No. 20-13365-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLES EDWARD JONES
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Southern District of Florida

No. 16-cv-22268

BRIEF OF APPOINTED AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

As required by Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rules 26.1-1, 26.1-2, and 29-2, amicus curiae certifies that the following list contains any trial judges, attorneys, persons, associations of persons, firms, partnership, and corporations with an interest in the outcome of the appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party, that are omitted in the Certificate of Interested Persons filed in Appellant's Brief and the Brief for the United States in Support of Confession of Error:

Funes, Freddy

Toth Funes PA

Dated: August 30, 2021 */s/Freddy Funes*
Freddy Funes

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STATEMENT OF IDENTITY

On July 20, 2021, amicus curiae was appointed "to defend the district court's judgment" in this appeal. Amicus curiae authored the brief in whole, no party or party's counsel authored any portion of this brief, and no other person contributed money to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUES

1. Whether 18 U.S.C. § 3559(c)(2)(F)'s residual clause is unconstitutionally vague, when it defines "serious violent felony" as covering an offense punishable by at least ten years of imprisonment 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."

2. Whether Mr. Jones met his burden of showing more likely than not that the sentencing court must have relied solely on § 3559(c)(2)(F)'s residual clause in finding his burglary-with-assault-or-battery conviction in Florida court a "serious violent felony."

SUMMARY OF THE ARGUMENT

1. Section 3559(c)(2)(F)'s residual clause is not unconstitutional. Residual clauses make prior convictions for offenses that have a certain threshold risk (say, "substantial risk" or "serious potential risk") of harm to another person or property trigger certain consequences (say, immigration consequences or stiffer sentences). The Supreme Court has held this form of residual clause to be unconstitutionally vague when they contain two features. First, this form of residual clause requires judges to consider a hypothetical "ordinary case" to see if the offense falls within the residual clause. Second, this form of residual clauses leaves wholly unclear what threshold level risk makes any given crime fall within the residual clause. This second feature does not exist in § 3559(c)(2)(F)'s residual clause, because it should be read in context with its enumerated clause. Its enumerated clause provides a coherent list of violent felonies (like murder and airplane piracy) that inherently involve a high level of risk. In other words, the enumerated list clarifies that to find a "substantial risk" of physical force under that statute's residual clause, the offense must meet a high and dangerous threshold level risk.

2. Alternatively, even if the residual clause is unconstitutional, this Court should affirm because Mr. Jones cannot meet his burden of proof. To prevail on his challenge, Mr. Jones must show that it is more likely than not that the sentencing court relied, exclusively, on the residual clause when it found that his prior convictions constituted serious violent felonies under § 3559(c), which subsequently enhanced Mr. Jones's sentence. Mr. Jones can meet this burden two ways: By pointing to evidence in the record, like statements from the sentencing court, or by providing caselaw that at the time of his sentencing required the sentencing court to rely on the residual clause. Both the district court and Mr. Jones assert that his conviction for burglary with assault or battery could not fit in 2003 under § 3559(c)(2)(F)'s elements clause, which defines as a serious violent felony any offense punishable by ten years' imprisonment or more that has as an element the use, attempted use, or threatened use of physical force against the person of another. But in 2003 Florida law made clear that burglary with assault or battery incorporated the elements of assault and simple battery, and no caselaw held that simple battery or assault could never fall within the elements clause. Mr. Jones cannot meet his burden.

ARGUMENT AND CITATIONS OF AUTHORITY

In 2002, the Government indicted the Appellant, Charles Edward Jones, for armed bank robbery, for knowingly carrying, using, and discharging a firearm during a crime of violence, and for being a felon in possession of a firearm. The Government sought to enhance Mr. Jones's sentence under 18 U.S.C. § 3559(c) based on two prior Florida-court convictions.

