UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-62364-CIV-COHN

HENRY WAINWRIGHT,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER GRANTING MOTION TO VACATE

THIS CAUSE is before the Court upon Movant Henry Wainwright's Motion to Vacate Pursuant to § 2255 ("Motion") [DE 8]. Movant seeks vacatur of several of his convictions and/or sentences on the ground that a recent Supreme Court decision renders them unconstitutional. The Court has carefully considered the Motion, the Government's Response [DE 9], Movant's Reply [DE 12-1], and oral argument, and is otherwise advised in the premises. For the reasons set forth below, Movant's Motion is granted.

I. BACKGROUND

In August of 2009, Movant was arrested along with two codefendants for his involvement in an attempted robbery. CR-DE[1] 55 at 1. In November 2009, a grand jury returned a multi-count superseding indictment against Movant charging him with:

1. Count One: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);

[1] All citations to the record in Movant's criminal case, case number 09-cr-60229, shall be denoted by "CR" preceding the docket entry.

2. Count Two: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a);
3. Count Three: conspiracy to use and carry a firearm during and in relation to a crime of violence (i.e., a violation of Title 18, U.S.C. § 1951(a) as set forth in Counts One and Two) and to possess the firearm in furtherance of that crime of violence in violation of 18 U.S.C. § 924(o);
4. Count Four: knowingly carrying a firearm during and in relation to a crime of violence (i.e., a violation of Title 18, U.S.C. § 1951(a) as set forth in Counts One and Two) and possessing the firearm in furtherance of that crime of violence in violation of 924(c)(1)(A); and
5. Count Six:[2] violation of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

CR-DE 55.

Just prior to trial, the Government filed a notice that it would seek an enhanced sentence of life imprisonment pursuant to 18 U.S.C. § 3559(c) (the "three-strikes law") should Movant be convicted on Count One or Count Two or both. DE 8 at 2. On May 28, 2010, the jury returned a general verdict finding Movant guilty on all Counts. Id. at 4. On August 31, 2010, the Court sentenced Movant to concurrent sentences of life imprisonment on Counts One and Two; 240 months concurrent on Count Three; 60 months consecutive on Count Four; and 180 months concurrent on Count Six. The total sentence was therefore life plus 60 months' imprisonment. Id. at 5.

[2] Movant's original indictment contained a Count Five (being a felon in possession of a firearm), but the superseding indictment charged Movant with Count Six instead of Count Five. DE 8 at 1-2.

The Eleventh Circuit affirmed Movant's convictions on appeal on August 15, 2011. Id. Movant timely filed a motion to vacate pursuant to 28 U.S.C. § 2255, which was denied on September 21, 2015. CR-DE 358. Less than a year after his first motion to vacate was denied, the Supreme Court invalidated the residual clause in the Armed Career Criminal Act ("ACCA") in Johnson v. U.S., 135 S.Ct. 2551 (2015), pursuant to which Movant filed another motion to vacate. DE 8 at 5. In that motion, the Eleventh Circuit permitted him to challenge his sentence on Count Four, the § 924(o) charge. DE 8 at 8. After Movant had submitted his second motion to vacate, however, the Eleventh Circuit issued two opinions that effectively decided the motion,[3] and the Court was therefore bound by precedential authority to deny it. Id. at 13-14. Movant appealed this denial to the Eleventh Circuit, but after Movant had filed his appeal, the Supreme Court issued its opinion in U.S. v. Davis, 139 S.Ct. 2319 (2019), which clearly invalidated the residual clause in § 924(c). Id. at 14. As a result, Movant voluntarily dismissed his appeal to seek leave to file another successive motion to vacate incorporating the Davis decision. Id. at 16.

The Eleventh Circuit granted Movant leave to file the instant Motion, finding that Movant had made a *prima facie* showing that (1) his § 924(o) and § 924(c) convictions (Counts Three and Four) may be based on the residual clause found unconstitutional in Davis, and (2) that his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs act robbery (Counts One and Two) may only qualify as "serious violent

[3] The Eleventh Circuit first announced in Ovalles v. U.S., 861 F.3d 1257 (11th Cir. 2017) (commonly known as "Ovalles I"), that the holding in Johnson did not extend to § 924(c). It later upheld this conclusion, though on different reasoning, in Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018), (commonly referred to as "Ovalles II").

felonies" under the residual clause of § 3559(c), which may also be invalid after Davis. Id. at 17-19. These are the arguments Movant now raises in this Motion.

II. STANDARD OF REVIEW

Prisoners in federal custody may seek relief from the court that imposed their sentence on the grounds that (1) the sentence was imposed in violation of the Constitution or another federal law, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). In order to file a second or successive motion pursuant to this statute, a prisoner must be granted leave to file another motion from the appropriate court of appeals. 28 U.S.C. § 2255(h). Courts of appeals will only approve such applications if the successive motion involves newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Id.

III. ANALYSIS

In his Motion, Movant argues that his sentences on Counts One and Two must be vacated because neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery qualifies as a "serious violent felony" under § 3559(c)(2)(F) without resort to its residual clause, which must be unconstitutionally vague after Davis. In addition, Movant argues that his convictions and sentences on Counts Three and Four must be vacated because the predicate convictions for these Counts are not crimes of violence under § 924(c) without resort to that statute's residual clause, which the Supreme Court struck down in Davis.

