

No. 23-4052

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TODD HAROLD COOPER,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Utah
The Honorable Jill N. Parrish, United States District Court Judge
District Court Nos. 1:16-CV-00088-JNP &
1:00-CR-00051-TC-1

Mr. Cooper's Petition for En Banc and Panel Rehearing

Adam Mueller
Jacob B. McMahan
HADDON, MORGAN AND FOREMAN, P.C.
945 N Pennsylvania Street
Denver, CO 80203-3118
Tel 303.831.7364
amueller@hmflaw.com
jmcMahon@hmflaw.com
Attorneys for Todd Harold Cooper

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Introduction

In 2003, the U.S. District Court for the District of Utah sentenced Mr. Cooper to life imprisonment under the federal three-strikes law. *See* 18 U.S.C. § 3559(c)(1)(A)(i). The sentencing court relied on the law’s residual clause, § 3559(c)(2)(F)(ii), as opposed to the elements or enumerated clauses, to count certain of his prior convictions as strikes. Based on the rule invalidating vague residual clauses that the U.S. Supreme Court established in *Johnson v. United States*, 576 U.S. 591, 597 (2015), and made retroactive in *Welch v. United States*, 578 U.S. 120, 130 (2016), Mr. Cooper should be resentenced in this authorized, successive collateral attack under 28 U.S.C. § 2255. He should not die in prison because his criminal history does not make him eligible for his three-strikes sentence. The Government does not argue that he would be eligible for this sentence under the law as properly understood today.

Yet the published panel opinion affirmed the district court’s denial of Mr. Cooper’s § 2255 motion because it concluded Mr. Cooper failed to establish “that the [sentencing] court actually relied on § 3559(c)(2)(F)(ii)’s residual clause.” *United States v. Cooper*, 159 F.4th 768, 772 (10th Cir. 2025).

The Court should grant en banc rehearing because the panel opinion conflicts with *United States v. Copeland*, 921 F.3d 1233, 1243 (10th Cir. 2019), regarding the movant’s burden, and the panel opinion exists in unacknowledged tension with the very important question reserved in *United States v. Lozado*, 968 F.3d 1145, 1150 (10th Cir. 2020). Further, this proceeding involves a question of exceptional importance—the legality of Mr. Cooper’s life imprisonment.

Even if the Court declines en banc review, the Court should grant panel rehearing because Mr. Cooper satisfied his burden to show the sentencing court’s reliance on the residual clause.

Factual Background

To secure this life sentence, the Government submitted a notice alleging that various of Mr. Cooper’s prior convictions qualified as strikes. *See Cooper*, 159 F.4th at 774. The sentencing court imposed the life sentence without specifying which convictions it was relying on or why they qualified as strikes. By all appearances, the sentencing court accepted the Government’s representations and counted all of the convictions as strikes.¹ Nothing in the Government’s briefing or the panel

¹ Indeed, when the sentencing court resolved Mr. Cooper’s first § 2255 motion, it continued to believe that a Utah burglary conviction counted as a strike,

opinion calls into question the view that, as a matter of history, the sentencing court counted all of the proffered priors.

The following chart summarizes the convictions that the Government presented to the sentencing court and the Government’s current positions as to whether the convictions are strikes.

Convictions the Government relied on as strikes at 2003 sentencing	Does the Government now rely on the conviction as a strike?
2003 federal bank robbery (instant offense)	Yes (conceded strike)
1981 California robbery	Yes
1982 Oregon first degree burglaries	No
1988 federal bank robberies	Yes (conceded strike)
1990 Oregon robbery	No

Legal Background

Since 2017, this Court has built and refined a two-step framework for addressing claims like Mr. Cooper’s. *See United States v. Snyder*, 871 F.3d 1122 (10th Cir. 2017); *United States v. Washington*, 890 F.3d 891 (10th Cir. 2018); *United States v. Driscoll*, 892 F.3d 1127 (10th Cir. 2018); *United States v. Lewis*, 904 F.3d

even though the Government conceded before sentencing that the conviction did not belong to Mr. Cooper. *See* Suppl. OB, p.4; Suppl. RB, p. 9; *see also United States v. Harrison*, 785 Fed. App’x 534, 538 (10th Cir. 2019) (considering district court’s actions on post-conviction review when assessing how prior convictions were treated at sentencing).

