In The
# United States Court of Appeals
For The Fourth Circuit

## UNITED STATES OF AMERICA,

*Plaintiff – Appellee*,

**v.**

## DERICK MONTIQUE HARPER,

*Defendant – Appellant.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH**

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# REDACTED CORRECTED BRIEF OF APPELLANT

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## INTRODUCTION

In this 28 U.S.C. § 2255 proceeding brought by Derick Harper, this Court granted a certificate of appealability on the following issue: "Whether sentencing counsel and appeal counsel rendered ineffective assistance in conceding that the North Carolina offense of second-degree kidnapping is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012)." The same lawyer represented Mr. Harper at sentencing and on appeal.

Mr. Harper was sentenced after the Supreme Court, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidated as unconstitutionally vague the ACCA's "residual clause." That risk-based clause had been broadly used by courts to qualify kidnapping offenses as predicate violent felonies. Because *Johnson* invalidated the residual clause and because Congress did not include kidnapping as an enumerated offense in the ACCA, the government in Mr. Harper's case would have had to prove that North Carolina second-degree kidnapping qualified under the ACCA's "force clause," by showing that the offense has as an element the use, attempted use, or threatened use of violent force. This would have been a problem for the government. A wall of authority established that kidnapping can be accomplished by deceptive means rather than by violent force. And kidnapping is in the second degree when the defendant released the victim in a safe place without serious injury. N.C. Gen. Stat. § 14-39(b) (see statute in this brief's Addendum).

Nonetheless, despite an obvious issue whether kidnapping qualified as a violent felony, Mr. Harper's counsel relieved the government of its burden by conceding the issue at sentencing and again in her principal brief on appeal.

Several months after briefing closed on appeal, in the summer of 2016, counsel attempted to retract her concession and asked this Court to permit supplemental briefing on whether the kidnapping offense qualified as an ACCA predicate. The government objected by invoking waiver, rather than engaging the merits of the issue. This Court "agree[d] with the Government that Harper waived this issue" and denied supplemental briefing "because Harper has waived the issue he now seeks to assert." *United States v. Harper*, 659 F. App'x 735, 738 (4th Cir. 2016) (per curiam). This Court affirmed Mr. Harper's enhanced sentence. *Id.*

The magnitude of counsel's waiver is evident by comparing the result in Mr. Harper's case with the result in another case that this Court decided just 10 days before affirming Mr. Harper's sentence. *See* Order, No. 14-4782, *United States v. Starkie* (4th Cir. Aug. 30, 2016), ECF No. 65. In *Starkie* the defendant's counsel contested whether North Carolina first-degree kidnapping qualifies as a violent felony under the ACCA. After *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the government in *Starkie*—the same U.S. Attorney's office that prosecuted Mr. Harper—stipulated in this Court that the offense does not qualify as an ACCA predicate, and the government itself moved to remand for resentencing.

Unopposed Mot. of U.S. to Remand 1–3, No. 14-4782, *Starkie* (4th Cir. Aug. 26, 2016), ECF No. 64. This Court vacated the defendant's sentence and remanded for resentencing (see order cited above), and the defendant was resentenced without the ACCA enhancement. By contrast, in Mr. Harper's appeal the government pounced on his counsel's concessions by arguing waiver. Counsel's performance doomed Mr. Harper.

Mr. Harper's counsel rendered ineffective assistance by failing to raise and indeed conceding an obvious issue about whether kidnapping qualified as an ACCA predicate, and her deficient performance prejudiced her client. Accordingly, the sentence should be vacated, and this matter should be remanded for resentencing.

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2255 and 1331. On August 10, 2018, the district court entered judgment dismissing Harper's § 2255 motion and denying a certificate of appealability. J.A. 158. Mr. Harper timely appealed by placing his notice of appeal in the prison mail system on September 10, 2018. J.A. 160. This Court has jurisdiction under 28 U.S.C. § 2253(a) and 28 U.S.C. § 1291 because the underlying order is a final order disposing of a § 2255 motion.

## STATEMENT OF THE ISSUE

This Court granted a certificate of appealability on this issue: Whether sentencing counsel and appeal counsel rendered ineffective assistance in conceding that the North Carolina offense of second-degree kidnapping is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012).

## STATEMENT OF THE CASE

### I. For Mr. Harper's sentencing, which occurred after *Johnson*, his counsel failed to contest the PSR's premise that North Carolina second-degree kidnapping qualifies as an ACCA predicate, and then conceded the issue.

On October 1, 2013, Derick Harper was indicted in the Eastern District of North Carolina on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). J.A. 13. He pleaded guilty in May 2014, J.A. 161, accepted responsibility, *see* J.A. 181 ¶¶ 65–66 [redacted]

Mr. Harper had at least three prior felony convictions (all from 1997): two for burglary, and others for second-degree kidnapping in violation of N.C. Gen. Stat. § 14-39. *See* J.A. 181 ¶ 64; J.A. 172–74. Based on those convictions, the presentence investigation report (PSR) recommended enhancing his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The ACCA imposes a 15-year mandatory minimum sentence, § 924(e)(1), whereas the statutory maximum would otherwise be 10 years, § 924(a)(2). Without the ACCA

enhancement, Mr. Harper's advisory Guidelines range would have been 46-57 months.[1]

A few weeks before Mr. Harper's sentencing, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held unconstitutional the ACCA's "residual clause," § 924(e)(2)(B)(ii), which had been broadly used to qualify offenses as "violent felonies" based on their risk of injury, *see id.* Because Congress did not include "kidnapping" as an enumerated offense in the ACCA, *see id.*, *Johnson*'s invalidation of the residual clause meant that Mr. Harper's sentence could not be enhanced under the ACCA (he would not have three or more prior "violent felonies") unless his second-degree kidnapping convictions could qualify under the ACCA's "force clause"—that is, unless the North Carolina kidnapping offense "has as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i).

Mr. Harper's counsel, however, filed a sentencing memo that did not take issue with kidnapping qualifying as an ACCA predicate violent felony. J.A. 14. Instead counsel's memo argued that all of Mr. Harper's prior felonies (separate convictions, different victims) should count as only one "violent felony" and that

[1] Without the ACCA enhancement, the base offense level was 20, and the total offense level after adjustments would have been 19. *See* J.A. 181. The Probation Office used the 2014 U.S. Sentencing Guidelines Manual (U.S.S.G.). *Id.* Our references to the Guidelines are to the 2014 version.

PTSD (from Marine Corps service; he served in Operation Desert Storm and Operation Desert Shield) rendered him without "the mental ability to alter his conduct or intend his [prior] crimes." J.A. 14–21. She also argued, citing *Johnson*, that the ACCA's requirement of three prior convictions "committed on occasions different from one another" was unconstitutionally vague. J.A. 22–24.

At sentencing the court asked counsel if she was contesting whether kidnapping is a predicate "violent felony" under the ACCA. J.A. 67. The court had referenced *United States v. Flores-Granados*, 784 F.3d 487 (4th Cir. 2015), J.A. 64:5–14, which was an enumerated-offense case applying U.S.S.G. § 2L1.2's commentary (the illegal reentry Guideline); in § 2L1.2's commentary, the Sentencing Commission included kidnapping among a list of enumerated offenses in defining "crime of violence" for a § 2L1.2 enhancement. *Flores-Granados* held that North Carolina second-degree kidnapping matched the generic, common meaning of that enumerated offense in § 2L1.2's commentary, 784 F.3d at 490–98, but *Flores-Granados* did not address the force clause, *see id.* at 490–91.

In response to the court's question, Mr. Harper's counsel asserted that North Carolina second-degree kidnapping does constitute a violent felony: "I didn't say they don't qualify as violent felonies. They do qualify as violent felonies." J.A. 67:12–13; *see also* J.A. 67:6–8 ("We're not attacking the violent felony. We don't disagree that they qualify with Fourth Circuit or any other case law."); J.A. 67:14–

19 (court: "Okay. So there's not an issue that you agree that objectively that under Fourth Circuit case law that second degree kidnapping under North Carolina law is a violent felony?"; counsel: "That's not the issue we're raising today").

The court adopted the PSR without change, J.A. 193, and thus sentenced Mr. Harper under the ACCA. [redacted] the court imposed a sentence of 144 months. J.A. 111:1–15; *see* J.A. 117 (judgment).

