

No. 25-

IN THE SUPREME COURT OF THE UNITED STATES

TODD HAROLD COOPER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit, No. 23-4052

Appendix to Petition for a Writ of Certiorari

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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

TODD HAROLD COOPER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION TO
VACATE AND CORRECT
SENTENCE UNDER 28 U.S.C. § 2255

Case No. 1:05-CV-00142 PGC

Plaintiff Todd Harold Cooper moves the court to vacate and correct his sentence under 28 U.S.C. § 2255 for armed bank robbery and brandishing a firearm (#1). Mr. Cooper was found guilty by a jury on January 23, 2003 and sentenced to life in prison pursuant to statute. His conviction was affirmed by the Tenth Circuit on July 19, 2004. Finally, the Supreme Court denied certioari on November 29, 2004. He has now filed this § 2255 motion, urging five different grounds for setting aside his conviction, After review of the facts of Mr. Cooper's case and his sentencing, the court GRANTS Mr. Cooper's motion to supplement his § 2255 motion (#4), and OVERRULES Mr. Cooper's objections to the court's extension order to the government (#8). The court DENIES Mr. Cooper's § 2255 motion (#1) and DENIES Mr. Cooper's motion for judgment (#7). The Clerk's Office is directed to close this case.

BACKGROUND

Mr. Cooper was indicted for bank robbery, 18 U.S.C. §§ 2113 (a),(d), and use of a firearm during a crime of violence, 18 U.S.C. § 924 (c)(1)(A)(ii), on July 26, 2000. After numerous extensions to accommodate Mr. Cooper's repeated requests for change of counsel, a jury trial was then held in October 2002, resulting in a verdict of guilty on both counts.

Before the start of the trial, the government filed a notice of sentencing enhancement for Mr. Cooper's prior convictions. After trial, Mr. Cooper, through counsel, presented his response and objections to the Pre-Sentence Report to the court. The court overruled these objections, finding that Mr. Cooper's criminal history category was V and the total offense level was 37. Given Mr. Cooper's criminal history and the base level of the convicted offense, the court imposed a sentence of life on the bank robbery charge, and 84 months to run consecutive for the use of a firearm charge. The court also imposed 60 month supervised release on count I, and 36 months supervised release on count II.

DISCUSSION

Mr. Cooper now moves the court, pursuant to 28 U.S.C. § 2255, to vacate and correct his sentence. He provides five grounds¹ upon which he relies, including: (1) the court issued an illegal sentence of life by exceeding the statutory maximum, (2) the court issued an illegal sentence by incorrectly applying U.S.S.G. § 4B1.1, (3) the court violated Mr. Cooper's Sixth Amendment rights by illegally enhancing his sentence, (4) the court violated Mr. Cooper's Fifth

¹Mr. Cooper does indicate in his motion for permission to appeal in forma pauperis (#9) that there are six grounds listed in this § 2255 motion. The court only finds five separate grounds presented by Mr. Cooper.

and Sixth Amendment rights by increasing the statutory maximum using a preponderance of the evidence standard, and (5) that he was provided ineffective assistance of counsel at both the trial and appellate level of his case. A reconsideration of plaintiff's sentence can only be addressed by this court if it was "imposed in violation of the Constitution or laws of the United States."²

A. The Sentence Did Not Exceed the Statutory Maximum

Mr. Cooper's memorandum in support of his § 2255 motion is both rambling and slightly incoherent, so the court will do its best to decipher Mr. Cooper's arguments and case citations. Mr. Cooper first "asserts that the sentence on Count 1 . . . of a life sentence . . . is a[] Constitutional sentencing error pursuant to" FED. R. CRIM. P. 52(b), exceeding both the court's authority under the Sentencing Reform Act and the statutory maximum of 18 U.S.C. §§ 2113(a),(d). Mr. Cooper also asserts that his counsel was ineffective for "failing to raise this issue at the sentencing and on direct appeal."

Mr. Cooper's support on this issue cites the court's opinion in *United States v. Wilson*,³ which held that "at the time of sentencing, [the court] shall state in open court the reasons for its imposition of the particular sentence, and if the sentence is . . . outside the [guidelines] range . . . the specific reason for the imposition of a sentence different from that described."⁴ Mr. Cooper argues that the court failed to state in open court the reasons for its imposition of the particular sentence, and that the court failed to state its reasons for "exceeding the [guidelines] range of

²18 U.S.C. § 2255.

³350 F. Supp. 2d 910, 916 (D. Utah 2005).

⁴*Id.* at 916.

324-405 months.”

Prior to trial, on October 15, 2002, the government filed a Notice of Sentencing Enhancement per Established Prior Convictions.⁵ The government provided notice that Mr. Cooper was subject to the provisions of 18 U.S.C. § 3559(c), which states “[n]otwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if [] the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of [] 2 or more serious violent felonies.” The notice stated that Mr. Cooper had been convicted of at least five “serious violent felony convictions” as defined in 18 U.S.C. § 3559(c)(2)(F). The notice also stated that if Mr. Cooper was convicted of either or both counts in the indictment, he would be subject to the penalty described in 18 U.S.C. § 3559(c), including a mandatory sentence of life imprisonment.

After Mr. Cooper was convicted by a jury of his peers, he and his counsel were provided with the Presentence Report. Mr. Cooper filed a response to the Presentence Report through counsel, and also provided objections to the sentencing enhancement under 18 U.S.C. §§ 3559(c)(1),(4). The court heard oral argument on the issue of whether Mr. Cooper had been properly identified and whether the government had carried its burden showing that the Todd Cooper convicted of the listed previous violent felonies was the same Todd Cooper found guilty in Case No. 1:00-CR-00051 PGC. The government provided certified documents showing prior

⁵*United States v. Cooper*, Case No. 2:00-CR-00051 PGC, Docket No. 214 (Oct. 15, 2002).

offenses committed by Todd Cooper, along with extensive police reports in a number of the prior convictions which detailed the events and the identification of Mr. Cooper. These also included photographs, social security numbers, dates of birth, and court records which identified Mr. Cooper. Additionally, the government provided the Presentence Reports with respect to two of Mr. Cooper's prior felony convictions, establishing Mr. Cooper's identity as the person who had committed those underlying felonies. Finally, Mr. Cooper himself represented to the court that there were no material errors and no corrections or additions that needed to be made to the Presentence Report in the case.

The court found that although Mr. Cooper objected to the career offender status, he had waived his right to challenge the information in the Presentence Report. Mr. Cooper and his counsel had access to the Presentence Report and failed to challenge the information including his prior serious violent felony convictions. On that basis alone, the court found ample evidence to conclude that Mr. Cooper was the same Todd Cooper who had been convicted of multiple serious violent felonies. Independently, the court found that Mr. Cooper had admitted that he was that same Todd Cooper while lodging his Rule 404(b) motions in limine prior to trial. The court also found that the government had provided ample certified documents showing that Mr. Cooper was that same Todd Cooper. Finally, the court noted that the probation officer conducted an independent evaluation and had decided that Mr. Cooper was the same Todd Cooper convicted of multiple serious violent felonies. Given all of these reasons, the court noted that although Mr. Cooper had a criminal history of 37 and a base offense level of V, the sentencing

was “superseded by the mandatory life sentence by statute.”⁶

The court explained its reasons in open court, and specifically referenced the mandatory life sentence provided by statute under 18 U.S.C. §§ 3559(c)(1). Since the court followed the applicable statute, Mr. Cooper’s claim that the court “exceeded” its authority under the statutory maximum of 18 U.S.C. §§ 2113(a),(d) and the Sentencing Reform Act of 1984 is unpersuasive. It is clear that no plain error occurred in this sentence, and Mr. Cooper’s arguments regarding the statutory maximum are wholly incorrect.

B. The Court Correctly Applied U.S.S.G. § 4B1.1.

Mr. Cooper argues that the appropriate calculation for his Presentence Report base offense level was 34, rather than 37. Specifically, he argues that the offense statutory maximum is level 34, because 18 U.S.C. §§ 2113(a),(d) “can only be enhanced by statute” and “only allows for an increase in the statutory maximum if it is contained within the statute of the offense.” He further argues that plain error occurred because the court relied on an erroneous Presentence Report, incorrectly raised the statutory maximum, and failed to follow the sentencing guidelines.

The bank robbery statute, 18 U.S.C. § 2113, provides a maximum sentence of twenty-five years imprisonment for a crime including assault, and a punishment of up to life imprisonment or death if a death results from the crime. Section 4B1.1 of the Sentencing Guidelines states, however, that “if the offense level for a career offender . . . is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply.” Under 18 U.S.C. § 3559(c)(1), Mr. Cooper is accorded a sentence on this serious violent felony of

⁶Sentencing Transcript, at 20.

“mandatory life imprisonment” for his separate prior convictions of 2 or more serious violent felonies. Accordingly, the offense statutory maximum becomes “Life” and his offense level was properly found to be 37 according to U.S.S.G. § 4B1.1.

Mr. Cooper fails to also note Application Note 2 of § 4B1.1, which states that the offense statutory maximum “refers to the maximum term of imprisonment authorized for the offense of conviction . . . including any increase in the maximum terms under a sentencing enhancement provision that applies because of the defendant’s prior criminal record.” Since 18 U.S.C. § 3559(c)(1) provides for such a sentencing enhancement, his arguments are unpersuasive and no plain error in Mr. Cooper’s sentence occurred.

C. Mr. Cooper’s Sixth Amendment Rights Were Not Violated When the Issue of His Previous Convictions Was Not Presented to a Jury

Mr. Cooper argues that this court’s failure to present his alleged prior convictions to a jury resulted in an enhanced sentence violating his Sixth Amendment right to a jury trial. He also argues that the court’s failure to find his crimes were not part of a common plan or scheme also increased his sentence and violated the Sixth Amendment.

The government provided five different instances in which Mr. Cooper had been convicted of serious violent felonies in its notice of sentencing enhancement. Indeed, the government consolidated his 1988 cases into one single conviction, so by the court’s count there are possibly at least six different serious violent felonies on Mr. Cooper’s record. It is clear to the court, however, that it had five different serious violent felony convictions to choose from for Mr. Cooper to be accorded a mandatory life sentence. These serious violent felonies occurred in 1981 in California and Utah, 1982 in Oregon, 1988 in Washington and Oregon, and 1990 in

Oregon.

