IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CR-08-251-02-C
	)	CIV-16-516-C
JOSHUA D. BOUZIDEN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Defendant filed a pro se Motion seeking relief from a sentence pursuant to 28 U.S.C. § 2255 based on the Supreme Court's recent decision in Johnson v. United States, ___ U.S. ___, 135 S.Ct. 2551 (2015). The Court appointed counsel to assist Defendant; counsel filed a Supplement to Defendant's Motion as well as a Reply to Plaintiff's Response.

On September 23, 2008, Defendant was indicted on three criminal counts: Count One – conspiracy to possess stolen firearm in violation of 18 U.S.C. § 371; Count Two – possession of stolen firearms in violation of 18 U.S.C. § 922(j); and Count Three – possession of a firearm after conviction of a felony in violation of 18 U.S.C. § 922(g). Defendant ultimately pleaded guilty to Counts Two and Three, and Count One was dismissed at sentencing. In preparation for sentencing, the United States Probation Office prepared a Presentence Investigation Report. The United States also filed an information to establish prior convictions seeking to enhance Mr. Bouziden's sentence pursuant to 18 U.S.C. § 924(e), the Armed Career Criminal Act ("ACCA"). Defendant's three underlying convictions were Canadian County Case No. CF-97-713 – Manslaughter in the First Degree;

Cleveland County Case No. CF-2002-1045 – Possession of a Controlled Dangerous Substance with Intent to Distribute; and Oklahoma County Case No. CF-2003-997 – Possession of a Controlled Dangerous Substance with Intent to Distribute. At sentencing this Court determined that Defendant was subject to the ACCA and sentenced him to 120 months imprisonment on Count Two and 180 months on Count Three, to be served concurrently. Defendant now seeks relief from his sentence, arguing that based upon the Supreme Court's decision in Johnson, application of the ACCA to him is improper.

Under the ACCA, a person who violates 18 U.S.C. § 922(g)(1) is subject to an enhanced sentence if he has three or more prior convictions for a "violent felony." § 924(e)(1). A violent felony is defined as "any crime punishable by imprisonment for a term exceeding one year" that satisfies one of three clauses. The first is the elements clause: a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Second is the enumerated offense clause: a crime which is a categorical match to the generic offenses of burglary, arson, or extortion. § 924(e)(2)(B)(iii). Third is the residual clause: a crime which involves conduct that presents a serious potential risk of physical injury to another. § 924(e)(2)(B)(ii). In Johnson the Supreme Court struck the residual clause, finding it was unconstitutionally vague.

Defendant does not challenge his two prior convictions for possession of a controlled dangerous substance; rather, he argues that his conviction for manslaughter does not satisfy the requirements of the elements clause.

The Court's review in this matter is governed by the framework described by the Supreme Court in Mathis v. United States, ___ U.S. ___, 136 S. Ct. 2243 (2016) and Descamps v. United States, ___ U.S. ___, 133 S.Ct. 2276, 2283 (2013). The Court is not to consider the particular facts underlying the conviction, rather the focus is on the elements of the offense, those "things the prosecution must prove to sustain a conviction . . . [or] [a]t a trial . . . what the jury must find beyond a reasonable doubt to convict the defendant." Mathis, 136 S.Ct. at 2248 (internal quotation marks and citation omitted). If the statutory offense encompasses conduct more broad than the generic crime, or broader than the required violent force or physical force, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." Descamps, 133 S.Ct. at 2283.

In certain circumstances, the Court may employ a modified categorical approach. This approach may be used only when the offense of conviction is "divisible," meaning it has multiple alternative versions of the crime. Descamps, 133 S.Ct. at 2283. If the modified categorical approach applies, it permits the Court to review "the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." Shepard v. United States, 544 U.S. 13, 26 (2005). Notably, a statute is not divisible for purposes of applying the modified categorical approach if the statute lists alternative means of violating a single element, and one of those means would not qualify as an ACCA predicate. Mathis, 136 S.Ct. at 2254-55. This raises the issue of whether the enumerated

alternatives are "means" or "elements." Id. While the Supreme Court has never provided a bright line definition or rule regarding what is an "element" as opposed to "means," in Mathis the Supreme Court noted that making the determination will be "easy" when the state's highest criminal court has decided the issue; that is, has the state's highest criminal court determined what specific elements must be determined in order to find the defendant guilty of the statute.