## II. On direct appeal, counsel again conceded the predicate-offense issue, and this Court used counsel's waiver against Mr. Harper.

On direct appeal, counsel reiterated her failed sentencing arguments while also arguing that the district court erred in not funding a second mental health expert. Br. of Appellant, *United States v. Harper*, No. 15-4440 (4th Cir. Jan. 4, 2016), ECF No. 24. But counsel's opening brief on appeal also posed as an issue—Issue 1(A)(1)—whether kidnapping qualifying as an ACCA predicate offense. *Id.* at 1. She then answered her issue statement with this concession: "second degree kidnapping is a violent felony." *Id.* at 10. For that concession she cited (*id.*) two enumerated-offense cases: *Taylor v. United States*, 495 U.S. 575 (1990), and *Flores-Granados*, *supra.*

Several months after briefing closed, counsel filed a Rule 28(j) notice regarding *Mathis v. United States*, 136 S. Ct. 2243 (2016). Citation of Supp. Authority 3, *United States v. Harper*, No 15-4440 (4th Cir. June 24, 2016), ECF No. 55 ("Rule 28(j) letter"). The *Mathis* Court rejected the Eighth Circuit's

exception to the ACCA's longstanding elements-only inquiry. The *Mathis* Court pointed out that the Eighth Circuit's approach conflicted with the Fourth Circuit's approach, which had rejected that exception. *See id.* at 2251 n.1 (citing *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014)).

Counsel's Rule 28(j) letter invoked *Mathis* for her argument that Mr. Harper's multiple felonies should count as one. But in the Rule 28(j) letter's final paragraph, counsel tried to retract her prior concessions by asserting error in categorizing kidnapping as a violent felony (the bolding, underlining, and brackets below are from counsel's letter):

> Furthermore, to the extent that the *Mathis* Court omits "second degree kidnapping" as a violent felony supporting ACCA application, counsel submits the Opinion in support, and correction, of Defendant's brief acceding the point at Issue I(A)(page 10), correcting it and raising **as error** the use of second degree kidnapping as a countable "violent felony" for the reasons articulated therein. In light of this authority, Appellant corrects as error that issue raised below at Issue I(A) in light of *Mathis* when the trial court is not allowed to investigate the "underlying brute facts or means" by which the defendant commits his crime, and because in North Carolina the elements of the offense of second degree kidnapping do not [necessarily] involve the "use, attempted use, or threatened use of physical force against [another's] person."

Rule 28(j) letter 3.

The government moved to strike that paragraph because it raised a new argument that counsel had "affirmatively waived before the district court and in [the] opening brief." Motion to Strike New Argument Raised for First Time in

Rule 28(j) Letter, *United States v. Harper*, No. 15-4440 (4th Cir. June 28, 2016), ECF No. 56. The government observed that "[b]efore the district court and on appeal, the defendant unequivocally represented that second-degree kidnapping under North Carolina law is a violent felony," *id.* ¶ 3, and counsel's representations "were made after, and with the benefit of, the Supreme Court's decision in *Johnson*," *id.* ¶ 4. The government said counsel's reliance on *Mathis* was "perplexing, as *Mathis* was dealing specifically with the enumerated offense of burglary." *Id.* Because of the waiver, the government did not brief the merits of the issue whether kidnapping qualified as an ACCA predicate. *See id.* at 1–3. In response to the motion to strike, Mr. Harper's counsel asked this Court to permit supplemental briefing that issue. Appellant's Response to Motion to Strike, *United States v. Harper*, No. 15-4440 (4th Cir. July 11, 2016), ECF No. 58.

Instead, on September 9, 2016, without oral argument, this Court affirmed Mr. Harper's sentence, writing: "Harper seeks to retract his concession that North Carolina second-degree kidnapping is a violent felony and to challenge the use of this offense as an ACCA predicate. . . . We agree with the Government that Harper waived this issue by expressly disclaiming it at sentencing." *United States v. Harper*, 659 F. App'x 735, 738 (4th Cir. 2016) (per curiam). The Court added: "[E]ven if this issue were deemed forfeited rather than waived, it would not entitle

Harper to relief because any error in this respect is not plain." *Id.*[2] The Court ended by stating it was "deny[ing] Harper's motion for leave to file a supplemental brief because Harper has waived the issue he now seeks to assert." *Id.*

### III. Mr. Harper moved under § 2255 to vacate his sentence, the district court denied the motion, and this Court granted a COA on his claim for ineffective assistance of counsel regarding the ACCA enhancement.

In May 2017, Mr. Harper filed a *pro se* 28 U.S.C. § 2255 motion to challenge the ACCA enhancement on the ground that North Carolina second-degree kidnapping is not a "violent felony" under the ACCA, and he claimed that counsel was ineffective at sentencing and on appeal for conceding otherwise. J.A. 122–52. The district court dismissed the § 2255 motion and denied a certificate of appealability. J.A. 153–58.

Mr. Harper appealed, and this Court granted a COA on the ineffective-assistance claim identified above (see Statement of the Issue).

## SUMMARY OF ARGUMENT

I. Counsel rendered deficient performance at sentencing and on appeal. Because the Supreme Court invalidated the ACCA's residual clause before Mr. Harper's sentencing, the only definitional clause the government could have

[2] The Court then cited two cases: *Mathis* and *Flores-Granados*; for the latter, this Court added this parenthetical: "applying categorical approach to hold that North Carolina second-degree kidnapping is categorically crime of violence under USSG § 2L1.2 because it constitutes generic kidnapping." 659 F. App'x at 738.

invoked to qualify kidnapping as a "violent felony" was the ACCA's force clause. But North Carolina's kidnapping statute contains no element requiring violent force. And a wall of authority dictated that the offense could not qualify under the force clause because the crime could be accomplished by deceptive means, rather than by violent force. Counsel was deficient for failing to advance this argument and instead conceding that the offense qualifies as a predicate. And counsel was deficient if she thought that the statute's "purposes" element (the *mens rea* element) requires proof of the use or threat of force. Moreover, this Court's decision in *Flores-Granados* did not foreclose an objection to the ACCA enhancement, as it was not a force-clause case or an ACCA case. *Flores-Granados* held that the North Carolina kidnapping offense matches the generic, contemporary meaning of "kidnapping" enumerated in the commentary to the illegal-reentry Guideline, U.S.S.G. § 2L1.2. The Court did not address the force clause, and kidnapping is not an enumerated offense in the ACCA.

Mr. Harper's counsel not only failed to raise an obvious issue about kidnapping qualifying as a violent felony, she demonstrated confusion about the law. For instance, when she conceded the issue in her principal appeal brief, she said that "'2nd Degree Kidnapping' in North Carolina is a violent felony as defined in USSG 4B1.2(a)(2)." But the enhancement in this case was governed by the ACCA, not by Guideline § 4B1.2, which for certain purposes defines a "crime of

violence" (not a "violent felony"). Section 4B1.2 enumerates "kidnapping" as a "crime of violence," but the ACCA does not for a "violent felony."

Contrary to the court's statement below in dismissing the § 2255 motion, Mr. Harper is not faulting counsel for failing to urge a change in the law. Rather, counsel failed to apply then-existing law to make an obvious objection.

II. Counsel's deficient performance prejudiced Mr. Harper. Without the enhancement, he faced a Guidelines range of 46–57 months. And if his counsel had not waived the issue by her concessions, there is a reasonable probability that Mr. Harper would have avoided the ACCA enhancement. In fact, there is a reasonable probability he would have stood in the same shoes as the defendant in another case whose appeal was pending in this Court at the same time. In that case the defendant's counsel contested whether North Carolina first-degree kidnapping qualifies as an ACCA violent felony; on appeal the government ultimately agreed that the offense does not qualify and moved this Court to remand for resentencing without the ACCA enhancement; this Court vacated his sentence and remanded for resentencing, just 10 days before this Court affirmed Mr. Harper's sentence.

## STANDARD OF REVIEW

This Court "review[s] a district court's denial of a 28 U.S.C. § 2255 motion de novo," *United States v. Murillo*, 927 F.3d 808, 815 (4th Cir. 2019), and will "resolve any factual ambiguities in the light most favorable to the movant," *id.*

## ARGUMENT

The Sixth Amendment's right to the "Assistance of Counsel," U.S. Const. amend. VI, "plays a crucial role in the adversarial system" because "counsel's skill and knowledge is necessary" to defend against prosecution. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (citations omitted). The Sixth Amendment requires "the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691–92. Thus, "'the right to counsel is the right to the *effective* assistance of counsel.'" *Id.* at 686 (emphasis added) (citation omitted). Of course, this right extends to sentencing. *See United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017) (*Carthorne II*). An ineffective-assistance claim is reviewed under *Strickland*'s two-part framework: a claim succeeds when counsel (1) rendered deficient performance that (2) prejudiced the defendant. 466 U.S. at 687.

