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.

original) (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013); *see also Johnson II*, 135 S. Ct. at 2557. The "focus [is] on the intrinsic nature of the offense rather than on the circumstances of the particular crime. Consequently, only the minimum criminal conduct necessary for conviction under a particular statute is relevant." *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006); *see also Stuckey v. United States*, 878 F.3d 62, 67 (2d Cir. 2017) ("[W]e . . . compare the minimum conduct necessary for a state conviction with the conduct that constitutes a 'violent felony' under the ACCA. If the statute 'sweeps more broadly'—i.e., it punishes activity that the federal statute does not encompass—then the state crime cannot count as a predicate 'violent felony' for the ACCA's fifteen-year mandatory minimum." (internal citation omitted) (quoting *Descamps*, 570 U.S. at 261)), *petition for cert. docketed*, No. 17-9369 (2018).

Under New York law, a person is guilty of robbery in the third degree "when he forcibly steals property." N.Y. Penal Law § 160.05. New York law further provides as follows:

> A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> (1) Preventing or overcoming resistance to the taking of the property or the retention thereof immediately after the taking; or
>
> (2) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00. New York's definition of third-degree robbery mirrors the ACCA's definition of a violent felony. *Compare* N.Y. Penal Law § 160.00 (defining "robbery" and "forcibly steal[ing] property" as occurring when a person "uses or threatens the immediate use of physical force upon another person"), *with* § 924(e)(2)(B)(i) (defining 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").

Although both the ACCA and New York's robbery statute refer to the use or threatened use of physical force, the Supreme Court has construed the phrase "physical force" in the ACCA to mean only "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States* ("*Johnson I*"), 559 U.S. 133, 140 (2010) (emphasis in original). In reaching its conclusion, the Supreme Court explicitly rejected the government's contention that "physical force" incorporated the common law definition of force, or "the intentional application of unlawful force against the person of another," which could "be satisfied by even the slightest offensive touching." *Id.* at 139. Rather, emphasizing "the context of a statutory definition of '*violent* felony,'" the Court held physical force for purposes of the ACCA must be force that is "substantial" and "strong." *Id.* at 140 (emphasis in original).

Prior to *Johnson I*, the Second Circuit had held that a conviction for attempted third-degree robbery under New York law qualifies as a violent felony under the ACCA. *United States v. Brown*, 52 F.3d 415, 425-26 (2d Cir. 1995). *Johnson I*, though, calls into question the continued vitality of the holding in *Brown* that third-degree robbery qualifies as an ACCA predicate offense.

Courts that have considered the question after *Johnson I* are divided over whether New York's third-degree robbery qualifies as a "violent felony" for the purposes of the ACCA. The Second Circuit has not definitively addressed the issue since *Johnson I*. In a decision it later vacated, though, the Circuit did hold that an analogous force clause in the Sentencing Guidelines could not be applied to a New York robbery conviction. *United States v. Jones*, 878 F.3d 10, 14 (2d Cir. 2017).

Several decisions of this Court and the Southern District of New York, moreover, after examining New York state robbery cases, have held that third-degree robbery is not a violent felony for purposes of the ACCA. *See, e.g.*, *United States v. Davis*, 2018 WL 3085204, at *6-7 (E.D.N.Y. June 22, 2018) (collecting cases and holding that "third-degree robberies in New York are not violent felonies within the meaning of the ACCA"); *Austin v. United States*, 280 F. Supp. 3d 567, 571-73 (S.D.N.Y. 2017) (also collecting cases and holding that *Brown* will "almost certainly be overruled," because New York's robbery statute does not categorically require "substantial" and "strong" violent force as defined by *Johnson I*), *appeal docketed*, No. 18-4 (2d Cir. 2018); *Thrower v. United States*, 234 F. Supp. 3d 372, 384-85 (E.D.N.Y. 2017) (concluding that *Johnson I* implicitly overruled *Brown* and that "third degree robbery and attempted third degree robbery under New York law do not necessarily involve the use of 'violent force'"), *appeal argued*, No. 17-445 (2d Cir. Apr. 19, 2018); *United States v. Johnson*, 220 F. Supp. 3d 264, 272 (E.D.N.Y. 2016) (finding that "Appellate Division decisions demonstrate that robbery in New York does not necessarily involve force 'capable of causing physical pain or injury to another,' as is required under *Johnson I*"); *see also United States v. Walker*, 2018 WL 2272714, at *10 (E.D.N.Y. May 17, 2018) (finding that second-degree robbery cannot be a predicate offense because it "may be accomplished without violent force"); *Buie v. United States*, 2017 WL 3995597, at *7 (S.D.N.Y. Sept. 8, 2017) (construing New York's robbery statute and concluding that "under New York law[] the 'force' in 'forcibly steals' need not be—and, as an empirical matter, is not always—'capable of causing physical pain or injury to another person'" (quoting *Johnson I*, 559 U.S. at 140)), *appeal docketed*, No. 17-3656 (2d Cir. 2017); *United States v. Childers*, 2017 WL 2559858, at *9-10 (D. Me. June 13, 2017) (finding that the "New York robbery statute does not require a showing of force 'capable of causing physical pain or

injury'"); *United States v. Moncrieffe*, 167 F. Supp. 3d 383, 403-06 (E.D.N.Y. 2016) (discussing 18 U.S.C. § 16(a), finding that the "'physical force' required under the New York robbery statute can be minimal and does not need to amount to the necessary 'violent force'" as defined in *Johnson I*, and collecting cases).

A few courts, though, even after similarly examining New York robbery precedents, have concluded that robbery as defined under New York law does qualify as a predicate "violent felony" under the "force" clause of the ACCA. *See Belk v. United States*, 2017 WL 3614446, at *4-6 (S.D.N.Y. Aug. 22, 2017) (considering whether convictions for first-degree robbery are violent felonies under the ACCA and concluding that, "[b]y criminalizing 'forcibly' stealing property, the plain language of the statute expressly contemplates the use of violent force"), *appeal docketed*, No. 17-2816 (2d Cir. 2017); *Massey v. United States*, 2017 WL 2242971, at *3-4 (S.D.N.Y. May 22, 2017) (relying on *Brown* to conclude that "the various degrees of New York robbery are predicate felonies under the ACCA"), aff'd on other grounds, 2018 WL 3370584 (2d Cir. July 11, 2018); *United States v. Coleman*, 2017 WL 2271529, at *2 (S.D.N.Y. May 2, 2017) (same).

To determine the meaning of New York law, federal courts look to New York state court decisions. *Johnson I*, 559 U.S. at 138; *Thrower*, 234 F. Supp. 3d at 384. Having done so, I conclude that those cases holding that New York's robbery statute does not categorically require use of violent force find more support in relevant New York case law. An examination of New York state cases reveals that New York's definition of "forcibly steal" "sweeps more broadly" than does the Supreme Court's construction of violent force in *Johnson I*. *See, e.g.*, *People v. Woodridge*, 30 A.D.3d 898, 900 (3d Dep't 2006) (finding sufficient evidence to uphold conviction for third-degree robbery where defendant pushed victim aside while picking up

money that victim had dropped on the floor); *People v. Spencer*, 255 A.D.2d 167, 168 (1st Dep't 1998) (holding that evidence of defendant's "standing 'chest to chest' with the victim, moving in unison with the victim until the latter was backed up against a subway pole," was sufficient to support charge of second-degree robbery); *People v. Bennett*, 219 A.D.2d 570, 570 (1st Dep't 1995) (upholding conviction of second-degree robbery where "[the defendant] and three others formed a human wall that blocked the victim's path as the victim attempted to pursue someone who had picked his pocket, allowing the robber to get away. The requirement that a robbery involve the use, or the threat of immediate use, of physical force does not mean that a weapon must be used or displayed or that the victim must be physically injured or touched" (internal citation omitted)); *People v. Lee*, 197 A.D.2d 378, 378 (1st Dep't 1993) (affirming second-degree robbery conviction where defendant "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit"); *People v. Safon*, 166 A.D.2d 892, 892 (4th Dep't 1990) (finding that "[P]roof that the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove that defendant used physical force" and to support conviction for third-degree robbery); *People v. Jenkins*, 67 A.D.2d 932, 933 (2d Dep't 1979) (finding that third-degree robbery should have been included in the jury charge as a lesser included offense to first-degree robbery because "the jury could well have concluded . . . that the element of force utilized in committing the robbery was the physical grabbing" of the victim by the defendant and not defendant's use of a knife).

At least two other Circuit Courts have had occasion to consider whether robbery under New York law categorically constitutes a violent felony. In *United States v. Steed*, 879 F.3d 440, 448-51 (1st Cir. 2018), the First Circuit, in the context of an analogous Sentencing Guidelines

provision, reviewed a series of New York state cases and held that it does not; in *Perez v. United States*, 885 F.3d 984, 990 (6th Cir. 2018), where the question arose under the ACCA, the Sixth Circuit held that it does.

I respectfully conclude, for a number of reasons, that *Perez* is less persuasive than those cases holding that robbery does not require the use of violent force. First, *Perez* relies upon a recent New York Court of Appeals case for the proposition that "robbery requires a threshold level of force and cannot be 'a taking "by sudden or stealthy seizure or snatching"' that is 'akin to pickpocketing, or the crime of jostling.'" *Perez*, 885 F.3d at 988 (quoting *People v. Jurgins*, 26 N.Y.3d 607, 614 (2015)). In *Jurgins*, though, the New York Court of Appeals did not announce a construction of the robbery statute; rather, it simply noted that the parties had *agreed* that robbery does not include a "sudden or stealthy seizure or snatching." *Jurgins*, 26 N.Y.3d at 614; *see also Steed*, 879 F.3d at 448 (declining to adopt the definition of robbery in *Jurgins* because the court in "*Jurgins* simply assumed, based on the representations of the parties in that case, that a purse snatching would not qualify as a robbery under New York law"). Moreover, even if *Jurgins* did announce a new construction of robbery under New York law, the relevant understanding of the statute is the one New York courts had at the time of Baldwin's conviction in 1982, not the one they have today. *Id.* at 447-48 (declining to follow *Jurgins* in part because it was decided after the defendant's conviction). At that time, as now, force sufficient under N.Y. Penal Law § 160.00 was less than the violent force required under *Johnson I*. *See Jenkins*, 67 A.D.2d at 933.

Second, although the decision in *Perez* noted some of the New York robbery cases involving limited force cited above—specifically, *Bennett*, *Lee*, *Spencer*, and *Safon*—it afforded those cases little weight. *Perez*, 885 F.3d at 991.

Finally, *Perez*, while acknowledging that there are "New York cases that do not seem to have the requisite use of physical force," reasoned that these cases "*may* have the requisite use of threatened force." 885 F.3d at 990 (emphasis added). The "force clause" in the ACCA does indeed encompass the threatened use of physical force. As the court in *Perez* goes on to acknowledge, though, federal courts considering what conduct is criminalized by a state statute should not "apply legal imagination" or "indulge in imaginative flights." *Id.* (internal quotation marks and citations omitted). The suggestion in *Perez* that New York robbery convictions based on conduct that does not include violent force "may" involve threatened use of force appears to be little more than speculation, and is therefore insufficient to address New York robbery cases that do not involve the use of violent force.

CONCLUSION

The majority of courts to have considered the question have concluded that a conviction of third-degree robbery pursuant to New York Penal Law § 160.05 is not a "violent felony" within the meaning of the ACCA. In this Court's view, the decisions of these courts are more persuasive than those few decisions reaching a contrary result. Accordingly, and because two of the three predicate felonies that led the District Court to sentence Baldwin under the ACCA were third-degree robberies, I respectfully recommend that Baldwin's petition be granted.[3]

Any objections to the recommendations made in this Report must be made within fourteen days after filing of this Report and Recommendation and, in any event, on or before July 31, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to file timely objections may waive the right to appeal the District Court's order. See Small v. Sec'y of Health

[3] Because I conclude that third-degree robbery is not a violent felony within the meaning of the ACCA, I do not reach petitioner's similar argument with respect to first-degree robbery. Pet'r's Mem. at 27-31.

& Human Servs., 892 F.2d 15, 16 (2d Cir. 1989) (discussing waiver under the former ten-day limit).

/s/
STEVEN M. GOLD
United States Magistrate Judge

Brooklyn, New York
July 17, 2018

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