The first conviction on which the Government relied was a 1988 conviction for burglary of an occupied conveyance in violation of section 810.02 of the Florida Statutes and for robbery in violation of section 812.131 (the "Robbery Conviction"). [Cr.-DE 38 at 9][1] The second conviction was a 2001 conviction for burglary with assault or battery, in violation of section 810.02(2)(a) (the "Burglary Conviction"). [Cr.-DE 38 at 3] Section 3559(c) mandates life imprisonment for a criminal defendant found guilty of committing a "serious violent felony" if that same criminal defendant has two prior, separate convictions for serious violent felonies. The statute goes on to define "serious violent felony" (1)

[1] For convenience, references to the record of case number 16-cv-22268 will be noted as "Cv-DE," while references to the record of case number 02-cr-20875 will be noted as "Cr-DE."

by specifying criminal statutes that constitute serious violent felonies, (2) by making any crime punishable by ten years in prison that uses, attempts to use, or threatens to use physical force a serious violent felony, and (3) by anointing as a serious violent felony an offense punishable by ten years in prison "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)(i)–(ii). This third definition of "serious violent felony" is commonly known as § 3559(c)(2)(F)'s residual clause.

In 2003, after a jury found him guilty, Mr. Jones received a life sentence based on the sentencing enhancement required by § 3559(c). Since then, in a trio of cases—*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)—the Supreme Court has held that similarly worded residual clauses in other federal statutes are unconstitutionally vague.

Here, Mr. Jones contends that, because § 3559(c)(2)(F)'s residual clause is similar to the residual clauses in *Johnson*, *Dimaya*, and *Davis*, it too must be unconstitutionally vague. From there, he argues that his

sentence cannot be upheld since it was assuredly based on § 3559(c)(2)(F)'s residual clause. These arguments are unfounded.

First, the Supreme Court has never held § 3559(c)(2)(F)'s residual clause to be unconstitutionally vague, and the residual clause is more definite than the residual clauses in *Johnson*, *Dimaya*, or *Davis*. Unlike § 3559(c)(2)(F), the relevant statutes in *Dimaya* and *Davis* lacked a list of specific criminal statutes that a court could consider in interpreting their respective residual clauses. And though the statute at issue in *Johnson* (18 U.S.C. § 924(e)) did have a list of specific criminal statutes, the Supreme Court in *Johnson* explicitly found the list a confusing hinderance rather than a useful aid. 576 U.S. at 603.

Second, even if the residual clause here falters, Mr. Jones carries the burden of proving that the sentencing judge relied solely on that unconstitutional residual clause when sentencing him to life in prison. This can be a tough standard: Where, as here, no evidence exists to suggest that the sentencing judge relied exclusively on the residual clause, a petitioner must show that authoritative precedent at the time of the sentencing confined the sentencing judge to relying solely to the residual clause.

I. THE RESIDUAL CLAUSE IS CONSTITUTIONAL.

As relevant here, under 18 U.S.C. § 3559, "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; or . . . one or more serious violent felonies and one or more serious drug offenses." 18 U.S.C. § 3559(c)(1)(A).[2] Section 3559 contains a definition of "serious violent felony":

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or

[2] Section 3559 imposes another condition before mandating a life sentence in these circumstances: "[E]ach serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first," 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).

> 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and
>
> (ii) 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 or *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) (emphasis added).

Subsection (i) is known as the enumerated clause, the unitalicized portion of subsection (ii) is known as the elements clause, and the italicized portion of subsection (ii) is known as the residual clause. Mr. Jones and the Government contend that, because this residual clause is strikingly similar to the residual clauses struck down by the Supreme Court in *Dimaya* and *Davis*, this Court should find § 3559(c)(2)(F)'s residual clause unconstitutionally vague. This argument ignores that this Court must consider the language of a statute in context.

A. Statutes Fixing Sentences Are Unconstitutionally Vague Only if They Fail To Specify the Range of Available Sentences with Sufficient Clarity.