Mr. Harper's counsel performed deficiently by not contesting and indeed conceding that one of the predicates used to enhance his sentence under the ACCA—North Carolina second-degree kidnapping—is a "violent felony" under the ACCA. Whether that offense qualified was an obvious issue after *Johnson* invalidated the residual clause. And authority strongly supported a basis for objecting to using kidnapping as a predicate ACCA offense under the "force clause"—the government's only available clause after *Johnson* invalidated the catch-all residual clause. Counsel's concessions (both at sentencing and on appeal)

waived her client's right to contest this issue and to hold the government to its burden in an adversarial process. Counsel thus failed to do what the Sixth Amendment "envisions," namely "playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685. And her deficient performance prejudiced Mr. Harper.

## I. Counsel was deficient for conceding that North Carolina second-degree kidnapping constitutes a "violent felony" under the ACCA.

An attorney's performance is deficient when the representation falls "below an objective standard of reasonableness," *id.* at 688, which occurs when the attorney is not "demonstrating legal competence, doing relevant research, and raising important issues," *Carthorne II*, 878 F.3d at 465. Counsel has the "duty . . . to raise critical issues for [the sentencing court's] consideration." *Id*. Thus, to render effective assistance, counsel may have to "raise material issues even in the absence of decisive precedent," *id.* at 465–66, and "to object when there is relevant authority strongly suggesting that a sentencing enhancement is not proper," *id.* at 466.

Accordingly, sentencing counsel may be deficient for failing to contest an enhancement even though, at the time of sentencing, the law is unsettled and so the enhancement is not a plain error. *See id.* at 464–65. In *Carthorne* the defendant's PSR designated him a "career offender" on the premise that his prior Virginia offense for assault and battery of a police officer (ABPO) should qualify as a

predicate "crime of violence" under U.S.S.G. § 4B1.2(a). *United States v. Carthorne*, 726 F.3d 503, 507–08 (4th Cir. 2013) (*Carthorne I*). Counsel did not object. *Id.* at 509. On appeal, new counsel contested the enhancement, *id.*, but this Court affirmed. *Id.* at 510–17. Although this Court agreed that the ABPO offense did not qualify under § 4B1.2's residual clause, the sentencing court did not plainly err; the error was not obvious, because neither the Supreme Court nor this Circuit had addressed the issue before the defendant's sentencing, and other circuits had split on the issue. *Id.* at 516.

But at the § 2255 stage, this Court held that counsel had rendered ineffective assistance, and vacated the sentence. *Carthorne II*, 878 F.3d at 461. Readily available precedent had "detail[ed] the analytical framework for determining whether a crime qualifies as a predicate offense," which focuses on "the elements of the offense under controlling state law." *Id.* at 467. And "precedent from this Court and Virginia's appellate courts strongly suggested at the time that ABPO did not qualify," because of the different ways in which the offense conduct could be committed. *Id.* at 467–68. Thus, "[c]ounsel should have known" that the cases "raised serious questions whether ABPO qualified as a crime of violence under the Guidelines." *Id.* at 469. This Court held that "counsel's failure . . . to demonstrate a grasp of the relevant legal standards, to conduct basic legal research relating to those standards, and to object to the sentencing enhancement (even though there

was a strong basis for such an objection), taken collectively, constituted deficient performance." *Id.* at 469.[3]

**A. With the residual clause invalidated and kidnapping not enumerated in the ACCA, the government had to show that the offense elements require proof of violent force, yet counsel's concessions relieved the government of that burden.**

Under the ACCA, "'violent felony' means any crime punishable by imprisonment for a term exceeding one year if that crime . . .

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. § 924(e)(2)(B) (2012). Kidnapping is not one of the enumerated offenses in subsection (2)(B)(ii). And the Supreme Court in *Johnson* invalidated

[3] By contrast, counsel is not deficient when case law at the time does not provide a "strong basis" for an objection and "tilt[s] decidedly" against it. *See United States v. Morris*, 917 F.3d 818, 824–25 (4th Cir. 2019). *Morris* involved a claim that counsel was deficient for failing (before *Johnson*) to contest that an abduction offense qualified under the career-offender Guideline's residual clause (both sides agreed the force clause did not apply). *Id.* at 822 & n.1. This Court acknowledged that defense attorneys "'are obliged to make [] argument[s] that [are] sufficiently foreshadowed in existing case law,'" but in *Morris*, "then-existing precedent, both within and outside of this circuit, did not strongly suggest that such an objection was warranted" under the residual clause. *Id.* at 824 (brackets in original) (citation omitted). Indeed, courts had ruled, before the defendant's 2013 sentencing hearing, "that the residual clause *does* apply to kidnapping offenses that encompass kidnapping by deceit." *Id.* Thus, the case law, "far from 'strongly supporting' Morris's argument, tilted decidedly in the other direction." *Id.* at 825.

subsection (2)(B)(ii)'s residual clause two weeks before Mr. Harper's counsel filed sentencing memoranda. *Johnson* was a groundbreaking decision with particular significance for Mr. Harper's case. Many courts had ruled that the residual clause applies to kidnapping offenses that can be accomplished by deceit. *Morris*, 917 F.3d at 825. After all, the vague residual clause extended to offenses posing a serious potential risk of physical injury, and courts reasoned that "kidnapping posed a serious risk of physical injury because of the likelihood that the victim, once alerted to his or her circumstances, would resist." *Id.*

When the Supreme Court voided the residual clause, it meant that kidnapping could not qualify as a violent felony unless the offense fell within subsection (2)(b)(i)'s force clause. Determining whether a crime qualifies under the force clause requires a different analysis than under the residual clause. *United States v. Aparicio-Soria*, 740 F.3d 152, 157 (4th Cir. 2014) (en banc) ("It is perhaps instinctively alluring to conflate the risk of physical injury with the use of violent force, but we refuse to do so because it is directly contrary to Supreme Court and sound Fourth Circuit precedent[.]"). The residual clause "sweeps more broadly" than the force clause. *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (involving 18 U.S.C. §16 "crime of violence").

The force clause required the government to show that North Carolina's kidnapping offense "has *as an element* the use, attempted use, or threatened use of

physical force against the person of another." § 924(e)(2)(B)(i) (emphasis added). Competent counsel would have known that the categorical approach cares only about "the *elements* of the prior offense rather than the *conduct* underlying the conviction." *United States v. Cabrera–Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013) (citations omitted). And it was established that the force clause requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

North Carolina's kidnapping statute contains no element requiring violent force; and *second-degree* kidnapping (the offense at issue here) means, as a matter of law, that the defendant released the kidnapped person in a safe place without serious injury. N.C. Gen. Stat. § 14-39(b). As shown below, moreover, authority dictated that North Carolina's kidnapping offense could not qualify under the force clause because the crime could be accomplished by deceptive means, rather than by violent force. Yet counsel inexplicably conceded that the offense qualified as a predicate violent felony. This was ineffective assistance.

**B. Counsel was deficient for failing to argue that kidnapping may be committed by deceptive means and that, therefore, the offense does not require violent force.**

Mr. Harper's counsel was deficient for failing to raise two key points: (1) established law dictated that kidnapping may be accomplished by deceptive means rather than by force; and (2) a plethora of authority established that an

offense that may be accomplished by deception, such as kidnapping, sweeps more broadly than what the force clause requires because the force clause covers only those offenses for which violent force *must* be proved to obtain a conviction.

The portion of North Carolina's kidnapping statute containing the offense's only *actus reus* provides in relevant part:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for [an enumerated proscribed purpose].

N.C. Gen. Stat. §14-39(a).[4]

Significantly, before Mr. Harper's sentencing, it was well established under North Carolina law (as elsewhere) that kidnapping may be committed by means of deception, i.e., *without force*. *See, e.g.*, *State v. Sturdivant*, 283 S.E.2d 719, 729 & n.3 (N.C. 1981) (observing that "kidnapping can be just as effectively accomplished by fraudulent means" and that cases "are replete with illustrations of kidnapping executed by deception"); *State v. Fulcher*, 243 S.E.2d 338, 350 (N.C.

