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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DEREK CAPOZZI, Petitioner,	)	
v.	)	Criminal Action No. 98-10087-PBS
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER

March 31, 2021

Saris, D.J.

INTRODUCTION

Petitioner Derek Capozzi moves under 28 U.S.C. § 2255 to challenge (1) his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), (2) his conviction for use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), and (3) his sentence enhancement pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1).

After a review of the record, the Court **ALLOWS** in part and **DENIES** in part the motion (Dkts. 403 and 416).

App.3

BACKGROUND

I. Criminal Proceedings

On July 8, 1996, Petitioner was charged in an indictment with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) (Count 1s), attempted extortion affecting interstate commerce in violation of 18 U.S.C. § 1951(a) (Count 3s), two counts of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (Counts 4s and 6s), and armed bank robbery, in violation of 18 U.S.C. § 2113(d) (Count 5s). Counts 1s, 3s, and 4s proceeded to trial, while Counts 5s and 6s were severed. On November 16, 1999, the jury convicted Petitioner of Counts 1s, 3s, and 5s.

According to the presentence report ("PSR"), he had seven ACCA violent felony predicate convictions and was an Armed Career Criminal ("ACC").[1] Defendant did not file any objections to this ACC classification or to the factual description of the predicates. Moreover, there was no challenge to the ACC classification during the sentencing hearing. On April 6, 2000, the Court sentenced Petitioner to 360 months in prison.[2]

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[1] Those convictions include breaking and entering in the daytime in violation of M.G.L. c. 266, § 18 (five convictions); entering without breaking in violation of M.G.L. c. 266, § 17; assault and battery with a dangerous weapon in violation of M.G.L. c. 265, § 15; and assault and battery on a police officer in violation of M.G.L. c. 265, § 13D.

[2] Petitioner's Guidelines Sentencing Range was 235 to 293 months. The Court sentenced Petitioner to 300 months as to Count 1s, 240

II. Direct Appeal

Petitioner appealed his conviction to the United States Court of Appeals for the First Circuit, which affirmed on October 6, 2003. United States v. Capozzi, 347 F.3d 327, 328 (1st Cir. 2003), cert. denied, Capozzi v. United States, 540 U.S. 1168 (2004).

III. First § 2255 Habeas Petition

On January 25, 2005, Petitioner filed his first motion under 28 U.S.C. § 2255 challenging his conviction on the basis of ineffective assistance of counsel. Mot. to Vacate, Set Aside or Correct Sent., Capozzi v. United States, 2007 WL 162247 (D. Mass. Jan. 12, 2007) (No. 05-10171), Dkt. 1. Petitioner amended the motion on March 25, 2005, to add a claim under Shepard v. United States, 544 U.S. 12 (2005), asserting that his previous convictions did not constitute sufficient ACCA violent felony predicates to qualify him as an ACC because they were non-generic burglaries, that the Court violated his Sixth Amendment right to a jury trial when it determined under a preponderance standard that his prior convictions qualified him as an ACC, and that his counsel provided ineffective assistance by failing to raise those arguments. This Court denied that motion on January

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months as to Count 3s to run concurrently with Count 1s, and 60 months as to Count 4s to run consecutively as required for the § 924(c) conviction.

12, 2007. Among other things, the Court pointed out that the PSR explicitly found that four of the Petitioner's prior convictions involved buildings and qualified him as an armed career criminal under 18 U.S.C. § 924(e). The Court also rejected as untimely the proposed amendment to his habeas petition asserting that his "prior convictions for allegedly non-generic burglary were impermissible ACCA predicates" on the ground that the amendment contained new details in his prior record that were never raised in the original habeas motion. The Court denied the certificate of appealability, which was filed only with respect to his Sixth Amendment claim under Almendarez Torres v. United States, 523 U.S. 224 (1998). The First Circuit affirmed the denial of the request for a certificate of appealability, stating:

> Petitioner's challenge to the continued validity of Almendarez-Torres v. United States, 523 U.S. 224 (1998), the only claim actually addressed in petitioner's COA application before the district court, does not present a debatable claim. See United States v. Burghardt, 939 F.3d 397, 409 (1st Cir. 2019). Petitioner concedes that the district court correctly concluded that his remaining challenges to his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), are time-barred, so no COA will issue on those claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Even absent this concession, we would find no grounds for granting a COA because petitioner failed to include the remaining ACCA claims in his request for a COA in the district court. See Peralta v. United States, 597 F.3d 74, 84 (1st Cir. 2010) (claim not included in request for COA in district court is waived).

Capozzi v. United States, Appeal No. 16-1562 (1st. Cir. 2019) (Document 00117525117).

IV. Second or Successive § 2255 Habeas Motion

On November 27, 2015, Petitioner filed a pro se motion for authorization to file a second or successive § 2255 motion challenging his sentence enhancement pursuant to 18 U.S.C. § 924(e)(1) based on Johnson v. United States, 576 U.S. 591 (2015) ("Johnson II"). After counsel was appointed, Petitioner amended his motion to include challenging his conviction for use of a firearm during attempted extortion in violation of 18 U.S.C. § 924(c) on Johnson II grounds.

