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File Name: 19a0039p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DURYANE LEWIS CHANEY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-2024

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 2:13-cr-20582-1; 2:15-cv-14219—Sean F. Cox, District Judge.

Argued: October 4, 2018

Decided and Filed: March 11, 2019

Before: BATCHELDER, GIBBONS, and ROGERS, Circuit Judges

COUNSEL

ARGUED: Joan E. Morgan, FEDERAL PUBLIC DEFENDER OFFICE, Flint, Michigan, for Appellant. Mark Chasteen, UNITED STATES ATTORNEYS OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Joan E. Morgan, FEDERAL PUBLIC DEFENDER OFFICE, Flint, Michigan, for Appellant. Mark Chasteen, UNITED STATES ATTORNEYS OFFICE, Detroit, Michigan, for Appellee.

OPINION

ROGERS, Circuit Judge. Duryane Chaney pleaded guilty to one count each of felon in possession of a firearm and possession with intent to distribute cocaine. Because his criminal

record included convictions for one "serious drug offense" and two "violent felon[ies]," Chaney was sentenced as an armed career criminal, subject to the Armed Career Criminal Act's fifteen-year mandatory minimum. 18 U.S.C. § 924(e)(1). On collateral review, Chaney argues that one of his three predicate convictions—a 1981 Michigan conviction for attempted unarmed robbery—does not qualify as a "violent felony" after the Supreme Court's invalidation of the ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015) [hereinafter *Johnson II*]. That claim fails, however, because Chaney's conviction qualifies as an ACCA-enhancing violent felony under the elements clause, which continues to apply notwithstanding *Johnson II*. Michigan unarmed robbery (as it existed in 1981) counts as a violent felony under the ACCA's elements clause even though the statute extends to "putting [a victim] in fear," because under Michigan law "putting in fear" means "putting in fear of bodily injury from physical force."

Chaney pleaded guilty to one count of felon in possession of a firearm, 18 U.S.C. § 922(g)(1).[1] Although the base maximum sentence for that crime is ten years' imprisonment, a violator who has three prior convictions for a "violent felony" or "serious drug offense" is subject to a fifteen-year mandatory minimum and a maximum sentence of life under the ACCA. § 924(e)(1). For purposes of this ACCA enhancement, a "violent felony" means a crime punishable by more than one year in prison that

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [the "elements clause"]; or

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[1]Chaney waived his right to a grand jury indictment and entered a guilty plea, with a Rule 11 plea agreement, to counts one and two of the First Superseding Information. Because the Information titled count one as "18 U.S.C. §§ 921(g)(1), 924(e) – Felon in possession of a firearm; Armed Career Criminal," it might appear that Chaney pleaded guilty to two separate things. This odd construction of the charge warrants clarification.

The former provision, § 921(g)(1) (felon in possession of a firearm), is a criminal offense, to which an accused must plead, and to which Chaney pleaded guilty in this case. But the latter provision, § 924(e)(1) (armed career criminal), is not a criminal offense; it is a sentencing enhancement that applies to certain qualifying defendants convicted under § 921(g). Because § 924(e)(1) does not create a separate offense or require a pleading—and would not require submission to a jury—it was neither necessary nor meaningful that Chaney "pleaded guilty" to a § 924(e)(1) charge. *See United States v. Mack*, 229 F.3d 226, 231 (3d Cir. 2000); *United States v. Henry*, 933 F.2d 553, 558 (7th Cir. 1991); *United States v. Affleck*, 861 F.2d 97, 99 (5th Cir. 1988).

Just as Chaney could not avoid application of § 924(e)(1) based on the absence of a "conviction" on that charge (by guilty plea or jury determination), he is not prohibited here from challenging the application of § 924(e)(1) at his sentencing hearing based on the unusual fact that he was charged with and pleaded guilty to a § 924(e)(1) charge as part of count one.

> (ii) is burglary, arson, or extortion, involves use of explosives [the "enumerated crimes clause"], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the "residual clause"].

18 U.S.C. § 924(e)(2)(B)(i)–(ii).

Chaney objected at sentencing to the ACCA enhancement on the grounds that his 1981 Michigan conviction for attempted unarmed robbery was not a "violent felony" because it resulted in less than one year of imprisonment and did not, in his particular case, involve the use of "physical force." The Government countered that a crime qualifies under the ACCA so long as it is punishable by more than one year in prison—regardless of the sentence handed down—and that Michigan unarmed robbery categorically qualifies as a violent felony, citing *United States v. Mekediak* to the sentencing court. *Mekediak* had held that Michigan "unarmed robbery categorically creates a sufficiently comparable risk of injury to another as the risk posed by burglary," and thus "is a crime of violence for the purposes of [the] ACCA." 510 F. App'x 348, 354 (6th Cir. 2013), *abrogation recognized by Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016). The district court concluded that the "government [was] absolutely right," adding, "and of course, a conviction for attempted unarmed robbery does involve the attempted use or threatened use of physical force. So it qualifies." Chaney was sentenced as an armed career criminal.

More than a year later, Chaney brought (and later amended) a § 2255 motion to vacate his sentence on the ground that he no longer qualified as an armed career criminal after the Supreme Court in *Johnson II* invalidated the ACCA's residual clause as unconstitutionally vague. 135 S. Ct. at 2563. With the residual clause effectively erased, Chaney argued that his 1981 Michigan conviction for attempted unarmed robbery is not a predicate violent felony because robbery is not an enumerated offense, 18 U.S.C. § 924(e)(2)(B)(ii), and does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," § 924(e)(2)(B)(i), as required by the elements clause. The district court, however, read the statute differently. In 1981, Michigan unarmed robbery was defined as follows:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Mich. Comp. Laws § 750.530 (1981). Relying on our unpublished opinion in *United States v. Mathews*, 689 F. App'x 840 (6th Cir. 2017), the district court held that the Michigan statute (even as applied to attempt) required the use, attempted use, or threatened use of "physical force," so as to qualify as an ACCA-enhancing "violent felony" under the elements clause. Accordingly, the court denied Chaney's motion to vacate his sentence.

As a threshold matter, the Government argues that Chaney's claim is procedurally improper because—despite its masquerading as a *Johnson II* residual-clause claim—it actually turns on the Court's earlier decision in *Johnson v. United States*, 559 U.S. 133 (2010) [hereinafter *Johnson I*], interpreting the degree of force required by the "elements clause." But a petitioner may bring a *Johnson II* claim challenging his status as an armed career criminal in a first § 2255 motion, like this one, so long as the sentencing court might have relied on the residual clause to enhance the sentence under the ACCA. *See Raines v. United States*, 898 F.3d 680, 685–86 (6th Cir. 2018) (per curiam).

Although it is true that *Johnson II* "does not reopen *all* sentences increased by [the ACCA]," *see Potter v. United States*, 887 F.3d 785, 787 (6th Cir. 2018), we have rejected the Government's implied premise that a first-time § 2255 movant must show that the sentencing court relied *only* on the residual clause in order for the movant to bring a *Johnson II* claim, *see Raines*, 898 F.3d at 684–86. Where it is unclear which ACCA clause a court relied on to enhance a sentence, a first-time § 2255 movant may use *Johnson II* to collaterally attack his ACCA enhancement by showing that the sentencing court *might have* relied on the residual clause. *See* Raines, 898 F.3d at 685–86.

Here, Chaney has shown just that. As in many pre-*Johnson II* cases, the sentencing judge did not specify which ACCA clause it relied on in deeming Michigan attempted unarmed robbery a violent felony. The Government's own arguments at sentencing, however, suggest that it and the court were looking to the residual clause. At sentencing, the Government cited only *Mekediak*, 510 F. App'x at 354, in support of the enhancement—a case expressly relying on the residual clause. That the only enhancement-supporting authority before the district court relied on the residual clause strongly suggests that the district court did too. On the other hand, the court did state that the conviction "involve[s] the attempted use or threatened use of physical

force," which tracks the language of the elements clause. But it is difficult to read too much into that off-the-cuff statement without any indication that the court conducted a statutory analysis. What's more, the district court below—the same to sentence Chaney—gave no indication that it relied on anything but the residual clause in sentencing Chaney. This record shows that Chaney at least *might* have been sentenced under the residual clause. *Compare Raines*, 898 F.3d at 686, *with Potter*, 887 F.3d at 787–88.

Having cleared that procedural hurdle, Chaney must survive another. For the first time on appeal the Government argues that Chaney procedurally defaulted his claim by failing to argue on direct review that his conviction did not satisfy the elements clause. In other words, the Government would have us fault Chaney for not making an argument that would have had no practical effect whatsoever given the then-viable residual clause. That would be a harsh outcome under any circumstances, and only more so here because the Government concedes that it has forfeited its own argument by failing to raise it before the district court. The Government asks us to look past its oversight because it was busy litigating other *Johnson II* claims at the time. But even if the Government's excuse of practical burden might fly in another context, we will not excuse the Government's forfeiture on that basis here only to hold Chaney's claim procedurally defaulted for his failure to raise a claim that would have had no practical effect. The Government has, therefore, forfeited any defense of procedural default.

On the merits, Chaney's 1981 Michigan conviction for attempted unarmed robbery is categorically a violent felony under the ACCA's elements clause. The operative Michigan statute punishes theft committed "by force and violence, or by assault, or putting in fear." Mich. Comp. Laws § 750.530 (1981). Each of these alternatives meets the requirements of the elements clause, notwithstanding Chaney's arguments that "putting in fear" or "force and violence" permits conviction without necessarily requiring the "use, attempted use, or threatened use of physical force" as required by that clause. *See* 18 U.S.C. § 924(e)(2)(B)(i). As defined in *Johnson I*, "physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140; *see also Stokeling v. United States*, 139 S. Ct. 544, 553 (2019).

As we held in *United States v. Mathews*, "putting in fear" under the statute requires the use or threatened use of physical force as defined in *Johnson I*. 689 F. App'x at 844–46. That is because, as explained in *Mathews*, the best guidance from the Michigan Supreme Court is that Michigan law requires a "reasonable belief that [the victim] may suffer injury unless he complies with the demand." *Id.* (quoting *Michigan v. Kruper*, 64 N.W.2d 629, 632 (Mich. 1954)); *see also Michigan v. Hearn*, 406 N.W.2d 211, 214 (Mich. Ct. App. 1987).