The Due Process Clause prohibits the Government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. To avoid being held unconstitutionally vague, a statute fixing sentences "must specify the range of available sentences with 'sufficient clarity.'" *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). The residual clause here meets this standard.

B. The Residual Clause Includes Only Those Crimes that Are Roughly Similar (in Kind as well as in Degree of Risk Posed) to the Crimes Listed in the Enumerated Clause.

Where an appellant challenges a statute's constitutionality, this Court reviews de novo the challenge and the statute's interpretation. *United States v. Spoerke*, 568 F.3d 1236, 1244 (11th Cir. 2009). When construing statutes, this Court begins "where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). That said, courts must "read the words in their context and with

a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotation marks omitted). After all, courts have a duty "to construe statutes, not isolated provisions." *Id.* And, in interpreting statutes, courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

This last dictate suggests that this Court should interpret the residual clause in conjunction with the enumerated clause; otherwise, the residual clause would encapsulate the elements clause: "A crime which has as an element the 'use, attempted use, or threatened use of physical force' against the person," as the elements clause specifies, "is likely to create" a substantial risk of physical force "and would seem to fall within the scope of" the residual clause. *Begay v. United States*, 553 U.S. 137, 142 (2008), *abrogated by Johnson*, 576 U.S. 591. Thus, in interpreting the residual clause—and, specifically, its term "substantial risk"—this Court should interpret the residual clause as encompassing only those convictions that are similar to § 3559(c)(2)(F)'s enumerated clause, e.g., murder, assault with intent to commit rape, and aircraft piracy.

This interpretation, moreover, is not a radical invention. It is analogous to the one the Supreme Court adopted for § 924(e)(2)(B)'s residual clause before it ultimately held that statute unconstitutionally vague. Indeed, before finding § 924(e)(2)(B)'s residual clause unconstitutional, the Court repeatedly noted that that "[t]he specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct" fell within the residual clause. *James v. United States*, 550 U.S. 192, 203 (2007), *abrogated by Johnson*, 576 U.S. 591; *see also Sykes v. United States*, 564 U.S. 1, 8 (2011) ("The offenses enumerated in [the enumerated clause]—burglary, extortion, arson, and crimes involving the use of explosives—provide guidance in making this determination [under the residual clause]."), *abrogated by Johnson*, 576 U.S. 591; *Begay*, 553 U.S. at 143 ("[W]e should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.").

Finally, if there be any doubt, this Court should adopt this interpretation under the doctrine of constitutional doubt. *See Tilton v. Playboy Ent. Grp.*, 554 F.3d 1371, 1376 (11th Cir. 2009) ("To the extent

that any ambiguity exists . . . , our interpretation is guided by the doctrine of constitutional doubt, which instructs us to construe a statute that is 'genuinely susceptible to two constructions' in favor of the construction that avoids 'a serious likelihood that the statute will be held unconstitutional.").

C. This Narrower Reading Saves the Residual Clause.

This construction has an added benefit: It likely saves the residual clause from being unconstitutionally vague. As the Court has explained in *Johnson*, *Dimaya*, and *Davis*, residual clauses become constitutionally problematic when they have two features. The first feature is when they tie judicial assessment of risk to a "hypothesis about the crime's 'ordinary case.'" *Dimaya*, 138 S. Ct. at 1213. The next feature is when they leave "unclear what threshold level risk made any given crime a 'violent felony." *Id.* at 1214. But, by reading the residual clause as including only offenses similar to crimes listed in the enumerated clause here, the threshold level of risk is better defined.

As the Supreme Court in *Begay* explained, when a residual clause is read in conjunction with an enumerated clause, the enumerated clause limits the crimes in the residual clause to "cover[] . . . crimes that

are roughly similar, in kind *as well as in degree of risk posed*, to the examples themselves." *Begay*, 553 U.S. at 143 (emphasis added). And § 3559(c)(2)(F)'s enumerated clause lists crimes that contain only serious degrees of risk—murder, manslaughter other than involuntary manslaughter, kidnapping, aircraft piracy, and robbery. Given this clarification of what threshold level risk makes a crime a "serious violent felony," the residual clause here avoids the pitfalls in *Johnson*, *Dimaya*, and *Davis*.