On December 11, 2019, the First Circuit granted Petitioner's request for a second or successive § 2255 motion. Based on Johnson II and United States v. Davis, 139 S. Ct. 2319 (2019), the First Circuit concluded that "Capozzi has made a prima facie showing that his challenge to his conviction under 18 U.S.C. § 924(c) legitimately relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Dkt. 387 at 1 (internal citations omitted). The First Circuit added: "To the extent his application includes additional claims, the court expresses no opinion whatsoever as to whether those claims satisfy either of the gatekeeping provisions set out at 28 U.S.C. § 2255(h), a finding that must be made by the district court in the first instance." Id. The First Circuit did not address the claim under § 924(e)(1). Id. However, it deemed

Petitioner's second or successive § 2255 motion filed on November 27, 2015.

On June 22, 2020, after the § 2255 motion was transferred back before this Court, Petitioner filed a supplement to his second or successive § 2255 motion, challenging his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) based on Rehaif v. United States, 139 S. Ct. 2191 (2019). He did not file a motion to amend pursuant to Fed. R. Civ. P. 15(a)(2). Petitioner also did not present his Rehaif claim to the First Circuit. The motion as supplemented is now before the Court.

DISCUSSION

I. Standard of Review

A federal criminal defendant "may petition for post-conviction relief under 28 U.S.C. § 2255(a) if, inter alia, the individual's sentence 'was imposed in violation of the Constitution or laws of the United States' or 'is otherwise subject to collateral attack.'" Lassend v. United States, 898 F.3d 115, 122 (1st Cir. 2018) (quoting 28 U.S.C. § 2255(a)). The petitioner bears the burden of establishing his entitlement to relief. Id.

II. Conviction Under 18 U.S.C. § 924(c)[3]

Petitioner argues that his conviction for use of a firearm during a crime of violence in violation of § 924(c) must be vacated because his predicate conviction for attempted Hobbs Act extortion in violation of 18 U.S.C. § 1951(a) does not qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(B).

Section 924(c) sets out mandatory sentence enhancements applicable to:

> any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.

Id. § 924(c)(1)(A). The statute defines a "crime of violence" as:

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

Id. § 924(c)(3). In United States v. Davis, the Supreme Court held that the statute's residual clause, § 924(c)(3)(B), is unconstitutionally vague. 139 S. Ct. 2319, 2336 (2019).

[3] The government does not dispute that the Court has jurisdiction over Petitioner's challenge to his conviction under 18 U.S.C. § 924(c).

Petitioner argues that a conviction for attempted Hobbs Act extortion does not qualify under the "force" clause in § 924(c)(3)(A) because it can be committed using threats to economic interests. The Government responds that Petitioner's conviction for attempted Hobbs Act extortion satisfies the "force" clause because the statute defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioner was charged with "the attempted obtaining of money, in the amount of $4,000.00, more or less, from a person, with his consent, induced by wrongful use of actual and threatened force, violence and fear." Dkt. 387-1 at 99. The Court instructed the jury: "What does extortion mean? Extortion means the obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence or fear." Dkt. 287 at 109:10-13.

The First Circuit has held that a Hobbs Act prosecution can be based on a "fear" of economic loss. See United States v. Cruzado-Laureano, 404 F.3d 470, 481 (1st Cir. 2005) (stating that "[e]xtortion by 'fear' can mean fear of economic loss"); United States v. Sturm, 870 F.2d 769, 772 (1st Cir. 1989) (holding that attempted Hobbs Act extortion "may be based on a creditor's fear of nonrepayment".) See also First Cir. Pattern

Jury Instr. § 4.18.1951, Interference with Commerce by Robbery or Extortion (Hobbs Act), cmt. 2 ("The 'fear' element of extortion can include fear of economic loss. . .. If the extortion is economic fear, the term 'wrongful' must be defined to require that the government prove that the defendant did not have a claim of right to the property, and that the defendant knew that he or she was not legally entitled to the property obtained.") (citations omitted). Other circuits agree. See United States v. Villalobos, 748 F.3d 953, 955, 956–57 (9th Cir. 2014) (finding Hobbs Act extortion where defendant threatened to mislead authorities investigating an offense); Levitt v. Yelp! Inc., 765 F.3d 1123, 1130–33 (9th Cir. 2014) (finding wrongful threats of economic injury would prove Hobbs Act extortion); United States v. Iozzi, 420 F.2d 512, 515 (4th Cir. 1970) (acknowledging that fear of economic loss is sufficient to support a conviction for Hobbs Act extortion).

The question is whether the "fear" element of extortion constitutes "physical force" as used in § 924(c)(3)(A). The Supreme Court has held that "physical force" requires "violent force," which means "strong physical force" or "force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010) (cleaned up). The actual facts supporting the conviction do not matter because the Court must follow the so-called "categorical approach." Mathis v.