A. Counts One and Two

The Government first argues that Movant is procedurally barred from presenting his arguments on Counts One and Two because (1) Davis does not apply to the three-strikes law, and there is therefore no new rule of constitutional law applicable to the Motion that would permit a successive motion to vacate under § 2255(h), (2) without a new rule of constitutional law, the Motion is untimely; and (3) Movant did not raise the arguments he makes in the Motion at sentencing or on direct appeal and is therefore procedurally barred from bringing them now. Although the Eleventh Circuit found that Movant presented a *prima facie* case that his claims satisfied the requirements of § 2255, the Government correctly notes that the Court must itself determine whether it has jurisdiction over the Motion. See Jordan v. Sec'y, Dept. of Corrs., 485 F.3d 1351, 1357 (11th Cir. 2007). Movant responds, also correctly, that the Government's procedural arguments fail or succeed depending on whether the Court agrees with the merits of Movant's substantive arguments. In order to know whether the Motion is timely, for example, the Court must determine whether Davis stated a new rule of constitutional law relevant to Movant's convictions and sentences. It is therefore necessary to evaluate the merits of Movant's claims before addressing the Government's procedural arguments.

Section 3559(c), commonly known as the "three-strikes law," calls for a mandatory sentence of life imprisonment upon an individual's conviction for a serious violent felony where that individual has at least two prior convictions for serious violent felonies or one conviction for a serious violent felony and one conviction for a serious drug offense. 18 U.S.C. § 3559(c). The statute defines a "serious violent felony" in

three ways: (i) the enumerated offenses clause lists specific crimes which constitute a serious violent felony, (ii) the elements clause expands the definition to include offenses that have the actual, attempted, or threatened use of force as an element, and (iii) the residual clause broadens the definition further to include any crime that, by its nature, involves a substantial risk of force being used against another. 18 U.S.C. § 3559(c)(2)(F).

It is undisputed that Movant did have at least two prior convictions for serious violent felonies. Movant argues, however, that his third-strike offenses, that is, his convictions on Counts One and Two (conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery, respectively), do not qualify as serious violent felonies. This is so, he asserts, because neither of the offenses of which he was convicted in these Counts qualifies as a "serious violent felony" under § 3559(c)(2)(F) without resort to its residual clause, and that residual clause is so similar to the one found void for vagueness in Davis that it, too, must be unconstitutional. He concludes that he was therefore unconstitutionally sentenced to life imprisonment on Counts One and Two pursuant to a statutory provision that is void for vagueness.

a. Davis extends to § 3559(c)(2)(F)

There has been no Supreme Court or Circuit Court ruling that definitively extends the holding in Davis to § 3559(c)(2)(F)(ii).[4] Nonetheless, there is strong support in favor of Movant's position.

The first point in favor of Movant's argument is the fact that the residual clauses in § 924(c)(3)(B) and § 3559(c)(2)(F)(ii) are nearly identical. The provision struck down

[4] The District Court of Massachusetts, however, has extended Davis to invalidate the residual clause in 3559(c)(2)(F)(ii). United States v. Goodridge, 392 F.Supp.3d 159 (D. Mass. 2019).

in Davis, § 924(c)(3)(B), defined "crime of violence" to include a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The residual clause in § 3559(c)(2)(F)(ii) defines "serious violent felony" to include an offense "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." Aside from the inclusion of the words "or property" in the residual clause Davis struck down, the clauses are identical. And the inclusion of the words "or property" in § 924(c)(3)(B) does not alter the meaning of the clause such that its absence from § 3559(c)(2)(F)(ii) might save that provision from vagueness.[5] Thus, the residual clauses in §§ 3359(c)(2)(F)(ii) and 924(c)(3)(B) are virtually identical and the invalidation of one supports the invalidation of the other.

The case law leading up to Davis also supports Movant's argument. If Davis were the only case in which the Supreme Court invalidated a residual clause, one might conclude that the holding has only narrow application. But Davis was the third Supreme Court case invalidating a residual clause. The first in this line was Johnson, where the Supreme Court held that the residual clause in the ACCA's definition of "violent felony" was void for vagueness. Johnson, 135 S.Ct. 2551 (2015). Key to this holding was the confirmation that the ACCA's residual clause required a categorical approach to determining whether a particular offense fit the definition. Id. at 2557. Under the categorical approach, courts must look only to the elements of the crime itself, not the actual facts underlying a particular conviction. Id.

[5] It is notable, too, that the residual clause in the ACCA, which was struck down in Johnson, only refers to injury against another person, not property. 18 U.S.C. § 924(e)(2)(B)(ii). The phrase "or property" therefore does not appear to have any impact on the constitutionality of the clauses.

Subsequent Circuit Court cases were split on whether the holding was applicable to another, similar residual clause in § 16(b) of the Immigration and Naturalization Act ("INA"), and so the Supreme Court took up Sessions v. Dimaya, 138 S.Ct. 1204 (2018), to resolve the split. In Dimaya, the Court employed the same reasoning it had employed in Johnson to invalidate the residual clause in the INA. Justice Kagan explained that the Court's holding in Johnson rested on the fact that the ACCA's residual clause contained two layers of abstraction: first, in construing the statute a court would be required to imagine what the "ordinary case scenario" for a particular crime is, and second, that the court would need to guess what degree of risk constitutes a "serious potential risk." Dimaya, 138 S.Ct. at 1213-14. The Court found that the same two levels of ambiguity existed in the INA as did in the ACCA and invalidated the INA's provision accordingly. Id. at 1216. The Court also reaffirmed that the categorical approach was required in determining whether a particular offense qualified as a "crime of violence" under the INA. Id. at 1211.

