CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FILED: June 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-9
(1:00-cr-00074-MR-1)
(1:16-cv-00212-MR)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD ALLEN JACKSON

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

32 F.4th 278
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.
Richard Allen JACKSON, Defendant – Appellant.

No. 20-9
|
Argued: March 10, 2022
|
Decided: April 20, 2022

Synopsis

Background: After defendant's conviction of causing the death of another through the use of a firearm during a crime of violence was upheld on appeal, 327 F.3d 273, defendant filed motion for habeas corpus relief. The United States District Court for the Western District of North Carolina, Martin Reidinger, Chief Judge, denied motion, and defendant appealed.

The Court of Appeals, Motz, Circuit Judge, held that federal first degree murder statute was divisible, and thus, modified categorical approach applied when determining if defendant's prior conviction for federal first-degree murder constituted "crime of violence" for purposes of section of Armed Career Criminal Act (ACCA) prohibiting the carrying or use of firearm in relation to crime of violence.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

***281** Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:00-cr-00074-MR-1; 1:16-cv-00212-MR)

Attorneys and Law Firms

ARGUED: Andrew Reed Childers, FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, Philadelphia, Pennsylvania, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. ON BRIEF: Shawn Nolan, FEDERAL COMMUNITY DEFENDER OFFICE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, Philadelphia, Pennsylvania, for Appellant. Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Niemeyer and Judge King joined.

DIANA GRIBBON MOTZ, Circuit Judge:

Convicted of causing the death of another through the use of a firearm during a "crime of violence" in violation of 18 U.S.C. § 924(c) and sentenced to death pursuant to 18 U.S.C. § 924(j), Richard Allen Jackson moves for relief under 28 U.S.C. § 2255. He contends that the Government failed to prove that he committed a "crime of violence." He is wrong. The jury unanimously found Jackson guilty of federal premeditated first-degree murder, which constitutes a qualifying "crime of violence." Accordingly, we affirm the district court's denial of Jackson's successive § 2255 motion.

I.

We assume familiarity with the facts underlying this case, which are set out in detail in *United States v. Jackson*, 327 F.3d 273, 279–81 (4th Cir. 2003). To summarize, Jackson confessed that he kidnapped twenty-two-year-old Karen Styles as she went for a run in the Pisgah National Forest in North Carolina in October 1994. Jackson duct-taped Styles to a tree and raped her. He then shocked her with a stun gun above her left breast and multiple times in her pubic area. When Styles began to scream after the duct tape Jackson had placed on her mouth became loose, Jackson shot her once in the head, killing her.

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In 1995, a North Carolina state jury convicted Jackson of first-degree murder, first-degree rape, and first-degree kidnapping. The court, consistent with the jury's ***282** recommendation, imposed the death penalty. But in 1998, the Supreme Court of North Carolina vacated Jackson's convictions and sentence after determining that the police violated his *Miranda* rights when interrogating him. *See State v. Jackson*, 348 N.C. 52, 497 S.E.2d 409 (1998), *abrogated by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). In March 2000, prior to a planned second state trial, Jackson pled guilty to second-degree murder and related offenses. A state court sentenced him to twenty-five to thirty-one years' imprisonment.

Then, in October 2000, a federal grand jury returned a single-count superseding indictment charging Jackson with: 1) using and carrying a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. § 924(c) and 2) using and carrying a firearm during a "crime of violence" resulting in death in violation of 18 U.S.C. § 924(j). [1] The Government alleged that Jackson committed three "crimes of violence": 1) federal first-degree murder, in violation of 18 U.S.C. § 1111(a); 2) federal kidnapping in violation of 18 U.S.C. § 1201(a)(2); and 3) federal aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1)–(2).

1 18 U.S.C. § 924(j) provides that "[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall — (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life."

In 2001, a federal jury unanimously voted to convict Jackson and recommended he be sentenced to death. The two-page verdict sheet reports the jury's unanimous finding that Jackson committed 1) "the crime of kidnap[p]ing Karen Styles"; 2) "the crime of aggravated sexual abuse of Karen Styles"; and 3) "the crime of the murder of Karen Styles." As to the murder conviction, the jury specifically found that Jackson committed the murder of Karen Styles 1) "with malice aforethought, willfully, deliberately, maliciously and with premeditation"; 2) "during the perpetration of kidnap[p]ing"; and 3) "during the perpetration of aggravated sexual abuse." On direct appeal, we affirmed Jackson's conviction and sentence. *See Jackson*, 327 F.3d at 279. In 2009, the district court denied Jackson's first motion for post-conviction relief under 28 U.S.C. § 2255. It subsequently denied Jackson a certificate of appealability, as did this Court.

