

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

JOHN ERNEST DADE,  
*Defendant-Appellant.*

No. 19-35172

D.C. Nos.  
4:16-cv-00224-BLW  
4:01-cr-00196-BLW-1

OPINION

Appeal from the United States District Court  
for the District of Idaho  
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted June 4, 2020  
Portland, Oregon

Filed July 28, 2021

Before: Marsha S. Berzon and Daniel P. Collins, Circuit  
Judges, and Jennifer Choe-Groves,\* Judge.

Opinion by Judge Choe-Groves

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\* The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

**SUMMARY\*\***

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**28 U.S.C. § 2255**

The panel affirmed the district court’s denial of John Ernest Dade’s second or successive 28 U.S.C. § 2255 motion in which he argued that the predicate offenses underlying his convictions for interstate domestic violence, in violation of 18 U.S.C. § 2261(a)(1), and use of a firearm in relation to a violent crime, in violation of 18 U.S.C. § 924(c), no longer qualify as categorical “crimes of violence” in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held that the residual-clause definition of “crime of violence” in 18 U.S.C. § 16(b) is unconstitutionally vague.

The panel agreed with the government’s contention that Dade has not demonstrated that his claims “rely on” the constitutional rule announced in *Dimaya*, and that his claims thus do not satisfy the gatekeeping provision set forth in 28 U.S.C. § 2255(h)(2). By reviewing the trial record, the panel narrowed the predicate offenses upon which the jury necessarily relied: Count 6 (§ 2261(a)(1)) necessarily rested on Idaho battery; Counts 3 (§ 2261(a)(1)) and 4 (§ 924(c)) necessarily rested on either Idaho assault or battery. The panel wrote that the record before the district court and the relevant legal background at the time of Dade’s trial confirm that the district court’s determination that Idaho assault and battery as crimes of violence relied on 18 U.S.C. § 16(a) (the force clause), not § 16(b) (the residual clause). Because Dade did not satisfy the gatekeeping requirement in

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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§ 2255(h)(2), the panel did not need to reach the question whether any *Dimaya* error was harmless.

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### COUNSEL

Miles Pope (argued) and Melissa Winberg, Trial Attorneys, Federal Defender Services of Idaho, Boise, Idaho; for Defendant-Appellant.

Syrena Case Hargrove (argued), Assistant United States Attorney; Bart M. Davis, United States Attorney; United States Attorney's Office, Boise, Idaho; for Plaintiff-Appellee.

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### OPINION

CHOE-GROVES, Judge:

Defendant John Ernest Dade appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Dade challenges his convictions for interstate domestic violence, in violation of 18 U.S.C. § 2261(a)(1), and use of a firearm in relation to a violent crime, in violation of 18 U.S.C. § 924(c), arguing that the predicate offenses underlying these convictions no longer qualify as categorical "crimes of violence" in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The government contends that Dade has not demonstrated that he was convicted and sentenced in violation of *Dimaya* and therefore fails to satisfy the gatekeeping provision set forth in 28 U.S.C. § 2255(h)(2). We agree and affirm.

## I.

In 2002, a grand jury returned a second superseding indictment charging Dade with eight counts: threatening interstate communications, in violation of 18 U.S.C. § 875(c) (Count 1); interstate stalking, in violation of 18 U.S.C. § 2261A(2)(B)(i) (Count 2); interstate domestic violence, in violation of 18 U.S.C. § 2261(a)(1) (Counts 3, 5, and 6)<sup>1</sup>; brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and (C)(i) (Counts 4 and 7); and witness tampering, in violation of 18 U.S.C. § 1512(b)(2)(A) and (b)(3) (Count 8). The charges stemmed from Dade’s actions against Teresa Aikele, his former girlfriend and the mother of their son.

