APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7316

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GREGORY A. MILTON, a/k/a G,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Michael F. Urbanski, Chief District Judge. (5:95-cr-70074-MFU-1)

Submitted: June 28, 2022 Decided: June 30, 2022

Before NIEMEYER and HEYTENS, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Gregory A. Milton, Appellant Pro Se. Jennifer R. Bockhorst, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gregory A. Milton seeks to appeal the district court's orders (a) granting in part and denying in part Milton's authorized, successive 28 U.S.C. § 2255 motion; and (b) adjudicating Milton's postjudgment motions filed pursuant to Fed. R. Civ. P. 59(e) and 60(b). The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B); *see generally United States v. McRae*, 793 F.3d 392, 400 & n.7 (4th Cir. 2015). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Milton has not made the requisite showing.* Accordingly, although we grant Milton's motion to supplement his

* Milton correctly asserts that the district court erroneously dismissed his request for Rule 60(b) relief as a successive and unauthorized § 2255 motion because, in that motion, Milton challenged the integrity of the § 2255 proceedings; therefore, this was a "true" Rule 60(b) motion. *See McRae*, 793 F.3d at 397. In any event, Milton's Rule 60(b) motion nonetheless fails to state a debatable claim of the denial of a constitutional right. Specifically, the record conclusively establishes that the mandatory, consecutive life sentence imposed on Milton's 18 U.S.C. § 924(c) conviction resulted from application of

informal brief, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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then-operative 18 U.S.C. § 924(i)(1)—not the challenged "three-strikes" designation under 18 U.S.C. § 3559(c).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	)	
	)	Case No. 5:95-CR-70074
v.	)	
	)	
GREGORY A. MILTON,	)	
	)	By: Michael F. Urbanski
Defendant	)	Chief United States District Judge
	)	

MEMORANDUM OPINION

On June 13, 1996, a jury found defendant Gregory A. Milton guilty of three crimes: conspiracy to distribute crack cocaine in violation of 21 U.S.C. § 841 (Count One), Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count Three), and use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count Four). On October 31, 1996, the court sentenced Milton to life imprisonment on Counts One and Three and a consecutive term of life imprisonment on Count Four. These convictions arose out of the drug related robbery and murder of Ian Byron-Cox on March 13, 1995. Third Superseding Indictment, ECF No. 94-1.

Milton was unsuccessful in challenging his conviction on appeal and in his first petition under 28 U.S.C. § 2255, but was granted authorization to file a second or successive § 2255 petition by the Fourth Circuit Court of Appeals on July 14, 2016 following the Supreme Court's decisions in Johnson v. United States, 576 U.S. 591 (2015), and Welch v. United States, 136 S.Ct. 1257 (2016). Milton's subsequent § 2255 petition was stayed for a period of time as the case law following Johnson applicable to convictions under § 924(c) developed.

Milton challenges his life sentences, arguing that the evolution of the law invalidates his conviction and the consecutive life sentence imposed for the § 924(c) violation in Count Four and the mandatory sentence of life imprisonment for violation of the Hobbs Act in Count Three. As to Count Four, Milton argues that he cannot be guilty of use of a firearm in furtherance of a crime of violence because the Hobbs Act robbery charged in Count Three no longer categorically qualifies as a crime of violence following United States v. Davis, 139 S. Ct. 2319 (2019), United States v. Simms, 914 F.3d 229 (4th Cir. 2019), and United States v. Taylor, 979 F.3d 203 (4th Cir. 2020). As regards Count Three, Milton argues that the enhancement to mandatory life imprisonment no longer applies because Hobbs Act robbery does not categorically qualify as a serious violent felony under 18 U.S.C. § 3559(c)(2)(F). While the government at one point agreed with Milton that Count Four must fall, it now argues that the petition be denied in its entirety, focusing on the fact that Count Four of the Third Superseding Indictment expressly alleges actual robbery in violation of the Hobbs Act as opposed to conspiracy or attempt to violate the Hobbs Act.[1]