D. The Residual Caluse in *Johnson* Had an Enumerated Clause that Could Not Help Define the Degree of Risk.

Because the residual clause must be read to include only those offenses similar in kind to those in the enumerated clause, it has sufficient clarity and gives fair notice to any potential criminal defendant of those crimes that may enhance his sentence. It also distinguishes the residual clause here from the residual clauses in *Johnson*, *Dimaya*, or *Davis*.

Take *Johnson*. There, the Court considered the residual clause to the Armed Criminal Career Act (or ACCA), 18 U.S.C. § 924(e). The Court held that ACCA's "residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576

U.S. at 598. Section 924(e), like § 3559(c)(2)(F), enhanced a sentence, though it did so if a criminal defendant had "three previous convictions by any court . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). Like § 3559(c)'s definition of "serious violent felony," § 924(e) contained a definition of "violent felony" with an elements clause, an enumerated clause, and a residual clause. Beyond this, however, ACCA's residual clause and § 3559(c)'s residual clause materially differed.

18 U.S.C. § 924(e)(2) (residual clause emphasized)	18 U.S.C. § 3559(c)(2) (residual clause emphasized)
(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that— (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*	(F) the term "serious violent felony" means— (i) a Federal or State offense . . . consisting of murder . . . ; manslaughter other than involuntary manslaughter . . . ; assault with intent to commit murder . . . ; assault with intent to commit rape; aggravated sexual abuse and sexual abuse . . . ; abusive sexual contact . . . ; kidnapping; aircraft piracy . . . ; robbery . . . ; carjacking . . . ; extortion; arson; firearms use; firearms possession . . . ; or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) 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 *or 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* . . . ."

Two distinctions stand out. First, ACCA's residual clause was more indefinite than § 3559(c)(2)(F)'s residual clause. It incorporated offenses that involved conduct that "presents a serious potential risk of physical injury." 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court found the term "potential risk" to be troublesome, because "assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Johnson*, 576 U.S. at 597. Second, ACCA's enumerated clause was confusing. It listed a mere handful of examples (extortion,[3] burglary, any crime that involves use of explosives) that were not inherently violent or did not inherently present a risk of physical injury:

> Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so."

[3] In sharp contrast, § 3559(c)(2)(F)'s enumerated clause includes extortion as "serious violent felony," but the statute also defines extortion narrowly as "an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person." 18 U.S.C. § 3559(c)(2)(C). ACCA had no such similar definition.

See Johnson, 576 U.S. at 603.

Neither of these concerns afflicts the residual clause here, since it lacks the "potential risk" language and it has a sensible enumerated clause. That enumerated clause lists truly violent crimes that do provide guidance to and notice of which crimes fall within § 3559(c)(2)(F)'s residual clause. *Johnson* does not require the conclusion that the residual clause here is unconstitutional.

E. In *Dimaya* and *Davis*, § 16 and § 924(c) Had No Related Enumerated Clauses Whatsoever To Help Construe Their Residual Clauses.

In *Dimaya*, the Supreme Court found unconstitutionally vague 18 U.S.C. § 16's residual clause. 138 S. Ct. at 1223. In *Davis*, the Supreme Court held § 924(c)'s residual clause unconstitutional. 139 S. Ct. at 2336. Both of those statute's residual clauses are similar to § 3559(c)(2)(F)'s residual clause. The two tables below compare the residual clauses in *Dimaya* and *Davis* with the one here.