United States, 136 S. Ct. 2243, 2251 (2016) (under the categorical analysis, how a defendant "actually perpetrated the crime . . . makes no difference"). Applying the "categorical approach," the Court must determine whether the statutory elements of the offense "necessarily require the use, attempted use, or the threatened use of physical force" under the force clause in § 924(c). United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019). Under the caselaw, the Court concludes that Hobbs Act extortion can be committed without "the use, attempted use or threatened use of physical force" because it can be committed by fear of economic harm. See In re Hernandez, 857 F.3d 1162, 1166-67 (11th Cir. 2017) (Martin, J., concurring) ("[A]ttempted Hobbs Act extortion is even less likely [than completed Hobbs Act extortion] to qualify as a 'crime of violence' in light of Johnson." (emphasis in original)).

A number of recent district court decisions have held that Hobbs act extortion does not qualify as a crime of violence under § 924(c)'s force clause because of the "fear" element. See United States v. White, No. MO:11-CR-0027612, 2020 WL 8024725, at *3-4 (W.D. Tex. Dec. 29, 2020) ("The word fear brings nonviolent blackmail and economic extortion within the scope of the Hobbs Act._. . . After Davis, Hobbs Act extortion can qualify as a crime of violence only under the now unconstitutionally vague residual clause.") (cleaned up); Brown

v. United States, No. 3:05-CR-376-RJC-3, 2020 WL 437921, at *2 (W.D.N.C. Jan. 28, 2020) ("The offense underlying Petitioner's § 924(c) convictions was Hobbs Act extortion which the Government correctly concedes is not a crime of violence under § 924(c)'s force clause.") (citations omitted); Burleson v. United States, No. 3:20-CV-487, 2020 WL 7027503, at *4 (M.D. Tenn. Nov. 27, 2020) (pointing to the government's concession that attempted Hobbs Act extortion cannot satisfy the force clause). The Government relies on United States v. Nikolla for the proposition that Hobbs Act extortion is categorically a "crime of violence." 950 F.3d 51, 52 (2d Cir.), cert. denied, 141 S. Ct. 634 (2020). That case is easily distinguished because the Second Circuit's holding is limited to "the offense specified in the clause of 18 U.S.C. § 1951(a) by the language '[w]hoever . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of [§ 1951].'" Nikolla, 950 F.3d at 54; see Scheidler v. Nat'l Org. for Women, 547 U.S. 9, 22 (2006) (acknowledging that acts or threats of physical violence in furtherance of Hobbs Act robbery or extortion constitute a "separate Hobbs Act crime").

Because attempted Hobbs Act extortion does not qualify as a "crime of violence," Petitioner's § 924(c) conviction must be vacated.

III. Conviction Under 18 U.S.C. § 922(g) (Rehaif Claim)

The Government argues that this Court has no jurisdiction over the Petitioner's Rehaif claim because he did not include it in his motion before the First Circuit. I agree. Petitioner supplemented his motion after the First Circuit issued the order allowing the second or successive petition. Because the claim does not satisfy the gatekeeping requirements, the Court dismisses the claim without prejudice on the ground this Court lacks jurisdiction. See Evans-Garcia v. United States, 744 F.3d 235, 237 (1st Cir. 2014); 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals[.]"); 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]"); 28 U.S.C. § 2244(b)(4) ("A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.").

IV. Sentence Enhancement Under 18 U.S.C. § 924(e)(1)

Petitioner argues that his ACCA enhanced sentence must be vacated because he lacks the necessary three predicate convictions to qualify as an ACC under 18 U.S.C. § 924(e)(1). Specifically, Petitioner states that Massachusetts breaking and entering does not qualify as a "violent felony" after the Supreme Court invalidated the residual clause in § 924(e)(2)(B)(ii) because "[t]here was no discussion of the bases upon which the ACCA predicates were considered violent felonies" during sentencing, Dkt. 403 at 3, and the offense satisfies neither the force clause, § 924(e)(2)(B)(i), nor the enumerated clause, the portion of § 924(e)(2)(B)(ii) that defines a "violent felony" as "burglary, arson, or extortion."

The ACCA sets out mandatory sentence enhancements applicable to:

> a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony . . . committed on occasions different from one another.

18 U.S.C. § 924(e)(1). The statute defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that--
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 924(e)(2)(B). In Johnson II, the Supreme Court considered the ACCA's residual clause, the portion of § 924(c)(2)(b)(ii) that defines a "violent felony" as any felony that "involves conduct that presents a serious potential risk of physical injury to another." 576 U.S. at 593. The Court held that the residual clause is unconstitutionally vague. Id. at 606.

As a threshold matter, the Court must determine whether it has jurisdiction to hear this claim since the First Circuit did not directly address the issue. The Government argues that Petitioner's challenge to his ACCA sentence enhancement pursuant to 18 U.S.C. § 924(e)(1) is really an untimely claim under Mathis, 136 S. Ct. at 2247–48, not a timely claim under Johnson II. In Mathis, the Supreme Court held that a "prior crime qualifies as an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense." Id.