In 2015, the Supreme Court issued its decision in *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). There, the Court struck down the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague. This meant that to serve as a predicate offense under the ACCA, a "violent felony" now had to satisfy the force (or elements) clause. [2] In 2016, the Court held that *Johnson* applies retroactively to cases on collateral review. *See Welch v. United States*, 578 U.S. 120, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016). Given these developments in the law, we authorized Jackson to file a successive § 2255 motion relying on *Johnson* and *Welch.*

2 To satisfy the force (or elements) clause, the "violent felony" must "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The district court stayed action on Jackson's successive § 2255 motion pending multiple subsequent decisions from the Supreme Court and this Court. Most relevant here, in 2019, the Supreme Court applied *Johnson*'s reasoning to 18 U.S.C. § 924(c), the statute under which the federal jury convicted Jackson. *See* ***283** *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). In doing so, it struck down the residual clause of 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague. *Id.* at 2336. Post-*Davis*, an underlying "crime of violence" must satisfy the force (or elements) clause of § 924(c)(3)(A). That is, it must "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." We subsequently held that *Davis* established a new rule of constitutional law made retroactive on collateral review. [3] *See In re Thomas*, 988 F.3d 783, 786 (4th Cir. 2021).

3 For this reason, the Government's first argument, that procedural default bars Jackson's § 2255 motion because he did not raise this issue on direct appeal, fails.

In March 2020, the district court granted the Government's motion to dismiss Jackson's successive § 2255 motion and denied Jackson a certificate of appealability. The court did so because in its view, both murder and aggravated sexual abuse qualified as "crimes of violence" under § 924(c)(3)(A). The district court relied on our prior decisions, *In re Irby*, 858 F.3d 231 (4th Cir. 2017), and *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), to hold that "the offense of murder

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in the first degree is unquestionably a crime of violence under the force clause." In *Irby*, we reasoned that "[c]ommon sense dictates that murder is categorically a crime of violence under the force clause.... In sum, one cannot unlawfully kill another human being without a use of physical force capable of causing physical pain or injury to another." 858 F.3d at 237–38. In *Mathis*, we relied on *Irby* to hold that the Virginia first-degree murder statute, Va. Code § 18.2-32 (which is almost identical to the federal first-degree murder statute at issue here in defining both premeditated murder and felony murder as first-degree murder), is categorically a "crime of violence." *See* 932 F.3d at 265.

Critically, the district court denied § 2255 relief prior to the Supreme Court's decision in *Borden v. United States*, —— U.S. ——, 141 S. Ct. 1817, 210 L.Ed.2d 63 (2021). *Borden* holds that a criminal offense that requires only a mens rea of recklessness cannot qualify as a "violent felony" under the force (or elements) clause of the ACCA. *Id.* at 1821–22, 1834. "In light of the striking similarities [in the] definitions [of "crime of violence" in § 924(c) and "violent felony" in the ACCA], the court decisions interpreting one such definition are persuasive as to the meaning of the other[ ]." *United States v. McNeal*, 818 F.3d 141, 153 n.9 (4th Cir. 2016).[4] Jackson contends that *Borden* requires reversal of the district court's denial of his successive § 2255 motion.

4 The Government does not argue that we should not apply *Borden* to § 924(c) and we see no reason not to do so. *See United States v. Toki*, 23 F.4th 1277, 1281 (10th Cir. 2022) ("[A]fter *Borden*, an offense that can be committed recklessly is not categorically a 'crime of violence' under § 924(c).").

We granted Jackson a certificate of appealability and now consider that question.

II.

To support a conviction under § 924(c) for using or carrying a firearm during and in relation to a "crime of violence," the Government need only prove one qualifying predicate offense. *See United States v. Said*, 26 F.4th 653, 659 (4th Cir. 2022) ("[A] § 924(c) conviction may stand even if the jury based its verdict on an invalid predicate, so long as the jury also relied on a valid predicate."). That crime must be a felony that "has as an element the use, attempted use, or threatened ***284** use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This use of force must be "purposeful or knowing," *Borden*, 141 S. Ct. at 1828, and have the "potential[ ]" to "cause physical pain or injury." *Stokeling v. United States*, —— U.S. ——, 139 S. Ct. 544, 554, 202 L.Ed.2d 512 (2019).

