[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12181
Non-Argument Calendar

D.C. Docket Nos. 4:16-cv-00202-CDL,
4:04-cr-00006-CDL-MSH-1

RONNIE J. GREER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(September 20, 2018)

Before MARTIN, BRANCH, and FAY, Circuit Judges.

PER CURIAM:

Ronnie Greer appeals the district court's denial of his 28 U.S.C. § 2255 motion to correct his sentence. He argues his sentence under the Armed Career

Criminal Act is invalid because his prior convictions under Georgia's terroristic threats statute do not qualify as violent felonies. After careful review, we affirm.

I.

In February 2004, Greer was found guilty of being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The probation officer prepared a presentence investigation report, which classified Greer as an armed career criminal based on three prior terroristic threats convictions under Georgia law. At the sentencing hearing in February 2005, the district court relied on United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), to rule that Greer could not be sentenced as an armed career criminal because the jury had not found his prior convictions were violent felonies. The district court instead gave Greer a high-end guideline sentence of 78-months imprisonment. Greer appealed his conviction, and the government filed a cross-appeal of Greer's sentence.

This Court affirmed Greer's conviction, reversed his sentence, and remanded for resentencing. United States v. Greer, 440 F.3d 1267, 1276 (11th Cir. 2006). With regard to Greer's sentence, this Court directed the district court to follow the Supreme Court's pre-Booker decision Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), which held that prior convictions for sentencing enhancement purposes are not required to be alleged in the indictment or found by a jury. Greer, 440 F.3d at 1273. The Court further explained why Almendarez-

Torres was not abrogated by Booker. Greer, 440 F.3d at 1273–75. We also stated that the violent nature of Greer's prior convictions could be determined "from the face of the certified copy of the conviction document read along with the indictment and in light of the statutory elements of the offense." Id. at 1275.

On remand, the district court resentenced Greer to 15-years imprisonment, followed by 3-years supervised release. Greer again appealed, challenging his conviction, but not his sentence. This Court affirmed based on the law-of-the-case doctrine. United States v. Greer, 203 F. App'x 307, 308 (11th Cir. 2006).

On June 21, 2016, Greer filed a § 2255 motion to correct his ACCA sentence based on the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). In his brief in support of his § 2255 motion, Greer conceded it was unclear whether the district court had decided his terroristic threats convictions qualified as ACCA predicates based on ACCA's elements clause, enumerated offenses, or residual clause. But he argued that, because the residual clause had been struck down as unconstitutional in Johnson, his sentence must be based on either the elements clause (which he called the "force" clause) or the enumerated offenses clause. He further argued that the district court must apply the categorical approach to determine whether his prior convictions under Georgia's terroristic threats statute qualified as violent felonies under the elements clause, citing this Court's decision in Mays v. United States, 817 F.3d 728 (11th

Cir. 2016), which held that Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013) applied retroactively on collateral review. Mays, 871 F.3d at 754. According to Greer, under the categorical approach, his convictions did not qualify as violent felonies under the elements clause because the least culpable conduct criminalized by the terroristic threats statute includes the threat to commit simple battery, which did not require the threat to use violent force.[1] Greer asserted his motion was timely under § 2255(f)(3), because it was filed within one year of the Supreme Court's Johnson decision.

In response, the government agreed that Greer's prior terroristic threats convictions could not serve as predicate violent felonies.

In January 2017, a magistrate judge recommended granting Greer's § 2255 motion. No objections were filed to the magistrate judge's recommendation. Nevertheless, the district court denied Greer's motion. The district court reasoned that Johnson applies only to defendants sentenced under ACCA's residual clause. It explained the government had argued at Greer's original sentencing that he should be sentenced under ACCA's elements clause, not the residual clause. The district court concluded it had never determined Greer's sentence should be enhanced under the residual clause. Because Greer's sentence was enhanced under

[1] Greer also argued his convictions did not qualify as one of the enumerated crimes. He is correct about that.

the elements clause of the ACCA, the court determined it did not have the authority to vacate his sentence under Johnson.