867 (10th Cir. 2018); *United States v. Copeland*, 921 F.3d 1233 (10th Cir. 2019); *United States v. Lozado*, 968 F.3d 1145 (10th Cir. 2020). The two steps ask different questions, allocate burdens to different parties, and are governed by different laws.

	Nature of Inquiry	Burden	Governing Law
Step One	Historical fact	Movant’s	Time of sentencing
Step Two	Legal harm	Government’s	Current

At the first step, the defendant must show that “he was sentenced under the residual clause.” *Washington*, 890 F.3d at 895, 897; *see Driscoll*, 892 F.3d at 1135 (stating that movant “must prove that the sentencing court, more likely than not, relied on the residual clause to enhance his sentence”); *Lewis*, 904 F.3d at 872 (explaining step one asks a question of historical fact, “what the sentencing court did” (quoting *United States v. Wilfong*, 733 Fed. App’x 920, 927 (10th Cir. 2018))); *Copeland*, 921 F.3d at 1242 (“whether the sentencing court relied on the residual clause”); *Lozado*, 968 F.3d at 1149 (reiterating this is a question of historical fact).

In resolving step one, courts examine “the sentencing record to confirm that there is no mention whatsoever of the residual clause in the PSR or any of the other sentencing court pleadings or transcripts.” *Copeland*, 921 F.3d at 1242 (quotations omitted). This may be enough to establish residual-clause reliance. *Id.* at 1242-43.

If not, courts 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.” *Id.* at 1242 (quotations omitted). “The 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.” *Id.* at 1243 (alterations and quotations omitted); *see also id.* (“[B]ackground law is only useful insofar as it helps to show the most likely reasoning of the district court.” (quotations omitted)).

At the second step, harmlessness, the government bears the burden. *Lewis*, 904 F.3d at 872; *Copeland*, 921 F.3d at 1252. The second step asks a legal question: whether the sentencing court’s use of the residual clause “‘had substantial and injurious effect or influence in determining’ [the movant’s] sentence.” *Driscoll*, 892 F.3d at 1132 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)); *see Lewis*, 904 F.3d at 872 (“whether the sentencing court’s reliance on the now-invalidated residual clause prejudiced the movant” (quoting *Wilfong*, 733 Fed. App’x at 927)). If, under current law, the movant would still receive the sentence enhancement, the sentencing court’s reliance on the residual clause was harmless

error. *Lewis*, 904 F.3d at 872-73; see *Copeland*, 921 F.3d at 1252; *Lozado*, 968 F.3d at 1149. Current law governs step two because it “goes to the question of remedies and resentencing.” *Lewis*, 904 F.3d at 873. In other words, the second step asks whether application of the sentence enhancement “is correct.” *Id.* at 872 (quoting *Wilfong*, 733 Fed. App’x at 927).

To summarize, this two-step analysis recognizes that a sentencing court’s use of the residual clause as a matter of historical fact (step one) could be legally harmless (step two) if there was a non-residual-clause way for the movant’s criminal history to result in the valid imposition of the sentencing enhancement. See *Copeland*, 921 F.3d at 1252. For instance, if a sentencing court had before it four of the defendant’s prior convictions, and the court imposed a three-strikes sentence by validly counting three convictions under the enumerated clause and by improperly counting one conviction under the residual clause, the court’s use of the residual clause to impose the sentence would be harmless error.

