

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

UNITED STATES OF AMERICA

v.

PERRY LEACH

:
:
:
:
:
:
:

CRIMINAL ACTION

NO. 12-406

MEMORANDUM

Tucker, J.

October 17, 2017

Before the Court are Petitioner Perry Leach’s Motion to Correct Sentence Under 28 U.S.C. § 2255 (“Motion for Relief”) (Doc. 42), the Government’s Response to the Defendant’s Motion for Rel[ie]f Under 28 U.S.C. § 2255 (Doc. 48), and Petitioner’s Reply Memorandum of Law in Support of Motion to Correct Sentence Under 28 U.S.C. § 2255 (Doc. 49). Upon consideration of the Parties’ submissions, Petitioner’s Motion for Relief is GRANTED.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Case And Petitioner’s Guilty Plea

On August 9, 2012, an indictment was unsealed against Petitioner Perry Leach. The Indictment set out four counts against Petitioner:

- (1) dealing in firearms without a license in violation of 18 U.S.C. §§ 922(a)(1)(A), 923(a), and 924(a)(1)(D);
- (2) possession of an unregistered firearm 26 U.S.C. §§ 5845(a) and (c), 5861(d), and 5871;
- (3) a September 7, 2010 offense involving the possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); and
- (4) a November 22, 2011 offense involving the possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

Indictment, Doc. 1. Factually, the Indictment alleged that Petitioner, a resident of Columbus, OH, obtained various firearms in Ohio and then transported the firearms to Philadelphia for sale. Indictment ¶¶ 1–3. Once Petitioner arrived in Philadelphia, on September 7, 2010, he

successfully sold the firearms, including a semi-automatic weapon with an obliterated serial number. Indictment ¶ 5. In late 2011, Petitioner again made arrangements to acquire and sell various firearms. On November 22, 2011, Petitioner again successfully sold a number of firearms to a buyer in Philadelphia. Indictment ¶¶ 7–9.

On August 1, 2013, this Court held a plea hearing in which Petitioner pleaded guilty to all four counts of the Indictment. That day, Petitioner executed a Guilty Plea Agreement. Guilty Plea Agreement, Doc. 26. The Guilty Plea Agreement set forth the Parties' understanding that the appropriate sentence for Petitioner's crimes was: "180 months imprisonment, 5 years supervised release, a fine as directed by the Court, and a \$400 special assessment." Guilty Plea Agreement 2, Doc. 26. In advance of Petitioner's sentencing hearing, the Parties submitted their sentencing memoranda. Pet'r's Sentencing Mem., Doc. 29; Gov't's Sentencing Mem., Doc. 30. In Petitioner's Sentencing Memorandum, Petitioner's counsel conceded that Petitioner qualified as an "armed career offender" and, therefore, the relevant sentencing guideline range began at 180 months. Pet'r's Sentencing Mem. 2, Doc. 29. Indeed, the Presentence Report prepared for Petitioner's sentencing hearing explained that he had several prior convictions including a 1996 conviction for terroristic threats in violation of 18 Pa. Cons. Stat. § 2706, and two 1999 felony convictions for possession of crack cocaine with intent to deliver.

B. Sentencing And Armed Career Criminal Act Enhancement

On February 10, 2014, the Court held a sentencing hearing and sentenced Petitioner to a bottom-of-the-guidelines range sentence of 180 months. J. in a Criminal Case 2, Doc. 40. The sentence consisted of "60 months on Count 1, 120 months on Count 2 and 180 months on each of Counts 3 and 4. All counts to run concurrently. The defendant is to receive credit for time served." J. in a Criminal Case 2, Doc. 40. The sentence reflected Petitioner's status as an armed

career criminal under the Armed Career Criminal Act (“ACCA”) based on Petitioner having earlier been convicted of three predicate offenses: one state conviction for terroristic threats in violation of 18 Pa. Cons. Stat. § 2706, and two convictions for possession of crack cocaine with intent to deliver. The Court further imposed five years of supervised release consisting of “3 years on each of counts 1 and 2 & a term of 5 years on each of counts 3 and 4,” and a \$400.00 special assessment. J. in a Criminal Case 3, Doc. 40.