Circuit Courts became split again, however, on whether Johnson and Dimaya applied to yet another similarly-drafted residual clause. And so, in Davis, Justice Gorsuch delivered the Court's opinion extending the holdings in Johnson and Dimaya to § 924(c)(3)(B). In his opinion, Justice Gorsuch first notes that there was no dispute that under the categorical approach, the residual clause in § 924(c)(3)(B) must be void for vagueness. Davis, 139 S.Ct. at 2320. Rather, the Court's inquiry was whether the residual clause in § 924(c)(3)(B) could survive constitutional scrutiny by applying a "case-specific" instead of a "categorical" approach. Id. at 2327. Justice Gorsuch admits that employing the case-specific approach "would avoid the vagueness problems that

doomed the statutes in Johnson and Dimaya." Id. However, he reasons that "the statute's text, context, and history" cannot support the use of the case-specific approach. Id. Thus, for the third time, the Supreme Court struck down an impermissibly vague residual clause, rejecting many of the arguments that had been used to preserve residual clauses in the wake of Johnson and Dimaya.

That there have been three Supreme Court cases consistently finding that the residual clauses of various statutes are void for vagueness is a strong indication that courts should continue to apply the same principles that the Court applied in Johnson: (1) that enhancement statutes must be evaluated using a categorical approach, and (2) that dual ambiguity renders a provision unconstitutionally vague. Applying these principles to the residual clause in § 3559(c)(2)(F)(ii), this Court finds the same two layers of vagueness that existed in the clauses at issue in all three Supreme Court cases: first, courts must determine what constitutes a "substantial risk" of force, and second, courts must imagine what the "nature" of a particular crime is without resort to the actual facts of an underlying offense. It is therefore clear that Davis and its predecessors also render § 3559(c)(2)(F)(ii) unconstitutional.

Nor is the three-strikes law's residual clause saved by its "escape hatch" provisions, as the Government contends. It is true that § 3559(c)(3) explicitly excludes certain methods of committing robbery and arson from the definition of a serious violent felony. Robbery, for example, will not qualify as a serious violent felony if it can be established by clear and convincing evidence that no dangerous weapon was used in the commission of the offense and the offense did not result in anyone's death or serious bodily injury. 28 U.S.C. § 3559(c)(3)(A). This exclusion, however, does not

alter the construction of the residual clause itself, which still contains the same dual layers of ambiguity. And while it does clearly require courts to employ the case-specific method to determine whether the provision is applicable, this does not mean that courts may apply the case-specific method to the entire statute because these exclusions only apply to the crimes of arson and robbery, but the residual clause could be applied to any crime. The residual clause cannot be unconstitutionally vague with respect to some offenses and not others. This argument is therefore unpersuasive.

Accepting Movant's preliminary argument that the residual clause of § 3559(c)(2)(F)(ii) is unconstitutionally vague, the next question is whether conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery still qualify as serious violent felonies under either the enumerated offenses clause or the elements clause of the statute. Movant argues that neither offense otherwise qualifies as a serious violent felony. The Government responds that both offenses qualify under the enumerated offenses clause.

b. The Elements Clause

The elements clause of § 3559(c)(2)(F)(ii) broadly defines a "serious violent felony" to include 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." Movant argues that neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery qualifies as a serious violent felony under the elements clause because the elements clause clearly requires a serious violent felony to involve actual, attempted, or threatened use of force against a **person**, while the Hobbs Act offenses could be perpetrated by actual, attempted, or

threatened force against **property**. The Government does not respond to this argument directly because the Solicitor General has conceded in a briefing before the Supreme Court that attempted Hobbs Act robbery does **not** qualify as a serious violent felony under the elements clause.

The Government does footnote, however, that in an order denying one of Movant's codefendants a Certificate of Appealability ("COA Order"), the Eleventh Circuit stated that attempted Hobbs Act robbery **is** a serious violent felony under the elements clause of § 3559(c)(2)(F)(ii). See Richitelli v. United States, No. 17-10482-G at 11 (11th Cir. Oct. 25, 2017). The COA Order was issued by a single judge and is not published, so it is not binding precedent, but district courts may view such orders as persuasive authority. The COA Order, however, does not contain sufficient independent discussion to provide guidance here. And the precedential landscape has changed significantly since the COA Order was issued such that any analysis that was provided may no longer be persuasive. Not only had the Supreme Court not yet decided Dimaya or Davis, but the Government had not yet conceded that Hobbs Act robbery is not a serious violent felony under the elements clause. It is also notable that the COA Order is currently under appellate review with the Eleventh Circuit. The Court therefore declines to rely upon the COA Order.

Even though the undersigned was the trial judge in Richitelli, the undersigned recognizes that a fresh analysis is appropriate here. The Supreme Court has clearly stated in Johnson, Dimaya, and Davis that in determining whether or not a particular crime qualifies as a predicate offense for the purposes of a sentence enhancement statute, courts must apply the categorical approach. This means that courts may not

look to the actual facts of any particular case or the manner in which any specific defendant perpetrated a predicate offense in determining whether the predicate offense qualifies for enhancement. Rather, courts must simply compare the elements of the predicate crime as stated in the defining statute with the elements required by the sentence enhancement statute. See Johnson, 135 S.Ct. at 2557.

Applying this standard to the case at issue, it is clear that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are not serious violent felonies under § 3559(c)(2)(F)(ii)'s elements clause. The elements clause has only two elements: first, that the predicate crime carry a maximum sentence of ten or more years' incarceration, and second, that the predicate crime have as an element "the use, attempted use, or threatened use of physical force against the person of another." There is no dispute that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery carry a maximum sentence of ten or more years' incarceration. Movant argues, however, and the Court agrees, that the Hobbs Act offenses do not require force against another as an element. The elements of a conspiracy to commit Hobbs Act robbery are "(1) two or more people, including the defendant, agreed to commit Hobbs Act robbery; (2) the defendant knew of the conspiratorial goal; and (3) the defendant voluntarily participated in furthering that goal." Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019). The Eleventh Circuit has explicitly held that none of these elements requires the use of threatened or attempted force. Id. Conspiracy to commit Hobbs Act robbery therefore is not a serious violent felony under the elements clause.

