REENA RAGGI, *Circuit Judge*, concurring:

I join my colleagues in today unanimously affirming the denial of petitioner Miguel Nunez's 28 U.S.C. § 2255 challenge to his 30-year prison sentence for conspiratorial and substantive Hobbs Act robbery as untimely. I write separately only to state that I do not share my concurring colleague's concern that this decision creates any "injustice" for Nunez by denying him the opportunity to pursue a vagueness challenge to the pre-*Booker* use of a residual clause definition of "crime of violence" to identify him as a Career Offender with a Guidelines range of 151–188 months rather than a non-Offender range of 121–151 months. That is because Nunez's sentence was not dictated by, or even anchored to, his Guidelines range. As the record makes plain, the district court sentenced Nunez to 30 years' imprisonment—almost double the high end of his Guidelines range—based on heinous conduct committed during the robbery that was not adequately factored into his Guidelines calculation. Specifically, Nunez repeatedly raped and sexually assaulted a bound robbery victim. The district court's discussion of these circumstances leaves me with no doubt that, even if Nunez could show that vagueness in the residual clause did not permit him to be denominated a Career Offender under the Guidelines, that would make no difference to the district court's decision to sentence him to 30 years.

I.

At the outset, let me note that I think it far from clear, even after *Johnson v. United States*, 135 S. Ct. 2551 (2015), that Nunez has a meritorious vagueness challenge to the residual clause of the Career Offender Guideline as applied prior to *United States v. Booker*, 543 U.S. 220 (2005). *See* U.S.S.G. §§ 4B1.1, 4B1.2(a)(2) (1998). The Supreme

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Court has ruled that the Guidelines, as advisorily applied after *Booker*, are not subject to vagueness challenges. *See Beckles v. United States*, 137 S. Ct. 886 (2017). Our court has not yet decided whether any different conclusion applies to the presumptively mandatory pre-*Booker* Guidelines. The Eleventh Circuit, however, has held that it does not. *See In re Griffin*, 823 F.3d 1350, 1354–55 (11th Cir. 2016). That court observed that a holding requiring the Guidelines to satisfy due process vagueness standards "differs fundamentally and qualitatively from a holding that . . . the ACCA sentencing statute [at issue in *Johnson*]—that increases the statutory penalty for the underlying new crime—is substantively vague." *Id.* at 1356. It explained that, as applied to ACCA's residual clause, *Johnson*'s vagueness determination "requires the district court to reduce the enhanced sentence to at least the unenhanced applicable statutory maximum." *Id.* at 1355.

> In stark contrast, whether the Guidelines are mandatory or advisory, the district court, even without the invalidated clause, could still impose a sentence within the same statutory penalty range and indeed the same sentence as before. In fact, in former mandatory guidelines cases, the resentencing would now be under an even more discretionary advisory system that would permit the district court to impose the same sentence.

Id.

In *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), the Seventh Circuit took a different view, but not necessarily in a way that helps Nunez.[1] That court read *Johnson* to hold that "a person has a right not

[1] We have expressly declined to follow *Cross*'s reasoning with respect to the timeliness of a *Johnson*-based vagueness challenge to the pre-*Booker* Guidelines. *See* Panel Op. at 14–15.

to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause." *Id.* at 294 (emphasis in original). Declining to limit that right to sentencing statutes such as ACCA, the court concluded that the *Cross* defendants were prejudiced by "an extended prison term . . . imposed on both men as a result of their designation as career offenders" under the pre-*Booker* Guidelines. *Id.* at 295. The emphasis *Cross* placed on the word "dictated" is significant. The defendants in that case were, in fact, sentenced within increased ranges dictated by their Career Offender designation. But the court had no occasion in *Cross* to consider how, if at all, a defendant would be prejudiced by a pre-*Booker* Career Offender designation that—as in Nunez's case—did *not* "dictate," or even anchor, the sentence actually imposed.[2]

II.