Dade proceeded to a jury trial. Viewed in the light most favorable to the verdict, the trial evidence established the following regarding the events that form the basis of Count 6 (interstate domestic violence). On October 20, 2000, Aikele received a call from Dade from her own home phone while she was at work. He still had a key to her house and had let himself in. When Aikele got home, he was still there. Aikele testified that he wanted her to go out with him and have dinner and go dancing. When she refused, he pulled her off the loveseat on which she was sitting and threw her onto the floor. He started punching her in the stomach and took her pants off. She testified that he penetrated her with his fingers. He then grabbed her hair and dragged her into

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<sup>1</sup> Counts 3 and 6 alleged that Dade committed interstate domestic violence, in violation of § 2261(a)(1), on two different occasions. Section 2261(a)(1) was amended in the interim between the alleged conduct underlying Counts 3 and 6. *Compare* 18 U.S.C. § 2261(a)(1) (1996) *with* 18 U.S.C. § 2261(a)(1) (2000). The jury instruction for Counts 3 and 6 were therefore different—Count 6 requiring the jury to find an additional element that Dade caused “bodily injury” to the victim.

the bedroom. In the bedroom, he handcuffed her, pulled her shirt over her head, and began biting her on her breast, telling her that they were both going to die. He put a gun to her face and told her the only way to get out of the situation was to kill her and himself. Eventually he calmed down and undid the handcuffs on Aikele so she could sleep. The next morning, she convinced him that she would not call the police if he left, and he did.

Counts 3 (interstate domestic violence) and 4 (brandishing a firearm during the crime of interstate domestic violence alleged in Count 3) were based on a subsequent attack on Aikele four months later. On February 18, 2001 around 3:00 a.m., Dade broke into Aikele's house by smashing a pane of glass, reaching in, and unlocking the door. Dade then entered Aikele's bedroom, grabbed her, and said, "See what you make me do? See what lengths you make me go to see you? I just want to see you." Aikele testified that he was "really angry" and grabbed her by the hair and slapped her in the face. He pulled her clothes off and put a gun to her face. He pushed her to the bed and called her demeaning names and said she was going to "get him off." Aikele testified that he penetrated her with his fingers and performed oral sex on her against her will. He slept in another room of Aikele's house for the rest of the night. The next morning, Aikele asked Dade if she could go to church, and he refused saying that she was going to tell someone about what he had done. He took her clothes off again and penetrated her with his fingers and performed oral sex on her against her will. Aikele was asked why she did not contact the police when Dade was sleeping in the other room. She responded that she "didn't dare" because he was angry that she had him arrested on a prior occasion and had told her "if you ever have me arrested, I'll kill you."

At the close of trial, the district court instructed the jurors that, to find Dade guilty of either count of interstate domestic violence, they would need to find that Dade traveled in interstate commerce to commit, or attempt to commit, a “crime of violence against Teresa Aikele.” The district court instructed the jury that, as a matter of law, three Idaho state offenses—assault, battery, and burglary—were crimes of violence. Therefore, it further instructed the jury that the government must prove that Dade committed either Idaho assault, battery, or burglary in connection with the attacks on Aikele, with each member of the jury “agreeing on which of these crimes the defendant committed.” The district court then provided the jurors with instructions that outlined the elements of each predicate offense as they applied to Dade’s case:

An “assault” under Idaho law is committed when a person:

- (1) unlawfully attempts, with apparent ability, to commit a violent injury on the person or another; or
- (2) intentionally and unlawfully threatens by word or act to do violence to the person of another, with an apparent ability to do so, and does some act which creates a well-founded fear in the other person that such violence is imminent.

A “battery” under Idaho law is committed when a person:

- (1) wilfully [sic] and unlawfully uses force or violence upon the person of another; or

- (2) actually, intentionally, and unlawfully touches or strikes another person against the will of the other; or
- (3) unlawfully and intentionally causes bodily harm to an individual.

“Burglary” under Idaho law is committed when a person:

- (1) enters the residence of another, and
- (2) at the time entry is made, that person has the specific intent to commit an assault or battery.

Additionally, the district court instructed the jurors that, to find Dade guilty of violating § 924(c), they would need to find that Dade brandished a firearm during and in relation to the “crime of violence” as charged in Count 3 (interstate domestic violence).

At the conclusion of Dade’s trial, the jury convicted Dade of five of the eight counts: threatening interstate communications (Count 1), interstate stalking (Count 2), interstate domestic violence (Counts 3 and 6) (“§ 2261”), and use of a firearm in relation to a crime of violence (Count 4) (“§ 924(c)”). The jury’s verdict did not expressly specify which predicate Idaho offense it relied on to find Dade guilty of the § 2261 and § 924(c) counts. The district court sentenced Dade to an aggregate term of 336 months’ imprisonment to be followed by a 5-year term of supervised release.

Dade appealed and this court affirmed his convictions, but vacated and remanded his sentence in light of *United*

*States v. Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc). See *United States v. Dade*, 136 F. App'x 973, 975 (9th Cir. 2005). On remand, the district court imposed the same 336-month aggregate sentence.

In 2009, Dade filed his first 28 U.S.C. § 2255 motion. In 2011, the district court dismissed Dade's § 2255 motion on the merits and denied a certificate of appealability. See *United States v. Dade*, Nos. 4:09-cv-00512-BLW & 4:01-cr-00196-BLW, 2011 WL 6301123, at \*15–16 (D. Idaho Dec. 16, 2011).

In 2015, the Supreme Court in *Johnson v. United States* (“*Johnson I*”), 576 U.S. 591 (2015), held that the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B) was unconstitutionally vague because it left “grave uncertainty” about both “how to estimate the risk posed by a crime” and “how much risk it takes for a crime to qualify as a violent felony.”<sup>2</sup> *Johnson II*, 576 U.S. at 597–98. Three years later, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court extended its reasoning in *Johnson II* to the definition of “crime of violence” found in 18 U.S.C. § 16(b). *Dimaya*, 138 S. Ct. at 1216. The Court concluded that § 16(b) is unconstitutionally vague because it creates “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* (quoting *Johnson II*, 576 U.S. at 598).

Following the Court's decision in *Johnson II*, Dade sought authorization from this court to file a second or successive § 2255 motion in the district court. This court

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<sup>2</sup> In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that the constitutional rule announced in *Johnson II* applies retroactively to cases on collateral review. *Welch*, 136 S. Ct. at 1268.

granted authorization, and Dade filed the § 2255 motion giving rise to the instant appeal. In the motion, he challenged his § 2261 convictions, asserting that they must be vacated because the offenses that served as the predicate crimes of violence—Idaho burglary, battery, and assault—no longer qualify as categorical crimes of violence under *Johnson II* and *Dimaya*.<sup>3</sup> Specifically, he argued that Idaho burglary is a crime of violence only under 18 U.S.C. § 16(b), which was facially invalidated in *Dimaya*, 138 S. Ct. at 1216. Because the jury had not specified which of the three Idaho offenses it had relied on in reaching its verdict, Dade argued that the § 2261 convictions could have relied on an invalid burglary predicate and that therefore his convictions were unlawful under *Dimaya*. Dade also challenged his § 924(c) conviction, asserting that the § 924(c) conviction must also be vacated because it was predicated on his now invalid § 2261 conviction as charged in Count 3.

The district court denied Dade’s second § 2255 motion. Applying *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), *overruled on other grounds by Stokeling v. United States*, 139 S. Ct. 544 (2019), *as recognized in Ward v. United States*, 936 F.3d 914, 918 (9th Cir. 2019), the district court concluded that Dade’s claims did not satisfy the so-called gatekeeping provision set forth in § 2255(h)(2), because the record made clear that Dade’s convictions did not rest on § 16(b) and therefore his claims did not actually “rely on” *Dimaya*. Citing both the jury instructions and

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<sup>3</sup> The Supreme Court decided *Dimaya* while Dade’s second § 2255 motion was pending in the district court. The parties supplemented their briefing to analyze and apply *Dimaya* to their arguments. Because *Dimaya* is an extension of *Johnson II*, and *Dimaya* is directly applicable to the statute at issue, 18 U.S.C. § 16, we will address the parties’ arguments only as they relate to *Dimaya*.

evidence introduced at trial, the district court held that Dade’s § 2261 convictions clearly relied on a valid legal ground—§ 16(a)—for categorizing the three predicate crimes of violence because the jury instructions required the jury to find that Dade used or attempted to use violent, physical force for Idaho assault, battery, and burglary. Because Dade’s § 924(c) conviction is predicated on his § 2261 conviction as charged in Count 3, the district court applied the same reasoning and concluded that Dade’s challenge to his § 924(c) conviction also did not rely on *Dimaya*. The district court granted Dade a certificate of appealability. This timely appeal followed.

## II.

We review de novo a district court’s decision to deny a § 2255 motion. *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014).

The definition of “crime of violence” in 18 U.S.C. § 16 contains two parts: subsection (a), which is known as the force or elements clause, and subsection (b), which is known as the residual clause. These subsections define a crime of violence as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or

property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

As we briefly mentioned, in *Dimaya*, the Supreme Court struck down the residual clause (“§ 16(b)”) as unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1216. In doing so, the Court concluded that § 16(b) is unconstitutionally vague because, similar to the ACCA’s residual clause declared unconstitutional in *Johnson II*, it creates “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.* (quoting *Johnson II*, 576 U.S. at 598).