Nor is attempted Hobbs Act robbery. The elements of an attempt of a federal crime are "(1) hav[ing] the specific intent to engage in the criminal conduct with which [a defendant] is charged; and (2) [taking] a substantial step toward the commission of the offense that strongly corroborates his criminal intent." United States v. St. Hubert, 909 F.3d 335, 351 (11th Cir. 2018). Neither of these elements requires the use or threatened use of force. Even assuming that these elements necessarily incorporate the elements of the principal offense, the force element of Hobbs Act robbery can be committed against a person **or property**. 18 U.S.C. § 1951(b)(1). The elements clause, however, is more narrowly drafted to only include the element of force against a person. By its own language, the principal crime of Hobbs Act robbery encompasses a broader array of conduct than the elements clause does. Attempted Hobbs Act robbery therefore also does not qualify as a serious violent felony under the elements clause.

Supreme Court case law also supports Movant's position. In U.S. v. Evans, 478 F.3d 1332 (2007), the Supreme Court was presented with the question of whether a conviction under 28 U.S.C. § 2332a(a)(3) for threatening to use a weapon of mass destruction against federal property qualified as a serious violent felony under the three-strikes law. In the course of concluding that threatening federal property is not a serious violent felony, the Court specifically addressed the inapplicability of the elements clause, noting that "[the elements clause] does not apply in this case either because the offense to which Evans pled guilty does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another.' Under the offense charged, the only force threatened was against property, not against a person." Evans, 478 F.3d at 1342 (quoting the elements clause) (internal citation omitted). Here,

the Supreme Court's reading of the elements clause comports with Movant's: where an offense is committed by force against property, it cannot satisfy the elements clause of § 3559(c)(2)(F)(ii). Although it must be noted that the principal crime which was the basis for Movant's convictions can be effected by force against persons or property, the fact remains that the elements clause requires force against a person specifically. Therefore, neither conspiracy to commit Hobbs Act robbery nor attempted Hobbs Act robbery is a serious violent felony within the meaning of the three-strikes law's elements clause.

c. The Enumerated Offenses Clause

Movant argues that neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery can qualify as a serious violent felony under the enumerated offenses clause, either, because Hobbs Act robbery is not itself explicitly listed in the clause and is substantially different from the forms of robbery that are listed. The Government counters that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do each qualify as a serious violent felony under the enumerated offenses clause because the elements of those crimes substantially correspond to the elements of the robbery statutes that are listed. Whether Hobbs Act robbery itself is a serious violent felony is the dispositive inquiry because the enumerated offenses clause explicitly includes "attempt, conspiracy, or solicitation to commit any of the [listed] offenses." 18 U.S.C. § 3559(c)(2)(F)(i). Therefore, if Hobbs Act robbery qualifies as a serious violent felony under the enumerated offenses clause, attempts and conspiracies to commit Hobbs Act robbery also qualify.

Movant first argues that the enumerated offenses clause does not encompass Hobbs Act robbery because Hobbs Act robbery is not listed there. The enumerated offenses clause only explicitly lists "robbery (as described in section 2111, 2113, or 2118) . . . ." 18 U.S.C. § 3559(c)(2)(F)(i). Section 2111 of Title 18 of the United States Code criminalizes maritime robbery, § 2113 covers bank robbery, and § 2118 deals with robberies involving controlled substances. The Government has not provided, and the Court has not located, any examples of a federal court finding that a federal offense qualified as a serious violent felony under the enumerated offenses clause except where the federal offense is clearly listed. While the Fourth Circuit has found that a conviction under 18 U.S.C. § 2114 for robbing a mail carrier is an appropriate predicate offense for purposes of a three-strikes law enhancement, its conclusion was based upon the elements clause, not the enumerated offenses clause. United States v. McAnulty, 175 F.3d 1017 (4th Cir. 1999). This seems to indicate that, at least as to federal crimes, the list should be strictly construed.

However, Movant's argument does not comport with the plain language of the statute. The enumerated offenses clause, by its own language, includes "Federal or State offense[s], **by whatever designation and wherever committed** . . . ." 28 U.S.C. § 3559(c)(2)(F)(i) (emphasis added). The phrase "by whatever designation and wherever committed" clearly qualifies both federal and state offenses. See United States v. Wicks, 132 F.3d 383, 387 (7th Cir. 1997) ("Both the language of the [three-strikes] statute and its legislative history support the proposition that it reaches a broad range of both state and federal crimes."). The plain language of the provision therefore

indicates that the list is not meant to be exhaustive, even with respect to federal crimes. For this reason, Movant's initial argument is unpersuasive.

Movant next argues that Hobbs Act robbery is not a serious violent felony under the enumerated offenses clause because the definition of Hobbs Act robbery encompasses a broader array of conduct than do the enumerated robbery offenses. The Government disagrees, arguing that the elements of Hobbs Act robbery and the enumerated robbery offenses "substantially correspond" such that Hobbs Act robbery is included in the enumerated offenses clause.

The parties agree, though, that the categorical approach applies when comparing federal laws to the enumerated offenses in § 3559(c)(2)(F)(i). When applying the categorical approach to determine whether a particular offense qualifies as an enumerated offense in a sentence enhancement statute, courts must compare the elements of the offense at issue with the elements of the crimes listed. See Descamps v. U.S., 570 U.S. 254 (2013). Where the elements of the offense at issue criminalize an array of conduct equal to or narrower than the elements of the enumerated offense, the enumerated offenses clause includes that offense at issue. Id. at 254; see also United States v. Johnson, 915 F.3d 223, 228 (4th Cir. 2019) ("We will thus apply a 'categorical approach,' meaning that we will compare the New York robbery statute, rather than the facts underlying Johnson's convictions, to the federal statutes that Congress referenced to describe robbery in the three-strikes law.")