Petitioner's claim that his Massachusetts breaking and entering convictions are not violent felony predicates after Johnson II invalidated the residual clause relies, in the Government's view, on the argument that those convictions also do not fall under the enumerated clause because their elements are broader than generic burglary -- a Mathis claim. The

Government relies heavily on United States v. Dimott, 881 F.3d 232, 234 (1st Cir. 2018), which held that a challenge to the designation of Maine burglary convictions as ACCA violent felony predicates based on Johnson II was really an untimely Mathis claim. The First Circuit added, "[T]o successfully advance a Johnson II claim on collateral review, a habeas petitioner bears the burden of establishing that it is more likely than not that he was sentenced solely pursuant to ACCA's residual clause." Id. at 243. Because Mathis is not a new rule of constitutional law that was previously unavailable and has been made retroactive to claims on collateral review by the Supreme Court, the Government argues that Petitioner's claim does not meet the gatekeeping requirements for a second or successive § 2255 motion. See 28 U.S.C. § 2244(b)(2), 2244(b)(4).

Petitioner responds that "the sentencing court did not have sufficient information to find that the Defendant had committed three generic burglaries" because "[t]he PSR does not indicate whether the B&Es identified in paragraphs 48, 49, 53, or 54 involved buildings or structures" and "does not indicate whether the 'entry' described in PSR ¶ 50 was in fact 'unlawful or unprivileged.'" Dkt. 427 at 13-14; see Taylor v. United States, 495 U.S. 575, 598 (1990) (defining generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime"). Thus, in

Petitioner's view, the Court must have relied on the residual clause at sentencing and Johnson II applies.

The Government correctly states that the Court does not have jurisdiction because Petitioner's challenge is an untimely Mathis claim. See 28 U.S.C. § 2244(b)(2), 2244(b)(4). As it points out, the Court already rejected this claim in the initial habeas motion, and in denying the certificate of appealability, the First Circuit stated, "Petitioner concedes that the district court correctly concluded that his remaining challenges to his sentence under the [ACCA] are time-barred. . . . Even absent this concession, we would find no grounds for granting a COA because petitioner failed to include the remaining ACCA claims in his request for a COA in the district court." Capozzi v. United States, Appeal No. 16-1562 (1st. Cir. 2019) (Document 00117525117). Moreover, there is no basis in the record for concluding that the Court sentenced Petitioner solely under the residual clause. In United States v. Wilkinson, the First Circuit held that breaking and entering of a building in the nighttime with the intent to commit a felony in violation of M.G.L. c. 266, § 16 fell within either the enumerated or residual prong of 18 U.S.C. § 924(e)(1) "or both" at the time of Petitioner's sentencing. 926 F.2d 22, 29 (1st Cir. 1991), overruled on other grounds, United States v. Vazquez, 724 F.3d 15 (1st Cir. 2013). It also relied on the Supreme Court holding

that "burglary" includes "an unlawful . . . entry into . . . a building with intent to commit a crime." Taylor v. United States, 495 U.S. 575 (1990).

Because the Court likely sentenced under both clauses, the attempt to characterize this as a Johnson claim fails.

ORDER

For the reasons stated above, Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Dkts. 403 and 416) is **ALLOWED** in part as to his § 924(c) conviction and **DENIED** in part as to his § 922(g) conviction and his sentence enhancement pursuant to § 924(e)(1).

SO ORDERED.

/s/ PATTI B. SARIS
Hon. Patti B. Saris
United States District Judge

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
Derek Capozzi

Date of Original Judgment: 4/13/2000
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

(Amended to vacate Count 4s and correct the sentence as to the remaining counts)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 98 CR 10087 - 001 - PBS**

USM Number: 22016-038

Dana L. Goldblatt
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☑ Direct Motion to District Court Pursuant ☒ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☒ was found guilty on count(s) 1s & 3s after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1)	Felon in Possession of a Firearm	02/18/98	1s
18 USC § 1951	Attempted Extortion Affecting Commerce	02/18/98	3s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☑ The defendant has been found not guilty on count(s) 5s & 6s
- ☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

3/24/2022
Date of Imposition of Judgment

/s/ Patti B. Saris
Signature of Judge The Honorable Patti B. Saris
Judge, U.S. District Court

Name and Title of Judge

3/29/2022
Date

DEFENDANT: Derek Capozzi
CASE NUMBER: **1: 98 CR 10087 - 001 - PBS**

IMPRISONMENT

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

300 Months as to Count 1s
240 Months as to Counts 3s to run concurrently with Count 1s

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

A Judicial recommendation to a FCI with psychiatric treatment.

☑ 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

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

60 MONTHS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: Derek Capozzi
CASE NUMBER: **1: 98 CR 10087 - 001 - PBS**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Derek Capozzi
CASE NUMBER: **1: 98 CR 10087 - 001 - PBS**

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is to participate in drug testing and treatment, in-patient if necessary, at the direction of the US Probation Office.

2. The defendant shall procure employment.

3. The defendant is to participate in mental health counseling.

4. The defendant, and any of his agents, (except counsel or a private investigator acting for counsel, shall not have contact nor cause any contact with any of the government witnesses or victims, or their families, in the Haverhill, Peabody or Beverly incidents. This order is effective immediately.

5. The defendant shall not mail any threatening communications or engage in any witness intimidation. This order is effective immediately.

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$	$

☐ 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 amount listed below.

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

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Derek Capozzi
CASE NUMBER: **1: 98 CR 10087 - 001 - PBS**

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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.