[4] "Unlawfully" means "'without justification or excuse.'" *State v. Logner*, 256 S.E.2d 166, 175 (N.C. 1979) (quoting jury charge). "Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance." *State v. Moore*, 335 S.E.2d 535, 538 (N.C. Ct. App. 1985), *aff'd*, 537 N.C. 144 (1986); *see also State v. Fulcher*, 243 S.E.2d 338, 351 (N.C. 1978) (noting "resort to a tape measure or a stop watch [is] unnecessary in determining whether the crime of kidnapping has been committed").

1978) (the crime may be accomplished "by force or fraud"); *State v. Alston*, 243 S.E.2d 354, 362 (N.C. 1978) (same); *State v. Call*, 508 S.E.2d 496, 519 (N.C. 1998) ("evidence of [a] ruse" sufficed); *State v. Gough*, 126 S.E.2d 118, 120–25 (N.C. 1962) (rejecting argument, under predecessor statute, that only forcible kidnapping qualifies, and observing that, under "the common law definition of kidnapping," "the use of physical force or violence is not always necessary to the commission of kidnapping"); *State v. Williams*, 689 S.E.2d 412, 417–18 (N.C. Ct. App. 2009) (holding that because "[k]idnapping can be accomplished *either* by actual force *or* by fraud or trickery," evidence sufficed for a conviction where defendant induced the kidnapped person "on the pretext of paying her money in return for a sexual act") (emphasis added); *State v. Sexton*, 444 S.E.2d 879, 904 (N.C. Ct. App. 1994) (fraud "may constitute a substitute for force in kidnapping").[5]

Before Mr. Harper's sentencing, many appellate decisions had analyzed state kidnapping offenses and similar crimes to determine if they qualify as predicate violent offenses, and these courts turned to the residual clause upon observing that the crimes could be accomplished by deception rather than by violent force.[6]

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[5] The Model Penal Code, for kidnapping, likewise distinguishes deceptive means from "threat" and "force." § 212.1 ("A removal or confinement is unlawful . . . if it is accomplished by force, threat or deception . . . .").

[6] *See United States v Chandler*, 743 F.3d 648, 656–57 (9th Cir. 2014) (observing that "force is not required" for Nevada second-degree kidnapping but the offense "presents a serious potential risk of physical injury to another [for the residual

Courts concluded that other crimes, too, swept beyond the force clause because they could be accomplished by deceptive or fraudulent means, rather than

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clause]"); *United States v. Schneider*, 681 F.3d 1273, 1278, 1281 (11th Cir. 2012) (commenting that Florida false imprisonment, like kidnapping, can be committed "by a ruse," and the "government [did] not argue" that statute's elements satisfy the force clause; "[t]he residual clause . . . is all that may apply"); *United States v. Ruiz-Rodriguez*, 494 F.3d 1273, 1277 (10th Cir. 2007) (holding that Nebraska first-degree false imprisonment "does not require that a defendant use force, because a defendant can be convicted under the statute by using deception"); *United States v. Stapleton*, 440 F.3d 700, 703 (5th Cir. 2006) (holding that Louisiana's crime of false imprisonment with a dangerous weapon, which requires confining or detaining the victim without consent, is not a violent felony under the force clause because "the non-consensual confinement of a person through deception or trickery may constitute false imprisonment even when the offender does not use, attempt to use or threaten to use force"); *United States v. Swanson*, 55 F. App'x 761, 762 (7th Cir. 2003) (concluding that Illinois' unlawful restraint statute, which required "knowingly without legal authority detain[ing] another," did not satisfy U.S.S.G. § 4B1.2's force clause because the crime may be committed by deception, but the residual clause applied); *United States v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (holding that Oregon's second-degree kidnapping "may be committed by deception, rather than by force," and so it did not qualify under § 4B1.2's force clause, but did under the residual clause); *United States v. Phelps*, 17 F.3d 1334, 1342 (10th Cir. 1994) (involving prior conviction under Missouri's kidnapping statute; court applied residual clause after noting the government argued that "kidnapping under the Missouri statute does not require proof of physical force as an element of the offense under [the ACCA's force clause]"; the court agreed with a Ninth Circuit case where that court "reasoned that although the crime of kidnapping did not contain the use of force as an essential element of the crime, it nonetheless" satisfied the residual clause); *United States v. Lonczak*, 993 F.2d 180, 181–83 (9th Cir. 1993) (holding that § 4B1.2's force clause did not apply to California crime of child abduction, which could be accomplished "fraudulently," but residual clause applied) (citing *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), which observed that because kidnapping may be accomplished by "trickery or deceit," the ACCA's force clause "would not apply to a conviction under the kidnapping statute," but kidnapping would satisfy the residual clause, *id.* at 1009)).

by violent force. *See, e.g.*, *United States v. Fuertes*, 805 F.3d 485, 498–99 (4th Cir. 2015) (holding, months before Mr. Harper's principal appeal brief, that a conviction for sex trafficking of children by "force, fraud, [or] coercion" under 18 U.S.C. § 1591(a) is not categorically a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A) because it "may be committed nonviolently—i.e., through fraudulent means"); *Dawson v. United States*, 702 F.3d 347, 351–52 (6th Cir. 2012) (concluding that force clause did not apply to attempted rape because crime can be committed by fraudulent means, but residual clause applied); *United States v. Riley*, 183 F.3d 1155, 1158 n.5 & 1159 (9th Cir. 1999) (observing that "simple rape can be achieved by trickery or deception"; "[t]he government conceded that [the] conviction for attempted simple rape does not fit within [the Guidelines' force clause]").

Finally, with respect to the federal kidnapping statute, which also proscribes abduction by deceit, *see* 18 U.S.C. § 1201(a) (listing "inveigles" or "decoys"), this Court long ago recognized that this means kidnapping may be committed "*by nonphysical, nonforcible means*." *United States v. Wills*, 234 F.3d 174, 177 (4th Cir. 2000) (emphasis added); *accord United States v. Hughes*, 716 F.2d 234, 239 (4th Cir. 1983) (holding that it suffices to prove that "the abductor used deceit and trickery . . . rather than overt force"). Based on this distinction, a court of appeals held several years before Mr. Harper's sentencing that "[t]he federal kidnapping

statute has no force requirement" to qualify under the substantially identical force clause in 18 U.S.C. § 16. *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012).

In sum, relevant authority established that North Carolina kidnapping can be accomplished by deception rather than by violent force and that an offense that can be committed by deception does not satisfy the force clause. Yet Mr. Harper's counsel did not raise this obvious point. That deficiency should end the analysis under *Strickland*'s performance prong.

### C. Mr. Harper's counsel was deficient if she assumed that the statute's "purposes" element requires proof of the use or threat of force.

If counsel believed that the statute's *mens rea* element could qualify kidnapping under the force clause, her belief was unreasonable. "Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the . . . purposes set out in the statute." *State v. Moore*, 340 S.E.2d 401, 404 (N.C. 1986). When Mr. Harper was convicted for kidnapping, the statute enumerated these proscribed purposes:

> the purpose of (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

N.C. Gen. Stat. § 14-39(a) (1997).[7] These proscribed purposes resemble the Model Penal Code's proscribed purposes for kidnapping. *See* Model Penal Code § 212.1.

As shown below, at the time of Mr. Harper's sentencing, authority and common sense strongly suggested that the government could not have properly relied on proscribed purposes—i.e., on *mens rea*—to satisfy the force clause. A defendant could have any of these purposes without using, attempting, or threatening violent force. North Carolina law dictated that proving proscribed purposes (unlawful intent) does not require proof of any particular conduct or proof that purposes were accomplished. Thus, *none* of the statute's proscribed purposes could satisfy the force clause.

**1. None of the proscribed purposes would satisfy the force clause.**

Because the statute's proscribed purposes require only proof of intent, they could not satisfy the force clause. Before Mr. Harper's sentencing, North Carolina law established that this *mens rea* element does not require proof of any particular act. Under the statute, "[i]t is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act *other than* that of confining, restraining, or removing the victim." *State v. Bell*, 603 S.E.2d 93, 113 (N.C. 2004)

[7] A decade after Harper was convicted for kidnapping, the legislature amended the statute by changing a statutory cross-reference and by adding two enumerated purposes. *See* 2006 N.C. Sess. Law 2006-247 p.18, § 20(c) (adding two purposes concerning sexual servitude reflected in § 14-39(a)(5)–(6)).

