

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2015

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9 ARGUED: APRIL 27, 2016
10 DECIDED: SEPTEMBER 11, 2017
11

12 No. 15-1518-cr
13

14 UNITED STATES OF AMERICA,
15 *Appellee,*
16

17 *v.*
18

19 COREY JONES,
20 *Defendant-Appellant.*
21

22
23 Appeal from the United States District Court
24 for the Eastern District of New York.
25 No. 13 Cr. 00438 – Nicholas G. Garaufis, *District Judge.*
26

27
28 Before: WALKER, CALABRESI, and HALL, *Circuit Judges.*
29
30

31 Defendant Corey Jones appeals from a sentence entered in the
32 United States District Court for the Eastern District of New York
33 (Garaufis, J.) following a jury-trial conviction for assaulting a federal

1 officer in violation of 18 U.S.C. § 111. He was sentenced as a career
2 offender principally to 180 months in prison to be followed by three
3 years of supervised release. The primary basis for Jones' appeal is
4 that, in light of the Supreme Court's holding in *Johnson v. United*
5 *States*, 559 U.S. 133 (2010) (*Johnson I*), New York first-degree robbery
6 is no longer categorically a crime of violence under the force clause
7 of the Career Offender Guideline, U.S.S.G. §§ 4B1.1 and 4B1.2, and
8 that the district court therefore erred in concluding that his prior
9 conviction for first-degree robbery would automatically serve as one
10 of the predicate offenses for a career offender designation.

11 After oral argument in this matter, the Supreme Court
12 decided *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that
13 the residual clause of the Career Offender Guideline—a second basis
14 for finding a crime of violence—was not unconstitutional. The Court
15 reached this conclusion notwithstanding the government's
16 concession to the contrary in cases around the country that the
17 residual clause, like the identically worded provision of the Armed
18 Career Criminal Act ("ACCA"), was void for vagueness. In light of
19 *Beckles*, we find that New York first-degree robbery categorically
20 qualifies as a crime of violence under the residual clause and
21 therefore need not address Jones' argument based on the force
22 clause. We also find that his sentence is substantively reasonable and
23 therefore AFFIRM the sentence imposed by the district court.

1 Judge CALABRESI and Judge HALL concur in the opinion of the
2 Court. Judge CALABRESI files a separate concurring opinion, which
3 Judge HALL joins.

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14
15 JOHN M. WALKER, JR., *Circuit Judge*:

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17 United States District Court for the Eastern District of New York
18 (Garaufis, J.) following a jury trial conviction for assaulting a federal
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20 offender principally to 180 months in prison to be followed by three
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17 Court. Judge CALABRESI files a separate concurring opinion, which
18 Judge HALL joins.

19 BACKGROUND

20 On June 21, 2013, Corey Jones was finishing a ninety-two
21 month federal sentence for unlawful gun possession in a halfway
22 house. Jones verbally threatened a staff member, a violation of the
23 rules of the halfway house, and thereby was remanded to the

1 custody of the Bureau of Prisons. Two Deputy U.S. Marshals arrived
2 to take Jones to prison, but Jones resisted the Marshals' efforts to
3 take him into custody. During the ensuing altercation, Jones bit the
4 finger of one of the Marshals, who suffered puncture wounds,
5 necessitating antibiotics and a tetanus vaccine at a hospital. This
6 assault, it turned out, had grave consequences for Jones who was
7 now in all likelihood a "career offender" subject to a greatly
8 enhanced sentence.

9 A jury convicted Jones of assaulting a federal officer in
10 violation of 18 U.S.C. § 111. In the pre-sentence report, the probation
11 officer calculated a relatively modest base offense level of fifteen for
12 the assault. But the probation officer then determined that Jones was
13 a career offender pursuant to the Career Offender Guideline
14 because, in addition to (1) being over eighteen years of age when he
15 committed the assault and (2) the assault being a crime of violence,
16 (3) he had at least two prior felony convictions of a crime of violence.
17 According to the report, Jones' previous two convictions in New
18 York for first-degree robbery and second-degree assault satisfied the
19 third element of the test. The probation officer, following U.S.S.G.
20 § 4B1.1, increased the offense level to thirty-two, which, when
21 combined with Jones' criminal history category of VI, resulted in a
22 Guidelines range of 210 to 262 months of incarceration. Because the

1 statutory maximum for assault is twenty years, the effective
2 Guidelines range was 210 to 240 months.

3 The district court adopted the findings of the pre-sentence
4 report and sentenced Jones to 180 months, or fifteen years, in prison
5 for the assault, to be followed by three years of supervised release.
6 Jones now appeals his sentence, arguing, first, that the district court
7 erred in designating him a career offender and, second, that his
8 sentence is substantively unreasonable.

9 After oral argument, we published an opinion that resolved
10 Jones' appeal in his favor. The government had conceded that the
11 residual clause was void for vagueness, and we concluded that the
12 force clause could not be applied to Jones for reasons not relevant
13 here. Shortly after our decision was issued, however, we vacated the
14 opinion in order to await the Supreme Court's decision in *Beckles*.
15 See *United States v. Jones*, 838 F.3d 291, 291 (2d Cir. 2016) (mem.).