☐ 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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States v. Capozzi

United States Court of Appeals for the First Circuit

July 2, 2025, Decided

No. 22-1243

Reporter
142 F.4th 91 *; 2025 U.S. App. LEXIS 16319 **; 2025 LX 282389; 2025 WL 1822949

UNITED STATES, Appellee, v. DEREK CAPOZZI, Defendant, Appellant.

Prior History: [**1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. [Hon. Patti B. Saris, U.S. District Judge].

Capozzi v. United States, 531 F. Supp. 3d 399, 2021 U.S. Dist. LEXIS 63966, 2021 WL 1210355 (Mar. 31, 2021)

Counsel: Dana Goldblatt, with whom The Law Office of Dana Goldblatt was on brief, for appellant.

Robert E. Richardson, Assistant United States Attorney, with whom Rachael S. Rollins, United States Attorney, was on brief, for appellee.

Judges: Before Barron, Chief Judge, and Howard, Circuit Judge.*

Opinion by: HOWARD

Opinion

[*93] **HOWARD, Circuit Judge**. Derek Capozzi brings two challenges to the district court's disposition of his motion to vacate his sentence under 28 U.S.C. § 2255. First, he argues that Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("Johnson II"), invalidates his enhanced sentence imposed under the Armed Career Criminal Act ("ACCA"). Second, he argues that although the court correctly vacated one of his convictions, it abused its discretion when it corrected that error by vacating the sentence for that conviction rather than conducting a new sentencing proceeding to resentence him for all his related convictions. Because Capozzi is time-barred from making the Johnson II claim and fails to meet his burden for the abuse-of-discretion claim, we affirm.

I.

A.

We begin with a brief overview of the two bodies of law that intersect to form the core of Capozzi's appeal: the ACCA and the Antiterrorism and Effective [**2] Death Penalty Act ("AEDPA").

The ACCA imposes a mandatory fifteen-year minimum sentence on defendants convicted of violating 18 U.S.C. § 922(g) who have previously been convicted of three "violent felon[ies]." 18 U.S.C. § 924(e). As originally enacted, the statute defines a "violent felony" as any crime that is punishable by greater than one year of imprisonment and that: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the force

* Judge Selya heard oral argument in this case and participated in the initial semble thereafter. His death on February 22, 2025 ended his involvement in this case. The remaining two panelists issued this opinion pursuant to 28 U.S.C. § 46(d).

clause); (2) is "burglary, arson, or extortion [or] involves the use of explosives" (the enumerated clause); or (3) "otherwise involves conduct that presents a serious risk of physical injury to another" (the residual clause). Id. § 924(e)(2)(B). In Johnson II, however, the Supreme Court struck down the residual clause as unconstitutional, holding that the clause's language was too vague to comport with due process principles. 576 U.S. at 597. The Court accordingly severed the clause from the statute, prohibiting future sentences from being enhanced under the residual clause. Id. at 606.

The other law at issue, AEDPA, was enacted "to reduce delays in the execution of state and federal criminal sentences." Woodford v. Garceau, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). As relevant here, AEDPA imposes strict timeliness requirements on federal [**3] inmates' motions to "vacate, set aside, or correct" a sentence based on its asserted violation of federal law.[1] 28 U.S.C. § 2255(a). Generally, AEDPA imposes a one-year statute of limitations on such motions, which begins to run when "the judgment of conviction becomes final." Id. § 2255(f)(1). But, if the § 2255 motion is based on a right that "has been newly recognized by the Supreme Court and made retroactively applicable to [*94] cases on collateral review," the one-year countdown resets on the "date on which the right asserted was initially recognized by the Supreme Court." Id. § 2255(f)(3). In other words, when the Supreme Court articulates a substantive constitutional right for the first time and determines that it applies to cases already decided, a federal inmate has one year from the date of the Supreme Court's decision to bring a claim asserting that right in federal court. If the Supreme Court's decision does not newly announce a substantive constitutional right or is not retroactively applicable, however, the clock is not reset, and AEDPA bars lower courts from hearing a § 2255 motion grounded in that decision more than one year after the inmate's final judgment of conviction. See, e.g., Pagan-San Miguel v. United States, 736 F.3d 44, 45 (1st Cir. 2013) (per curiam) (denying application for leave [**4] to file a § 2255 motion where petitioner relied on Supreme Court decisions that "did not announce a new rule of constitutional law"); Butterworth v. United States, 775 F.3d 459, 465-68, 470 (1st Cir. 2015) (affirming denial of relief where petitioner relied on Supreme Court decision that "was not retroactively applicable on collateral review").

Johnson II is an example of the former kind of case: it announced a "substantive rule of law" that applies retroactively on collateral review and reopened federal courts to § 2255 motions from inmates sentenced under the ACCA's residual clause for one year following its announcement. Shea v. United States, 976 F.3d 63, 65-66 (1st Cir. 2020) (citing Welch v. United States, 578 U.S. 120, 130, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)).