To determine whether a felony meets this definition and thus constitutes a "crime of violence," we generally use the categorical approach. *See United States v. Roof*, 10 F.4th 314, 398 (4th Cir. 2021), *cert. pending* (2022). That is, we "look to whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of physical force." *United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc). We consider only the elements of the crime as defined in the statute, not the facts particular to the case at hand. Thus, we ask whether the "most innocent conduct" criminalized by the statute meets the definition of a "crime of violence." *Roof*, 10 F.4th at 398.

In certain circumstances, we apply a "variant" of the categorical approach referred to as the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). We use the modified categorical approach when the statute at issue is divisible. Divisible statutes set forth "multiple, alternative versions of the crime" with distinct elements, *id.* at 262, 133 S.Ct. 2276, while indivisible statutes merely set out different means of completing the crime. Elements, as opposed to means, are the " 'constituent parts' of a crime's legal definition" that the "prosecution must prove to sustain a conviction" and which "the jury must find beyond a reasonable doubt to convict the defendant." *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) (citations omitted).

III.

With this history and these controlling legal principles in mind, we turn to Jackson's challenge to the denial of his successive § 2255 motion, which we review de novo. *United States v. Mayhew*, 995 F.3d 171, 176 (4th Cir. 2021).

A.

Recall that the federal jury found Jackson guilty of first-degree murder, first-degree aggravated sexual abuse, and first-degree kidnapping. Jackson maintains that none of these

crimes constitutes a "crime of violence" under § 924(c). Because conviction under § 924(c) requires proof of only one underlying "crime of violence," we need only consider the first-degree murder statute. [5]

5 Thus, we need not reach the question of whether aggravated sexual abuse is also a "crime of violence." We have previously held that federal kidnapping does not qualify as a "crime of violence." *See United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019).

That statute, 18 U.S.C. § 1111(a), defines four types of first-degree murder as follows:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder **[1]** perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or **[2]** committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or **[3]** perpetrated as part of a pattern or practice of assault or torture against a child or children; or **[4]** perpetrated from a premeditated design unlawfully and maliciously ***285** to effect the death of any human being other than him who is killed, is murder in the first degree.

§ 1111(a) (enumeration added).

Jackson argues that § 1111(a) is a single indivisible statute to which we apply the categorical approach. He further contends that felony murder, the conduct delineated in the second clause of the second sentence of this assertedly indivisible statute, requires only a mens rea of recklessness and so its commission cannot qualify as a "crime of violence." If the statute is indivisible, he is correct. This is so because it is the most innocent conduct criminalized by an indivisible statute that must categorically meet the definition of a "crime of violence." Felony murder cannot qualify as a "crime of violence" because it requires only the mens rea necessary to attempt or complete the underlying felony (i.e., arson, escape, etc.). That mens rea is not more than recklessness and thus, does not satisfy *Borden.* [6]

6 The Government has acknowledged this result of *Borden* in another case. *See* Supplemental Brief for the United States at 18, *United States v. King*, Nos. 18-2800, 18-2877 (8th Cir. Mar. 30, 2022) ("The Government's position here ... acknowledges the consequence that some forms of federal first-degree murder, namely first-degree felony murders predicated on felonies that do not require the use of force against a person, are not crimes of violence. That position is not taken lightly, but after *Borden*, it is what the categorical approach requires.").

But the Government maintains that the federal first-degree murder statute is divisible and sets out four alternative versions of first-degree murder. If this is so, then the modified categorical approach applies. That means we examine whether the particular version of first-degree murder committed by Jackson is a "crime of violence." If the statute is divisible and the jury found Jackson guilty of a version of federal first-degree murder that requires an intentional mens rea (such as premeditated murder), *Borden* provides him no assistance.

B.

We turn to the critical issues in this appeal: whether § 1111(a) is divisible and if so, whether the version of first-degree murder committed by Jackson qualifies as a "crime of violence" sufficient to support his conviction of violating 18 U.S.C. §§ 924(c) and (j).

Section 1111(a) is phrased alternatively. The second sentence contains four separate components, the first two of which are relevant here. Each component is separated by a semicolon followed by the word "or." The first component of § 1111(a) sets out premeditated murder as a type of first-degree murder, while the second component sets out felony murder as a type of first-degree murder. Each of these components requires the Government to prove a unique element that the jury must find unanimously; the first component requires proof of premeditation, and the second requires proof of the accomplishment (or attempted accomplishment) of a

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listed felony. Therefore, these two components list alternative versions of first-degree murder, which makes the statute divisible. [7]

7 Jackson's contention, that in *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), the Supreme Court established that § 1111(a) is indivisible, is meritless. There, the Supreme Court simply held that the United States Constitution permitted the Supreme Court of Arizona to uphold a state conviction of first-degree murder based on a general verdict that combined findings of premeditation and felony murder. *Id.* at 630–31, 111 S.Ct. 2491. The Court expressly disclaimed any opinion on whether the Arizona statute was divisible; the Supreme Court of Arizona had already held that it was not. *See id.* at 636, 111 S.Ct. 2491 ("If a state's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination."). In contrast, the question here is not whether it would be *constitutional* to combine premeditated and felony murder, but whether Congress has in fact done so.

