

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA :

v. :

BRIAN MCNEAL, :
Defendant. :

CRIMINAL ACTION NO. 13-16

MEMORANDUM OPINION

Rufe, J.

July 14, 2017

Before the Court is Defendant Brian McNeal’s Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 89). For the reasons that follow, Defendant’s Motion will be granted, his sentence will be vacated, and Defendant will be re-sentenced.

I. BACKGROUND

In 2013, Defendant was convicted by a jury of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and sentenced to 210 months’ imprisonment. Defendant’s sentence was predicated upon application of the Armed Career Criminal Act’s (“ACCA’s”) 15-year mandatory minimum sentence. ACCA mandates such a sentence for any defendant who violates § 922(g) and has three previous convictions for “a violent felony or a serious drug offense.”¹

At the time of Defendant’s sentencing, Defendant had one prior conviction for a serious drug offense (which is not at issue here), two convictions for first-degree robbery under 18 Pa. C.S. § 3701(a), and one conviction for second-degree aggravated assault under 18 Pa. C. S. § 2702(a). At that time, there was no real dispute that Defendant’s robbery and aggravated

¹ 18 U.S.C. § 924(e)(1).

assault convictions qualified as “violent felonies” under ACCA.² ACCA defines “violent felony” to encompass any felony that has “as an element the use, attempted use, or threatened use of physical force” (the “force clause”) or that “otherwise involves conduct that presents a serious risk of physical injury to another” (the “residual clause”).³ Because Defendant had four prior convictions for a violent felony or a serious drug conviction, the Court concluded that he was subject to ACCA’s 15-year mandatory minimum sentence.

Defendant’s sentence was called into question by the Supreme Court’s 2015 decision in *Johnson v. United States*, which held that ACCA’s residual clause was unconstitutionally vague.⁴ After *Johnson* was decided, Defendant timely filed this motion asserting that, with the residual clause invalidated, his robbery and aggravated assault convictions no longer qualify as ACCA predicate offenses because they are not “violent felonies” under ACCA’s force clause.

II. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a prisoner serving a sentence in federal custody may petition the court which imposed the sentence to vacate, set aside, or correct the sentence by asserting that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”⁵

² Doc. No. 68 (Government’s Sentencing Memorandum) at 3; Doc. No. 78 (Sentencing Tr.) at 5:1-11.

³ 18 U.S.C. § 924(e)(2)(B)(i)-(ii); *see also United States v. Singleton*, Criminal No. 10-578-1, 2017 WL 1508955, at *1 (E.D. Pa. Apr. 26, 2017). ACCA also contains an “enumerated offenses” clause that is not at issue here because it applies only to burglary, arson, extortion, or crimes involving the use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii).

⁴ *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). In *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016), the Supreme Court subsequently held that *Johnson* was retroactively applicable, and there is no dispute that it applies to Defendant’s sentence.

⁵ 28 U.S.C. § 2255(a).

III. ANALYSIS

To determine whether Defendant’s prior convictions qualify as violent felonies under ACCA’s force clause, the Court begins with the categorical and modified categorical approaches. The Court then examines Defendant’s robbery convictions and concludes that they do not so qualify regardless of which approach applies. Without these convictions as predicates, there is no need to determine whether Defendant’s aggravated assault conviction qualifies as an ACCA predicate, as that conviction, combined with Defendant’s serious drug conviction, would still fall short of the three prior convictions required under ACCA. Finally, the Court addresses the Government’s remaining argument—that Defendant has failed to meet his burden of showing an entitlement to relief under § 2255—and finds it unpersuasive.

A. The Categorical and Modified Categorical Approaches to Determining Whether a Prior Conviction Qualifies as an ACCA Predicate

Courts employ either a categorical or a modified categorical approach to determine whether a prior conviction qualifies as an ACCA predicate. “The Supreme Court has long held that in evaluating most prior convictions, ACCA ‘mandates a formal categorical approach.’”⁶ Under this approach, “courts may ‘look only to the statutory definitions’—*i.e.*, the elements—of a defendant’s prior offenses, and not ‘to the particular facts underlying those convictions.’”⁷

The Supreme Court has articulated three justifications for this limited, elements-only inquiry. First, it is consistent with ACCA’s text, which refers to “previous convictions,” rather than “what the defendant had actually done.”⁸ “Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns” because “only a jury, and not a judge, may find facts that increase a maximum penalty, except for the

⁶ *Singleton*, 2017 WL 1508955, at *2 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

⁷ *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (quoting *Taylor*, 495 U.S. at 600).