Mathis v. United States, 579 U.S. 500, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), on the other hand, is an example of the latter kind of case. In Mathis, the Supreme Court clarified how lower courts should determine whether a prior conviction under an "alternatively phrased statute" counts as a "violent felony" under the ACCA's enumerated clause. See 579 U.S. at 517. In what it described as "a straightforward case," the Court drew on "longstanding principles" from its prior decisions to clarify that lower courts "should do what [the Court] [has] previously approved," namely, compare only the elements of the statute at issue to the generic definition of the relevant offense in the enumerated clause. See id. at 509, 519. While the Supreme Court outlined the [**5] contours of the enumerated clause in Mathis, providing guidance to courts applying the ACCA thereafter, it "did not announce a new, retroactively applicable rule" in that case for purposes of AEDPA's timeliness bar. Dimott v. United States, 881 F.3d 232, 237 (1st Cir. 2018) (citing Mathis, 579 U.S. at 519).

Thus, Johnson II opened a one-year window for §

[1] Such motions are roughly analogous to a state inmate's habeas-corpus petition. See Hill v. United States, 368 U.S. 424, 427, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962).

2255 motions, while Mathis did not. AEDPA consequently prohibits federal courts from hearing retroactive Johnson II claims when the claimant relies on a nonretroactive case like Mathis as a steppingstone to argue that the sentencing court must have used the stricken residual clause in applying the ACCA enhancement. Id. at 237-38. Otherwise, litigants could circumvent AEDPA's timeliness bar by shoehorning into a Johnson II claim any sentencing court's error in applying the force or enumerated clauses by construing the sentence to necessarily fall under the "catch-all" criteria of the residual clause. Id. ("To hold otherwise would create an end run around AEDPA's statute of limitations. It would allow petitioners to clear the timeliness bar by bootstrapping their Mathis claims onto Johnson II claims . . . . This cannot be right.").

[*95] **B**.

With all this in mind, we turn to the case at hand. In 1999, a jury convicted Capozzi on three counts: possession of a firearm as a felon under 18 U.S.C. § 922(g)(1); attempted extortion [**6] under 18 U.S.C. § 1951(a); and use of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). At sentencing, the district court determined that the ACCA subjected Capozzi to a fifteen-year minimum sentence because eight of his previous convictions in Massachusetts state courts qualified as ACCA predicate offenses: five "breaking and entering in the daytime" ("B&E") convictions under Mass. Gen. Laws ch. 266, § 18; one "entering without breaking" conviction under Mass. Gen. Laws ch. 266, § 17; one "assault and battery with a dangerous weapon" conviction under Mass. Gen. Laws ch. 265, § 15; and one "assault and battery of a police officer" conviction under Mass. Gen. Laws ch. 265, § 13D. The record of the original sentencing is unclear as to which ACCA clause(s) the court viewed the convictions to correspond. Still, accounting for the ACCA enhancement, the court sentenced Capozzi to a total of 360 months in prison: 300 months for the felon-in-possession count; 240 months for the attempted-extortion count to be served concurrently with the felon-in-possession sentence; and 60 months for the firearm-in-furtherance count to be served consecutively to the first 300 months. Capozzi directly appealed the convictions to this court but was unsuccessful. See United States v. Capozzi, 347 F.3d 327, 337 (1st Cir. 2003). The Supreme Court declined to review. Capozzi v. United States, 540 U.S. 1168, 124 S. Ct. 1187, 157 L. Ed. 2d 1218 (2004).

In 2005, Capozzi filed his first [**7] § 2255 motion, in which he claimed that his B&E convictions should not have counted as ACCA predicates. Citing Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), he noted that for a prior conviction to qualify as "burglary" for the purposes of the ACCA's enumerated clause, see 28 U.S.C. § 2255(e)(2)(B)(ii), the prior conviction must involve unlawful entry into a "building or structure." Capozzi contrasted the Massachusetts statute giving rise to his B&E convictions, which criminalizes breaking and entering not only a building but also a "ship or motor vehicle or vessel." See Mass. Gen. Laws ch. 266, § 18. He argued that, because § 18 encompasses conduct that does not fit within the generic definition of "burglary" outlined in Taylor -- "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime," 495 U.S. at 598 -- the government could not have properly treated his B&E convictions as "burglaries" under the ACCA's enumerated clause absent a showing that he specifically pled guilty to breaking and entering a building, as opposed to a "ship or motor vehicle or vessel," Mass. Gen. Laws ch. 266, § 18 (1999).

The district court held that the government did make that showing, however. The court reviewed the presentence report ("PSR") used during sentencing and concluded that it "explicitly [**8] indicated that at least four of [Capozzi's] prior convictions involved buildings rather than ships, vessels, or vehicles." Capozzi v. United States, No.

05-10171, 2007 U.S. Dist. LEXIS 3730, 2007 WL 162247, at *6 (D. Mass. Jan. 12, 2007) ("Capozzi I"). Thus, the reviewing district court concluded, "the claim [was] barred." Id.

In 2015, within the one-year period after the Supreme Court issued its decision in Johnson II, Capozzi sought permission from this court to file a second or successive motion to vacate. His application was approved, and he filed a second § 2255 motion based on Johnson II. While the [*96] motion was still pending before the district court, he amended it and requested that the court also vacate his firearm-in-furtherance conviction in accordance with the Supreme Court's decision in United States v. Davis, 588 U.S. 445, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019).[2]

The district court granted the motion as to the firearm-in-furtherance conviction but denied it as to Capozzi's other requests for relief, including his Johnson II claim. Capozzi v. United States, 531 F. Supp. 3d 399, 407 (D. Mass. 2021) ("Capozzi II"). In so doing, the court reduced Capozzi's sentence by sixty months to reflect the consecutive sentence of that duration imposed for the vacated firearm-in-furtherance conviction. Id.