Mr. Cooper fails to discuss the applicable sentencing guidelines that are relevant to his Presentence Report. Even though the Presentence Report failed to consolidate certain incidents, including his escape from state prison, U.S.S.G. § 4B1.1 applied to compute his criminal history category as VI. Regardless of whether some of his convictions should or should not have been grouped together, the court found at least two serious violent felony convictions on Mr. Cooper's record to apply 18 U.S.C. § 3559(c)(1) and make Mr. Cooper eligible for career offender status. And none of these prior convictions were facts that needed to be proved to a jury. In *Booker v. United States*, the Supreme Court specifically "reaffirm[ed its] holding in *Apprendi*; Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁷ The maximum sentence authorized by the facts, including Mr. Cooper's prior convictions, was mandatory life imprisonment, and therefore his reliance on *Booker* is wholly unavailing. Additionally, the Tenth Circuit recently held that *Booker* does not apply retroactively to 28 U.S.C. § 2255 motions.⁸ As such, the court does not find Mr. Cooper's Sixth Amendment arguments regarding his sentence persuasive. No plain error occurred regarding Mr. Cooper's Sixth Amendment right to a jury trial.

D. Mr. Cooper's Fifth and Sixth Amendment Rights Were Not Violated Based on the Court's Use of the Preponderance of the Evidence Standard

⁷*Booker v. United States*, 125 S.Ct. 738, 756 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000)).

⁸*United States v. Bellamy*, 411 F.3d 1182, 1186 (10th Cir. 2005).

Mr. Cooper next argues that the court erred by finding facts based on a preponderance of the evidence standard to enhance his sentence. He asserts that the court violated his Fifth and Sixth Amendment rights because the court's findings based on a preponderance of the evidence allowed him to "be exposed to a penalty exceeding the maximum" he could have received based on the jury verdict alone. Basically, Mr. Cooper makes another *Booker* argument that his sentence was increased based on facts found by a preponderance of the evidence, thereby resulting in certain constitutional violations.

As stated in the previous section, a prior conviction is not a fact that needs to be proven to a jury. Indeed, the Supreme Court stated in *Booker* that it "reaffirm[ed its] holding in *Apprendi*; Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."⁹ The court relied on Mr. Cooper's prior convictions, by the proper preponderance of the evidence standard, to find that Mr. Cooper was subject to an enhancement under 18 U.S.C. § 3559(c) and the career offender status in U.S.S.G. § 4B1.1. Mr. Cooper's sweeping constitutional arguments notwithstanding, he has failed to show any plain error in the sentence the court has provided. He has also failed to show any constitutional deficiencies in his sentencing based on current Supreme Court law.

E. No Ineffective Assistance of Counsel at the District and Appellate Level

To establish an ineffective assistance of counsel claim, Mr. Cooper must show that his

⁹*Booker*, 125 S.Ct. 738, 756 (2005) (citing *Apprendi*, 530 U.S. at 488).

counsel's performance was significantly "deficient and that he was prejudiced by that deficiency."¹⁰ Under *Strickland v. Washington*,¹¹ Mr. Cooper must show that his counsel's representation fell below an objective standard of reasonableness to satisfy the first prong. He must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹² The court looks at an ineffective assistance of counsel claim with "a strong presumption that counsel provided effective assistance of counsel," and Mr. Cooper "has the burden of proof to overcome that presumption."¹³

First, Mr. Cooper argues that his counsel fell below the standard of reasonableness during his appeal. He specifically offers a statement from the government's brief on appeal which "admonishes the defense counsel for mischaracterizing the record." With respect to the trial court, Mr. Cooper explains in hindsight as to how his counsel should have tried the case. Such examples include: "[F]iling a [F.O.I.A. request] on the F.D.I.C. records" to "discover" that the certificate of insurance for the bank was "manufactured" by the FDIC; "challeng[ing] the jurisdiction to TRY this case," rather than test the sufficiency of the evidence; and making an *Apprendi* type argument regarding the aggravating factors for Mr. Cooper's sentencing. Mr. Cooper also argues that his counsel failed to object to the Presentence Report at sentencing,

¹⁰*United States v. Kennedy*, 225 F.3d 1187, 1197 (10th Cir. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

¹¹466 U.S. 668, 688 (1984).

¹²*Id.* at 694.

¹³*United States v. Kennedy*, 225 F.3d 1187, 1197 (10th Cir. 2000).

failed to review the report with Mr. Cooper, failed to advise Mr. Cooper of the importance of the Presentence Report, failed to make objections to the notice of enhancement prior to trial, and failed to challenge the offense statutory maximum, among other contentions.

At this point, the court notes the difficulty of finding an attorney that met with Mr. Cooper's approval. Although indicted in July of 2000, it took over two years to bring this case to trial. By the court's count, Mr. Cooper had seven different attorneys, and also represented himself at times. Mr. Cooper deemed it necessary to proceed pro se only three months before trial, and the court appointed stand-by counsel for Mr. Cooper at that time. Mr. Cooper often peppered the court with numerous frivolous motions, but he agreed to representation by counsel during his trial. The analogy to a sinking ship comes to mind, as Mr. Cooper's counsel fought an uphill battle because of the overwhelming evidence of Mr. Cooper's guilt (he was caught in a drunken car crash with the loot bag and mask worn in the bank robbery immediately next to him).

Contrary to the allegations by Mr. Cooper, Mr. Cooper's counsel performed quite admirably during trial. The majority of Mr. Cooper's discussion appears to be a review of tactical decisions made by counsel to try to win this case. And other allegations, such as his counsel's alleged failure to either show the Presentence Report to Mr. Cooper or to advise Mr. Cooper about the importance of the Presentence Report, are unpersuasive given the record that was developed at the sentencing hearing that demonstrates Mr. Cooper was in fact advised. Mr. Cooper also appears intimately familiar with the federal criminal system, based on his previous convictions, and the court finds it highly unlikely that Mr. Cooper did not understand the gravity

of the Presentence Report. And even if Mr. Cooper could somehow manage to show ineffective assistance of counsel, there is no “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁴ As such, the court finds that Mr. Cooper’s counsel, while presented with very difficult circumstances created by Mr. Cooper himself, was neither deficient, nor did his actions result in any prejudice to Mr. Cooper. Mr. Cooper’s claim for ineffective assistance of counsel is unpersuasive, as his counsel ably attempted to right the sinking ship which was Mr. Cooper’s case.

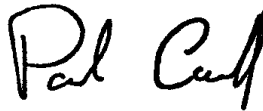
CONCLUSION

The court GRANTS Mr. Cooper’s motion to supplement his § 2255 motion (#4), and OVERRULES Mr. Cooper’s objections to the court’s extension order to the government (#8). Given the reasoning below, the court DENIES Mr. Cooper’s § 2255 motion (#1) and DENIES Mr. Cooper’s motion for judgment (#7). The Clerk’s Office is directed to close this case.

SO ORDERED.

DATED this 28th day of March, 2006.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Paul Cassell", written over a horizontal line.

Paul G. Cassell
United States District Judge

¹⁴*Strickland*, 466 U.S. at 694.

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 14, 2020

Christopher M. Wolpert
Clerk of Court

In re: TODD HAROLD COOPER,

Movant.

No. 16-4115
(D.C. Nos. 1:05-CV-00142-PGC &
1:00-CR-00051-PGC-1)
(D. Utah)

ORDER

Before **HOLMES**, **MORITZ**, and **EID**, Circuit Judges.

Movant, Todd Harold Cooper, proceeding through counsel, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court. *See* 28 U.S.C. §§ 2255(h), 2244(b)(3). This matter is currently abated; we now lift the abatement.

Movant was convicted of armed bank robbery and of using a firearm during a crime of violence. He was given a mandatory life sentence under 18 U.S.C. § 3559(c)(1) based on his prior conviction for one or more “serious violent felonies.” He alleges that at least one of these convictions qualifies as a “serious violent felony” only as that term is defined in § 3559(c)(2)(F)(ii)’s residual clause. The language of this residual clause is virtually identical to the language in 18 U.S.C. § 924(c)(3)’s residual clause. The Supreme Court invalidated § 924(c)(3)’s residual clause as unconstitutionally vague in *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

After filing the motion for authorization and two supplements, counsel moved to withdraw at Movant's apparent request. Movant filed a motion for the appointment of new counsel and subsequently attempted to file, pro se, several additional supplements to his motion for authorization. Those pro se materials have been docketed as received but not filed, pending a ruling on counsel's motion to withdraw. In the supplement received on March 23, 2020, Movant seeks authorization to challenge his life sentence on a second ground, namely that he has newly discovered evidence that a prior Utah burglary conviction on which the government relied "is a false conviction and false charge." Mot. to Suppl. 28 U.S.C. § 2255 Motion, Due to Newly Discovered Evidence at 1.

To obtain authorization, Movant must make a prima facie showing that his second or successive § 2255 motion meets the gatekeeping requirements of § 2255(h). 28 U.S.C. § 2244(b)(3)(C); *see also United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir. 2018). In assessing this showing, we do not consider the merits of the second or successive motion.¹ *See In re Barrett*, 840 F.3d 1223, 1227 (10th Cir. 2016); *Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007) (per curiam). A motion may be authorized under § 2255(h)(2) if it relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Davis* announced a new rule of constitutional law that the Supreme Court made retroactive to cases on collateral review through the combination of its holdings in *Welch v. United*

¹ In limiting our consideration of this motion to the requirements of § 2255(h), we do not consider the existence or applicability of any plea-agreement waiver that may have been executed. We leave that and other merits considerations for the district court.

States, 136 S. Ct. 1257, 1265 (2016), and *Davis*. See *In re Mullins*, 942 F.3d 975, 979 (10th Cir. 2019). We therefore conclude that Movant has made the required prima facie showing under § 2255(h)(2).

A second or successive § 2255 motion may also be authorized under § 2255(h)(1) if it relies on “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.” In his March 23, 2020, supplement, Movant contends he has new evidence in the form of a Certified Record Search from Utah’s Third District Court stating that the court’s records do not show that Movant has a criminal case with the court. We need not decide whether this showing meets the standard for authorization under § 2255(h)(1) because we have already determined that he has a claim that meets the standard for authorization in § 2255(h)(2).

Accordingly, we grant Movant authorization to file a second or successive § 2255 motion in district court. We grant counsel’s motion to withdraw and accept for filing all of Movant’s pro se submissions. We deny Movant’s motion for appointment of counsel as moot.