In *Michigan v. Randolph*, the Michigan Supreme Court held that "Michigan's unarmed robbery statute is derived from the common law," and indeed "adopted the common-law definition of robbery."[2] 648 N.W.2d 164, 167 (Mich. 2002), *superseded by statute*, P.A. 2004, No. 128, *as recognized in Michigan v. March*, 886 N.W.2d 396 (Mich. 2016). Michigan's codification of common law robbery is significant because the Michigan Supreme Court interpreted the common law (and thus Michigan's statute) to require "the felonious and forcible taking, from the person of another, of goods or money to any value by violence or putting him in fear." *See id.* (quoting 4 Blackstone, Commentaries, Public Wrongs, ch. 17, 241). In so interpreting the common law, the *Randolph* court relied on sources that repeatedly equated "putting in fear" with putting a person in fear of immediate injury. *See id.* at 167–168, 167 n.6 ("Feloniously taking the property of another in his presence and against his will, *by putting him in fear of immediate personal injury*, is robbery at common law." (quoting Rapajle, Larceny & Kindred Offenses § 445 (1892)) (emphasis added)). Because Michigan unarmed robbery codifies common law robbery, and common law robbery, as understood by the Michigan Supreme Court, requires putting the victim in fear of immediate personal injury, Michigan's unarmed robbery statute must be read to require the same.

This court has held that a state robbery statute that requires "putting in fear" qualifies as a violent felony under the elements clause when state law interprets "fear," as it does here, to mean "fear of bodily injury from physical force offered or impending." *See United States v. Mitchell*,

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[2]The Michigan unarmed robbery statute was amended in 2004. *See* Mich. Comp. Laws § 750.530 (2004). Because Chaney was sentenced under the earlier statute, our analysis is confined to that version of the statute, as was effective in 1981.

743 F.3d 1054, 1059 (6th Cir. 2014) (Tennessee robbery). Thus, the "putting in fear" clause here too satisfies the elements clause.

The "force and violence" alternative also satisfies the elements clause, notwithstanding Chaney's argument that the Michigan statute criminalizes "force and violence" less than the "physical force" needed to satisfy the ACCA. *Johnson I* defines "physical force" as "violent force," 559 U.S. at 140, and the plain text of the Michigan statute required "force and violence," Mich. Comp. Laws § 750.530 (1981). Of course, that does not by itself dictate that Michigan's "force and violence" must mean exactly the same as *Johnson I's* "violent force," but there is not a lot of interpretive daylight between them. Despite their similarity, Chaney tries to drive a definitional wedge between those phrases by citing two Michigan intermediate appellate decisions and Michigan jury instructions suggesting that, at least for assault, "the words 'force and violence' mean any use of physical force against another person so as to harm or embarrass him." *See* Mich. Crim. Jury Instr. 2d 17.14. In *Michigan v. Chandler*, for instance, the court cited Michigan Criminal Jury Instruction 17.14 to that effect, but did so to interpret an assault statute and, even then, only to note that "force and violence" requires "physical force." 506 N.W.2d 882, 884 (Mich. Ct. App. 1993). Similarly inapposite, *Michigan v. Boyd* held that throwing urine into the face of another constituted the use of "violence" for purposes of assault of a corrections officer.[3] 300 N.W.2d 760, 762 (Mich. Ct. App. 1980). These examples are outside of the robbery context and therefore of little import here.

We assume that if Michigan unarmed robbery could be accomplished by merely using physical force to embarrass the victim, then it would fall outside of the ACCA. But it takes far too active an imagination to dream up a scenario in which a person could steal someone's property by touching the victim in a harmless and non-threatening but embarrassing way. The categorical approach's "focus on the minimum conduct criminalized by the state statute is not an

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[3]Chaney also cites *Michigan v. Passage*, 743 N.W.2d 746, 748 (Mich. 2007), to suggest that Michigan law requires only minimal force, but that decision interpreted an amended version of the statute that changed "force and violence" to "force or violence" in an intentional move away from the narrower definition at common law. As explained in *United States v. Harris*, the amended statute requires less force than the 1981 version Chaney was convicted under and the "Legislature's decision to replace the word 'and' with the word 'or' in the 2004 amendments evidences its changed intent to include theft by force but without violence as an unarmed robbery." 323 F. Supp. 3d 944, 948 (E.D. Mich. 2018). Chaney's reliance on *Passage* is therefore misplaced.

invitation to apply 'legal imagination' to the state offense." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

As explained in *Randolph*, it is not enough under Michigan law that force and violence be used at some point during the theft; the force and violence (or threat of such) must be the act that is used to accomplish the taking. *See* 648 N.W.2d at 173. This distinction is key and separates unarmed robbery here from, for example, plain assault or the battery statute at issue in *Johnson I*. For battery, the offensive or embarrassing touching is itself the crime, whereas that same harmless touch would somehow have to deprive the victim of property to amount to robbery. One can imagine a robbery involving an offensive or embarrassing touch coupled with a threat—implicit or otherwise—of harm for noncompliance. But it strains the imagination to think someone could steal property through an offensive or embarrassing touch alone.