⁸ *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016).

simple fact of a prior conviction.”⁹ Third, “an elements-focus avoids unfairness to defendants.”¹⁰ “Statements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary,” meaning “[a]t trial, and still more at plea hearings, a defendant may have no incentive to contest” them.¹¹ Accordingly, in a typical ACCA case, a court employing the categorical approach “cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.”¹²

The Supreme Court has also recognized that “a narrow range of cases [] require a sentencing court to look beyond the elements of an offense to the charging paper and jury instructions in order to determine whether a particular offense could qualify as a violent felony under the ACCA.”¹³ “This ‘modified categorical approach’ applies when the statute defining the offense in question is ‘divisible’—that is, when one or more of the elements of the offense has an alternative.”¹⁴ In *Mathis v. United States*, the Supreme Court reaffirmed that a statute is divisible only if it lists elements of crimes disjunctively, rather than merely enumerating “various factual means of committing a single element.”¹⁵

Under the modified categorical approach, “a sentencing court looks 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.”¹⁶ These are often

⁹ *Id.* (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

¹⁰ *Id.* at 2253.

¹¹ *Id.*

¹² *Id.* at 2252 (citations omitted).

¹³ *United States v. Robinson*, 844 F.3d 137, 143 (3d Cir. 2016) (quoting *Taylor*, 495 U.S. at 602) (internal quotation marks omitted).

¹⁴ *Id.* (citing *Descamps*, 133 S. Ct. at 2881).

¹⁵ *Mathis*, 136 S. Ct. at 2249.

¹⁶ *Id.* (citations omitted).

referred to as “*Shepard* documents.”¹⁷ “The purpose of this ‘modified’ approach, and its accompanying license to review any available *Shepard* documents, is to provide sentencing judges with a tool to determine reliably not what specific conduct was the basis for a particular crime as a factual matter, but rather what type of conduct is generally represented by an underlying conviction as a legal matter.”¹⁸ “But because the modified approach is accordingly intended only to ‘serve[] the limited function’ of ‘help[ing] effectuate the categorical analysis,’ it retains the categorical approach’s single purpose: to figure out the precise elements of the crime of conviction.”¹⁹

With this framework in mind, the Court turns to 18 Pa. C.S. § 3701(a), the Pennsylvania first-degree robbery statute under which Defendant was convicted.

B. Defendant’s First-Degree Robbery Convictions Do Not Qualify as Violent Felonies

1. Pennsylvania’s First-Degree Robbery Statute Criminalizes Conduct That Does Not Categorically Qualify as a Violent Felony

At the time Defendant was convicted of first-degree robbery, that offense was defined as follows:

- (1) A person is guilty of robbery if, in the course of committing a theft, he:
 - (i) inflicts serious bodily injury upon another;
 - (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
 - (iii) commits or threatens immediately to commit any felony of the first or second degree[.]

¹⁷ See *Shepard v. United States*, 544 U.S. 13, 26 (2005).

¹⁸ *Singleton*, 2017 WL 1508955, at *2.

¹⁹ *Id.* (quoting *Shepard*, 544 U.S. at 26).

The parties disagree regarding whether § 3701(a)(1) is divisible,²⁰ but even if it is, the Government concedes that robbery under § 3701(a)(1)(iii) is not categorically a violent felony.²¹ Therefore, unless the Court can determine using the modified categorical approach that Defendant’s convictions were for violations of § 3701(a)(1)(i) or (ii) rather than § 3701(a)(1)(iii), they cannot qualify as ACCA predicates. If the available *Shepard* documents show only that Defendant was convicted of violating § 3701(a)(1) generally, the conviction cannot qualify as an ACCA predicate because it covers conduct that the Government concedes does not qualify as a violent felony.²² The Court now turns to that analysis.