16 *Beckles* addressed the constitutionality of the Career Offender
17 Guideline's residual clause, which was in effect at the time of Jones'
18 sentencing but has since been removed and replaced with new
19 language.¹ Following *Johnson v. United States*, 135 S. Ct. 2551, 2557

¹ After *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (*Johnson II*), the Sentencing Commission amended the Guidelines, effective August 1, 2016, to remove the residual clause on the belief that, contrary to *Beckles*' later holding, the residual clause was unconstitutional. See U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines 1-3 (Jan. 21, 2016), http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments_0.pdf.

1 (2015) (*Johnson II*), which held that the residual clause of the ACCA
2 was unconstitutionally void for vagueness, there existed a general
3 belief that the identically worded residual clause of the Career
4 Offender Guideline was similarly unconstitutional, as the
5 government had consistently maintained. In *Beckles*, however, the
6 Court held that the residual clause of the Career Offender Guideline
7 is immune from void-for-vagueness challenges, as are the
8 Guidelines generally. *Beckles*, 137 S. Ct. at 892. After *Beckles*, we
9 invited the parties in this case to provide supplemental briefing as to
10 whether first-degree robbery, as defined in New York, categorically
11 qualifies as a crime of violence under the previously codified
12 residual clause of the Career Offender Guideline.² We now address
13 that question.

14 DISCUSSION

15 As noted, prior to *Beckles*, Jones' argument centered upon the
16 force clause of the Career Offender Guideline. Aided now by the
17 Supreme Court's holding that the residual clause of the Career
18 Offender Guideline is not void for vagueness, we find that first-
19 degree robbery as defined in New York is categorically a crime of
20 violence under the residual clause and thus we need not address
21 Jones' argument based on the force clause.

² The alternative basis for the career offender enhancement—the commission of a “controlled substance offense”—is not relevant here. *See* U.S.S.G. § 4B1.1(a).

1 In the district court, Jones contested his career offender
2 designation solely on the basis that his first-degree robbery
3 conviction occurred when he was a juvenile. He raised no argument
4 that robbery in New York was not a crime of violence. We
5 accordingly review his present challenge on that ground for plain
6 error. *See United States v. Gamez*, 577 F.3d 394, 397 (2d Cir. 2009) (per
7 curiam). To meet this standard, Jones must establish the existence of
8 (1) an error; (2) “that is plain”; (3) “that affects substantial rights”; (4)
9 and that “seriously affects the fairness, integrity, or public
10 reputation of judicial proceedings.” *Id.* (alterations and citation
11 omitted). We apply this standard less “stringently in the sentencing
12 context, where the cost of correcting an unpreserved error is not as
13 great as in the trial context.” *Id.* We first address point (1): whether
14 the district court committed error of any kind in designating Jones a
15 career offender.

16 **I. The Legal Provisions at Issue in This Appeal**

17 This appeal involves the interplay between substantive state
18 criminal law and the federal Sentencing Guidelines (“Guidelines”).
19 The question we face is straightforward: is first-degree robbery in
20 New York, defined in New York Penal Law §§ 160.00 and 160.15,
21 however it may be committed, categorically a crime of violence
22 under the Career Offender Guideline?

1 A defendant commits robbery in New York when he “forcibly
2 steals property,” which the statute defines as “a larceny” involving
3 the use or threatened “immediate use of physical force upon another
4 person.” N.Y. Penal Law § 160.00. The various degrees of robbery,
5 which carry different penalties, turn upon the presence of particular
6 aggravating factors. *Compare* § 160.05 (defining third-degree
7 robbery), *with* § 160.10 (defining second-degree robbery), *and with*
8 § 160.15 (defining first-degree robbery). First-degree robbery occurs
9 when a defendant commits robbery and during the course of the
10 crime or his immediate flight either “(1) [c]auses serious physical
11 injury to any person who is not a participant in the crime; or (2) [i]s
12 armed with a deadly weapon; or (3) [u]ses or threatens the
13 immediate use of a dangerous instrument; or (4) [d]isplays what
14 appears to be a . . . firearm.” § 160.15.

15 The Career Offender Guideline enhances sentences for
16 defendants in federal court who satisfy certain criteria. *See* U. S.
17 Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n
18 Nov. 2014) (U.S.S.G.). A defendant is a career offender if (1) he is “at
19 least eighteen years old at the time [he] committed the instant
20 offense of conviction”; (2) his “instant offense of conviction is a
21 felony that is . . . a crime of violence”; and (3) he “has at least two
22 prior felony convictions of . . . a crime of violence.” *Id.*

1 At the time of Jones’ sentencing in 2015,³ as mentioned earlier,
2 there were two separate clauses defining “crime of violence.” *See*
3 § 4B1.2(a). The first definition, the “force clause,” specifies that a
4 crime of violence is a felony “that has as an element the use,
5 attempted use, or threatened use of physical force against the person
6 of another.” § 4B1.2(a)(1). The second clause enumerates several
7 offenses that qualify as crimes of violence—“burglary of a dwelling,
8 arson, [] extortion[, or] involves use of explosives”—before ending
9 with the “residual clause,” which specifies that a crime of violence
10 also includes any offense that “otherwise involves conduct that
11 presents a serious potential risk of physical injury to another.”
12 § 4B1.2(a)(2) (2015).