Even if a more creative mind could imagine such a scenario, there must be a "realistic probability, not a theoretical possibility, that [Michigan] would apply its statute to conduct that" is less than violent force, for the conviction to fall outside of the elements clause. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *Perez v. United States*, 885 F.3d 984, 990 (6th Cir. 2018). Chaney has not pointed to any Michigan case that applied the statute to nonqualifying force and thus has not shown that realistic probability. *See Gonzalez*, 549 U.S. at 193. The two cases Chaney cites purporting to interpret "force and violence" do so in the context of assault statutes. Again, the court in *Boyd* affirmed a conviction for assault of a prison employee. 300 N.W.2d at 762. Although the *Chandler* case did, after addressing the assault statute at issue, go on to find sufficient evidence of attempted unarmed robbery, it did so based on a clear threat of violent force—namely, the defendant's threat to "blow [the victim's] head off" if he didn't get out of the car. *See Chandler*, 506 N.W.2d at 885. The *Chandler* court's only discussion of "force and violence" was dicta regarding an assault-with-intent-to-rob statute and has no bearing here. *See id.* at 884.

The cases most on point strongly suggest that robbery requires violent force and that a theft without such force would more realistically be charged as larceny from the person, a lesser offense than robbery. *See* Mich. Comp. Laws §750.357 (1981). "The larceny-from-the-person statute punishes pickpockets, purse- and wallet-snatchers, and others who invade the person or

'immediate presence' of the victim to accomplish a theft." *Michigan v. Smith-Anthony*, 821 N.W.2d 172, 175 (Mich. Ct. App. 2012), *aff'd*, 837 N.W.2d 415 (Mich. 2013). "What separates robbery from larceny from the person is violence or the threat of violence." *Michigan v. Gould*, 166 N.W.2d 530, 533–34 (Mich. Ct. App. 1968), *aff'd in part, rev'd in part on other grounds*, 179 N.W.2d 617 (Mich. 1970). Having failed to identify a single Michigan case affirming a conviction for unarmed robbery involving "force and violence" less than the minimum "violent force" required by *Johnson I*, Chaney has not shown a realistic probability that Michigan would apply its statute to such conduct.

Also, for this reason, this case is distinguishable from cases such as *United States v. Yates*, 866 F.3d 723, 728–32 (6th Cir. 2017), where the state supreme court had clearly interpreted a state robbery statute to punish conduct that was held not to rise to violent force under the ACCA's elements clause.

Moreover, the statutory history and underpinnings of the ACCA support the conclusion that Michigan unarmed robbery qualifies under the elements clause, as both statutes trace their roots to common law robbery. *See Stokeling*, 139 S. Ct. at 549–52. As originally enacted in 1984, the ACCA listed only two predicate offenses—robbery and burglary. *See* Pub. L. 98-473, § 1802, 98 Stat. 2185, 18 U.S.C.App. § 1202(a) (1982 ed. and Supp. II).[4] The definition of robbery in that version of the ACCA was drawn directly from the common law: "'robbery' means any felony consisting of the taking of the property of another from the person or presence of another by force or violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury." *See id.* § 1803(2); *Stokeling*, 139 S. Ct. at 550–51. That definition not only encompasses Michigan unarmed robbery, but is nearly identical to it, and for good reason: they are both drawn from the common law. *Compare* § 1803(2), *and Stokeling*, 139 S. Ct. at 550–51, *with* Mich. Comp. Laws § 750.530 (1981). Two years later, Congress "expanded the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a[ny] violent felony.'" *See Taylor v. United States*, 495 U.S. 575, 582 (1990). Congress did so to promote "a greater sweep and more effective use of this important

[4]In 1986, § 1202 was recodified as 18 U.S.C. § 924(e) by the Firearms Owners' Protection Act, Pub. L. 99-308, § 104, 100 Stat. 458.

statute." *See id.* at 583 (quoting 132 Cong. Rec. 7697 (1986)). In doing so, it used the *sine qua non* of common law robbery—"force or violence"—as the basis for the definition of a violent felony: a crime punishable by more than one year's imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). Were Chaney correct that Michigan unarmed robbery is not a violent felony, we would have to read Congress's expansion of the ACCA predicates from common law robbery to all violent felonies to somehow exclude Michigan's codification of common law robbery. That tortured reading has nothing to recommend it. "By retaining the term 'force' in the [amended] version of [the] ACCA and otherwise 'expanding' the predicate offenses under [the] ACCA, Congress made clear that the 'force' required by common-law robbery would be sufficient to justify an enhanced sentence under the new elements clause." *Stokeling*, 139 S. Ct. at 551.