As to the § 924(c) conviction on Count Four, on balance, and applying the modified categorical approach, the court is convinced that Milton was convicted of actual Hobbs Act robbery, as opposed to attempt or conspiracy. As explained herein, the principal reason for this conclusion is that the jury was not instructed on attempt or conspiracy to violate the Hobbs Act, and was told that in order to convict on Count Three the government must prove

[1] The government filed a Motion to Withdraw the United States' Partial Response to Motion to Vacate, ECF No. 369, in which it stated "[a]fter further review, the United States has determined that its concession was improvidently made and, in fact, the conviction remains valid." As the court fully addresses this issue on the merits and concludes that the law does not support the concession as to Count Four later withdrawn by the government, the government's motion to withdraw its partial response is **GRANTED**.

actual robbery, i.e., "that the defendant took the property from Ian Byron-Cox by force or violence." Jury Instructions, ECF No. 398-5, at 76. In short, as the jury was only instructed on actual Hobbs Act robbery, the court is required to conclude that Milton was convicted of that offense. As Hobbs Act robbery categorically remains a crime of violence for § 924(c) purposes, the court may not set aside his conviction on Count Four. As "firearms possession (as described in section 924(c))" is an enumerated offense meeting the definition of a "serious violent felony" for the purposes of the mandatory life imprisonment enhancement in 18 U.S.C. § 3559(c)(1), Milton's life sentence on Count Four remains mandatory.

As to the Hobbs Act robbery conviction on Count Three, however, the court is required to set aside Milton's life sentence. Because the Hobbs Act makes it illegal to affect commerce by robbery of a person or property, it is categorically broader than the definition of a "serious violent felony" in 18 U.S.C. § 3559(c)(2)(F). As such, the mandatory life sentence imposed for Count Three must be vacated. Milton will be resentenced to a 20-year term of imprisonment on Count Three.

Next, Milton challenges the life sentence imposed on Count One under the First Step Act. Milton is eligible for relief under the First Step Act, and the court will reduce his sentence on Count One to 20 years, to run concurrent with the 20-year sentence on Count Three. The life sentence on Count Four must run consecutive to the sentences on Counts One and Three.

Milton also seeks to bring an actual innocence claim. However, because he cannot meet the threshold requirements of 28 U.S.C. § 2244(b)(2), he is not entitled to bring the claim in this successive § 2255 motion and the claim is dismissed.

I.

18 U.S.C. § 924(c)(1)(A) provides that a person who uses or carries a firearm "during and in relation to any crime of violence or drug trafficking crime" or possesses a firearm "in furtherance of any such crime" may be convicted both for the underlying predicate crime and utilizing a firearm in connection with such crime of violence or drug trafficking crime.[2] The statute defines a "crime of violence" as a felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). The first part of the crime of violence definition is referred to as the force (or elements) clause, and the second part is known as the residual clause.

Following Johnson's legacy, in United States v. Davis, the Supreme Court held that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. 139 S. Ct. at 2336. The Fourth Circuit recently ruled that "Davis announced a new substantive rule of constitutional law that has been made retroactive to cases on collateral review by the Supreme Court and was previously unavailable." In re Thomas, 988 F. 3d 783, 790 (4th Cir. 2021).

Since Davis was decided, the Fourth Circuit has issued three opinions on the question whether Hobbs Act robbery qualifies as a crime of violence under the force clause of § 924(c)(3)(A). In United States v. Mathis, 932 F.3d 242, 266 (4th Cir. 2019), the court "conclude[d] that Hobbs Act robbery constitutes a crime of violence under the force clause

[2] Milton was charged in Count 2 with use and carrying of a firearm in furtherance of the conspiracy to distribute crack cocaine, as to which the jury returned a Not Guilty verdict.

of Section 924(c)." While an actual Hobbs Act robbery qualifies as a crime of violence, the Fourth Circuit has held that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the force clause in § 924(c)(3)(A), reasoning that a conspiracy, an illegal agreement, "does not invariably require the actual, attempted, or threatened use of physical force." Simms, 914 F.3d at 234. In similar fashion, the Fourth Circuit recently held "that attempted Hobbs Act robbery is not 'categorically' a 'crime of violence.'" Taylor, 979 F. 3d at 210.

