# APPENDIX

17-2189
*Coleman v. United States*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of January, two thousand nineteen.**

PRESENT:

ROBERT A. KATZMANN,
*Chief Judge*,
AMALYA L. KEARSE,
*Circuit Judge*,
JEFFREY A. MEYER,
*District Judge*.[*]

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TAJIE COLEMAN,

*Petitioner-Appellant*,

v. No. 17-2189

UNITED STATES OF AMERICA,

*Respondent-Appellee*.

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For Petitioner-Appellant: Daniel Habib, Of Counsel, Federal Defenders of New York, Inc., New York, NY.

[*] Judge Jeffrey A. Meyer, of the United States District Court for the District of Connecticut, sitting by designation.

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| For Respondent-Appellee: | Elinor L. Tarlow, Karl Metzner, Assistant United States Attorneys, *for* Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY. |

Appeal from an order of the United States District Court for the Southern District of New York (Daniels, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the order of the district court is **AFFIRMED**.

Tajie Coleman appeals from an order entered on May 3, 2017, denying his motion to vacate his sentence pursuant to 28 U.S.C. § 2255. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

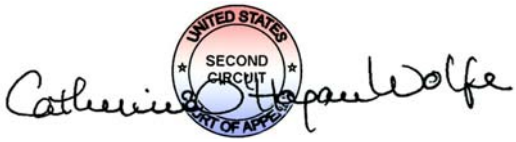
Coleman is currently serving a fifteen-year mandatory minimum sentence based on three prior New York state convictions for robbery in the third degree, attempted robbery in the second degree, and attempted robbery in the third degree, which the district court determined all qualified as violent felony convictions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Coleman argues that this Court should vacate his sentence because the force sufficient to establish the New York robbery crimes of which he was convicted falls well short of the "*violent* force . . . capable of causing physical pain or injury" required to satisfy ACCA's elements clause. *Johnson v. United States*, 559 U.S. 133, 140 (2010). Coleman has conceded, however, that his argument is foreclosed by this Court's recent decision in *United States v. Pereira-Gomez*, which stated that all degrees of New York robbery and attempted robbery qualify as crimes of violence under the November 1, 2014 edition of the U.S. Sentencing Guidelines, *see* 903 F.3d 155, 166 (2d Cir. 2018). That Guideline and ACCA use identical language to describe the violence component. *Compare* 18 U.S.C. § 924(e)(2)(B) (defining a

violent felony as any crime punishable by imprisonment for more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another") *with* Application Note 1(B)(iii) of Section 2L1.2 of the November 2014 U.S. Sentencing Guidelines (defining a crime of violence to include any state law offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

We have considered all of petitioner's remaining contentions on appeal and have found in them no basis for reversal. Accordingly, the order of the district court denying petitioner's motion to vacate his sentence is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

-against-

TAJIE COLEMAN,

Defendant.

MEMORANDUM DECISION AND ORDER

13 Cr. 596 (GBD)

GEORGE B. DANIELS, United States District Judge:

Before this Court is Defendant Tajie Coleman's motion to vacate his September 8, 2015 sentence pursuant to 28 U.S.C. § 2255. (Mot. to Vacate, ECF No. 37.) Coleman argues that his 180 month custodial sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is unlawful in light of recent case law. For the reasons set forth below, Coleman's motion is DENIED.

## I. PROCEDURAL HISTORY

On January 8, 2014, Coleman pleaded guilty to possession of a firearm following a felony conviction, in violation of 18 U.S.C. § 922(g)(1). On September 8, 2015, Coleman was sentenced to 180 months' imprisonment, the mandatory minimum required by ACCA, and five years of supervised release. The ACCA sentence was premised on Coleman's three prior robbery convictions, including: (1) a 2008 conviction for third-degree robbery (N.Y. Penal Law § 160.05); (2) a 2011 conviction for attempted second-degree robbery (*id.* § 160.10); and (3) a 2011 conviction for attempted third-degree robbery (*id.* § 160.05). (*See* Sept. 8, 2015 Sent. Tr., ECF No. 33, at 10-11.)

On September 21, 2016, Coleman filed a motion to vacate under 28 U.S.C. § 2255. In submissions dated March 13 and April 17, 2017, the Government opposed Coleman's motion on the ground that his sentence was calculated correctly under the ACCA.

## II. ACCA

The ACCA imposes a sentence of at least fifteen years' imprisonment for any individual convicted of violating 18 U.S.C. § 922(g) who "has three previous convictions . . . for a violent felony or serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that falls into one of three categories: "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "force clause"); is burglary, arson, extortion, or involves use of explosives (the "enumerated offenses clause"); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B).

In *Johnson v. United States*, 559 U.S. 133, 141 (2010) ("*2010 Johnson*"), the Supreme Court held that the "physical force" element of ACCA requires "violent force—that is, force capable of causing physical pain or injury to another person." Accordingly, a Florida offense of battery by "actually and intentionally touching" another person did not constitute an ACCA "violent felony." *Id.* at 138.

In a subsequent decision revisiting the ACCA, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) ("*2015 Johnson*"), the Court held that increasing a defendant's sentence under ACCA's residual clause violates due process. The next year, the Court held that *2015 Johnson* applied retroactively. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

On July 21, 2016, the Second Circuit Court of Appeals, relying on *2010 Johnson*, held that "a conviction for first-degree robbery in New York is not in every instance a conviction for a

'crime of violence'" under Sections 4B1.1(a) and 4B1.2(a) of the U.S. Sentencing Guidelines ("USSG"). *United States v. Jones*, 2016 WL 3923838 (2d Cir. July 21, 2016), *vacated by* 2016 WL 5791619 (2d Cir. Oct. 3, 2016). The panel's opinion reasoned that forcible stealing alone, absent other aggravating factors, did not necessarily involve the use of violent force.[1] However, on October 3, 2016, the Second Circuit vacated *Jones* pending the Supreme Court's disposition in *Beckles v. United States*. *United States v. Jones*, 838 F.3d 296 (2d Cir. 2016).[2]

## III. COLEMAN'S ACCA SENTENCE

A prisoner in federal custody may move to vacate, set aside or correct his sentence only "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 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). Coleman argues that, following the two *Johnson* decisions and the Second Circuit's vacated decision in *Jones*, none of his robbery convictions qualifies as ACCA "violent felonies." (*See* Mot. to Vacate at 2.) That is, for both second-degree and third-degree robberies under New York law, the physical force required is categorically less than the "violent force" necessary for ACCA predicate offenses. (*See* Reply Letter, ECF No. 45, at 4.) In opposition, the Government argues that *Jones* is not currently the law, and that Coleman's prior convictions still qualify as ACCA "violent felonies" under binding Second Circuit case law. (*See* Mem. L. in Opp'n ("Opp'n Mem."), ECF No. 42.)[3]

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[1] Although *Jones* is a Sentencing Guidelines case, cases interpreting the definition of "crime of violence" in the Guidelines are highly persuasive in interpreting the ACCA definition of "violent felony." *See United States v. Walker*, 595 F.3d 441, 443 n.1 (2d Cir. 2010).

[2] On March 6, 2017, the Supreme Court ruled in *Beckles v. United States*, 137 S. Ct. 886 (2017), that the Sentencing Guidelines are not subject to vagueness challenges under the due process clause.

[3] Although Coleman's motion indicates that the Government consented to vacatur and resentencing, the Government has made clear that it "can no longer agree that Coleman's decision should be vacated" following the Second Circuit's decision to vacate *Jones*. (Opp'n Mem. at 8 n.1.)

Having reviewed the parties' submissions, this Court denies Coleman's motion for post-conviction relief. The Second Circuit has held that attempted robbery in the third degree, in violation of N.Y. Penal Law § 160.05, is a "violent felony" under the ACCA. *United States v. Brown*, 52 F.3d 415, 426 (2d Cir. 1995). Although Coleman argues that *Brown* was abrogated by the Supreme Court's decision in *2010 Johnson*, (Reply Letter at 1), the Second Circuit has continued to endorse *Brown* in recent years. *See Belk v. United States*, No. 16-765, 2016 WL 1587223, at *1 (2d Cir. Apr. 19, 2016) (citing *Brown* in holding that petitioner's robbery convictions qualified as ACCA predicates under the force clause); *United States v. Miles*, 748 F.3d 485, 490 (2d Cir. 2014) (citing *Brown* in finding that third-degree robbery satisfies ACCA force clause); *United States v. Williams*, 526 F. App'x 29, 37 (2d Cir. 2013); *see also United States v. Bogle*, 522 F. App'x 15, 19 (2d Cir. 2013) (holding that second-degree attempted robbery qualifies as ACCA predicate offense); *United States v. Kornegay*, 641 F. App'x 79, 85 (2d Cir 2016) (holding that second-degree robbery convictions are categorically crimes of violence under the career offender guideline). In *Williams*, 526 F. App'x at 36-37, albeit a summary order, the Second Circuit relied on *Brown* in holding that both third-degree and attempted second-degree robbery categorically qualify as "violent felonies" for purposes of the ACCA. In light of these decisions, all three of Coleman's robbery convictions are ACCA predicate offenses.

Coleman relies heavily on *Jones*, arguing that its reasoning should control even if the decision lacks precedential effect. (Reply Mem. at 5-11.) But the Second Circuit has vacated *Jones*, rendering it a "nullity" that has no persuasive authority in this case. *Rainey v. United States*, No. 14-CR-197, 2017 WL 507294, at *3 n.3 (S.D.N.Y. Feb. 7, 2017); *see also Boone v. United States*, No. 02-CR-1185, 2017 WL 398386, at *1 (S.D.N.Y. Jan. 30, 2017) (finding that courts in this District are bound by *Brown*'s holding that robbery is a "crime of violence" within the meaning of the ACCA, "unless and until the Second Circuit itself holds otherwise").

In conclusion, Coleman's three robbery convictions qualify as "violent felonies" under the ACCA, and his sentence should not be set aside.

## IV. CONCLUSION

Defendant's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 is DENIED. The Clerk of the Court is directed to close the motion at ECF No. 37.

Dated: New York, New York
May 2, 2017

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SO ORDERED.

George B. Daniels

GEORGE B. DANIELS
United States District Judge