Furthermore, treating Michigan unarmed robbery as an ACCA predicate under the elements clause accords with decisions by two of our sister circuits holding that Michigan unarmed robbery is a violent felony under the ACCA. The Eighth Circuit in *United States v. Lamb* similarly relied on *Randolph* to hold as much. *See* 638 F. App'x 575, 577 (8th Cir. 2016), *vacated on other grounds by* 137 S. Ct. 494 (2016); *see also United States v. Tirrell*, 120 F.3d 670, 680 (7th Cir. 1997). Those decisions also accord with decisions from this and other circuits interpreting other common-law-derived robbery statutes in the same way. *See, e.g.*, *United States v. Priddy*, 808 F.3d 676, 686 (6th Cir. 2015) (Tennessee robbery), *abrogated on other grounds by United States v. Stitt*, 860 F.3d 854 (2017) (en banc), *decision reversed on other grounds*, 139 S. Ct. 399 (2018); *United States v. Harris*, 844 F.3d 1260, 1268–70 (10th Cir. 2017) (Colorado robbery); *United States v. Doctor*, 842 F.3d 306, 308–12 (4th Cir. 2016) (South Carolina robbery); *United States v. Duncan*, 833 F.3d 751, 754–58 (7th Cir. 2016) (Indiana robbery).

Without addressing these cases, Chaney points to cases construing dissimilar state robbery statutes to fall outside of the ACCA's reach. But, even assuming they survive *Stokeling*, 139 S. Ct. at 554–55, those cases are easily distinguishable—in each, state decisional law was found to provide that, unlike at common law or in Michigan, no more than de minimis force was

required for robbery. *See, e.g.*, *United States v. Winston*, 850 F.3d 677, 684–85 (4th Cir. 2017) (Virginia robbery); *United States v. Geozos*, 870 F.3d 890, 900–01 (9th Cir. 2017) (Florida robbery); *United States v. Nicholas*, 686 F. App'x 570, 574–76 (10th Cir. 2017) (Kansas robbery); *United States v. Gardner*, 823 F.3d 793, 803–04 (4th Cir. 2016) (North Carolina robbery); *United States v. Parnell*, 818 F.3d 974, 978–80 (9th Cir. 2016) (Massachusetts armed robbery); *United States v. Eason*, 829 F.3d 633, 640–42 (8th Cir. 2016) (Arkansas robbery).

Finally, Chaney argues that, even if Michigan unarmed robbery qualifies as a violent felony, Michigan *attempted* unarmed robbery does not. But the ACCA's elements clause expressly includes the "attempted use" of "physical force." *See* 18 U.S.C. § 924(e)(2)(B)(i).

Despite that straightforward reading, Chaney argues that Michigan's attempt statute must equal the generic definition of attempt—intent to commit the underlying offense and a "substantial step" towards commission—to satisfy the elements clause's "attempted use" requirement. Chaney cites no binding authority for that point, but even if we were to require that Michigan's attempt statute must satisfy the generic definition of attempt, it does. Under Michigan law, attempt requires intent and an overt action "more than mere preparation to commit the crime," which "would lead immediately to the completion of the crime had the defendant not failed in the perpetration, or been intercepted or prevented in the execution of the same." *See Michigan v. Burton*, 651 N.W.2d 143, 150 (Mich. Ct. App. 2002) (internal quotation marks omitted).

Moreover, the attempt factor is applied only to the first element of unarmed robbery—the felonious taking—not the force element. *See Michigan v. Gardner*, 265 N.W.2d 1, 5 n.1 (Mich. 1978). That is, the only difference between unarmed robbery and attempted unarmed robbery is whether the perpetrator is successful in taking the property—the same degree of "force and violence, assault, or putting in fear" is needed in both cases. *See Tirrell*, 120 F.3d at 680–81. Thus, it makes no difference that Chaney was convicted for *attempted* unarmed robbery. Michigan attempted unarmed robbery, as it existed in 1981, is a violent felony under the ACCA's elements clause.

For these reasons, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

Case No. 13-20582

v.

Hon. Sean F. Cox

Duryane Chaney,

Defendant.
_____/

OPINION & ORDER DENYING PETITIONER'S § 2255 MOTION TO VACATE SENTENCE AND RULING AS TO CERTIFICATE OF APPEALABILITY

In Criminal Case Number 13-20582, Petitioner Duryane Chaney ("Petitioner") pleaded guilty, pursuant to a Rule 11 Plea Agreement, to one count of Felon in Possession of a Firearm, in violation of 18 U.S.C. §§ 922(g), 924(e), and to one count of Intent to Distribute Cocaine, in violation of 21 U.S.C. § 841(a)(1). (Doc. # 16, Rule 11 Plea Agreement). Petitioner was sentenced as an armed career criminal to serve 188 months and 120 months, to run concurrently.

This matter is now before the Court on Petitioner's "Motion to Vacate Sentence Pursuant to 28 USC 2255." (Doc. # 47, Pet. Mo.). Petitioner's request for relief is based upon the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2251 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. The Government has filed a response opposing Petitioner's motion. (Doc. # 51, Gov't Resp.). Petitioner has filed a reply. (Doc. # 52, Pet. Reply). Petitioner has also filed two supplemental briefs, (Docs. # 53, 54), containing district court cases that Petitioner argues support his position.

After the parties fully briefed this matter, the Sixth Circuit issued *United States v. Matthews*, 2017 WL 1857265 (6th Cir. May 8, 2017), holding that Michigan's unarmed robbery statute constitutes a predicate violent felony for purposes of the ACCA. The parties were permitted to file supplemental briefs addressing the *Matthews* decision. Petitioner filed his supplemental brief on June 27, 2017.[1] (Doc. # 57). The Government chose not to file a supplemental brief.