Defendant was convicted under Oklahoma's manslaughter statute, 21 Okla. Stat. § 711. That statute states,

> Homicide is manslaughter in the first degree in the following cases:
>
> 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.
>
> 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
>
> 3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

The Defendant argues that this statute is not divisible, but rather sets out three different methods to commit the offense of manslaughter in the first degree. According to Defendant, because the statute provides three alternative means, the statute is not divisible under Descamps, 133 S.Ct. at 2283; Shepard, 544 U.S. at 26. After consideration of the statute and the Supreme Court's reasoning in Descamps and Shepard, the Court finds Oklahoma's homicide statute is divisible. That is, the statute is comprised of "multiple alternative versions

of the crime" of manslaughter. Descamps, 133 S.Ct. at 2284-85. This decision is bolstered by the fact that the Oklahoma Court of Criminal Appeals has, through its adoption of uniform jury instructions, established specific sets of instructions to apply to each subparagraph of § 711. Defendant's conviction under § 711(2) required the jury to find beyond a reasonable doubt that there was (1) adequate provocation, (2) passion or emotion such as anger, rage, fear, or terror, (3) a homicide occurring during a state of passion, and (4) the existence of a causal connection between provocation, passion, and homicide. See OUJI-CRIM 4-95. Different elements would have to be proven to convict Defendant of one of the other subparagraphs of § 711. Therefore, the Court applies the "modified categorical approach."

Under that approach, the Court may examine the underlying documents to determine under which portion of Oklahoma's manslaughter law Defendant was convicted. The documents provided by Plaintiff demonstrate Defendant was convicted of violating § 711(2) i.e., heat of passion manslaughter. Thus, the question is whether Defendant's conviction qualifies as a crime of violence.

As noted above, the elements clause of the ACCA is triggered when the defendant is convicted of a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). The Supreme Court has defined "physical force" to mean violent force. See Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) ("We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force – that is, force capable of

causing physical pain or injury to another person."). Certainly, the killing of another person satisfies the requirement of causing physical pain or injury to another person.

Defendant argues that because a conviction under § 711(2) does not require "a design to effect death," see Powell v. Oklahoma, 2000 OK CR 5, ¶ 107, 995 P.2d 510, 533, the killing could occur as a result of reckless conduct. Defendant then directs the Court to United States v. Armijo, 651 F.3d 1226 (10th Cir. 2011), where the Tenth Circuit concluded the Colorado manslaughter statute did not constitute a crime of violence because the offense involved reckless conduct. However, as Plaintiff notes, an intent to kill is not a required element to qualify as a violent felony under the ACCA. Rather, there must only be either attempted or actual use of physical force on the part of the Defendant. An examination of the Oklahoma jury instruction for a conviction of manslaughter in the first degree by heat of passion, as set forth above, demonstrates that Defendant's conviction under that statute satisfies the violent felony requirements of the ACCA. The relevant jury instruction states:

> No person may be convicted of manslaughter in the first degree by heat of passion unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, the death of a human;
>
> Second, caused by the defendant;
>
> Third, the death was not excusable or justifiable;
>
> Fourth, the death was inflicted in a cruel and unusual manner;
>
> Fifth, when performing the conduct which caused the death, defendant was in a heat of passion.

OR

Fourth, the death was inflicted by means of a dangerous weapon;

Fifth, when performing the conduct which caused the death, defendant was in a heat of passion.

OUJI-CRIM 4-95. Thus, to be convicted of violating § 711(2) the jury is required to find beyond a reasonable doubt that Defendant killed another person either in a cruel and unusual manner or by means of a dangerous weapon.

Applying the modified categorical approach, the Court finds that Defendant was convicted of a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Accordingly, Defendant's conviction for manslaughter in the first degree qualifies as a crime of violence under the ACCA, and Johnson does not require vacating his earlier sentence. Defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. No. 115) is DENIED.

IT IS SO ORDERED this 13th day of January, 2017.

ROBIN J. CAUTHRON
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

February 27, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA D. BOUZIDEN,

Defendant - Appellant.