Nunez cannot here demonstrate prejudice—much less injustice—because his 30-year prison sentence was not dictated by the Career Offender Guideline's residual clause definition of a violent crime. The record convincingly shows that, although Judge Kaplan relied on the residual clause to denominate Nunez a Career Offender

[2] Like the *Cross* defendants, Nunez failed to raise a vagueness challenge to the Career Offender Guideline's residual clause either in the district court or on appeal and, thus, must show cause and prejudice, or actual innocence, to pursue the argument on a § 2255 motion. *See Bousley v. United* States, 523 U.S. 614, 621–22 (1998); *Harrington v. United States*, 689 F.3d 124, 129 (2d Cir. 2012). Even such a showing, however, might not be enough to allow Nunez to pursue his vagueness claim if a court were to find him to have waived the argument by stipulating in his plea agreement that his Hobbs Act robbery crimes of conviction qualified as violent felonies under the Career Offender Guideline. *See United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015) (explaining various circumstances that can manifest waiver, including where defendant "agrees to a course of action that he later claims was error"). For purposes of this concurrence, however, I do not assume waiver.

in calculating his Guideline range at 151–188 months, the judge did not feel compelled to sentence Nunez within that range rather than the lesser 121–151 month non-Offender range. Rather, Judge Kaplan decided that, in Nunez's case, justice demanded a 30-year sentence, far above—indeed, almost double—*both* these ranges. In so concluding, Judge Kaplan made no reference to Nunez's Career Offender designation or to the other convictions supporting that designation.[3] Rather, he based the departure on Nunez's heinous conduct in the course of the crimes of conviction, conduct not adequately accounted for by the Guidelines. This included Nunez repeatedly raping and sexually assaulting a bound female victim of the Hobbs Act robbery who, as a consequence, suffered serious and years-long psychological harm.

This court did not need to discuss this conduct in any detail to hold Nunez's § 2255 motion untimely. But such a discussion cannot be avoided to explain why our decision today does Nunez no injustice.

Late on the night of February 14, 1994, Nunez and two confederates (one male, one female) lay in wait for a couple to return to their Bronx apartment with the cash proceeds of their florist business. When the couple reached their door, Nunez's male confederate grabbed the female victim from behind, placed his hand over her mouth, put a gun to her neck, and forced her into the apartment. Meanwhile, Nunez put a gun to the male victim's head

[3] To qualify for Career Offender designation, not only must a defendant's instant offense of conviction be a felony crime of violence or a felony controlled substance offense, but also, the defendant must have two prior felony convictions for either a crime of violence or a controlled substance offense. Nunez concedes that his two prior New York first-degree robbery convictions—one committed at gunpoint, the other with a knife—are for violent crimes. *See United States v. Ojeda*, 951 F.3d 66, 72 (2d Cir. 2020).

and forced him inside. In the apartment, the male victim's hands were tied behind his back—tied so tightly as later to require surgery for him to regain their full use. Meanwhile, the female victim was taken into a bedroom where she was placed face down on a bed and bound hand and foot by Nunez's male confederate, who then threw pillows and blankets over her head, threatening to kill her if she tried to look at his face.

With their victims thus restrained, the robbers proceeded to ransack the apartment, stealing cash, credit cards, beepers, liquor, and jewelry, including the female victim's wedding ring.

For the female victim, however, the terror was by no means over. Nunez entered the bedroom where she was restrained, pulled down her pants and proceeded, on four separate occasions, to molest her sexually by digitally penetrating her vagina.

The male confederate also entered the bedroom and threatened to burn the woman's business down and to injure her son—whom he identified by name and business—if she reported the robbery to the police.

Then, with all three robbers in the bedroom, Nunez twice raped the terrified female victim, first vaginally and then anally. When he finished, Nunez's male confederate took his turn, also raping the woman both vaginally and anally. These events reduced the three robbers to laughter.