Greer moved for reconsideration of the district court's order. He asserted that Descamps and Johnson applied retroactively to his case and that the Georgia terroristic threats statute is categorically overbroad. For this reason, he argued that even if the district court enhanced his sentence under the elements clause, he was still entitled to relief.

The government filed a brief in support of Greer. It agreed with the district court that Greer's sentence was enhanced based on the elements clause. It asserted, however, that Greer could still challenge his sentence based on Descamps because Descamps applied retroactively on collateral review. See Mays, 817 F.3d at 734. Again the government asserted that the Georgia terroristic threats statute was overbroad because threatening to commit a simple battery did not qualify as a violent felony under the ACCA.

The district court denied Greer's motion for reconsideration. The court reiterated its position that it had sentenced Greer under the elements clause, so Johnson had no bearing. The court also noted the government had not raised and "arguably ha[d] waived" the argument that Greer's Descamps argument was time-barred. So, rather than reject Greer's argument as time barred, the court addressed the merits of Greer's claim under Descamps and Mathis. The court determined

that the Georgia terroristic threats statute contained alternative elements of separate types of terroristic threats, rather than alternative means to commit one crime. The district court reviewed the indictments for Greer's three prior convictions and concluded he was convicted under the provision that makes it a crime to threaten to commit any crime of violence with the purpose of terrorizing another person. It found that Greer's three convictions necessarily included a threat of force capable of causing physical pain or injury because they were based on threatening to commit murder or aggravated assault. Thus, it held those convictions were violent felonies under the elements clause of the ACCA. The district court rejected the government's argument that simple battery was a crime of violence under the statute and that a conviction under Georgia's terroristic threats statute can be based on a crime of violence that does not involve the threat of physical pain or injury. As a result, the district court denied Greer's motion for reconsideration.

The district court granted a certificate of appealability, and this appeal followed.

III.

On an appeal from the denial of a § 2255 motion, we review the district court's "findings of fact for clear error and questions of law de novo." Rhode v. United States, 583 F.3d 1289, 1290 (11th Cir. 2009) (per curiam).

We begin by addressing the scope of the certificate of appealability. The question presented by the certificate is whether Greer's terroristic threats convictions qualify as "predicate violent felon[ies] for sentence enhancement purposes under the elements clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), and thus [were] properly considered when [Greer's] sentence was enhanced for his federal conviction . . . ." The certificate encompasses what this Court's precedent refers to as a Descamps claim, a claim that a defendant's predicate convictions do not qualify as violent felonies under ACCA's elements or enumerated offenses clause. See Beeman v. United States, 871 F.3d 1215, 1220 (11th Cir. 2017). By contrast, the district court did not grant a certificate of appealability on whether Greer's sentence was based on the residual clause (a Johnson claim). See Beeman, 871 F.3d at 1220. Greer's Johnson claim is therefore not before us on appeal.

So, we are in the rare position of having a district court grant a certificate of appealability on a Descamps claim but not a Johnson claim. With that in mind, we proceed in two parts. We start with the government's argument that Greer's Descamps claim is untimely and then turn to the merits.

A.

The government argues that Greer's Descamps claim is untimely under § 2255(f). Since Greer was resentenced in 2006 and Descamps did not announce a

new rule of constitutional law, we will assume (without deciding) that Greer's Descamps argument is untimely under § 2255(f).

Although we have the discretion to consider the government's argument, see Spaziano v. Singletary, 36 F.3d 1028, 1041 (11th Cir. 1994), we decline to do so in this case. Twice before the district court, the government filed briefs arguing Greer's § 2255 motion should be granted. Both of these briefs relied on arguments that Greer's terroristic threats convictions could not qualify under ACCA's elements clause in light of Descamps. Also, the government relied on this Court's decision in Mays, in which we simultaneously considered a Johnson claim and Descamps because the government had waived the timeliness bar to the application of Descamps. See Mays, 817 F.3d at 732 ("[T]he 'time-barred' issue that the district court relied on in denying Mays's challenge to his sentence is moot because the Government has waived its period of limitations defense."); Beeman v. United States, ___ F.3d ____, No. 16-16710, 2018 WL 3853960, at *5 n.3 (11th Cir. Aug. 14, 2018) (Julie Carnes, J., concurring in the denial of rehearing en banc) (distinguishing the result in Mays from Beeman on the ground that the government had waived the timeliness bar in Mays but not in Beeman). The government therefore invited the district court to apply the framework this Court used in Mays, which permits the Court to review whether an ACCA-enhanced sentence can be justified under modern elements-clause precedent. See Mays, 817 F.3d at 733–34.