(emphasis added). Relatedly, North Carolina law dictated that, to sustain a conviction, "[i]t is not necessary under this statute to show that the kidnapping *accomplished* its purpose." *Moore*, 335 S.E.2d at 538 (emphasis added); *Moore*, 340 S.E.2d at 405 (reciting jury charge on that point). Proof of a proscribed purpose requires only proof of the *contemplated*, not accomplished, conduct.

An example is the North Carolina Supreme Court's decision in *Fulcher*: the jury found that the defendant restrained people for the purpose of facilitating the commission of a felony; the Supreme Court held that "the crime of kidnapping *was complete, irrespective of whether* the then contemplated [felony] ever occurred." 243 S.E.2d at 352 (emphasis added). The court illustrated as follows:

> Let us suppose, for example, a restraint for the purpose of committing rape followed by a rescue of the victim before the contemplated rape is accomplished. Such a restraint would constitute kidnapping under G.S. 14-39.

*Id.*

This distinction is reinforced by the statute's text. The statute permits a conviction if the defendant acted "for the purpose of . . . [d]oing serious bodily harm," § 14-39(a)(3), but then provides that second-degree kidnapping (Mr. Harper's prior offense) means the victim was released in a safe place and "had *not* been seriously injured," § 14-39(b) (emphasis added). Thus, a defendant convicted of second-degree kidnapping for having had the "purpose" of doing serious bodily injury did not do what he intended. This could happen for many reasons. For

instance, someone could intervene (or the defendant could have a change of heart) after the defendant commences the restraint, confinement, or removal (acts that require no particular length of time or distance, *see* n.4, *supra*). Or, for instance, the state could prove that the defendant was caught with a concealed weapon.[8]

Similarly, one of the listed purposes is "the purpose of . . . terrorizing the person so confined, restrained or removed or any other person," § 14-39(a)(3), but North Carolina law has long been clear that this does not require proof that the defendant terrorized the victim: "'the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's *purpose* was to terrorize.'" *State v. Davis*, 455 S.E.2d 627, 639 (N.C. 1995) (quoting *Moore*, 340 S.E.2d at 405) (emphasis added). As the State's court of appeals approvingly commented on a contested jury instruction, the trial judge properly distinguished the defendant's purpose, "an element of the offense," from "the effect of defendant's action upon the victim, which is not an element of the offense." *State v. Jones*, 244 S.E.2d 709, 713 (N.C. Ct. App. 1978).

[8] *Cf. Stapleton*, 440 F.3d at 703 (holding that Louisiana crime of false imprisonment with a dangerous weapon swept beyond the force clause: "because a loaded pistol is construed in Louisiana to be a dangerous weapon even when totally concealed on the culprit's person during the offense, the crime of false imprisonment with a dangerous weapon likewise can be committed with a hidden loaded pistol, without the use, attempted use or threatened use of physical force").

In sum, if the government had tried to rely on proscribed purposes, counsel should have known, from established North Carolina law, that the *mens rea* element does not require proof of particular conduct, much less that the defendant accomplished his purpose. Competent counsel thus would have argued that *none* of the proscribed purposes requires proof that a defendant necessarily use, attempt, or threaten violent force (and, consequently, *Shepard* documents showing which purpose actually formed the basis of the prior convictions would not matter). This would have sufficed to counter an argument based on proscribed purposes.

For other reasons it would have been unreasonable for counsel to worry that the statute's "purpose of terrorizing" language might qualify under the force clause, wholly aside from scenarios where a defendant could act for the purpose of terrorizing a kidnapped person without using or threatening violent force.[9] For instance, the force clause requires the use or threatened use of "physical force *against the person of another*," § 924(e)(2)(B)(i) (emphasis added), but case law showed that a defendant can have the purpose of terrorizing the kidnapped person by threatening *suicide* in that person's presence, *see State v. Baldwin*, 540 S.E.2d 815, 821–22 (N.C. Ct. App. 2000), which would be a threat against *oneself*, not another. Further, the statute's "purpose of terrorizing" language does not require a

[9] The purpose of terrorizing means the purpose of putting a person in "a state of intense fright or apprehension." *Davis*, 455 S.E.2d at 639 (quoting *Moore*, 340 S.E.2d at 405).

purpose to terrorize *the kidnapped person*; rather, it suffices if the purpose is to terrorize "any other person" (the same goes for the purpose of doing serious bodily harm). § 14-39(a)(3). This can be accomplished when the defendant's singular purpose is to instill great fear or fright in a non-present loved one of the missing kidnapped person, with no use or threat of force required.

**2. Moreover, the government would have had to prove that *all* of the proscribed purposes satisfy the force clause because the statute's "purposes" element is indivisible.**

The argument above would have sufficed if the government had invoked proscribed purposes in support of the force clause. But the government's burden actually would have been higher. The government would have had to show that *all* of the statute's proscribed purposes satisfy the force clause because, as shown below, this element is indivisible: the North Carolina Supreme Court made clear, before Mr. Harper's sentencing, that a jury need not unanimously find which of the charged purposes the defendant had; the proscribed purposes are simply different means of accomplishing what is one intent element for a single crime under the statute.

To begin with, the statute includes purposes that do not even require an *intent* to use force. An example is "the purpose of . . . [f]acilitating the commission of any felony." § 14-39(a)(2). It is not limited to violent felonies, and it includes felonies directed at property. *See Bell*, 603 S.E.2d at 112 (jury charge).

Thus, as the government told this Court in another case while Mr. Harper's direct appeal was pending, "[B]ased on the wide range of purposes for which a defendant may engage in kidnapping, including facilitating the 'commission of any felony,' the government does not argue that the purposes of kidnapping render the offense categorically a violent felony." Supp. Resp. Br. of U.S. 24 n.14, *United States v. Starkie*, No. 14-4782 (4th Cir. Nov. 12, 2015), ECF No. 47 (citation omitted).

Moreover, precedent provided counsel with the basis to demonstrate that the *mens rea* element is indivisible, based on the established juror-unanimity rule.

For starters, precedent explained that an offense is divisible if it "set[s] out *elements in the alternative*," *United States v. Montes-Flores*, 736 F.3d 357, 365 (4th Cir. 2013) (emphasis added), creating "several different crimes," *Descamps v. United States*, 570 U.S. 254, 263 (2013). Thus, the "use of the disjunctive 'or' in the definition of a crime does not automatically render it divisible." *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014); *id.* at 198–99 (rejecting government's view that because Virginia defines "larceny" as a "wrongful *or* fraudulent taking," "the use of the word 'or' creates two different versions of the crime" (emphasis in original) (citation omitted)). Precedent explained that, in deciding whether an offense sets out alternate elements, a court should distinguish elements from potential means of commission. *See id.* at 198.

On that score, precedent dictated that "[e]lements, as distinguished from means, are factual circumstances of the offense the jury must find 'unanimously and beyond a reasonable doubt.'" *Id.* (quoting *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013), in turn quoting *Descamps*, 570 U.S. at 269).[10] Under this jury-unanimity test, "[a]ny statutory phrase that—explicitly or implicitly—refers to multiple, alternative means of commission must still be regarded as indivisible if the jurors need not agree on which method of committing the offense the defendant used." *Omargharib*, 775 F.3d at 194. In applying the jury-unanimity test, a court naturally should consider how state courts instruct juries on that offense. *Royal*, 731 F.3d at 341. Thus, in *Royal*, this Court took notice that "Maryland juries are not instructed that they must agree 'unanimously and beyond a reasonable doubt' on whether the defendant caused 'offensive physical contact' or 'physical harm' to the victim; rather, it is enough that each juror agree only that one of the two occurred, without settling on which." *Id.* And in *Omargharib* this Court found a larceny crime indivisible because "Virginia juries are not instructed to agree 'unanimously and beyond a reasonable doubt' on whether defendants charged with larceny took property 'wrongfully' or 'fraudulently.'" 775 F.3d at 199.

[10] *See also Fuertes*, 805 F.3d at 498 ("A statute is indivisible when the jury need not agree on anything past the fact that the statute was violated.") (internal quotation marks omitted).