The Hobbs Act, 18 U.S.C. § 1951, makes it unlawful to interfere with commerce by threats or violence. It provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Count Three of the Third Superseding Indictment makes it clear that Milton was charged with actual Hobbs Act robbery. Count Three states that Milton and codefendants Derek Yancy and John Waller:

> [A]s principals and/or aiders and abettors, did unlawfully obstruct, delay and affect, and attempt and conspire to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, in that the defendants Gregory A. Milton and Derek Yancy did unlawfully take and obtain personal property consisting of monies, clothing, a telephone and other items from the person and in the presence of Ian Byron-Cox, against his will by means of actual and threatened force, violence, and fear of injury, immediate and future, to his person and the person of another.

ECF No. 94-1, at 4. While Count Three plainly charges actual Hobbs Act robbery, it also charges that Milton and others did "attempt and conspire to obstruct, delay and affect commerce . . . by robbery." Id.

Count Four charges that Milton and others "as principals and/or aiders and abettors, during and in relation to a crime of violence for which they may be prosecuted in a Court of the United States, that is robbery under Title 18, United States Code, Section 1951, knowingly used and carried a firearm." Id. at 5. Count Four continues that in the course of his violation, Ian Byron-Cox was murdered. Although the text of Count Four does not reference attempt or conspiracy to commit Hobbs Act robbery, the first paragraph of Count Four notes that "Count Three of this Indictment is fully realleged and incorporated into this Count Four of the Indictment." Id.

A.

While the Fourth Circuit's opinion in Mathis teaches that actual Hobbs Act robbery is a qualifying crime of violence for § 924(c) purposes, Simms and Taylor hold that attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery are not qualifying crimes

of violence. Because of the salient distinction crafted in recent case law, the court is required to determine what Milton was convicted of in Count Four.

Milton argues that he was convicted of all three Hobbs Act crimes, actual robbery, attempt, and conspiracy, for two reasons. First, he argues that Count Four includes attempt and conspiracy as Count Three is realleged and incorporated in Count Four. Next, arguing that Hobbs Act robbery is "a statute with alternative elements," Descamps v. United States, 570 U.S. 254, 261-62 (2013), Milton asks the court to employ the "modified categorical approach"[3] and consider that, when instructing the jury on Count Four, the court told the jury that Count Four required proof "that the killing of Cox through the use of the firearm was during and in relation to the robbery alleged in count three." Trial Tr., Jury Instructions, ECF No. 398-5, at 77-78.

While Count Four of the Third Superseding Indictment does incorporate by reference Count Three, the court is not convinced from examination of all of the documents approved for review by the Supreme Court in Taylor v. United States, 495 U.S. 575, 602 (1990), and Shepard, 544 U.S. at 26, that Milton was convicted of attempt and conspiracy in addition to actual Hobbs Act robbery.

[3] "In a 'narrow range of cases' courts may use the 'modified categorical approach' because 'a statute with alternative elements' is deemed 'divisible—i.e., comprises multiple, alternative versions of the crime.' When a defendant is convicted of violating a divisible statute, courts can 'look beyond the statutory elements to the charging paper and jury instructions' (Shepard[v. United States, 544 U.S. 13 (2005)]-approved documents) to determine what offense the defendant was convicted of committing." United States v. Al-Muwwakkil, 983 F.3d 748, 753 (4th Cir. 2020) (internal citations omitted). See United States v. Runyon, 983 F. 3d 716, 724 (4th Cir. 2020) ("Under this approach, the court may look to the terms of the relevant charging document, jury instructions, plea agreement, plea colloquy, and the like."). As the Fourth Circuit noted in Runyon, "as allowed by the modified categorical approach, we review the indictment on which Runyon was convicted and the jury instructions leading up to his conviction to determine the actual crime for which Runyon was convicted." Id. at 12.