The government contends that we need not address Dade’s *Dimaya*-based challenges to his § 2261 and § 924(c) convictions because Dade has not demonstrated that his claims “rely on” the constitutional rule announced in *Dimaya*, and thus, his claims do not satisfy the gatekeeping requirement of § 2255(h)(2). We agree.

To file a second or successive § 2255 motion, a movant must show that his claim relies on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h)(2). “A claim necessarily ‘relies on’ a rule of constitutional law if the claim is that the movant was sentenced in violation of that constitutional rule.” *Geozos*, 870 F.3d at 895. In *Geozos*, we clarified how to determine whether a movant was sentenced in violation of a new constitutional rule for purposes of satisfying § 2255(h)(2). *See id.* at 895–96. There, we recognized that there may be instances in which a court has specified which of the two clauses (*i.e.*, the force clause or the residual clause) it has invoked in classifying a particular offense as a

crime of violence, which would then allow us to easily determine whether a conviction or sentence rested on a valid legal theory. *Id.* at 895. However, even where the record lacks such an explicit statement, it nonetheless may be possible to determine that the district court did not rely on the residual clause by looking to the relevant background legal environment at the time of trial. *See id.* at 896. If the record and legal background support that the district court did not rely on the residual clause when categorizing an offense as a crime of violence, then a movant’s claim does not “rely on” the new constitutional rule announced. *Id.*

Here, the district judge made the determination and instructed the jury that each Idaho predicate offense was, as a matter of law, a crime of violence. By convicting Dade of the § 2261 and § 924(c) counts, the jury concluded that Dade had indeed committed a crime of violence. However, the verdict did not expressly specify on which predicate the jury relied to make that determination. Therefore, before determining whether the district court relied on § 16(a) or § 16(b) to conclude that the Idaho predicate offenses were crimes of violence, we must first determine whether the record as a whole makes clear which predicate offenses the jury relied on to convict Dade of violating § 2261 and § 924(c). Although the jury did not return a special verdict indicating on which predicates it necessarily found, we can narrow the predicate offenses the jury necessarily relied upon by reviewing the trial record.

We first address Count 6, which required the jury to find that Dade committed either Idaho assault, battery, or burglary, and that as a result of committing one of those offenses, Dade “*thereby* cause[d] bodily injury” to Aikele. 18 U.S.C. § 2261(a)(1) (1996) (emphasis added). The jury’s guilty verdict on Count 6 validates that the jury concluded

that the crime of violence Dade committed “cause[d] bodily injury.” *Id.* On this record, the only Idaho predicate that could have caused bodily injury is Idaho battery. Even assuming that the jury agreed that Dade committed Idaho burglary or assault, the record reflects that the jury necessarily also found the elements of Idaho battery when it concluded that Dade’s crime of violence “cause[d] bodily injury” to Aikele. Therefore, we can conclude that Count 6 necessarily rests on Idaho battery.

We next address Counts 3 and 4. The jury instruction for Count 3 was not identical to that of Count 6 because § 2261, the interstate domestic violence statute, was amended in the interim between the conduct underlying each count. Unlike Count 6, the jury instruction for Count 3 did not include the bodily injury element. On this record, we cannot conclude, merely from the conviction on Count 3, which predicate the jury necessarily relied on to convict Dade for that count. But the jury also convicted Dade of Count 4—the § 924(c) offense—which was predicated on Dade committing a crime of violence as charged in Count 3. Thus, in order to convict Dade of Count 4, the jury was required to find that Dade “brandished” a firearm “during and in relation to” the crime as charged in Count 3. “[T]he term ‘brandish’ means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.” 18 U.S.C. § 924(c)(4). On this record, the finding that Dade brandished a firearm during a crime of violence, as charged in Count 3, must be based on Dade displaying the firearm, or making its presence known, in front of Aikele, *after* he had entered her home. Therefore, the predicate crime of violence in Counts 3 and 4 could not have been Idaho burglary which, under Idaho law, is complete upon entry, *see*

*State v. Rawlings*, 363 P.3d 339, 342 (Idaho 2015). Accordingly, we can conclude that the jury must have necessarily relied on either Idaho assault or battery to convict Dade of Counts 3 and 4.