In the interest of justice, we direct the Clerk pursuant to 28 U.S.C. § 1631 to transfer the motion for authorization and supplements to the district court for the District of Utah for filing as an authorized successive § 2255 motion. The filing date for the

authorized § 2255 motion is June 28, 2016, the date the motion for authorization was filed in this court.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

TODD HAROLD COOPER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

**MEMORANDUM DECISION AND
ORDER DENYING PETITIONER'S
MOTIONS TO VACATE, SET ASIDE,
OR CORRECT A SENTENCE UNDER
28 U.S.C. § 2255**

Case No. 1:16-cv-00088-JNP

District Judge Jill N. Parrish

Before the court are Petitioner Todd Harold Cooper's ("Cooper") Motion to Correct Sentence under 28 U.S.C. § 2255 [ECF No. 1], Supplemental Motion to Vacate and Set Aside a Sentence under 28 U.S.C. § 2255(h)(1) [ECF No. 46-1], and Supplemental Motion to Vacate and Set Aside a Sentence Under 28 U.S.C. § 2255(h)(2) [ECF No. 46-2].¹ In essence, Cooper argues that his mandatory life sentence under the federal three-strikes law violates the Constitution. For the reasons set forth below, the court DENIES Cooper's § 2255 motions.

¹ Cooper has filed several iterations of his motions in this case. Per the court's order at ECF No. 48, the court treats ECF Nos. 1, 46-1, and 46-2 as the operative motions. ECF No. 1 is the initial motion filed by Cooper's then-counsel. ECF Nos. 46-1 and 46-2 are the 2255(h)(1) and 2255(h)(2) motions, respectively, composed by Cooper. Cooper also submitted several iterations of his reply brief. The court treats ECF No. 81 as the operative iteration.

BACKGROUND

I. FEDERAL THREE-STRIKES LAW

Cooper grounds his motions in his assertion that the sentencing judge erroneously sentenced him to a mandatory life sentence under the federal three-strikes law. The federal three-strikes law, codified at 18 U.S.C. § 3559(c), “is a recidivist statute” that “enhances the sentence of a defendant who is convicted of a serious violent felony when the defendant previously was convicted of at least two other serious violent felonies.” *United States v. Kaluna*, 192 F.3d 1188, 1195 (9th Cir. 1999). Specifically, the enhanced penalty provision provides:

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony and serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding serious violent felony or serious drug offense.

18 U.S.C. § 3559(c).

The law sets forth three categories of offenses that count as a “serious violent felony,” and thus, a strike. First, the “enumerated clause” lists a series of enumerated offenses that qualify as serious violent felonies. *See* 18 U.S.C. § 3559(c)(2)(F)(i). The list of enumerated serious violent felonies includes any “Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118).” *See id.* Sections 2111, 2113, and 2118 each describe robbery as the taking or attempting to take something of value from the person or presence of another, by force and violence or by intimidation. 18 U.S.C. §§ 2111

(robbery within federal territorial jurisdiction), 2113 (bank robbery), 2118 (robbery involving controlled substances). Second, the “elements clause” designates as a serious violent felony “any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 3559(c)(2)(F)(ii). Third, the “residual clause” identifies as a serious violent felony “any offense punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” *Id.* Accordingly, a sentencing judge could find that a particular offense qualifies as a serious violent felony under the enumerated clause, the elements clause, or the residual clause.

However, the Supreme Court’s decisions in *Johnson v. United States*, 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019) called the constitutionality of the residual clause into question. In each of those cases, the Supreme Court held statutory language that is similar to the language in § 3559’s residual clause void for vagueness. *See Johnson*, 576 U.S. at 597-602 (holding the residual clause of the Armed Career Criminal Act unconstitutionally vague); *Dimaya*, 138 S. Ct. at 1223 (holding the residual clause of the definition of “crime of violence” in 18 U.S.C. § 16(b) unconstitutionally vague); *Davis*, 138 S. Ct. at 2336 (holding the residual clause at 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague). Given the substantial similarities between the residual clauses already held unconstitutional by the Supreme Court and the § 3559 residual clause, courts across the country have found § 3559’s residual clause unconstitutionally vague. *See United States v. Bell*, No. 22-5111, 2023 WL 2583384, at *4 (10th Cir. Mar. 21, 2023) (“We can rely, though, on *Johnson* and *Davis* to support a conclusion on direct appeal that the residual clause of similarly worded statutes are

unconstitutionally vague”); *Langford v. United States*, No. 4:16-cv-00132-RGE, 2019 WL 12025155, at *3 (S.D. Iowa Sept. 30, 2019) (comparing the residual clause language in *Johnson*, *Dimaya*, and *Davis* to the § 3559 residual clause and holding that “this Court finds the nearly identical language contained in § 3559 is also unconstitutionally vague”); *United States v. Minjarez*, 374 F. Supp. 3d 977, 992-93 (E.D. Cal. 2019) (holding the § 3559 residual clause unconstitutional because it “possesses the exact same two features that rendered the residual clauses in [*Johnson* and *Dimaya*] void for vagueness” (citation omitted)); *United States v. Goodridge*, 392 F. Supp. 3d 159, 173 (D. Mass. 2019) (holding the § 3559 residual clause “unconstitutionally vague in accordance with *Johnson* and *Dimaya*”). Indeed, the government concedes that “the portion of the definition beginning with ‘or that, by its nature’ [i.e., the residual clause] is no longer valid.” ECF No. 53, at 12.

To summarize, the government can seek a mandatory life sentence under the federal three-strikes law if an offender is convicted of an offense qualifying as a strike and the offender already has two previous outstanding strikes. An offense counts as a strike for purposes of the federal three-strikes law only if it qualifies as a serious violent felony under the enumerated clause or the elements clause. To the extent that a sentencing judge adjudicated an offense as a serious violent felony—or strike—under the residual clause, the sentence suffers from a constitutional defect.

Finally, prior to a trial or plea where the government seeks an enhanced sentence under the federal three-strikes law, the government must serve a copy of the prior convictions upon which the government bases the sentencing enhancement on the court and counsel for the defendant. *See* 21 U.S.C. § 851(a)(1) (incorporated by 18 U.S.C. § 3559(c)(4)). This document is called an information or a notice of sentencing enhancement (“Notice”). “Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.” *Id.*

II. FIRST TWO STRIKES

The government sought an enhanced sentence under the federal three-strikes law in the underlying case (Case No. 1:00-cr-00051) because of the prior strikes on Cooper's record. Before the trial, the government filed a Notice, indicating that it intended to seek a mandatory life sentence for Cooper under 18 U.S.C. § 3559. The Notice listed the following offenses as potential qualifying strikes:

1. 1981: Robbery (80520), State of California, County of Santa Cruz ["offense (1)"];
Burglary of a Dwelling (2nd degree felony) in Third Judicial District Court, Salt Lake County, Utah (Case # 24605). Judgment & Commitment filed on or about June 18, 1973²
2. 1982: Burglary in the first degree (82-0066 – State of Oregon, County of Washington) ["offense (2)"]
3. 1982: Burglary in the first degree (82-0169 – State of Oregon, County of Washington) ["offense (3)"]
4. 1988: Armed bank robbery (CR88-99T [116] – Western District of Washington);
Armed bank robbery (CR88-306 – United States District Court, District of Oregon, Rule 20 transfer to Western District of Washington and sentenced with CR88-99T) [collectively, "offense (4)"]
5. 1990: Robbery (C890126CR – State of Oregon, Washington County) ["offense (5)"]

ECF No. 46-1, at 28. While the government's Notice did not specifically clarify which of the above convictions constituted Cooper's first two strikes, the government clearly stated that either the conviction for armed bank robbery in the District of Utah or the conviction for use of a firearm during a crime of violence in the District of Utah could serve as a third strike. In response to

² As discussed further below, the government listed two separate offenses under number one. The government indicated in its response to Cooper's objection to sentencing enhancement that the Utah burglary was included in error and requested that it be stricken prior to Cooper's sentencing. ECF No. 274, at 5 n.1. Cooper concurs that this court should not consider the Utah burglary for purposes of evaluating his liability under the federal-three strikes law. Indeed, Cooper points out several times that he has no criminal case record at the Utah Third District Court. *See, e.g.*, ECF No. 46-1, at 29. Therefore "offense (1)" includes only the California robbery.

Cooper's present motion, the government identifies offenses (1), (4), and the underlying District of Utah bank robbery conviction as the relevant three strikes. To that end, the court provides additional background on offenses (1) and (4), then describes the events leading to the third strike—the strike that gave rise to Cooper's mandatory life sentence.

Offense (1) is a California robbery conviction that stems from an incident in Santa Cruz, California in October 1981. Cooper and a co-defendant broke into a home. The resident returned during the course of the crime. Cooper and his partner tied the resident up and Cooper threatened the resident with a hunting knife. While Cooper expressed a desire to kill the resident, his partner talked him out of it. The pair left with \$6,500 from the home. Cooper was convicted under California Penal Code § 211 and received a three-year prison term. A California court later denied probation. As one of the grounds for the probation denial, the court cited California Rule of Court 414(c)(3), which states that one of the “[c]riteria affecting the decision to grant or deny probation [is] [w]hether the defendant was armed with or used a weapon.” ECF No. 53-3, at 3.

Offense (4) encompasses several robberies prosecuted in federal court. On September 28, 1988, Cooper robbed a bank in Portland, Oregon. He immediately proceeded to attempt to rob a bank in Vancouver, Washington, then successfully robbed a different bank also located in Vancouver, Washington. Although Cooper's activities spanned state lines, the case was consolidated into the Western District of Washington, which presided over the case as to both counts of bank robbery. Cooper's conduct led to two federal convictions for bank robbery, resulting in a 125-month prison sentence. As discussed below, the two convictions count as a single strike for purposes of the federal three-strikes law.

III. THIRD STRIKE AND COLLATERAL ATTACKS

Cooper's third strike resulted from a bank robbery that occurred in Utah. On July 17, 2000, Cooper robbed a bank at gunpoint. During the course of the robbery, he threatened to shoot bank employees and customers. Police subsequently apprehended Cooper and the government brought charges against him. Cooper proceeded to trial. On October 28, 2002 a jury in the District of Utah convicted Cooper of one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of using a firearm during a crime of violence in violation of 18 U.S.C. § 924(c).