18 U.S.C. § 16 (residual clause emphasized)	18 U.S.C. § 3559(c)(2) (residual clause emphasized)
The term "crime of violence" means— (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) *any other offense that is a felony and 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.*	(F) the term "serious violent felony" means— (i) a Federal or State offense . . . consisting of murder . . . ; manslaughter other than involuntary manslaughter . . . ; assault with intent to commit murder . . . ; assault with intent to commit rape; aggravated sexual abuse and sexual abuse . . . ; abusive sexual contact . . . ; kidnapping; aircraft piracy . . . ; robbery . . . ; carjacking . . . ; extortion; arson; firearms use; firearms possession . . . ; or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) 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 *or 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. § 924(c) (residual clause emphasized)	18 U.S.C. § 3559(c)(2) (residual clause emphasized)
(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and— (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) *that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*	(F) the term "serious violent felony" means— (i) a Federal or State offense . . . consisting of murder . . . ; manslaughter other than involuntary manslaughter . . . ; assault with intent to commit murder . . . ; assault with intent to commit rape; aggravated sexual abuse and sexual abuse . . . ; abusive sexual contact . . . ; kidnapping; aircraft piracy . . . ; robbery . . . ; carjacking . . . ; extortion; arson; firearms use; firearms possession . . . ; or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) 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 *or 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 . . . .*"

At first read, these similarities seem conclusive: The language in the residual clauses in § 16 and § 924(c) are nearly identical to the residual clause in § 3559(c)(2)(F). The two notable differences in the language are that § 3559(c)(2)(F)(ii) limits itself to (1) offenses punishable by 10 years and (2) offenses that risk of physical force against another person. Sections 16 and 924(c) are broader: Neither has the ten-year requirement, and each contemplates force against property of another. Upon closer scrutiny, however, a material distinction arises.

Neither § 16 nor § 924(c) has an enumerated list of offenses to help define "substantial risk" in their residual clauses. As explained in section I.C, this makes all the difference. In fact, the Court in *Dimaya* underscored that a list of crimes in an enumerated clause helps give shape to a residual clause. *See Dimaya*, 138 S. Ct. at 1221 ("We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning."). Because of this, neither *Dimaya* nor *Davis* requires this Court to find the residual clause here unconstitutionally vague.

II. ALTERNATIVELY, MR. JONES CANNOT MEET HIS BURDEN UNDER *BEEMAN*.

Besides, this Court should affirm the district court's order on an alternative ground. *See Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017) ("Regardless of the ground stated in the district court's order or judgment, '[w]e may affirm on any ground supported by the record.'" (alteration in original)). After all, where a movant attacks a sentence because it was based on an unconstitutionally vague residual clause, the "movant must establish that his sentence enhancement 'turn[ed] on the validity of the residual clause,'" and Mr. Jones has failed to meet this burden. *Id.* 1221 (alteration in original).

A. Mr. Jones Bears the Burden of Showing that the Residual Clause Actually Adversely Affected His Sentence.

The Supreme Court has held three other statutes' residual clauses unconstitutionally vague. Yet not every sentence based on an unconstitutionally vague residual clause gets overturned. In *Beeman v. United States*, this Court explained that to prevail on this form of a challenge, a movant, like Mr. Jones, can prevail only if he shows that—

"more likely than not—it was use of the residual clause that led to the sentencing court's enhancement of his sentence." 871 F.3d at 122.[4]

> That will be the case only . . . if the sentencing court relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause . . . to qualify a prior conviction as a [serious] violent felony . . . .

Id. at 1221. Importantly, "[i]t is not enough to establish that the district court *could have* relied on either the residual clause or another clause; rather, the movant must show that the district court relied *only* on the residual clause." *Santos v. United States*, 982 F.3d 1303, 1310 (11th Cir. 2020). Thus, to prevail, Mr. Jones must show that it was more likely than not that the sentencing judge found that either the Robbery Conviction or the Burglary Conviction constituted a "serious violent felony" under § 3559(c)'s residual clause *alone*.