Under this test, North Carolina authority dictated that the kidnapping statute's proscribed-purposes element is indivisible. Specifically, before Mr. Harper's sentencing, North Carolina law established that juries in kidnapping cases are not instructed that they must agree unanimously on which of the charged proscribed purposes they find, because the purposes are alternate means of establishing a *single element* of heightened intent for what is, under the statute, a single crime of kidnapping. *See Bell*, 603 S.E.2d at 112–13.

*Bell* involved a disjunctive kidnapping instruction listing multiple proscribed purposes. *Id.* at 112. The defendant argued that the disjunctive instruction violated his right to a unanimous verdict. *Id.* In rejecting his challenge, the North Carolina Supreme Court explained that a disjunctive instruction—and the corollary risk of non-unanimity—poses a problem *only if* each of the disjunctive components "*is in itself a separate offense*." *Id.* at 112–13. "In contrast," when a *single offense element* can be proved in multiple ways, a disjunctive charge does not matter. *Id.* at 113.

In other words, "'if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense,* the requirement of unanimity is satisfied.'" *Id.* at 113 (emphasis in original) (citations omitted). Applying that principle to the kidnapping statute, *Bell* ruled that the statute defines just one crime of kidnapping, and so the disjunctive "purposes"

charged are alternative means by which to accomplish the intent element—a singular element. *See id.* Therefore, it would not matter if jurors split over which of the charged purposes the state proved; so long as each juror could find one of the purposes, the jury was in unanimous agreement that the defendant was guilty of one crime: kidnapping. *See id.* The "statute provides numerous routes by which a defendant may be convicted of first-degree kidnapping," the Court said, but "a defendant can only be found guilty and punished once." *Id.*; *see also Moore*, 340 S.E.2d at 405 (reciting charge instructing jury that state had to prove "one or more" of the proscribed purposes; jury was not charged on unanimity); *State v. McNeil*, 574 S.E.2d 145, 147–48 (N.C. Ct. App. 2002) (rejecting contention that because defendant was charged with two proscribed purposes, he was charged with two different crimes: "two different crimes are not alleged"; "[r]ather, the indictment sets forth two different *purposes* for which the kidnapping took place").

For these reasons, if the government had relied on the proscribed purposes in Mr. Harper's case, the government would have had to show that *all* of the statute's proscribed purposes qualify under the force clause. The government could not show that. Again, counsel could have demonstrated that *none* of the purposes satisfy the force clause because they concern intent, and to sustain a conviction the State is not required to prove that the purpose was accomplished or to prove any particular conduct. *See* part I.C.1, *supra*.

### D. *Flores-Granados* was not a force-clause case (or an ACCA case) and so it did not foreclose objecting to the ACCA enhancement.

At Mr. Harper's sentencing the judge invoked *United States v. Flores-Granados*, 783 F.3d 487 (4th Cir. 2015), as if it controlled whether kidnapping qualified as an ACCA "violent felony." *See* J.A. 64:5–14; J.A. 78:14–16. The judge asked counsel if she was contesting whether the offense is a violent felony "under Fourth Circuit law," presumably referring to *Flores-Granados*; counsel said no. J.A. 71:12–19. On direct appeal, counsel's principal brief reiterated her concession by invoking *Flores-Granados* against her client: she stated that "under the rationale of [*Flores-Granados*] and authority cited therein, second degree kidnapping is a violent felony." Br. of Appellant 10, *United States v. Harper*, No. 15-4440 (4th Cir. Jan. 4, 2016), ECF No. 24.

But *Flores-Granados* was not an ACCA case and, significantly, it was not a force-clause case. *See Flores-Granados*, 783 F.3d at 490–91 ("we need not look to . . . whether 'use of force' is an element of the crime").

Instead, *Flores-Granados* concerned the illegal-reentry Guideline for immigrants, U.S.S.G. § 2L1.2, and in particular the *enumerated-offenses clause* in § 2L1.2's commentary, where the Commission defined "crime of violence" for that Guideline. § 2L1.2 cmt. n.1(B)(iii) (2014). That clause enumerated "kidnapping" among a list of other crimes. *Id.* Consequently, the *Flores-Granados* Court merely applied the categorical approach to determine the "'generic, contemporary

meaning' of the enumerated crime," 783 F.3d at 492 (quoting *Taylor*, 495 U.S. at 598), and held that North Carolina's statute is consistent with the generic definition of the enumerated crime, *id.* at 491–98. By contrast, however, Congress did not enumerate kidnapping as a violent felony in the ACCA.

Moreover, authority established that the Commission's enumerated offenses in § 2L1.2 are not coterminous with the force clause—i.e., the Commission included offenses regardless of whether they fulfill the force clause. *United States v. Chacon*, 533 F.3d 250, 254–58 (4th Cir. 2008) (noting that § 2L1.2 enumerates offenses "that do not have physical force as an element," and holding that a Maryland sex offense that did not qualify under the force clause nonetheless was a "forcible sex offense" enumerated in § 2L1.2's commentary). For instance, § 2L1.2's enumerated-offenses clause includes property crimes like burglary, arson, and extortion, which the Supreme Court said generally sweep broader than the force clause. *See Taylor*, 495 U.S. at 597 (observing that the ACCA enumerates "certain general categories of property crimes—namely burglary, arson, extortion, and the use of explosives," "even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person"). Other examples include statutory rape, *see Chacon*, 533 F.3d at 258, and "extortionate extension of credit," *see United States v. Pereira-Salmeron*, 337 F.3d 1148, 1152 (9th Cir. 2003).

The Commission itself made clear long ago that § 2L1.2's enumerated offenses include crimes that would not fulfill the force clause; the two clauses are distinct. *See* U.S. Sentencing Comm'n, Guidelines Manual app. C, amend. 658, Reason for Amend. (2003) ("The amended definition makes clear that the enumerated offenses are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another.").[11]

Because § 2L1.2 enumerated offenses do not necessarily satisfy the force clause, Mr. Harper's counsel was deficient for failing to counter the sentencing judge's statement (regarding *Flores-Granados*) that the Fourth Circuit "uses the

[11] The Commission could have grounded its enumerated offenses on a type of risk-based assessment reflected in the *residual clause*. *See United States v. Gomez-Leon*, 545 F.3d 777, 789 (9th Cir. 2008) (observing that although § 2L1.2's drafters omitted an explicit residual clause, "they did not remove all risk-based offenses"; "[i]nstead, they specially listed a number of offenses as 'crimes of violence' and, thus, deserving of the sixteen-level enhancement, even though some of those crimes do not contain as an element of their offense the intentional use of force"). The residual clause's shadow also explains this Court's pre-*Johnson* decision in *United States v. Starkie*, 611 F. App'x 113 (4th Cir. 2015) (per curiam), *reh'g granted* 615 F. App'x 132 (4th Cir. 2015). In *Starkie*, the district court (before *Johnson*) invoked the ACCA's residual clause to qualify a prior first-degree North Carolina kidnapping conviction as a predicate ACCA "violent felony." Sentencing Tr. 11–12, *United States v. Starkie*, No. 5:13-cr-00128-FL (E.D.N.C. Nov. 9, 2014), ECF No. 115. This Court affirmed (before *Johnson*), citing *Flores-Granados*, 611 F. App'x at 116, which suggests the *Starkie* Court may have viewed § 2L1.2's enumerated offenses as grounded in a type of risk-of-injury forecast embodied in the residual clause. And, indeed, the *Starkie* panel vacated its decision because of *Johnson*. 615 F. App'x at 133. The defendant ultimately was resentenced without the ACCA enhancement. *See* n.16, *infra.*

same precedence [sic] for determining whether something is a crime of violence under the Guidelines as well as a violent felony under the ACCA." J.A. 64:10–14. To be sure, this Court uses precedents interchangeably when applying substantially identical language—such as a similar force clause or (pre-*Johnson*) a similar residual clause. *See, e.g.*, *United States v. King*, 673 F.3d 274, 279 n.3 (4th Cir. 2012) (using precedents interchangeably "because the two terms have been defined in a manner that is 'substantively identical'").

