2017 WL 4842617
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United States Court of Appeals,
Seventh Circuit.

Joseph **VAN SACH**, Petitioner–Appellant,
v.
UNITED STATES of America,
Respondent–Appellee.

No. 17–1824
|
Submitted August 1, 2017
|
Decided September 1, 2017

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 05530, Rubén Castillo, *Chief Judge*

Attorneys and Law Firms

Carol A. Brook, William H. Theis, Office of the Federal Defender Program, Chicago, IL, for Petitioner–Appellant.

Debra Riggs Bonamici, Office of the United States Attorney, Chicago, IL, for Respondent–Appellee.

Before William J. Bauer, Circuit Judge, Joel M. Flaum, Circuit Judge, Kenneth F. Ripple, Circuit Judge

ORDER

***1** In this appeal from the denial of his motion for post-conviction relief under 28 U.S.C. § 2255, Joseph **Van Sach** claims that none of his three Illinois convictions—one for armed robbery and two for aggravated battery to a police officer—can be characterized as a violent felony under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The district court disagreed, and so do we.

Both **Van Sach** and the government agree that the three Illinois convictions—which were used to enhance the penalty for **Van Sach's** federal firearm conviction—must be analyzed under the elements clause of the ACCA to count as predicate offenses. *See Johnson v. United States*, 135 S.Ct. 2551 (2015) (invalidating only the "residual clause" of the ACCA). So, we look at these convictions under that microscope.

No one disputes that Illinois' robbery statute provides only one way in which a person can commit the crime of robbery, requiring that we look solely to the text of the statute—a categorical approach. *See Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). In other words, the actual facts of the individual conviction are irrelevant. (We note that **Van Sach's** conviction was for "armed" robbery—simple robbery plus carrying a dangerous weapon or firearm during its commission. But the government makes nothing of this fact, and accordingly nor do we. *Cf. United States v. Parnell*, 818 F.3d 974, 982 (9th Cir. 2016)("The notion ... that *armed* robbery doesn't qualify as a violent felony seems ... absurd.") (emphasis in original) (Watford, J., concurring).)

We have held that convictions under Illinois' robbery statute are crimes of violence under the elements clause of 18 U.S.C. § 924(e). *United States v. Dickerson*, 901 F.2d 579, 584 (7th Cir. 1990). **Van Sach**, however, cautions the court's lockstep reliance on *Dickerson* based on the Supreme Court's ruling in *Johnson v. United States*, 559 U.S. 133 (2010). In *Johnson*, the Court made clear that not all convictions involving some level of force qualify as a "crime of violence" under the ACCA. *Dickerson* preceded *Johnson*, **Van Sach** notes, and therefore, under *Johnson*, requires that a court consider not only the statute's language but also the level of force Illinois courts require to sustain a conviction under the robbery statute. The threshold that the Court drew in *Johnson*, however, " 'is not a high one.' " United States v. Enoch, No. 16–1546, slip op. at 13–14 (7th Cir. July 28, 2017), quoting *United States v. Duncan*, 833 F.3d 751, 754 (7th Cir. 2016).

A recent examination of a sampling of Illinois cases convinced us that a conviction under Illinois' robbery statute requires force sufficient to qualify under *Johnson*. In *United States v. Chagoya–Morales*, 859 F.3d 411, 422 (7th Cir. 2017), we noted that "Illinois courts had eliminated [from Illinois' robbery statute], for example, takings without any sensible or material violence to the person, as snatching a hat from the head or a cane or umbrella from the hand." (Internal quotation marks and citations omitted.) Importantly, the court explicitly pointed out that the crime's aggravating factor— *i.e.*, a defendant who indicates verbally or by his actions to the victim that he is presently armed with a firearm—"serves as an *additional* reason to conclude that Mr. Chagoya–Morales's predicate offense required more force than the threshold described in *Johnson I*. *Id.* (Emphasis added.) Although *Chagoya–Morales* dealt with the career offender provision of the Guidelines, not the ACCA, we

treat cases interpreting the "crime of violence" provisions interchangeably. *Id.* at 421. We see no reason to reconsider the conclusion reached in *Chagoya–Morales*.