At sentencing, the district court took a much steelier view of things. Judge Kaplan described Nunez's conduct during the robbery as "barbaric," App. 35, "exceptionally heinous, cruel, brutal and degrading," *id.* at 34, and "close to torture, gratuitous infliction of injury and the prolonging of pain and humiliation," *id.* He concluded

that a significant upward departure from Nunez's Sentencing Guidelines range was warranted by U.S.S.G. §§ 5K2.0 (cases outside the "heartland"), 5K2.3 (cases of extreme psychological injury to a victim), and 5K2.8 (cases of "unusually heinous, cruel, brutal, or degrading" conduct toward the victim). Indeed, the district court emphasized that the extent of its departure did not depend on the cumulative effect of these Guidelines. He would depart to the same significant extent under any one of these Guidelines. In so stating, the district court observed that characterizing Nunez's actions as "out of the heartland of robbery cases is such a vast understatement as to be absurd." *Id.* at 35. Referencing the victim's prolonged psychological injury, detailed in the Pre-Sentence Report and, therefore, requiring no elaboration, the district court stated that it could not "readily imagine a case that more readily fits into 5K2.8." *Id.* ("Imagine what went through this victim's mind, lying there going through what this man subjected her to, over and over again").

On this record, which so convincingly supports the district court's upward departure to a 30-year sentence, there is absolutely no reason to think that if vagueness in the residual clause did not permit Nunez to be identified as a Career Offender with a Guidelines range of 151–188 months, the district court would have sentenced him within the non-offender Guidelines range of 121–151 months, or even to any sentence less than 30 years. Thus, insofar as that is Nunez's argument, he cannot show prejudice, much less injustice.[4]

[4] Nunez's inability to show prejudice makes it unnecessary for me to address whether he shows cause. Insofar as Nunez further argues that, regardless of prejudice, vagueness in the residual clause would mean he is "actually innocent" of being a Career Offender, I am not convinced. The cases Nunez cites that apply the actual innocence standard to a defaulted Guidelines enhancement challenge—whether before or after *Booker*—all involve defendants claiming that they did not, in fact, commit the enhancing predicate crimes. This comports with precedent

To the extent the district court did anchor its 30-year sentence to a Guidelines range, it was not to the challenged 151–188 month range for Hobbs Act robbery, but rather to the 292–365 month range that would apply to Aggravated Sexual Abuse, 18 U.S.C. § 2241(a)—a crime comparable to the rapes and sexual assaults aggravating Nunez's Hobbs Act robbery and informing the district court's departure decision. Nunez does not challenge the comparison, either generally or specifically for employing a Career Offender enhancement in calculating the resulting 292–365 month range. In fact, any such Career Offender challenge would be to no avail because force is an element of § 2241(a) Aggravated Sexual Abuse, making that comparator offense a crime of violence under U.S.S.G. § 4B1.2(a)(1), without regard to the residual clause definition of U.S.S.G. § 4B1.2(a)(2). Moreover, the district court did not reference the Aggravated Sexual Abuse range as somehow dictating its 30-year sentence. Rather, it drew the comparison simply to demonstrate the reasonableness of its decision to impose a sentence nearly twice the high end of the 151–188 month range applicable to Nunez's robbery crimes of conviction.

In sum, whatever vagueness challenge might be made to U.S.S.G. § 4B1.2(a)(2)'s residual clause definition of a crime of

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which makes clear that "actual innocence" refers to factual, not legal, innocence. *See Bousley v. United States*, 523 U.S. at 623; *Poindexter v. Nash*, 333 F.3d 372, 381 (2d Cir. 2003) (actual innocence "normally means simply that the defendant did not commit the crime"). Thus, I doubt that Nunez can use legal principles, such as facial vagueness or categorical construction, to show that he is actually innocent of having committed a "violent crime" of conviction when the facts of his case demonstrate violence beyond any doubt. *See Poindexter v. Nash*, 333 F.3d at 382 (explaining actual innocence exception does not apply where petitioner "merely makes [a] legal argument"); *Darby v. United States*, 508 F. App'x 69, 71 (2d Cir. 2013) (explaining that defendant's "essentially legal argument that he is innocent of the [career offender] sentencing enhancement because the district court misclassified his predicate offenses . . . is insufficient to trigger the actual innocence exception").

violence, the panel's rejection of Nunez's challenge as untimely does him no injustice because the record plainly shows that his 30-year sentence was not dictated by that Guideline. Rather, the sentence represented a significant, but entirely justified, departure from both the challenged and urged Guideline ranges based on Nunez and his confederate repeatedly raping and sexually assaulting their bound robbery victim.