Whether the residual clause was in fact "the basis for the sentencing court's enhancement is a question of 'historical fact'" that can be determined "first" by looking "to the record." *United States v. Pickett*, 916 F.3d 960, 963 (11th Cir. 2019). "[I]f the record proves

[4] *Beeman* concerned the residual clause of § 924(e), but its logic applies equally to § 3559(c)'s residual clause if unconstitutional.

undeterminative," courts "can look to the case law at the time of the sentencing." *Id.* Neither through the record nor through caselaw can Mr. Jones show that more likely than not it was *solely* § 3559(c)'s residual clause that led the enhancement of his sentence.

B. There Is No Record Evidence Showing that the Sentencing Judge Relied *Solely* on the Residual Clause.

Mr. Jones contends that, in 2003, the sentencing judge relied exclusively on the residual clause to apply his Burglary Conviction as a predicate.[5] The district court agreed.

Yet nothing in the record shows that the sentencing judge relied, exclusively, on § 3559(c)(2)(F)'s residual clause when he sentenced Mr. Jones to life in prison. In fact, the district court found that "the record . . . does not make clear which provision" (that is, the enumerated, the elements, or the residual clause) it "relied on." [Cv-DE 60 at 10] This finding is reviewed for clear error, *see Williams v. United States*, 985 F.3d 813, 816 (11th Cir. 2021), and, on appeal, Mr. Jones has not

[5] The district court held that Mr. Jones had "'effectively conceded' [his] ability to satisfy *Beeman*" as to the Robbery Conviction. [Cv-DE 60 at 12] Mr. Jones does not appear to challenge that finding in his brief.

challenged this finding by the district court. Hence, Mr. Jones cannot meet his burden by relying on the record.

C. To Show Through Caselaw that the Sentencing Judge Relied *Solely* on the Residual Clause, Mr. Jones Must Show that Binding Precedent Blocked the Judge from Relying on the Elements or Enumerated Clauses.

This leaves Mr. Jones with one option: He must show that the caselaw at the time of his sentencing would have forced the district court to rely on the residual clause to find either the Robbery Conviction or Burglary Conviction a "serious violent felony." The district court held that Mr. Jones met his burden because in 2003 the Burglary Conviction "was a 'serious violent felony' under *only* the residual clause." [Cv-DE 60 at 6] But the decision on whether caselaw in 2003 mandated use of the residual clause is a legal question that this Court reviews de novo, *see id.*, and, since the district court issued its order, this Court has issued three opinions highlighting the difficulty Mr. Jones faces in proving, through caselaw, that the sentencing judge must have relied solely on the residual clause.

In December of 2020, this Court issued *Santos v. United States*, 982 F.3d 1303. There, a convicted defendant had his sentence enhanced under the Armed Career Criminal Act. *Id.* at 1306. When the Supreme

Court in *Johnson* held ACCA's residual clause unconstitutional, the convicted defendant filed a § 2255 "challenge to his 1994 sentence, claiming that the retroactive application of . . . *Johnson* rendered his sentence unconstitutional." *Id.* at 1306. In particular, the criminal defendant argued that his conviction under Florida law for battery on a law enforcement officer could trigger ACCA's sentencing enhancement only under ACCA's residual clause and that Florida battery could not meet ACCA's version of an elements clause because Florida battery required mere touching. *Id.* at 1306–07.

