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In the  
United States Court of Appeals  
For the Second Circuit

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AUGUST TERM, 2015

ARGUED: APRIL 27, 2016  
DECIDED: SEPTEMBER 11, 2017  
AMENDED: OCTOBER 5, 2017

No. 15-1518-cr

UNITED STATES OF AMERICA,  
*Appellee,*

*v.*

COREY JONES,  
*Defendant-Appellant.*

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

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Before: WALKER, CALABRESI, and HALL, *Circuit Judges.*

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Defendant Corey Jones appeals from a sentence entered in the  
United States District Court for the Eastern District of New York

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

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

1 therefore AFFIRM the sentence imposed by the district court and  
2 REMAND for further consideration as may be just under the  
3 circumstances.

4 Judge CALABRESI and Judge HALL concur in the opinion of the  
5 Court. Judge CALABRESI files a separate concurring opinion, which  
6 Judge HALL joins.

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BRIDGET M. ROHDE, Acting Assistant United States Attorney (Amy Busa, Assistant United States Attorney, *on the brief*), for Acting United States Attorney for the Eastern District of New York, *for Appellee*.

MATTHEW B. LARSEN, Assistant Federal Defender, Federal Public Defenders of New York, New York, NY, *for Defendant-Appellant*.

\_\_\_\_\_

17 JOHN M. WALKER, JR., *Circuit Judge*:

18 Defendant Corey Jones appeals from a sentence entered in the  
19 United States District Court for the Eastern District of New York  
20 (Garaufis, J.) following a jury trial conviction for assaulting a federal  
21 officer in violation of 18 U.S.C. § 111. He was sentenced as a career  
22 offender principally to 180 months in prison to be followed by three  
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1 of the Career Offender Guideline, U.S.S.G. §§ 4B1.1 and 4B1.2, and  
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3 conviction for first-degree robbery would automatically serve as one  
4 of the predicate offenses for a career offender designation.

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9 reached this conclusion notwithstanding the government’s  
10 concession to the contrary in cases around the country that the  
11 residual clause, like the identically worded provision of the Armed  
12 Career Criminal Act (“ACCA”), was void for vagueness. In light of  
13 *Beckles*, we find that New York first-degree robbery categorically  
14 qualifies as a crime of violence under the residual clause and  
15 therefore need not address Jones’ argument based on the force  
16 clause. We also find that his sentence is substantively reasonable and  
17 therefore AFFIRM the sentence imposed by the district court and  
18 REMAND for further consideration as may be just under the  
19 circumstances.

20 Judge CALABRESI and Judge HALL concur in the opinion of the  
21 Court. Judge CALABRESI files a separate concurring opinion, which  
22 Judge HALL joins.

## BACKGROUND

1  
2 On June 21, 2013, Corey Jones was finishing a ninety-two  
3 month federal sentence for unlawful gun possession in a halfway  
4 house. Jones verbally threatened a staff member, a violation of the  
5 rules of the halfway house, and thereby was remanded to the  
6 custody of the Bureau of Prisons. Two Deputy U.S. Marshals arrived  
7 to take Jones to prison, but Jones resisted the Marshals' efforts to  
8 take him into custody. During the ensuing altercation, Jones bit the  
9 finger of one of the Marshals, who suffered puncture wounds,  
10 necessitating antibiotics and a tetanus vaccine at a hospital. This  
11 assault, it turned out, had grave consequences for Jones who was  
12 now in all likelihood a "career offender" subject to a greatly  
13 enhanced sentence.

14 A jury convicted Jones of assaulting a federal officer in  
15 violation of 18 U.S.C. § 111. In the pre-sentence report, the probation  
16 officer calculated a relatively modest base offense level of fifteen for  
17 the assault. But the probation officer then determined that Jones was  
18 a career offender pursuant to the Career Offender Guideline  
19 because, in addition to (1) being over eighteen years of age when he  
20 committed the assault and (2) the assault being a crime of violence,  
21 (3) he had at least two prior felony convictions of a crime of violence.  
22 According to the report, Jones' previous two convictions in New  
23 York for first-degree robbery and second-degree assault satisfied the

1 third element of the test. The probation officer, following U.S.S.G.  
2 § 4B1.1, increased the offense level to thirty-two, which, when  
3 combined with Jones' criminal history category of VI, resulted in a  
4 Guidelines range of 210 to 262 months of incarceration. Because the  
5 statutory maximum for assault is twenty years, the effective  
6 Guidelines range was 210 to 240 months.