***286** Several indicia of divisibility support this conclusion. First, the text of § 1111(a) describes the alternative versions of first-degree murder by using the disjunctive. While not dispositive, "[w]hen a criminal statute is phrased disjunctively it serves as a signal that it may well be divisible." *United States v. Allred*, 942 F.3d 641, 649 (4th Cir. 2019).

Further, the underlying conduct for premeditated murder differs significantly from the underlying conduct for felony murder. To be guilty of premeditated murder, the Government must prove a person intended to kill the victim. In contrast, proof of felony murder does not require proof of intent but rather proof of the (attempted) perpetration of a listed crime. In other words, the two rest on different formulations and "each formulation of the crime involves a different type of conduct." *United States v. Vinson*, 794 F.3d 418, 425 (4th Cir.), *rev'd on reh'g on other grounds*, 805 F.3d 120 (4th Cir. 2015). "That the kind of conduct proscribed by the different formulations ... differs quite significantly suggests that ... the different formulations should be treated as separate crimes warranting the use of the modified categorical approach." *Id.* [8]

8 Jackson notes that the statute sets out the same penalty for all four versions of first-degree murder listed in § 1111(a). Reply Br. at 10. But while the existence of different penalties for different segments of a statute necessitates finding divisibility, the absence of distinct punishments is not dispositive. *See Mathis*, 136 S. Ct. at 2256.

The record in this case reinforces this conclusion as to the divisibility of § 1111(a). A court may "peek at the record documents ... [to] determin[e] whether the listed items are elements of the offense." *Mathis*, 136 S. Ct. at 2256–57 (cleaned up). Doing so reveals that the indictment does not simply charge Jackson with first-degree murder. Instead, it states that Jackson "unlawfully killed a human being, Karen Styles, with malice aforethought, by shooting her with the firearm [1] willfully, deliberately, maliciously, and with premeditation, and [2] in the perpetration and attempted perpetration of a felony, to wit: kidnapping and aggravated sexual abuse," i.e., that Jackson separately committed 1) premeditated murder and 2) felony murder. [9] (enumeration added).

9 We note that indictments in other cases have similarly been held to demonstrate that prosecutors charge defendants with a specific alternative version of federal first-degree murder, not first-degree murder in general. *See, e.g., United States v. Lespier*, 725 F.3d 437, 443 n.4 (4th Cir. 2013) (quoting the indictment, which charged the defendant with premeditated murder); *United States v. Higgs*, 353 F.3d 281, 299 (4th Cir. 2003) (quoting the indictment, which separately charged the defendant with premeditated murder and felony murder.). In *Higgs*, we affirmed the defendant's convictions of multiple counts of premeditated murder and multiple counts of felony murder in violation of § 1111(a). *Id.* at 313–14, 334.

The jury instructions also point toward divisibility. The district court specifically instructed the jury that to convict it had to "unanimously agree that the Government has proved beyond a reasonable doubt that the defendant committed murder in one of the three manners alleged" and that it had to "unanimously agree on the same one." This confirms that each component of § 1111(a) is a separate crime: to convict, each member of the jury had to ***287** agree that Jackson committed one of those crimes. If premeditated murder and felony murder were merely means of committing a single

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crime as Jackson urges, the jury could have found Jackson guilty of first-degree murder in the absence of unanimous agreement as to the type of murder he committed. The jury could have reached a verdict of first-degree murder if some jurors found Jackson guilty of premeditated murder (but others did not), while some jurors found Jackson guilty of felony murder (but others did not). The district court instructed the jury that it could not convict Jackson on this basis.

Finally, we may also look to the verdict form. *See Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). Here, the verdict form exactly matches the jury instructions. The verdict form directed the jury to decide specifically whether Jackson committed the murder of Karen Styles 1) "with malice aforethought, willfully, deliberately, maliciously and with premeditation"; 2) "during the perpetration of kidnap[p]ing"; and 3) "during the perpetration of aggravated sexual abuse." The jurors clearly indicated, by the check marks they placed next to all three of these crimes on the verdict form, that they found Jackson guilty of all three.