Critically, nowhere does the court instruct the jury on attempted Hobbs Act robbery or conspiracy to engage in Hobbs Act robbery. Although the court had three opportunities to instruct the jury on attempt or conspiracy in the context of Count Three, it never did so.[4]

First, the court told the jury that it was going to read the charges in the indictment.[5] But in reading Count Three, the court did not read to the jury the "and attempt and conspire to obstruct" language contained in Count Three. It was omitted. As regards the critical portion of Count Three, the court instead stated:

> That on or about March 13, 1995 in the Western Judicial District of Virginia, Gregory A. Milton, Derek Yancy, the defendants, and John Kirk Waller, as principals and/or aiders and abettors, did unlawfully obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, in that the defendants, Gregory A. Milton and Derek Yancy did unlawfully take and obtain personal property consisting of monies, clothing, a telephone and other items from the person and in the presence of Ian Byron-Cox against his will by means of actual and threatened force, violence, and fear of injury, immediate and future, to his person and the person of another.

Trial Tr., Jury Instructions, ECF No. 398-5, at 68-69.

Second, the court also did not mention attempt or conspiracy in outlining the elements of Count Three to the jury. Rather, the court listed the elements as follows:

> Obstructing, delaying or affecting interstate commerce by robbery, as charged in count three, has three essential elements that the Government must prove beyond a reasonable doubt. First, that the defendant, Gregory Milton, took property from Ian

[4] To be sure, the jury was instructed on conspiracy, but those instructions concerned the drug trafficking conspiracy charged in Count One. Trial Tr., Jury Instructions, ECF No. 398-5, at 65-67.

[5] The court stated: "Now there are four counts, as you have been told, in the indictment. I'm about to read that indictment to you. I'm also going to permit you to carry a copy of the indictment with you back to the jury room, and I want to remind you and caution you that the indictment is not evidence. It is simply the Government's accusation against the defendant." Trial Tr., Jury Instructions, ECF No. 398-5, at 65.

> For you to find the defendant guilty of this crime you must be convinced that the Government has proven the following beyond a reasonable doubt.
>
> One, first, that the defendant knowingly used a firearm or aided and abetted the use of a firearm on or about the date alleged.
>
> Second, that the defendant knowingly used the firearm or aided and abetted the use of a firearm to kill Ian Byron-Cox.
>
> Third, that the killing was with malice aforethought and premeditated.
>
> And fourth, that the killing of Cox through the use of the firearm was during and in relation to the robbery alleged in count three.
>
> If the Government fails to prove each of these essential elements beyond a reasonable doubt, then you must find the defendant not guilty of count four.

Trial Tr., ECF No. 398-5, at 93-94.

The absence of a jury instruction on attempt or conspiracy to commit Hobbs Act robbery is consistent with the government's closing argument, which also did not mention Hobbs Act attempt or conspiracy. Instead, the government's closing argument focused on the contested element of the impact on interstate commerce of the actual robbery and murder in this case. As the government explained during its closing argument,

> Counts three and four arise out of a federal statute known as the Hobbs Act. And the purpose of the Hobbs Act was, essentially, to punish people who by force or by threats or violence commit some action to disrupt interstate commerce.
>
> If you rob someone and it affects interstate commerce, if you use a firearm it violates this federal statute known as the Hobbs Act; in this particular case, the interstate commerce aspect.
>
> * * *

> Byron-Cox. Second, that the defendant took the property from Ian Byron-Cox by force or violence. And third, that the robbery obstructed, delayed or affected interstate commerce.

Id. at 76.

Third, the jury sent a note during its deliberations which the court interpreted as a request "to re-instruct you on the elements as to each of the counts, and I will do that." Id. at 86. Again, while the court instructed on conspiracy, it did so on "the crime of conspiracy as charged in count one of the indictment." Id. at 87-90. The court re-instructed the jury as to the elements of Counts Three and Four, making no mention of attempt or conspiracy, as follows:

> Obstructing, delaying or affecting interstate commerce by robbery as charged in count three has three essential elements that the Government must prove beyond a reasonable doubt.
>
> First, that the defendant, Gregory Milton, took property from Ian Byron-Cox. Two, that the defendant took the property from Ian Byron-Cox by force or violence. And three, that the robbery obstructed, delayed or affected interstate commerce.
>
> If the Government fails to prove each of these essential elements beyond a reasonable doubt, you must find the defendant not guilty of count three.
>
> The phrase interstate commerce means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States.
>
> An action which obstructs, delays or affects interstate commerce is any action that interferes with, changes or alters the movement, transportation or flow of goods, money or other property in interstate commerce. Interstate trafficking in narcotics is interstate commerce.
>
> Gregory Milton is charged in count four with knowingly using a firearm during and in relation to the robbery alleged in count three.