***2** Illinois' battery statute, unlike its robbery statute, does not set out a single, indivisible set of elements—one part of the battery statute contains a bodily harm element while a second part of the statute involves physical contact that is merely insulting or provoking. Because there is more than one way to commit a battery, it must first be determined what form of battery **Van Sach** committed—a modified categorical approach. *See Mathis v. United States*, 136 S.Ct. at 2249. But we need not linger here. **Van Sach's** two aggravated battery convictions—the offenses were "aggravated" because they were committed against known peace officers—were based on the bodily harm provision of the statute. The parties both concede as much.

We already have concluded that the phrase "causes bodily harm" in the state's battery statute means force that would satisfy *Johnson*'s requirement of violent physical force, *Hill v. Werlinger*, 695 F.3d 644, 649 (7th Cir. 2012); *United States v. Rodriquez–Gomez*, 608 F.3d 969, 973–74 (7th Cir. 2010), a holding that we reaffirmed earlier this year. *United States v. Lynn*, 851 F.3d 786. 799 (7th Cir. 2017). We require a compelling reason to overturn circuit precedent, United States v. Jackson, No. 15–3693, slip op. at 12 (7th Cir. Aug. 4, 2017), especially one so recent as *Lynn*, and **Van Sach** has not persuaded us of any legal development that would justify overturning these decisions.

AFFIRMED.

All Citations

Not Reported in F.3d, 2017 WL 4842617

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 28, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

JOEL M. FLAUM, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

No. 17-1824

JOSEPH VAN SACH,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 C 05530

Rubén Castillo,
Chief Judge.

O R D E R

On consideration of petitioner-appellant's petition for rehearing and rehearing *en banc* filed on October 13, 2017, and the Answer of the United States to the petition for rehearing *en banc* filed on November 17, 2017, in connection with the above-referenced case, all of the judges on the original panel have voted to deny the petition for rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is, therefore, ORDERED that the petition for rehearing and petition for rehearing *en banc* are DENIED.

2017 WL 987365
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Joseph VAN SACH, Petitioner,
v.
UNITED STATES of America, Respondent.

No. 16 C 5530
|
Signed 03/14/2017

Attorneys and Law Firms

AUSA, Christopher Paul Hotaling, United States Attorney's Office, Chicago, IL, for Respondent.

William H. Theis, Federal Defender Program, William Todd Watson, Chicago, IL, for Petitioner.

MEMORANDUM OPINION AND ORDER

Rubén Castillo, Chief Judge

***1** Joseph Van Sach moves to vacate his sentence pursuant to 28 U.S.C. § 2255 based on the U.S. Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (R. 5, Mot) For the reasons set forth below, his motion is denied.

BACKGROUND

In 2005, Van Sach was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *United States v. Van Sach*, 458 F.3d 694, 696 (7th Cir. 2006). He was sentenced to 210 months under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)—which provides enhanced sentences for defendants who have three or more prior violent felony convictions—based on his Illinois convictions for aggravated battery to a police officer and armed robbery. *Id.* at 703-05. In 2006, his federal conviction and sentence were affirmed by the U.S. Court of Appeals for the Seventh Circuit in all respects. *Id.* at 699-705.

In 2008, Van Sach filed a motion under Section 2255 seeking to vacate his sentence on grounds that the Court committed various errors at trial and at sentencing. *Van Sach v. United States*, No. 08 C 304, ECF No. 1. The Court denied his motion. *Id.*, ECF No. 4. He appealed, but his appeal was dismissed by the Seventh Circuit for failure to pay the docketing fee without a determination of the merits. *Id.*, ECF No. 16.

In April 2016, Van Sach sought leave from the Seventh Circuit to pursue a second motion under Section 2255 based on the Supreme Court's 2015 decision in *Johnson*, which found a portion of the ACCA void on vagueness grounds.[1] (R. 1, Mot.) The Seventh Circuit issued an order authorizing this Court to consider Van Sach's proposed *Johnson* claim. (R. 2, 7th Cir. Order.) In his filings with this Court, Van Sach argues that his Illinois convictions for aggravated battery to a police officer and armed robbery no longer constitute violent felonies for purposes of the ACCA after *Johnson*. (R. 5, Mot. at 1-3; R. 13, Reply at 2-14.) He argues that he has already served the maximum sentence that could have been imposed without the ACCA enhancement and should be immediately released from custody.[2] (R. 13, Reply at 1.) The government disagrees that Van Sach is entitled to relief under *Johnson.* (R. 12, Resp.)