Argument

I. The Court Should Grant En Banc Rehearing.

A. The panel opinion conflicts with *Copeland* on how a movant may satisfy his step-one burden.

This panel opinion concluded that Mr. Cooper failed to establish that the 2003 sentencing court “actually relied” on the residual clause. *Cooper*, 159 F.4th at 772. Actual reliance, according to the panel opinion, required Mr. Cooper to show not only that the sentencing court used the residual clause to count a conviction, but also that “the sentencing court would have had to rely upon the residual clause to impose a life sentence.” *Id.* at 773. In other words, even if the sentencing court relied on the residual clause to count a particular conviction, actual reliance could only be shown if the sentencing court, even using other convictions, had no non-residual-clause way to impose the life sentence. *See id.* at 774 n.4. As explained below, *see* Part I.B., this analysis collapses the two-step framework and is in deep tension with *Lozado*, a decision the panel opinion never acknowledged.

But even accepting the panel opinion’s conception of actual reliance for argument’s sake—the upshot of which is that Mr. Cooper must show residual-clause reliance with respect to his California robbery conviction—the Court should

grant en banc rehearing because *Cooper* conflicts with *Copeland*'s articulation of the step-one burden.

Copeland recognized that “[t]he movant may meet his burden to show the court relied on the residual clause by establishing that the background law did not permit reliance on the other clauses.” 921 F.3d at 1244. But this isn’t the only way. *Copeland* also said that a movant “adequately show[s] it is more likely than not that the sentencing court relied on the residual clause to enhance his sentence” where “background law foreclosing the enumerated *or* elements clause is coupled with a silent or ambiguous record.” *Id.* at 1243 (emphasis added) (quotations omitted). In other words, per *Copeland*, ruling out one of the two still-valid clauses on a silent or ambiguous record is enough for a movant to satisfy his step-one burden.

The panel opinion declared this record “silent” but required Mr. Cooper to rule out both other clauses. *Cooper*, 159 F.4th at 773. Looking to two unpublished cases that pre-date *Copeland* and that neither party cited, the panel opinion said Mr. Cooper had to show that controlling law at the time of sentencing “required” the sentencing court to rely on the residual clause or that such law “did not permit” application of the other clauses. *Id.* (quoting *United States v. Hernandez*, 743 Fed.

App'x 156, 159 (10th Cir. 2018), and *United States v. Barela*, 768 Fed. App'x 821, 823-24 (10th Cir. 2019)).

The panel opinion ruled against Mr. Cooper because it concluded that the sentencing court could have counted his California robbery conviction under the enumerated clause, *id.* at 776, a conclusion that is addressed below, *see* Part II.

For the purposes of this argument, what matters is that Mr. Cooper satisfied his step-one burden, at least as articulated by *Copeland*, because, even if the enumerated clause was in play, which it wasn't, he definitively ruled out the elements clause. *See* 18 U.S.C. § 3559(c)(2)(F)(ii); Cal. Penal Code, §§ 211, 212; *United States v. Romero*, 122 F.3d 1334, 1343 (10th Cir. 1997); *see also Cooper*, 159 F.4th at 777 (addressing *Romero*'s elements-clause scope); *Cooper*, 159 F.4th at 774 (“The government does not argue that that [the California robbery] conviction could qualify as a strike under § 3559(c)(2)(F)(ii)'s elements clause.”). Combine the sentencing record's silence with this background law “foreclosing” use of the elements clause, and, under *Copeland*, Mr. Cooper “has adequately shown it is more likely than not that the sentencing court relied on the residual clause to enhance his sentence,” 921 F.3d at 1243 (quotations omitted), even under the

panel opinion’s erroneous view that Mr. Cooper is limited to showing residual-clause reliance with respect to the California robbery conviction.

The conflict between *Copeland* and *Cooper* warrants en banc rehearing, but the Court need not simply choose between these rules. Mr. Cooper preserved arguments that the movant’s burden should be more easily met. *See* Suppl. OB, p. 10 n.3 (contending relief should be available when the movant shows the sentencing court “*could have* relied on the residual clause”); *id.* at 42 n.7 (arguing that, instead of the two-step framework, courts applying *Johnson* should simply analyze whether the priors qualify without resorting to the now-unconstitutional residual clause). The en banc Court should settle the movant’s burden.