In denying Capozzi's Johnson II challenge to the ACCA enhancement, the district court reasoned that although Capozzi styled his challenge as one arising from Johnson II, it actually amounted to [**9] a Mathis claim because there was "no basis in the record for concluding that the Court sentenced [Capozzi] solely under the residual clause" as a Johnson II claim would require, concluding instead that "the Court likely sentenced under both [the enumerated and residual] clauses." Id. at 406-07. And because Mathis did not reset the § 2255 statute of limitations, see Dimott, 881 F.3d at 237, Capozzi was prohibited from asserting that case as a basis for relief in his second § 2255 motion, more than a decade after his conviction was finalized. Capozzi II, 531 F. Supp. 3d at 406-07. The district court thus concluded that it lacked jurisdiction to hear the claim. Id. at 406.

Capozzi appeals on two grounds. He argues (1) that the district court had jurisdiction to hear his Johnson II-styled claim and (2) that the court erred in opting to simply vacate the sixty-month consecutive sentence instead of holding a resentencing hearing. We address each argument in turn.

II.

A.

We review de novo the district court's denial of a habeas petition on procedural grounds. Dimott, 881 F.3d at 236.

AEDPA provides us with jurisdiction to reach the merits of Capozzi's ACCA claim if the right that it asserts derives from Johnson II, but it bars jurisdiction if the right derives from some other non-retroactive case such as Mathis.[3] To present a Johnson II claim, Capozzi must show that [**10] his "original ACCA sentence [was] based solely on the residual clause." Id. In the absence of express statements from the district court judge presiding over the sentencing, we afford "due weight" to any findings made by that same judge while presiding over subsequent postconviction motions when that judge is "describing [her] own decisions at sentencing."[4] Id. at 237.

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[2] Capozzi also added a request to vacate his felon-in-possession conviction based on Rehaif v. United States, 588 U.S. 225, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), which the district court dismissed for lack of jurisdiction. Capozzi v. United States, 531 F. Supp. 3d 399, 405 (D. Mass. 2021). He does not pursue this issue on appeal.

[3] The government contends that Capozzi waived any appeal to the district court's determination that he brought a Mathis claim because he did not expressly address that point in his opening brief. Because we ultimately lack jurisdiction over Capozzi's claim, we need not decide the waiver question.

[4] A § 2255 motion is usually heard by the district court judge that presided over the sentencing proceedings. See 28 U.S.C. § 2255(a)

[*97] Here, when the district court originally sentenced Capozzi under the ACCA, it made no express reference to the ACCA's definitional clauses. But the same district court judge did make statements on the matter in both the 2005 and later postconviction proceedings. When reviewing Capozzi's 2005 motion, the court concluded that Capozzi had failed to show that his prior convictions could not qualify as "violent felonies" under the ACCA's enumerated clause. The court explained that the PSR used during the original sentencing "explicitly indicated that at least four of Petitioner's prior convictions involved buildings." Capozzi I, 2007 U.S. Dist. LEXIS 3730, 2007 WL 162247, at *6. The court did not once mention whether the burglaries were "otherwise dangerous" or use any language from the residual clause. And when reviewing Capozzi's 2022 motion, the same district court judge held that there [**11] was "no basis in the record for concluding that the Court sentenced Petitioner solely under the residual clause," explicitly stating what was implicit in the 2005 opinion.[5] Capozzi II, 531 F. Supp. 3d at 407.

Affording these findings "due weight," as we must, see Dimott, 881 F.3d at 237, leads us to the conclusion that Capozzi's ACCA enhancement was not "based solely" on the residual clause, id. at 236.[6] As a result, Capozzi cannot make out a Johnson II challenge. Rather, because "the linchpin of [his] argument" is that his Massachusetts B&E convictions are for "nongeneric offense[s]" such that they "cannot qualify as [] ACCA predicate[s]," we agree with the district court that Capozzi's "petition[] depend[s] on Mathis, and [is] thus untimely." See id. at 237-38.

Capozzi acknowledges the district court's finding on this score, but he maintains that the court's reliance on the enumerated clause at the time of his original sentencing was legally impossible, and thus mistaken, under Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). Irrespective of its merits, this argument cannot provide Capozzi with a basis for relief. Taylor was decided well before Capozzi's conviction and sentencing; AEDPA thus requires him to have brought any § 2255 motion on that ground within one year of the final judgment against him. 28 U.S.C. § 2255(f). Indeed, [**12] Capozzi did make such a challenge in his first § 2255 motion in 2005. But the Supreme Court's subsequent decision in Johnson II does not provide him with an opportunity to relitigate the claims he raised then, as none invoked the residual [*98] clause. See Capozzi I, 2007 U.S. Dist. LEXIS 3730, 2007 WL 162247, at *1-5. And now, any claim asserting error in the application of the enumerated clause based on Taylor is too late for us to hear.