13 **II. The Categorical and Modified Categorical Approaches**

14 The Supreme Court has set forth the methodology for
15 determining whether a state conviction qualifies as a predicate
16 offense for a federal sentence enhancement. There are two possible
17 methods: the categorical approach and the modified categorical
18 approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

19 The categorical approach is confined to an examination of the
20 legal elements of the state criminal statute to determine whether

³ With only one exception not relevant here, district courts are to sentence defendants pursuant to the version of the Guidelines in effect on the date of sentencing. *See* 18 U.S.C. § 3553(a)(4)(A); *see also Beckles*, 137 S. Ct. at 890 & n.1. Accordingly, all references to the Guidelines are to the November 2014 version, which was in effect when Jones was sentenced on April 24, 2015.

1 they are identical to or narrower than the relevant federal statute.
2 *See id.* If so, a conviction under the state statute categorically
3 qualifies as a predicate offense. *See id.* However, if the state statute
4 criminalizes *any* conduct that would not fall within the scope of
5 either the force clause or the residual clause, a conviction under the
6 state statute is not categorically a crime of violence and cannot serve
7 as a predicate offense. *See id.*

8 Under the categorical approach we must confine our inquiry
9 to the legal elements of the state statute without at all considering
10 the facts of the underlying crime. The Supreme Court has set forth
11 two reasons for this. First, the text of the Career Offender Guideline,
12 like that of the ACCA, explicitly refers to convictions rather than
13 conduct. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). The
14 Career Offender Guideline directs the sentencing court to consider
15 whether the offender “has at least two prior felony convictions of . . .
16 a crime of violence,” U.S.S.G. § 4B1.1(a), which indicates that “the
17 sentencer should ask only about whether the defendant had been
18 convicted of crimes falling within certain categories, and not about
19 what the defendant had actually done,” *Mathis*, 136 S. Ct. at 2252
20 (internal quotation marks and citation omitted).

21 Second, by focusing upon the legal elements, rather than the
22 facts of the offense, the sentencing court “avoids unfairness to
23 defendants.” *Id.* at 2253. “Statements of ‘non-elemental fact’ in the

1 records of prior convictions [such as the precise manner in which the
2 crime was committed] are prone to error precisely because their
3 proof is unnecessary.” *Id.* (citation omitted). Defendants therefore
4 may have little incentive to ensure the correctness of those details of
5 earlier convictions that could later trigger the unforeseen career
6 offender enhancement.

7 Occasionally, however, a state statute will criminalize
8 multiple acts in the alternative. Where this occurs, courts may
9 employ what is known as the modified categorical approach. But the
10 Supreme Court has emphasized that the modified categorical
11 approach is available only where the state statute is “divisible” into
12 separate crimes. *Descamps*, 122 S. Ct. at 2281-82; *see also Flores v.*
13 *Holder*, 779 F.3d 159, 165-66 (2d Cir. 2015). A statute is divisible if it
14 “list[s] *elements* in the alternative, and thereby define[s] multiple
15 crimes” but is not divisible if it instead lists “various factual *means* of
16 committing a single element.” *Mathis*, 136 S. Ct. at 2249 (emphases
17 added).

18 When a statute is divisible, a court employing the modified
19 categorical approach can then peer into the record to see which of
20 the multiple crimes was implicated. But the court may discern this
21 only from “a limited class of documents (for example, the
22 indictment, jury instructions, or plea agreement and colloquy) to
23 determine what crime, with what elements, a defendant was

1 convicted of.” *Id.* Once that determination is made, the modified
2 categorical approach is at an end and the court must apply the
3 categorical approach to the legal elements of the appropriate
4 criminal offense. *Id.*

5 New York’s first-degree robbery statute is divisible and
6 therefore subject to the modified categorical approach. New York
7 defines robbery as “forcibly stea[ling] property.” N.Y. Penal Law §§
8 160.00–.15. There are four categories of first-degree robbery,
9 depending on whether: the perpetrator “(1) [c]auses serious physical
10 injury to any person who is not a participant in the crime; or (2) [i]s
11 armed with a deadly weapon; or (3) [u]ses or threatens the
12 immediate use of a dangerous instrument; or (4) [d]isplays what
13 appears to be a . . . firearm.” § 160.15; *see also Flores*, 779 F.3d at 166
14 (analyzing the divisibility of New York’s first-degree sexual abuse
15 statute).

16 In the typical case under the modified categorical approach
17 we would examine certain documents in the record to ascertain
18 which of the four crimes Jones committed. In this instance, however,
19 we are stymied and unable to employ the modified categorical
20 approach because no one has produced the record. Where this
21 occurs, however, we are not at a complete loss. We instead look to
22 “the least of [the] acts” proscribed by the statute to see if it qualifies
23 as a predicate offense for the career offender enhancement. *See*

1 *Johnson I*, 559 U.S. at 137. If so, Jones’s first-degree robbery
2 conviction can serve as a predicate offense for the enhancement
3 regardless of which first-degree robbery subpart provided the basis
4 for his conviction. *See id.*

5 Jones identifies the act of “forcibly stealing property” while
6 “armed with a deadly weapon” as being the “least of the acts” in the
7 statute, and we agree. *See* N.Y. Penal Law § 160.15(2). The question
8 we must answer, therefore, is whether a defendant who perpetrates
9 such an act commits a crime of violence within the meaning of the
10 residual clause of the Career Offender Guideline.

11 In the opinion we issued and then withdrew, prior to *Beckles*,
12 we addressed only the force clause. We did not concern ourselves
13 with whether Jones’ first-degree robbery conviction qualified as a
14 crime of violence under the Career Offender Guideline’s residual
15 clause because, consistent with the government’s concession on that
16 point, we had previously held that the residual clause was
17 unconstitutional in light of *Johnson II*. *See United States v. Welch*, 641
18 F. App’x 37, 42-43 (2d Cir. 2016) (summary order). Now that the
19 Supreme Court has held in *Beckles* that the Guidelines, regardless of
20 whatever other defects they may have, cannot be void for
21 vagueness, 137 S. Ct. at 890, we are free to assess whether New York
22 first-degree robbery categorically qualifies as a crime of violence
23 under the residual clause.

1 **III. Whether Jones’ Conviction Qualifies as a Crime of**
2 **Violence Under the Residual Clause**

3 We have little difficulty concluding that the “least of the acts”
4 of first-degree robbery satisfies the definition of the Guidelines’
5 residual clause. The least of the acts, both sides agree, is “forcibly
6 stealing property” while “armed with a deadly weapon.” The
7 residual clause provides that a crime of violence includes any
8 offense that “ involves conduct that presents a serious potential risk
9 of physical injury to another.” U.S.S.G. § 4B1.2(a)(2). Plainly, a
10 robber who forcibly steals property from a person or from his
11 immediate vicinity, while armed with a deadly weapon, engages in
12 “conduct that presents a serious potential risk of physical injury to
13 another.” *See id.*

14 If there were any misgiving on this score, it is removed by the
15 commentary provision to the Guidelines in effect at the time of
16 Jones’ sentencing, which specifically enumerated robbery as a crime
17 of violence.⁴ § 4B1.2 cmt. n.1.

⁴ The relevant commentary provision specified in full:

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as ‘crimes of violence’ if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives

1 Commentary provisions must be given “controlling weight”
2 unless they: (1) conflict with a federal statute, (2) violate the
3 Constitution, or (3) are plainly erroneous or inconsistent with the
4 Guidelines provisions they purport to interpret. *Stinson v. United*
5 *States*, 508 U.S. 36, 45 (1993). Jones has not identified any such flaws
6 nor do we discern any. Where the basis for categorizing a prior
7 conviction as a crime of violence is that the offense is specifically
8 enumerated as such in the Career Offender Guideline or its
9 commentary, we undertake the categorical approach by comparing
10 the state statute to the generic definition of the offense. *See United*
11 *States v. Walker*, 595 F.3d 441, 445-46 (2d Cir. 2010).

12 That there is consensus in the criminal law as to what
13 constitutes robbery thus further convinces us that the least of the
14 acts constituting New York first-degree robbery, *i.e.*, “forcibly
15 stealing property” while “armed with a deadly weapon,” is a crime
16 of violence under the residual clause. As we have noted, “all fifty
17 states define robbery, essentially, as the taking of property from
18 another person or from the immediate presence of another person
19 by force *or* by intimidation.” *Id.* (emphasis in original). Indeed, it
20 would seem that, pursuant to the commentary to the former residual

(including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

1 clause, robbery of *any degree* in New York qualifies as a crime of
2 violence.

3 Jones contends nonetheless that New York's robbery statute is
4 broader than the generic definition. He argues, specifically, that the
5 generic definition of robbery requires the use or threat of force in the
6 process of asserting dominion over the property that is the subject of
7 the offense, whereas the New York statute would be violated by a
8 robber who uses or threatens force after assuming dominion of the
9 property. We disagree.

10 The specific language of the New York robbery statute that
11 Jones points to is that "forcible stealing" consists of (1) the "use[] or
12 threat[] [of] immediate use of physical force upon another person"
13 (2) "in the course of committing a larceny" (3) for the purpose of
14 either "preventing or overcoming resistance to the taking of the
15 property *or to the retention thereof immediately after the taking*" or
16 "[c]ompelling the owner of such property or another person to
17 deliver up the property or to engage in other conduct which aids in
18 the commission of the larceny." N.Y. Penal Law § 160.00 (emphasis
19 added).

20 The generic definition of robbery, however, is broader than
21 Jones acknowledges. It is true that the common law definition
22 confines robbery to the use or threat of force before, or simultaneous
23 to, the assertion of dominion over property and therefore comports

1 with Jones' argument. *See, e.g.,* Wayne LaFave, 3 *Substantive Criminal*
2 *Law* § 20.3(e) (2d ed. Supp. 2016); Charles E. Torcia, 4 *Wharton's*
3 *Criminal Law* § 463 (15th ed. Supp. 2016). But a majority of states
4 have departed from the common law definition of robbery,
5 broadening it, either statutorily or by judicial fiat, to also prohibit
6 the peaceful assertion of dominion followed by the use or threat of
7 force. *See, e.g.,* LaFave § 20.3(e); Torcia § 463; *State v. Moore*, 274 S.C.
8 468, 480-81 (S.C. Ct. App. 2007) (collecting state statutes and judicial
9 decisions that have departed from the common law definition of
10 robbery). Indeed, the Model Penal Code, which we relied upon in
11 *United States v. Walker*, 595 F.3d at 446, is often cited as the authority
12 for expanding the definition of robbery in this manner, *see* LaFave
13 § 20.3(e), because it specifies that robbery includes conduct where
14 the initial use or threat of force occurs "in flight after the attempt or
15 commission [of the theft]," Model Penal Code § 222.1. As a result,
16 this broader definition has supplanted the common law meaning as
17 the generic definition of robbery. *See Taylor v. United States*, 495 U.S.
18 575, 598 (1990) (specifying that the "generic" definition of a crime is
19 the "sense in which the term is now used in the criminal codes of
20 most states").

21 Moreover, New York places two restrictions on the temporal
22 relationship between the underlying theft and the use or threat of
23 force that buttress the conclusion that its definition of robbery falls

1 within the generic definition of the offense: (1) force must be “in the
2 course of committing a larceny,” *i.e.*, a theft, and (2) force must occur
3 during “immediate flight” after the taking for purposes of retaining
4 the property. *See* N.Y. Penal Law § 160.00. Jones does not provide,
5 and we are not aware of, any authority that the New York statute
6 criminalizes the use of force after the robber has successfully carried
7 the property away and reached a place of temporary safety.

8 For all of the foregoing reasons, we easily conclude that New
9 York’s definition of robbery necessarily falls within the scope of
10 generic robbery as set forth in the commentary to U.S.S.G. § 4B1.2(a).
11 Because Jones’ argument that first-degree robbery is not necessarily
12 a crime of violence within the meaning of U.S.S.G. § 4B1.2(a) under
13 the categorical approach is without merit, the district court did not
14 commit error, much less plain error, in sentencing Jones as a career
15 offender.

16 **IV. The Substantive Reasonableness of Jones’ Sentence**

17 Finally, we reject Jones’ argument that his sentence of 180
18 months is substantively unreasonable. In assessing the substantive
19 reasonableness of a sentence for abuse of discretion, we review
20 questions of law *de novo* and questions of fact for clear error. *United*
21 *States v. Bonilla*, 618 F.3d 102, 108 (2d Cir. 2010) (citation omitted).
22 We may not substitute our own judgment for that of the district
23 court and can find substantively unreasonable only those sentences

1 that are so “shockingly high, shockingly low, or otherwise
2 unsupportable as a matter of law” that affirming them would
3 “damage the administration of justice.” *United States v. Rigas*, 583
4 F.3d 108, 123 (2d Cir. 2009). In the “overwhelming majority of
5 cases,” a sentence within the Guidelines range will “fall comfortably
6 within the broad range of sentences that would be reasonable.”
7 *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (citation
8 omitted).

9 Jones’ Guidelines range was 210 months to 262 months, the
10 top of which was lowered to 240 months, the statutory maximum for
11 assault of a federal officer. The court imposed a sentence of 180
12 months, or fifteen years, which, while substantial, was considerably
13 below the Guidelines range.

14 The primary thrust of Jones’ argument is that a fifteen-year
15 sentence is substantively unreasonable for an assault of a federal
16 officer that consists solely of biting the victim’s finger and in which
17 the injury was not permanent. Jones’ argument, however, misses the
18 mark. The district court specified a combination of reasons for the
19 fifteen-year sentence, including: (1) the need to encourage respect
20 for the law and cooperation with law enforcement officials who are
21 attempting to carry out their lawful duties; (2) Jones’ substantial
22 prior criminal history, consisting of seven prior convictions, two of
23 which, in addition to the assault of the officer, resulted in him being

1 designated a career offender; and (3) Jones' substantial history of
2 misconduct while incarcerated, including twenty-seven occasions
3 upon which he was disciplined.

4 Jones attempts to compare his case to instances where
5 defendants were convicted of violating the same statute, received
6 lower sentences, and arguably committed more egregious conduct.
7 That defendants convicted of similar or even more serious conduct
8 received lower sentences, however, does not render Jones' sentence
9 substantively unreasonable. Plainly, the district court also relied
10 upon Jones' criminal and prison history, including his career
11 offender status, which distinguishes this case from those to which he
12 refers. Under these circumstances, we cannot say that Jones'
13 sentence was substantively unreasonable.

14 **CONCLUSION**

15 For the reasons stated above, we AFFIRM the sentence
16 imposed by the district court.

1 GUIDO CALABRESI, *Circuit Judge*, with whom Peter W. Hall, *Circuit Judge*, joins,
2 concurring:

3 I believe Judge Walker's opinion states the law correctly, and I concur in
4 its reasoning and in its result. I write separately because that result, while
5 mandated by the law, seems to me to be highly unjust, and little short of absurd.
6 To explain why I think so, let me give the facts and procedural history of this case
7 in a way that is slightly different from the majority opinion—which, however, is
8 also correct, and in which, as noted above, I join, fully.

9 A. Background

10 Corey Jones is a now-39-year-old man with an I.Q. of 69.¹ While at a
11 residential reentry center ("RRC"), finishing a nearly eight-year sentence for
12 felony possession of a firearm, (he was five months' shy of his scheduled
13 release), Jones allegedly grumbled a threat and was insolent to a staff member.
14 The staff members called the federal marshals to take custody of Jones, who
15 resisted arrest. The marshals conceded that, during his resistance, Jones never
16 stepped towards, kicked, or punched them. Nonetheless, as they were trying to
17 lower his head to the ground, the hand of the marshal who was apprehending
18 Jones slipped down Jones' face, and Jones bit him, causing the finger to bleed.
19 Shortly thereafter, Jones said, "I give," and was arrested and taken away. The
20 marshal provided a sworn affidavit indicating that he suffered no loss because of
21 the injury and that he did not request damages. At trial, the bite was described
22 by the prosecutor as "not the most serious wound you'll ever see."

¹ This I.Q. score is considered to be in the "mentally deficient" range of intellectual functioning, below the generally accepted range for "intellectual disability," which is an I.Q. score of approximately 70-75. See Dist. Ct. Dkt. 46-1 at 5, Jones Sentencing Memorandum, Exhibit A, "Sentencing Memo Letter of Dr. Sanford L. Drob", at 5.

1 Pursuant to a single-count indictment for assaulting a federal officer, Jones
2 was found guilty in violation of 18 U.S.C. § 111(a)(1)–(b). Under the Guidelines
3 as they were then calculated, and as described in Judge Walker’s opinion, Jones
4 faced a sentence of between 210–240 months, (seventeen-and-one-half to twenty
5 years), with the high end being the statutory maximum. This calculation was
6 based on Jones’ designation as a career offender, a status that was triggered by
7 two earlier convictions: (i) an assault in which the then twenty-year-old Jones
8 shot a man in the leg, which later needed to be amputated, and (ii) a conviction
9 for first-degree robbery in New York, a crime Jones committed when he was
10 sixteen years old.²

11 The district court, applying what it believed was the law of this circuit as it
12 stood at that time, found that Jones’ robbery conviction constituted a “crime of
13 violence” under the categorical approach to the Sentencing Guidelines. *See*
14 *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (holding that, under the
15 law of New York, the crime of attempted third-degree robbery constitutes a
16 “crime of violence” for the purposes of the “force clause” of the Sentencing
17 Guidelines), *abrogated by Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*);
18 *see also United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012) (per curiam).³ Given this

² A defendant’s youthful offender adjudications are, for the purposes of the relevant Guidelines calculations, deemed “‘adult convictions’ [where the defendant] (1) pleaded guilty to both felony offenses in an adult forum and (2) received and served a sentence of over one year in an adult prison for each offense.” *See United States v. Jones*, 415 F.3d 256, 264 (2d Cir. 2005).

³ A crime of violence, along with other factors, serves as a predicate requiring a district court to sentence a defendant as a “career offender” subject to an increased sentencing spectrum. *See* U.S. Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n Nov. 2014) (U.S.S.G.) (defining “career offender” as a defendant who is (1) “at least eighteen years old at the time [he] committed the instant offense of conviction;” (2) his “instant offense of

1 holding, and because Jones' prior conviction for assault certainly constituted a
2 crime of violence, the district court determined that the career offender status
3 applied. Absent Jones' designation as a career offender, his Guidelines sentence

conviction is a felony that is . . . a crime of violence;" and (3) he "has at least two prior felony convictions of . . . a crime of violence.") .

As described in Judge Walker's opinion, there were, at the time of Jones' sentencing, two clauses in the Sentencing Guidelines, either of which could define a "crime of violence." These two clauses are referred to as the "force clause," and the "residual clause." The "force clause" specifies that a crime of violence is a felony 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(a)(1). The "residual clause" comes at the end of a second set of enumerated offenses, and provides that a crime of violence also includes any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a)(2).