Because the files and records of the case conclusively establish that Petitioner is not entitled to relief as to any of the claims set forth in this § 2255 motion, an evidentiary hearing is not necessary and the decision is therefore ready for a decision by this Court.

For the reasons that follow, the Court shall **DENY** Petitioner's motion. The Court will issue a certificate of appealability only as to whether Petitioner's attempt unarmed robbery conviction qualifies as a violent felony under the ACCA because reasonable jurists have found this question debatable. However, the Court declines to issue a certificate of appealability as to Petitioner's remaining claims.

BACKGROUND

The relevant background facts are undisputed. Petitioner was charged in a five-count First Superseding Information with: one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); one count of possession with intent to distribute cocaine, in violation of 18 U.S.C. § 841(a)(1); one count of possession with intent to distribute cocaine base, in violation of 841(a)(1); one count of possession with intent to distribute heroin, in violation of 18 U.S.C. §

[1] The Court notes that Petitioner's supplemental brief does not address the *Matthews* decision.

841(a); and one count of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A).

Petitioner pleaded guilty, pursuant to a Rule 11 Plea Agreement, "to Counts One and Two of the First Superseding Information, which charge felon in possession of a firearm, Armed Career Criminal, in violation of 18 U.S.C. §§ 922(g), 924(e), and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1)." (Rule 11 Plea Agreement).

On November 6, 2013, the probation department prepared a presentence investigation report. ("PSIR"). Petitioner's base offense level was calculated at 24 pursuant to United States Sentencing Guideline ("USSG") § 2K2.1(a)(2). (PSIR at ¶ 22). Petitioner's offense level was increased four levels pursuant to USSG § 2K2.1(b)(6)(B) because he committed the instant offense subsequent to sustaining at least two convictions of either a crime of violence or a controlled substance. (*Id.* at ¶ 23).

Petitioner was considered an armed career criminal because he had at least three prior convictions for a violent felony or serious drug offense, pursuant to 18 U.S.C. § 924(e). (*Id.* at ¶ 28). As such, Chapter Four Enhancements were applied, resulting in a base offense level of 34 pursuant to USSG 4B1.4. (*Id.*). Petitioner received a three level downward departure for acceptance of responsibility pursuant to USSG § 3E1.1(a). (*Id.* at ¶¶ 29-30). Petitioner's total offense level was calculated at 31, and he had a criminal history category of VI. The PSIR determined that the applicable sentencing guideline range was 188-235 months of imprisonment.

The PSIR identified the following prior "violent felonies" or "serious drug offenses": (1) 1981 attempt unarmed robbery; (2) 1990 assault with intent to do great bodily harm and

felonious assault; and (3) 2003 conspiracy to possess with intent to distribute cocaine. (PSIR at ¶¶ 32, 34, 37). On March 14, 2014, the Court sentenced Petitioner to 188 months and 120 months, to run concurrently.

On December 2, 2015, Petitioner filed a *pro se* Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. (Doc. # 35). On February 16, 2016, Petitioner filed a *pro se* Motion to Amend pursuant to Rule 15(c). (Doc. # 42). On June 8, 2016, counsel for Petitioner filed the instant Motion to Vacate Sentence (Doc. # 47, Pet. Mo.) and on July 27, 2016, Petitioner's counsel withdrew the previous *pro se* filings. (Doc. # 49). Petitioner's motion has been fully briefed by the parties.

STANDARD

Petitioner's motion is brought pursuant to 28 U.S.C. § 2255, which provides:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence imposed was in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

28 U.S.C. § 2255(a). To prevail on a § 2255 motion, "a petitioner must demonstrate the existence of an error of constitutional magnitude which has a substantial and injurious effect or influence on the guilty plea or the jury's verdict." *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005). A movant can prevail on a § 2255 motion alleging non-constitutional error only by establishing a "fundamental defect which inherently results in a complete miscarriage of justice, or an error so egregious that it amounts to a violation of due process." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999).

The Court must hold an evidentiary hearing on a § 2255 motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief . . . ." 28 U.S.C. § 2255(b); *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996) ("evidentiary hearings are not required when . . . the record conclusively shows that the petitioner is entitled to no relief.").

Here, Petitioner does not request an evidentiary hearing as to the issues and there does not appear to be a need as the record conclusively establishes whether or not Petitioner is entitled to relief.

ANALYSIS

Petitioner's sentence was imposed pursuant to the Armed Career Criminal Act ("ACCA"), which requires a mandatory minimum sentence of 15 years in prison for a defendant convicted of violating 18 U.S.C. § 922(g) if the defendant has three or more prior convictions for "a serious drug offense" or a "violent felony." 18 U.S.C. § 942(e). A "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year" that:

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

§ 924(e)(2)(B). The first clause is commonly referred to as the "elements clause," and the latter portion of the second clause is commonly referred to as the "residual clause." In *Johnson*, the Supreme Court held that the ACCA's residual clause–which defined a "violent felony" as "otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another"–was unconstitutionally vague. *Johnson*, 135 S.Ct. at 2563.

In light of *Johnson*, Petitioner argues that his 1981 conviction of attempt unarmed robbery and his 1990 convictions of assault with intent to do great bodily harm and felonious assault no longer qualify as predicate violent felonies under the ACCA. The Government counters that Petitioner's convictions qualify as violent felonies under the ACCA's "elements clause," which remains valid post-*Johnson*.

To determine whether a prior conviction is a violent felony within the meaning of the ACCA, the Court has two approaches available to it: the "categorical approach" or the "modified categorical approach."

Under the categorical approach, which both parties appear to apply here, the Court must consider the offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141-42 (2008) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). This "categorical approach" requires the Court to compare Michigan's unarmed robbery offense with the elements clause of the ACCA. And in making in this comparison, the Court "must consider the least objectionable conduct that would violate this statute." *United States v. Maness*, 23 F.3d 1006, 1008 (6th Cir. 1994).

Under the modified categorical approach, the Court looks to documents beyond the elements of a crime when a criminal statute is "divisible," *i.e.*, when the statute provides for alternative elements as opposed to alternatives means. *See Descamps v. United States*, 133 S.Ct. 2276 (2013).

A. Michigan's Attempt Unarmed Robbery Qualifies as a "Violent Felony" Under the ACCA's Elements Clause

Petitioner's attempt unarmed robbery conviction is from 1981. The Court must analyze

the version of the statute in effect at the time of Petitioner's conviction, which states:

> Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Mich. Comp. Laws. § 750.530 (1981).[2] "The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force [and] violence or assault or putting in fear, and (3) being unarmed." *People v. Johnson*, 206 Mich. App. 122, 125-26 (1994). The elements of attempt unarmed robbery are: "(1) an attempted felonious taking of property from the person of another, (2) by force and violence or by assault or by putting in fear, and (3) defendant being unarmed. *People v. Chandler*, 201 Mich. App. 611 (1993).

Because Michigan's unarmed robbery statute does not provide alternative means for committing the offense, the Court must utilize the categorical approach to determine whether the statute qualifies as a violent felony under the elements clause of the ACCA. To meet this qualification, attempt unarmed robbery must have as an element, "the use, attempted use, or threatened use of physical force against the person of another." Physical force, in the context of the statutory definition of violent felony, "means *violent* force—*i.e.*, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 134 (2010) (emphasis in original) ("*Johnson* 2010") (describing the meaning of "physical force" for the purpose of determining a "violent felony" under the ACCA).

Here, Petitioner argues that "[b]ecause the least offensive conduct violative of MCL 750.530 is theft from a person, *aggravated by fear from violence*, the statute does not qualify as a

[2] The statute was amended in 2004.

violent felony under the ACCA." (Pet.'s Br. at Pg. ID 202) (emphasis added). In support of his position, Petitioner relies on two district court cases that have held that unarmed robbery in Michigan does not qualify as a "crime of violence" under the elements clause of the career offender guideline. *See United States v. Lamb*, 2017 WL 730426 (E.D. Mich. Feb. 24, 2017) and *United States v. Ervin*, 2016 WL 4072052 (D. Mont. July 28, 2016).

Petitioner's arguments are not persuasive in light of the Sixth Circuit's recent decision in *United States v. Matthews*, 2017 WL 1857265 (6th Cir. May 8, 2017).[3] The issue in *Matthews* was "whether the unarmed robbery for which [the defendant] had been convicted under Michigan law was a violent-felony conviction" for purposes of the ACCA. *Matthews*, 2017 WL 1857265, at *1. After considering relevant Michigan law, the Sixth Circuit rejected the argument Petitioner makes now and held that unarmed robbery in Michigan constitutes a violent felony under the ACCA. *Id.* at *3.

First, the Sixth Circuit determined that, under Michigan law, committing an unarmed robbery by "putting in fear" requires the victim to fear *personal injury*. The Sixth Circuit then reasoned that the act which causes the victim fear of injury must necessarily involve the use or threatened use of physical force:

> Under the Michigan statute, one can accomplish an unarmed robbery by *putting a person in fear*, which the Michigan Supreme Court has held to mean *fear of personal injury*. The Michigan Supreme Court has explained that its state legislature codified common law robbery in the unarmed robbery statute. *See Michigan v. Randolph*, 648 N.W.2d 164, 167-68, 171 (Mich. 2002) ("[R]obbery is a larceny aggravated by the fact that the taking is from the person, or in his presence, accomplished with force or the threat of force."), *superseded by statute*, P.A. 2004, No. 128, as recognized in *Michigan v. March*, 886 N.W.2d 396 (Mich.

[3] As of date, *Matthews* is the only Sixth Circuit decision addressing whether unarmed robbery in Michigan constitutes a violent felony for purposes of the ACCA.

> 2016). *Randolph* analyzed whether violence that occurred during a defendant's flight following a larceny escalated the larceny to a robbery. The Michigan Supreme Court explained at length that violence or putting in fear are foundational elements of robbery at common law, citing Blackstone and other commentators. A repeated point in this discussion is that "putting in fear" requires putting a person in fear of *injury*. *See Randolph*, 648 N.W.2d at 167-168 & 167 n. 6 ("Feloniously taking the property of another in his presence and against his will, by *putting him in fear of immediate personal injury*, is robbery at common law." (emphasis added) (quoting RAPAJLE, LARCENY & KINDRED OFFENSES § 445 (1892))). The *Randolph* court did not contradict this language and quoted it with approval.
>
> ....
>
> When Michigan courts apply this test to determine whether a victim was put in fear, they ask whether the victim believed that injury was likely to result if he or she failed to comply . . . . Because Michigan law requires one to fear injury in order to be "put in fear," Michigan's statute criminalizing unarmed robbery is a violent felony for purposes of the ACCA.

Id. at *4; *see also Michigan v. Kruper*, 64 N.W.2d 629, 632 (Mich. 1954).

The Court in *Matthews* also noted that the Seventh and Eighth circuits have similarly concluded that a Michigan conviction for unarmed robbery qualifies as a violent felony. *Matthews*, 2017 WL 1857265 at *4 (citing *United States v. Tirrell*, 120 F.3d 670, 679-81 (7th Cir. 1997) and *United States v. Lamb*, 638 F. App'x 575, 576 (8th Cir. 2016), *vacated on other grounds by* 137 S.Ct. 494 (2016)).

Because the Sixth Circuit's decision in *Matthews* squarely resolves the instant issue, the Court concludes that Petitioner's attempt unarmed robbery conviction constitutes a violent felony for purposes of the ACCA. And to the extent that Petitioner argues that a conviction for *attempt* changes the outcome here, he is mistaken. Pursuant to Michigan law, the "attempt" factor is only added to the first element of the crime. *See Chandler*, 201 Mich. App. at 614.

B. Michigan's Assault With Intent To Do Great Bodily Harm Qualifies as a "Violent Felony" Under The ACCA's Elements Clause

Petitioner was convicted of assault with intent to do great bodily harm in 1990. The applicable Michigan statute states:

> Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

Mich. Comp. Laws § 750.84 (1990).[4] The elements of this offense are as follows: "(1) an attempt or threat with *force or violence* to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v. Brown*, 703 N.W.2d 230, 236 (Mich. Ct. App. 2005) (emphasis added).

Because this statute does not provide alternative means for committing the offense, the Court must utilize the categorical approach to determine whether the statute qualifies as a violent felony under the elements clause of the ACCA – that is, whether it has an element the use, attempted use, or threatened use of physical force against another.

The Sixth Circuit has held that "[a]ssault with intent to commit great bodily harm [ ] meets the definition of a violent felony because it 'has an element the use ... of physical force against the person of another. . . ." *United States v. Simmons*, 329 Fed. App'x 629, 632 (6th Cir. 2009); *United States v. Raybon*, 2017 WL 3470389, at *4 (6th Cir. Aug. 14, 2017) (holding that Michigan's assault with intent to do great bodily harm less than murder qualifies as a crime of violence under the elements clause of the guidelines; *see also United States v. Colbert*, 2017 WL 491935 (E.D. Mich. Feb. 7, 2017); *United States v. Thompson*, 2015 WL 1780801, at *7 (E.D. Mich. Apr. 20, 2015) (denying petitioner's § 2255 motion, concluding that Michigan's felony

[4] The statute was amended in 2013.

assault statute "is certainly a crime that 'has an element the use, attempted use, or threatened use of physical force against the person of another'").

C. The Court Need Not Consider Whether Felonious Assault Qualifies as a "Violent Felony" Under The ACCA's Elements Clause

Petitioner was also convicted of felonious assault in 1991. The incident which gave rise to this conviction also gave rise to Petitioner's conviction for assault with intent to do great bodily harm. Because these two convictions arise from the same incident, the Court may count as a qualifying predicate violent felony either of the convictions, but not both. 18 U.S.C. § 924(e)(1). Since the Court previously concluded that Petitioner's 1991 conviction for assault with intent to do great bodily harm is a qualifying predicate felony, the Court may decline to consider whether Defendant's felonious assault conviction qualifies as a violent felony under the ACCA.

D. Certificate of Appealability

A certificate of appealability must issue before a petitioner may appeal the district court's denial of his § 2255 Motion. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b). 28 U.S.C. 2253 provides that a certificate of appealability may issue only if a petitioner makes a substantial showing of a denial of a constitutional right. 28 U.S.C. 2253(c)(2).

"Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court concludes that reasonable jurists have found the Court's assessment of Petitioner's attempt unarmed robbery claim debatable. As such, the Court shall issue a

certificate of appealability as to this claim only. The Court declines to issue a certificate of appealability as to Petitioner's remaining claims.

CONCLUSION & ORDER

For the foregoing reasons, **IT IS ORDERED** that Petitioner's 28 U.S.C. § 2255 motion (Doc. # 47) is **DENIED**. Additionally, this Court shall issue a certificate of appealability as to Petitioner's attempt unarmed robbery claim. The Court declines to issue a certificate of appealability as to Petitioner's remaining claims.

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 16, 2017

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 16, 2017, by electronic and/or ordinary mail.

s/Jennifer McCoy
Case Manager

No. 17-2024

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 28, 2019
DEBORAH S. HUNT, Clerk

DURYANE LEWIS CHANEY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: BATCHELDER, GIBBONS, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.