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

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

20 *Beckles* addressed the constitutionality of the Career Offender  
21 Guideline's residual clause, which was in effect at the time of Jones'  
22 sentencing but has since been removed and replaced with new

1 language.<sup>1</sup> Following *Johnson v. United States*, 135 S. Ct. 2551, 2557  
2 (2015) (*Johnson II*), which held that the residual clause of the ACCA  
3 was unconstitutionally void for vagueness, there existed a general  
4 belief that the identically worded residual clause of the Career  
5 Offender Guideline was similarly unconstitutional, as the  
6 government had consistently maintained. In *Beckles*, however, the  
7 Court held that the residual clause of the Career Offender Guideline  
8 is immune from void-for-vagueness challenges, as are the  
9 Guidelines generally. *Beckles*, 137 S. Ct. at 892. After *Beckles*, we  
10 invited the parties in this case to provide supplemental briefing as to  
11 whether first-degree robbery, as defined in New York, categorically  
12 qualifies as a crime of violence under the previously codified  
13 residual clause of the Career Offender Guideline.<sup>2</sup> We now address  
14 that question.

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<sup>1</sup> 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. The Sentencing Commission noted disagreements among courts of appeals regarding whether the clause was unconstitutionally vague in light of *Johnson II* and whether the Guidelines were susceptible to a vagueness challenge. U.S. Sentencing Comm’n, Amendments to the Sentencing Guidelines 4–5 (Jan. 21, 2016), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121\\_Amendments\\_0.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20160121_Amendments_0.pdf). The Commission, without taking a position on the constitutionality of the residual clause, “determined that the residual clause . . . implicates many of the same concerns cited by the Supreme Court in [*Johnson II*]” and removed it “as a matter of policy.” *Id.* at 5. The Commission suggested that the amendment would alleviate application difficulties associated with the clause and some of the ongoing litigation and uncertainty resulting from *Johnson II*. *Id.*

<sup>2</sup> 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).

## DISCUSSION

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

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



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

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

8           A defendant commits robbery in New York when he “forcibly  
9 steals property,” which the statute defines as “a larceny” involving  
10 the use or threatened “immediate use of physical force upon another  
11 person.” N.Y. Penal Law § 160.00. The various degrees of robbery,  
12 which carry different penalties, turn upon the presence of particular  
13 aggravating factors. *Compare* § 160.05 (defining third-degree  
14 robbery), *with* § 160.10 (defining second-degree robbery), *and with*  
15 § 160.15 (defining first-degree robbery). First-degree robbery occurs  
16 when a defendant commits robbery and during the course of the  
17 crime or his immediate flight either “(1) [c]auses serious physical  
18 injury to any person who is not a participant in the crime; or (2) [i]s  
19 armed with a deadly weapon; or (3) [u]ses or threatens the  
20 immediate use of a dangerous instrument; or (4) [d]isplays what  
21 appears to be a . . . firearm.” § 160.15.

22           The Career Offender Guideline enhances sentences for  
23 defendants in federal court who satisfy certain criteria. *See* U. S.

1 Sentencing Guidelines Manual § 4B1.1(a) (U.S. Sentencing Comm’n  
2 Nov. 2014) (U.S.S.G.). A defendant is a career offender if (1) he is “at  
3 least eighteen years old at the time [he] committed the instant  
4 offense of conviction”; (2) his “instant offense of conviction is a  
5 felony that is . . . a crime of violence”; and (3) he “has at least two  
6 prior felony convictions of . . . a crime of violence.” *Id.*

7 At the time of Jones’ sentencing in 2015,<sup>3</sup> as mentioned earlier,  
8 there were two separate clauses defining “crime of violence.” *See*  
9 § 4B1.2(a). The first definition, the “force clause,” specifies that a  
10 crime of violence is a felony “that has as an element the use,  
11 attempted use, or threatened use of physical force against the person  
12 of another.” § 4B1.2(a)(1). The second clause enumerates several  
13 offenses that qualify as crimes of violence—“burglary of a dwelling,  
14 arson, [] extortion[, or] involves use of explosives”—before ending  
15 with the “residual clause,” which specifies that a crime of violence  
16 also includes any offense that “otherwise involves conduct that  
17 presents a serious potential risk of physical injury to another.”  
18 § 4B1.2(a)(2) (2015).