Our decision not to consider the government's timeliness argument is also justified based on the certificate of appealability, which addresses only whether Greer's terroristic threats convictions qualify as violent felonies under the elements clause. Even though we have the discretion to expand the certificate of appealability, see Dell v. United States, 710 F.3d 1267, 1272 (11th Cir. 2013), doing so is not warranted in this case in part because it would have no impact on the result.

Under these circumstances, we decline to exercise our discretion to consider the timeliness bar on appeal. We therefore proceed to the merits of Greer's Descamps claim.

B.

The Armed Career Criminal Act ("ACCA") requires a 15-year mandatory minimum sentence for defendants convicted of being a felon in possession of a firearm or ammunition with three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

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

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is called the "elements clause," while the second prong contains the "enumerated crimes" and the "residual clause." The question on appeal is whether Greer's convictions for terroristic threats qualify as violent felonies under the elements clause.

We use a "categorical approach" to evaluate whether a state conviction qualifies as a violent felony under ACCA. Taylor v. United States, 495 U.S. 575, 600, 110 S. Ct. 2143, 2159 (1990). Under this method, we look to the elements of the prior conviction, not the particular facts of the conviction, to determine whether the state offense qualifies as a violent felony. Id. In the context of the elements clause, we look to whether the least culpable conduct criminalized by the state offense contains an element requiring "the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. § 924(e)(2)(B)(i); United States v. Vail-Bailon, 868 F.3d 1293, 1296 (11th Cir. 2017) (en banc). "Physical force," as used in the elements clause, means "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, 130 S. Ct. 1265, 1271 (2010) ("Curtis Johnson").

We use a slightly different approach "when a statute lists multiple, alternative elements, and so effectively creates several different crimes." Descamps, 570 U.S. at 264, 133 S. Ct. at 2285 (quotation marks omitted and

alteration adopted). Statutes like that are "divisible," and we "use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." Id. at 278, 133 S. Ct. at 2293. Under the modified categorical approach, we look to "to a limited class of documents [from the record of a prior conviction] to determine what crime, with what elements, a defendant was convicted of." Mathis v. United States, 579 U.S. ___, 136 S. Ct. 2243, 2249 (2016). We then apply the categorical approach to that crime. Id.

Greer's sentence was enhanced based on three prior convictions for violating Georgia's terroristic threats statute. At the time of Greer's convictions, that statute provided:

> A person commits a terroristic threat when he threatens to commit any crime of violence, or to burn or damage property, with the purpose of terrorizing another, or of causing the evacuation of a building . . . , or of otherwise causing serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

O.C.G.A. § 26-1307(a).[2] The parties agree this statute is divisible and that, based on the limited class of documents we may consider, Mathis, 136 S. Ct. at 2249, Greer was convicted of "threaten[ing] to commit any crime of violence." We therefore assume the divisibility of the statute without deciding that issue.[3]

[2] An amended version of this statute was recodified at O.C.G.A. § 16-11-37(a). The amended version still criminalizes threats to commit a crime of violence. Id. Because there is no indication that Georgia courts' interpretation of this crime has changed, we consider case law and jury instructions applying § 16-11-37(a) to aid our decision in this case.

[3] The parties do not refer to the statute as divisible or indivisible. But they agree that the question is whether threatening to commit a crime of violence categorically qualifies as a violent

Next, we must decide whether threatening to commit a crime of violence categorically requires threatened use of violent force. See id. We begin by stating the importance of not deferring to labels given by states. See id. at 2251. Georgia's choice of the phrase "crime of violence" does not mean this state-law crime necessarily includes the use of violent force required by federal law. See Curtis Johnson, 559 U.S. at 138, 130 S. Ct. at 1269 ("The meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law.") . Our job is to figure out whether the least culpable act criminalized by the statute includes the threatened use of violent force.

The elements of the offense of "threaten[ing] any crime of violence" are: (1) a threat to commit any crime of violence; (2) with the purpose of terrorizing someone. Poole v. State, 756 S.E.2d 322, 327 (Ga. Ct. App. 2014).[4] The statute

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felony. They therefore presume the statute is divisible, at least between the "crime of violence" element and the "burn or damage property" element. See also Georgia Suggested Pattern Jury Instructions – Criminal § 2.24.10.

[4] The district court believed that a jury was required to find that, as an element of the offense of threatening any crime of violence, the threatened act constituted a particular state crime, such as murder or aggravated assault. For this understanding, the district court relied on Martin v. State, 692 S.E.2d 741, 744 (Ga. Ct. App. 2010).

We understand Martin to mean only that the defendant must be found to have made the threat alleged in the indictment. Martin concerned whether the jury instructions allowed the defendant to be found guilty of a crime other than the one alleged in the indictment, which would violate due process. See id. This is a universal concern about criminal prosecutions not specific to Georgia's terroristic threats statute. As interpreted by Georgia courts, Georgia's terroristic threats statute does not require the jury to find that the threatened act would satisfy all of the elements of a state criminal offense. See Lanthrip v. State, 218 S.E.2d 771, 774 (Ga. 1975).

does not define "crime of violence," and neither do Georgia's jury instructions.[5] In the absence of a definition, Georgia juries are apparently left to decide whether a particular threat is a threat to commit "any crime of violence" based on their own understanding of "violence" without reference to whether the conduct at issue amounts to an offense criminalized by the state. See Major v. State, 800 S.E.2d 348, 352 (Ga. 2017) (stating, in the context of a vagueness challenge to the terroristic threats statute, that a "person of ordinary intelligence can clearly understand the meaning of threatening to commit any crime of violence"); Lanthrip v. State, 218 S.E.2d 771, 774 (Ga. 1975) ("All the State had to do, to satisfy this

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Because we understand Martin differently than the district court, we reject the district court's application of the categorical approach. The district court found that Greer had been indicted for threatening to "commit any crime of violence, to-wit: Murder" on two occasions and to "commit any crime of violence, to-wit: Aggravated Assault" on a third occasion. The district court reasoned that Aggravated Assault and Murder categorically required an element of violent force, and therefore Greer's convictions for threatening to do those acts did as well. But Aggravated Assault and Murder were just references in the indictments against Greer. They are not elements to be found by the jury, see Lanthrip, 218 S.E.2d at 774; Poole, 756 S.E.2d at 327, and are therefore not to be considered when applying the categorical approach. See Mathis, 136 S. Ct. at 2256.

[5] The pattern jury instruction for the current version of O.C.G.A. § 16-11-37 provides:

> A person commits terroristic threats when that person threatens to (commit any crime of violence) (burn/damage property) with the purpose of
>
> a) (terrorizing another) (in reckless disregard of the risk of causing terror) or
>
> b) (causing evacuation of a building, place of assembly, facility of public transportation) or
>
> c) (causing serious public inconvenience) (in reckless disregard of the risk of causing serious public inconvenience).
>
> No person shall be convicted of terroristic threats on the unsupported testimony of the party to whom the threat is made.

See Georgia Suggested Pattern Jury Instructions – Criminal § 2.24.10.

part of its case, was to persuade the jury beyond a reasonable doubt that the crime communicated as a threat by the defendant was a crime of violence.").[6] Consistent with this approach, the parties have addressed their arguments to how much "violence" is necessary to violate this criminal statute. We do as well.