B. *Lozado* reserved an important question that the panel opinion resolved without analysis or acknowledgement.

Because step one asks a question of historical fact—whether the sentencing court relied on the residual clause, *see Lewis*, 904 F.3d at 872 (explaining that determining “what the sentencing court did” is step one’s “sole objective” (quotations omitted))—the movant should be able to meet his step-one burden by showing that the sentencing court used the residual clause to count any of the prior convictions that the Government put before the sentencing court.

In *Lozado*, this Court expressly reserved the question whether “the sentencing court’s reliance on the residual clause with respect to any of the predicate convictions is sufficient to satisfy the first stage of *Johnson* and trigger harmless-error review for the other convictions.” 968 F.3d at 1150. The panel opinion never cited *Lozado* or acknowledged this issue. The panel opinion effectively resolved the issue against § 2255 movants without analysis, but the question is of extreme importance and warrants en banc review.

Here, if all the convictions that the sentencing court counted at the Government’s behest are fair game, Mr. Cooper not only clears step one; he is entitled to relief. Because the sentencing court accepted the Government’s representation that all of Mr. Cooper’s convictions were qualifying strikes, it necessarily counted his two 1982 Oregon burglaries using the residual clause. “[I]t is undisputed” that these convictions “qualify as a strike *only* under the residual clause.” *Cooper*, 159 F.4th at 774. Mr. Cooper satisfied his step-one burden because, as a matter of historical fact, the sentencing court necessarily relied on the residual clause to count the Oregon burglaries and impose the three-strikes sentence.

Then it's on to step two, and because the Government concedes the conviction it needs, the California robbery, does not qualify as a strike under current law, *see id.* at 775; *see also Thompson v. United States*, 585 F. Supp. 3d 809, 823 (E.D. Va. 2022) (concluding California robbery not a categorical match under enumerated clause); *United States v. Minjarez*, 374 F. Supp. 3d 977, 989 (E.D. Cal. 2019) (same); *Morrison v. United States*, No. 16-CV-1517 DMS, 2019 WL 2472520, at *7 (S.D. Cal. June 12, 2019) (same), Mr. Cooper has only two strikes and must be resentenced.

In a footnote, the panel opinion rejected the Oregon-burglaries theory by collapsing the two-step framework. It doesn't matter that the sentencing court must have relied on the residual clause to count these convictions, the panel opinion reasoned, because Mr. Cooper had to show that "the sentencing court needed to rely on the residual clause to count [his] *remaining* prior conviction," i.e., the California robbery conviction. *Cooper*, 159 F.4th at 774 n.4 (emphasis added).

Because the Government now wants to defend only the conceded strikes and the California robbery, the Government views the Oregon burglaries as "superfluous." Suppl. AB, p. 13. The panel opinion wrongly threw them out of the

step-one analysis. What is “superfluous” is an invention of the Government’s position on collateral review; it does not reveal the most likely reasoning of the sentencing court. There is no basis for thinking that what most likely happened at sentencing is whatever is most advantageous to the Government on collateral review, but the panel opinion adopted that anti-movant view of history.

The en banc Court should hold that if the sentencing court used the residual clause to count any of the movant’s prior convictions for a sentence enhancement, the movant has satisfied his step-one burden. The panel opinion wrongly placed the burden on Mr. Cooper to show not only that the sentencing court used the residual clause as a matter of historical fact, but also that the sentencing court had no non-residual-clause pathway to impose the sentence enhancement.

The existence of the second step in the two-step framework shows that the panel opinion erred about what the movant must show at step one. If clearing step one requires the movant to show historical reliance on the residual clause that was necessarily prejudicial, there will never be anything to analyze at step two. It is at the second step, not the first step, that courts examine whether there were other ways for the sentencing court to apply the enhancement without relying on the residual clause.