No. 17-6031
(D.C. Nos. 5:16-CV-00516-C and 5:08-CR-00251-C-2)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Joshua D. Bouziden filed this motion under 28 U.S.C. § 2255, contending that his prior conviction for first degree manslaughter in Oklahoma did not qualify as a predicate offense under the force clause of the Armed Career Criminal Act ("ACCA"). He argues that Oklahoma's first degree manslaughter statute is not divisible, and, alternatively, that the subsection of the statute he was convicted under (heat of passion manslaughter) cannot qualify as a violent felony under the ACCA because it does not contain the requisite violent physical force required under 18 U.S.C. § 924(e)(2)(B)(i). The district court denied Bouziden's § 2255 motion. The

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

district court subsequently granted Bouziden a certificate of appealability ("COA") on his first argument, and we granted him a COA on his second argument.

Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the district court's denial of Bouziden's § 2255 motion.

I

On December 12, 2008, Bouziden pled guilty to one count of being in possession of stolen firearms, in violation of 18 U.S.C. § 922(j), and one count of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). ROA, Vol. I, at 21–37. The Presentence Investigation Report ("PSR") noted Bouziden had three prior convictions that qualified as ACCA predicate offenses: a 1997 conviction for first degree manslaughter in Oklahoma, and 2002 and 2003 convictions for possession of a controlled dangerous substance with intent to distribute. ROA, Vol. II, at 21–22. Bouziden did not object to the PSR, and the district court adopted the PSR as presented. *See id*. at 32. On April 9, 2009, the district court sentenced Bouziden to 180 months of imprisonment and five years of supervised release. *Id*. at 5; ROA, Vol. I at 40–41. Bouziden did not file a direct appeal.

In 2016, with the assistance of counsel, Bouziden filed a § 2255 motion to vacate, set aside, or correct his sentence, arguing he did not have three predicate offenses under the ACCA in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). ROA, Vol. I, at 68–80. Bouziden did not challenge the conclusion that his two prior drug offenses qualified as predicate offenses; he only argued that his first degree manslaughter conviction did not qualify

as a violent felony under the ACCA. *Id*. at 72. Specifically, he argued that (i) the Oklahoma manslaughter statute is indivisible, and (ii) even if it is divisible, the subsection under which he was convicted (heat of passion manslaughter) does not require violent physical force, which Bouziden argued must involve intentional conduct and not merely reckless or negligent conduct. *See id*. at 126–32; *see also id*. at 73 ("The force must also be intentional; mere recklessness or negligent conduct is insufficient." (citing *United States v. Zuniga-Soto*, 527 F.3d 1110, 1116 (10th Cir. 2008)).

The district court denied Bouziden's § 2255 motion, concluding that (i) the Oklahoma manslaughter statute was divisible, and (ii) Oklahoma's heat of passion manslaughter statute requires violent physical force because "the killing of another person satisfies the requirement of causing physical pain or injury to another person." ROA, Vol. I, at 138–140. Bouziden requested a COA, which the district court granted as to the divisibility argument. *Id*. at 147–48. We then granted a COA on the violent physical force argument as well.

II

"On appeal from the denial of a § 2255 motion, ordinarily 'we review the district court's findings of fact for clear error and its conclusions of law de novo.'" *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015) (quoting *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)). When "the district court does not hold an evidentiary hearing, but rather denies the motion as a matter of law upon an uncontested trial record, our review is strictly de novo." *Id*. (quoting *Rushin*, 642 F.3d at 1302).

III

Bouziden's § 2255 motion rests on his argument that the district court erroneously enhanced his sentence under the ACCA. The ACCA provides that a person who violates 18 U.S.C. § 922(g), and who has three prior convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The statute defines a violent felony as:

> any crime punishable by imprisonment for a term exceeding one year . . . 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.

18 U.S.C. § 924(e)(2)(B).

In *Johnson*, the Supreme Court held that the residual clause in § 924(e)(2)(B)(ii) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") was unconstitutionally vague, leaving in effect only § 924(e)(2)(B)(i)'s force clause and § 924(e)(2)(B)(ii)'s enumerated offenses clause. *Johnson*, 135 S. Ct. at 2563.[1] The Court subsequently held that *Johnson* was

[1] *Johnson* only affords a § 2255 movant collateral relief if the movant's "enhanced sentence is supported, at least in part, by the now-unconstitutional residual clause of the ACCA." *United States v. Pam*, 867 F.3d 1191, 1203 (10th Cir. 2017). (continued . . .)

retroactive because it announced a new rule. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

IV

A

If the sentencing court enhanced Bouziden's sentence under the now-void residual clause, Bouziden argues that he was ineligible for an ACCA enhancement because he did not have three qualifying predicate offenses. To determine if this argument will prevail, we must decide whether Bouziden's 1997 conviction for first degree manslaughter in Oklahoma could only have counted as a predicate offense under the residual clause, or if the sentencing court could have counted the offense as a violent felony under § 924(e)(2)(B)(i)'s force clause.

