c) for brandishing a firearm during and in relation to a crime of violence, i.e., Hobbs Act Robbery. Because the predicate offense of Hobbs Act Robbery does not require "the use of force capable of causing pain or injury for a conviction," Porter believes it categorically cannot satisfy the "force" clause of § 924(c) and instead only qualifies as a "crime of violence" under the residual clause. (DN 87-1, at p. 7). Porter's argument rests on the belief that *Johnson's* holding extends to invalidate the residual clause of § 924(c).

As an initial matter, *Johnson* is inapplicable to Porter's case. *Johnson* addressed the constitutionality of the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii). 135 S. Ct. at 2563. The ACCA sets a mandatory minimum sentence for a felon with three or more prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e). The statute previously defined a "violent felony" as a crime that is punishable by more than one year and that falls within one or more of the following clauses: (1) it "has an element the use, attempted use, or threatened use of physical force against the person of another;" (2) it "is burglary, arson, or extortion, [or] involves the use of explosives;" or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The foregoing clauses are known as the "force" clause, the "enumerated offenses" clause, and the "residual" clause, respectively.

In *Johnson*, the Supreme Court invalidated the ACCA's residual clause as unconstitutionally vague.[2] 135 S. Ct. at 2563. *Johnson*, however, affords Porter no relief because he is not challenging his conviction based on the ACCA's residual clause. Rather, Porter challenges his conviction under 18 U.S.C. § 924(c)(1)(A), which is not part of the ACCA. In comparison, § 924(c) criminalizes the use, possession,

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[2] The Supreme Court has clarified that *Johnson's* holding applies retroactively on collateral review, meaning that prisoners who were sentenced prior to *Johnson* as armed career criminals based on prior convictions that were considered violent felonies under the residual clause, are eligible for resentencing. *Welch v. United States*, 136 S. Ct. 1257 (2016).

or carrying of a firearm, "during and in relation to" or "in furtherance of" any crime of violence or drug trafficking crime. This statute defines "crime of violence" as a felony that:

> (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Section (A) is known as the "force clause" and section (B) is known as the "residual clause."

Although the "residual clauses" in these two statutes are similar, the Sixth Circuit has explicitly rejected Porter's argument that the "residual clause" of § 924(c)(3)(B) is unconstitutionally vague based on the reasoning of the Supreme Court in *Johnson.* The Sixth Circuit's opinion in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016) identifies several factors which distinguish the two residual clauses.

First, *Taylor* explains that § 924(c)(3)(B)'s requirement that physical force "be used *in the course* of committing the offense" demonstrates that the force must be used and the risk must arise in order to effectuate the crime. 814 F.3d at 377. Unlike the ACCA's residual clause, § 924(c)(3)(B) does not allow a court to consider "physical injury [that] is remote from the criminal act," a consideration that supported the Court's vagueness analysis in *Johnson. Id.* (quoting *Johnson*, 135 S. Ct. at 2559).

Next, *Taylor* discusses that unlike the ACCA, § 924(c)(3)(B) does not require analogizing the level of risk involved in a defendant's conduct to four enumerated offenses: burglary, arson, extortion, or the use of explosives. *Id.* Third, the Court in *Taylor* calls attention to the four prior attempts of the Supreme Court to analyze the ACCA's residual clause, whereas, the Supreme Court has never attempted to articulate a standard applicable to the § 924(c)(3)(B) analysis. *Id.* at 377-78. Finally, the Sixth Circuit explains that the *Johnson* majority "stressed that its reasoning did not control other statutes that refer to predicate crimes," including those statutes using terms like "substantial risk."[3] *Id.* at 378. In sum, the Sixth Circuit has determined that § 924(c)(3)(B) passes constitutional muster under the "void for vagueness" doctrine. Because *Taylor* controls the only issue Porter raises for relief, his § 2255 motion should be denied.

Even if *Johnson* did apply to render the residual clause of § 924(c) unconstitutionally vague, Porter would still not be entitled to relief based on his argument that Hobbs Act Robbery cannot categorically qualify as a crime of violence under the "force clause." The Hobbs Act contains three alternative elements for violating the statute: (1) robbery; (2) extortion; or (3) commission or threat of physical violence, all in furtherance of obstructing commerce. 18 U.S.C. § 1951(a). Porter was indicted only for Hobbs Act Robbery (DN 1) and, thus, the

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[3] The Sixth Circuit clarified that *Johnson* invalidated the ACCA residual clause because it combined an overbroad version of the categorical approach with other vague elements. *Id.* at 378 (citing *Johnson*, 135 S. Ct. at 2557).

United States could not have convicted him by proving, for example, that he violated the Hobbs Act through extortion. As a result, the statute was divisible and using a modified categorical approach for determining whether the crime qualified as a predicate offense for § 924(c) was permissible. The Indictment alleged that Porter used "actual or threatened force, violence, and fear of immediate injury" to commit Hobbs Act Robbery (DN 1, at ¶¶ 1, 3, 5-6, 8, 10, 12, 14, 16) and Porter admitted in his plea agreement that he used such actual or threatened force or violence (DN 65, at ¶ 3). Accordingly, the Court properly determined that Porter's conviction for Hobbs Act Robbery was a crime of violence subject to the sentencing enhancement in § 924(c)(3)(a).[4] Porter's sentence should not be disturbed on that ground.

C. Certificate of Appealability

To warrant the grant of a Certificate of Appealability, a movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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[4] Numerous cases decided by the Supreme Court, the Sixth Circuit, and other Circuit Courts of Appeals, have not questioned the fact that Hobbs Act Robbery serves as the predicate offense for convictions under 18 U.S.C. § 924(c). *McAfee v. United States*, No. 2:01-CR-190, 2016 WL 8731023, at *3 (S.D. Ohio Sept. 12, 2016) (citing *Alleyne v. United States*, 133 S. Ct. 2151, 2155-56 (2013); *United States v. Maddox*, 803 F.3d 1215, 1217 (11th Cir. 2015); *United States v. McBride*, No. 14-1851, 625 Fed.Appx. 61 (3d Cir. Aug. 24, 2015); *United States v. Richardson*, 793 F.3d 612, 617 (6th Cir. 2015); *United States v. Adams*, 789 F.3d 713 (7th Cir. 2015); *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993)).

Upon review, this Court does not believe reasonable jurists would finds its assessment of Porter's *Johnson* claim to be debatable or wrong based on the Sixth Circuit's decision in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016). The Court, therefore, recommends a Certificate of Appealability be denied as to Porter's claim.

RECOMMENDATION

For the foregoing reasons, the Court **RECOMMENDS** the claims in Porter's § 2255 motion to vacate (DN 87) be **DENIED**. The Court further **RECOMMENDS** that no Certificate of Appealability issue as to Porter's claims.