We now must determine whether the district court’s finding that the implicated predicate offenses—Idaho assault and battery—relied on the force clause of § 16(a) or the residual clause in § 16(b). We consider both the record before the district court and the relevant background legal environment at the time of Dade’s trial. *See Geozos*, 870 F.3d at 896. The record confirms that the district court relied on § 16(a) to conclude that Idaho assault and battery were crimes of violence. Prior to trial, the government submitted a trial memorandum to the district court, stating that Idaho assault and battery were crimes of violence under § 16(a) because the offenses had as an element the use, attempted use, or threatened use of physical force against the person or property of another. Dade neither filed a trial brief nor objected to the government’s arguments in its trial brief. This supports the view that the district court did not rely on § 16(b) to conclude that Idaho assault and battery are categorical crimes of violence.

Moreover, our caselaw instructs us to examine the relevant background legal environment to determine whether there is any controlling law from the time Dade went to trial that would indicate whether the district court relied on something other than § 16(b). *See Geozos*, 870 F.3d at 895–96. The relevant background legal environment further confirms that the district court’s conclusion that Idaho assault and battery were crimes of violence did not rest on § 16(b). The residual clause, by its terms, applied only to an offense “that is a *felony*.” 18 U.S.C. § 16(b) (emphasis added). In order to be classified as a

felony, a crime must be punishable by imprisonment for more than one year. *See, e.g., Moncrieffe v. Holder*, 569 U.S. 184, 188 (2013). But under Idaho law, at the time of Dade’s trial, assault was punishable by imprisonment in the county jail for up to three months, *see* Idaho Code § 18-902, and battery was punishable by imprisonment in the county jail for up to six months, *see id.* § 18-904. Under Idaho law, neither battery nor assault is a felony. Furthermore, Idaho assault and battery do not meet the federal definition of a felony. *See Moncrieffe*, 569 U.S. at 188. Therefore, under the relevant legal background, the district court could not have relied on § 16(b) to classify Idaho assault and battery as crimes of violence.

The outcome might have been different had we not been able to eliminate Idaho burglary as the basis for the jury’s verdict on Counts 3, 4, and 6, because the record confirms that the district court relied on the residual clause to categorize Idaho burglary as a crime of violence. In its pre-trial memorandum, the government stated that burglary—unlike assault and battery—was categorized as a crime of violence under the residual clause. Just as that submission suggests that the district court likely relied on the force clause to determine that assault and battery are crimes of violence, *see supra* p. \*14, it likewise supports concluding that the district court may have relied on the residual clause to categorize burglary as a crime of violence. Nor does the controlling law at the time of Dade’s trial establish otherwise. *See Geozos*, 870 F.3d at 896. As the government concedes, at the time of Dade’s trial, we had recognized that similar statutory residential burglary offenses were categorical crimes of violence under the residual clause. *See United States v. M.C.E.*, 232 F.3d 1252, 1255 (9th Cir. 2000); *United States v. Becker*, 919 F.2d 568, 571–72 (9th Cir. 1990), *superseded by statute as stated in United States*

*v. Ramos-Medina*, 706 F.3d 932, 937 (9th Cir. 2013). Based on the record and legal background, we must therefore presume that the district court relied on the residual clause, not the force clause, to categorize Idaho burglary as a crime of violence. *See Geozos*, 870 F.3d at 896. But because the jury’s verdict here did not rest on the Idaho burglary predicate, it is clear that Dade’s conviction does not rest on the residual clause.

The record and relevant background legal environment thus confirm that the district court’s determination that Idaho assault and battery qualify as crimes of violence did not rest on § 16(b). Because his § 2261 and § 924(c) convictions did not rely on § 16(b), Dade’s challenges to those convictions do not “rely on” *Dimaya*. *See Geozos*, 870 F.3d at 895–96. Dade’s second § 2255 motion, therefore, does not meet the gatekeeping requirements for a second or successive motion. 28 U.S.C. § 2255(h)(2). Because Dade has not satisfied the gatekeeping requirement set forth in § 2255(h)(2), we need not reach the question whether any *Dimaya* error is harmless. *See Geozos*, 870 F.3d at 897.

### III.

Dade has not demonstrated that he was convicted and sentenced in violation of *Dimaya* and, therefore, fails to satisfy the gatekeeping requirement set forth in 28 U.S.C. § 2255(h)(2). For the foregoing reasons, we affirm the district court’s denial of Dade’s § 2255 motion.

**AFFIRMED.**