To summarize, Capozzi cannot clear the threshold of establishing a Johnson II claim because he cannot show that his sentence was "solely based" on the residual clause. See Dimott, 881 F.3d at 237. As a result, he pivots to arguing that if the court did rely on the enumerated clause, it erred under Taylor. But we lack jurisdiction to hear such a claim, regardless of whether it relies on Mathis or Taylor, as the statute of limitations on such a claim has lapsed. For challenges to sentences brought

("A prisoner may . . . move the court which imposed the sentence to vacate, set aside, or correct the sentence.").

[5] Contrary to Capozzi's objection, we do not read the district court's subsequent citation to United States v. Wilkinson, 926 F.2d 22 (1st Cir. 1991), as suggesting that all Massachusetts B&E convictions categorically qualify as ACCA predicates. See Capozzi II, 531 F. Supp. 3d at 407. The court cited Wilkinson only after prefacing that "there is no basis in the record for concluding that the Court sentenced Petitioner solely under the residual clause," indicating that the court conducted the requisite case-specific inquiry. See id. Its subsequent citation to Wilkinson is more naturally read as supportive authority for its conclusion that, given the record's clarity that Capozzi entered a building in the commission of the relevant B&E offenses, the sentencing court could permissibly rely on the enumerated clause at his original sentencing. Indeed, had the district court attributed the broad proposition to Wilkinson that Capozzi intimates, it would have obviated the need for the rest of its analysis, as it would have been manifestly clear that Capozzi's convictions qualified as ACCA predicates under the enumerated clause.

[6] We need not determine whether the court relied on the residual clause elsewhere because the four B&E convictions alone satisfy the ACCA's three-felony minimum. See 18 U.S.C. § 924(e)(1).

based on Johnson II, AEDPA's statute of limitations resets only as to those sentences imposed in fact under the ACCA's residual clause, not for those that purportedly should have been imposed under the residual clause because their imposition under another clause was flawed. Because this case is one of the latter, and more than a year has passed since the judgment of conviction against [**13] him became final, AEDPA bars federal courts from hearing Capozzi's ACCA claim.

B.

This leaves only the resentencing issue. "We review the district court's determination of the appropriate remedy for a § 2255 violation for abuse of discretion." United States v. Torres-Otero, 232 F.3d 24, 29-30 (1st Cir. 2000). This is an extremely deferential standard. See United States v. Walker, 665 F.3d 212 (1st Cir. 2001) ("An abuse of discretion occurs 'when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales.'" (quoting United States v. Nguyen, 542 F.3d 275, 281 (1st Cir. 2008))).

After granting a § 2255 motion, a district court may award one of four remedies: vacate the sentence, order a de novo resentencing, grant a new trial, or correct the sentence. 28 U.S.C. § 2255(b). Capozzi admits that the district court had the discretion to adjust his sentence, but he maintains that because the sentence for his firearm-in-furtherance conviction was "intertwined" with the other two sentences, the court should have awarded him a plenary resentencing. In support, he relies on language from our decision in United States v. Rodriguez, in which we held that "where the Guidelines contemplate an interdependent [**14] relationship between the sentence for the vacated conviction and the sentence for the remaining convictions -- a sentencing package -- a district court may, on a petition under 28 U.S.C. § 2255, resentence on the remaining convictions." 112 F.3d 26, 30-31 (1st Cir. 1997) (emphasis added) (footnotes omitted).

To explain how the district court abused its discretion in the manner recognized in Rodriguez, however, Capozzi points only to the government's concession that "under current jurisprudence, the Defendant would not be an [armed career criminal]." He cites no cases that reverse a district court for failing to conduct a de novo resentencing after vacating an intertwined conviction, nor any in which a court ordered a resentencing because jurisprudential standards have evolved. Further, Capozzi presented the Rodriguez case and his equitable argument to the court below, and the record indicates that the court considered both in its decision. Thus, we cannot find that the court abused its considerable discretion on these facts by opting to correct Capozzi's sentence without doing so.

[*99] **III**.

For the foregoing reasons, we **affirm**.

End of Document

United States Court of Appeals
For the First Circuit

No. 22-1243

UNITED STATES,

Appellee,

v.

DEREK CAPOZZI,

Defendant - Appellant.

Before

Barron, Chief Judge,
Selya,* Howard, Gelpí, Montecalvo, Rikelman, and Aframe
Circuit Judges.

ORDER OF COURT

Entered: September 23, 2025

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Derek Capozzi, Dana Lynne Goldblatt, Donald Campbell Lockhart, Robert Edward Richardson, Mark Jon Grady

* Judge Selya heard oral argument in this case and participated in the initial semble thereafter. His death on February 22, 2025, ended his involvement in this case.

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)

(2) As used in this subsection-(A) the term "serious drug offense" means-(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that-(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e) (1998)

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new

rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Derek Capozzi — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

PROOF OF SERVICE

I, Dana Goldblatt, do swear or declare that on this date, December 22, 2025, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

AUSA Donald Lockhart

1 Courthouse Way, Suite 9200

Boston, MA 02210

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 22, 2025

(Signature)