The en banc Court should resolve the question *Lozado* reserved. *See* 968 F.3d at 1150.

II. The Court Should Grant Panel Rehearing.

Even if Mr. Cooper must show that the sentencing court relied on the residual clause to count his California robbery conviction as a strike, and even if the reliance showing requires him to establish that the 2003 background law precluded reliance on the elements *and* enumerated clauses, he has satisfied his burden. Because this argument contends the panel opinion erred within its own framework, panel rehearing would be appropriate, but Mr. Cooper invites en banc review of this issue as well.

As noted, the California robbery conviction did not qualify under the elements clause. *See* Part I.A. The panel opinion concluded the sentencing court could have counted the California robbery conviction under the enumerated clause, however. *Cooper*, 159 F.4th at 776. To count Mr. Cooper's California robbery conviction under the enumerated clause, the sentencing court would have had to apply the circumstance-specific approach, as opposed to the categorical approach. *Id.* at 775-76; *see Taylor v. United States*, 495 U.S. 575, 602 (1990). The panel opinion concluded "it would have been *permissible* for the sentencing court to

apply the circumstance-specific approach” in the context of the enumerated clause. *Cooper*, 159 F.4th at 775-76 (emphasis added). The panel opinion overlooks that the text of § 3559(c)(2)(F)(ii) imposed the categorical approach in 2003. *See* Suppl. OB, p. 52; Suppl. RB, p. 12.

The panel opinion’s use of “permissible” seems to mean “reasonably wrong.” It cannot mean “correct” because the categorical approach, not the circumstance-specific approach, governs § 3559(c). *United States v. Leaverton*, 895 F.3d 1251, 1253 (10th Cir. 2018).

But *Leaverton* was a 2018 decision, the panel opinion noted, and “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.” *Cooper*, 159 F.4th at 776. This overlooks that decisions of this Court are not the only constraint on district courts. The statutory text is law, and it bound the district court all along. *See Bostock v. Clayton Cty.*, 590 U.S. 644, 654 (2020) (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President.”); *see id.* (discussing the people’s “right to continue relying on the original meaning of the law”).

Leaverton did not establish the categorical approach for § 3559(c). *See* 895 F.3d at 1254 n.1 (declining to “abandon the categorical approach under § 3559(c) generally”). *Leaverton* recognized, from the plainness of the text, that the categorical approach always applied. *Id.* at 1253 (“Both parties state that the categorical approach applies under § 3559(c), although our court has not expressly considered the question. We agree.”); *see also id.* at 1254 (noting that references to criminal code sections and offense elements are highly indicative that the categorical approach applies). *Leaverton*’s 2018 issuance has no bearing on what § 3559(c) said in 2003. It was never permissible to apply the circumstance-specific approach. The fact that the text made this so obvious that it took decades to acknowledge the point should not work against Mr. Cooper.

The panel opinion cited no case permitting the circumstance-specific approach for the enumerated clause in 2003, but it said the sentencing court could have reasonably thought the circumstance-specific approach permissible based on *United States v. Mackovich*, 209 F.3d 1227 (10th Cir. 2000), and *United States v. Martinez-Candejas*, 347 F.3d 853 (10th Cir. 2003). *Cooper*, 159 F.4th at 776. *Leaverton*, however, did not have to overrule these cases to confirm that the text prescribes the categorical approach, and these cases do not supply cover for the

sentencing court's hypothesized reliance on the circumstance-specific approach to the enumerated clause.

The panel opinion acknowledged that *Mackovich*'s approval of the circumstance-specific approach addressed only the non-qualification inquiry of § 3559(c), *id.* (discussing *Mackovich*, 209 F.3d at 1240), which is not the relevant provision here. Still, the panel opinion found the following "broad language" supported the circumstance-specific approach: "The offense of robbery is generally considered a serious violent felony for purposes of the Three Strikes statute." *Id.* (quoting *Mackovich*, 209 F.3d at 1238, other internal quotations omitted). Robbery is of course among § 3559(c)(2)(F)(i)'s enumerated offenses, but this sentence gives no hint that a sentencing court may make the qualification inquiry by peering into the underlying circumstances, as opposed to reviewing the elements. *Mackovich* does not make the sentencing court's imagined application of the circumstance-specific approach reasonable. *Mackovich* squarely addressed a different provision, and it did not allow for the circumstance-specific approach in dicta.

The panel opinion acknowledged its other case, *Martinez-Candejas*, could not have guided the sentencing court because it was decided after sentencing. *Id.*

Yet the panel opinion pointed to it as evidence that courts were reasonably misreading *Mackovich* in 2003. *See id.* & n.6. *Martinez-Candejas*, according to the panel opinion, “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.’” *Id.* at 776 (quoting 347 F.3d at 859). Even if this post-sentencing decision were fair game, the panel opinion cuts off *Martinez-Candejas*’s description of *Mackovich* mid-sentence. *Martinez-Candejas* immediately continued: “because the *applicable statute* provided that a prior robbery does not qualify as a ‘strike’ if the defendant affirmatively establishes that no use or threatened use of a dangerous weapon was involved.” 347 F.3d at 859 (emphasis added). This context makes plain that *Martinez-Candejas* correctly understood *Mackovich*’s holding as bound to the non-qualification inquiry. *Martinez-Candejas* was not attributing to *Mackovich* the panel opinion’s sweeping statement about the non-applicability of the categorical approach generally, and cutting off a passage mid-sentence would not have been a reasonable way for the sentencing court to read this Court’s (after-the-fact) precedent. The circumstance-specific approach was never permissible.

But even if the sentencing court could have permissibly used the circumstance-specific approach, the panel opinion offers no analysis as to which of the three forms of “robbery” enumerated in § 3559(c)(2)(F)(i) that Mr. Cooper’s conviction fits using the circumstance-specific approach. *See* Suppl. RB, pp. 16-19; *cf. Cooper*, 159 F.4th at 775 (reasoning circumstance-specific approach revealed case involved threatened violence against a person without identifying a fitting robbery cross referenced in § 3559(c)(2)(F)(i)).

Under the law’s text and this Court’s cases, the sentencing court was neither correct nor reasonably wrong to apply the circumstance-specific approach to the enumerated clause in 2003. Mr. Cooper satisfied his step-one burden, even if he had to show the background law precluded the sentencing court’s use of the elements *and* enumerated clauses. The Government, of course, makes no step-two argument.

The panel should grant rehearing.

Conclusion

The Court should grant panel or en banc rehearing, reverse the district court’s denial of Mr. Cooper’s § 2255 motion, and order that he be resentenced.

December 23, 2025.

Respectfully submitted,

s/ Adam Mueller

s/ Jacob B. McMahon

Adam Mueller

Jacob B. McMahon

HADDON, MORGAN AND FOREMAN, P.C.

945 N Pennsylvania Street

Denver, CO 80203-3118

303.831.7364

amueller@hmflaw.com

jcmahon@hmflaw.com

Counsel for Todd Harold Cooper

Certificate of Compliance with Rule 32

This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 3,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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s/ Jacob B. McMahon

Certificate of Service

I certify that on December 23, 2025, a copy of *Mr. Cooper's Petition for En Banc and Panel Rehearing* was filed with the Court using CM/ECF, which will send notification of the filing to all parties of record. A copy of *Mr. Cooper's Petition for En Banc and Panel Rehearing* was also mailed to:

Todd Harold Cooper
Register No. 18256-086
FCI Otisville
Federal Correctional Institution
P.O. Box. 1000
Otisville, NY 10963

s/ Liz Stalnaker