III.

There is a final reason why I think the panel decision today does Nunez no injustice: the record demonstrates that even a successful vagueness challenge would not secure him a reduced sentence. As already shown, the district court's upward departure to a 30-year sentence was not anchored to Nunez's 151–188 month Career Offender range but, rather, to the fact that his cruel and brutal conduct during the robbery equated to Aggravated Sexual Abuse. There is no reason to think the district court would take a different view of this conduct or impose a lesser sentence if the Guideline's residual clause definition of a violent crime were declared void for vagueness.

That conclusion is only reinforced by the fact that, on remand, Nunez could not be sentenced under the presumptively mandatory Guidelines regime that the Supreme Court declared unconstitutional in *Booker*. Rather, any resentencing would have to be under advisory Guidelines, which afford the district court more—not less—discretion to impose sentences outside the Guidelines. *See In re Griffin*, 823 F.3d at 1355. Moreover, that discretion would allow the district court to consider whether Nunez's Hobbs Act robbery crimes, even if not categorically violent under the elements clause of the Career Offender Guideline, were nevertheless actually so violent as to inform statutory sentencing factors and thereby warrant a non-Guidelines sentence.

See 18 U.S.C. § 3553(a)(2)(A) (referencing seriousness of offense and need to provide just punishment for that offense); *id.* § 3553(a)(2)(B) (referencing need to afford adequate deterrence for defendant's criminal conduct); *id.* § 3553(a)(2)(C) (referencing need to protect public from further crimes of defendant); *see also id.* § 3661 (prohibiting any limitation on information concerning "background, character, and conduct" of defendant that district court may consider in imposing appropriate sentence).[5]

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To conclude, the panel's rejection of Nunez's vagueness challenge as untimely does him no injustice for three reasons. First, it is not evident that a vagueness challenge can be made to the pre-*Booker* Guidelines. Second, even giving Nunez the benefit of the doubt on that point, he cannot show prejudice because his challenged 151–188 month Guidelines range did not dictate the 30-year sentence imposed by the district court. Rather, the district court based that significantly higher sentence on conduct—repeated rapes and sexual

[5] Because Hobbs Act robbery can be committed by using force against persons *or* property, it reaches more broadly than the Career Offender Guideline's elements clause, which is limited to offenses using force against persons. *Compare* 18 U.S.C. § 1951(a), *with* U.S.S.G. § 4B1.2(a)(1); *cf. United States v. Hill*, 890 F.3d 51 (2018) (recognizing Hobbs Act robbery as crime of violence under ACCA, whose element clause references force against person *or* property). It was for this reason that, despite the actual violence of Nunez's Hobbs Act robbery, the district court could not find it a categorical crime of violence under § 4B1.2(a)(1) and, instead, relied on § 4B1.2(a)(2)'s residual clause. *Booker* does not change the categorical application of the Career Offender Guideline, but it does mean that, in exercising their sentencing discretion pursuant to 18 U.S.C. § 3553(a), district courts can consider whether a defendant committed a crime that is not categorically violent in a particularly violent way. Although definitions of violent crime continue to apply categorically after *Booker*, district courts are free to consider the actual violence of a defendant's criminal conduct in deciding whether to impose a within-Guidelines sentence.

assaults of a robbery victim—that was not adequately factored into the challenged range, and that was more akin to Aggravated Sexual Abuse, a crime that is categorically violent based on its elements, without reference to the challenged residual clause. Third, because the conduct supporting the district court's departure decision would not be mitigated by a successful vagueness challenge to the Guideline's residual clause, and because, on any remand, the district court would have more, not less, discretion to impose a non-Guidelines sentence, I think it clear that remand would not secure Nunez any lesser sentence.

Accordingly, I join in the panel decision to affirm without any reservation about doing Nunez an injustice.