C. The United States Supreme Court’s Decision In *Johnson v. United States* And The Present Motion For Relief

In 2015, the United States Supreme Court decided, in *Johnson v. United States*, that the ACCA’s “residual clause” set forth in 18 U.S.C. § 924(e)(2)(B), used to define the term “violent felony” as it relates to potential sentencing enhancements for career criminals, was unconstitutionally vague and, therefore, invalid. 135 S. Ct. 2551, 2560 (2015). A year later, the Supreme Court confirmed that its holding in *Johnson* constituted a “new substantive rule of law with retroactive effect on collateral review.” *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

On April 21, 2016, this Court appointed the Federal Community Defender Office to represent Petitioner in connection with the filing of a motion to challenge his sentence in light of the Supreme Court’s holding in *Johnson*. Order, Doc. 41. Petitioner then filed the present Motion for Relief, which is now ripe for decision. Mot. to Correct Sentence, Doc. 42.

II. STANDARD OF REVIEW

Under 28 U.S.C. § 2255, a prisoner may move to “vacate, set aside, or correct” a sentence that “was imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. § 2255(a). A § 2255 petitioner is entitled to relief “for an error of law or fact only where the error constitutes a ‘fundamental defect which inherently results in a complete miscarriage of justice.’”

United States v. Eakman, 378 F.3d 294, 298 (3d Cir. 2004) (quoting *United States v. Addonizio*, 422 U.S. 178, 185 (1979)). If the court finds grounds for relief, it “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

The law requires that a petitioner bring her claim for relief within a one year statute of limitations. *Id.* § 2255(f). The statute of limitations clock begins to run from a number of dates including, for example, the date on which “the right asserted [by a petitioner as grounds for relief] 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” 28 U.S.C. § 2255(f)(3).¹

III. DISCUSSION

Petitioner argues that his enhanced sentence as a career criminal improperly relied upon a prior state conviction for terroristic threats, which has conclusively been rejected as a “violent felony” for purposes of the ACCA. As one of the three prior convictions on which his enhanced sentence relied cannot now constitute a predicate offense under the ACCA, as a matter of law, Petitioner’s enhanced sentence must be vacated.

The Court agrees and Petitioner’s sentence will be vacated. The Court will hold a new sentencing hearing.

A. Definition Of A Violent Felony Under The ACCA

As an initial matter, under the ACCA, any convicted felon in possession of a firearm violates 18 U.S.C. § 922(g) and shall be punished by a minimum of ten years imprisonment. 18

¹ As set forth in greater detail below, the Court finds that Petitioner timely filed his Motion for Relief because his Motion for Relief implicates the new rule of constitutional law articulated by the Supreme Court in *Johnson*. *Johnson* was decided on June 26, 2015. Petitioner’s Motion for Relief was filed on June 22, 2016. Therefore, Petitioner’s Motion for Relief is timely.

U.S.C. § 924(a)(2). If a convicted felon violates § 922(g) while also having had “three previous convictions . . . for a *violent felony* or a serious drug offense, or both,” then the minimum punishment for a violation of § 922(g) increases to fifteen years imprisonment. *Id.* at § 924(e)(1) (emphasis added). A “violent felony” is defined under the ACCA as:

Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- i. has as an element the use, attempted use, or threatened use of physical force against the person of another;² or
- ii. is burglary, arson, or extortion, involves use of explosives,³ or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized portion of the definition is known as the ACCA’s “residual clause.” The residual clause was explicitly invalidated as unconstitutionally vague by the Supreme Court in *Johnson*. 135 S. Ct. at 2563. The Supreme Court’s decision did not otherwise “call into question [the] application of the Act to the four enumerated offenses [under the enumerated offenses clause], or the remainder of the Act’s definition of a violent felony [under the elements clause].” *Id.* In the wake of *Johnson*, whether a particular prior conviction constitutes a violent felony turns on whether it is one of the specifically enumerated offenses under the enumerated offenses clause or whether it contains an element of force such that the prior conviction might satisfy the elements clause.

