

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION NO. 10-325-01  
 :  
 ANTHONY REID : CIVIL ACTION NO. 15-5040  
 :

**MEMORANDUM**

**SURRICK, J.**

**DECEMBER 18, 2015**

Presently before the Court is Petitioner Anthony Reid's *pro se* Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (ECF No. 108.) For the following reasons, the Motion will be denied.

**I. BACKGROUND**

On September 4, 2009, Anthony Reid ("Petitioner"), along with his codefendant Brian Williams, committed a robbery of an armored car. (Gov't's Resp.1, ECF No. 110.) Reid and Williams took \$100,000 from the driver of the armored car when he was loading money into an automated teller machine ("ATM"). (*Id.* at 1-2.) After brutally attacking the guard and taking his firearm, Reid and his co-conspirator fled in a nearby getaway car. (*Id.* at 2.) During the high-speed chase that followed, Reid drove the car while his coconspirator fired a handgun at the police officers who pursued them. (*Id.*) The chase ended when Reid crashed the car into a parked car. (*Id.*) At the accident scene, Reid drew a handgun and pointed it at the police officers. (*Id.*) Several officers responded by discharging their firearms. (*Id.*) During the gunfire, Reid was stuck in his leg multiple times. (*Id.*) One of the police officers was shot in the face. (*Id.*) Reid and Williams were subsequently detained. (*Id.* at 1-2.)

On May 13, 2010, Reid was charged in a four-count indictment with conspiracy to commit robbery which interfered with interstate commerce, in violation of 18 U.S.C. § 1951(a) (Count 1); interference with interstate commerce by robbery, in violation of 18 U.S.C. § 1951(a) (Count 2); carrying and using firearms during a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (Count 3); and being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (Count 4). (*Id.* at 1; Indict., ECF No. 2.) In February 2011, a jury in the Eastern District of Pennsylvania found Reid guilty on all four counts. (*See* ECF No. 63.)

At sentencing, it was established that Reid was subject to the Armed Career Criminal Act (“ACCA”) enhancement. He was therefore subjected to a fifteen-year mandatory minimum sentence on Count 4. (Gov’t’s Resp. 4.) At the sentencing hearing on October 13, 2013, the effective sentencing guideline range was determined to be 384-465 months. Reid was sentenced to a total period of incarceration of 300 months. (*Id.*) Reid’s sentence consisted of concurrent terms of incarceration of 240 months on Count One and Count Two; 180 months incarceration on Count Four, to run concurrently with Counts One and Two; and a consecutive term of 60 months incarceration on Count Three.<sup>1</sup>

On September 2, 2015, Reid filed this Motion *pro se* pursuant to 28 U.S.C. § 2255. (Petr’s Mot., ECF No. 108.) On October 9, 2015, the Government filed a response.

## **II. LEGAL STANDARD**

Under § 2255, a federal prisoner may move the sentencing court to vacate, set aside, or correct a sentence “upon the ground 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

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<sup>1</sup> We note that granting the relief requested here by Reid would not affect Reid’s sentence in any practical way. The 180-month term of imprisonment on Count Four runs concurrently with the 240-months term imposed with respect to Count One and Count Two.

such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). Relief under this provision is generally available “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.” *United States v. DeLuca*, 889 F.2d 503, 506 (3d Cir. 1989).

The statute provides, as a remedy for a sentence imposed in violation of the law, that “the court 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. Reid asserts that he was sentenced under an unconstitutional statute.

The Court may in its discretion hold an evidentiary hearing on a § 2255 petition. *See Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). However, such a hearing need not be held if the “motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b); *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

### **III. DISCUSSION**

Reid argues that he is entitled to be resentenced without the ACCA enhancement because the U.S. Supreme Court recently declared the statute’s residual clause unconstitutional in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Pet’r’s Mot. 5.) After a thorough review, we are satisfied that *Johnson* simply does not apply to this case. The Motion will therefore be denied and no certificate of appealability will issue.

#### **A. Timeliness**

Section 2255 motions are subject to a one-year statute of limitations. Under subsection (f), that one-year clock starts to run from the latest of the following dates:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted 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; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Reid seeks relief under subsection (f)(3). Under that subsection, the limitations period begins when the new right on which the habeas action is based is first recognized by the Supreme Court and given retroactive application to cases on collateral review.

28 U.S.C. § 2255(f)(3). Reid bases his Motion on the “new” rule announced in *Johnson*, which was decided on June 26, 2015. *See Johnson*, 135 S. Ct. at 2551. Since Reid filed this Motion on September 2, 2015, it is timely under § 2255(f)(3).

Subsection (f)(3) concerns new rules only. A new rule is one that is not dictated by precedent. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). By its terms, subsection (f)(3) is a vehicle for relief only when the new rule has been given retroactive application. Those courts which have considered whether *Johnson* announces a new rule that may be retroactively applied to cases on collateral review have reached differing results. *Compare Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) (“There is no escaping the logical conclusion that the Court itself has made *Johnson* categorically retroactive to cases on collateral review.”) with *In re Williams*, 806 F.3d 322, 325-26 (5th Cir. 2015) (holding that *Johnson* announced a new substantive rule, but that it could not be applied retroactively on collateral review); *In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) (“Although we agree that *Johnson* announced a new substantive rule of constitutional law, we reject the notion that the Supreme Court has held that the new rule should be applied retroactively on collateral review.”). The Third Circuit has not yet spoken on the

issue. We will, out of an abundance of caution, assume that the rule announced in *Johnson* is “new” and should be applied retroactively.<sup>2</sup>

## **B. Merits**

Under federal law, convicted felons are prohibited from possessing firearms. 18 U.S.C. § 922(g). Violations of § 922(g) are generally punishable by a term of up to 10 years imprisonment. 18 U.S.C. § 924(a)(2). However, § 924(e)—otherwise known as the ACCA—provides that a person who has three previous convictions for a “violent felony,” a “serious drug offense,” or both is subject to a mandatory minimum of fifteen years imprisonment. 18 U.S.C. § 924(e)(1). It was determined at sentencing that Reid committed at least three prior violent felonies. He therefore received the ACCA sentencing enhancement. The ACCA defines “violent felony” as follows:

[A]ny 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 explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B)(i) and (ii)(emphasis added). The Supreme Court in *Johnson* ruled that the italicized language, which is commonly called the ACCA’s “residual clause,” violates the Constitution’s guarantee of Due Process because it is impermissibly vague. *Johnson*, 135 S. Ct. at 2563 (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.”). Reid acknowledges that the Supreme Court’s decision applies only to the ACCA’s residual clause. As so limited, the *Johnson* decision does not affect the ACCA’s application to Reid’s sentence.

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<sup>2</sup> The Government in its response assumes without discussion that the rule is new and should be applied retroactively.

The first subsection under the ACCA’s “violent felony” definition is referred to as the “elements clause.” Since *Johnson* did not call its validity into question, the ACCA enhancement remains appropriate where a violator’s three prior convictions qualify as crimes of violence under the Act’s elements clause. *Id.* (“Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.”). We are satisfied that Reid had been previously convicted of at least three violent felonies—as defined by the ACCA’s elements clause—at the time of his sentencing. Relief under *Johnson* is therefore unavailable.

An offender cannot be said to have committed a violent felony as defined by the ACCA’s elements clause unless the offense had an element of either attempted or threatened use of physical force. 18 U.S.C. § 924(e)(2)(B)(i). The Supreme Court has instructed that the phrase “physical force” means “violent force—that is, force capable of causing physical pain or injury to another person.” *United States v. Hollins*, 514 F. App’x 264, 267 (3d Cir. 2012) (quoting *Johnson v. United States*, 559 U.S. 133, 135 (2010)). Therefore, the ACCA’s elements clause is applicable only where the violator committed at least three predicate offenses that fit within the definition of violent felonies. Reid’s criminal history, which is significant, contains at least three prior Pennsylvania robbery convictions that may be properly characterized as violent felonies under the ACCA’s elements clause.<sup>3</sup>

Under Pennsylvania law that was in effect at the time of Reid’s conduct,

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;

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<sup>3</sup> The criminal history includes ten prior convictions and seventeen prior arrests.

- (iii) commits or threatens immediately to commit any felony of the first or second degree;
- (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
- (v) physically takes or removes property from the person of another by force however slight.<sup>4</sup>

18 PA. CONS. STAT. § 3701(a)(1) (amended in 2010).

As the Government correctly notes, until the Supreme Court decided *Johnson* (2010), the Third Circuit’s view was that any violation of § 3701(a)(1)—regardless of which subsection was violated—constituted a violent felony for purposes of the ACCA. *See, e.g., United States v. Cornish*, 103 F.3d 302, 309 (3d Cir. 1997). Analyzing the Supreme Court’s guidance in *Johnson* (2010), the Third Circuit later held that § 3701(a)(1)’s fifth subsection, which penalizes “robbery by force, *however slight*, no longer satisfies” the ACCA’s definition of a crime of violence. *Hollins*, 514 F. App’x at 268 (emphasis added). The teachings of *Johnson* (2010) and *Hollins* do not affect the outcome of Reid’s request for habeas relief. At least three of Reid’s prior convictions relate to conduct proscribed by subsection (iv) of Pennsylvania’s robbery statute. We are aware of no authority suggesting that violations of the fourth subsection of § 3701(a)(1) do not qualify as violent felonies under the ACCA. In fact, courts that have considered the issue have held that subsection (iv) continues to qualify as a violent felony—even in light of *Johnson* (2010). *See, e.g., McCode v. Ziegler*, No. 13-21542, 2014 WL 4215874, at \*6 (S.D.W. Va. Aug. 4, 2014) *adopted by* 2014 WL 4215876 (S.D.W. Va. Aug. 25, 2014).

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<sup>4</sup> Section 3701 was enacted as part of 1972, Dec. 6 P.L. 1482, No. 334 § 1 and was made effective June 6, 1973. The statute was amended by 1976, June 24, P.L. 425, No. 102 § 1, which was made effective immediately. Section 3701 was not amended again until 2010. *See Pennsylvania v. Jannett*, 58 A.3d 818, 821 (Pa. Super. Ct. 2012) (“The Legislature recently added Section 3701(a)(1)(vi) to the robbery statute, effective May 15, 2010. This created a lesser included offense; however, the Legislature did not amend or delete the previous forms of robbery . . .”).

The U.S. Supreme Court and the Third Circuit have provided a framework for analysis here. Where a sentencing court must decide “whether a previous conviction counts as a ‘violent felony’ under the ACCA, [it] may look only to the elements of a defendant’s prior conviction, not ‘. . . to the particular facts underlying those convictions.’” *United States v. Abbott*, 748 F.3d 154, 157 (3d Cir. 2014) (quoting *Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013)). This method of analysis is commonly called the “categorical approach.” *See id.* In cases such as this—where the “statute underlying a prior conviction lists multiple, alternative elements, rather than a single, indivisible set of elements,” “a sentencing court may look beyond the elements of a prior conviction to decide if it can serve as an ACCA predicate offense.” *Id.* (internal quotation marks and citation omitted). This inquiry is commonly called “the modified categorical approach.” *Id.* In other words, where a statute has divisible subsections, the modified categorical approach allows courts to look beyond the statute to determine which particular subsection served as the basis for the predicate conviction. Then, as with the traditional categorical approach, courts determine whether that particular subsection proscribes “violent,” physical force. Although Pennsylvania’s robbery statute is divisible, analysis here employs only the traditional categorical approach since we have determined that subsection (iv) served as the basis for each of Reid’s predicate convictions. We need not consider any of the underlying facts of Reid’s prior convictions to make this determination.

At the time of his sentencing, Reid had been convicted of committing robbery in violation of § 3701(a)(1) at least three times between 1985 and 2005.<sup>5</sup> (Pa. Docket No. 51-CR-0618452-1985, at 2 (Pa. Commw. Ct. 1985); Pa. Docket No. 51-CR-0804091-1996, at 2 (Pa.

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<sup>5</sup> Reid was also convicted of Robbery—which was graded a felony in the *first* degree—in 2011 for an offense that occurred in 2009. (*See* Pa. Docket No. 51-CR-0000160-2010.)

Commw. Ct. 1986); Pa. Docket No. 51-CR-0202411-2005, at 3 (Pa. Commw. Ct. 2005)).<sup>6</sup> As indicated on Reid’s criminal docket sheets, each state robbery conviction was a felony in the second degree. *See id.* It necessarily follows that each conviction was based only on a violation of § 3701(a)(1)’s fourth subsection.<sup>7</sup> As already noted, the Pennsylvania robbery statute included only five subsections when Reid committed each of the aforementioned robberies. Of those, subsection four alone was graded as a second-degree felony. 18 PA. CONS. STAT. § 3701(b)(1) (2005) (amended in 2010). Violations of subsections one through three constituted first degree felonies, and a violation of subsection five was a felony in the third degree. *See id.* Therefore, up until § 3701(a)(1) was amended in 2010, a person who committed a robbery of the second degree could be said to have violated only § 3701(a)(1)’s fourth subsection. Accordingly, it is clear that Reid was convicted of violating § 3701(a)(1)’s fourth subsection in the three prior instances.

Addressing next the question of whether a conviction based on a violation of § 3701(a)(1)’s fourth subsection may appropriately serve as a predicate offense under the ACCA, a person who violates § 3701(a)(1)(iv) commits a “violent felony” as described in 18 U.S.C.

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<sup>6</sup> We note that reliance on uncertified docket reports is proper. The Third Circuit “has never established a per se rule that certified copies of a conviction must be offered by the government before a judge may determine a defendant’s career offender status . . . .” *United States v. Howard*, 599 F.3d 269, 272 (3d Cir. 2010). In fact, the Third Circuit expressly declined the invitation to establish “a per se rule that certified copies of the judgments of conviction [be] required in every case before a sentencing court may determine that the defendant’s prior convictions are for violent felonies under the Armed Career Criminal Act.” in. *Id.* (internal quotation marks omitted) (citing *United States v. Watkins*, 54 F.3d 163, 168 (3d Cir. 1995)). Uncertified docket entries “are the type of judicial records that are permissible for sentencing courts to use to establish past convictions for sentencing purposes.” *Howard*, 599 F.3d at 273.

<sup>7</sup> A finding that a particular subsection of § 3701(a)(1) was the lone basis for Reid’s robbery convictions is permissible under the law. *See United States v. Blair*, 734 F.3d 218, 225 (3d Cir. 2013) (“Given the clearly laid out alternative elements of the Pennsylvania robbery statute, it is obviously divisible . . .”).

§ 924(2)(B)(i). By its terms, a conviction under subsection four of Pennsylvania’s robbery statute requires a finding that the violator “inflict[ed] bodily injury upon another” or that he “threaten[ed] another with or intentionally put him in fear of immediate bodily injury.” 18 PA. CONS. STAT. § 3701(a)(1)(iv). Since 1973, Pennsylvania has defined “bodily injury” as the “[i]mpairment of physical condition or substantial pain.” 18 PA. CONS. STAT. § 2301. Given the degree of harm required, it is apparent a conviction under subsection (iv) requires the use or threatened use of “physical force” within the meaning of the ACCA—i.e., “*violent* force—that is force capable of causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140 (emphasis in original); cf. *United States v. Horton*, 461 F. App’x 179, 184 (3d Cir. 2012). Thus, Reid’s convictions under § 3701(a)(1)’s fourth subsection are violent felonies. They are therefore appropriate predicate offenses for ACCA purposes.

This record conclusively shows that Reid is entitled to no relief. No hearing is necessary to rule on this matter. *See* 28 U.S.C. § 2255(b). Since Reid’s Motion is meritless, the Motion will be denied.

### **C. Certificate of Appealability**

To qualify for a certificate of appealability, a habeas litigant must demonstrate, among other things, that reasonable jurists would debate whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Since no reasonable jurist would disagree with our assessment of Reid’s claims, no certificate of appealability can issue. *See id.*

**IV. CONCLUSION**

For the foregoing reasons, Petitioner Anthony Reid's Motion to Vacate, Set Aside, or Correct Sentence will be denied and no certificate of appealability will issue.

An appropriate Order follows.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read "R. Surrick", is written over a light gray circular stamp.

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**R. BARCLAY SURRECK, J.**

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION NO. 10-325-01  
 :  
 ANTHONY REID : CIVIL ACTION NO. 15-5040  
 :

**ORDER**

**AND NOW**, on this 18<sup>th</sup> day of December, 2015, upon consideration of Petitioner Anthony Reid's *pro se* Motion to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 (ECF No. 108), and all documents submitted in support thereof and in opposition therein, it is **ORDERED** as follows:

- A. Petitioner's Habeas Corpus Motion under 28 U.S.C. § 2255 is **DENIED**.
- B. No Certificate of Appealability shall issue.

**IT IS SO ORDERED.**

**BY THE COURT:**



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**R. BARCLAY SURRICK, J.**