But when definitions are not equivalent, the analysis is different, and that is true when a felony is enumerated by the Commission in § 2L1.2's commentary but not by Congress in the ACCA. *See United States v. Perez-Perez*, 737 F.3d 950, 954–55 (4th Cir. 2013) (rejecting defendant's reliance on an ACCA precedent in § 2L1.2 case because the ACCA did not enumerate the crime "and contains only the 'residual' and 'force' clauses, neither of which expressly contemplate sexual offenses involving minors"; "[g]iven these distinguishing characteristics, we are constrained to agree with the Government that [the ACCA precedent] does not control"). As the government's appellate brief in *Flores-Granados* said: "Enumerated offenses under § 2L1.2 need not necessarily qualify as crimes of violence under . . . the Armed Career Criminal Act." U.S. Br. 7, *United States v. Flores-Granados*, No. 14-4249 (4th Cir. Sept. 29, 2014).

Therefore, *Flores-Granados* could not have controlled Mr. Harper's post-*Johnson* ACCA case involving no enumerated offense. The government in this case had to show that the force clause applied. *See United States v. Burns-Johnson*, 864 F.3d 313, 316 (4th Cir.) ("Therefore, because robbery is not listed in the [ACCA's] enumerated offense clause, statutory armed robbery under North Carolina law may qualify as a violent felony [after *Johnson*] only by satisfying the requirements of the ACCA's force clause."), *cert. denied*, 138 S. Ct. 461 (2017).

Nor did *Flores-Granados* definitively hold that the statute is divisible, much less for purposes of the force clause. In one line the Court said, "Although the statute's elements are divisible, there are no *Shepard*-approved documents present in the record." 783 F.3d at 491. That divisibility statement was dictum because it was unnecessary to resolve that case; because no *Shepard* documents had been filed, the Court treated the statute as indivisible by categorically comparing the statute to the generic definition of § 2L1.2's enumerated kidnapping offense, and the Court resolved the case on that basis. *Id.* at 492–96. Moreover, the Court did not state which portion of the statute might set out alternate elements. And the Court cited no North Carolina case law supporting divisibility. (The government's appellate brief in that case did not contend that the statute is divisible.) At any rate, because *Flores-Granados* was a generic-offense case, the Court's divisibility comment presumably was not directed to whether the statute is divisible for

*purposes of the force clause*, a clause the Court said it had no need to address. Precedent established that what matters for the force clause is whether the statute has alternate elements "divisible into forceful or nonforceful acts." *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (stating that the Maryland statute there "is divisible" because it "can be divided into two categories," one of which "can be divided further into subcategories," "[b]ut, notably, it is not divisible into forceful or nonforceful acts" for the force clause).

The government itself has asserted that *Flores-Granados*'s remark on divisibility was dictum or inapplicable in this context. *See* Second Supp. Response Br. of U.S. 12, *Starkie* (4th Cir. July 28, 2016), ECF No. 57 (stating, in post-*Johnson* and post-*Mathis* filing, that *Flores-Granados*'s divisibility remark "is dicta (because the Court ultimately applied the categorical approach) or otherwise does not apply in [the *Starkie*] case" which involved whether North Carolina first-degree kidnapping qualified under the ACCA's force clause after *Johnson*).

### E. Mr. Harper's counsel not only failed to make raise an obvious issue about kidnapping qualifying as a violent felony, she also demonstrated confusion about the law.

Given the substantial authority above, counsel performed deficiently at sentencing by failing to contest and indeed conceding that kidnapping qualified as an ACCA predicate offense, despite an "obvious issue." *See Carthorne II*, 878 F.3d at 468. And on direct appeal she performed deficiently when she again

conceded what was an obvious, nonfrivolous issue and instead advanced weak arguments that had no chance of success. These included her contention that the district court abused its discretion by not funding a second mental health expert, her claim that her client lacked sufficient *mens rea* for the prior state court convictions (which the district court likened to an impermissible collateral attack), and her claim that the ACCA's phrase "committed on occasions different from one another" is unconstitutionally vague. *See Harper*, 659 F. App'x at 736–37.

Counsel also demonstrated confusion about the law.[12] In her opening appeal brief, counsel oddly framed as an issue presented, "Whether '2nd Degree Kidnapping' in North Carolina is a v*iolent felony as defined in USSG 4B1.2(a)(2)*." Br. of Appellant 1, *United States v. Harper*, No. 15-4440 (4th Cir. Jan. 4, 2016), ECF No. 24 (emphasis added). Counsel answered yes, with an argument heading titled, "'2nd Degree Kidnapping' in North Carolina is a *violent felony as defined in USSG 4B1.2(a)(2)*." *Id.* at 10 (emphasis added).

But the enhancement in this case was governed by the ACCA, *not* by Guideline § 4B1.2, which defines a "crime of violence" for certain purposes, not a

[12] This Court flagged one point of confusion: counsel asserted an appeal issue on the mistaken belief that her client had received a 2-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice, *Harper*, 659 F. App'x at 736 n.1, but he did not—the enhancement was under a different Guideline. *Id.* ("But the district court imposed a substantial risk enhancement under USSG § 3C1.2, not an obstruction of justice enhancement under USSG § 3C1.1. Moreover, this enhancement did not affect Harper's Sentencing Guidelines range.").

"violent felony." Indeed, the Guideline for ACCA offenders specifically warns that "violent felony" is defined by statute in § 924(e)(2) and should not be confused with § 4B1.2's different definition of "crime of violence" because they are "not identical." U.S.S.G. § 4B1.4 cmt. n.1 (2014).

This is significant because § 4B1.2's commentary enumerated "kidnapping" as a "crime of violence," *id.*, whereas the ACCA did not for a "violent felony." In counsel's post-briefing Rule 28(j) letter about *Mathis v. United States*, 136 S. Ct. 2243 (2016), which involved the ACCA's enumerated offense of burglary, counsel asserted that she wished to retract her prior concession "to the extent that the *Mathis* Court omits 'second degree kidnapping' as a violent felony supporting ACCA application." Citation of Supp. Auth. 3, *United States v. Harper*, No 15-4440 (4th Cir. June 24, 2016), ECF No. 55 ("Rule 28(j) letter").

Counsel's Rule 28(j) letter then invoked the force clause for the first time, *id.*, which reveals that counsel had failed to appreciate the significance of *Johnson* at sentencing. Again, *Johnson* was significant because it invalidated the clause that courts had used to qualify kidnapping as a predicate offense in the absence of an applicable enumerated-offense clause. *See* part I.A, *supra.* But counsel had neglected that point and instead misapplied *Johnson* at sentencing and on appeal: she used the case to advance a meritless claim that the ACCA's phrase "committed on occasions different from one another" is unconstitutionally vague. J.A. 22–24;

*see Harper*, 659 F. App'x at 737 (rejecting claim because *Johnson* was inapposite).[13]

Counsel's Rule 28(j) invocation of *Mathis* was also perplexing because her letter bolded one line that she quoted from *Mathis*, but that line simply quoted the 26-year-old *Taylor* decision: "'ACCA requires a sentencing judge to look only to "the elements of the [offense], not to the facts of [the] defendant's conduct."'" Rule 28(j) letter 2 (quoting *Mathis*, 136 S. Ct. at 2251, in turn quoting *Taylor*, 495 U.S. at 601) (alteration in original). Counsel's sentencing and appeal briefs never mentioned that longstanding elements-based rule.

Moreover, *Mathis* did not even change Supreme Court or Fourth Circuit law. Citing decades of Supreme Court cases, the *Mathis* Court concluded: "Our precedents make this a straightforward case." 136 S. Ct. at 2257. Those precedents had "repeatedly made clear that application of ACCA involves, and involves only, comparing elements." *Id.* *Mathis* arose because the Eighth Circuit had defied this approach by carving out an "exception," one by which the ACCA's elements-based approach "gives way when a statute happens to list various means by which a defendant can satisfy an element." *Id.* at 2251.

[13] Counsel's argument failed to appreciate that *Johnson* was based on the unique uncertainty and years of judicial struggle posed by tying the risk assessment "to a judicially imagined 'ordinary case' of a crime." *Johnson*, 135 S. Ct. at 2557.

In rejecting the Eighth Circuit's exception, *Mathis* certainly did not change the law in *this* Circuit. The *Mathis* Court said it had granted certiorari because the Eighth Circuit's decision added to a circuit split, and the Supreme Court specifically cited *this Court's* 2014 decision in *Omargharib* as lying on the other, correct, side of the split. *Id.* n.1.[14] Counsel did not need *Mathis* to contend that the elements of North Carolina second-degree kidnapping do not require the use, attempted use, or threatened use of violent force.