When addressing whether predicate offenses qualify as violent felonies by falling within § 924(e)(2)(B)(i)'s force clause, we use "the categorical approach, which examines the elements of the predicate state conviction in the abstract, rather than the precise conduct giving rise to that conviction." *United States v. Hammons*, 862 F.3d 1052, 1054 (10th Cir. 2017) (emphasis omitted) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)). The categorical approach "is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single

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(cont'd)
The parties appear to agree that the sentencing court relied upon the residual clause. We accept this view of the record and also assume that the sentencing court relied on the residual clause. *See generally United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017) (making this assumption when the parties similarly agreed).

crime." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). But in some cases, "[a] single statute may list elements in the alternative, and thereby define multiple crimes." *Id*. at 2249. These statutes are described as "divisible." *Id*. When a statute is divisible, we apply the modified categorical approach. The modified categorical approach permits us to "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id*. Once we have determined the elements of the defendant's crime of conviction, we proceed to determine if these elements satisfy § 924(e)(2)(B)(i)'s force clause.

The Supreme Court has identified three ways to discern whether a statute is divisible. *See id*. at 2256. First, a state court decision may provide the answer. *Id*. Second, the statute might make that distinction clear on its face. *Id*. That is, "if statutory alternatives carry different punishments," then these alternatives must be elements, but "if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission." *Id*. (quoting *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014)). Alternatively, "a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)." *Id*. And third, "if state law fails to provide clear answers," a "peek" at the underlying court record might dictate whether the listed items are elements of the offense. *Id*. at 2256–57. For instance, "jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute

contains a list of elements, each one of which goes toward a separate crime." *Id*. at 2257.

B

At the time of Bouziden's conviction for first degree manslaughter, the Oklahoma statute provided:

> Homicide is manslaughter in the first degree in the following cases:
>
> > 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.
> >
> > 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
> >
> > 3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

Okla. Stat. tit. 21, § 711 (1997). Any violation of § 711 was "a felony punishable by imprisonment in the custody of the Department of Corrections for not less than four (4) years." Okla. Stat. tit. 21, § 715 (1997).

C

Applying *Mathis*' three ways to identify divisibility, we determine that two of the three forms of analysis indicate that § 711 is divisible. First, Oklahoma courts treat each subsection of § 711 as a separate crime with separate elements, which indicates that § 711 is divisible. Cases from the Oklahoma Court of Criminal

Appeals ("OCCA") refer to a defendant's charge or conviction by citing to a particular subsection and by listing the elements for that particular crime. *See, e.g.*, *Barnett v. State*, 271 P.3d 80, 86–87 (Okla. Crim. App. 2012) (listing the specific "elements" of § 711(2)); *O.W.M. v. State*, 946 P.2d 257, 259 (Okla. Crim. App. 1997) (referring to a charge under § 711(2)); *Revilla v. State*, 877 P.2d 1143, 1150 (Okla. Crim. App. 1994) (referring to "an instruction on misdemeanor-manslaughter under 21 O.S.1981, § 711(1)"). Further, the Oklahoma Uniform Jury Instructions provide separate sets of instructions for each of § 711's three subsections. *See* Oklahoma Uniform Jury Instructions, Criminal (2d Ed. 1997 through 2017) §§ 4-94 through 4-102. Thus, although no single case conclusively answers the question of whether the statute is divisible, the Oklahoma courts uniformly treat the subsections of § 711 as separate crimes. These sources point toward our conclusion that § 711 is divisible.

But the text of § 711 does not indicate whether the statute is divisible. Though § 711 is divided into three distinct subsections, that alone does not inform us whether those subsections are means or elements. Bouziden contends that because all three of §711's subsections carry the same punishment, those subsections must be means in an indivisible statute. *See* Aplt. Br. at 15. But the punishment associated with each subsection is not dispositive because "nothing in *Mathis* suggests that statutory alternatives carrying the same punishment are necessarily means rather than elements." *United States v. Burtons*, 696 F. App'x 372, 378 (10th Cir. 2017) (unpublished); *see also United States v. Robinson*, 869 F.3d 933, 939 (9th Cir. 2017)

(holding that multiple statutory alternatives carrying the same punishment do not necessarily clarify whether those alternatives are means or elements).