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<sup>3</sup> 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           **II. The Categorical and Modified Categorical Approaches**

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

7           The categorical approach is confined to an examination of the  
8 legal elements of the state criminal statute to determine whether  
9 they are identical to or narrower than the relevant federal statute.  
10 *See id.* If so, a conviction under the state statute categorically  
11 qualifies as a predicate offense. *See id.* However, if the state statute  
12 criminalizes *any* conduct that would not fall within the scope of  
13 either the force clause or the residual clause, a conviction under the  
14 state statute is not categorically a crime of violence and cannot serve  
15 as a predicate offense. *See id.*

16           Under the categorical approach we must confine our inquiry  
17 to the legal elements of the state statute without at all considering  
18 the facts of the underlying crime. The Supreme Court has set forth  
19 two reasons for this. First, the text of the Career Offender Guideline,  
20 like that of the ACCA, explicitly refers to convictions rather than  
21 conduct. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). The  
22 Career Offender Guideline directs the sentencing court to consider  
23 whether the offender “has at least two prior felony convictions of . . .

1 a crime of violence,” U.S.S.G. § 4B1.1(a), which indicates that “the  
2 sentencer should ask only about whether the defendant had been  
3 convicted of crimes falling within certain categories, and not about  
4 what the defendant had actually done,” *Mathis*, 136 S. Ct. at 2252  
5 (internal quotation marks and citation omitted).

6 Second, by focusing upon the legal elements, rather than the  
7 facts of the offense, the sentencing court “avoids unfairness to  
8 defendants.” *Id.* at 2253. “Statements of ‘non-elemental fact’ in the  
9 records of prior convictions [such as the precise manner in which the  
10 crime was committed] are prone to error precisely because their  
11 proof is unnecessary.” *Id.* (citation omitted). Defendants therefore  
12 may have little incentive to ensure the correctness of those details of  
13 earlier convictions that could later trigger the unforeseen career  
14 offender enhancement.

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

1 committing a single element.” *Mathis*, 136 S. Ct. at 2249 (emphases  
2 added).

3         When a statute is divisible, a court employing the modified  
4 categorical approach can then peer into the record to see which of  
5 the multiple crimes was implicated. But the court may discern this  
6 only from “a limited class of documents (for example, the  
7 indictment, jury instructions, or plea agreement and colloquy) to  
8 determine what crime, with what elements, a defendant was  
9 convicted of.” *Id.* Once that determination is made, the modified  
10 categorical approach is at an end and the court must apply the  
11 categorical approach to the legal elements of the appropriate  
12 criminal offense. *Id.*

13         New York’s first-degree robbery statute is divisible and  
14 therefore subject to the modified categorical approach. New York  
15 defines robbery as “forcibly stea[ling] property.” N.Y. Penal Law §§  
16 160.00–.15. There are four categories of first-degree robbery,  
17 depending on whether: the perpetrator “(1) [c]auses serious physical  
18 injury to any person who is not a participant in the crime; or (2) [i]s  
19 armed with a deadly weapon; or (3) [u]ses or threatens the  
20 immediate use of a dangerous instrument; or (4) [d]isplays what  
21 appears to be a . . . firearm.” § 160.15; *see also Flores*, 779 F.3d at 166  
22 (analyzing the divisibility of New York’s first-degree sexual abuse  
23 statute).

1           In the typical case under the modified categorical approach  
2 we would examine certain documents in the record to ascertain  
3 which of the four crimes Jones committed. In this instance, however,  
4 we are stymied and unable to employ the modified categorical  
5 approach because no one has produced the record. Where this  
6 occurs, however, we are not at a complete loss. We instead look to  
7 “the least of [the] acts” proscribed by the statute to see if it qualifies  
8 as a predicate offense for the career offender enhancement. *See*  
9 *Johnson I*, 559 U.S. at 137. If so, Jones’s first-degree robbery  
10 conviction can serve as a predicate offense for the enhancement  
11 regardless of which first-degree robbery subpart provided the basis  
12 for his conviction. *See id.*

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

19           In the opinion we issued and then withdrew, prior to *Beckles*,  
20 we addressed only the force clause. We did not concern ourselves  
21 with whether Jones’ first-degree robbery conviction qualified as a  
22 crime of violence under the Career Offender Guideline’s residual  
23 clause because, consistent with the government’s concession on that

1 point, we had previously held that the residual clause was  
2 unconstitutional in light of *Johnson II*. See *United States v. Welch*, 641  
3 F. App'x 37, 42-43 (2d Cir. 2016) (summary order). Now that the  
4 Supreme Court has held in *Beckles* that the Guidelines, regardless of  
5 whatever other defects they may have, cannot be void for  
6 vagueness, 137 S. Ct. at 890, we are free to assess whether New York  
7 first-degree robbery categorically qualifies as a crime of violence  
8 under the residual clause.