We give violence its plain meaning. See Lanthrip, 218 S.E.2d at 774. Webster's defines "violence" as "physical force used so as to injure or damage." Violence, Webster's New Twentieth Century Dictionary 2040 (2d ed. 1983). Thus, to convict someone of threatening to commit a crime of violence, Georgia juries must find the defendant threatened to commit any violent crime, where "violent" is understood to require "physical force used so as to injure or damage." See id. Force of that kind is "physical force" within the meaning of § 924(e)(2)(B)(i). See Curtis Johnson, 559 U.S. at 140, 130 S. Ct. at 1271 (defining "physical force" as "violent force—that is, force capable of causing physical pain or injury to another person.").[7]

[6] Based on Lanthrip and Major, it seems as though Georgia courts have essentially read "crime" out of "crime of violence," at least in the strict sense that laws, not juries, define crimes. Any question about the correctness of that interpretation is one of state law or, conceivably, federal constitutional law. Those questions are not before this Court.

[7] In Leocal v. Ashcroft, 543 U.S. 1, 125 S. Ct. 377 (2004), the Supreme Court stated that the ordinary meaning of "crime of violence," as used in 18 U.S.C. § 16, "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses" or, more generally, offenses "encompass[ing] accidental or negligent conduct." Id. at 10–11, 125 S. Ct. at 383. Leocal was, of course, interpreting "crime of violence," as a matter of federal law in a different statutory context. Nevertheless, we find its interpretation informative.

Notwithstanding the statute's ordinary meaning, Greer argues Georgia's terroristic threats statute can be violated by threatening to commit a simple battery. As an example, Greer cites Shepherd v. State, 496 S.E.2d 530 (Ga. Ct. App. 1998). In Shepherd, a defendant was convicted of "threaten[ing] to commit any crime of violence with the purpose of terrorizing another." Id. at 531 (quotation marks omitted). In the words of the Georgia Court of Appeals, the indictment charged that the defendant "did threaten to commit simple battery and battery against" another. Id. (emphasis added). The evidence showed the defendant told someone that "he was going to kick the [SOB's] ass because he was whooping his kids." Id. (first alteration in original, second alteration omitted).

Although this threatened act could qualify as a simple battery, not every simple battery necessarily qualifies as a "crime of violence" in Georgia's terroristic threats statute. In a terroristic threats prosecution, the jury is not asked to consider whether the defendant threatened to commit a simple battery or any other specified Georgia crime. Instead, the jury determines whether the evidence showed the defendant threatened a generalized "crime of violence." See Poole, 756 S.E.2d at 327. The affirmance in Shepherd shows the Georgia courts consider the threat to kick someone's ass to be a threat to commit a crime of violence under the terroristic threat statute. That threat involves the threatened use of "force capable of causing physical pain or injury." See Curtis Johnson, 559 U.S. at 140, 130 S.

Ct. at 1271. Shepherd is therefore consistent with our conclusion that the Georgia crime of "threaten[ing] to commit any crime of violence" has an element of the threatened use of violent force under federal law.

Besides his misplaced reliance on Shepherd, Greer has not cited any example of a Georgia court holding that a threat to commit a crime of violence includes conduct that does not involve the threat to commit violence force. The government cites one case that comes close. In In re K.J., 668 S.E.2d 775 (Ga. Ct. App. 2008), a student, who was described by multiple witnesses as "screaming" and "out of control," was repeatedly "pounding" her first into her hands while threatening to "snap" and "get" her math teacher. Id. at 775–76. This lasted more than twenty minutes until teachers stopped her outbursts. Id. The Georgia Court of Appeals affirmed this student's juvenile terroristic threats conviction, reasoning that the juvenile court "was authorized to conclude that K.J.'s conduct constituted a threat directed toward the instructor for the purpose of terrorizing her." Id. at 776. Although the threatened act is unspecific, the defendant's conduct—repeatedly pounding her first into her hand—suggests she was threatening to punch the teacher. A threat to punch someone constitutes the threat to use physical force under § 924(e)(2)(B)(i). See Curtis Johnson, 559 U.S. at 140, 130 S. Ct. at 1271.

Both the ordinary meaning of "violence" and the holdings of Georgia courts show that only threatened violent force is criminalized under the "crime of

violence" prong of Georgia's terroristic threats statute. We therefore hold that Greer's three prior convictions each qualify as violent felonies under ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i).

AFFIRMED.