Further, were it necessary for us to take a peek at the jury instructions given at Bouziden's trial, those instructions favor divisibility because the court instructed the jury using Oklahoma Uniform Jury Instruction for "Manslaughter in the First Degree by Heat of Passion," as defined by § 711(2). ROA, Vol. I, at 113–25. Those instructions set forth the elements of heat of passion manslaughter in detail. *See id.* at 119 (listing the elements of first degree heat of passion manslaughter); 120 (same); 121 (listing the elements for heat of passion); 122 (defining provocation); 123 (defining passion); 124 (defining "cooling time" for the distinction between heat of passion manslaughter and homicide); 125 (defining "causal connection" as the term is used in heat of passion manslaughter). The instructions given in Bouziden's case did not include any reference to § 711(1) or § 711(3), or to any of the elements of those crimes. *See generally id*.

Therefore, under a *Mathis* analysis, § 711 is divisible because the statute has multiple distinct subsections which Oklahoma courts—like Bouziden's state trial court—treat as separate crimes. Under the modified categorical approach, we can look to the jury instructions to determine which part of a divisible statute was applied in the defendant's case. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Here, we see the jury instructions only included the elements of Oklahoma's heat of passion manslaughter statute, § 711(2). *See* ROA, Vol. I, at 113–25. The

district court correctly concluded that § 711 is divisible and that Bouziden was convicted of violating § 711(2).

V

Although the district court denied a COA on the issue of whether Bouziden's conviction under § 711(2) (heat of passion manslaughter) satisfies the violent physical force required under 18 U.S.C. § 924(e)(2)(B)(i), we granted a COA on this issue to specifically address whether the intent required for a conviction under § 711(2) for heat of passion manslaughter satisfies the force requirement of § 924(e)(2)(B)(i). The OCCA has held that § 711(2) is not a deliberate intent crime because "heat of passion requires the defendant to act on the force of a strong emotion following adequate provocation that would naturally affect the ability to reason and render the mind incapable of cool reflection." *Hogan v. State*, 139 P.3d 907, 924 (Okla. Crim. App. 2006) (quoting *Black v. State*, 21 P.3d 1047, 1066 (Okla. Crim. App. 2001)).

Instead, the OCCA has treated § 711(2) as a general intent crime. First, in *Morgan v. State*, the OCCA suggested model jury instructions for use when § 711(2) is charged. 536 P.2d 952, 959–60 (Okla. Crim. App. 1975) *overruled on other grounds by Walton v. State*, 744 P.2d 977 (Okla. Crim. App. 1987). These instructions define voluntary manslaughter as "unlawful and *intentional killing* of another under the influence of a sudden heat of passion caused by adequate provocation, and without malice." *Id*. at 959 (emphasis added). Since its ruling in *Morgan*, the OCCA has consistently held that under § 711(2) "[t]he question is

whether, *in addition to evidence of intent*, there was evidence that [the defendant] killed the deceased with adequate provocation, in a heat of passion, without the design to effect death." *Davis v. State*, 268 P.3d 86, 118 (Okla. Crim. App. 2011) (emphasis added). Thus, under Oklahoma law, § 711(2) is a general intent crime.[2]

General intent can be sufficient to meet the force clause of the ACCA because "[t]he presence or absence of an element of specific intent does not dispositively determine whether a prior conviction qualifies as a violent felony under the ACCA." *United States v. Ramon Silva*, 608 F.3d 663, 673 (10th Cir. 2010). And killing another person with general intent is using "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) (emphasis omitted). Therefore, § 711(2) required proof of violent physical force which satisfies the force clause of the ACCA, and is thereby a valid predicate offense under the ACCA.

[2] Because we conclude that § 711(2) is a general intent crime, we need not address the parties' arguments regarding *Voisine v. United States*, 136 S. Ct. 2272 (2016). *Voisine* would only have been potentially relevant in this case if the mens rea of the predicate offense at issue were recklessness. *See id*. at 2280.

VI

We AFFIRM the district court's denial of Bouziden's 28 U.S.C. § 2255 motion.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

March 26, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA D. BOUZIDEN,

Defendant - Appellant.

No. 17-6031

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk