UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FREDDRICK BALDWIN,	:	
	:	
Petitioner,	:	
	:	REPORT &
-against-	:	RECOMMENDATION
	:	16-CV-3350 (ERK) (SMG)
UNITED STATES OF AMERICA,	:	97-CR-0164 (ERK)
	:	
Respondent.	:	

GOLD, STEVEN M., U.S.M.J.:

INTRODUCTION

Petitioner Freddrick Baldwin ("Baldwin" or "Petitioner") moves under 28 U.S.C. § 2255(a) to vacate his sentence. Motion to Vacate, Docket Entry 76; Petitioner's Memorandum of Law in Support ("Pet'r's Mem.") at 2, Docket Entry 87.[1] On June 27, 2018, Senior United States District Judge Edward R. Korman referred petitioner's motion to me for Report and Recommendation. Order dated June 27, 2018. For the reasons set forth below, I respectfully recommend that Baldwin's petition be granted.

Baldwin was convicted by a jury in October 1997 of one count of being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). Pet'r's Mem. at 4; Judgment, Docket Entry 55. A conviction under § 922(g)(1) carries with it a maximum penalty of ten years of imprisonment. 18 U.S.C. § 924(a)(2). A defendant with three prior "violent felony" convictions, though, is subject to a higher Sentencing Guidelines range and a sentence of fifteen years to life under the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e).

[1] All docket entry references are to the docket in 97-CR-0164.

Baldwin's criminal record includes three robbery convictions: a first-degree robbery conviction imposed pursuant to New York Penal Law § 160.15(2) on November 15, 1983; a third-degree robbery conviction imposed pursuant to New York Penal Law § 160.05 on April 2, 1982; and a third-degree robbery conviction imposed pursuant to New York Penal Law § 160.05 on October 23, 1989. Pet'r's Mem. at 3. At Baldwin's sentencing, the Court concluded that his three prior robbery convictions were predicate offenses triggering application of the ACCA. Transcript of Sentencing Hearing held on September 3, 1998 ("Tr."), 12:20-23, Docket Entry 58; *see also* Presentence Investigation Report ¶¶ 26, 29-30, Docket Entry 93. On September 3, 1998, having determined that Baldwin was subject to the ACCA, the Court imposed a sentence of 300 months (twenty-five years) in custody. Pet'r's Mem. at 5; Tr. 10:9-18. Baldwin, who has apparently been detained since his arrest on January 24, 1997, is currently scheduled to be released on February 22, 2019. Order of Detention, Docket Entry 3; Pet'r's Mem. at 5 n.5.

Petitioner now challenges his sentence on the grounds that his convictions for third-degree robbery are not violent felonies for purposes of the ACCA, and that his twenty-five year prison sentence should be vacated because it exceeds the ten year maximum applicable to convictions for violating 18 U.S.C. § 922(g)(1). Pet'r's Mem. at 7. Because he has now served approximately twenty-one years on what he contends should have been a ten-year sentence, Baldwin moves this Court to vacate his sentence and order his immediate release. *Id.* at 32.

DISCUSSION

I. The "Force Clause" of the ACCA

As noted above, the provision of the ACCA at issue here subjects a defendant convicted under § 922(g)(1) to an enhanced sentence if he has three prior convictions for a "violent

felony." 18 U.S.C. § 924(e). Three clauses of the ACCA define those offenses that qualify as a "violent felony":

(1) The "force" or "elements" clause, § 922(e)(2)(B)(i), which defines a "violent felony" as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another";

(2) The "enumerated offenses" clause, § 922(e)(2)(B)(ii), which states that a crime is a violent felony if it "is burglary, arson, or extortion, or involves use of explosives"; and

(3) The "residual" clause, § 922(e)(2)(B)(ii), which includes in the definition those crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

18 U.S.C. § 924(e)(2)(B).

In *Johnson v. United States* ("*Johnson II*"), 135 S. Ct. 2551, 2557, 2563 (2015), the Supreme Court held that the "residual" clause was impermissibly vague and therefore unconstitutional. The Supreme Court subsequently held in *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016), that *Johnson II* announced a new substantive rule and therefore applies retroactively to cases on collateral review. Because his three robbery convictions were not for "enumerated offenses" and because the holding in *Johnson II* that the "residual" clause is unconstitutional applies retroactively, petitioner's enhanced sentence was properly imposed only if each meets the definition of "violent felony" in the "force" or "elements" clause.

II. Robbery in the Third Degree Is Not a Violent Felony

Courts determine whether a predicate offense qualifies as a "violent felony" by employing what is known as the "categorical approach." *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018).[2] Under this approach, courts "'look only to the statutory definitions'—*i.e.*, the elements—of [the] . . . offense[], and *not* 'to the particular [underlying] facts.'" *Id.* (alteration in

[2] Petitioner and the government both agree that the categorical approach is properly applied here. Pet'r's Mem. at 13-15; Respondent's Memorandum of Law in Opposition at 3, Docket Entry 92.