2. The Available *Shepard* Documents Do Not Show That Defendant Was Convicted of Violating § 3701(a)(1)(i) or (ii)

Defendant was convicted of first-degree robbery in 1995 and 2003. In both cases, the available *Shepard* documents fail to establish that Defendant was convicted of violating § 3701(a)(1)(i) or (ii).

a. 1995 Robbery Conviction

In November 1995, Defendant pleaded *nolo contendere* to first-degree robbery. The bill of information charged Defendant with one count of “Robbery – F1” and listed each subsection

²⁰ In 2013, the Third Circuit held that Pennsylvania’s robbery statute is “obviously divisible” because it contains “clearly laid out alternative elements.” *United States v. Blair*, 734 F.3d 218, 225 (3d Cir. 2013). That holding likely has been abrogated at least in part by the Supreme Court’s more recent decision in *Mathis*, as another court in this District recently noted. *Singleton*, 2017 WL 1508955, at *8-9. As explained, there is no need to resolve the issue of § 3701(a)(1)’s divisibility because Defendant’s first-degree robbery convictions do not qualify as ACCA predicates even under the modified categorical approach.

²¹ Doc. No. 98 (Government’s Response) at 14. For example, committing identity theft, forgery, or stealing between \$100,000 and \$500,000 all qualify as first-degree robbery under § 3701(a)(1)(iii), but none constitute violent felonies under ACCA’s force clause because they do not include as an element the use, attempted use, or threatened use of force. *See* Doc. No. 95 at 14 (listing examples).

²² Because of the way Pennsylvania’s robbery statute is applied in practice, it is fairly common for a defendant to be convicted of first-degree robbery without a clear indication of which subsection of § 3701(a)(1) the defendant was convicted of violating. As Defendant’s brief illustrates, Pennsylvania prosecutors frequently (if not universally) charge defendants with first-degree robbery under § 3701(a)(1) without specifying any particular subsection in the charging document. Doc. No. 95 (Defendant’s Memorandum of Law in Support of Motion) at 9-11. Similarly, Pennsylvania judges often instruct juries that they need only agree that robbery was committed in *one* of the ways proscribed by § 3701(a), not that they must agree upon *which* way it was committed. *Id.*

of § 3701(a)(1).²³ In his written plea colloquy, Defendant admitted only that he “committed the crime[] of Robb F1.”²⁴ These documents do not prove that Defendant entered a plea of *nolo contendere* to § 3701(a)(1)(a)(i) or (ii) (the subsections that qualify as a “violent felony” under ACCA) as opposed to the statute generally, or that he admitted to any of the underlying facts as part of his plea.²⁵

The Government nevertheless argues that Defendant’s 1995 conviction qualifies as violent felony because Defendant’s 1995 criminal complaint and 2013 federal presentence report show that Defendant committed the 1995 robbery in a violent manner—namely, by shocking the victim with a Taser.²⁶ These documents certainly reveal that the robbery was violent. But the relevant inquiry is not whether Defendant could have been convicted of a violent felony, but whether he actually was convicted of a crime that categorically qualifies as such. As the Supreme Court has explained, “facts . . . are mere real world things—extraneous to the crime’s legal requirements.”²⁷

Accordingly, the Court may not examine the complaint and the presentence report to determine the facts underlying Defendant’s 1995 conviction; instead, the Court’s inquiry is limited to whether these documents show that Defendant necessarily was convicted of a violent felony within the meaning of ACCA.²⁸ They do not. The criminal complaint merely alleges that

²³ Doc. No. 95, Ex. A at 2.

²⁴ *Id.* at 6.

²⁵ Indeed, “in Pennsylvania a *nolo contendere* plea does not constitute an admission of factual guilt, and thus has no evidentiary value in assessing whether the defendant committed a crime.” *United States v. Poellnitz*, 372 F.3d 562, 567 (3d Cir. 2004).

²⁶ Doc. No. 98 (Government’s Response), Ex. A at 2.

²⁷ *Mathis*, 136 S. Ct. at 2248.

²⁸ See *United States v. Johnson*, 376 F. App’x 205, 207 n.2 (3d Cir. 2010) (“[A]bundantly clear as the facts in the underlying criminal complaint may be,” courts “may not consider [a defendant’s] actual conduct” because “[t]he modified categorical approach is not meant to circumvent the categorical approach”) (quoting *United States v. Johnson*, 587 F.3d 203, 208 (3d Cir. 2009)) (alterations and internal quotation marks omitted).

Defendant committed “F1 Robbery” in a violent manner, not that he violated § 3701(a)(1)(i) or (ii).²⁹ Similarly, the presentence report states only that Defendant was convicted of “robbery” without specifying the statute pursuant to which Defendant was convicted.³⁰ These documents thus fail to show Defendant was convicted of a violent felony within the meaning of ACCA.³¹ And because Defendant pleaded *nolo contendere*, he admitted no facts, and the Court found none.