instructed on attempt or conspiracy to commit Hobbs Act robbery, Milton could not be convicted of that conduct. United States v. Polowichak, 783 F. 3d 410, 417 (4th Cir. 1986). In Polowichak, the trial court did not instruct the jury on the elements of Counts 6 and 7, charging violations of the Travel Act, 18 U.S.C. § 1952(a)(3), and defendants challenged their convictions on these counts on appeal. The Fourth Circuit unambiguously held that the convictions on Counts 6 and 7 must be reversed, concluding that "we know of no case in which a conviction was upheld in the absence of a jury charge. A charge was absent here, and we perceive no acceptable substitute." 783 F. 3d at 417.[6]

As evident from the jury instructions, the court did not submit the issues of attempt or conspiracy to commit Hobbs Act robbery to the jury. And while a court may not broaden the charges in an indictment by constructive amendment in its jury instructions,[7] it may narrow them. See Griffin v. United States, 502 U.S. 46, 60 (1991) ("What we have said today does not mean that a district court cannot, in its discretion, give an instruction of the sort petitioner requested here, eliminating from the jury's consideration an alternative basis of liability that does not have adequate evidentiary support."); United States v. Miller, 471 U.S. 130, 144-45 (1985) ("[W]here an indictment charges several offenses, or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment.")

[6] The court reached that conclusion notwithstanding the fact that in Polowichak, as here, the court supplied the jury with a copy of the indictment, with appropriate instructions that it is not evidence. Id. at 413, Trial Tr., Jury Instructions, ECF No. 398-5, at 65.

[7] "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994).

> How does it affect interstate commerce? Because when Ian Byron-Cox was robbed, and we'll turn first to the robbery which is count three of the indictment, when he was robbed, when these individuals went in, and using force or violence, the use of the weapon, the use of the threats, the beatings and all the things associated with them - - and that's what the robbery is - - if you find from all those things, and during the course of that they took from him certain things, they took the, they took a cell phone, they took $700 which was clearly the proceeds of a drug trafficking transaction, they took clothing, they took other items from him, you can find that that's affected his ability to carry on the drug trade.

Trial Tr., Government Closing Argument, ECF No. 398-5, at 43-44. In its rebuttal, the government was more succinct on Counts Three and Four, stating simply that "[i]f he's involved in the murder, it involved a robbery, he's guilty of counts three and four." Id. at 54. In short, the government did not argue for a conviction on Count Three based on attempt or conspiracy to violate the Hobbs Act. The government's closing argument focused on the evidence of actual robbery and murder.

Consistent with the jury instructions and argument, the verdict form did not break out Count Three into actual Hobbs Act robbery, attempt, or conspiracy. Rather, it simply asked the jury to find Milton guilty or not guilty "[a]s charged in Count Three of the Indictment." ECF No. 162. And as to Count Three, the jury heard only argument and instruction about an actual robbery.

Thus, the question to be answered was whether Milton was convicted of attempted Hobbs Act robbery or conspiracy to engage in Hobbs Act robbery. While Count Three of the indictment includes attempt and conspiracy language, the jury was not instructed on attempted Hobbs Act robbery or conspiracy to violate the Hobbs Act. Rather, the jury was only instructed as to the elements of actual Hobbs Act robbery. Because the jury was not

(internal citations and quotations omitted). As such, the court must conclude that Milton was convicted of Hobbs Act robbery alone.