The case then entered the sentencing phase. Cooper objected to an enhanced sentence under the federal three-strikes law on the grounds that the government had not established that Cooper was the person convicted of the predicate offenses. Specifically, Cooper contended that by neglecting to produce prison packets containing fingerprints or DNA from the alleged prior convictions, the government had failed to meet its burden. *See* Case No. 1:00-cr-00051, ECF No. 271, at 1-2. However, at the sentencing hearing the sentencing judge overruled this objection on the grounds that Cooper had stated that there were "no material errors" in the presentence report ("PSR"), and "no corrections or additions which the defendant wishes to make to the Pre-Sentence Investigation prior to the Time of Sentencing." ECF No. 271, at 1. The judge further considered the fact that Cooper's counsel admitted that he had no evidence to suggest that the convictions were anything other than Cooper's. ECF No. 53-2, at 9-10.

On January 21, 2003, the Court sentenced Cooper to life in prison on the bank robbery charge and eighty-four months in prison on the firearm charge, to run consecutively. The court subsequently entered judgment against Cooper.

Cooper appealed the conviction to the Tenth Circuit. Cooper argued that the jury had insufficient evidence to convict him, that the court had erroneously instructed the jury that he could

be found guilty of aiding and abetting, that he was improperly denied access to a law library, and that the court erred by sentencing him under the federal three-strikes law. On July 19, 2004, the Tenth Circuit affirmed his conviction. Several months later, the Supreme Court denied Cooper's petition for a writ of certiorari.

Subsequently, Cooper pursued several collateral attacks on his Utah bank robbery conviction. Cooper's first collateral attack began on November 18, 2005. Cooper filed a motion to vacate his sentence under 28 U.S.C. § 2255 arguing that he had received ineffective assistance of counsel and that his sentence violated the statutory maximum, was incorrect under the guidelines, and violated his Fifth and Sixth Amendment rights. The court denied Cooper's motion. *See Cooper v. United States*, 1:05-cv-142 (D. Utah Mar. 28, 2006) (unpublished order at ECF No. 11).

Cooper appealed the court's denial, but the Tenth Circuit declined to issue a certificate of appealability on the grounds that the district court's resolution of Cooper's § 2255 motion was not subject to debate. *See United States v. Cooper*, No. 06-4094 (D. Utah Jan. 11, 2007) (unpublished order).

Cooper's second collateral attack began on June 27, 2016. Through counsel, Cooper requested that the Tenth Circuit authorize a successive § 2255 motion based upon the recently decided Supreme Court case, *Johnson v. United States*, 576 U.S. 591 (2015).

The Tenth Circuit acquiesced,³ and Cooper filed a motion through counsel arguing that the state robbery and burglary offenses were not serious violent felonies in light of *Johnson*, thus

³ The court notes that the Tenth Circuit's permission to file the present successive § 2255 motion does not bear on whether the Tenth Circuit approves of the motion. To obtain authorization from the Tenth Circuit, Cooper had only to make a prima facie showing that his second or successive § 2255 motion meets the gatekeeping requirements of § 2255(h). *See* 28 U.S.C. § 2244(b)(3)(C); *see also United States v. Murphy*, 887 F.3d 1064, 1067 (10th Cir. 2018). As the Tenth Circuit stated in this case, "[i]n assessing this showing, we do not consider the merits of the second or successive motion." *See* ECF No. 81, at 49 (citing *In re Barrett*, 840 F.3d 1223, 1227 (10th Cir.

precluding application of the federal three-strikes law to his case. *See* ECF No. 1. Soon thereafter, Cooper's counsel withdrew at his request. Cooper filed several motions for extensions of time while he searched for counsel. Ultimately, Cooper filed two supplemental § 2255 motions pro se. *See* ECF Nos. 46-1, 46-2. The government responded to all of Cooper's § 2255 motions in a single filing. *See* ECF No. 53. Cooper filed two replies. *See* ECF Nos. 59, 81. Because Cooper filed his initial reply while on lockdown for COVID-19 and requested leave to amend his reply upon the termination of his lockdown, the court treats Cooper's final reply brief (ECF No. 81) as the operative reply.

LEGAL STANDARD

Under 28 U.S.C. § 2255, a prisoner may “move the court which imposed the sentence to vacate, set aside, or correct the sentence” where “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.” 28 U.S.C. § 2255(a)-(b). In essence, the court looks for “a fundamental defect which inherently results in a complete miscarriage of justice. *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (citation omitted). In reviewing a § 2255 motion, the court presumes that the prior proceedings were lawful. *See Klein v. United States*, 880 F.2d 250, 253 (10th Cir. 1989). The movant bears the burden of demonstrating the deprivation of a constitutional right. *See United States v. Kennedy*, 225 F.3d 1187, 1196 n.6 (10th Cir. 2000).

2016). This court, in contrast, is tasked with considering the merits of Cooper's § 2255 motion. Therefore, to the extent Cooper suggests that he has “proven” something to the Tenth Circuit, what he has “proven” does not affect the merits of his § 2255 petition. ECF No. 81, at 17.

A court must conduct a hearing on a § 2255 motion “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). “The purpose of an evidentiary hearing is to resolve conflicting evidence.” *Anderson v. Att’y Gen. of Kan.*, 425 F.3d 853, 860 (10th Cir. 2005). But when the evidence allows the court to resolve the § 2255 motion on the existing record, no evidentiary hearing is required. *United States v. Lopez*, 100 F.3d 113, 121 (10th Cir. 1996). If the claims relate to occurrences in the courtroom or record evidence, then the court need not conduct a hearing. *Machibroda v. United States*, 368 U.S. 487, 494-95 (1962).⁴

ANALYSIS

Across three motions, Cooper advances two essential arguments for why the court should re-sentence him without applying the federal-three strikes sentence enhancement. First, he argues that *Johnson v. United States*, 576 U.S. 591 (2015), renders § 3559’s residual clause unconstitutional. Thus, Cooper argues, to the extent the sentencing court relied on the residual clause in concluding that a particular offense was a strike, the court must overturn the sentence. Second, he argues that the government committed a series of reversible errors in the Notice, including (1) inaccurately stating the timing of various convictions or changing the dates of convictions to mask timing issues, (2) inaccurately representing consolidated offenses as multiple strikes, (3) including a false conviction for a burglary in Utah in which Cooper did not participate, and (4) misrepresenting offense number (4) as an armed robbery when in fact the charging documents do not support such a representation. The government responds to Cooper’s arguments

⁴ Because Cooper’s claims relate to courtroom occurrences and record evidence, the court need not hold an evidentiary hearing.

and adds its own contention that Cooper does not comply with the foundational gatekeeping requirements put in place by 28 U.S.C. § 2255.⁵

The court proceeds by clarifying which of Cooper’s offenses can count as strikes for purposes of the federal three-strikes law. The court then discusses whether offense (1), the California robbery, qualifies as a strike in light of recent Supreme Court decisions. Finally, the court reviews the Notice errors highlighted by Cooper. For the following reasons, the court DENIES Cooper’s motion.

I. RELEVANT OFFENSES

As an initial matter, the court begins by clarifying which offenses are at issue here. Cooper argues, and the government concurs, that the two bank robbery convictions—offense (4) and the underlying Utah bank robbery conviction—each constitute a strike for purposes of the federal three-strikes law. *See* 18 U.S.C. § 3559(c)(2)(F)(i). The government prosecuted both offenses under 18 U.S.C. § 2113, which is an exemplar statute included in the enumerated offense list under 18 U.S.C. § 3559(c)(2)(F)(i). And both parties acknowledge that offense (4) accounts for only a single strike, despite the fact that the Notice lists two separate bank robbery convictions. *See* 18 U.S.C. § 3559(c)(1)(B) (noting that each strike must be “committed after the defendant’s conviction of the preceding [strike]”). Accordingly, both parties agree that Cooper has two strikes as a result of the convictions arising from offense (4) and the underlying Utah bank robbery. The only question for the court, then, is whether any of the other offenses listed by the government in the Notice qualify as a strike. Any additional strike would bring Cooper’s total number of strikes to three, which would support the sentencing judge’s decision to impose a mandatory life sentence.

⁵ Because Cooper obtained prior authorization from the Tenth Circuit, the court assesses the merits of Cooper’s § 2255 claim.

The government does not contest Cooper's contention that offenses (2), (3), and (5) do not qualify as strikes. First, offenses (2) and (3), which both pertain to burglaries in Oregon, are not serious violent felonies under any valid provision⁶ of the three strikes law. Burglary is not an enumerated offense. And the government "does not argue that the Oregon burglary convictions [offenses (2) and (3)] qualified under the [elements] clause at the time Cooper was sentenced." ECF No. 53, at 13 n.3. Thus, the government concedes that offenses (2) and (3) do not qualify as strikes.

Moreover, the government concedes that the timing of offense (5) precludes its use as a predicate serious violent felony. In order to qualify as a strike for purposes of the federal three-strikes law, an offense must have been "committed after the defendant's conviction of the preceding serious violent felony or serious drug offense." 18 U.S.C. § 3559(c)(1)(B). A federal court in Washington entered judgment against Cooper on February 16, 1989 for offense (4) based on his guilty plea. ECF No. 53-1, at 15-16. The government asserts that offense (4) counts as a strike. But Cooper committed offense (5) on September 17, 1988, well before his conviction for offense (4). As the government acknowledges, "[b]ecause of the timing requirement in § 3559(c)(1)(B), the use of a federal bank robbery as a strike means the Oregon robbery cannot be counted as a strike." ECF No. 53, at 13 n.3.

And finally, the government agrees with Cooper that the Utah burglary mentioned under offense (1) is not relevant for purposes of application of the three-strikes law. Cooper spends several pages introducing "new evidence" that a clerk from Utah's Third Judicial District certified that the court had no record of a burglary conviction against Cooper. But the government moved

⁶ As discussed above, the residual clause is unconstitutional so the court considers only the applicability of the enumerated clause and the elements clause.

to strike that offense from the Notice prior to the sentencing hearing. Case No. 00-cr-00051-TC, ECF No. 274, at 5 n.1 (“The Information contains a clerical error on page 2. Item No. 1 lists the defendant’s 1981 Robbery . . . A reference to a burglary (unrelated to this case) was inadvertently included in this paragraph. The United States requests that this reference to the burglary be stricken.”). Thus, the sentencing judge did not take that offense into account when conducting sentencing.

