

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10482-G

JAY A. RICHITELLI,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Jay Richitelli moves for a certificate of appealability in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Jay A. Richitelli is a federal prisoner serving a life imprisonment sentence after being convicted of conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, conspiring to use a firearm during the commission of a crime of violence, using a firearm during the commission of a crime of violence, and possession of a firearm by a convicted felon. At sentencing, the government sought to enhance Richitelli's sentence to life imprisonment pursuant to 18 U.S.C. § 3559(c).

Richitelli's presentence investigation report ("PSI") reported that he had 59 prior felony convictions, including convictions for Florida armed robbery with firearms, Florida armed robbery with a deadly weapon, and Florida armed robbery. Richitelli did not object to the accuracy of his prior convictions at sentencing. Moreover, Richitelli conceded at sentencing that he was unable to find any legal basis to attack the § 3559(c) enhancement, and, under the enhancement, the court was required to sentence him to a minimum mandatory life sentence. Thus, the sentencing court imposed a life sentence and entered an amended judgment reflecting that sentence.

On April 29, 2010, Richitelli appealed his convictions and sentences, and in 2011, this Court affirmed the convictions and sentences. Thereafter, Richitelli filed a petition for a writ of certiorari, which the United States Supreme Court denied in April 2011.

On April 11, 2012, Richitelli filed his first § 2255 motion, which the district court denied. This Court also denied Richitelli a COA. In 2016, Richitelli filed an application for leave to file a second or successive § 2255 motion. Richitelli's application raised only one ground for relief, namely, that increasing his sentence to mandatory life imprisonment pursuant to § 3559(c) violated his due process rights. He argued that, based on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) and *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), *Johnson's* ACCA

residual clause analysis (that the ACCA's residual clause void for vagueness) also applied to § 3559(c)'s similarly worded residual clause, and therefore, he was denied due process because his prior Florida armed robbery convictions only qualified as § 3559(c) predicates under the statute's residual clause. In June 2016, this Court granted Richitelli leave to file a successive § 2255 motion based on his *Johnson* challenge to the § 3559(c) definition of a "serious violent felony," which included a residual clause component similar to the ACCA.

On June 25, 2016, Richitelli filed the instant § 2255 motion, arguing that, in light of the Supreme Court's decision in *Johnson*, he was not eligible for a mandatory life sentence under § 3559(c) because: (1) *Johnson*'s residual clause analysis also applied to § 3559(c)'s residual clause; and (2) his § 3559(c) qualifying convictions only qualified under § 3559(c)'s residual clause. Further, he argued that his motion was timely under 28 U.S.C. § 2255(f)(3) because it was filed within one year of *Johnson* decision. The magistrate judge: (1) determined that Richitelli's prior convictions qualified as "serious crimes of violence" under § 3559(c)'s elements clause; (2) noted that *Johnson* did not provide relief from the classification of Richitelli's prior convictions as "serious violence felonies" under § 3559(c)'s elements clause; and (3) recommended dismissing the motion as untimely because *Johnson*'s inapplicability to § 3559(c)'s elements clause prevented Richitelli from using *Johnson* as the date from which the § 2255(f)(3)

one-year limitations period began to run. Over Richitelli's objections, the district court adopted the magistrate judge's recommendation, dismissed Richitelli's successive § 2255 motion as untimely, and alternatively denied the successive § 2255 motion on the merits. The district court denied a COA in the same order.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas motion on the merits, the prisoner 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 Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion that begins to run from the latest of four possible events:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Commonly referred to as the “three-strikes” statute, § 3559(c) provides for mandatory life imprisonment for any person who is convicted of a “serious violent felony and who has previously been convicted of two or more “serious violence felonies.” See 18 U.S.C. § 3559(c)(1)(A). The statute defines the term “serious violent felony” as:

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; [the “enumerated offense” clause] and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use attempted use, or threatened use of physical force against the person of another [the “elements” clause] or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense [the “residual” clause].