In broad terms, §§ 2111, 2113, and 2118 criminalize the taking of property from the person or presence of another by "force and violence, or intimidation." Hobbs Act robbery similarly requires a taking of personal property from the person or in the

presence of another. Movant theorizes, however, that Hobbs Act robbery can not only be effected by "force and violence, or intimidation," but also with (1) threats of force or violence, (2) causing fear of harm, (3) using threatened or actual force against tangible and intangible property, (4) taking something which is "not at the locus of the taking," (5) taking something that does not belong to the person from whose presence the item is taken, and (6) threats of future force or violence.

Most of these assertions are unpersuasive. It is not clear, for example, how a robber would take property "not at the locus of the taking" and still be in the presence of another, so the fourth method does not appear to describe a realistic manner of effecting Hobbs Act robbery. Also, all the enumerated robbery offenses define robbery to include takings effected by intimidation, and "intimidation" means "fear of bodily injury." See Morrison v. United States No. 16-cv-1517 DMS, 2019 WL 2472520 at *7 (S.D. Cal. June 12, 2019). And putting someone in fear of bodily injury requires some sort of threat of force. The first two methods Movant lists therefore do not render Hobbs Act robbery broader than the enumerated offenses. For the same reason, Movant's sixth proposed method is also one by which the enumerated offenses could be effected. A threat of force is, in essence, a promise to commit some action in the future, even if only a few minutes in the future. Robbery by "intimidation" therefore is perpetrated with threat of future force. And the enumerated robbery offenses by their terms do not require that the item taken belong to the person present at the time of the crime, so the fifth method listed does not render Hobbs Act robbery broader than the enumerated offenses.

It is not so clear, however, whether the enumerated robbery offenses can occur through actual or threatened violence or force against property, like Hobbs Act robbery can. The Government argues, unconvincingly, that the inclusion of conduct against property in the definition of Hobbs Act robbery is a "modest deviation" from the definitions of the enumerated robbery offenses that the Court should simply disregard. But the Supreme Court has found that even "modest" differences can render a particular crime too broad to fit an enumerated offense under the categorical approach. See Descamps, 570 U.S. 254 (finding a state form of burglary could not qualify as a "violent felony" under the ACCA because California's burglary statute did not require an unlawful entry and the "generic" form of burglary enumerated in the ACCA's enumerated offenses clause did so require). The Government also cites to Gray v. United States, 622 F. App'x 788 (11th Cir. 2015), and Unites States v. Rosario-Delgado, 198 F.3d 1354 (11th Cir. 1999), for the proposition that the three strikes law in general, and the enumerated offenses clause specifically, should be interpreted to be inclusive. Those cases, however, deal with state robbery statutes, none of which are written so broadly as Hobbs Act robbery. In neither case did the Eleventh Circuit address the question presented here, so these citations provide little guidance for the present analysis. The question requires the determination of what is meant by the phrase, present in all the enumerated robbery offenses, "force and violence, or intimidation." If this phrase encompasses actual or threatened force against property, then Movant's argument fails. If not, then the enumerated offenses clause does not encompass Hobbs Act robbery.

Wherever these elements are discussed in case law, the discussion suggests that they are intended to refer to conduct against a person. For example, in determining what level of force is required in the commission of an offense in order for that offense to qualify as a "violent felony" under the ACCA, the Supreme Court has determined that the "ordinary meaning" of the phrase "physical force" is "force capable of causing physical pain or injury **to another person**." Johnson v. United States, 559 U.S. 133, 140 (2010) (emphasis added). The Supreme Court later revisited this determination in Stokeling v. United States, clarifying that the level of force required was that which was required at common law: force sufficient to overcome a victim's resistance, however slight that resistance may be. 139 S.Ct. 544, 551 (2019). In discussing its conclusion, the Court noted that

> robbery that must overpower a victim's will – even a feeble or weak-willed victim – necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself capable of causing physical pain or injury.

Id. at 553 (internal quotation marks omitted). Each time the Supreme Court has explained what is meant by "force," its discussion assumes that the force required to perpetrate the crime of robbery is exerted against a person. Therefore, per Supreme Court jurisprudence, one can conclude that both the ordinary meaning of the term and the common-law meaning of the term denotes conduct against a person, not property.

This point is particularly relevant because in United States v. Carr, the D.C. Circuit Court found that bank robbery as described in § 2113 "plainly uses language drawn from the classic definition of common law robbery . . . ." 946 F.3d 598, 603 (D.C. Cir. 2020). Therefore, the D.C. Circuit concluded, § 2113 "call[s] for the amount of force

required under the common law definition of robbery." Id. And, as discussed above, the common law definition of robbery required force sufficient to overcome a victim's resistance. The D.C. Circuit went on in Carr to endorse the Tenth and Seventh Circuits' determination that "intimidation" requires a threat of physical force that would put a victim in fear of bodily harm. See; United States v. McCranie, 889 F.3d 677, 680 (10th Cir. 2018) ("[I]ntimidation requires an objectively reasonable fear of bodily harm . . . ."); United States v. Jones, 932 F.2d 624 (7th Cir. 1991); see also United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990) ("This court has defined 'intimidation' under section 2113(a) to mean 'wilfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm."). This indicates not only that bank robbery as described in § 2113 requires force against a person, but also that the offenses described in §§ 2111 and 2118, which also use the phrase "force and violence, or intimidation," all require force against a person.