LEGAL STANDARD

A federal prisoner can move to vacate his sentence on "the ground that the sentence was imposed in violation of the Constitution or laws of the United States ... or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Relief under this statute is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79 (7th Cir. 2013).

ANALYSIS

***2** The ACCA provides enhanced sentences for defendants convicted of violating 18 U.S.C. § 922(g) who have "three previous convictions by any court ... for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). A defendant who meets this definition is subject to a mandatory prison sentence of 15 years to life. *Id.* The ACCA defines "violent felony" as "any crime

punishable by imprisonment for a term exceeding one year" that meets one of the following requirements: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) it is burglary, arson, extortion, or an offense involving the use of explosives; or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(i)-(ii). The first clause is commonly referred to as the "elements clause," the second as the "enumerated crimes clause," and the third as the "residual clause." In *Johnson*, the Supreme Court invalidated the residual clause as unduly vague, but left intact the enumerated crimes clause and the elements clause. *See Johnson*, 135 S. Ct. at 2563 ("Today's decision does not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."); *Stanley v. United States*, 827 F.3d 562, 564 (7th Cir. 2016) ("*Johnson* holds that the residual clause is unconstitutionally vague. *Johnson* does not otherwise affect the operation of the Armed Career Criminal Act.").[3]

There is no question that Van Sach was convicted of violating 18 U.S.C. § 922(g), or that he has three Illinois convictions: two for aggravated battery of a police officer and one for armed robbery. He argues, however, that these offenses cannot be characterized as "violent felonies" after *Johnson* and thus his enhanced sentence is invalid.

I. Aggravated Battery Convictions

Because the residual clause has been invalidated, Van Sach's aggravated battery convictions must fall under either the elements clause or the enumerated crimes clause to count as predicates.[4] Aggravated battery is obviously not one of the enumerated offenses, 18 U.S.C. § 924(e)(2)(B)(ii), which leaves the elements clause as the only possibility. As stated above, a prior conviction falls under the elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* The Supreme Court has interpreted "physical force" in this context to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140-42 (2010) ("*Curtis Johnson*").

***3** In determining whether a prior conviction qualifies as an ACCA predicate, courts ordinarily apply a "categorical approach," which focuses solely on the text of the statute underlying the conviction. *United States v. Mathis*, 136 S. Ct. 2243, 2248 (2016). Application of this approach "is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime." *Id.* The Court simply "lines up that crime's elements alongside those of the generic offense and sees if they match." *Id.* The analysis becomes difficult, however, when the relevant statute "ha[s] a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder." *Id.* at 2249. In other words, "[a] single statute may list elements in the alternative, and thereby define multiple crimes," some of which involve violent force while others do not. *Id.* In such cases, the Court employs a "modified categorical approach." *Id.* Under this approach, the Court may look to "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* But even under that approach, the question is not "what the defendant did in fact," but rather, "whether the elements of the crime ... bring the conviction within the scope of the recidivist enhancement." *Stanley*, 827 F.3d at 565; *see also Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) ("Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions," (citation omitted)).

Under Illinois law, a person commits battery "if he or she knowingly without legal justification by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." 720 ILL. COMP. STAT. 5/12-3. The offense is elevated to aggravated battery if certain conditions are met, including where the offender knew the victim to be a peace officer, knew the victim to be pregnant, or committed the offense on public property. 720 ILL. COMP. STAT. 5/12-3.05. A conviction based on the first prong of the statute—*i.e.*, "causing bodily injury"—has as an element the use, attempted use, or threatened use of physical force, and therefore qualifies as a violent felony under the elements clause of the ACCA.[5] *Hill v. Werlinger*, 695 F.3d 644, 650 (7th Cir. 2012). By contrast, a conviction based on the second prong of the Illinois statute—*i.e.*, involving "physical contact of an insulting or provoking nature"—does not qualify as a violent felony for purposes of the ACCA. *See United States v. Evans*, 576 F.3d 766, 768 (7th Cir. 2009) (explaining that a conviction under the second prong of Illinois aggravated battery statute—for conduct like "spit[ting] on a pregnant woman"—does not qualify as a predicate offense for federal sentencing purposes); *United States v. Saunders*, No. 15 C 8587, 2016 WL 1623296, at *2 (N.D. Ill. Apr. 25, 2016) ("Battery [under Illinois law] does not automatically qualify as a violent felony because there is an avenue by which battery may occur without

force.").

***4** Given these different ways of violating the statute, the Seventh Circuit has held that the Illinois aggravated battery statute is divisible, requiring application of the modified categorical approach. *See Stanley*, 827 F.3d at 566; *see also United States v. Rodriguez-Gomez*, 608 F.3d 969, 973 (7th Cir. 2010) (looking to state charging document and concluding that defendant's Illinois aggravated battery conviction for kicking a police officer involved an element of force). Van Sach believes that this line of cases is no longer valid after the Supreme Court's 2016 decision in *Mathis.* (R. 13, Reply at 6-7.) He is right that *Mathis* "narrowed the field of statutes that can be deemed divisible." *Garcia-Hernandez v. Boente*, 847 F.3d 869, 872 (7th Cir. 2017). After *Mathis*, a statute will be considered divisible "only if it creates multiple offenses by listing one or more alternative *elements.*" *United States v. Edwards*, 836 F.3d 831, 835 (7th Cir. 2016). By contrast, "[a] statute that defines a single offense with alternative *means* of satisfying a particular element is indivisible and therefore not subject to the modified categorical approach." *Id.*

Although the Seventh Circuit has not expressly considered whether the Illinois aggravated battery statute is divisible following *Mathis*, it is this Court's view that *Mathis* would not alter the Seventh Circuit's prior rulings on this issue. As drafted, the Illinois aggravated battery statute describes multiple offenses with alternative elements: battery causing bodily harm, and battery by physical contact of "an insulting and provoking nature." 720 ILL. COMP. STAT. 5/12-3; *see also Mathis*, 136 S. Ct. at 2248 ("Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." (citation and internal quotation marks omitted)). The statute has a different structure than the Iowa burglary statute at issue in *Mathis*, which "enumerate[d] various factual means of committing a single element," *i.e.*, "the various places that crime could occur."[6] *Id.* at 2248-49. Notably, other district judges in this Circuit have continued to apply the modified categorical approach to determine whether an Illinois aggravated battery conviction constitutes a violent felony under the elements clause alter *Mathis. See Bell v. United States*, No. 16-CV-736-NJR, 2017 WL 553013, at *3 (S.D. Ill. Feb. 10, 2017) (looking to charging document to determine whether petitioner's Illinois conviction for aggravated battery to a police officer fell under the elements clause of the ACCA); *Rogers v. United States*, 179 F. Supp. 3d 835, 841-42 (CD. Ill. 2016) (same). The Court believes this to be the correct approach.

Therefore, the Court looks to the charging documents in Van Sach's state cases to determine which prong of the battery statute he was convicted of violating. In consulting those documents, it is clear that Van Sach's aggravated battery convictions were premised on the first prong of the statute, as both involved bodily harm to the victim. In case number 94 CR 11407, the information charged that Van Sach "knowingly and without legal justification caused bodily harm to Officer Ronald Caliendo ... by kicking him and pushing him, causing him to fall to the ground." (R. 12-2, State Ct. Records at 6.) He was found guilty and sentenced to 60 days in jail. (*Id.* at 4.) In case number 95 CR 07530, the information charged that Van Sach "intentionally or knowingly without legal justification caused bodily harm to Police Officer Mercado, knowing him to be a peace officer engaged in the execution of his official duties ... by scratching and biting Officer Mercado's hand." (R. 12-3, State Ct. Records at 3.) Van Sach was found guilty and sentenced to two years in prison. (*Id.* at 9.)