This Court disagreed: "To rely on case law to make his *Beeman* showing," the convicted defendant "needs to show that it is unlikely that the trial court thought the convictions also qualified under" ACCA's elements clause. *Id.* at 1312. And the convicted defendant in *Santos* could not show this, because "[n]o Eleventh Circuit decision prior to the sentencing date ever suggested that" a battery on a law enforcement officer "conviction (or any other type of battery offense) did not also qualify under the elements clause." *Id.* To the contrary, after the convicted defendant's sentencing, this Court held that simple battery in Florida qualified as a violent felony under the elements

clause. *See id.* at 1313. Though the Supreme Court reversed this Court's determination, the Eleventh Circuit's opinions "generally held that a Florida battery fell well within the elements clause and similar statutory definitions" without suggesting that "their holdings departed from any prior decisions to the contrary." *Id.* In other words, although no Eleventh Circuit precedent authorized the convicted defendant's "sentencing court to rely on the elements clause in 1994, it did not preclude the court from so doing either," and so the convicted defendant could not meet his burden. *Id.*

In January of this year, this Court issued *Williams v. United States*, 985 F.3d 813. In *Williams*, a criminal defendant challenged a sentence enhancement under ACCA, arguing that "case law at the time of his sentencing established that more likely than not the sentencing court relied on the residual clause." *Id.* at 815. The criminal defendant argued that the caselaw at the time of his sentencing suggested that his prior federal-kidnapping charge could not be a violent felony under ACCA except through the residual clause. *See id.* at 817–18. This Court rejected that argument because, "[a]bsent authority that would have compelled a particular result" at the time of the criminal defendant's

sentencing, the criminal defendant could not "meet his burden of proof through case law alone." *Id.* at 820.

Finally, in July of 2021, this Court once again explained, "If there were binding precedent at the time of sentencing that would have compelled the district court to rely on the residual clause and only the residual clause, then we can conclude there is enough circumstantial evidence to find the 'historical fact' that it actually did so." *Pitts v. United States*, 4 F.4th 1109, 1115 (11th Cir. 2021).

In sum, *Beeman* is a tough standard. When relying on legal precedent, alone, a movant cannot meet the *Beeman* burden without "clear precedent on point." *Williams*, 985 F.3d at 820–21. And, in 2003, no clear precedent required use of the residual clause to find the Burglary Conviction a serious violent felony.

D. Assault or Battery Are Elements of the Burglary Conviction and, in 2003, Both Could Fit into the Elements Clause.

This Court must decide whether at the time of Mr. Jones's sentencing (2003) caselaw foreclosed the sentencing court from concluding that a conviction of section 810.02(2)(a) (for burglary with

assault or battery) fell within § 3559(c)(2)(F)'s elements clause. The caselaw did not.

The district court concluded that the Burglary Conviction did "not qualify as a predicate under the elements clause because Florida burglary with assault or battery does not require as an element the use, attempted use, or threatened use of force." [Cv-DE 60 at 9] In so holding, the district court interpreted *United States v. Fulford*, 267 F.3d 1241 (11th Cir. 2001),[6] binding precedent from this Court that existed at the time of Mr. Jones's sentencing, as having required the sentencing judge to focus on the elements of the crime as noted in "the conviction." [Cv-DE 60 at 8] But the elements of section 810.02(2)(a) include the elements of assault or battery.

[6] In *Fulford*, this Court affirmed a district court's decision that "it could not look beyond the judgment in the Florida aggravated assault case to determine whether the conviction constituted a 'serious violent felony' for purposes of § 3559." 267 F.3d at 1248. This Court held that the district court correctly decided it could not go beyond the judgment (to the information) to see whether a conviction for aggravated assault—which was defined as an assault with a deadly weapon without an intent to kill—constituted a serious violent felony. *See id.* at 1248–50. Here, however, the judgment itself listed Mr. Jones's conviction as falling under section 810.02(2)(a).

The judgment for the Burglary Conviction expressly lists the conviction as being under section 810.02(2)(a). [No. 05-cv-22622, ECF No. 48 at 1] In 1998, that statute stated,

> (2) Burglary is a felony in of the first degree . . . if in the course of committing the offense, the offender:
>
> > (a) makes an assault or battery upon any person . . . .