To determine whether a prior conviction qualifies as a violent felony under the elements clause, the court must use the “categorical approach.” *Descamps v. United States*, 133 S. Ct.

² This portion of the definition of a “violent felony” is commonly referred to as the “elements clause” or the “force clause” of the ACCA.

³ This portion of the definition of a “violent felony” is commonly referred to as the “enumerated offenses clause” of the ACCA.

2276 (2013). The categorical approach requires a court to “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—i.e., the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute’s elements are the same as, or narrower than, those of the generic offense.” *Id.* at 2281. If “the state statute ‘sweeps more broadly’ than the federal definition, a conviction under it is not a career offender predicate” *United States v. Brown*, 765 F.3d 185, 189 (3d Cir. 2014) (citing *Descamps*, 133 S. Ct. at 2283).

B. State Conviction For Terroristic Threats Not A Violent Felony Under Elements Clause Of The ACCA

The year after the decision in *Descamps*, the Third Circuit determined, using the categorical approach, that the Pennsylvania state crime of “terroristic threats” under 18 Pa. Const. Stat. § 2706 could not constitute a predicate violent felony for ACCA sentencing enhancement purposes. *Brown*, 765 F.3d at 193. In so holding, the Third Circuit acknowledged that its own holding in the case *United States v. Mahone*,⁴ which recognized that a conviction for terroristic threats could—in some cases—constitute a violent felony, was abrogated by the Supreme Court’s decision in *Descamps*. *Brown*, 765 F.3d at 193. After the decisions in *Descamps* and *Brown*, therefore, the Pennsylvania crime of terroristic threats under 18 Pa. Const. Stat. § 2706 could not constitute a predicate violent felony for ACCA purposes under the elements clause.

While the decisions in *Descamps* and *Brown* made clear that the crime of terroristic threats could not meet the definition of a violent felony under the elements clause of the ACCA, the courts were left open to conclude that terroristic threats might otherwise qualify as a violent

⁴ 662 F.3d 651 (3d Cir. 2011) *abrogated by Descamps*, 133 S. Ct. 2276.

felony under the residual clause.⁵ It was not until the Supreme Court’s decision in *Johnson* to reject the residual clause in its entirety that a state conviction for terroristic threats was finally deemed ineligible as a predicate offense for ACCA enhancement purposes.

C. Petitioner Is Entitled To Relief

In view of the foregoing, Petitioner has established his entitlement to relief because after *Johnson*, a conviction for terroristic threats under 18 Pa. Const. Stat. § 2706 cannot be used as a predicate to enhance a defendant’s sentence. The Third Circuit made clear in *Brown* that after the Supreme Court’s decision in *Descamps*, the crime of terroristic threats could not meet the definition of a “violent felony” under the elements clause of the ACCA. The Supreme Court then eliminated the possibility that the crime of terroristic threats could otherwise meet the definition of a “violent felony” under the residual clause by expressly ruling the residual clause unconstitutional. Therefore, as Petitioner’s prior conviction for terroristic threats was one of the three ACCA predicates on which his enhanced sentence was based, and as Petitioner’s prior conviction for terroristic threats cannot—as a matter of law—constitute an ACCA predicate, then Petitioner is left with only two ACCA predicates. With only two ACCA predicates, instead of three, his enhanced sentence is no longer appropriate under the ACCA. Petitioner’s sentence must be vacated, and Petitioner must be resentenced accordingly.

In arguing against resentencing, the Government asserts that Petitioner’s Motion for

⁵ Indeed, some federal courts suggested, and in some cases concluded, that a state “conviction for terroristic threats . . . [was] similar to the enumerated offenses set forth in § 924(e)(2)(B)(ii)” such that it could be used as a predicate prior conviction to enhance a sentence under the ACCA. *United States v. Pratt*, Crim. No. 06-77, 2011 WL 6749031, *9 (citing *Mahone*, 662 F.3d 651 *abrogated by Descamps*, 133 S. Ct. 2276). *See also United States v. Imm*, 03-cr-63, 2014 WL 6774072, *3 (W.D. Pa. Dec. 1, 2014) (leaving a sentencing judge’s finding that a defendant’s prior conviction for terroristic threats could be an ACCA predicate undisturbed despite the Third Circuit’s holding in *Brown*, which explicitly rejected terroristic threats as a predicate under the elements clause of the ACCA definition of a violent felony).

Relief is untimely because Petitioner should have raised his claim for relief after the Supreme Court's decision in *Descamps* rather than after the decision in *Johnson*. Gov't's Resp. to Def.'s Mot. for Rel[ie]f 5, Doc. 48. The Court is unpersuaded by the Government's argument.

Instead, the Court concludes, consistent with a number of Courts of Appeals and a great number of our sister courts, that where, as here, the record is unclear as to whether the sentencing court relied upon the elements clause or the residual clause of the ACCA in order to find that a prior conviction constituted a predicate offense for enhanced sentencing purposes, then a petitioner need only establish that the judge may have relied upon the residual clause in order to state a claim for relief under *Johnson*.⁶ This conclusion comports with the logic articulated by the U.S. Court of Appeals for the Eleventh Circuit in *In re Chance*. 831 F.3d 1335. That the Eleventh Circuit's decision in *In re Chance* is particularly persuasive is supported by the fact that another court in this District recently adopted the Eleventh Circuit's approach. *See Ballard*, 2017 WL 2935725, *4 (stating that "[t]his Court agrees with the *Chance* court that imposing the

⁶ *See, e.g., United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (holding that "when an inmate's sentence may have been predicated on . . . [the] residual clause . . . the inmate has shown that he 'relies on' a new rule of constitutional law . . ."); *In re Chance*, 831 F.3d 1335, 1341 (11th Cir. 2016) (holding that petitioner need not affirmatively prove whether sentencing judge relied on elements or residual clause in enhancing sentence); *United States v. Christian*, 668 F. App'x 820, 821 (reversing district court decision denying § 2255 petition where petitioner had shown that sentencing judge relied "at least in part" on the residual clause"); *United States v. Ballard*, Cr. No. 03-810, 2017 WL 2935725, *4 (E.D. Pa. Jul. 10, 2017) (holding that § 2255 petitioner met his burden of showing entitlement for relief under *Johnson* by showing that "the [sentencing] court may have relied on the residual clause in sentencing him."); *United States v. Wolf*, No. 04-CR-347-1, 2016 WL 6433151, at *4 (M.D. Pa. Oct. 31, 2016) (holding same); *Thrower v. United States*, 234 F. Supp. 3d 372, 376 (E.D.N.Y. 2017) (holding that petitioner can satisfy burden of showing entitlement to relief under *Johnson* by "showing that the [sentencing] court may have relied on the residual clause during sentencing."); *United States v. Butler*, Cr. No. 12-46, 2017 WL 2304215, *4 (D.D.C. May 25, 2017) (holding that "it is sufficient for a criminal defendant to show that a sentencing judge might have relied on the residual clause in order to proceed"); *United States v. Wilson*, Cr. No. 96-0157, 2017 WL 1383644, *4 (D.D.C. Apr. 18, 2017) (holding that defendant "may bring a *Johnson 2015* claim without establishing that the sentencing judge actually relied on the residual clause").

burden on a movant to show that he or she was sentenced under the residual clause is the wrong approach.”).

In *In re Chance*, the Eleventh Circuit concluded that the Government’s position, which would require a petitioner to prove affirmatively that he was sentenced under the residual clause in order to qualify for relief under *Johnson*, was flawed in two respects. First, such a requirement would “impl[y] that the district judge deciding [a petitioner’s] upcoming § 2255 motion [could] ignore decisions from the Supreme Court that were rendered since [petitioner’s initial sentencing]” *In re Chance*, 831 F.3d at 1340. Second, such a requirement would unfairly disadvantage a petitioner as a result of the sentencing judge’s decision not to specify on what clause of the ACCA the judge relied in deciding that a prior conviction constituted a predicate offense. *Id.* This reasoning acknowledges the reality that sentencing judges are under no obligation to specify which clause of the ACCA the judge relies upon in enhancing a defendant’s sentence and, therefore, prisoners should not be penalized to the extent a judge does not state explicitly what clause she invokes in enhancing a defendant’s sentence. *Id.* This Court agrees with the approach taken by the Eleventh Circuit in *In re Chance*, which parallels the approach adopted by the Fourth Circuit and a multitude of district courts.⁷

In the present case, while the Government asserts that Petitioner’s “conviction for terroristic threats did not rest on the now invalidated residual clause, but instead was based on the elements clause that was not implicated in *Johnson*,” and, therefore, Petitioner’s Motion for Relief is untimely, the Court finds no support for this assertion in the record. *See generally* Tr. Feb. 10, 2014 Hr’g. The Court finds instead, that it is sufficient that the Petitioner has shown that the residual clause may have been the basis of his enhanced sentence in order for him to

⁷ *See supra* note 6.

raise his claim for relief under *Johnson*. Accordingly, Petitioner's Motion for Relief is timely. Under the circumstances presented in this case, Petitioner's Motion for Relief is also granted.

As a final note, the Court acknowledges that in addressing similar facts as those presented in this case, other courts have held that a petitioner may, in the wake of *Johnson*, assert an actual innocence exception to overcome what the Government in this case has framed as the Petitioner's untimeliness and/or procedural default. See, e.g., *Harris v. United States*, 757 F. Supp. 2d 1303, 1309–10 (S.D. Fla. 2010) (collecting cases in which courts have embraced this approach). Indeed, in *Harris*, the U.S. District Court for the Southern District of Florida concluded that a petitioner who may have procedurally defaulted on a challenge to the validity of his ACCA enhanced sentence may assert that he is, in essence, “actually innocent” of the aggravating factors that permitted enhancement under the ACCA and overcome his procedural default. *Id.* at 1310. This rule would, the district court reasoned, “avoid the fundamental miscarriage of justice which would otherwise result if petitioner were forced to serve an enhanced sentence which was not predicated on three valid convictions for ‘violent felonies’ or ‘serious drug offenses’ within the meaning of the ACCA.” *Id.*

Though the rationale set forth by the district court in *Harris* and other courts bears some weight, this Court need not expressly adopt the approach of this line of cases to resolve the present Motion for Relief. The Court notes this line of cases only to show that the argument raised by the Government in this case in opposing relief for Petitioner has been found unpersuasive by a number of courts for varying reasons. In sum, the Court, as stated above, concludes that Petitioner's showing that the sentencing court may have relied on the now unconstitutional and invalid residual clause is sufficient to establish Petitioner's entitlement to challenge his sentence in view of *Johnson*.

IV. CONCLUSION

For the foregoing reasons, Petitioner's Motion for Relief is GRANTED. An appropriate Order follows.

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

UNITED STATES OF AMERICA

v.

PERRY LEACH

:
:
:
:
:
:
:

CRIMINAL ACTION

NO. 12-406

ORDER

AND NOW, this __17th__ day of October, 2017, upon consideration of Petitioner Perry Leach’s Motion to Correct Sentence Under 28 U.S.C. § 2255 (“Motion for Relief”) (Doc. 42), the Government’s Response to the Defendant’s Motion for Rel[ie]f Under 28 U.S.C. § 2255 (Doc. 48), and Petitioner’s Reply Memorandum of Law in Support of Motion to Correct Sentence Under 28 U.S.C. § 2255 (Doc. 49), **IT IS HEREBY ORDERED AND DECREED** that Petitioner’s Motion for Relief is **GRANTED** as follows:¹

1. Petitioner’s criminal sentence in the above-captioned case is **VACATED**;
2. The United States Probation Office shall prepare a new Presentence Report consistent with the Order and Memorandum Opinion of this Court;
3. The Court shall schedule the case for resentencing after receipt of a new Presentence Report from the United States Probation Office; and
4. The Federal Community Defender Office for the Eastern District of Pennsylvania shall continue to represent Petitioner in this case and in connection with the future resentencing hearing;
5. Until resentencing, Petitioner’s sentence, as imposed on February 10, 2014, shall remain in effect.

¹ This Order accompanies the Court’s Memorandum dated October 17, 2017.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.