Another court in this District recently reached a similar conclusion in *United States v. Singleton*, which likewise concerned a challenge to an ACCA mandatory-minimum sentence predicated upon § 3701(a)(1) convictions.³² There, as here, there was little doubt the defendant’s robberies were violent in that they were “performed at gunpoint.”³³ Nonetheless, because the charging documents and plea colloquies either referred generally to § 3701(a)(1) or listed all of its subsections, the court was unable to determine with certainty that the defendant had been convicted of violating § 3701(a)(1)(i) or (ii), and so vacated the defendant’s sentence.³⁴ As in *Singleton*, “if the question were whether [defendant’s] robberies were violent crimes in the everyday sense of the term, the answer would almost certainly be yes. But the question . . . is

²⁹ It is also unclear whether the criminal complaint is even properly before the Court on a modified categorical review, as it predates the information and thus does not appear to be the relevant charging document. *See Evanston v. Att’y Gen. of U.S.*, 550 F.3d 284, 293 n.7 (3d Cir. 2008) (“[B]ecause the criminal complaint was superceded by the criminal information in this case, it is not the relevant charging document and is not an appropriate source under the modified categorical approach.”).

³⁰ *See Johnson*, 587 F.3d at 212 n.10 (facts in PSR, to which defendant did not object, were irrelevant in determining whether prior conviction qualified as a “crime of violence” because it failed to show whether defendant pleaded guilty to a crime with the requisite mental state); *see also United States v. Gonzalez-Aparicio*, 663 F.3d 419, 433 (9th Cir. 2011).

³¹ As Defendant notes, while the manner in which he committed the 1995 robbery could likely ground a conviction under § 3701(a)(1)(i) or (ii), it could also theoretically support a conviction under § 3701(a)(1)(iii). Doc. No. 101 at 7 n.3. It is therefore impossible to say with certainty which subsection of § 3701(a)(1) Defendant’s conviction was based on, even after reviewing all the available *Shepard* documents.

³² *Singleton*, 2017 WL 1508955, at *1.

³³ *Id.* at *7.

³⁴ *Id.*

not factual, but formalistic: Were [Defendant’s] convictions for those crimes categorically violent felonies under ACCA?”³⁵ Because the available *Shepard* documents fail to establish that Defendant’s 1995 robbery conviction was for a crime that categorically qualifies as a violent felony under ACCA, it cannot qualify as an ACCA predicate offense.³⁶

b. 2003 Robbery Conviction

The analysis is similar for Defendant’s 2003 conviction. In March 2003, Defendant was found guilty of first-degree robbery following a bench trial. The bill of information associated with that conviction lists every subsection of § 3701(a)(1), and states only that Defendant was adjudged guilty of “Robbery F1.”³⁷ The trial transcript is also unhelpful as it reveals only that the judge found Defendant “guilty of all charges.”³⁸ Because Defendant was charged under every subsection of § 3701(a)(1), this decision sheds no light on whether Defendant was convicted of committing a violent felony.

The Government argues that testimony at trial established that Defendant committed the robbery with a sawed-off shotgun, and therefore that his conviction must have been for a “violent felony.” But under the modified categorical approach, the only relevant portion of the trial transcript is “any explicit factual finding by the trial judge to which the defendant assented”; the Court cannot engage in ex-post fact-finding based on witness testimony.³⁹ Here, the court did not make any explicit factual findings or state under which subsection Defendant was convicted. And again, that Defendant’s crime was violent in the everyday sense does not mean that

³⁵ *Id.*

³⁶ *Accord United States v. Ballard*, Criminal Action No. 03-810, 2017 WL 2935725, at *3 (E.D. Pa. July 10, 2017) (reaching the same conclusion in a similar case involving prior convictions under § 3701(a)(1)).

³⁷ Doc. No. 95, Ex. B at 2-3.

³⁸ Doc. No. 95, Ex. B (Trial Tr.) at 96:10-13.

³⁹ *Shepard*, 544 U.S. at 16.

Defendant was convicted of a “violent felony” under ACCA.

Because neither of Defendant’s first-degree robbery convictions qualifies as a “violent felony,” Defendant is ineligible for a 15-year mandatory minimum sentence under ACCA and must be resentenced. At resentencing, the Court can and will consider Defendant’s prior record as part of its analysis under 18 U.S.C. § 3553(a).

C. The Government’s Burden Argument is Unpersuasive

The Government also argues that Defendant has failed to demonstrate either that he was actually sentenced under the ACCA residual clause invalidated in *Johnson* or that his sentence amounted to a miscarriage of justice.⁴⁰ That is, the Government argues that even if Defendant’s sentence is legally invalid post-*Johnson*, Defendant is not entitled to relief because he faces a higher burden when attacking his sentence collaterally than he would if he were contesting his eligibility for an ACCA mandatory-minimum sentence at sentencing. These arguments have already been rejected by other courts in this District, and they are unavailing here as well.

As other courts have concluded, a defendant challenging a sentence under *Johnson* need not establish that he was actually sentenced under ACCA’s residual clause.⁴¹ Instead, a defendant must only show that application of ACCA’s mandatory-minimum sentence may have hinged on the residual clause, and that post-*Johnson*, his prior convictions do not qualify as ACCA predicates, as Defendant has done.⁴² This approach avoids the unfairness that would follow if relief under *Johnson* turned on a sentencing court’s decision to specify whether a

⁴⁰ Doc. No. 98 at 23.

⁴¹ See *Ballard*, 2017 WL 2935725, at *4 (collecting cases).

⁴² *Id.* (explaining that “imposing the burden on a movant to show that he or she was sentenced under the residual clause is the wrong approach” and that a defendant must “show only that the court may have relied on the residual clause in sentencing him”).

sentence relied on ACCA's residual clause.⁴³

Regarding the Government's argument that Defendant must prove his sentence amounted to a "miscarriage of justice," that standard applies only where a defendant seeks to overcome a procedural default. It has no applicability where, as here, Defendant has timely filed a § 2255 motion and there are no procedural barriers to review.⁴⁴ Rather, "[i]t is a longstanding principle that, as in civil cases generally, the standard of proof in a habeas proceeding is by a preponderance of evidence."⁴⁵ Defendant has met that burden by showing that his 15-year mandatory-minimum sentence is legally invalid.⁴⁶ There is no additional requirement that Defendant prove his sentence amounted to a miscarriage of justice.

IV. CONCLUSION

Defendant's 15-year mandatory minimum sentence under ACCA was based upon two first-degree robbery convictions that no longer qualify as ACCA predicates. Accordingly, Defendant's motion to vacate his sentence must be granted and a resentencing will be ordered. An appropriate Order follows.

⁴³ See *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) ("We will not penalize a movant for a court's discretionary choice not to specify under which clause of Section 924(e)(2)(B) an offense qualified as a violent felony. Thus, imposing the burden on movants urged by the government in the present case would result in selective application of the new rule of constitutional law announced in *Johnson*, violating the principle of treating similarly situated defendants the same.") (internal quotation marks omitted).

⁴⁴ See *Singleton*, 2017 WL 1508955, at *11 (quoting *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1932 (2013)); see also *Ballard*, 2017 WL 2935725, at *5 ("To the extent the Government suggests this Court should extend the 'miscarriage of justice' requirement beyond procedural default cases, the Court declines to do so.").

⁴⁵ *Id.* at *12 (citations omitted); see also *Pazden v. Maurer*, 424 F.3d 303, 313 (3d Cir. 2005).

⁴⁶ As part of its argument, the Government urges the Court to look beyond the available *Shepard* documents to determine whether Defendant qualifies for an ACCA mandatory-minimum sentence. Doc. No. 98 at 23. In other words, the Government asks the Court to uphold Defendant's sentence based upon an examination of the facts underlying his prior convictions—the precise method the Supreme Court has forbade due to concerns about fairness and the Sixth Amendment rights of criminal defendants. *E.g.*, *Mathis*, 136 S. Ct. at 2253. The Court will decline this invitation.

**IN THE UNITED STATES DISTRICT COURT
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BRIAN MCNEAL,
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CRIMINAL ACTION NO. 13-16

ORDER

AND NOW, this 14th day of July 2017, upon consideration of Defendant's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 89), the briefing in support thereof, and the response thereto, it is hereby **ORDERED** that for the reasons set forth in the accompanying Memorandum Opinion the motion is **GRANTED**. The Court will issue a subsequent Order scheduling a resentencing date.

IT IS SO ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.