FLA. STAT. § 810.02(2)(a) (1998).[7] At the time of Mr. Jones's sentencing, this crime incorporated the elements of assault or battery. *See Ellison v. State*, 545 So. 2d 480, 481 (Fla. Dist. Ct. App. 1989) ("The simple battery in this case was the same act charged, proved and incorporated in the burglary offense to escalate it to a first degree burglary."); *Bradley v. State*, 540 So. 2d 185, 187 (Fla. Dist. Ct. App. 1989) ("The other method, and one used in the burglary statute section 810.02, is to make the differentiating factors upon which the different punishment is to depend, into degree elements differentiating the one basic substantive burglary offense into three separate statutory offenses, each of which authorizes a different degree or level of punishment."

[7] Since 1985, this statute had no substantive changes that could affect its interpretation.

(footnote omitted)); *Spradley v. State*, 537 So. 2d 1058, 1061 (Fla. Dist. Ct. App. 1989) ("[A]lthough burglary with a battery requires proof of elements that battery does not, battery does not require proof of elements that burglary with a battery does not."); *Rozier v. State*, 402 So. 2d 539, 540 n.1 (Fla. Dist. Ct. App. 1981) ("[T]hese basic elements can be augmented by allegations and proof of additional elements, such as that the defendant, in the course of committing the offense, made an assault upon some person . . . .").

What's more, no precedent whatsoever prevented Mr. Jones's sentencing judge from finding that *both* of Florida's assault or battery crimes fell within § 3559(c)'s elements clause.

Again, that clause defines as a "serious violent felony" 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." 18 U.S.C. § 3559(c)(2)(F)(ii).

As to battery, this Court has already held that, before 2010, nothing prevented a sentencing judge from finding that simple battery in Florida included as an element the use, attempted use, or threatened

use of physical force. *See Santos*, 982 F.3d at 1313.[8] In any event, Florida law at the time of Mr. Jones's sentencing supported the conclusion that even simple battery required the use, attempted use, or threatened use of physical force. *See Thorn v. State*, 529 So. 2d 363, 364 (Fla. Dist. Ct. App. 1988) ("[I]njury to the victim is an element of the offense and was properly scored."). No clear-cut opinion from the Florida Supreme Court held otherwise in 2003.

As to "assault," Florida law defines it as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." FLA. STAT. § 784.011(1).[9] By its plain language, this statutory language falls within the elements clause. In 2003, nothing from this Court or

[8] To be sure, *Santos* concerned ACCA's definition of "violent felony" through its elements clause, but the language between ACCA's elements clause and § 3559(c)(2)(F)'s elements clause is indistinguishable. *See* 18 U.S.C. § 924(e)(2)(B)(i) ("[T]he term 'violent felony' means any crime . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another.").

[9] The language of section 784.011(1) has not substantively changed in the relevant period.

from the Florida Supreme Court interpreted assault to require anything less than "an intentional, unlawful threat by word or act to do violence to the person of another." FLA. STAT. § 784.011(1). At no point in his brief does Mr. Jones cite any pre-2003 opinions from the Florida Supreme Court or this Court holding that "an intentional, unlawful threat . . . to do violence" somehow did not fall within "threatened use of physical force."

Nothing barred a sentencing judge from concluding (1) that section 810.02(2)(a) incorporated as elements assault or battery, (2) that simple battery under Florida law fit within the elements clause, and (3) that assault under Florida law fit within the elements clause. Consequently, Mr. Jones cannot meet his *Beeman* burden.

CONCLUSION

For these reasons, this Court should affirm the district court's order denying Mr. Jones's § 2255 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g), I, Freddy Funes, certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure29(a)(5), because this brief contains 6498 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

August 30, 2021

/s/ Freddy Funes
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CERTIFICATE OF SERVICE

I certify that, on August 30, 2021, a copy of this Amicus Curiae Brief has been furnished to the following counsel of record via the CM/ECF system, as required by 11th Circuit Rule 25-3(a) and that seven copies of the Amicus Curiae Brief were mailed on this day to the Eleventh Circuit Court of Appeals.

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