Accordingly, we apply the modified categorical approach to this divisible statute. To do so, we consult these same record documents to determine which version of first-degree murder Jackson committed. *See id.* at 144, 130 S.Ct. 1265; *Shepard v. United States*, 544 U.S. 13, 21–23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The jury unanimously and unambiguously found that Jackson committed two versions of first-degree murder: premeditated murder and felony murder (through the commission of two separate felonies). Jackson argues that we cannot rely on the modified categorical approach to affirm on the basis that premeditated murder is a "crime of violence" because the "*Shepard* documents do not prove with certainty that the § 924(c) predicate upon which Mr. Jackson was necessarily convicted was premeditated murder." Reply Br. at 18. That argument fails. The verdict sheet (a *Shepard* document) plainly shows that the jury unanimously found that Jackson committed premeditated murder. As to this finding, the jury could not have been clearer.

Undoubtedly, federal premeditated first-degree murder is a "crime of violence." Jackson does not even argue to the contrary. Moreover, federal premeditated murder requires an intentional mens rea and thus does not in any way violate *Borden*'s requirement. 141 S. Ct. at 1821–22, 1834. And premeditated murder necessarily requires the use of "*violent* force — that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. Indeed, to commit federal premeditated first-degree murder, a death-results crime, is to intentionally inflict the greatest physical injury imaginable — death. *See Roof*, 10 F.4th at 401. Thus, premeditated murder in violation of § 1111(a) is categorically a "crime of violence." And this "crime of violence" constitutes a valid underlying crime sufficient to support Jackson's conviction of violating §§ 924(c) and (j). Accordingly, his successive § 2255 motion fails.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

All Citations

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APPENDIX C

2020 WL 1542348
Only the Westlaw citation is currently available.
United States District Court, W.D. North Carolina,
Asheville Division.

Richard Allen JACKSON, Petitioner,
v.
UNITED STATES of America, Respondent.

CIVIL CASE NO. 1:16-cv-00212-MR
|
[CRIMINAL CASE NO. 1:00-cr-00074-MR]
|
Signed 03/31/2020

Attorneys and Law Firms

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MEMORANDUM OF DECISION AND ORDER

Martin Reidinger, United States District Judge

***1 THIS MATTER** is before the Court on the Petitioner's Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255 [CV Doc. 1] [1] and the Government's Motion to Dismiss [CV Doc. 17].

1 Citations to the record herein contain the relevant document number referenced preceded by either the letters "CV" denoting that the document is listed on the docket in the civil case file number 1:16-cv-00212-MR, or the letters "CR" denoting that the document is listed on the docket in the criminal case file number 1:00-cr-00074-MR.

I. BACKGROUND

On October 31, 1994, 22-year-old Karen Styles went for a run on a trail in the Pisgah National Forest. She was confronted on the trail by the Petitioner Richard Allen Jackson ("Jackson"), who was armed with a gun. Jackson forced her to walk deep into the forest, where he duct-taped her to a tree and removed her clothing. Jackson then raped Styles. She pleaded with Jackson not to hurt her, but he proceeded to shock Styles with a stun gun, once above her left breast and several times in her pubic area. He placed duct tape over her mouth and then masturbated while looking at a pornographic magazine. When the duct tape over her mouth loosened, Styles began screaming. Jackson then put a gun to Styles's head and shot her once, killing her. Styles's nude body was later discovered by a hunter, still duct-taped to the tree. Investigators found a duct-tape wrapper, a pornographic magazine, and one spent Remington .22 caliber rifle casing near her body, all of which were tied to Jackson. Jackson made a full confession to the crime. As a part of this proceeding, Jackson does not dispute that he committed these acts.

Jackson was charged in this Court in a one count indictment with using and carrying a firearm during and in relation to each of the following crimes of violence: (1) first-degree murder, in violation of 18 U.S.C. § 1111(a); (2) kidnapping, in violation of 18 U.S.C. § 1201(a)(2); and (3) aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1)-(2), and in the course of such violation and through the use of such firearm, causing the death of Karen Styles, all in violation of 18 U.S.C. §§ 924(c) and 924(j)(1). [CR Doc. 19: Superseding Bill of Indictment].