***5** Based on the above, the Court finds that Van Sach's Illinois aggravated battery convictions have as an element "the use, attempted use, or threatened use of physical force," and therefore qualify as violent felonies under the ACCA notwithstanding *Johnson. See Stanley*, 827 F.3d at 565 (observing that "Stanley's [Illinois] conviction for aggravated battery of a peace officer ... is outside the scope of *Johnson*" because it fell under the elements clause); *Bell*, 2017 WL 553013, at *3 (holding that petitioner's Illinois conviction for aggravated battery to a police officer where he was alleged to have "caused bodily harm to a peace officer by striking [the officer] in the shoulder and head with a beer bottle" constituted a violent felony under the elements clause of the ACCA and was thus unaffected by *Johnson*); *Rogers*, 179 F. Supp. 3d at 841-42 (denying Section 2255 petition raising *Johnson* claim where petitioner's Illinois aggravated battery conviction involved bodily harm to the victim and thus fell under elements clause of the ACCA); *Saunders*, 2016 WL 1623296, at *2 (rejecting petitioner's *Johnson* claim where the charging document in his Illinois aggravated battery case "indicate [d] an element of bodily harm against the victim" and thus fell under elements clause of the ACCA); *Taylor v. United States*, No. 15-CV-1087-MJR, 2016 WL 5369476, at *9 (S.D. Ill. Sept. 26, 2016) (denying petitioner's *Johnson* claim where charging document underlying Illinois aggravated battery conviction showed that offense involved bodily harm to the victim).

II. Armed Robbery Conviction

Van Sach's remaining argument is that his Illinois

conviction for armed robbery does not constitute a violent felony after *Johnson*. (R 13, Reply at 8-14.) Again, this conviction counts as a predicate if it falls within either of the two clauses that remain valid after *Johnson*. Armed robbery is not one of the enumerated offenses, 18 U.S.C. § 924(c)(2)(b), which leaves only the elements clause. As stated above, an offense qualifies as a violent felony under the elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(c)(2)(B)(ii). Under the Supreme Court's decision in *Curtis Johnson*, this means "force capable of causing physical pain or injury to another person." 559 U.S. at 140-42.

The Illinois robbery statute provides that "[a] person commits robbery when he or she knowingly takes property ... from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILL. COMP. STAT. 5/18-1(a). The offense is elevated to aggravated robbery when the defendant commits robbery as defined by the statute "while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon." 720 ILL. COMP. STAT. 5/18-1(b)(1). By its terms, the statute includes an element the use of force or, at a minimum, threatening the imminent use of force, which tracks the language of the elements clause. 18 U.S.C. § 924(c)(2)(B)(ii). Because of the plain language of the statute, the Seventh Circuit has long held that a conviction under the Illinois robbery statute falls under the elements clause of the ACCA. *United States v. Dickerson*, 901 F.2d 579, 584 (7th Cir. 1990) (holding that Illinois robbery statute "in its own terms includes the elements of either 'use of force or ... threatening the imminent use of force,' that clearly come within the scope of 18 U.S.C. § 924(e)(2)(B)."); *see also United States v. Carter*, 910 F.2d 1524, 1532 (7th Cir. 1990) ("It is beyond dispute that under Illinois law, robbery is an offense that has as an element the use or threatened use of force.").

Van Sach argues that the Seventh Circuit's *Dickerson* opinion is no longer valid after the Supreme Court's 2010 decision in *Curtis Johnson*. (R. 13, Reply at 8-14.) In essence, he believes that some minimal level of force could be used to commit robbery under the Illinois statute that would not satisfy the definition of force required by *Curtis Johnson*—for example, where a defendant "snatch[ed] a chain from the victim's neck." (*Id.* at 10.) The Court disagrees that the act of "snatching" an item of jewelry off a person's body is not "capable of causing physical pain or injury," which is all that *Curtis Johnson* requires. 559 U.S. at 140-42. But in any event, *Dickerson* remains binding precedent in this Circuit, and this Court must follow it unless it is overturned by the Seventh Circuit. This seems unlikely given that the Seventh Circuit and district judges in this Circuit have continued to rely on *Dickerson* even after the *Curtis Johnson* decision. *See, e.g.*, *United States v. Nigg*, 667 F.3d 929, 937 (7th Cir. 2012) (applying *Dickerson* to reject argument that conviction under Arizona robbery statute did not constitute a violent felony under the ACCA); *United States v. Jones*, No. 07 CR 415, 2016 WL 6995569, at *3 (N.D. Ill. Nov. 29, 2016) (applying *Dickerson* and holding that Illinois armed robbery conviction constituted a violent felony for purposes of the ACCA); *Adams v. United States*, No. 16-1096, 2016 WL 4487835, at *2 (CD. Ill. Aug. 25, 2016) (same).