**F. The district court erred in dismissing Mr. Harper's § 2255 motion.**

For the foregoing reasons, the district court erred in dismissing the § 2255 motion. The court said § 2255 could not be used "relitigate" the "claim" that counsel had "expressly waived" and thus lost in his criminal case, J.A. 156, but, of course, this proceeding presents a different claim, a Sixth Amendment claim for ineffective assistance of counsel, which is appropriately addressed under § 2255. *See Carthorne II*, 878 F.3d at 464–66 (ruling for movant on *Strickland* claim where sentencing counsel failed to challenge enhancement and appellate counsel unsuccessfully raised the issue under plain-error review).

The district court said that counsel could not be deficient "'for failing to anticipate a future change in the law,'" J.A. 157 (quoting *Moss v. Ballard*, 537 F.

[14] *See also United States v. Barcenas-Yanez*, 826 F.3d 752, 758 (4th Cir. 2016) (pre-*Mathis* case holding that Texas statute's disjunctive *mens rea* element is not divisible because Texas case law established that jury unanimity is not required).

App'x 191, 195 (4th Cir. 2013) (unpublished), and *United States v. McNamara*, 74 F.3d 514, 516–17 (4th Cir. 1996)), but counsel is not being faulted for failing to urge a change in the law.[15] The problem, as shown above, is that counsel failed to invoke *then-existing* law (*see* part I, *supra*) to make an "obvious objection." *See Carthorne II*, 878 F.3d at 461, 463–69 (finding sentencing counsel deficient "by failing to make an obvious objection to the career offender designation," when no decisive Supreme Court or Fourth Circuit precedent existed and thus the error itself was not obvious; the categorical approach and cases outside the circuit "strongly suggested" that the prior conviction did not qualify as a predicate under the residual clause); *Jansen v. United States,* 369 F.3d 237, 243–44 (3d Cir. 2004) (holding, despite the absence of controlling Third Circuit precedent, that counsel's failure to raise a Guidelines argument was deficient performance where the argument was "readily available to him" based on case law outside the circuit, even though negative authority would need to be distinguished).

[15] The *McNamara* and *Moss* cases cited by the district court are thus inapposite. In *McNamara* the defendant faulted counsel for not having raised a futile objection that was foreclosed by on-point Fourth Circuit precedent, precedent later overruled by the Supreme Court. 74 F.3d at 515–17. In the unpublished *Moss* case, a state prisoner used hindsight to fault trial counsel for having failed to invoke West Virginia's juvenile presentment statute to object to the admission of evidence, but the exclusionary rule at issue was not announced by West Virginia's appellate court until a year after the petitioner's trial, and the rule was a departure from then-existing law and did not apply retroactively. 537 F. App'x at 195–96.

## II. Counsel's deficient performance prejudiced Mr. Harper.

Prejudice is established if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A movant need not show that counsel's deficiency "more likely than not altered the outcome in the case." *Id.* at 693.

The ACCA enhancement prejudiced Mr. Harper. Without the enhancement, he faced a 10-year statutory maximum and a Guidelines range of 46–57 months [redacted] But the ACCA imposed a 15-year mandatory minimum. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (reasonable probability standard met when error increases Guidelines range).

There is a reasonable probability that Mr. Harper would not have received that enhancement had his counsel not conceded that kidnapping is a predicate "violent felony." In *Carthorne II*, this Court found prejudice because "[i]f Carthorne's counsel had objected to ABPO as a predicate offense, there is a 'reasonable probability' that the district court would not have applied the enhancement." 878 F.3d at 469–70. This Court so held even though in Carthorne's direct appeal this Court had ruled that the sentencing court did not commit plain error by finding ABPO to be a predicate crime of violence, *id.* at 463–66; no controlling precedent existed, and other circuits were split, *id.* at 463.

Nor would it not have mattered if Mr. Harper's sentencing judge had rejected the argument. Unlike *Strickland*'s performance prong, the prejudice analysis considers later legal developments. *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 266 n.6 (3d Cir. 2018) ("Prejudice, on the other hand, is analyzed taking into account everything that the reviewing court knows given the benefits of hindsight . . . .") (citing *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)); *McKee v. United States*, 167 F.3d 103, 106–07 (2d Cir. 1999) ("Unlike the performance determination, the prejudice analysis may be made with the benefit of hindsight."). Hindsight shows that if Mr. Harper's counsel had pressed the matter at sentencing and on direct appeal—rather than waiving in both forums—there is a reasonable probability that Mr. Harper would have stood in the same shoes as the defendant in another case whose appeal was pending in this Court at the same time. *See McKee*, 167 F.3d at 107 ("The fact that precisely the same claim was successful on an appeal pursued by a similarly situated litigant is a strong indication that the failure of the petitioner's counsel to press that claim was prejudicial, for '[a]n assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like[.]") (quoting *Strickland*, 466 U.S. at 695); *Mayo v. Henderson*, 13 F.3d 528, 536 (2d Cir. 1994) (similar).

That other case is *Starkie*, where the defendant's counsel contested whether North Carolina first-degree kidnapping constitutes a violent felony. After the Supreme Court's *Johnson* and *Mathis* decisions, the government (the same U.S. Attorney's office that prosecuted Mr. Harper) stipulated in this Court that North Carolina first-degree kidnapping is not a violent felony under the ACCA after *Johnson*—the force clause does not apply—and thus the government moved to remand for resentencing. Unopposed Mot. of U.S. to Remand 1–3, No. 14-4782, *Starkie* (4th Cir. Aug. 26, 2016), ECF No. 64. This Court vacated the judgment and remanded for resentencing 10 days before affirming Mr. Harper's sentence. Order, No. 14-4782, *Starkie* (4th Cir. Aug. 30, 2016), ECF No. 65.[16]

By contrast, in Mr. Harper's appeal, when counsel tried to retract her concession, the government did not engage the merits of the predicate-offense issue and instead argued that counsel's concessions created a waiver. This Court agreed with the government on waiver.

There is at least a reasonable probability that Mr. Harper would have the same outcome as the defendant in *Starkie* had Mr. Harper's counsel properly contested the predicate-offense matter rather than waiving the issue. To deny Mr.

[16] He was resentenced without the ACCA enhancement. Resentencing Tr. 3, *Starkie*, No. 5:13-cr-00128-FL (E.D.N.C. May 10, 2017), ECF No.172; Amended Judgment, *Starkie*, No. 5:13-cr-00128-FL (E.D.N.C. May 10, 2017), ECF No. 146.

Harper that same result based on his counsel's concessions—to treat two otherwise similarly situated defendants differently—would be a manifest injustice.[17]

## CONCLUSION

The district court's judgment should be reversed, Mr. Harper's sentence should be vacated, and the case should be remanded for resentencing.

Respectfully submitted,

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[17] After the court below ruled on the § 2255 motion, this Court confirmed, upon applying preexisting case law, that the force clause does not apply to kidnapping offenses under federal and Virginia law because kidnapping can be accomplished by deception. *See United States v. Walker*, 934 F.3d 375, 378–79 (4th Cir. 2019) (federal); *United States v. Mathis*, 932 F.3d 242, 266–67 (4th Cir. 2019) (Virginia).

# ADDENDUM

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**Appendix Page**

# Addendum: excerpts of statutes

## 18 U.S.C. § 922(e) [Armed Career Criminal Act]

**(e)(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

**(2)** As used in this subsection--

***

**(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

**(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or

**(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ***

***

## N.C. Gen. Stat. § 14-39 (1997) Kidnapping*

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

* * *

* Later amended by 2006 N.C. Sess. Law 2006-247 p.18, § 20(c), effective Dec. 1, 2006.

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS**

Pursuant to Fed. R. App. P. 32(A)(7):

I certify that this Redacted brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 11,804 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), because it has been prepared in a proportionally spaced, typeface, 14-point Times New Roman, using Microsoft Word version 2016.

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Dated: November 20, 2019

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of December 2019, I caused this Redacted Corrected Brief of Appellant and Corrected Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user who is counsel of record for the Appellee, the United States:

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I further certify that on this 10th day of December 2019, I caused the required copies of this Redacted Corrected Brief of Appellant and the Corrected Joint Appendix to be hand filed with the Clerk of the Court and copies of the Sealed Corrected Brief and Sealed Corrected Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

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