Several courts have also found that "generic" robbery does not include crimes that can be committed by force against property. See United States v. O'Connor, 874 F.3d 1147, 1153 (10th Cir. 2017) ("[W]e conclude that because Hobbs Act robbery includes threats to property, it is broader than . . . generic robbery . . . ."); United States v. Camp, 903 F.3d 594, 602 (6th Cir. 2018) ("We agree with the Tenth Circuit that Hobbs Act robbery reaches conduct that falls outside of generic robbery."); United States v. Bankston, 901 F.3d 1100 (9th Cir. 2018) (finding that a California robbery offense, which could be perpetrated by force against property, was not a crime of violence under the Sentencing Guidelines because generic federal robbery cannot be perpetrated by force against property). While generic robbery is not the same as

common law robbery, and also differs from the robbery offenses enumerated in § 3559(c)(2)(F)(i), these cases are still informative because they indicate that federal robbery statutes in general do not describe crimes in which force is exerted against property. It is therefore reasonable to conclude, based on the body of case law discussing all federal forms of robbery, that Hobbs Act robbery is unusual in its inclusion of conduct against property and because of this, it is not included in the enumerated offenses clause of § 3559(c)(2)(F)(i).

The conclusion that Movant's convictions cannot qualify as serious violent felonies under either the elements or the enumerated offense clause is further bolstered by the Eleventh Circuit's recent decision in United States v. Eason, No. 16-15413, 2020 WL 1429110 (11th Cir. Mar. 24, 2020). There, the Eleventh Circuit found that Hobbs Act robbery does not qualify as a "crime of violence" under the career offender sentencing guidelines. The definition of "crime of violence," like the three-strikes law, has both an elements clause and an enumerated offenses clause. Its elements clause includes any offense punishable by more than a year's imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. 4B1.2. It is thus identical to the elements clause in the three-strikes law. Applying the categorical approach, the Circuit Court found that "[b]y its terms, the Hobbs Act robbery statute — which can be violated with threats of force to 'person *or* property,' . . . is broader than the Guidelines' elements clause definition." Eason at *3. The Eason Court went on to find that Hobbs Act robbery also does not qualify as a "crime of violence" under the definition's enumerated offenses clause, which includes generic robbery. In so finding, the Court rejected the same argument the

Government makes here, that Hobbs Act robbery is "substantially" similar to the enumerated robbery offense, stating that "[t]he government's reading of the statute would render the word 'property' superfluous or insignificant." Id. at *7. Binding precedent therefore leads to the conclusion that Movant's convictions on Counts One and Two do not qualify as serious violent felonies for purposes of the three-strikes law, and his sentences on those two Counts are due to be vacated.

Because Davis does extend to the three-strikes law's residual clause, the Motion satisfies the jurisdictional requirements of 28 U.S.C. § 2255(h) and the timing requirements of 28 U.S.C. § 2244(d). Similarly, Movant can avoid the bar of procedural default because he has successfully demonstrated a jurisdictional error. See United States v. Bane, 948 F.3d 1290, 1294 (11th Cir. 2020) ("[Defendant] can avoid the procedural-default bar altogether, meaning he can raise a claim for the first time on collateral review without demonstrating cause and prejudice, if the alleged error is jurisdictional."). That is, Movant's lifetime sentences on Counts One and Two were in excess of the twenty-year statutory maximum for Hobbs Act offenses, see 18 U.S.C. § 1951(a), and federal courts may not impose a heavier sentence than is authorized by statute. See United States v. Bushert, 997 F.2d 1343, n.18 (11th Cir. 1993) ("It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute.") Finally, by showing that his charged offenses cannot qualify as serious violent felonies under the elements or the enumerated offenses clause, Movant has shown that his convictions more likely than not relied upon the residual clause, and thus he has carried the burden of proof all § 2255 movants bear: a showing, by a preponderance of the evidence, that they are

entitled to relief. See Beeman v. United States, 871 F.3d 1215, 1222 (11th Cir. 2017) (affirming that the burden of proof in a § 2255 proceeding lies with the movant). Therefore, the Government's procedural arguments fail.

B. *Counts Three and Four*

Movant argues that his convictions and sentences on Counts Three and Four cannot stand following the Supreme Court's decision in Davis. Section 924(c)(1) of Title 18 of the United States Code, under which Movant was charged in Count Four, criminalizes using or carrying a firearm in furtherance of a "crime of violence." 18 U.S.C. § 924(c)(1). Section 924(o), under which Movant was charged in Count Three, criminalizes conspiring to commit the offense described in § 924(c)(1). 18 U.S.C. § 924(o). Congress defined a "crime of violence" in two ways: the elements clause includes felonies that "[have] as an element the use, attempted use, or threatened use of physical force against the person or property of another," and the residual clause expanded the definition to include any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). Davis, however, invalidated the residual clause, and thus an offense only qualifies as a crime of violence if it satisfies the elements clause.

Movant asserts that his convictions on Count Three and Count Four are invalid because they both rely on § 924(c)(3)'s now-invalid residual clause. Specifically, Movant argues that conspiracy to commit Hobbs Act robbery, the charge in Count One, was the only possible predicate crime for the Count Three and Four convictions, but the Eleventh Circuit has clearly established that conspiracy to commit Hobbs Act robbery

cannot qualify as a crime of violence after Davis. See Brown, 942 F.3d at 1075. In the alternative, Movant argues that (1) where, as here, the predicate for a § 924(c) conviction is unclear, courts must assume that the least culpable offense charged was the predicate, and (2) even if the convictions on Counts Three and Four were predicated upon the attempt charge, attempted Hobbs Act robbery is not a "crime of violence" within the meaning of § 924(c).

The second argument is patently without merit. In United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit held that although the "substantial step" required to show an attempted crime may not use actual or threatened force, attempted Hobbs Act robbery is still a crime of violence. Although Movant notes that this decision has been appealed to the Supreme Court, it is still binding precedent at this time. Movant's conviction on Count Two is therefore a proper predicate for his convictions on Counts Three and Four. The question, then, is whether the attempt charge actually was the predicate for Movant's convictions on Counts Three and Four.