***6** Indeed, in a recent case, the Seventh Circuit rejected an argument like Van Sach's in the context of determining whether a federal bank robbery conviction constituted a violent crime for purposes of a parallel federal sentencing enhancement contained in the U.S. Sentencing Guidelines; the Seventh Circuit concluded that the offense involved the level of force required by *Curtis Johnson* even though it could be accomplished through " 'intimidation,' as distinct from by 'force or violence.' " *United States v. Armour*, 840 F.3d 904, 908 (7th Cir. 2016). As the Seventh Circuit explained:

> *Curtis Johnson* teaches that the violent force that must be feared for robbery by intimidation to be a crime of violence has a low threshold—a fear of a slap in the face is enough. This low threshold of violent force is necessarily satisfied in attempted bank robbery by intimidation. A bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force of the type satisfying *Curtis Johnson* because bank robbery ... inherently contains a threat of violent physical force.

Id. at 909 (citations omitted). As another judge in this District recently concluded, the Seventh Circuit's reasoning applies with equal force to the Illinois armed robbery statute. *See Jones*, 2016 WL 6995569, at *3 (applying *Armour* and *Dickerson* to reject Section 2255 motion arguing that Illinois armed robbery conviction did not constitute a violent felony under the ACCA).

For these reasons, the Court concludes that Van Sach's Illinois armed robbery conviction falls under the elements

clause of the ACCA. Van Sach thus has three prior violent felony convictions as defined by the ACCA and is properly serving an enhanced sentence under that statute. His Section 2255 motion is denied.

III. Certificate of Appealability

As a final matter, the Court must decide whether to grant Van Sach a certificate of appealability. *See* RULE 11 OF THE RULES GOVERNING SECTION 2255 CASES. To obtain a certificate of appealability, Van Sach must make a substantial showing of the denial of a constitutional right by establishing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). Given the rapidly evolving law in this Circuit interpreting *Johnson* and *Mathis*, and the nuanced inquiry required in the case of divisible statutes, the Court finds that reasonable jurists could debate the outcome of Van Sach's first claim regarding his aggravated battery convictions. The Court will grant him a certificate of appealability on that issue as outlined below. Because Seventh Circuit case law is clear on the issue of Van Sach's armed robbery conviction, the Court declines to grant him a certificate of appealability on that claim.

CONCLUSION

For the foregoing reasons, the motion under 28 U.S.C. § 2255 (R. 5) is DENIED and hereby DISMISSED WITH PREJUDICE. The Clerk of the Court is DIRECTED to enter a final judgment in favor of Respondent United States of America and against Petitioner Joseph Van Sach. Petitioner is GRANTED a certificate of appealability on the following issue: Whether his Illinois aggravated battery convictions constitute violent felonies for purposes of the Armed Career Criminal Act following the Supreme Court's decisions in *Johnson* and *Mathis.*

All Citations

Slip Copy, 2017 WL 987365

Footnotes

1 In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court made the holding of *Johnson* retroactive to cases on collateral review. Defendants whose criminal cases were already final at the time *Johnson* was decided had one year from the date the *Johnson* opinion was issued, or until June 26, 2016, to seek relief under Section 2255. *Holt v. United States*, 843 F.3d 720, 723 (7th Cir. 2016). Van Sach's motion filed in April 2016 is therefore timely.

2 At present, Van Sach has served a little more than 11 years of his 17-year sentence. Without the ACCA enhancement, his conviction under 18 U.S.C. § 922(g) carried a statutory maximum sentence of ten years. 18 U.S.C. § 924(a)(2).

3 *Stanley*, as well as several other cases cited in this opinion, addressed the career offender provision of the U.S. Sentencing Guidelines, which, like the ACCA, provides for an enhanced sentence where the defendant has prior convictions for a "crime of violence." 827 F.3d at 564. The Guidelines define "crime of violence" as "any offense that has as an element the use, attempted use, or threatened use of physical force against another person"—the identical language used in the elements clause of the ACCA. U.S.S.G. § 4B1.2(a)(1). The career offender guideline also contained an identical residual clause, which the Seventh Circuit found invalid in light of *Johnson. United States v. Hurlburt*, 835 F.3d 715, 725 (7th Cir. 2016) (en banc). The Supreme Court recently overturned that ruling and held that the residual clause in the career offender guideline is not invalid on vagueness grounds. *See Beckles v. United States*, ——S. Ct. ——, 2017 WL 855781 (Mar. 6, 2017). Notwithstanding the evolution of the law on the residual clause, case law interpreting the *elements* clause of the career offender guideline remains instructive.