9 **III. Whether Jones' Conviction Qualifies as a Crime of**  
10 **Violence Under the Residual Clause**

11 We have little difficulty concluding that the "least of the acts"  
12 of first-degree robbery satisfies the definition of the Guidelines'  
13 residual clause. The least of the acts, both sides agree, is "forcibly  
14 stealing property" while "armed with a deadly weapon." The  
15 residual clause provides that a crime of violence includes any  
16 offense that " involves conduct that presents a serious potential risk  
17 of physical injury to another." U.S.S.G. § 4B1.2(a)(2). Plainly, a  
18 robber who forcibly steals property from a person or from his  
19 immediate vicinity, while armed with a deadly weapon, engages in  
20 "conduct that presents a serious potential risk of physical injury to  
21 another." See *id.*

22 If there were any misgiving on this score, it is removed by the  
23 commentary provision to the Guidelines in effect at the time of

1 Jones' sentencing, which specifically enumerated robbery as a crime  
2 of violence.<sup>4</sup> § 4B1.2 cmt. n.1.

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

14       That there is consensus in the criminal law as to what  
15 constitutes robbery thus further convinces us that the least of the  
16 acts constituting New York first-degree robbery, *i.e.*, "forcibly

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<sup>4</sup> 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 (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 cmt. n.1 (2015).



1 stealing property” while “armed with a deadly weapon,” is a crime  
2 of violence under the residual clause. As we have noted, “all fifty  
3 states define robbery, essentially, as the taking of property from  
4 another person or from the immediate presence of another person  
5 by force *or* by intimidation.” *Id.* (emphasis in original). Indeed, it  
6 would seem that, pursuant to the commentary to the former residual  
7 clause, robbery of *any degree* in New York qualifies as a crime of  
8 violence.

9 Jones contends nonetheless that New York’s robbery statute is  
10 broader than the generic definition. He argues, specifically, that the  
11 generic definition of robbery requires the use or threat of force in the  
12 process of asserting dominion over the property that is the subject of  
13 the offense, whereas the New York statute would be violated by a  
14 robber who uses or threatens force after assuming dominion of the  
15 property. We disagree.

16 The specific language of the New York robbery statute that  
17 Jones points to is that “forcible stealing” consists of (1) the “use[] or  
18 threat[] [of] immediate use of physical force upon another person”  
19 (2) “in the course of committing a larceny” (3) for the purpose of  
20 either “preventing or overcoming resistance to the taking of the  
21 property *or to the retention thereof immediately after the taking*” or  
22 “[c]ompelling the owner of such property or another person to  
23 deliver up the property or to engage in other conduct which aids in

1 the commission of the larceny.” N.Y. Penal Law § 160.00 (emphasis  
2 added).

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

1 575, 598 (1990) (specifying that the “generic” definition of a crime is  
2 the “sense in which the term is now used in the criminal codes of  
3 most states”).

4 Moreover, New York places two restrictions on the temporal  
5 relationship between the underlying theft and the use or threat of  
6 force that buttress the conclusion that its definition of robbery falls  
7 within the generic definition of the offense: (1) force must be “in the  
8 course of committing a larceny,” *i.e.*, a theft, and (2) force must occur  
9 during “immediate flight” after the taking for purposes of retaining  
10 the property. *See* N.Y. Penal Law § 160.00. Jones does not provide,  
11 and we are not aware of, any authority that the New York statute  
12 criminalizes the use of force after the robber has successfully carried  
13 the property away and reached a place of temporary safety.

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

#### 1           **IV.    The Substantive Reasonableness of Jones' Sentence**

2           Finally, we reject Jones' argument that his sentence of 180  
3 months is substantively unreasonable. In assessing the substantive  
4 reasonableness of a sentence for abuse of discretion, we review  
5 questions of law *de novo* and questions of fact for clear error. *United*  
6 *States v. Bonilla*, 618 F.3d 102, 108 (2d Cir. 2010) (citation omitted).  
7 We may not substitute our own judgment for that of the district  
8 court and can find substantively unreasonable only those sentences  
9 that are so "shockingly high, shockingly low, or otherwise  
10 unsupportable as a matter of law" that affirming them would  
11 "damage the administration of justice." *United States v. Rigas*, 583  
12 F.3d 108, 123 (2d Cir. 2009). In the "overwhelming majority of  
13 cases," a sentence within the Guidelines range will "fall comfortably  
14 within the broad range of sentences that would be reasonable."  
15 *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (citation  
16 omitted).

17           Jones' Guidelines range was 210 months to 262 months, the  
18 top of which was lowered to 240 months, the statutory maximum for  
19 assault of a federal officer. The court imposed a sentence of 180  
20 months, or fifteen years, which, while substantial, was considerably  
21 below the Guidelines range.

22           The primary thrust of Jones' argument is that a fifteen-year  
23 sentence is substantively unreasonable for an assault of a federal

1 officer that consists solely of biting the victim's finger and in which  
2 the injury was not permanent. Jones' argument, however, misses the  
3 mark. The district court specified a combination of reasons for the  
4 fifteen-year sentence, including: (1) the need to encourage respect  
5 for the law and cooperation with law enforcement officials who are  
6 attempting to carry out their lawful duties; (2) Jones' substantial  
7 prior criminal history, consisting of seven prior convictions, two of  
8 which, in addition to the assault of the officer, resulted in him being  
9 designated a career offender; and (3) Jones' substantial history of  
10 misconduct while incarcerated, including twenty-seven occasions  
11 upon which he was disciplined.

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

1

**CONCLUSION**

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For the reasons stated above, we AFFIRM the sentence imposed by the district court and REMAND for further consideration as may be just under the circumstances.

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.<sup>1</sup> 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

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<sup>1</sup> 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 Jones slipped down Jones' face, and Jones bit him, causing the finger to bleed.  
2 Shortly thereafter, Jones said, "I give," and was arrested and taken away. The  
3 marshal provided a sworn affidavit indicating that he suffered no loss because of  
4 the injury and that he did not request damages. At trial, the bite was described  
5 by the prosecutor as "not the most serious wound you'll ever see."

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

16 The district court, applying what it believed was the law of this circuit as it  
17 stood at that time, found that Jones' robbery conviction constituted a "crime of

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<sup>2</sup> 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).



1 violence” under the categorical approach to the Sentencing Guidelines. *See*  
2 *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (holding that, under the  
3 law of New York, the crime of attempted third-degree robbery constitutes a  
4 “crime of violence” for the purposes of the “force clause” of the Sentencing  
5 Guidelines), *abrogated by Johnson v. United States*, 559 U.S. 133 (2010) (*Johnson I*);  
6 *see also United States v. Reyes*, 691 F.3d 453 (2d Cir. 2012) (per curiam).<sup>3</sup> Given this

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<sup>3</sup> 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 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

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

7 Departing downward significantly from the Guidelines, Judge Garaufis  
8 sentenced Jones to fifteen years.

### 9 **B. Doctrinal Developments and Impact on Sentencing**

10 Judge Garaufis' opinion rested on his interpretation of the application of  
11 the force clause to New York State's definition of robbery. Because Judge  
12 Garaufis was of the view that first-degree robbery was a crime of violence under  
13 the force clause even after *Johnson I*, Judge Garaufis did not address the

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14 categorical approach, a crime must involve the "use of physical force," and  
15 found that battery did not meet that definition. *Id.* at 460. Even after *Spencer*, it  
16 was an open question whether first-degree robbery was a crime of violence. After  
17 *Reyes*, that question depended on whether the use of physical force was, indeed,  
18 present in the New York definition of that crime.

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

1 additional possible determinant of a crime of violence now at issue before us: the  
2 “residual clause.”

3 After Jones’ initial sentencing, but before we heard Jones’ appeal, the  
4 Supreme Court found language in the Armed Career Criminal Act (“ACCA”)   
5 which was identical to the language used in the residual clause of the  
6 Guidelines—the lynchpin clause undergirding the authority of Jones’ current  
7 sentence—to be unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551,  
8 2557 (2015) (*Johnson II*). Subsequent to *Johnson II*, most federal courts of appeals  
9 to decide the issue found that, given the Supreme Court’s decision, the residual  
10 clause was also unconstitutionally vague. See *United States v. Pawlak*, 822 F.3d  
11 902, 907-11 (6th Cir. 2016); *United States v. Hurlburt*, 835 F.3d 715, 725 (7th Cir.  
12 2016); *United States v. Calabretta*, 831 F.3d 128, 137 (3d Cir. 2016); *United States v.*  
13 *Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015); but see *United States v. Matchett*, 802  
14 F.3d 1185, 1193-96 (11th Cir. 2015).

15 As a result—with the application of the force clause to Jones in doubt as a  
16 result of *Johnson I*, and with the residual clause struck down across several  
17 circuits as a result of *Johnson II*—any number of defendants were found *not* to  
18 have committed crimes of violence, either as a matter of first instance, or on  
19 appeal, for purposes of determining their career offender status under the  
20 Guidelines. Accordingly, they were resentenced (or sentenced in the first

1 instance) to lower sentences. We are told the government is not challenging these  
2 lower sentences.

### 3 **C. Removal of the Residual Clause from the Guidelines**

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

### 8 **D. Procedural History in this Court**

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

17 Before the district court resentenced Jones, however, the Supreme Court  
18 granted *certiorari* in *Beckles v. United States*, 137 S. Ct. 886 (2017), to consider  
19 whether the language that, in *Johnson II* it had deemed unconstitutionally vague  
20 *in a statute*, was also void for vagueness when the identical language was

1 employed in the Guidelines. In view of the Supreme Court’s action, we withdrew  
2 our opinion, and suspended resentencing pending the *Beckles* decision.  
3 Interestingly, at least one district court, in an independent case, had already  
4 granted a motion for resentencing in light of our now-recalled decision. *Miles v.*  
5 *United States*, No. 11-cr-581, 2016 WL 4367958 (S.D.N.Y. Aug 15, 2016).

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

9 As a result, we are bound to consider Jones’ earlier convictions on the basis  
10 of the revived (but no longer extant, since it has been removed by the Sentencing  
11 Commission) residual clause. Under that clause, we today correctly find that  
12 Jones’ robbery conviction constituted a crime of violence and, as such, served as  
13 a predicate offense which—together with his assault convictions—categorically  
14 renders Jones a career offender. He was, therefore, correctly subject to the

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<sup>4</sup> 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 sentencing guidelines of 210–240 months on the basis of which the district  
2 court—albeit, perhaps incorrectly relying on the force clause rather than the  
3 residual clause— had imposed his original sentence of fifteen years.

4         Because that sentence was correctly based on the Guidelines as we now  
5 hold they stood when the district court sentenced Jones, we now affirm that  
6 sentence. We also hold that, given the applicable Guidelines, the sentence  
7 imposed—which departed significantly downward from these applicable  
8 Guidelines—was not substantively unreasonable.

9         **E. DISCUSSION**

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

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

19         The fact is that we do not know what sentence the district court would  
20 have deemed appropriate if Jones had been subject to different Guidelines. Had

1 our opinion come down slightly earlier, as did those of most other circuits  
2 dealing with similar issues, Jones would have been resentenced pursuant to a  
3 substantively lower Guidelines range. We would, then, know what sentence  
4 would have seemed appropriate to the district court in those circumstances. Had  
5 that sentence been lower—as it apparently was in any number of other cases in  
6 other circuits—the Government apparently would not have objected to it. Had  
7 Jones committed his crime under the currently existing Guidelines, (*i.e.*, in which  
8 the residual clause has been removed by the Sentencing Commission), and  
9 assuming that we would have read the force clause not to apply (as we did in  
10 our earlier, now-retracted opinion), the district court would have had, again, the  
11 opportunity to gauge Jones’ degree of dangerousness under a very different set  
12 of Guidelines than those we, today, finally conclude it correctly applied at  
13 sentencing.

14 Because we (advisedly) withdrew our earlier opinion in light of the  
15 Supreme Court’s grant of *certiorari* in *Beckles*, and because of the Supreme Court’s  
16 ultimate decision in *Beckles*, I agree that we now are bound to affirm Jones’  
17 original sentence. This means that, as a result of timing quirks (his appeal to us  
18 was slightly too late, leading to our decision to pull our earlier opinion), Jones  
19 receives a very, very high sentence in contrast with almost every similarly  
20 situated defendant.

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

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

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

14           I find our inability to learn this to be both absurd and deeply troubling. I  
15 believe our affirmance is correct, and that we can do no other. I hope, however,

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<sup>5</sup> 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 that somewhere, somehow, there exists a means of determining what would, in  
2 fact, be an appropriate sentence for Jones.<sup>6</sup>

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<sup>6</sup> After our opinion was issued, it was called to our attention that 28 U.S.C. § 2106 permits affirmances and remands for further proceedings in the interest of justice, and has been applied in criminal situations, *United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981); *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977) (en banc); see also *United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016) (affirming a sentence but remanding for further consideration of that sentence, without making express reference to § 2106). We have now altered our disposition in this case to that effect. This altered disposition may permit the district court to reconsider the sentence imposed and thereby go a long way to avoid the absurdity, which this opinion has suggested.