Movant claims that the Court's jury instructions foreclosed the possibility that the jury could have used the Count Two attempt charge as the predicate offense for convicting him on Counts Three and Four. To support his assertion with respect to Count Three, Movant relies on two specific instructions: (1) the Court's instruction that Movant could only be found guilty of the offense charged in Count Three if the jury found, beyond a reasonable doubt, that Movant "conspired to commit the crime of violence charged in **Count One** of the Indictment," and (2), the Court's instruction that Movant was charged with violating the law "as charged in **Count One** in two separate ways." CR-DE 255 at 16, 17 (emphasis added). With respect to Count Four, Movant

points to the Court's instruction that the jury should refer back to the Count Three instructions for clarification of what constitutes a violation of § 924(c). Id. at 18. Movant asserts that the Court's instructions on Count Three, and the reference back to them in the Count Four instructions, required the jury to consider the conspiracy charge as the only predicate offense for both convictions.

The Court finds this argument persuasive as to Count Three. It must be noted that the Court also instructed the jury as to Count Three by initially noting that Movant was charged with conspiring to possess and use a firearm "in relation to a crime of violence, that is, a violation of Title 18, United States Code, Section 1951(a), as set forth in **Counts One and Two** of the Indictment." Id. at 16. The jury also had access to the indictment itself during its deliberations. However, the jury instructions were clear that Movant could be found guilty on Count Three "**only if**" the jury found that he had conspired to commit the crime of violence charged in **Count One**. Id. (emphasis added). The instructions later confirmed that Count Three charged Movant with "violat[ing] the law as charged in **Count One** in two separate ways." Id. at 17. The plain language of the instructions therefore clearly required the jury to base its Count Three conviction on the Count One charge. Movant has therefore shown that his Count Three conviction was, more likely than not, based on the conspiracy offense, which the Eleventh Circuit has determined is not a crime of violence without resort to § 924(c)'s residual clause. See Brown, 942 F.3d 1069, 1075. The Count One conviction was therefore not a proper predicate for Movant's conviction on Count Three.

The language of the Count Four instructions is not so clear, however. It is true that the Court did refer back to the Count Three instructions to inform the jury as to

"[w]hat constitutes a violation of Title 18, United States Code, Section 924(c)(1)." Id. at 18. Shortly thereafter, though, the Court also stated that the indictment charged that Movant 1) knowingly carried a firearm in relation to a **conspiracy** to commit a crime of violence, 2) possessed a firearm in furtherance of a **conspiracy** to commit a crime of violence, 3) knowingly carried a firearm in relation to an **attempt** to commit a crime of violence, and 4) possessed a firearm in furtherance of an **attempt** to commit a crime of violence. Id. The Court went on to note that while the Government charged Movant with violating the law in four ways, it only needed to prove beyond a reasonable doubt that Movant violated the law in one of those ways. The instructions therefore did, in part, include language which might have led the jury to predicate its Count Four conviction on the Count Two attempt charge. It is therefore unclear from the instructions that the jurors could not have predicated their Count Four conviction on the attempt charge.

Movant next argues that the Court must presume that the least culpable conduct charged, i.e. the conspiracy of Count One, was the predicate for the Count Three and Count Four convictions. He cites three lines of cases he asserts support this argument. He first cites Moncrieffe v. Holder, 569 U.S. 184 (2013), in which the Supreme Court, in the context of a challenge to a sentence enhancement under the ACCA, clarified that when a court applies the categorical approach to a state statute that provides multiple means of committing a particular offense, the court must presume that the defendant only engaged in the least culpable conduct. He next cites Stromberg v. People of California, 283 U.S. 359 (1931), in which the Supreme Court found that a conviction could not be upheld where the underlying statute criminalized several different actions,

one of which was found to be an unconstitutional prohibition. Finally, he cites In re Gomez, 830 F.3d 1225 (11th Cir. 2016), where the Eleventh Circuit permitted a prisoner to file a successive § 2255 motion to challenge his duplicitous conviction under § 924(c) in light of the Supreme Court's then-recent decision in Johnson.

In re Gomez deals with the issue of duplicitous indictments, that is, indictments that charge two separate crimes in a single count. See United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997). Because the Motion can be disposed of on other grounds, the Court need not address this argument here. And the facts underlying the Motion are clearly distinguishable from those in Moncreiffe, which dealt with the determination of whether a particular state crime could qualify as a violent felony under the ACCA. In the instant action, the question of whether a crime qualifies as a crime of violence has already been answered by the Eleventh Circuit. See Brown 942 F.3d at 1075 (finding that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)); St. Hubert, 909 F.3d at 351 (finding that attempted Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause). Movant infers from Moncrieffe that where there are insufficient facts to answer a particular question definitively, courts must assume the facts are most favorable to a defendant. But as there is no discussion in the opinion that clearly supports this argument, Movant's inference is closer to speculation than interpretation. That case is therefore inapplicable to the inquiry at hand.

Stromberg is applicable, however. In Stromberg, the Supreme Court reviewed the conviction of an appellant who had been convicted under a state statute that criminalized several actions. The criminalization of one of these actions, however, was

ruled an unconstitutional restriction on free speech. Because it was unclear whether the appellant's conviction had been predicated upon that constitutionally protected conduct, the Supreme Court found that "the conviction could not be upheld." Stromberg, 283 U.S. at 368. The Eleventh Circuit has clarified the Stromberg holding to mean that "a conviction cannot be upheld if (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) *one of the listed grounds was constitutionally invalid*." Knight v. Dugger, 863 F.2d 705, 730 (11th Cir. 1988) (emphasis in original) (quoting Adams v. Wainwright, 764 F.2d 1356, 1362 (11th Cir. 1985)) (internal quotation marks omitted). Movant is clearly entitled to relief under this standard with respect to both his Count Three and Count Four convictions. First, the jury was instructed that Counts Three and Four could be predicated on the attempt or the conspiracy charge. Second, as the Government concedes, it is impossible to determine upon which charge the jury actually based its Count Three and Four convictions. And finally, the conspiracy charge was a constitutionally invalid predicate for a conviction on Counts Three and Four. Therefore, applying Stromberg to the instant action, Movant's convictions on Counts Three and Four are due to be vacated.

The Government does not refute Movant's argument that, per the jury instructions, only Count One could have been the predicate offense for the convictions on Counts Three and Four, nor does the Government take any position with respect to whether the Court must presume that the Count Three and Four convictions were predicated upon the conspiracy conviction. The Government's only arguments on

Counts Three and Four are procedural. First, the Government argues that Movant has procedurally defaulted on these claims. This argument is unpersuasive as to Counts Three and Four for the same reasons it was unpersuasive as to Counts One and Two: jurisdictional challenges are not defaultable. See Bane, 948 F.3d at 1294. Next, the Government argues that Movant cannot carry his burden of proof with respect to those Counts. According to the Government, because the jury returned a general verdict that does not indicate the predicate offenses for Counts Three and Four, Movant cannot carry his burden of showing that, more likely than not, his Count Three and Four convictions were predicated upon the conspiracy offense charged in Count One, as the Government contends Beeman, 871 F.3d 1215, requires him to do.

It should be noted in the first instance that, even if the Government if correct, Movant has carried his burden with respect to his Count Three conviction, as noted above. But the Government is not correct. Beeman is not applicable to Counts Three and Four in the same way it is applicable to Counts One and Two, however. Beeman merely reaffirmed that a § 2255 movant bears the burden of proving that he is entitled to relief. In the context of a challenge to a judge's determination that a particular crime qualified for a sentence enhancement, as was the case in Beeman, a petitioner is entitled to relief if his enhanced sentence was based upon an unconstitutionally vague residual clause. Therefore, a Beeman-style movant's burden is to show that he, more likely than not, received an enhanced sentence pursuant to an unconstitutional residual clause. But this is not the question in Movant's case. The question here is whether a jury based its conviction upon a constitutionally invalid ground. And per Stromberg and Knight, a movant is entitled to relief when he shows the three things required in Knight.

It is the uncertainty of the grounds for the jury verdict that triggers the entitlement to relief. Therefore, while Movant does need to carry his burden of proof, his burden is to show, by a preponderance of the evidence, that it is unclear whether the jury based its convictions on Counts Three and Four on the Count One charge or the Count Two charge, which Movant has done.

During oral argument, the Government suggested that the Eleventh Circuit's opinion in In re Cannon, 931 F.3d 1236 (11th Cir. 2019), supports its argument, but the undersigned finds the Government's reading of that case to be overly broad. In Cannon, the Eleventh Circuit found that a § 2255 movant had made a *prima facie* case that his § 924(c) conviction may have relied upon the residual clause the Supreme Court struck down in Davis. It cautioned the movant, however, that he "still bears the burden of proving the likelihood that the jury based its verdict of guilty in Count 3 solely on the Hobbs Act conspiracy, and not also on one of the other valid predicate offenses identified in the count (four drug crimes and two carjackings)." Cannon, 931 F.3d at 1243. This comment, however, which was not given in the context of a fulsome discussion and thus may be characterized as nonprecedential dicta, must be read within the context of the whole opinion. The Eleventh Circuit, just prior to making this statement, pointed out that "Cannon's predicate crimes seem inextricably intertwined." Id. That is to say that it was "difficult to see how a jury would have concluded that Cannon was guilty of using a firearm during and in furtherance of the underlying Hobbs Act predicates without at the same time also concluding that he did so during and in furtherance of the underlying drug and carjacking predicates." Id. The Eleventh Circuit's comment, therefore, is better interpreted to simply note that Cannon would

need to show that the predicate crimes for his conviction were not so inextricably intertwined that the jury's finding him guilty of his Hobbs Act offenses necessitated the jury's finding him guilty of the drug and carjacking predicates. To interpret it otherwise, as the Government suggests, one would need to believe that the Eleventh Circuit intended to call into question not only its own, also the Supreme Court's, precedential authority on a question of constitutional law, without any discussion of those precedents, and in a single sentence. This the undersigned does not believe, and the Government's only argument must therefore fail.

IV. Conclusion

In summation, because Movant's sentence enhancement on Counts One and Two relied upon the unconstitutionally vague residual clause in 18 U.S.C. § 3559(c)(2)(F)(ii), his sentences on those two Counts must be vacated, and he must be resentenced for the underlying convictions. Movant's convictions and sentences on Counts Three and Four are also due to be vacated because one of the predicate crimes for those convictions is not a crime of violence without resort to the unconstitutionally vague residual clause in § 924(c)(2). It is thereupon

ORDERED AND ADJUDGED as follows:

1. Movant Henry Wainwright's Motion to Vacate Pursuant to § 2255 [DE 8] is **GRANTED**.
2. Movant's convictions and sentences as to Counts Three and Four are hereby **VACATED**.

3. Movant's sentences as to Counts One and Two are hereby **VACATED**. Movant shall be **RESENTENCED** as to Counts One and Two only. The Court will enter a separate order setting a resentencing hearing.
4. The United States Probation Office shall prepare an amended Presentence Investigation Report recalculating Movant's Advisory Guideline Sentencing Range with respect to Counts One and Two only.
5. The Clerk of Court is directed to **CLOSE** this case and **DENY as moot** all pending motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of April, 2020.

Copies provided to:
Counsel of record via CM/ECF
U.S. Probation