See 18 U.S.C. § 3559(c)(2)(F).

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the Armed Career Criminal Act (“ACCA”) is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and

how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. *Johnson*, however, did not call into question the ACCA's to the four enumerated offenses clause or elements clause, which remained valid. *Id.* at 2563. In *Welch*, the Supreme Court held that *Johnson* announced a new substantive rule of constitutional law that applied retroactively to cases on collateral review. *See* 136 S. Ct. at 1268.

"Generally, . . . in determining whether a prior conviction is a qualifying offense for sentencing enhancement purposes," this Court applies a "categorical approach." *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010). Using the categorical approach, this Court looks only at the statutory elements of an offense, and not the particular facts underlying the conviction, in determining whether an offense qualifies as a predicate for enhancement. *Descamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) ("How a given defendant actually perpetrated the crime . . . makes no difference."). Further, this Court must assume that the offense "rests upon the least of the acts criminalized" by the statute. *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014). If a criminal statute is divisible, meaning it lists multiple potential offense elements in the alternative, only some of which qualify as a predicate for enhancement, this Court may use the "modified categorical approach" and look to a restricted set of

materials such as plea agreements or plea colloquy transcripts to determine which element formed the basis of the defendant's conviction. *Descamps*, 133 S. Ct. at 2283-85; *Shepard v. United States*, 544 U.S. 13, 26 (2005) (limiting inquiry to "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"). Nonetheless, the modified categorical approach retains the categorical approach's central feature, a focus on the elements, rather than the facts, of a crime. *Descamps*, 133 S. Ct. at 2283-85.

The Supreme Court has made clear that the phrase "physical force" means violent force—that is, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010); *United States v. Owens*, 672 F.3d 966, 971 (11th Cir. 2012) (observing that under *Johnson*, the term "physical force," as used in the ACCA's elements clause, means "strong physical force or a substantial degree of force"). The Supreme Court has also made clear that the term "use" requires the "active employment" of force, which demands a high degree of intent, not mere negligence or accidental conduct. *See Leocal v. Ashcroft*, 125 S. Ct. 377, 381 (2004).

Hobbs Act robbery requires "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. 18 U.S.C. § 1951(b)(1). This Court has previously determined that Hobbs Act robbery clearly qualifies as a “crime of violence” under the use of force clause in § 924(c)(3)(A). *See In re Fleur*, 824 F.3d 1337, 1340 (11th Cir. 2016); *In re Gordon*, 827 F.3d 1289, 1294 (11th Cir. 2016). Although this Court has determined that Hobbs Act robbery satisfies the elements/use of force clause in § 924(c)(3)(A), it has not determined whether the Hobbs Act robbery, or attempted Hobbs Act robbery satisfies the elements/use of force clause in § 3559(c). Whereas Hobbs Act robbery requires an “unlawful taking or obtaining of personal property from . . . another, against his will, by means of actual or threatened force, or violence, or fear of injury, a criminal “attempt” requires not only a specific intent to commit the underlying offense, but also an overt act constituting a substantial step toward the commission of the offense. *See United States v. Resendiz-Ponce*, 127 S. Ct. 782, 787 (2007). This Court has stated that to convict a defendant of an attempt charge, the government must prove that the defendant “had the specific intent to engage in criminal conduct and that he took a substantial step toward the commission of the offense” and explained that “a substantial step must be more than remote preparation, and must be conduct strongly corroborative of the firmness of the defendant’s criminal intent.” *United States v. Perez*, 580 Fed. App’x 795, 803 (11th Cir. 2014) (unpublished).

As discussed above, among Richitelli's 59 prior convictions, 4 were Florida convictions for armed robbery and all of which occurred between 1986 and 1995. Both the 1986 and 1995 versions of Fla. Stat. § 812.13(1) defined robbery as taking money or property from another by force, violence, assault or putting the victim in fear. *See* Fla. Stat. § 812.13(1) (1986); *see also* Fla. Stat. § 812.13(1) (1995). In addition, both versions classified robbery as a first-degree felony where "in the course of committing the robbery the offender carried a firearm or other deadly weapon." *See* Fla. Stat. § 812.12(2)(a).

In *United States v. Lockley*, this Court held that a conviction for robbery under Florida law constitutes a conviction for a "crime of violence" under the Sentencing Guidelines elements clause of § 4B1.2(a), a clause whose language is identical to that in the § 3559(c)'s elements clause. *See* 632 F.3d 1238, 1245 (11th Cir. 2011); *see also United States v. Gonzalez-Lopez*, 911 F.2d 542, 548 (11th Cir. 1990). This Court has recently reaffirmed the continuing vitality of *Lockley*. *See United States v. Seabrooks*, 839 F.3d 1326, 1341-42 (11th Cir. 2016). Further, in *Seabrooks*, this Court affirmed that Fla. Stat. § 812.12(1) has "consistently" required more force than sudden snatching. *Id.* at 1343-44; *see also Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997).

Here, reasonable jurists would not find the district court's assessment of Richitelli's successive § 2255 motion debatable. Neither the Supreme Court nor

this Court have held that the residual clause analysis in *Johnson* applied to § 3559(c)'s residual clause. Moreover, in granting Richitelli's successive application, this Court explicitly stated that it had not determined whether the new rule announced in *Johnson* would invalidate § 3559(c)'s residual clause. Further, this Court stated that in some cases, it had been able to bypass this type of issue because the record made it clear that the predicate crimes met the statute's definitional requirements under § 3559(c)'s elements or enumerated offenses clauses.

To determine whether Richitelli's prior convictions for attempted Hobbs Act robbery and Florida armed robbery qualify as serious violent felonies under § 355(c)(2)(F)'s elements or use of force clause, this Court must employ the categorical approach. Because attempted Hobbs robbery required Richitelli to take a substantial step toward committing an offense (Hobbs robbery) that requires the actual or threatened use of force, which is an element of the offense, Richitelli necessarily committed an offense (attempted Hobbs robbery) that has as an element the "attempted use" or the "threatened use" of physical force, which satisfies the elements clause definition of a "serious violent felony." *See* 18 U.S.C. § 3559(c)(2)(F)(ii). An individual convicted of attempted Hobbs Act robbery has not only acted with a specific intent, but has also taken a substantial step to unlawfully take property from another, against his will, by means of actual or

threatened force, or violence, or fear of injury. *See* 18 U.S.C. § 1951(b)(1). By doing so, such individual has committed an offense that necessarily involved the attempted or threatened use of physical force against another. *See id.* Accordingly, attempted Hobbs Act robbery, one of Richitelli's instant conviction, qualifies as a "serious violent felony," as defined under § 3559(c)(2)(F)'s elements clause.

Additionally, given that Florida robbery requires either the use of force, violence, a threat of imminent force or violence coupled with apparent ability, or some act that puts the victim in fear of death or great bodily harm, and this Court has previously considered Florida robbery a "crime of violence" under the Sentencing Guidelines, Florida robbery necessarily satisfies § 3559(c)'s use of force clause definition of a "serious violent felony" because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *See* Fla. Stat. § 812.13(1) (1986); *see also* Fla. Stat. § 812.13(1) (1995); 18 U.S.C. § 3559(c)(2)(F).

Because *Johnson* does not provide relief from the classification of attempted Hobbs robbery or Florida robbery as a "serious violent felony" under § 3559(c)'s elements clause, Richitelli cannot invoke the date of the *Johnson* decision as the date from which the § 2255(f)(3) one-year limitations period began to run. Further, Richitelli did not file his successive § 2255 motion until June 2016, more

than four years beyond the date on which his conviction became final. *See* 28 U.S.C. § 2255(f). Accordingly, Richitelli's motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE