

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION NO. 99-155-1
v.	:	
	:	CIVIL ACTION NO. 15-4244
MARTELL JOHNSON	:	

MEMORANDUM OPINION

RUFE, J.

December 14, 2015

Defendant Martell Johnson has filed a motion pursuant to 28 U.S.C. § 2255 seeking to vacate his sentence based on the Supreme Court’s recent decision in *United States v. Johnson*.¹ The Government opposes the motion and requests that it be denied. For the reasons discussed below, Defendant’s motion will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On June 14, 1999, Defendant Martell Johnson, represented by counsel, pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). On August 23, 1999, Defendant was sentenced to 235 months of imprisonment, supervised release for three years, and a special assessment of 100 dollars.² Defendant did not directly appeal the sentence.

Defendant was sentenced pursuant to the Armed Career Criminal Act (ACCA) based on three prior convictions, two for serious drug offenses and one for a violent felony. As a result, he was subjected to a mandatory minimum sentence of fifteen years of imprisonment.³ Defendant’s

¹ 135 S. Ct. 2551 (2015). The Supreme Court decision involved a different defendant with the last name Johnson, and has no relationship to this case.

² Doc. Nos. 24, 25. This case was reassigned to this Court from the docket of the late Honorable Charles R. Weiner after sentencing was imposed.

³ 18 U.S.C. § 924(e).

conviction for a violent felony was a 1994 state conviction for first-degree robbery.⁴ The criminal complaint alleged that:

At 21 and Erie, in concert with others, in the course of committing a theft the defendant did threaten or intentionally put another in fear of serious bodily injury/bodily injury by approaching the complainant Derrick Whitfield, and at point of simulated gun demanding his personal property and taking his Lorus wristwatch, two gold rings, and wallet containing \$22. Def threatened to “pop” compl because compl had trouble removing jewelry.⁵

On December 10, 2008, Defendant filed a *pro se* Motion to vacate his sentence under 28 U.S.C. § 2255,⁶ which the Court dismissed as untimely on December 28, 2009.⁷ On July 31, 2015, Defendant filed this *pro se* Motion pursuant to 28 U.S.C. § 2255, again seeking to vacate his sentence.⁸ The Government concedes that there is no procedural bar to Defendant’s motion.⁹ In the Motion, Defendant argues that under the Supreme Court’s recent decision in *Johnson*,¹⁰ his sentence was wrongly enhanced under the ACCA because his robbery conviction is not a violent felony.

⁴ Gov.’s Resp. at 14, Doc No. 62.

⁵ Gov.’s Resp. at 15, Doc No. 62.

⁶ Def’s Motion to Vacate, Set Aside, or Correct Sentence, Doc No. 39.

⁷ Memorandum Opinion and Order, Doc. Nos. 45, 46.

⁸ Def’s Motion to Vacate, Set Aside, or Correct Sentence, Doc. No. 60.

⁹ When the Supreme Court decides a new constitutional rule that is substantive, the new rule generally applies retroactively to convictions that are already final. *Schirro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The Government concedes that *Johnson* announces a new rule that has a substantive effect and thus is retroactive, because a sentence enhanced under the residual clause of the ACCA imposes unlawful punishment above the statutory maximum sentence. The Government further concedes that Defendant’s Motion is timely as it was filed within one year of the Supreme Court’s decision in *Johnson*, and it is not a second or successive petition because Defendant has not previously presented a 2255 motion that was adjudicated on the merits. *See e.g., United States v. Colon*, No 01-2771, 2002 WL 32351175, at *5 (E.D. Pa. Aug. 12, 2002) (“a § 2255 petition is successive when a prior § 2255 petition has been decided on the merits.”) (internal citations and quotations omitted).

¹⁰ 135 S. Ct. at 2563.

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.”¹¹ “Habeas corpus relief is generally available only to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.”¹²

It is within the district court’s discretion to determine whether it should order a hearing on a motion made under 28 U.S.C. § 2255.¹³ In exercising this discretion, the court first must determine whether the movant “has alleged facts, viewed in the light most favorable to him, that, if proven, would entitle him to relief.”¹⁴ Second, the court must determine whether a hearing is necessary to determine whether the factual allegations are true.¹⁵

III. DISCUSSION

Under the ACCA, a person who is convicted of the charge of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and has three prior convictions for “a violent felony or a serious drug offense, or both” must be sentenced to a minimum of fifteen

¹¹ 28 U.S.C. § 2255(a).

¹² *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

¹³ *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) (citation omitted).

¹⁴ *Gov’t of the Virgin Islands v. Weatherwax*, 20 F.3d 572, 574 (3d Cir. 1994).

¹⁵ *Id.*

years imprisonment.¹⁶ In 1999, when Defendant was sentenced as an armed career criminal, a violent felony was defined as an offense that is punishable by one year or more of imprisonment that: (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause), (2) “is burglary, arson, or extortion, [or] involves use of explosives” (the enumerated offenses clause), or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (“the residual clause”).¹⁷ In *Johnson*, however, the Supreme Court held that the third clause defining violent felony, the residual clause, violates defendants’ constitutional right to due process.¹⁸ The decision did not alter “the remainder of the Act’s definition of a violent felony.”¹⁹

Defendant argues that his sentence was wrongfully enhanced under the now unconstitutional residual clause of the ACCA. He contends that his robbery conviction was not a violent felony under the elements clause or the enumerated offenses clause of the ACCA, and thus that his sentence could only have been enhanced under the residual clause.²⁰ The Government argues that Defendant’s robbery conviction is a violent felony under the still-valid elements clause of the ACCA, and thus that Defendant’s sentence was lawfully enhanced.

Under Pennsylvania law, three offenses qualify as first degree robbery offenses:

(a)(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

¹⁶ 18 U.S.C. § 924(e)(1).

¹⁷ 18 U.S.C. § 924(e) (effective 1998).

¹⁸ 135 S. Ct. at 2563.

¹⁹ *Id.*

²⁰ Defendant does not dispute that he has two prior convictions that qualify as serious drug offenses under the ACCA and *Johnson* does not alter the definition of serious drug offenses under the ACCA.

- (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 degree²¹

Defendant concedes that subsections (a)(1)(i) and (ii) are violent felonies under the elements clause of the ACCA because they have “as an element the use, attempted use, or threatened use of physical force against the person of another.”²² However, he argues, he was convicted of robbery under subsection (a)(1)(iii) of the robbery statute, which may or may not be a violent felony under the elements clause of the ACCA depending on whether the first or second degree felony that was committed or threatened is itself a violent felony.²³ The Government responds that Defendant was charged and convicted under both subsections (a)(1)(ii), which is a violent felony, and (a)(1)(iii), for threatening to commit the violent felony of aggravated assault.

First, the Court will evaluate the section of the robbery statute under which Defendant was convicted. The Court will then assess whether that particular subsection qualifies as a violent felony under the ACCA.

A. Whether Defendant was Convicted of 18 Pa. C.S. § 3701(a)(1)(ii) or (a)(1)(iii)

Because the Third Circuit has held that the Pennsylvania robbery statute is divisible,²⁴ the Court may employ the modified categorical approach to determine the subsection of the robbery statute under which Defendant was convicted. In determining whether a defendant’s prior

²¹ 18 Pa. C.S. § 3701.

²² 18 U.S.C. § 924(e)(1).

²³ *United States v. Blair*, 734 F.3d 218, 225-26 (3d Cir. 2013) *cert. denied*, 135 S. Ct. 49 (2014) *reh’g denied*, 135 S. Ct. 743 (2014). In *Blair*, the Third Circuit found that the defendant committed or threatened to commit the first degree felony of aggravated assault and thus committed a violent felony under the ACCA, but that “some felonies of the first and second degree involve no violence.” *Id.* at 226.

²⁴ *Blair*, 734 F.3d at 225.

conviction is an ACCA predicate, courts generally apply the “categorical approach” and look only to “to the fact of conviction and the statutory definition of the prior offense.”²⁵ However, where the statute “comprises multiple, alternative versions of the crime,” it is divisible and the court may employ the modified categorical approach to determine whether the conviction is an ACCA predicate.²⁶ Under the modified categorical approach, the court may examine “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”²⁷

Although Defendant argues that he was convicted of first degree robbery under subsection (a)(1)(iii), he provides no support his claim. The language of the criminal complaint instead perfectly matches the language in subsections (a)(1)(ii), a first degree felony, and (a)(1)(iv), a second degree felony. While Defendant argues that this document is not a valid *Shepard* document, in Pennsylvania, the criminal complaint is the charging document and can be considered under the modified categorical approach.²⁸

The charging document states that Defendant “in the course of committing a theft...did threaten or intentionally put another in fear of serious bodily injury/bodily injury.”²⁹ Under (a)(1)(ii), “[a] person is guilty of robbery if, in the course of committing a theft he...threatens

²⁵ *Taylor v. United States*, 495 U.S. 575, 602 (1990).

²⁶ *Descamps v. United States*, 133 S. Ct. 2276, 2284, *reh'g denied*, 134 S. Ct. 41 (2013).

²⁷ *Shepard v. United States*, 544 U.S. 13, 16 (2005).

²⁸ *Garcia v. Attorney Gen. of United States*, 462 F.3d 287, 292 (3d Cir. 2006) (“In Pennsylvania, a criminal complaint is not merely a police report. It is the charging instrument, and in this case bears the imprimatur of the district attorney. The filing of a criminal complaint is sufficient to initiate criminal proceedings in the Commonwealth and Pennsylvania law does not require the subsequent filing of either an information or an indictment if a plea of guilty or nolo contendere is entered.”) (internal quotations omitted).

²⁹ Gov.’s Resp. at 15, Doc No. 62.

another with or intentionally puts him in fear of immediate serious bodily injury.”³⁰ Under (a)(1)(iv) “[a] person is guilty of robbery if, in the course of committing a theft he . . . threatens another with or intentionally puts him in fear of immediate bodily injury.”³¹ The charging document’s “course of committing a theft” and “threaten or intentionally put another in fear of *serious* bodily injury” language “is specifically akin”³² to the language in subsection (a)(1)(ii),³³ whereas the “course of committing a theft” language and “threaten or intentionally put another in fear of *bodily* injury” language “is specifically akin”³⁴ to the language in subsection (a)(1)(iv).³⁵ As the charging document is “framed in the same language”³⁶ as subsection (a)(1)(ii) and (iv), the only rational reading of both the robbery statute and the charging document is that Defendant was charged under both subsection (a)(1)(ii) and (iv). As only subsection (a)(1)(ii) is a first degree felony (subsection (a)(1)(iv) is a second degree felony), Defendant was convicted of subsection (a)(1)(ii). Defendant does not dispute that he was convicted of robbery in the first degree and the written documentation of Defendant’s guilty plea includes the notation “F-1” for first degree.³⁷ As a result, Defendant could have only been convicted of subsection (a)(1)(ii) of the robbery statute.

³⁰ 18 Pa. C.S. § 3701(a)(1)(ii).

³¹ 18 Pa. C.S. § 3701(a)(1)(iv).

³² *Blair*, 734 F.3d at 222-23.

³³ 18 Pa. C.S. § 3701(a)(1)(ii).

³⁴ *Blair*, 734 F.3d at 222-23.

³⁵ 18 Pa. C.S. § 3701(a)(1)(iv).

³⁶ *Blair*, 734 F.3d at 222-23.

³⁷ Gov.’s Resp. at 14, Doc No. 62; *Blair*, 734 F.3d at 222 (“Each of Blair’s signed guilty pleas includes the notation ‘F1’ (indicating first-degree) ‘Robbery.’”) (internal citations omitted).

In contrast, the language in the charging document does not plausibly match the elements of the subsection under which Defendant argues he was convicted, subsection (a)(1)(iii). As a result, the charging document makes clear that Defendant was not charged with this subsection.

B. Whether 18 Pa. C.S. § 3701(a)(1)(ii) is a Violent Felony under the Elements Clause of the ACCA

Because Defendant could only have been convicted of robbery under § 3701(a)(1)(ii), if this type of robbery is a violent felony under either the elements clause or the enumerated offenses clause of the ACCA, Defendant’s sentence was lawfully enhanced. Although Defendant concedes that robberies under (a)(1)(ii) are violent felonies under the elements clause of the ACCA, the Court will still conduct this final step of the analysis.

Under the enumerated offenses clause of the ACCA, “burglary, arson, or extortion, [or] [crimes] involv[ing] use of explosives” and that are punishable by a term of imprisonment for more than one year are violent felonies.³⁸ As Defendant’s conviction was not for any of these offenses and did not involve explosives, it is not a violent felony under this clause.

Under the elements clause of the ACCA, a crime is a violent felony if it is punishable by a term of imprisonment for more than one year and contains “as an element the use, attempted use, or threatened use of physical force.”³⁹ “Physical force” means “*violent* force—that is, force capable of causing physical pain or injury to another person.”⁴⁰ As Defendant was convicted of “threaten[ing] another with or intentionally put[ting] him in fear of immediate serious bodily injury,”⁴¹ he was convicted of a crime that has as an element threatened force capable of causing

³⁸ 18 U.S.C. § 924(e)(2)(B)(ii).

³⁹ 18 U.S.C. § 924(e)(2)(B)(i).

⁴⁰ *Johnson v. United States*, 559 U.S. 133, 140 (2010).

⁴¹ 18 Pa. C.S. § 3701(a)(1)(ii).

physical pain or injury.⁴² Additionally, robbery under (a)(1)(ii) is punishable by more than one year of imprisonment.⁴³ As a result, Defendant was convicted of a violent felony under the elements clause of the ACCA, and was properly sentenced as an armed career criminal.

IV. CONCLUSION

For the reasons stated above, Defendant's claim conclusively fails to establish that his sentence was unlawfully enhanced under the residual clause of ACCA. As a result, his Motion will be denied without hearing. Because Defendant has not made a substantial showing of the denial of a constitutional right, a certificate of appealability shall not issue.⁴⁴

⁴² See *United States v. Thompson*, No. 12-418-5, 2014 WL 6819973, at *4 (E.D. Pa. Dec. 4, 2014) (finding that a conviction under 18 Pa. C.S. § 3701(a)(1)(ii) requires the use or threatened use of force capable of causing physical pain or injury to another person); *United States v. Horton*, 461 F. App'x 179, 184 (3d Cir.2012) (holding that assault statute prohibiting the attempt to cause significant bodily injury requires the use of force sufficient to cause physical pain or injury).

⁴³ 18 Pa. C.S. § 1103 (stating that first degree felonies are punishable by up to 20 years imprisonment).

⁴⁴ 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION NO. 99-155-1
v.	:	
	:	CIVIL ACTION NO. 15-4244
MARTELL JOHNSON	:	

ORDER

AND NOW, this 14th day of December 2015, upon consideration of Defendant’s Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 [Doc. No. 60], 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 **DENIED**. No certificate of appealability shall issue, and no evidentiary hearing shall be held. The Clerk is directed to **CLOSE** this case.

IT IS SO ORDERED.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.