A jury convicted Jackson. [CR Doc. 176: Verdict Sheet]. The jury returned a special verdict form specifically finding that Jackson had committed each of the three crimes of violence specified in the indictment. The jury unanimously found that Jackson "committed the crime of the murder of Karen Styles"; that Jackson "committed the crime of aggravated sexual abuse of Karen Styles"; and that Jackson "committed the crime of kidnaping Karen Styles." [Id. at 1]. Additionally, the jury also specifically and unanimously found that Jackson had committed the murder of Styles in three specific ways. [Id. at 2]. The jury found that Jackson "committed the murder of Karen Styles with malice aforethought, willfully, deliberately, maliciously and with premeditation"; that Jackson "committed the murder of Karen Styles during the perpetration of kidnaping"; and that Jackson "committed the murder of Karen Styles during the perpetration of aggravated sexual abuse." [Id.].

***2** Following a sentencing trial, the jury unanimously recommended that Jackson be sentenced to death. [CR Doc. 181: Special Verdict Form]. This Court entered a Judgment in accord with the jury's verdict of guilty of the offense charged in the indictment and imposing the sentence of death. [CR

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Doc. 187]. The Fourth Circuit affirmed Jackson's conviction and sentence. Jackson, 327 F.3d at 279. The United States Supreme Court denied Jackson's petition for writ of certiorari. Jackson v. United States, 540 U.S. 1019 (2003).

In 2009, this Court denied Jackson's first motion under 28 U.S.C. § 2255. Jackson v. United States, 638 F. Supp. 2d 514, 618 (W.D.N.C. 2009), cert. of appealability denied, No. 1:04cv251, 2010 WL 2775402 (W.D.N.C. July 13, 2010). The Fourth Circuit denied a certificate of appealability and dismissed Jackson's appeal. Jackson v. United States, No. 09-0010 (4th Cir. Feb. 11, 2011). The United States Supreme Court then denied a petition for writ of certiorari. Jackson v. United States, 568 U.S. 826 (2012).

In June of 2016, with authorization from the Fourth Circuit, Jackson filed the present Motion to Vacate, asking this Court to vacate his conviction and sentence. In his motion, he argues that, in light of the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), the three federal offenses upon which Jackson's conviction rested—murder, kidnapping, and aggravated sexual assault—can no longer be considered "crimes of violence" under 18 U.S.C. § 924(c)(3) and thus his conviction is void. [CV Doc. 1].

In response to Jackson's petition, the Government filed a motion to hold this proceeding in abeyance pending decisions by the Fourth Circuit Court of Appeals in the cases of United States v. Ali, No. 15-4433 (4th Cir.) and United States v. Simms, No. 15-4640 (4th Cir.). [CV Doc. 7]. At issue in these cases was whether Johnson rendered the residual clause of § 924(c)(3)(B) unconstitutionally vague. The Court granted the Government's motion and held this case in abeyance pending a decision in Ali and/or Simms. [CV Doc. 8]. At the request of the parties, the Court continued to hold this case in abeyance pending a decision in United States v. Davis, No. 18-431, in which the United States Supreme Court granted certiorari in order to address the constitutionality of the residual clause of § 924(c). [CV Doc. 10].

The Supreme Court announced its decision in Davis on June 24, 2019. United States v. Davis, 139 S. Ct. 2319 (2019). Thereafter, the Court lifted the stay of this action and directed the Government to file a response to the Petitioner's allegations. [CV Doc. 11]. The Government thereafter received two extensions of time in which to respond. [CV Text-Only Orders entered Aug. 19, 2019 and Oct. 2, 2019]. In November 2019, the Government moved to stay the case pending a decision by the Supreme Court in Walker v. United States, No. 19-373 (cert. granted Nov. 15, 2019).[2] [CV Doc. 15]. The Court denied the Government's motion without prejudice and directed the Government to respond to the Motion to Vacate. [CV Doc. 16].

2 The question presented in Walker was whether an offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the Armed Career Criminal Act. Due to the death of the petitioner, the Supreme Court dismissed the petition for writ of certiorari on January 27, 2020. Walker v. United States, No. 19-373, 2020 WL 411668 (U.S. Jan. 27, 2020).

***3** The Government filed the present Motion to Dismiss on January 15, 2020. [CV Doc. 17]. The Petitioner filed his Response to the Government's Motion to Dismiss on March 30, 2020. [CV Doc. 21].

Having been fully briefed, this matter is ripe for disposition.

II. STANDARD OF REVIEW

Pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings, sentencing courts are directed to promptly examine motions to vacate, along with "any attached exhibits and the record of prior proceedings" in order to determine whether a petitioner is entitled to any relief. After having considered the record in this matter, the Court finds that this matter can be resolved without an evidentiary hearing. See Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970).

III. DISCUSSION

Jackson was convicted of violating 18 U.S.C. §§ 924(c) and 924(j)(1), which together impose an enhanced sentence for a defendant who causes the death of another while using or carrying a firearm during, among other things, a "crime of violence." 18 U.S.C. §§ 924(c)(1)(A), (j)(1). A "crime of violence" is defined as a felony offense that:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the "force clause"], 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 ["the residual clause"].

Id. § 924(c)(3).

Following its reasoning in Johnson v. United States, 135 S. Ct. 2551 (2015), in which the residual clause of the Armed Career Criminal Act was found to be constitutionally infirm, the Supreme Court has held that the residual clause set forth in § 924(c)(3)(B) is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 2323 (2019). The Supreme Court has held that its ruling in Johnson, being a new substantive rule, is retroactively applicable to claims asserted on collateral review. Welch v. United States, 136 S. Ct. 1257, 1265 (2016). Numerous courts of appeals have held that Davis is similarly applicable retroactively to claims asserted on collateral review. See, e.g., United States v. Reece, 938 F.3d 630, 635 (5th Cir. 2019); United States v. Bowen, 936 F.3d 1091, 1098 (10th Cir. 2019); In re Hammoud, 931 F.3d 1032, 1039 (11th Cir. 2019).

With the elimination of the residual clause portion of the definition of "crime of violence" in § 924(c), a conviction under this statute may stand only if the underlying offense qualifies as a crime of violence under the force clause of § 924(c)(3)(A). Jackson argues that his conviction and capital sentence must be vacated, and that he is entitled to immediate release, because none of the three offenses supporting his § 924(c) conviction—murder, kidnapping, and aggravated sexual abuse—requires the intentional use of physical force and therefore cannot satisfy the force clause.

In order to determine whether the predicate offense underlying a § 924(c) conviction falls within the force clause, the Court looks to the elements of the "ordinary case" of such offense. In re Irby, 858 F.3d 231, 234 (4th Cir. 2017). In so doing, the Court is mindful that Jackson's offense of conviction requires only one "crime of violence." 18 U.S.C. §§ 924(c)(1)(A), (j)(1). Thus, if any of the three predicate offenses continues to qualify as a "crime of violence," Jackson is entitled to no relief.

***4** The Court first turns to Jackson's first-degree murder offense under 18 U.S.C. § 1111(a). Section 1111(a) defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The statute further provides as follows:

> Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Id. "Any other murder is murder in the second degree." Id. First-degree murder and second-degree murder are different offenses that carry different penalties. See 18 U.S.C. § 1111(b).

Fourth Circuit precedent establishes that "first-degree murder" qualifies categorically as a crime of violence under the force clause of § 924(c). The Fourth Circuit held in Irby that "murder is a crime of violence under the force clause because unlawfully killing another human being requires the use of force 'capable of causing physical pain or injury to another person.' " Irby, 858 F.3d at 236 (citation omitted). As the Court noted: "[s]imply, it is hard to imagine conduct that can cause another to die that does not involve physical force against the body of the person killed." Id. at 236 (quoting in part United States v. Checora, 155 F. Supp. 3d 1192, 1997 (D. Utah. 2015)). Further, the Fourth Circuit recently held in Mathis that Virginia's first-degree murder statute, Va. Code § 18.2-32, which mirrors the federal murder statute, categorically meets the requirements of the force clause. United States v. Mathis, 932 F.3d 242, 265 (4th Cir. 2019).

Jackson argues that federal first-degree murder does not require the intentional use of force because it can be accomplished by a death occurring during the commission of a felony. [CV Doc. 1-1 at 20-21]. Accepting this argument, however, would render the language of the force clause broadly inapplicable to murder. The Fourth Circuit, however, has unambiguously recognized that murder constitutes "a quintessential crime of violence." Irby, 858 F.3d at 237. The felony-murder doctrine is recognized in most jurisdictions in the United States. See 2 Wayne R. LaFave, Substantive Criminal Law, § 14.5 (3d ed.). Adopting Jackson's position here would render the force clause inapplicable to murder in

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all of these jurisdictions. The Supreme Court has cautioned that the language of the force clause should not be construed in a way that "would render it inapplicable in many states." Stokeling v. United States, 139 S. Ct. 544, 552 (2019).

In short, as the Fourth Circuit has recognized, and as common-sense dictates, the offense of murder in the first degree is unquestionably a crime of violence under the force clause of § 924(c). To hold otherwise would be to exclude the "most morally repugnant crime" from the ambit of the force clause, Irby, 858 F.3d at 237, while permitting less serious offenses, such as robbery, to remain. See United States v. Mathis, 932 F.3d 242, 265-66 (4th Cir.) (holding that Hobbs Act robbery is a crime of violence), cert. denied, 140 S. Ct. 639 (2019). The law cannot countenance such an absurd and illogical result.

***5** Jackson's offense of aggravated sexual abuse also clearly qualifies as a crime of violence under the force clause. Section 2241(a) punishes "[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a federal prison, knowingly causes another person to engage in a sexual act" — "(1) by *using force* against that other person; or (2) by *threatening* or placing that other person in fear that any person will be subjected to *death, serious bodily injury, or kidnapping*; or attempts to do so." 18 U.S.C. § 2241(a) (1998) (emphasis added). As the Supreme Court has noted, this statute "prohibits *forced* sexual acts against 'another person.' " Lockhart v. United States, 136 S. Ct. 958, 964 n.1 (2016) (emphasis added). It is difficult to fathom how a "forced sexual act" does not involve the use of force sufficient to satisfy § 924(c)(3)(A).

Jackson attempts to argue that aggravated sexual abuse does not qualify as a crime of violence because the offense may be accomplished by physical contact, "however slight," or even by no contact at all [CV Doc. 1-1 at 24-27]. Jackson further argues that because kidnapping may be accomplished in "many non-forceful ways," the use of a threat of kidnapping does not constitute a threat of physical force, thereby removing the entire crime of aggravated sexual abuse from the ambit of the force clause. [Id. at 27-28]. In making such arguments, Jackson blithely ignores the requirement that when applying the force clause the Court must focus on the "minimum conduct" that the government "would *actually punish*." United States v. Salmons, 873 F.3d 446, 448 (4th Cir. 2017) (emphasis added). In other words, "there must be a 'realistic probability, not a theoretical possibility,' " that the Government would "actually punish" causing a sexual act under section 2241(a) that has no potential to cause any pain or injury. See id. The standard does not permit the application of "legal imagination" to the predicate offense. United States v. Bell, 901 F.3d 455, 472 (4th Cir. 2018) (quoting Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)), cert. denied, 140 S. Ct. 123 (2019). Instead, a party ordinarily "must at least point to his own case or other cases in which state courts in fact did apply the statute" in the "manner for which he argues." Bell, 901 F.3d at 472 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). Jackson has not come close to meeting this requirement for either of his arguments. He has not identified even an imaginary scenario under which the kind of actual or threatened conduct described by the statute had no potential of causing pain or injury. [3]

[3] Because the Court has determined that at least two of Jackson's underlying offenses qualify as crimes of violence under the force clause, the Court need not address Jackson's other underlying offense or the other arguments raised in the Government's Motion to Dismiss.

Jackson's crimes against Karen Styles involved some of the worst and most violent conduct that any human being can inflict on another: kidnapping, assault, rape, and ultimately, murder. Jackson not only took the life of Karen Styles: he terrorized, tortured, and raped her before executing her with a single bullet to the head. Counsel's effort to argue that Jackson's crimes do not constitute crimes of violence, however well-meaning, flies in the face of reason and common-sense. They simply represent the next step in the continued "protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence." United States v. Doctor, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring). Such arguments undermine the public's confidence in lawyers, the legal system, and the Court. While the Court appreciates zealous advocacy by counsel on the part of a litigant, such advocacy has its limits. And the Court cannot allow a lawyer's zealous representation of a client to undermine the principles of justice.

IV. CONCLUSION

***6** For the foregoing reasons, the Government's Motion to Dismiss is granted, and the Petitioner's Motion to Vacate is denied and dismissed.

The Court further finds that Petitioner has not made a substantial showing of a denial of a constitutional right. See generally 28 U.S.C. § 2253(c)(2); see also Miller El v.

Cockrell, 537 U.S. 322, 336 38 (2003) (in order to satisfy § 2253(c), a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong") (citing Slack v. McDaniel, 529 U.S. 473, 484-85 (2000)). Given the specific issues presented here, it is hard to imagine that reasonable jurists would adopt the Petitioner's arguments. The Petitioner has failed to demonstrate both that this Court's dispositive procedural rulings are debatable, and that the motion to vacate states a debatable claim of the denial of a constitutional right. Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). As a result, the Court declines to issue a certificate of appealability. See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. § 2255.

ORDER

IT IS, THEREFORE, ORDERED that the Government's Motion to Dismiss [CV Doc. 17] is **GRANTED**, and the Petitioner's Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255 [CV Doc. 1] is **DENIED** and **DISMISSED**.

IT IS FURTHER ORDERED that the Court declines to issue a certificate of appealability.

IT IS SO ORDERED.

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