IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Respondent,	)	Case No. 16 C 6268
v.	)	
	)	Judge Robert W. Gettleman
LASHON BROWNING,	)	
	)	
Petitioner,	)	

MEMORANDUM OPINION AND ORDER

Petitioner Lashon Browning filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence.[1] The government opposes this motion. For the reasons discussed below, petitioner's motion is denied.

BACKGROUND

Petitioner was convicted of one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) on March 17, 2005. The court found that petitioner had three prior convictions that qualified as "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1) ("ACCA"), and sentenced him to 240 months' imprisonment. Petitioner's predicate convictions were a 1992 armed robbery, a 1994 armed robbery, and a 1994 aggravated battery. All of the convictions were under Illinois law. Had the court not found that petitioner was an Armed Career Criminal under the ACCA, his maximum sentence under 18. U.S.C. § 922(g) would have been 120 months' imprisonment.

[1] Petitioner's criminal case No. 02 CR 1168, was tried by then-Judge Anderson. This court will refer to that proceeding as the "sentencing court."

DISCUSSION

Petitioner filed the instant motion on June 24, 2016. In his motion, petitioner asserts that after Samuel[2] Johnson v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257 (2016), his predicate convictions no longer qualify as violent felonies under the ACCA. According to petitioner, it follows that his sentence is unconstitutional.

I. Legal Standard

Section 2255 allows a person convicted of a federal crime to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255. Relief pursuant to § 2255, however, "is appropriate only for 'an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" See Harris v. United States, 366 F.3d 593, 594 (7th Cir. 2004) (quoting Borre v. United States, 940 F.2d 215, 217 (7th Cir. 1991)). When considering a § 2255 motion, the district court reviews the record and draws all reasonable inferences in favor of the government. See Carnine v. United States, 974 F.2d 924, 928 (7th Cir. 1992).

II. Analysis

A. Timeliness

Respondent argues that petitioner's claims were untimely. The court disagrees. Petitioner filed his motion June 24, 2016, within one year of the Supreme Court's decision in Samuel Johnson (June 26, 2015). Samuel Johnson established a "newly recognized" right that is "retroactively applicable to cases on collateral review." See Welch, 136 S. Ct. 1257 (2016). Specifically, Samuel Johnson invalidated the residual clause of the ACCA.[3]

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[2] Because there are more than one cases discussed herein in which the defendant's last name is Johnson, the court will refer to the 2015 Supreme Court decision as "Samuel Johnson."

[3] Prior to Samuel Johnson, the ACCA defined violent felony as follows: . . .continue

Respondent's untimeliness argument is premised on the notion that petitioner's Samuel Johnson claim is a claim based on Descamps v. United States[4] in disguise. See In re Hires, 825 F.3d 1297, 1303 (11th Cir. 2016). Again, the court disagrees. In Descamps, the petitioner was sentenced under the enumerated clause of the ACCA. He argued that the sentencing court misapplied the enumerated clause, and his burglary conviction could not qualify as an ACCA predicate because the statute he was convicted under was broader than the "generic crime" enumerated by the ACCA. Descamps, 133 S. Ct. at 2282. The Supreme Court agreed, holding that if a predicate conviction was under an indivisible statute, that is, a statute which does not contain alternative elements, the reviewing court must use a "formal categorical approach," or "look only to the statutory definitions," not "to the particular facts underlying those convictions," in determining whether the petitioner's predicates qualify under the ACCA. Id. at 2283 (citing Taylor v. United States, 495 U. S. 575 (1990)). A conviction under an indivisible statute 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. Petitioner cites Descamps to support this particular rule of statutory interpretation, but his "newly recognized" right is based entirely on the invalidation of the residual clause of the ACCA in Samuel Johnson.

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continue . . .
(B) the term "violent felony" means 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 explosives, *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 comprises the residual clause, which the Supreme Court held is unconstitutionally vague. Samuel Johnson, 135 S. Ct. 2551. The remaining portion of (B)(ii) is known as the enumerated clause. 18 U.S.C. § 924(e)(2)(B)(i) is known as the elements clause.

[4] 133 S. Ct. 2276 (2013).

Respondent argues that petitioner in the instant case brings the same argument as the petitioner in Descamps, but applies it to the elements clause rather than the enumerated clause; thus petitioner's claim is a Descamps argument under the guise of Samuel Johnson. This argument is misguided. The petitioner does not claim that the sentencing court misapplied the elements clause, but rather that the sentencing court *could not have applied* the elements clause; thus, the court must have relied on the residual clause.[5] Cf. Dawkins v. United States, 809 F.3d 953, 956 (7th Cir. 2016); Douglas v. United States, 2017 WL 2413442 (7th Cir. June 5, 2017) (holding that § 2255 motions that challenge a sentence based on the elements clause are unaffected by Samuel Johnson). Petitioner's claim is timely.

B. Procedural Default

Respondent also argues that petitioner's motion is procedurally defaulted because petitioner did not "demonstrat[e] cause and prejudice for his failure to raise the claims before his sentencing or on direct appeal." Doc. 12 at 9. The court disagrees.

Although respondent is correct that petitioner must clear the "cause and actual prejudice" hurdle to obtain collateral relief, see United States v. Frady, 456 U.S. 152, 166, 167 (1982), petitioner has done so. As petitioner argues, the Supreme Court has ruled that when:

> [A] decision of this Court . . . explicitly overrule[s] one of our precedents . . . there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted. Consequently, the failure of a defendant's attorney to have pressed such a claim before a state court is sufficiently excusable to satisfy the cause requirement.

Reed v. Ross, 468 U.S. 1, 17 (1984).

[5] Petitioner's predicates are not enumerated offenses under the ACCA.

Samuel Johnson explicitly overruled James v. United States, 550 U.S. 192 (2007). Samuel Johnson, 135 S. Ct. at 2563. Petitioner has shown cause.

Petitioner's actual prejudice is clear. The statutory maximum for a conviction of possession of a firearm under 18 U.S.C. § 922(g) is 120 months. Petitioner was sentenced to 240 months' imprisonment under the ACCA, double the statutory maximum. Had petitioner not been convicted under the ACCA, his sentence would have been 120 months at the most. Petitioner, having showed "cause and actual prejudice," is not procedurally barred from bringing his claim.

C. Petitioner's Claims

According to respondent, petitioner's predicate offenses are unaffected by Samuel Johnson because the court did not resort to the ACCA's residual clause in determining that petitioner's prior offenses were violent felonies. See Stanley v. United States, 827 F.3d 562 (7th Cir. 2016).

Respondent argues that the sentencing court did not rely on the residual clause of the ACCA, therefore petitioner's offenses are beyond Samuel Johnson's reach and his motion should be denied. See Stanley, 827 F.3d 562 (holding that convictions that do not resort to the residual clause do not "reopen[] all questions about the proper classification of prior convictions under . . . the Armed Career Criminal Act"). Petitioner argues that because the sentencing court did not specify which clause it relied on, Samuel Johnson not only opens the door to his habeas claim, it invites an inquiry into whether petitioner's prior offenses qualify as predicates under the ACCA without the residual clause.

It cannot be determined from the record which clause the sentencing court relied upon in determining that petitioner was a career offender under the ACCA. Prior to Samuel Johnson, ambiguity in enhanced sentences under the ACCA was common, likely because sentencing courts could rely upon the broad and now unconstitutional residual clause of the ACCA when applying

the career offender enhancements. United States v. Bennett, 2016 WL 5719443 (N.D. Ind. Sep. 30, 2016); United States v. Carrion, 2017 WL 662484 (D. Nev. Feb. 17, 2017). Respondent argues that, because the district court found that the predicates were "crimes of violence," the sentencing court had no need to resort to the ACCA's residual clause. Doc. 12 at 7. This argument is circular and unpersuasive. Because petitioner's predicate convictions were for unenumerated offenses, petitioner's sentence is necessarily based on either the elements clause *or* the residual clause, but the district court did not specify which part of the ACCA it relied on in determining that petitioner was a career offender.

Without clear indication from the sentencing court regarding which clause petitioner's sentence relied upon in determining petitioner is a career offender, and there being no procedural bars to petitioner's § 2255 claim, this court must determine whether petitioner's predicates qualify as violent felonies under the elements clause; whether petitioner's predicates "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)(i).

These are not questions of first impression. The Seventh Circuit has held that petitioner's prior offenses of armed robbery and aggravated battery qualify as predicates under the elements clause of the ACCA.[6]

[6] Some courts would now consider whether petitioner can use modern case law to support his arguments or is limited to case law at the time of his conviction. United States v. Christian, 668 F. App'x. 820 (9th Cir. 2016). Respondent does not dispute that modern case law is appropriate to determine whether petitioner's predicates qualify as violent felonies under the ACCA. Therefore, the court does not reach this question.

1. Illinois Aggravated Battery

Petitioner was convicted of two counts of aggravated battery in 1994. Simple battery can be elevated to aggravated battery for a number of reasons. Relevant to the instant case, "a person who, in committing a battery, intentionally or knowingly causes great bodily harm . . ." or "knows the individual to be a peace officer, a person summoned and directed by a peace officer, or a correctional institution employee . . ." are independently sufficient. Because one can be convicted of aggravated battery under either of the two prongs, petitioner's convictions, by themselves, do not establish that he committed a violent crime. See United States v. Rodriguez-Gomez, 608 F.3d 969, 973 (7th Cir. 2010). The court must therefore determine which prong petitioner was convicted under. Id. In doing so, the court is permitted to consult limited documents, one of which is the charging document. Id. (citing Shepard v. United States, 554 U.S. 13, 16 (2005)).

The Shepard documents reveal that petitioner was convicted of two counts of aggravated battery under Illinois Revised Statutes 1989, Chap. 38, Section 12-4-B (". . . knows the individual to be a peace officer . . ."). These convictions could arguably be classified as non-violent felonies. However, petitioner was also convicted of one count of aggravated battery under Section 12-4-A (". . . intentionally or knowingly causes great bodily harm."). Petitioner argues that the force required under Section 12-4-A of the statute is broader than that required by the ACCA and is therefore not encompassed by the elements clause.

The Supreme Court has defined the ACCA term "violent force" as "force capable of causing physical pain or injury to another person." Curtis Johnson v. United States, 559 U.S. 133, 140 (2010). The Seventh Circuit has consistently ruled that an aggravated battery conviction under the "great bodily harm" prong requires force sufficient to satisfy the elements clause of the ACCA. Hill v. Welinger, 695 F.3d 644, 649-50 (7th Cir. 2012); United States v. Rodriguez-Gomez, 608

F.3d 969, 973 (7th Cir. 2010); United States v. Aviles-Solarzano, 623 F.3d 470, 474 (7th Cir. 2010). The court is bound by this precedent.

The court agrees that simple battery convictions, or aggravated battery convictions elevated only by the status of the victim or where the battery took place, would likely be too broad to be considered a violent felony under the elements clause of the ACCA. United States v. Hampton, 675 F.3d 720, 731 (7th Cir. 2012); Flores v. Ashcroft, 350 F.3d 666, 670 (7th Cir. 2003). This, however, is not such a case. Petitioner was sentenced under the "great bodily harm" prong of the aggravated battery statute. Because petitioner's aggravated battery conviction qualifies as a "violent felony" under the elements clause of the ACCA, there was no need for the sentencing court to resort to the residual clause.

2. Illinois Armed Robbery

Petitioner was twice convicted of armed robbery, once in 1992 and again in 1994. According to Illinois law "[a] person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." 720 ILCS 5/18-2. Section 18-1 reads: "a person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1.

Petitioner argues that because the Illinois robbery statute is indivisible, and because the force sufficient for robbery can be as slight as the force required to remove the property from the person, the statute is too broad to fall within "violent force" as used in the elements clause of the ACCA. See United States v. Rodriguez, 925 F.2d 1049, 1052 (7th Cir. 1991). Petitioner further argues that there is no "meaningful distinction to be made between robbery and armed robbery under Illinois law." Doc 6 at 13. Because armed robbery can be committed by "merely carrying a

dangerous weapon" during the commission of robbery, petitioner argues that an armed robbery conviction is too broad to fall under the elements clause of the ACCA. To support his proposition, petitioner cites United States v. Parnell, 818 F.3d 974 (9th Cir. 2016), which held that a similarly structured armed robbery statute in Massachusetts did not qualify as a "violent felony" under the elements clause of the ACCA.

Respondent does not contest that the Illinois robbery statute is indivisible, but argues that because robbery categorically involves intimidation, it must involve the threatened use of force sufficient to satisfy the ACCA, that is, "force capable of causing physical pain or injury to another person." United States v. Saunders, No. 15 C 8587, 2016 WL 1623296; Curtis Johnson 559 U.S. 133; United States v. Enoch, 2015 WL 6407763 (N.D. Ill. Oct. 21, 2015). Respondent further argues that the Seventh Circuit has consistently ruled that armed robbery is a violent felony within the scope of 18 U.S.C. § 924(e)(2)(B)(i). See United States v. Dickerson, 901 F.2d 579 (7th Cir. 1990). The court agrees.

Post-Curtis Johnson and Descamps, the Seventh Circuit has explicitly ruled that robbery (and, as is the case for petitioner, armed robbery) categorically falls within the elements clause of the ACCA. United States v. Smith, 669 Fed. Appx. 314, (7th Cir. 2016); Sedgwick Johnson v. United States, No. 16-2101, 2016 U.S. App. LEXIS 14105, at 1-2 (7th Cir. June 9, 2016) (each affirming the Appellate Court's reasoning from Dickerson). The court is bound by this precedent. Accordingly, petitioner's armed robbery convictions fall under the elements clause of the ACCA and are therefore predicate offenses without resort to the now unconstitutional residual clause. Because petitioner's three prior convictions qualify as violent felonies under the elements clause of the ACCA, his 28 U.S.C. § 2255 motion is denied.

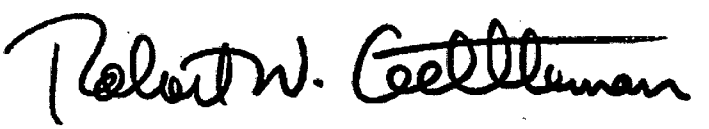
III. Certificate of Appealability

Under Rule11(a) of the Rules Governing Section 2255 Proceedings, the district court must either issue or deny a certificate of appealability when it enters a final order adverse to the petitioner. Petitioner is entitled to a certificate of appealability only if he can make a substantial showing of the denial of a constitutional right. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). To make a substantial showing, petitioner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 437, 484 (2000) (internal quotation omitted). Given recent developments in case law relating to whether petitioner's armed robbery convictions qualify as predicate offenses under the ACCA, the court finds that such a showing has been made and will issue a certificate of appealability.

CONCLUSION

For the reasons discussed above, petitioner's § 2255 motion to vacate his sentence is denied on the merits and his case before this court is terminated. The court will issue a certificate of appealability.

ENTER: June 26, 2017



Robert W. Gettleman
United States District Judge