The Fourth Circuit's decisions in United States v. Vann, 660 F. 3d 771 (4th Cir. 2011), and United States v. Chapman, 666 F.3d 220 (4th Cir. 2012), relied upon heavily by Milton, do not support a contrary conclusion. In Vann, the Fourth Circuit held that it could not determine from the state court charging documents whether Vann had been convicted of a particular provision of the North Carolina Indecent Liberties Statute subjecting him to sentencing enhancement under the Armed Career Criminal Act, 18 U.S.C. § 922(e). As such, the Fourth Circuit vacated the district court's imposition of the enhancement. Chapman cited Vann for the proposition that "when a defendant pleads guilty to a formal charge in an indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct." 666 F. 3d at 228. Here, in contrast, the jury instructions conclusively establish that Milton was convicted only of Hobbs Act robbery as no argument was made nor instruction given to the jury as to attempt or conspiracy to violate the Hobbs Act. Unlike in Vann and Chapman, the Taylor and Shepard-approved record in this case makes it clear that Milton was convicted only of Hobbs Act robbery, which is a crime of violence under the force clause of § 924(c)(3)(A).

Each of the other cases cited by Milton on this point are likewise distinguishable. In United States v. Berry, No. 3:09cr00019, 2020 WL 91569, *3 (W.D. Va. Feb. 6, 2020), unlike here, the "parties acknowledge[d] that the jury instructions allowed for a conviction on either conspiracy or attempted Hobbs Act robbery, and the jury verdict was a general verdict which does not specify which was the basis of the conviction." (internal quotation omitted). In re

Gomez, 830 F.3d 1225, 1227 (11th Cir. 2016), concerned an application to file a successive § 2255 petition based on the fact that the indictment charged attempted Hobbs Act robbery, Hobbs Act conspiracy, and drug trafficking crimes as § 924(c) predicate offenses. The court noted that "[t]he way Gomez's indictment is written, we can only guess which predicate the jury relied on." Id. at 1228. The court granted the application allowing a second § 2255 petition to be considered and returned the case to the district court. The order concluded that "[s]hould an appeal be filed from the district court's determination, nothing in this order shall bind the merits panel in that appeal." Id. (internal citation omitted). In United States v. Lettiere, No. CR 09-049-M-DWM, 2018 WL 3429927 (D. Mont. July 16, 2018), the court examined the jury instructions to determine whether Lettiere had been convicted of Hobbs Act robbery or extortion, the latter of which would not serve as a § 924(c) predicate. The court noted that the jury instructions failed to charge all of the elements of Hobbs Act robbery.

> The jury instruction does not show how Lettiere was convicted of robbery. It shows he was convicted of robbery or extortion or even, arguably, just extortion. There is no reason to doubt that Lettiere's *conduct* was robbery. In categorical analysis, "[h]ow a given defendant actually perpetrated the crime makes no difference." Mathis [v. United States, 136 S. Ct 2243], at 2251. The point of the Shepard documents is to determine what *elements* were proved against the defendant. From the record, one cannot say the jury convicted Lettiere of taking personal property "from the person or in the presence of" the victim, "against his will." Those elements were not submitted for the jury's deliberation. All that can be said is that the jury convicted Lettiere of inducing the victim to part with property by wrongfully using the threat of force or fear.
>
> * * *
>
> The jury did not find all the elements of Hobbs Act robbery. Although Hobbs Act robbery is a crime of violence under § 924(c)(3)(A), extortion is not. Section 924(c)(3)(B) is unconstitutionally vague. As a result, Lettiere's conviction under § 924(c) cannot stand under controlling law.

Id. at *4-5. In fact, the court's analysis in Lettiere, focusing as it did on the text of the jury instructions given to the jury in that case, supports the conclusion that Milton was convicted only of Hobbs Act robbery, and not attempt or conspiracy. The same is true as regards Milton's citation of United States v. McCall, No. 3:10cr170, 2019 WL 4675762 (E.D. Va. Sept. 25, 2019). There, unlike here, the court instructed the jury that the charge of violent crime in aid of racketeering ("VICAR") in violation of 18 U.S.C. § 1959(3) could be based on either the underlying predicate state court offenses of assault with a dangerous weapon or conspiracy to commit such assault. Because both the indictment and jury instructions included a conspiracy charge, the court reasoned that "McCall's liability in Count Three could have been based on committing assault with a dangerous weapon by either unlawful or malicious wounding or brandishing or conspiring to commit those offenses. Conspiring to commit the crimes of malicious or unlawful wounding or brandishing does not necessarily require the use, attempted use, or threatened use of physical force that is required as a predicate for a conviction under § 924(c)." Id. at *7. In short, because Milton's jury was not instructed on either attempt or conspiracy to commit Hobbs Act robbery, the court finds that his conviction on Count Three necessarily included only actual Hobbs Act robbery. As such, none of these cases cited by Milton support vacating his § 924(c) conviction.

"'[O]nce the court has [under the modified categorical approach] consulted the record and isolated the specific crime underlying the defendant's conviction, it must then apply the categorical approach to determine if it constitutes a [crime of violence],' considering only the elements of the identified crime and the fact of conviction." Runyon, 983 F.3d at 725 (quoting United States v. Allred, 942 F.3d 641, 648 (4th Cir. 2019). In Mathis, the Fourth Circuit

"conclude[d] that Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)." 924 F.3d at 266. As Milton's Hobbs Act robbery conviction categorically qualifies as a crime of violence under the force clause of § 924(c), his motion to set aside his conviction on Count Four must fail.

B.

Next, Milton argues that because he was charged, and the jury was instructed on the offense of aiding and abetting Hobbs Act robbery, his conviction was not for a crime of violence. This argument ignores well-established law that aiding and abetting a crime is not a separate offense; rather it is merely a way of committing the crime charged.

> It is settled that vicarious liability predicated on having aided or abetted the crimes of another need not be charged in an indictment. See United States v. Wills, 346 F.3d 476, 495 (4th Cir. 2003). The reason for this rule is that aiding and abetting simply describes the way in which a defendant's conduct resulted in the violation of a particular law. The federal criminal statute dealing with the subject speaks simply of agency and causation principles, providing that a person is punishable "as a principal" if he "aids, abets, counsels, commands, induces or procures" the commission of a federal offense or "willfully causes" another to do an act that would be criminal if he performed it himself. 18 U.S.C. § 2. Because the aiding and abetting provision does not set forth an essential element of the offense with which the defendant is charged or itself create a separate offense, aiding and abetting liability need not be charged in an indictment. See United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987).

United States v. Ashley, 606 F. 3d 135, 143 (4th Cir. 2010); United States v. Day, 700 F. 3d 713, 720 (4th Cir. 2012); accord United States v. Camara, 908 F. 3d 41, 46 (4th Cir. 2018).

On remand from the United States Supreme Court, the Third Circuit in United States v. Richardson, 948 F.3d 733 (6th Cir. 2020), recently addressed this question directly.

> Richardson . . . argues that his conviction for *aiding and abetting*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	)
	)
	) Case No. 5:95-cr-70074
v.	)
	)
GREGORY A. MILTON	) By: Hon. Michael F. Urbanski
	) Chief United States District Judge
	)

ORDER

As set forth in the accompanying memorandum opinion, the court **GRANTS** in part and **DENIES** in part petitioner Milton's motion for relief under 28 U.S.C. § 2255. Milton's Motion to Vacate, ECF No. 327, as amended by ECF Nos. 335, 364, and 383, is **GRANTED** insofar as Milton's life sentences imposed on Counts One and Three are reduced to twenty years. The court **DENIES** Milton's request to reduce the life sentence imposed on Count Four, which remains mandatorily imposed pursuant to § 3559(c). The sentence on Count Four must be served consecutively to the sentences imposed on Counts One and Three. In all other respects, the judgment of November 4, 1996 remains intact. In addition, the court **DENIES** relief on Milton's actual innocence claim.

The court **DENIES** Milton's requests for subpoena, ECF Nos. 347, 379, 406.

The court **GRANTS** Milton's motion to correct scrivener's error, ECF No. 376.

The court **GRANTS** the government's motion to withdraw its partial response to the motion to vacate, ECF No. 369.

The court **DENIES** Milton a certificate of appealability.

It is so **ORDERED**.

Entered: April 20, 2021

Michael F. Urbanski
Chief U.S. District Judge
2021.04.20 11:36:00 -04'00'

Michael F. Urbanski
Chief United States District Judge

APPENDIX C

FILED: August 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HERE

No. 21-7316
(5:95-cr-70074-MFU-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GREGORY A. MILTON, a/k/a G

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Heytens, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk