

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

UNITED STATES OF AMERICA

v.

HAROLD GRIFFIN

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Crim. No. 07-28-1

Diamond, J.

MEMORANDUM

September 18, 2018

Defendant Harold Griffin argues that because his four Pennsylvania convictions for second-degree robbery are not violent felonies under the Armed Career Criminal Act, he was improperly sentenced as a career criminal. (Doc. No. 125.) I agree and will vacate his sentence.

I. PROCEDURAL HISTORY

On January 18, 2007, the grand jury charged Griffin with possession of a firearm by a convicted felon. (Doc. No. 1); 18 U.S.C. § 922(g)(1). On February 7, 2008, after a four-day trial presided over by Judge Pollak (late of this Court), the jury found Defendant guilty. (See Doc. Nos. 46–50.)

The Armed Career Criminal Act subjects a defendant convicted under 18 U.S.C. § 922(g), who has three prior convictions “for a violent felony or a serious drug offense,” to a mandatory minimum sentence of fifteen years’ imprisonment. 18 U.S.C. § 924(e)(1). A “violent felony” is:

any crime punishable by imprisonment for a term 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 explosive, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. at § 924(e)(2)(B). The statute’s first clause is the “elements clause”; the second, the “residual clause.”

On June 3, 2009, Probation submitted a revised Presentence Investigation Report designating Defendant as an “armed career criminal” because he had five prior state-law robbery convictions (four second-degree robbery convictions and one first-degree robbery conviction); one prior state-law conviction for possession with intent to distribute a controlled substance; and one prior state-law misdemeanor conviction for conspiracy to commit robbery. (PSR ¶¶ 35–54); see also 18 Pa. C.S. § 3701.

Defendant argued that the five robberies should be treated as a single conviction under the ACCA because he pled guilty to all five during the same proceeding. (Doc. No. 58.) On November 11, 2011, Judge Pollak ruled that even if all five robberies are treated as a single conviction under the ACCA, Defendant would still qualify as an armed career criminal because his drug conviction was for a “serious drug offense,” and the misdemeanor criminal conspiracy offense also qualified as a “violent felony.” (Doc. No. 83.)

On May 15, 2012, this case was reassigned to me. (Doc. No. 81.) Absent the armed career offender designation, Defendant would have faced an advisory Guidelines range as low as sixty-three to seventy-eight months’ imprisonment. With the designation, however, Defendant’s Guidelines range rose to 210 to 262 months’ imprisonment, with a mandatory minimum of 180 months’ imprisonment. (PSR ¶¶ 98, 99.)

On July 12, 2012, I sentenced Defendant as an armed career criminal to 262 months’ imprisonment. (Doc. No. 95.) The Third Circuit upheld the conviction and sentence on July 29, 2014, explaining that each of Defendant’s five robberies constituted a separate violent felony for the purposes of the ACCA. United States v. Griffin, 582 F. App’x 119, 123 (3d Cir. 2014).

On June 4, 2015, Defendant filed a *pro se* § 2255 Motion, arguing, *inter alia*, that his sentence was illegal because the ACCA’s “residual clause”—which defines “violent felony” in

part as “conduct that presents a serious potential risk of physical injury to another”—was unconstitutionally vague. (Doc. No. 114); 18 U.S.C. § 924(e)(2)(B). On June 26, 2015, the Supreme Court held that the ACCA’s residual clause was unconstitutionally vague. Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). On April 18, 2016, the Supreme Court held that *Johnson* applied retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257, 1259 (2016).

On May 12, 2016, Defendant, now represented by the Federal Defender, moved to amend his *Pro Se* Petition. (Doc. Nos. 125, 126.) I granted the Motion, but stayed the action in accordance with Chief Judge Tucker’s administrative standing order regarding *Johnson* cases. (Doc. Nos. 127, 128, 129.) On December 14, 2016, Defendant moved to lift the stay and filed a supporting Memorandum of Law, arguing that because his four Pennsylvania second-degree robbery convictions are not violent felonies under the ACCA’s remaining “elements clause,” his sentence violates due process. (Doc. Nos. 130, 131.)

In its response, the Government argues that: (1) Defendant’s four second-degree robbery convictions qualify as violent felonies; and (2) even if the robberies are not violent felonies, I should deny habeas relief because Defendant has not shown either that the prior offenses were based on the statute’s residual clause (now unconstitutionally vague), or that his sentence was a miscarriage of justice. (Doc. No. 133.) Defendant has replied. (Doc. No. 136.)

The Parties apparently agree that Defendant’s conspiracy conviction is not a “violent felony” under the ACCA. Cf. United States v. Long Hoah Thanh, 2018 WL 3972297, at * 4 (N.D. Cal. Aug. 20, 2018) (“[T]he ‘overwhelming weight’ of recent district court authority holds that conspiracy to commit Hobbs Act robbery is not a ‘crime of violence’ under the elements clause.”). They also apparently agree that his controlled substances conviction qualifies under

the ACCA as a “serious drug offense.” The Government has not responded to Defendant’s argument that his first-degree robbery conviction is not a violent felony. (Gov’t’s Resp. 5 n.1, Doc. No. 133.) Even assuming, *arguendo*, that it is, this would give Defendant only two prior qualifying convictions. Accordingly, I must decide if any one of Defendant’s second-degree robbery convictions is a “violent felony” under the ACCA’s elements clause: whether 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(e)(2)(B).

II. CATEGORICAL APPROACH

To determine whether an offense is a “violent felony” under the ACCA, I must “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime.” Descamps v. United States, 570 U.S. 254, 257 (2013). “Elements are the constituent parts of a crime’s legal definition—the things the prosecution must prove to sustain a conviction.” Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (quotation marks omitted). “The prior conviction qualifies [as a violent felony] only if the statute’s elements are the same as, or narrower than, those of the generic offense.” Descamps, 570 U.S. at 257.

In making this comparison, I must first apply the “categorical approach,” allowing me to “look only to the [elements]’ of a defendant’s prior offenses, and *not* ‘to the particular facts underlying those convictions.’” Id. at 261 (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)). Where a statute “list[s] elements in the alternative, and thereby define[s] multiple crimes,” however, it is “divisible,” and I may apply the “modified categorical approach.” Mathis, 136 S. Ct. at 2249. Only then may I consider very limited “*Shepard* materials” (including charging documents and judgments) “to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” Descamps, 570 U.S. at 261. See

generally Shepard v. United States, 544 U.S. 13 (2005).

Accordingly, when “faced with an alternatively phrased statute,” I must first determine whether its alternatives are “elements” (the constituent parts of the legal definition that the prosecution must prove), or “means” (“various factual ways of committing some component of the offense [that] a jury need not find (or a defendant admit)” to convict). Mathis, 136 S. Ct. at 2256. If they are “means,” the statute is not divisible. Id. at 2249.

To determine whether listed alternatives are elements or means, I must consider the text of the statute: for example, where the “statutory alternatives carry different punishments” or “identify which things must be charged (and so are elements) and which need not be (and so are means).” Id. I may also consider state court decisions. Id. “[I]f state law fails to provide clear answers,” I may “peek” at the record of the prior conviction for “the sole and limited purpose of determining whether the listed items are elements of the offense.” Id. at 2256–57.

If the challenged statute provides alternative means, I may not “decide which of the statutory alternatives was at issue in the earlier prosecution.” Id. at 2256. If it provides alternative elements, however, I may then “review the record materials to discover which of the enumerated alternatives played a part in the defendant’s prior conviction, and then compare that element (along with all others) to those of the generic crime.” Id.

III. DISCUSSION

At the time of Defendant’s convictions, Pennsylvania’s second-degree robbery statute provided in relevant part that,

[a] person is guilty of robbery, if, in the course of committing a theft, he . . . inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury.

18 Pa. C.S. § 3701(a)(iv). The statute is thus comprised of three disjunctive subclauses:

infliction-of-injury; putting-in-fear; and threatening another.

A. The Second Degree Robbery Statute is Not Internally Divisible

I must first consider whether § 3701(a)(iv) is itself divisible (an issue not addressed by the Parties). See Mathis, 136 S. Ct. at 2256. If it is divisible, I may review the record documents to determine whether a second-degree robbery conviction was for “inflict[ion of] bodily injury,” or for “threaten[ing] another with or intentionally put[ting] him in fear of immediate bodily injury.” 18 Pa. C.S. § 3701(a)(iv).

The statute’s clauses are disjunctive, explicitly listing alternative means of commission, and so are not elements. Pennsylvania’s pattern jury instructions respecting § 3701(a)(iv) confirm this. See Mathis, 136 S. Ct. at 2257 (endorsing consideration of jury instructions).

Those instructions provide in relevant part:

To find the defendant guilty of [second-degree robbery], you must find that the following two elements have been proven beyond a reasonable doubt:
First, that the defendant: a. inflicted bodily injury on the victim; [or] b. threatened the victim with immediate bodily injury; [or] c. intentionally put the victim in fear of immediate bodily injury
Second, that the defendant did this during a theft.

Pa. SSJI (Crim), §15.3701B (2016) (brackets in original).

Significantly, the instruction provides that the crime has *two* elements, and lists all three subclauses under the first element. This confirms that a defendant may be found guilty of second-degree robbery if he either inflicts bodily injury, or threatens the victim with immediate bodily injury, or intentionally puts the victim in fear of immediate bodily injury. This is “as clear an indication as any that each alternative is only a possible means of commission.” Mathis, 136 S. Ct. at 2257. The statute is thus not divisible, and I may not consider *Shepard* documents to determine the bases of Defendant’s prior second-degree robbery convictions. Even if it were divisible, however, the *Shepard* documents are not helpful.

All four Informations (the charging documents under Pennsylvania law) provide that Defendant “inflict[ed] bodily injury upon another” and “threaten[ed] another with or intentionally put him in fear of immediate bodily injury.” (Doc. Nos. 131-1–131-3.) The corresponding judgments show that Defendant pled guilty only to “F-2” (second-degree felony). There is no mention of whether he pleaded guilty to inflicting injury, threatening the victim, or intentionally putting the victim in fear of immediate bodily injury. (Doc. Nos. 131-1–131-3.) Consequently, even if second-degree robbery were internally divisible, the modified categorical approach sheds no light on the question before me. See United States v. McNeal, Crim. No. 13-16, 2017 WL 5186385, at *4–5 (E.D. Pa. July 14, 2017) (declining to apply modified categorical approach to Pennsylvania first-degree robbery because *Shepard* documents did not demonstrate particular subsection of conviction); United States v. Singleton, No. 10-578-01, 2017 WL 1508955, at *7–8 (E.D. Pa. Apr. 26, 2017) (same).

In these circumstances, I must consider § 3701(a)(iv) as a whole—whether Defendant’s convictions under the statute necessarily established violent felonies.

B. Second-Degree Robbery Is Not a Violent Felony

Because § 3701(a)(iv) is not divisible, I must determine whether any of its three subclauses does not “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B). The statute’s infliction-of-injury subclause does not require intentional or knowing force. Accordingly, § 3701(a)(iv) is not a violent felony because the clause does not satisfy ACCA’s “use” requirement.

The Government apparently believes that the infliction-of-injury subclause requires the use of force because: (1) under the Supreme Court’s decision in *United States v. Voisine*, the ACCA’s use-of-force clause can be satisfied by reckless conduct; and (2) § 3701(a)(iv)’s

infliction-of-injury subclause satisfies *Voisine* because it requires the reckless infliction of bodily injury in the course of a theft. 136 S. Ct. 2272 (2016). The Government misreads *Voisine* and § 3701(a)(iv).

The ACCA Requires Intentional or Knowing Force

The Federal Criminal Code defines “crime of violence” as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. Applying this definition to several statutes—including the ACCA—the Third Circuit held that a “violent felony” requires intentional or knowing force. United States v. Lewis, 720 F. App’x 111, 114 (3d Cir. 2018); United States v. Mahone, 662 F.3d 651, 655 (3d Cir. 2011) (“[R]eckless or negligent conduct . . . would be insufficient to establish the intent necessary [for a crime of violence].”), abrogated in part on other grounds by United States v. Brown, 765 F.3d 278 (3d Cir. 2014); United States v. Otero, 502 F.3d 331, 335 (3d Cir. 2007) (Pennsylvania simple assault is not a crime of violence because it “requires a minimum *mens rea* of recklessness rather than intent,” and it is “settled law in this Circuit that an offender has committed a ‘crime of violence’ only if he acted with an intent to use force.”) (citing Popal v. Gonzalez, 416 F.3d 249, 254 (3d Cir. 2005)); Tran v. Gonzalez, 414 F.3d 464, 470 (3d Cir. 2005).

The Government argues that this wealth of authority is no longer good law—that the *Voisine* Court overturned all decisions that the ACCA requires intentional or knowing force. In fact, the *Voisine* Court explicitly limited its holding so that it would *not* necessarily apply to the ACCA.

Voisine held that “misdemeanor assault convictions for reckless (as contrasted to knowing or intentional) conduct trigger the statutory firearms ban” for a defendant previously convicted of a “misdemeanor crime of domestic violence” under 18 U.S.C. § 922(g)(9). *Voisine*, 136 S. Ct. at 2276. Like a “violent felony,” a “misdemeanor crime of domestic violence” includes offenses that “ha[ve], as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by” someone with a close relationship to the victim. 18 U.S.C. § 921(a)(33)(A)(ii). Relying on several dictionaries, the Court explained that “use” means “the ‘act of employing’ something,” and “is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.” *Voisine*, 136 S. Ct. at 2279.

Significantly, the *Voisine* Court relied in part on § 922(g)(9)’s stated goal of preventing domestic abusers from obtaining firearms. *See id.* at 2278 (“Statutory text *and background* alike lead us to conclude that a reckless domestic assault qualifies as a ‘misdemeanor crime of domestic violence’ under § 922(g)(9).” (emphasis supplied)). The Court thus explicitly refrained from deciding whether its definition of “use” would extend to other statutes, including 18 U.S.C. § 16—the statute that forms the basis of the Third Circuit’s determination that the ACCA requires intentional or knowing force:

[O]ur decision today concerning § 921(a)(33)(A)’s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings *in light of differences in their contexts and purposes*, and we do not foreclose that possibility with respect to their required mental states.

Voisine, 136 S. Ct. at 2280 n.4 (emphasis supplied)); accord *Baptiste v. Attorney General*, 841 F.3d 601, 607 n.5 (3d Cir. 2016); *United States v. Mahone*, 662 F.3d 651, 655 (3d Cir. 2011) (relying on interpretation of § 16 in *Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006)); *see also*

United States v. Lewis, 720 F. App'x 111, 114 (3d Cir. 2018) (ACCA requires intentional or knowing force) (citing United States v. Otero, 502 F.3d 331, 335 (3d Cir. 2007) (definition of “crime of violence” under § 16(a) is identical to definition under U.S.S.G. § 2L1.2’s enhancement for defendants “previously deported . . . after a conviction of a felony that is a crime of violence”)).

Undoubtedly relying on the limiting language in *Voisine*, the Third Circuit just this year again stated (in *dictum*) that “use” under the ACCA requires more than reckless force. Lewis, 720 F. App'x at 114. Because the *Voisine* Court did not decide whether “use of force” as provided in the ACCA includes reckless conduct, I remain bound by this Circuit’s holdings that such “use” must be knowing or intentional. Cf. United States v. Hill, 225 F. Supp. 3d 328, 339 (W.D. Pa. 2016) (“This Court must follow the Supreme Court’s directives and is likewise bound by the Third Circuit’s holdings that a conviction of Pennsylvania simple assault under § 2701(a)(1) is not categorically a crime of violence under the elements clause.”).

The Government also argues that § 3701(a)(iv) is a violent felony under the Third Circuit’s decision in *United States v. Dobbins*, 629 F. App'x 448 (3d Cir. 2015). The *Dobbins* Court addressed § 3701(a)(ii), however, not § 3701(a)(i) or (a)(iv), and thus did not determine whether a conviction under § 3701(a)(iv)’s infliction-of-injury subclause requires a “use” of force. Moreover, *Dobbins* was a non-precedential panel decision predating *Voisine*. The panel thus could not possibly have overturned the Circuit’s requirement of intentional or knowing force. See Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 5.7 (“The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court”); id. at 9.1 (“[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel.”). Indeed,

neither the panel nor the parties in *Dobbins* addressed whether Pennsylvania’s robbery statute satisfied the ACCA’s knowing-or-intentional force requirement. See Supp. Brief of Appellee at *13–17, United States v. Dobbins, 629 F. App’x 448 (3d Cir. 2015).

Accordingly, because a violent felony under the ACCA requires intentional or knowing force, violating § 3701(a)(iv) is not violent felony.

Finally, the rule of lenity counsels against interpreting the ACCA to include reckless conduct. “The rule of lenity provides that ‘when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant.’” United States v. Flemming, 617 F.3d 252, 269 (3d Cir. 2010) (quoting United States v. Pollen, 978 F.2d 78 (3d Cir. 1992)); accord Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

The word “use” in the ACCA is plainly ambiguous. The Supreme Court and the Third Circuit have interpreted “use” and “use of force” in other statutes to require intentional conduct, and, as I have explained, the *Voisine* Court explicitly declined to decide whether “use of force” has the same meaning in other statutes. See Voisine v. United States, 136 S. Ct. 2272, 2283 (2016) (Thomas, J., dissenting) (“We have routinely defined “use” in ways that make clear that the conduct must be intentional.”); Tran v. Gonzales, 414 F.3d 464, 470 (3d Cir. 2005) (“[T]he ‘use’ of force means more than the mere occurrence of force; it requires the intentional employment of that force, generally to obtain some end.”); see also Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (where statutory text is “plain and unambiguous . . . we must apply the statute according to its terms”). Moreover, the ACCA’s legislative history does not indicate whether

Congress intended to impose greater penalties on criminals who repeatedly commit crimes using unintentional force. In these circumstances, the rule of lenity counsels resolving the ACCA's ambiguity in favor of Defendant. The rule thus further confirms that Congress intended to require the imposition of more severe penalties only for the intentional or knowing use of force. For this reason as well, violating § 3701(a)(iv) is not a violent felony under the ACCA.

The Infliction-of-Injury Subclause Does Not Require Reckless Conduct

Even if the Government were correct—that *Voisine* overruled Third Circuit decisions requiring knowing and intentional use of force—it would still have to show that § 3701(a)(iv) requires the reckless use of force. Yet, the statute's language, case law, and pattern jury instructions all show that § 3701(a)(iv) does not include *any* mental culpability requirement with respect to the infliction of bodily injury. Accordingly, the statute does not even satisfy *Voisine*'s recklessness requirement.

Because the text of § 3701(a)(iv) makes no mention of *mens rea*, the Government argues that under Pennsylvania's default culpability statute, the infliction-of-injury subclause requires reckless infliction of a bodily injury. See 18 Pa. C.S. § 302(c) (“When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly, or recklessly with respect thereto.”). Yet, I am unable to find a single Pennsylvania decision requiring the Commonwealth to prove under Pennsylvania's second-degree robbery statute that the defendant acted recklessly when inflicting bodily injury. Indeed, case law shows just the opposite.

The Superior Court has held that robbery under § 3701(a)(1)(i)—which differs from § 3701(a)(iv)'s infliction-of-bodily-injury subclause only in that it proscribes infliction of *serious* bodily injury—does not require a culpable state of mind with respect to the infliction of injury.

Compare 18 Pa. C.S. § 3701(a)(1)(i), with id. at § 3701(a)(1)(iv). In *Commonwealth v. McCarthy*, the defendant argued that because “the Commonwealth did not present evidence that [the defendant] was aware that [his coconspirator] had a gun, it failed to present evidence of the requisite culpability to be an accomplice to § 3701(a)(1)(i) robbery.” No. 11 WDA 2014, 2016 WL 193402, at *5 (Pa. Super. Jan. 15, 2016). The Superior Court disagreed, ruling that “[w]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is *sufficient for the commission of the offense.*” Id. (emphasis supplied) (quoting 18 Pa. C.S. § 306(d)). The Superior Court explained that “§ 3701(a)(1)(i) does not require that the perpetrator intend to inflict serious bodily injury, it only requires that the perpetrator inflict serious bodily injury.” McCarthy, 2016 WL 193402, at *5; accord Commonwealth v. Flint, No. 2928 EDA 2014, 2015 WL 9306890, at *4 (Pa. Super. Dec. 22, 2015) (“[R]obbery does not require a *mens rea* of recklessness, which is an element of REAP.”); Commonwealth v. Payne, 2005 PA Super 62, ¶ 22, 868 A.2d 1257, 1263 (Pa. Super. 2005) (aggravated assault does not merge with § 3701(a)(i) robbery because aggravated assault requires the perpetrator to “‘cause [] . . . serious bodily injury to another . . . intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life,’” whereas “robbery [requires] the perpetrator [to] ‘*inflict[] serious bodily injury upon another*’” (quoting 18 Pa. C.S. §§ 2701(a)(iv), 2702(a)(1))); see also Commonwealth v. Rice, 383 A.2d 903, 905 (Pa. 1978) (3-3 decision) (defendant committed first-degree robbery by snatching a purse from an inebriated victim who then fell and suffered fatal head injuries); cf. Commonwealth v. Johnson, No. 2706 EDA 2013, 2015 WL 6169417, at *5 (Pa. Super. Feb. 23, 2015) (because robbery no longer requires “felonious intent to [steal] from the person, presence

or control of another,” “specific intent to steal, when accompanied by the use of force or the threat of the use of force, [is] sufficient to demonstrate the *mens rea* element of robbery”). Compare McCarthy, 2016 WL 193402, at *5, with State v. Sewell, 603 A.2d 21, 23–24 (N.J. 1992) (New Jersey’s derivative of the Model Penal Code requires knowing or intentional infliction of bodily harm).

Pennsylvania pattern jury instructions confirm that a defendant charged with second-degree robbery need not have a culpable mental state with respect to the infliction of injury. Rather, the instructions provide only that a defendant convicted under the infliction-of-injury subclause must intend to commit theft. See Pa. SSJI (Crim), §15.3701B (2016) (second-degree robbery requires infliction of injury “during a theft [T]heft means taking someone else’s property *intending not to give it back.*”) (emphasis added); see also Commonwealth v. Prosdocimo, 578 A.2d 1723 (Pa. 1990) (affirming trial court’s use of nearly identical pattern jury instruction for first-degree robbery).

The “least culpable conduct hypothetically necessary to sustain a conviction” for second-degree robbery thus does not require a reckless mental state with respect to the infliction of injury. United States v. Dahl, 833 F.3d 345, 350 (3d Cir. 2016) (quoting Hernandez-Cruz v. Att’y Gen., 764 F.3d 281, 285 (3d Cir. 2014)). Accordingly, even if *Voisine* overturned this Circuit’s knowing-or-intentional force requirement, second-degree robbery is not a violent felony under the ACCA’s elements clause.

C. Defendant Has Shown An Entitlement to Relief

Relying on *In re Moore*, the Government argues that because Defendant has not shown that he was sentenced under the residual clause, he has not shown that his Motion is based on the “new rule of constitutional law” set out in *Johnson*. 830 F.3d 1268 (11th Cir. 2016). The

Government has misread *Moore*. In *dictum*, the *Moore* Court stated that to file a second and successive § 2255 motion under *Johnson*, a defendant must “prove[] that he was sentenced using the residual clause and that the use of that clause made a difference in the sentence.” *Moore*, 830 F.3d at 1273. Yet, the Government does not argue that Defendant’s Motion is second and successive (or time barred, which could also require reliance on a “new rule of constitutional law”). See 28 U.S.C. § 2244(d)(1)(C). Accordingly, *Moore* does not apply.

Even assuming, *arguendo*, that Defendant must rely on a “new rule of constitutional law,” *Moore* does not bar relief. Other Circuits and this Court have declined to follow the *Moore* Court’s *dictum*. See *United States v. Winston*, 850 F.3d 667, 682 (4th Cir. 2017) (“Although the record does not establish that the residual clause served as the basis for concluding that Winston’s prior convictions for rape and robbery qualified as violent felonies, ‘[n]othing in the law requires a [court] to specify which clause . . . it relied upon in imposing a sentence.’ . . . 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.” (citation omitted) (quoting *In re Chance*, 831 F.3d 1335, 1340 (11th Cir. 2016), *abrogated by* *Curry v. United States*, 714 F. App’x 968 (11th Cir. 2018))); *United States v. Ballard*, No. 03-810, 2017 WL 2935725, at *4 (E.D. Pa. July 10, 2017). Rather, a defendant must “show only that the court *may* have relied on the residual clause in sentencing him.” *Ballard*, 2017 WL 2935725, at *4 (emphasis supplied); accord *United States v. Geozos*, 870 F.3d 890, 895–96 (9th Cir. 2017) (“[W]hen it is unclear whether a sentencing court relied on the residual clause in finding that a defendant qualified as an armed career criminal, but it may have, the defendant’s § 2255 claim ‘relies on’ the constitutional rule announced in *Johnson II*.”); *Winston*, 850 F.3d at 682.

Here, the record is silent as to whether Judge Pollak relied on the residual clause in finding that Defendant's second-degree robbery convictions were violent felonies. Judge Pollak did not refer to the elements clause during the hearing. Rather, he stated that Defendant's specific acts during the robberies "certainly would constitute a form of a crime of violence within the federal system." (Nov. 16, 2011 Hr'g Tr. 13:12–13, Doc. No. 83.) I, too, did not refer to the elements clause. During the sentencing hearing (well after I had stated that I would not revisit Judge Pollak's rulings), the Government stated that "these were no mere purse snatchings; they were robberies. And robbery . . . involve[s] an element of violence." (Sent. Hr'g Tr. 29:25–30:2, Doc. No. 107.) This statement had nothing to do, however, with whether Defendant's prior convictions were violent felonies under the elements clause. Rather, in discussing the § 3553(a) factors, the prosecution described the circumstances of two of the Pennsylvania robberies. Finally, in its PSR, Probation stated that conspiracy to commit robbery constitutes a violent felony. (PSR p. 23.) Probation did not, however, discuss the elements clause with respect to Defendant's second-degree robbery convictions, and, as I have explained, Judge Pollak did not discuss the elements clause at all.

Because the Sentencing Court thus "may have relied on the residual clause in sentencing" Defendant, he is entitled to seek relief under *Johnson*. Ballard, 2017 WL 2935725, at *4.

Finally, the Government argues that *Bousley v. United States*, Defendant must show that denying his Motion would result in a miscarriage of justice. 523 U.S. 614 (1998). That decision has nothing to do with the questions before me. The *Bousley* Court held that to challenge successfully the validity of his guilty plea, a Defendant was obligated to show that the plea has given rise to a miscarriage of justice. Bousley, 523 U.S. at 621–22. Here, Defendant is not challenging the validity of a guilty plea, and the Government does not argue that Defendant

procedurally defaulted his claim. See McQuiggin v. Perkins, 569 U.S. 383, 393 (2013). Accordingly, I conclude that Defendant is not required to show a miscarriage of justice.

IV. GUIDELINES CALCULATION

As I have explained, the Government did not address (and I need not decide) whether Defendant's first-degree robbery conviction constitutes a violent felony because, even if it does, Defendant still does not qualify for the armed career criminal designation under the ACCA. The effect all Defendant's convictions have on his Guidelines calculation will be addressed by Probation in its updated PSR and the Parties in their resentencing memoranda. See U.S.S.G. § 2K2.1(a)(2) (2008).

V. CONCLUSION

Although it seems counterintuitive, Defendant's second-degree robbery convictions under Pennsylvania law are not violent felonies under the ACCA. Accordingly, Defendant has, at most, only two prior convictions that qualify him for career offender status. I am thus compelled to vacate his sentence and resentence him without the career offender designation.

An appropriate Order follows.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.

September 18, 2018

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

UNITED STATES OF AMERICA

v.

HAROLD GRIFFIN

:
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:
:
:

Crim. No. 07-28-1

ORDER

AND NOW, this 18th day of September, 2018, upon consideration of Defendant's Amended Motion to Correct Sentence under 28 U.S.C. § 2255 and Supporting Memorandum (Doc. Nos. 125, 131), the Government's Response (Doc. No. 133), Defendant's Reply (Doc. No. 136), and the Government's Letter (Doc. No. 137) citing supplemental authority, it is hereby **ORDERED** that Defendant's Amended Motion (Doc. No. 125) is **GRANTED** as follows:

1. The Judgment (Doc. No. 96) entered against Defendant Harold Griffin is **VACATED**;
2. Defendant shall be **RESENTENCED** without a career offender designation;
3. **THE UNITED STATES OFFICE OF PROBATION** shall **PREPARE** a Presentence Investigation Report **no later than October 25, 2018**; and
4. A Notice of Hearing shall follow.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond

Paul S. Diamond, J.