In *Spencer*, we had held that, under the force clause, third-degree robbery, as defined by New York law, was a crime of violence. After the Supreme Court's analysis of the force clause in *Johnson I*, however, we held that battery, as defined by the state of Florida, was not a crime of violence. *Reyes*, 691 F.3d 453. In *Reyes*, we noted *Johnson I*'s dictate that, to constitute a "crime of violence" under the categorical approach, a crime must involve the "use of physical force," and found that battery did not meet that definition. *Id.* at 460. Even after *Spencer*, it was an open question whether first-degree robbery was a crime of violence. After *Reyes*, that question depended on whether the use of physical force was, indeed, present in the New York definition of that crime.

Judge Garaufis held that the reasoning of *Spencer* meant that first degree robbery was a crime of violence. In our former, withdrawn opinion, we held, for reasons similar to those given in *Reyes*, that first-degree robbery was not. *Cf.*, *United States v. Yates*, No. 16-3997, 2017 WL 3402084 (6thCir. Aug 9, 2017) (finding in analogous circumstances that the force clause does not apply). All of that analysis, however, was with respect to the force clause, not the co-extant – and here essential – residual clause.

1 range would have been between 36 and 48 months (or three to four years),
2 instead of the range of 210-240 months, or the seventeen-and-one-half years to
3 twenty years that the court deemed applicable.

4 Departing downward significantly from the Guidelines, Judge Garaufis
5 sentenced Jones to fifteen years.

6 **B. Doctrinal Developments and Impact on Sentencing**

7 Judge Garaufis' opinion rested on his interpretation of the application of
8 the force clause to New York State's definition of robbery. Because Judge
9 Garaufis was of the view that first-degree robbery was a crime of violence under
10 the force clause even after *Johnson I*, Judge Garaufis did not address the
11 additional possible determinant of a crime of violence now at issue before us: the
12 "residual clause."

13 After Jones' initial sentencing, but before we heard Jones' appeal, the
14 Supreme Court found language in the Armed Career Criminal Act ("ACCA")
15 which was identical to the language used in the residual clause of the
16 Guidelines—the lynchpin clause undergirding the authority of Jones' current
17 sentence—to be unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551,
18 2557 (2015) (*Johnson II*). Subsequent to *Johnson II*, most federal courts of appeals
19 to decide the issue found that, given the Supreme Court's decision, the residual
20 clause was also unconstitutionally vague. See *United States v. Pawlak*, 822 F.3d
21 902, 907-11 (6th Cir. 2016); *United States v. Hurlburt*, 835 F.3d 715, 725 (7th Cir.
22 2016); *United States v. Calabretta*, 831 F.3d 128, 137 (3d Cir. 2016); *United States v.*
23 *Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015); but see *United States v. Matchett*, 802
24 F.3d 1185, 1193-96 (11th Cir. 2015).

25 As a result—with the application of the force clause to Jones in doubt as a
26 result of *Johnson I*, and with the residual clause struck down across several

1 circuits as a result of *Johnson II*—any number of defendants were found *not* to
2 have committed crimes of violence, either as a matter of first instance, or on
3 appeal, for purposes of determining their career offender status under the
4 Guidelines. Accordingly, they were resentenced (or sentenced in the first
5 instance) to lower sentences. We are told the government is not challenging these
6 lower sentences.

7 **C. Removal of the Residual Clause from the Guidelines**

8 The Sentencing Commission, in light of the decisions of several courts of
9 appeals grounded on the Supreme Court’s decision in *Johnson II*, revised the
10 Guidelines and removed the residual clause as a basis for future sentencing. (*See*
11 Majority Opinion, n.1).

12 **D. Procedural History in this Court**

13 We heard Jones’ appeal after *Johnson II*, and we held: (i) that, under *Johnson*
14 *I*, the force clause was not applicable to him; (ii) (like several of our sister circuits)
15 that the other possible ground for Jones’ career offender status, the residual
16 clause, was unconstitutional, pursuant to *Johnson II*; and, (iii) that, as a result,
17 Jones’ robbery conviction did not qualify as a predicate violent offense under the
18 Guidelines. We therefore ordered Jones’ sentence vacated and sent the case back
19 for resentencing. We expressly instructed the district court that, in resentencing
20 Jones, it should not treat him as a career offender.

21 Before the district court resentenced Jones, however, the Supreme Court
22 granted *certiorari* in *Beckles v. United States*, 137 S. Ct. 886 (2017), to consider
23 whether the language that, in *Johnson II* it had deemed unconstitutionally vague
24 *in a statute*, was also void for vagueness when the identical language was
25 employed in the Guidelines. In view of the Supreme Court’s action, we withdrew
26 our opinion, and suspended resentencing pending the *Beckles* decision.

1 Interestingly, at least one district court, in an independent case, had already
2 granted a motion for resentencing in light of our now-recalled decision. *Miles v.*
3 *United States*, No. 11-cr-581, 2016 WL 4367958 (S.D.N.Y. Aug 15, 2016).

4 In *Beckles*, the Supreme Court held the relevant clause of the Guidelines *not*
5 to be unconstitutionally vague.⁴ Hence, the clause remained applicable to cases
6 like the one before us.

7 As a result, we are bound to consider Jones' earlier convictions on the basis
8 of the revived (but no longer extant, since it has been removed by the Sentencing
9 Commission) residual clause. Under that clause, we today correctly find that
10 Jones' robbery conviction constituted a crime of violence and, as such, served as
11 a predicate offense which—together with his assault convictions—categorically
12 renders Jones a career offender. He was, therefore, correctly subject to the
13 sentencing guidelines of 210–240 months on the basis of which the district
14 court—albeit, perhaps incorrectly relying on the force clause rather than the
15 residual clause—had imposed his original sentence of fifteen years.

16 Because that sentence was correctly based on the Guidelines as we now
17 hold they stood when the district court sentenced Jones, we now affirm that
18 sentence. We also hold that, given the applicable Guidelines, the sentence

⁴ The Supreme Court held as it did based on the history of discretion in sentencing before the Guidelines and the discretionary nature of the Guidelines themselves. My concern with our holding today does not dispute the correctness of the Court's decision. That the Court's decision was unexpected, however, cannot be doubted. Between *Johnson II* and *Beckles*, courts of appeals, prosecutors, and the Sentencing Commission took actions which assumed a different result. Indeed, the Justice Department had taken the position that *Johnson II* governed *Beckles*, and the Supreme Court had to appoint special counsel to present the opposite view. It is that unexpectedness and what happened between *Johnson II* and *Beckles* that is, in significant part, responsible for making today's result so troubling to me.

1 imposed—which departed significantly downward from these applicable
2 Guidelines—was not substantively unreasonable.

3 E. DISCUSSION

4 I agree that the sentence is not substantively unreasonable; but I believe
5 the result to be close to absurd.

6 Jones was about to be released when he committed a crime whose full
7 nature and significance the district court is better able to evaluate than we. The
8 district court decided on a fifteen-year sentence. Perhaps this sentence was based
9 on its view of Jones’ prior criminal activity, and on Jones’ dangerousness.
10 Perhaps the sentence, departing downward notably from the Guidelines, was,
11 however, imposed because the district court believed that, given those
12 Guidelines, it had gone down as much as it felt it reasonably could.

13 The fact is that we do not know what sentence the district court would
14 have deemed appropriate if Jones had been subject to different Guidelines. Had
15 our opinion come down slightly earlier, as did those of most other circuits
16 dealing with similar issues, Jones would have been resentenced pursuant to a
17 substantively lower Guidelines range. We would, then, know what sentence
18 would have seemed appropriate to the district court in those circumstances. Had
19 that sentence been lower—as it apparently was in any number of other cases in
20 other circuits—the Government apparently would not have objected to it. Had
21 Jones committed his crime under the currently existing Guidelines, (*i.e.*, in which
22 the residual clause has been removed by the Sentencing Commission), and
23 assuming that we would have read the force clause not to apply (as we did in
24 our earlier, now-retracted opinion), the district court would have had, again, the
25 opportunity to gauge Jones’ degree of dangerousness under a very different set
26 of Guidelines than those we, today, finally conclude it correctly applied at
27 sentencing.

1 Because we (advisedly) withdrew our earlier opinion in light of the
2 Supreme Court’s grant of *certiorari* in *Beckles*, and because of the Supreme Court’s
3 ultimate decision in *Beckles*, I agree that we now are bound to affirm Jones’
4 original sentence. This means that, as a result of timing quirks (his appeal to us
5 was slightly too late, leading to our decision to pull our earlier opinion; his
6 crimes too early so that the now-removed, but no longer unconstitutional,
7 residual clause was in effect when he committed them), Jones receives a very,
8 very high sentence in contrast with almost every similarly situated defendant.

9 What is more—and this may be the true source of my sense of absurdity—
10 there appears to be no way in which we can ask the district court to reconsider
11 the sentence it ordered in view of the happenstances that have worked against
12 Jones, *and* in view of its assessment of Jones’ crimes and of its downward
13 departure.

14 Were this a civil case, there would be any number of ways of letting the
15 lower court revisit matters.⁵ But, as far as I have been able to discern, there is no
16 way for us to send this back to the district court and ask it to tell us what I
17 believe should determine Jones’ sentence:

18 In the light of sentences that other similarly guilty defendants have
19 received, and in the light of Jones’ own situation, *both of which you, as*
20 *a district judge, are best suited to determine*, what is the sentence that
21 you deem appropriate in this case?

⁵ For example: Federal Rule of Civil Procedure 60(b)(6) provides a court with the power to entertain a motion to relieve a party from a final judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). To similar effect, Rule 60(d) states that a court has the power to “entertain an independent action to relieve a party from a judgment, order, or proceeding.” *Id.* 60(d)(1).

1 I find our inability to learn this to be both absurd and deeply troubling. I
2 believe our affirmance is correct, and that we can do no other. I hope, however,
3 that somewhere, somehow, there exists a means of determining what would, in
4 fact, be an appropriate sentence for Jones.