In sum, the government predicates its arguments solely on the grounds that offense (1), offense (4), and the underlying Utah bank robbery conviction support application of the federal three-strikes law. By limiting its arguments to these offenses, the government moots Cooper’s arguments related to offenses (2), (3), and (5), as well as the Utah burglary conviction mistakenly listed under offense (1).

II. CALIFORNIA ROBBERY AND THE RESIDUAL CLAUSE

The government argues that offense (1), Cooper’s California robbery conviction, qualifies as a strike because it constitutes an enumerated offense. Cooper responds that offense (1) does not qualify as a strike under 18 U.S.C. § 2255 for two reasons. First, Cooper contends that offense (1) does not count as a strike because a California robbery conviction does not qualify as an enumerated offense. Specifically, Cooper relies on the categorical approach to argue that the statute under which he was sentenced in California is not a categorical match for the federal robbery statutes cited in 18 U.S.C. § 3559(c)(2)(F)(i). Second, he argues that to the extent the judge considered offense (1) as a strike under the residual clause, the sentence is unconstitutional under *Johnson v. United States*.

As discussed above, both Cooper and the government agree that the residual clause is unconstitutional. Thus, to the extent the sentencing judge relied on the residual clause to find that

offense (1) qualified as a strike, the sentence would result from application of an unconstitutional provision. But if, as the government asserts, the sentencing judge used the enumerated clause to find that offense (1) qualified as a strike, then the sentence is not constitutionally defective. Therefore, the operative question for the court is whether the sentencing judge relied on the residual clause or the enumerated offenses clause in sentencing Cooper.⁷

When a court faces the question of which clause a sentencing judge used to determine that a particular offense qualified as a strike within the meaning of the federal three-strikes law, the Tenth Circuit instructs this court to engage in a two-step process to determine, “*as a matter of historical fact*, whether the sentencing court relied on the residual clause in imposing the [mandatory] sentence.” *United States v. Lewis*, 904 F.3d 867, 872 (10th Cir. 2018) (citation omitted). In the first step, the court looks at the sentencing record for evidence of the clause the sentencing judge relied upon in sentencing the movant. *See United States v. Driscoll*, 892 F.3d 1127, 1132 (10th Cir. 2018). If the sentencing record clarifies which clause the sentencing judge used, the court need not continue to the second step. But where the sentencing record is ambiguous, the court “examine[s] the ‘relevant background legal environment’ at the time of sentencing to determine whether the district court would have needed to rely on the residual clause.” *Id.* Cooper bears the burden of demonstrating by a preponderance of the evidence that the sentencing court “relied on the residual clause to enhance his sentence.” *Driscoll*, 892 F.3d at 1135 & n.5.

A. Sentencing Record

“To determine whether the sentencing court relied on the residual clause, we examine [first] ‘the sentencing record to confirm that there is no mention whatsoever of the residual clause in the

⁷ The elements clause does not apply here. As discussed in more detail below, because Cooper’s California robbery conviction was not punishable by a maximum term of imprisonment of ten years or longer, it did not qualify under the elements clause.

PSR or any of the other sentencing court pleadings or transcripts.” *United States v. Copeland*, 921 F.3d 1233, 1242 (10th Cir. 2019) (quoting *Driscoll*, 892 F.3d at 1132). In examining the sentencing record, the court looks for “(1) references to the residual clause or another . . . clause, and (2) information about a movant’s prior convictions.” *Id.* at 1243 (citations omitted). “[E]xpress ‘mention’ of either the residual, elements, or enumerated clause by the sentencing judge at sentencing, in a court order, in a PSR adopted by the sentencing judge, or in a party’s motion may be relevant and even sufficient to show whether the sentencing court relied on the residual clause.” *Id.* (citation omitted).

Here, the sentencing transcript contains no reference to either the residual, elements, or enumerated clause. Prior to the sentencing hearing, Cooper objected to the PSR on the grounds that the government had not borne its burden of demonstrating, via fingerprints or DNA, that Cooper was the person named in the documents. Accordingly, the sentencing hearing focused largely on the government’s burden and whether Cooper was the individual named in the prior convictions listed in the PSR.

In fact, the sentencing judge never specifically indicated which offenses he relied on as strikes for Cooper. During his colloquy with Cooper’s counsel, the sentencing judge referenced certain paragraphs of the PSR that correspond to descriptions of offenses (4) and (5), as well as an offense not listed in the Notice. *See* ECF No. 53-2, at 19 (“Specifically relevant to this particular situation are the paragraphs, I think it’s Paragraph 35 and 36, 37 and 38, perhaps others as well . . .”). And as Cooper accurately points out, there was “not one word about the 2nd degree robbery [i.e., offense (1)] in the entire sentencing transcripts.” ECF No. 81, at 17. But the sentencing judge’s failure to specifically mention offense (1) does not preclude a finding by this court that the sentencing judge considered it as a strike. This is particularly true in light of the fact

that the government clearly listed offense (1) in the Notice that it provided to the court in advance of sentencing. And the sentencing transcript indicates that the judge did not intend to definitively indicate which prior offenses he relied upon when he listed the relevant paragraph numbers—as evidenced by his inclusion of a paragraph that corresponded to an offense not listed in the Notice. Rather, the court reads the sentencing judge’s comment as a spur-of-the-moment reference to potentially relevant paragraphs of the PSR. Indeed, the sentencing judge himself notes that, in addition to the paragraphs mentioned, there were “perhaps others as well” that corresponded to other relevant offenses. ECF No. 53-2, at 19. In sum, the record of the sentencing hearing is ambiguous as to which offenses the sentencing judge considered as strikes. And, most importantly, it makes no explicit or implicit reference to which specific clause the sentencing judge used to determine that the relevant offenses were strikes.

Cooper’s PSR is similarly unhelpful. The PSR contains a few references to the federal three-strikes law. It states that “[t]he maximum term of imprisonment for this offense, a Class A Felony, is Life, pursuant to 18 U.S.C. § 3559(c).” PSR ¶ 54. And it references the government’s notice to the defendant that he is subject to a three-strikes sentence enhancement. *Id.* ¶ 4. But, again, it contains no mention of the offenses on which the sentencing judge relied, nor does it shed any light upon which clause the judge used to determine that the relevant offenses constituted strikes. Finally, the briefing provided to the sentencing judge in advance of the sentencing hearing, which primarily focuses on Cooper’s objections related to the lack of DNA or fingerprint evidence tying him to the offenses listed in the Notice, is similarly devoid of information about which offenses or clause the court used to sentence Cooper to mandatory life imprisonment.

The ambiguity in the sentencing record “favors neither [the petitioner] nor the government.” *Driscoll*, 892 F.3d at 1135. Instead, “[w]hen . . . we are presented with an ambiguous sentencing

record,” the court looks to the relevant background legal environment when the sentencing judge imposed the mandatory life sentence “to show the most likely reasoning of the sentencing court.” *See Copeland*, 921 F.3d at 1246 (citation omitted).

B. Background Legal Environment

“[W]e examine the relevant background legal environment at the time of sentencing ‘to determine whether the district court would have needed to rely on the residual clause.’” *Copeland*, 921 F.3d at 1243-44 (quoting *Driscoll*, 892 F.3d at 1132). “[T]he relevant background legal environment is, so to speak, a ‘snapshot’ of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions.” *United States v. Snyder*, 871 F.3d 1122, 1129 (10th Cir. 2017). “If the court’s only option was the residual clause under the background law because it could not have relied on the enumerated or elements clause, we conclude that the sentencing court must have relied on the residual clause.” *Copeland*, 921 F.3d at 1243 (citation omitted). “[F]acts about the movant’s previous convictions contained in the PSR, sentencing hearing, or other parts of the district court docket, when viewed in light of background law, can often enable a court to determine whether the district court relied on the residual clause in sentencing.” *Id.*

Here, the following factors indicate that the sentencing judge relied on the enumerated clause, not the residual clause, in determining that offense (1) qualified as a strike. First, at the time of the sentencing hearing, courts generally considered robbery a serious violent felony for purposes of the enumerated clause. Second, Cooper’s California robbery did not qualify for any exception to that rule in light of the facts of his case, which a 2003 court would have considered. Third, a plain reading of the residual clause would have precluded its use by the sentencing judge. The court addresses each factor in turn.

Considering the legal environment as it existed in 2003, Cooper's California robbery qualified as a strike under the enumerated clause. Cooper accurately notes that there are "no specific on-point cases . . . that have found that CPC § 211 qualifies, or does not qualify, under § 3559(c)'s enumerated offenses clause." ECF No. 81, at 18. But the law does not require a case directly on point. Rather, the court looks to the landscape of caselaw at the time of Cooper's sentencing hearing. And caselaw clearly establishes that, at the time of Cooper's sentencing, the Tenth Circuit generally considered robbery a serious violent felony for purposes of the three strikes sentencing enhancement. *See United States v. Gottlieb*, 140 F.3d 865, 866 (10th Cir. 1998) ("Robbery is generally considered a 'serious violent felony' for purposes of the Three Strikes statute."); *United States v. Mackovich*, 209 F.3d 1227, 1238 (10th Cir. 2000) (same); *United States v. Fortune*, 216 F.3d 1088, at *7 (10th Cir. 2000) (unpublished table decision) (same).

However, caselaw at the time of Cooper's sentencing also acknowledged an exception to the general rule. Specifically, the nonqualifying felony clause of § 3559 states that "§ 3559 treats robbery as a non-qualifying felony if the defendant establishes by clear and convincing evidence that – (i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and (ii) the offense did not result in death or serious bodily injury . . . to any person." *United States v. Smith*, 208 F.3d 1187, 1188-89 (10th Cir. 2000). But that exception does not apply here.

In order to determine whether an enumerated offense qualified for an exception under § 3559(c)(3)(A), the 2003 sentencing court would have examined the facts underlying the conviction. Cooper's PSR describes the California robbery as follows:

When they arrived in Santa Cruz, they broke into the home of a 62-year-old victim. When the victim arrived home, they made him lie down and they tied him up with a cord from an iron. The defendant, who was holding a hunting knife, made the statement "Let's kill him." The codefendant apparently talked the defendant out of

murdering the victim and, during the Court proceedings, the victim testified that, in his opinion, the codefendant saved his life.

PSR ¶ 27. Based on this account, which Cooper did not contest at the time of sentencing,⁸ Cooper undoubtedly threatened to use a dangerous weapon (a hunting knife) during his commission of the robbery. Such “threat of use of a firearm or dangerous weapon” would have prevented the sentencing judge from treating the offense as a non-qualifying felony. *See* 18 U.S.C. § 3559(c)(3)(A).

Nevertheless, Cooper contends that the court cannot look to the specific facts of the California robbery but must instead use the categorical approach to compare California Penal Code § 211 to the enumerated federal robbery statutes. Accordingly, Cooper spends several pages demonstrating that California Penal Code § 211 does not qualify as an enumerated offense under the categorical approach. But, as the government points out, the Tenth Circuit did not expressly adopt the categorical approach to the federal three-strikes context until 2018. *See* ECF No. 53, at 19 n. 4 (citing *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2019)). And caselaw from the time of Cooper’s conviction indicates that the sentencing judge would not have applied the categorical approach to determine whether Cooper’s offense qualified for an exception to the enumerated offense clause. In 2000, the Tenth Circuit stated that that “*Taylor*’s categorical approach is inapplicable to the ‘nonqualification’ inquiry under § 3559(c)(3)(A).” *Mackovich*, 209 F.3d at 1240. The Tenth Circuit affirmed this position several months after the court sentenced Cooper, reiterating that “the *Taylor* categorical approach is inapplicable to a district court’s determination of whether an offense qualifies as a ‘strike’ under the federal ‘three-strikes’ law.”

⁸ *See* PSR Addendum, at 1 (“As of January 13, 2003, defense counsel Edwin Wall had not advised the probation officer that he had any objections to the presentence report); ECF No. 53-2, at 12 (“[Defendant] submits to the Court there are no corrections or additions which the defendant wishes to make to the presentence investigation.”).

United States v. Martinez-Candejas, 347 F.3d 853, 859 (10th Cir. 2003). The language of the statute, the Tenth Circuit reasoned, “unmistakably requires the courts to look to the specific facts underlying the prior offense.” *Id.* Accordingly, a sentencing judge in 2003 would have looked to the specific facts of Cooper’s offense to determine whether the nonqualification clause applied to his offense. As discussed above, the specific facts of his offense clearly demonstrate that Cooper cannot avail himself of the nonqualification clause to avoid a finding that offense (1) falls under the enumerated clause.

And finally, even a cursory examination of the residual clause by the sentencing judge would have eliminated use of the residual clause from consideration. The residual clause covers “any offense punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” 18 U.S.C. § 3559(c)(2)(F)(ii). Thus, the residual clause plainly requires that the sentencing judge find the relevant offense punishable by at least ten years. But California Penal Code § 213 provided that first-degree robbery is punishable either by “three, six, or nine years” or “three, four, or six years” depending on the circumstances, and second-degree robbery is punishable by “two, three or five years.”⁹ Thus, in 2003 (as now) the longest sentence for any degree of robbery under California Penal Code § 211 was nine years. Accordingly, the sentencing judge could not have used the residual clause with regard to offense (1) because the California robbery conviction did not meet the threshold requirement that the offense be punishable by a maximum term of ten years or more.

⁹ Cooper refers to his conviction as second-degree robbery. But, as the government notes, the record contains no evidence indicating the degree of Cooper’s robbery conviction. Given that the maximum term of imprisonment for either first- or second-degree robbery falls under ten years, the court need not further investigate the distinction.

In sum, a review of the relevant background legal environment at the time of Cooper's sentencing supports a finding that the sentencing judge relied on the enumerated clause—not the residual clause—to determine that offense (1), the California robbery, qualified as a serious violent felony. Because this court finds that the sentencing judge relied on the enumerated clause, not the residual clause, Cooper has failed to sustain his burden of establishing a deprivation of his constitutional rights. And because the court determines that, as a matter of historical fact, the sentencing court did not rely on the residual clause, it need not reach Cooper's harmless error arguments.

III. NOTICE ERRORS

Finally, Cooper includes a number of arguments objecting to various alleged errors in the Notice. For instance, he objects to the order in which several of the offenses are listed, the dates associated with several offenses, and the indication that offense (4) is an armed robbery. These alleged errors do not alter the court's conclusion.¹⁰

First, Cooper did not object to any of these issues at the time of sentencing, despite having ample opportunity. Indeed, his only objection was that the government had not sufficiently established that he was the person named in the convictions.

Second, most of Cooper's objections to the Notice have no grounding in law. Cooper highlights ten errors. ECF No. 46-1, at 15-16. Several of the errors complain that the government listed the offenses in the wrong order. But there is no legal authority requiring the government to list the predicate offenses in any particular order in the Notice. Other objections assert that the

¹⁰ The court sympathizes with Cooper's complaint that the government inappropriately included several of the offenses in the § 3559 Notice. These offenses, which the government now concedes do not qualify as strikes, made Cooper's potential strikes appear numerous. Nevertheless, erroneously including superfluous offenses in the Notice, when the Notice already includes sufficient strikes under the federal three-strikes law, is not grounds for revisiting Cooper's sentence.

government listed the incorrect date for some offenses. But the government included the conviction records as an attachment to the Notice, meaning it clearly put Cooper on notice of which offenses it intended to use despite clerical errors in the dates listed. *See United States v. Hood*, 615 F.3d 1293, 1304 (10th Cir. 2010) (“Because [the movant] had sufficient notice of the prior conviction upon which the government sought enhancement as well as an opportunity to be heard, the Enhancement Information’s incorrect identification of the court and place of conviction would be at most harmless error.”). Similarly, Cooper’s complaint that offense (4) was listed as an armed bank robbery, when in fact it was unarmed, was apparent from the conviction records attached.

Third, Cooper objects to use of the Utah burglary listed under offense (1). But as discussed above, the government had already moved to strike this offense from the list by the time the sentencing hearing occurred.

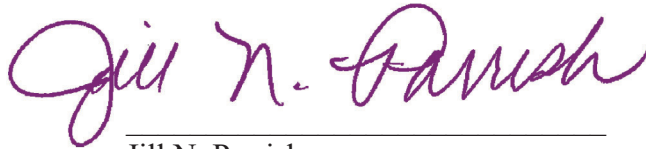
And finally, the government concedes that the errors Cooper identifies as “error #9” and “error #10” are correct but argues that they have no relevance to this petition. The court agrees. Error #9 accuses the government of giving the court the false impression that the two bank robberies listed under offense (4) may count as two individual predicate offenses. But as discussed above, the government does not attempt to count the two offenses listed in offense (4) as separate strikes here. Error #10 points out that Cooper committed offense (5) prior to his conviction for offense (4). But again, the government does not attempt to rely on offense (5) as a strike. Indeed, it acknowledges that offense (5) cannot qualify as a strike because Cooper committed it before the conviction for offense (4). In sum, Cooper’s identified errors do not alter the court’s conclusion that offense (1), offense (4), and the underlying Utah bank robbery conviction add up to three valid strikes against Cooper.

CONCLUSION

The court DENIES Cooper's Motions to Vacate, Correct, or Set Aside his sentence under 28 U.S.C. § 2255.

DATED March 29, 2023.

BY THE COURT



Jill N. Parrish
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

TODD HAROLD COOPER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

Case No. 1:16-cv-00088-JNP

District Judge Jill N. Parrish

IT IS ORDERED AND ADJUDGED that petitioner Todd Harold Cooper's petition is denied.

DATED March 29, 2023.

BY THE COURT:



JILL N. PARRISH

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

TODD HAROLD COOPER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

**ORDER PARTIALLY GRANTING AND
PARTIALLY DENYING COOPER A
CERTIFICATE OF APPEALABILITY**

Case No. 1:16-cv-00088-JNP

District Judge Jill N. Parrish

On May 31, 2023, the Tenth Circuit issued an order directing a limited remand to this court. ECF No. 105. The purpose of this remand was for the court to consider whether it should issue a certificate of appealability for an appeal of the court's March 29, 2023 memorandum decision and order denying Todd Harold Cooper's ("Cooper") 28 U.S.C. § 2255 motions. ECF No. 97.

The court will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this standard, a petitioner must show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted).

In his § 2255 motions, Cooper advanced two arguments for why the court ought to overturn his life sentence. First, Cooper argued that the Supreme Court's somewhat recent decision in *Johnson v. United States*, 576 U.S. 591 (2015), rendered 18 U.S.C. § 3559's residual clause unconstitutional and that, to the extent the sentencing court relied on the residual clause in

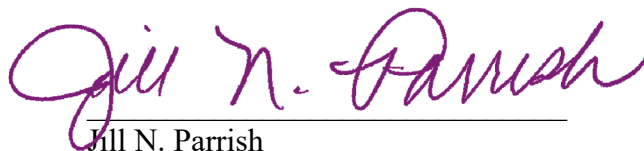
concluding that a particular offense was a strike, the court must overturn his three-strike sentence. Second, Cooper argued that the government committed a series of reversible errors in its notice to the sentencing judge that it was seeking life imprisonment. These errors included (1) inaccurately stating the timing of various convictions or changing the dates of convictions to mask timing issues, (2) inaccurately representing consolidated offenses as multiple strikes, (3) including a false conviction for a burglary in Utah in which Cooper did not participate, and (4) misrepresenting an offense as an armed robbery when in fact the charging documents do not support such a representation.

Though the court believes that its memorandum decision and order denying Cooper's § 2255 motions was not in error, it nonetheless GRANTS Cooper a certificate of appealability for his first argument advanced under *Johnson v. United States*. With this argument, Cooper made a "substantial showing of the denial of a constitutional right" because the issue is fairly debatable. 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484.

But the court DENIES a certificate of appealability for Cooper's second argument, that the Government's notice that it was seeking life imprisonment contained reversible errors. Only denials of constitutional rights are eligible for certificates of appealability, but this portion of Cooper's § 2255 motion only argued that the Government and sentencing court violated federal statutes.

DATED June 2, 2023

BY THE COURT



Jill N. Parrish
United States District Court Judge

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

November 18, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 23-4052

TODD HAROLD COOPER,

Defendant - Appellant.

Appeal from the United States District Court
for the District of Utah
(D.C. Nos. 1:16-CV-00088-JNP &
1:00-CR-00051-TC-1)

Jacob B. McMahon (Adam Mueller with him on the briefs), of Haddon, Morgan and Foreman, P.C., Denver, Colorado, for Defendant – Appellant.

Todd Harold Cooper, pro se, filed briefs on his own behalf.

Nathan H. Jack, Assistant United States Attorney (Trina A. Higgins, United States Attorney, with him on the brief), Salt Lake City, Utah, for Plaintiff – Appellee.

Before **HOLMES**, Chief Judge, **EBEL**, and **BACHARACH**, Circuit Judges.

EBEL, Circuit Judge.

Todd Harold Cooper appeals the district court’s decision to deny his second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his life sentence. Exercising jurisdiction under 28 U.S.C. §§ 1291, 2253, and 2255(d), we AFFIRM.

I. BACKGROUND

In 2003, a jury convicted Cooper of armed bank robbery in violation of 18 U.S.C. § 2113. At sentencing, the government sought a life sentence under 18 U.S.C. § 3559(c), the three strikes provision. Relevant here, § 3559(c) mandates a life sentence if the defendant “is convicted in a court of the United States of a serious violent felony” and has two or more prior federal or state convictions for “serious violent felonies.” 18 U.S.C. § 3559(c)(1)(A)(i).

Section 3559(c)(2)(F) sets forth three categories of offenses that count as a “serious violent felony.” First, in its “enumerated clause,” § 3559(c)(2)(F) lists a series of offenses that qualify. Id. § 3559(c)(2)(F)(i). Second, the “elements clause” (also called the “force” clause) includes any offense “punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another.” Id. § 3559(c)(2)(F)(ii). Third, the “residual clause” includes any offense “punishable by a maximum term of imprisonment of 10 years or more . . . that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” Id.

No one disputes that Cooper’s underlying conviction in this case—his 2003 armed bank robbery conviction—qualifies as a “serious violent felony.” Prior to

Cooper’s 2003 sentencing for that conviction, the government filed a notice listing five of Cooper’s prior convictions that the government asserted also qualified as “serious violent felonies” under § 3559(c)(2)(F). The district court concluded that Cooper had three strikes and imposed a life sentence under § 3559(c). In doing so, however, the district court did not identify which of Cooper’s five prior convictions it relied upon or which of § 3559(c)(2)(F)’s three categories of “serious violent felonies” his prior convictions triggered.

This court upheld Cooper’s conviction and life sentence on direct appeal. United States v. Cooper, 375 F.3d 1041 (10th Cir. 2004), cert. denied, 543 U.S. 1011 (2004).¹ Subsequently, Cooper unsuccessfully sought collateral relief under 28 U.S.C. § 2255. United States v. Cooper, 212 Fed. App’x 743, 746 (10th Cir. 2007) (unpublished), cert. denied, 552 U.S. 930 (2007).

In 2020, we authorized Cooper to file the second or successive § 2255 motion underlying this appeal. In re: Cooper, No. 16-4115 (10th Cir. July 14, 2020). See 28 U.S.C. § 2255(h). In this § 2255 proceeding, Cooper challenges his life sentence, alleging that § 3559(c)(2)(F)(ii)’s residual clause is unconstitutionally vague and the district court relied upon that unconstitutional residual clause to impose his life sentence. The district court denied relief, but granted Cooper a certificate of appealability (“COA”) to appeal, see 28 U.S.C. § 2253(c)(1)(B). See Cooper v.

¹ The jury also convicted Cooper of using a firearm while committing a crime of violence and the district court sentenced him to seven years in prison for that conviction, to run consecutive to the life sentence he is challenging in this § 2255 proceeding. Cooper, 375 F.3d at 1044.

United States, No. 1:16-cv-00088-JNP, at 2 (D. Utah June 2, 2023). We appointed counsel to represent Cooper on appeal and the case was fully briefed and argued before this panel.

Because the district court did not conduct an evidentiary hearing, we review de novo the district court’s decision to deny Cooper § 2255 relief. See United States v. Copeland, 921 F.3d 1233, 1242 (10th Cir. 2019).

II. DISCUSSION

Relevant here, Cooper’s second or successive § 2255 collateral attack must be based 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. § 2255(h)(2); see Copeland, 921 F.3d at 1238–39.

Cooper contends that his current § 2255 motion is based on a new rule of constitutional law because, although the Supreme Court has never addressed the constitutionality of § 3559(c)(2)(F)(ii)’s residual clause, the Court has held that similarly worded residual clauses in other federal statutes are unconstitutionally vague. See Johnson v. United States, 576 U.S. 591, 593–02 (2015) (holding 18 U.S.C. § 924(e)(2)(B)’s residual clause is unconstitutionally vague); see also United States v. Davis, 588 U.S. 445, 447–48 (2019) (reaching same conclusion as to 18

U.S.C. § 924(c)(3)(B)’s residual clause); Sessions v. Dimaya, 584 U.S. 148, 152–53 (2018) (same, as to 18 U.S.C. § 16(b)’s residual clause).²

We need not decide whether Johnson and the other Supreme Court cases are sufficient to permit Cooper to challenge § 3559(c)(2)(F)(ii)’s residual clause under § 2255(h)(2) because Cooper has failed to establish, in any event, that the district court actually relied on § 3559(c)(2)(F)(ii)’s residual clause to sentence Cooper to life in prison. See United States v. Washington, 890 F.3d 891, 895 (10th Cir. 2018) (“The only question is whether Defendant’s claim relies on Johnson—that is, whether the district court enhanced Defendant’s sentence by relying on the . . . residual clause to do so.”).

Critical to our decision here affirming the denial of § 2255 relief, Cooper, as “[t]he § 2255 movant bears the burden of proving by a preponderance of the evidence that ‘it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.’” Copeland, 921 F.3d at 1242 (quoting United States v. Driscoll, 892 F.3d 1127, 1135 (10th Cir. 2018), and citing Washington, 890 F.3d at 895).

Therefore, Cooper must establish that it is more likely than not that, “as a matter of historical fact, . . . the sentencing court relied on the residual clause” when applying

² As to § 2255(h)(2)’s further requirements, the Supreme Court held that Johnson’s new substantive rule applies retroactively on collateral review. See Welch v. United States, 578 U.S. 120, 129–30 (2016). Based on Welch, this court has concluded Davis also applies retroactively to cases on collateral review. See In re Mullins, 942 F.3d 975, 978 (10th Cir. 2019). Further, the rule of constitutional law first recognized in Johnson was previously unavailable to Cooper at his sentencing in 2003 and when he made his first § 2255 motion in 2005, because the Supreme Court did not decide Johnson until 2015.

the three strikes law to Cooper. United States v. Lewis, 904 F.3d 867, 872 (10th Cir. 2018) (emphasis in original) (further quotation omitted). Cooper has not met his burden in this case.

There are several ways that Cooper might have met his burden. See Copeland, 921 F.3d at 1242. First, he could rely on the sentencing record. See id. But here, the sentencing record is silent, both as to which of Cooper's prior convictions the sentencing court relied upon and whether the court applied the residual clause to deem any of those prior convictions to be "serious violent felonies."

We instead consider the second way Cooper could meet his burden, by looking to "the relevant background legal environment at the time of sentencing"—here, 2003—"to determine whether the district court would have needed to rely on the residual clause." Id. (quoting Driscoll, 892 F.3d at 1132) (internal quotation marks omitted). For instance, if binding precedent at the time of sentencing precluded use of the enumerated and elements clauses for a particular conviction, then a reviewing court can conclude that the sentencing court must have relied on the residual clause when counting that conviction. See Driscoll, 892 F.3d at 1135. Conversely, if, "given the relevant background legal environment that existed at the time of [the defendant's] sentencing, there would have been no need for reliance on the residual clause," then the defendant has not shown it is more likely than not the sentencing court relied on the residual clause. Id. at 1134–35 (quoting United States v. Snyder, 871 F.3d 1122, 1130 (10th Cir. 2017)); see also United States v. Hernandez, 743 Fed. App'x 156, 159 (10th Cir. 2018) (unpublished) (finding no error because defendant

had “not shown the controlling law when he was sentenced would have required the court to rely on the residual clause”); United States v. Barela, 768 Fed. App’x 821, 823–24 (10th Cir. 2019) (unpublished) (explaining that the defendant must “demonstrate that, at the time he was sentenced, controlling law did not permit the district court to apply the elements clause or enumerated-offense clause”).³ “[T]he relevant background legal environment is, so to speak, a ‘snapshot’ of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions.” Snyder, 871 F.3d at 1129.

We look, then, to the legal background at the time of Cooper’s sentencing, in 2003, to determine whether the sentencing court would have had to rely upon the residual clause to impose a life sentence. We conclude the court would not have had to rely on the residual clause.

Relevant here, § 3559(c) mandates a life sentence if Cooper was “convicted in a court of the United States of a serious violent felony” and has two or more prior federal or state convictions for “serious violent felonies.” 18 U.S.C.

§ 3559(c)(1)(A)(i). No one disputes that, in this case, Cooper was convicted in the District of Utah of a serious violent felony—armed bank robbery in violation of 18 U.S.C. § 2113. That counts as the first strike.

³ We cite all unpublished decisions only for their persuasive value. See 10th Cir. R. 32.1(A).

Prior to sentencing for that offense, the government noticed five of Cooper's prior convictions that the government contended also qualified as "serious violent felonies":

- 1) a 1981 California robbery conviction,
- 2) a 1982 Oregon burglary conviction,
- 3) a second 1982 Oregon burglary conviction,
- 4) two 1988 federal bank robbery convictions occurring in Washington (which are counted together as one prior conviction), and
- 5) a 1990 Oregon robbery conviction.

The parties agree that Cooper's 1988 Washington federal bank robbery convictions, which count as one prior conviction, qualify as a serious violent felony. That is the second strike.

The government concedes that Cooper's 1990 Oregon robbery conviction does not qualify as a prior "serious violent felony" because Cooper committed that offense before he committed the 1988 bank robberies. See 18 U.S.C. § 3559(c)(1)(B) (requiring that each qualifying conviction be committed after the preceding qualifying conviction). Based on that, we do not consider the 1990 Oregon robbery conviction. Further, it is undisputed that Cooper's two 1982 Oregon burglaries qualify as a strike only under the residual clause.⁴

⁴ Cooper contends that this fact, alone meets his burden; that is, he contends that he only needs to establish that the sentencing court relied on the residual clause to count any of his five prior convictions at issue at sentencing as a "serious violent felony." We reject that argument. It is, instead, Cooper's burden to prove, "by a preponderance of the evidence that 'it was use of the residual clause that led to the sentencing court's enhancement of his sentence.'" Copeland, 921 F.3d at 1242 (quoting Driscoll, 892 F.3d at 1135). That requires us to consider, next, whether the sentencing court needed to rely on the residual clause to count Cooper's remaining prior conviction as a serious violent felony.

That leaves only Cooper’s 1981 California robbery conviction. The government does not argue that that conviction could qualify as a strike under § 3559(c)(2)(F)(ii)’s elements clause. Thus, the dispositive question is whether, at the time of sentencing in 2003, the California robbery qualified as a strike under § 3559(c)(2)(F)(i)’s enumerated clause.

Relevant here, the enumerated clause includes “a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118).” 18 U.S.C. § 3559(c)(2)(F)(i). Those specifically enumerated sections refer to: robbery within special maritime and territorial jurisdiction of the United States (section 2111), bank robbery (section 2113), and robberies involving controlled substances (section 2118). Section 3559(c)(3)(A) also provides an exception in certain cases where dangerous weapons were not involved and no death or serious bodily injury resulted from the robbery (the “nonqualifying clause”).⁵

⁵ The nonqualifying clause provides:

Robbery . . . or an offense described in [the elements or residual clauses] shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

- (i) [n]o firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
- (ii) [t]he offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C. § 3559(c)(3)(A).

For his 1981 California robbery, Cooper was convicted under California Penal Code § 211, which provides: “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” See also Cal. Penal Code § 212 (defining “fear” to include fear of property damage).

Whether Cooper’s conviction under CPC § 211 would have qualified as a strike under the enumerated clause at the time of his 2003 sentencing turns on whether the sentencing court would have applied the “categorical approach” or the circumstance-specific approach to this question. Under the “categorical approach”—which was first established by the Supreme Court in Taylor v. United States, 495 U.S. 575, 602 (1990)—a court “do[es] not inquire into the particular factual circumstances surrounding” the conviction to determine whether it qualifies as a robbery under § 3559(c)(2)(F)(i). United States v. King, 979 F.2d 801, 802 (10th Cir. 1992). Rather, it looks “only to the fact of conviction and the statutory definition of the prior offense.” Id. (quoting Taylor, 495 U.S. at 602). On the other hand, if the court applies a circumstance-specific approach, then it is free to look at the specific facts and conduct that led to the conviction in order to determine whether the conviction qualifies. United States v. Leaverton, 895 F.3d 1251, 1253 (10th Cir. 2018).

The government does not dispute that, if the categorical approach applied at the time of Cooper’s sentencing in 2003, then his California robbery conviction would not have qualified as a strike under the enumerated clause: CPC § 211 covers

the taking of personal property that involves threats only to property, even if there are no threats to people. “Because the federal robbery statutes, at a minimum, require actions that ‘would put an ordinary, reasonable person in fear of bodily harm,’ CPC § 211 is not a categorical match because it punishes conduct that is outside the reach of §§ 2111, 2113, or 2118.” United States v. Minjarez, 374 F. Supp. 3d 977, 989 (E.D. Cal. 2019) (quoting United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990)).

At the same time, Cooper does not dispute the district court’s conclusion that, if the circumstance-specific approach applied at the time of sentencing, his California robbery conviction would have qualified as a strike under the enumerated clause. The relevant details of his California robbery conviction are as follows: That conviction

stems from an incident in Santa Cruz, California in October 1981. Cooper and a co-defendant broke into a home. The resident returned during the course of the crime. Cooper and his partner tied the resident up and Cooper threatened the resident with a hunting knife. While Cooper expressed a desire to kill the resident, his partner talked him out of it. The pair left with \$6,500 from the home. Cooper was convicted under California Penal Code § 211 and received a three-year prison term.

(I R. 391 (district court’s order).) Thus, the facts show that Cooper’s offense qualified as a robbery as enumerated in § 3559(c)(2)(F)(i) because Cooper put a person in fear of bodily harm (threatening with a knife), and his use of a dangerous weapon precludes application of the nonqualifying clause in 18 U.S.C. § 3559(c)(3)(A). Therefore, the question is whether the categorical approach or

circumstance-specific approach was the proper method for a sentencing court at the time of Cooper's sentencing in 2003.

Though the law appears somewhat unsettled at that time, we conclude it would have been permissible for the sentencing court to apply the circumstance-specific approach and conclude Cooper's California robbery conviction qualified as a "serious violent felony" under the enumerated clause. It was not until 2018 that we expressly stated for the first time that the categorical approach applies under § 3559(c). Leaverton, 895 F.3d at 1253 ("Both parties state the categorical approach applies under § 3559(c), although our court has not expressly considered the question. We agree."). But, as Leaverton itself indicates, prior to that holding there was no settled precedent in this circuit about which approach was proper in this situation, which suggests that Cooper's sentencing court, in 2003, would have considered the circumstance-specific approach permissible.

This conclusion is supported by our cases decided around the time of Cooper's sentencing in 2003. First, in United States v. Mackovich, we held that the nonqualifying clause, 18 U.S.C. § 3559(c)(3)(A), requires a circumstance-specific approach, rather than a categorical approach because "the plain language" of the nonqualifying clause "unmistakably requires courts to look at the specific facts underlying the prior offense." 209 F.3d 1227, 1240 (10th Cir. 2000). While Mackovich addressed only whether the nonqualifying clause requires the circumstance-specific approach, not whether an initial determination of qualification under the enumerated clause does, the case employed broad language that would have

supported a court in 2003 concluding that the circumstance-specific approach was appropriate to the initial determination of qualification: “The offense of robbery is ‘generally considered a “serious violent felony” for purposes of the Three Strikes statute.’” Id. at 1238 (quoting United States v. Gottlieb, 140 F.3d 865, 866 (10th Cir. 1998), and citing United States v. Oberle, 136 F.3d 1414, 1423 (10th Cir. 1998)).

Several years later, while considering an unrelated statute, we described Mackovich as holding that “the Taylor categorical approach is inapplicable to a district court’s determination of whether an offense qualifies as a ‘strike’ under the federal ‘three-strikes’ law.” United States v. Martinez-Candejas, 347 F.3d 853, 859 (10th Cir. 2003). While Martinez-Candejas was decided after sentencing in this case and, therefore, does not establish the governing law at the time of sentencing, it nonetheless supports our understanding of how courts interpreted Mackovich at that time.⁶

Given this background legal environment, we conclude that Cooper’s sentencing court, in 2003, could have permissibly applied the circumstance-specific approach and concluded that his 1981 California robbery conviction qualified as a strike under the enumerated clause of § 3559(c)(2)(F)(i). Therefore, Cooper has failed to establish that it is more likely than not that his sentencing court, instead,

⁶ We also recognize that, in Leaverton, we expressly stated that the holding in Mackovich was limited to a sentencing court’s determination of whether the nonqualifying clause applied. Leaverton, 895 F.3d at 1254 n.1. However, Leaverton came fifteen years after sentencing in this case and does not negate the fact that courts in 2003 could reasonably read Mackovich more broadly, as we did in Martinez-Candejas.

relied on the residual clause to count his 1981 California robbery conviction as a “serious violent felony.” Cooper has, thus, failed to meet his burden of proving, “by a preponderance of the evidence that ‘it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.’” Copeland, 921 F.3d at 1242 (quoting Driscoll, 892 F.3d at 1135).

Cooper argues that, in fact, the sentencing court would have used the categorical approach in determining whether his 1981 California robbery conviction qualified as a strike under the enumerated clause and would have concluded it did not qualify. Thus, he argues, the sentencing court must have applied the residual clause to rely on Cooper’s 1982 Oregon burglaries instead. In support of this argument, Cooper cites to our decision in United States v. Romero, in which we addressed whether to apply the categorical approach to the elements and residual clauses of § 3559(c). 122 F.3d 1334, 1342–43 (10th Cir. 1997). In that case, we stated:

In determining whether a conviction constitutes a serious violent felony under section 3559(c), the statute indicates that we follow a two-step process. First, we must examine the statute itself to determine whether the offense contains as an “element the use, attempted use, or threatened use of physical force against the person” or whether the offense “by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.” If either of these tests are met, the burden shifts to the defendant to avoid a “strike” by establishing, under the clear and convincing evidence standard, that his conviction is a nonqualifying offense.

Id. at 1343. Cooper argues this language indicates that the categorical approach applies when determining whether a conviction qualifies as a strike under any of the three clauses in § 3559(c). But the language in Romero expressly addresses only the

elements and residual clauses and says nothing about the enumerated clause. And it never actually discusses the categorical approach; it simply uses the statutory language of the other two clauses of § 3559(c).

III. CONCLUSION

Given the substantial uncertainty in determining whether the sentencing court relied on the residual clause in this case, Cooper has failed to show by a preponderance of the evidence that “it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.” Copeland, 921 F.3d at 1242 (quoting Driscoll, 892 F.3d at 1135). Therefore, Cooper did not show that his life sentence under § 3559(c) has been invalidated by any new rule of constitutional law related to that residual clause. We AFFIRM the district court’s denial of Cooper’s second or successive § 2255 motion.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Byron White United States Courthouse
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Denver, Colorado 80257
(303) 844-3157
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

November 18, 2025

Jacob McMahon
Adam Mueller
Haddon, Morgan & Foreman
945 North Pennsylvania Street, Suite 1000
Denver, CO 80203

RE: 23-4052, United States v. Cooper
Dist/Ag docket: 1:16-CV-00088-JNP, 1:00-CR-00051-TC-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Wolpert', with a long horizontal flourish extending to the right.

Christopher M. Wolpert
Clerk of Court

cc: Nathan Jack
Tyler Murray

CMW/sls

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

November 18, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TODD HAROLD COOPER,

Defendant - Appellant.

No. 23-4052
(D.C. Nos. 1:16-CV-00088-JNP &
1:00-CR-00051-TC-1)
(D. Utah)

JUDGMENT

Before **HOLMES**, Chief Judge, **EBEL** and **BACHARACH**, Circuit Judges.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 22, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TODD HAROLD COOPER,

Defendant - Appellant.

No. 23-4052
(D.C. Nos. 1:16-CV-00088-JNP and
1:00-CR-00051-TC-1)
(D. Utah)

ORDER

Before **HOLMES**, Chief Judge, **EBEL**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Per Curiam