4 Van Sach suggests that because this Court is precluded from considering whether the offenses satisfy either of the other two clauses that remain valid after *Johnson* because it relied on the residual clause at sentencing. (R. 13, Reply at 6.) He has not pointed to any legal authority in support of this argument, nor is the Court aware of any. The question before this Court is whether Van Sach's sentence should be invalidated under 28 U.S.C. § 2255. If he has sufficient predicates to qualify as an armed career criminal notwithstanding *Johnson*, then his sentence is proper. *See generally Holt*, 843 F.3d at 722-23 (suggesting that where Section 2255 petitioner's prior offenses could be categorized as violent felonies under either of the two clauses that remain valid after *Johnson*, he would not be entitled to habeas relief); *Rogers v. United States*, 179 F. Supp. 3d 835, 841-42 (CD. Ill. 2016) (denying *Johnson* claim where consideration of state charging documents showed that petitioner's conviction qualified as a violent felony under the elements clause, even though the sentencing judge (who had since retired) may not have looked at the charging

documents at the time of sentencing). Indeed, in the order granting Van Sach leave to pursue the present motion, the Seventh Circuit suggested that it would have conducted this inquiry if it had access to Van Sach's presentence report ("PSR"). (R. 2, 7th Cir. Order at 2 (observing that "the government did not provide Van Sach's PSR, so we. cannot determine if, after *Johnson*, Van Sach is an armed career criminal")).

5 To the extent Van Sach is arguing that the Illinois aggravated battery statute does not involve the level of force required by *Curtis Johnson*, (R. 13, Reply at 2), the Court finds this argument unavailing. The Seventh Circuit held in *Hill*—which was decided after *Curtis Johnson* and specifically referenced that opinion—that a conviction under the first prong of the Illinois battery statute involved the requisite level of force to qualify as an ACCA predicate. 695 F.3d at 649-50. This Court is required to follow *Hill* unless it is overturned by the Seventh Circuit, which appears unlikely given recent cases in which the Circuit rejected arguments similar to Van Sach's. *See United States v. Bailey*, No. 16-1280, 2017 WL 716848, at *1 (7th Cir. Feb. 23, 2017) ("We already have concluded that the phrase 'causes bodily harm' in the Illinois statute [ ] defining battery ... means force that would satisfy [*Curtis*] *Johnson*'s requirement of violent physical force."); *United States v. Waters*, 823 F.3d 1062, 1064 (7th Cir.), *cert. denied*, 137 S. Ct. 569, 196 L.Ed. 2d 448 (2016) (observing that it had previously concluded that a conviction for domestic battery under Illinois law involves the level of force required by *Curtis Johnson*, and defendant "has not persuaded us that this precedent should be overturned").

6 Likewise, a Wisconsin burglary statute at issue in *Edwards* (which the Seventh Circuit found to be indivisible following *Mathis*) provided as follows: "Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony: (a) Any building or dwelling; or (b) An enclosed railroad car; or (c) An enclosed portion of any ship or vessel; or (d) A locked enclosed cargo portion of a truck or trailer; or (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or (f) A room within any of the above." WISC. STAT. § 943.10(1m). The Seventh Circuit understood the different locations to be merely "illustrative examples" of where the offense could take place, not actual elements of the offense. *Edwards*, 836 F.3d at 837.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

United States of America	)	
	)	Case No: 16 C 5530
v.	)	
	)	Chief Judge Ruben Castillo
Joseph Van Sach	)	

ORDER

Joseph Van Sach's Rule 59(e) motion to reconsider the COA [17] is granted. The motion hearing set for 4/19/2017 is stricken. The Court has reevaluated its prior ruling on the certificate of appealability, and grants Joseph Van Sach a certificate of appealability as to his robbery claim.

Date: April 17, 2017 /s/ Chief Judge Ruben Castillo