IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR-04-97-R**
	)	**CIV-16-582-R**
	)	
	)	
CURTIS REED SUMRALL,	)	
	)	
Defendant.	)	

ORDER

Before the Court is Defendant-Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. [Doc. 323]. Finding that relief is appropriate, the Court GRANTS the Motion.

I. Background

In October 2004, a grand jury sitting in the Western District of Oklahoma returned a nine-count superseding indictment naming Defendant-Petitioner Curtis Sumrall in six counts. [Doc. 93]. Mr. Sumrall eventually pled guilty to possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g). [Doc. 95]. Prior to his plea, the Government informed him that he was eligible for enhancement under the Armed Career Criminal Act (ACCA). [Doc. 16]. Under the ACCA, a person convicted of possessing a firearm as a felon faces a minimum of fifteen years' imprisonment if that person has three previous convictions for "a serious drug offense" or a "violent felony." 18 U.S.C. § 924(e). Without this sentence enhancement, a conviction for possessing a firearm as a felon carries a maximum prison

term of ten years. § 924(a)(2). Finding that the Mr. Sumrall did in fact qualify for the ACCA enhancement, the Court sentenced Mr. Sumrall to 188 months' imprisonment on February 1, 2005. [Doc. 142]. But on appeal, and in light of the Supreme Court's intervening decision in *Shephard v. United States*, 544 U.S. 13 (2005), the Tenth Circuit remanded the case to the district court to make adequate findings to support an ACCA-enhancement. [Doc. 207].

Prior to resentencing, the Government identified the three earlier state-law convictions of Mr. Sumrall's that it believed qualified him for sentence enhancement: (1) unlawful possession of marijuana with intent to distribute,[1] (2) assault and battery with a dangerous weapon,[2] and (3) witness intimidation.[3] [Doc. 210]. The Court agreed with the Government that these convictions counted as ACCA-predicate offenses and resentenced him to his original term of 188 months' imprisonment. [Docs. 213, 214]. On May 31, 2016, Defendant moved to vacate his sentence under 28 U.S.C. § 2255 based on the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Mr. Sumrall and the Government disagree on whether, after *Johnson*, Mr. Sumrall still has three prior convictions for a serious drug offense or a violent felony that qualify him for the ACCA's 15-year-minimum prison term.

Because Mr. Sumrall has the better argument, the Court finds that relief is appropriate. The Court will grant relief and resentence him accordingly.

[1] Okla. Stat. tit. 63, § 2 – 401(B)(2).
[2] Okla. Stat. tit. 21, § 645.
[3] Okla. Stat. tit. 21, § 455.

II. Standard of Review

"Under § 2255, federal courts have authority to vacate sentences 'imposed in violation of the Constitution or laws of the United States,' 'in excess of the maximum authorized by law,' 'that the [sentencing] court was without jurisdiction to impose,' 'or ... otherwise subject to collateral attack.'" *United States v. Blackwell*, 127 F.3d 947, 953 (10th Cir. 1997) (quoting 28 U.S.C. § 2255). To be sure, a remedy under § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio,* 442 U.S. 178, 184, 99 S.Ct. at 2240. Rather, "an error of law does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* at 185 (citing *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962)).

III. Analysis

A. Sentence Enhancement under the Armed Career Criminal Act

"Absent an enhancement under the ACCA, 'the felon-in-possession statute sets out a 10-year maximum penalty.'" *United States v. Titties*, __ F.3d __, 2017 WL 1102867, at *3 (10th Cir. Mar. 24, 2017) (citing *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016)); 18 U.S.C. § 924(a)(2). If a defendant, however, is convicted of possessing a firearm as a felon under 18 U.S.C. § 922(g) and the defendant has three prior convictions for a "violent felony" or a "serious drug offense," then the ACCA prescribes a 15-year mandatory minimum sentence. *Id*.; § 924(e)(1). Further convictions by guilty plea—such as in Mr. Sumrall's case—qualify as ACCA offenses. *See Shephard,* 544 U.S. at 19 (2005). To apply the ACCA enhancement, the government must show that a past conviction qualifies as an

ACCA-predicate offense. *See United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir. 2012).

Congress, however, did not leave the question of whether a prior conviction qualifies as a "violent felony" or a "serious drug offense" to guesswork. Rather, the ACCA defines both terms. A "serious drug offense," for example, includes state law crimes for attempting to distribute controlled substances which carry maximum prison terms of at least ten years. 18 U.S.C. § 923(e)(2)(A)(ii). Identifying a "violent felony," on the other hand, is admittedly more complicated. Before *Johnson*, the ACCA defined the term as "any crime punishable by imprisonment for a term exceeding one year" that meets one of three requirements: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"—referred to as the *elements clause*; (2) is "burglary, arson, or extortion, or involves the use of explosives"—referred to as the *enumerated-offense clause*; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another"—referred to as the *residual clause*. § 924(e)(2)(B)(i), (ii). *Johnson* affected the validity of only this last clause, with the Supreme Court deeming it unconstitutionally vague since it "both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S.Ct. at 2557. Now, in the wake of *Johnson*, a prior conviction qualifies as a violent felony under the ACCA only if it falls within the enumerated-felony clause or the elements clause.

Now that the residual clause may no longer serve as a basis for an ACCA-predicate offense, Mr. Sumrall's requested relief hinges on whether he has his three prior convictions that qualify under the ACCA's definition of serious drug offense or its two remaining valid

definitions of violent felony. Two of his prior convictions are undoubtedly ACCA-predicate offenses. First, his conviction for possession of marijuana with intent to distribute under Okla. tit. 63, § 2-401(B)(2) qualifies as serious drug offense because it involves the intent to distribute a controlled substance and authorizes a term of imprisonment of life. Second, his conviction for assault and battery with a dangerous weapon qualifies because the Tenth Circuit has said as much. *See United States v. Mitchell*, 843 F.3d 1215, 1224–25 (10th Cir. 2016) (holding that conviction for assault and battery with a dangerous weapon categorically qualified as a crime of violence under the elements clause of the United States Sentencing Guidelines).[4]

Mr. Sumrall thus has at least two ACCA-predicate offenses. The issue is whether his conviction for witness intimidation qualifies as a third. It certainly is not a serious drug offense. And it clearly does not qualify as a violent felony under the enumerated-offense clause because it is not "burglary, arson, or extortion, [and does not] involve[] the use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). Yet it still may fall within the elements clause if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). Without one of these elements, though, his conviction does not qualify as a violent felony, meaning he lacks the three prior convictions

[4] Though *Mitchell* interpreted the phrase "crime of violence" as used in the United States Sentencing Guidelines, the Guidelines define that phrase in the same way that the ACCA defines "violent felony," meaning *Mitchell* is thus still instructive. *See, e.g., United States v. Ramon Silva*, 608 F.3d 663, 671 (10th Cir. 2010) ("Given the similarity in language between the ACCA and USSG, we have occasionally looked to precedent under one provision for guidance under another in determining whether a conviction qualifies as a violent felony.") (internal quotes omitted).

required for sentence enhancement under the ACCA. If that is the case, then his 188-month sentence far exceeds that imposed for non-ACCA offenses.

B. The Categorical and Modified-Categorical Approaches

Pursuant to the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143 (1990), courts use an elements-based approach in deciding whether a conviction qualifies as an ACCA-predicate offense. Most of the time, this task calls for the "formal categorical approach," which looks to the elements of the statutes of conviction "and not to the particular facts underlying those convictions." *Id*. at 600. Consequently, "[a] prior conviction is an ACCA predicate only if the elements of the prior crime necessarily satisfy the ACCA definition." *United States v. Tittles*, __ F.3d ___, 2017 WL 1102867, at *5 (10th Cir. Mar. 24, 2017); *also see Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013) ("Congress meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.").

"[I]f the statute sweeps more broadly" than the ACCA definition—that is, if some conduct would justify the state-law conviction but would not satisfy the ACCA definition—then any "conviction under that law cannot count as an ACCA predicate." *Id.* at 2283. In other words, it does not matter if the facts underlying a defendant's earlier conviction reveal that the defendant's conduct was actually violent; if the statute contemplates criminalizing conduct that would not meet the ACCA's definition of violent felony, then that conviction cannot support the ACCA-sentence enhancement. Because the focus is on elements, not facts, any "mismatch of elements saves the defendant from an ACCA sentence." *Mathis*, 136 S.Ct. at 2251.

In rare cases, however, this formal categorical approach will not suffice. Sometimes a statute of conviction will be "divisible"—that is, it "sets out one or more elements of the offense in the alternative." *Descamps*, 133 S.Ct. at 2281. "For these statutes, '[n]o one could know just from looking at the statute, which version of the offense [the defendant] was convicted of,' and there can be no categorical comparison of elements when the statue is unclear about which of the alternative elements formed the basis of the defendant's conviction." *Tittles*, 2017 WL 1102867, at *5 (quoting *Descamps*, 133 S.Ct. at 2284). This approach, known as the modified-categorical approach, "serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." *Id*. (citing *Mathis*, 136 S.Ct. at 2253). To that end, a court may then "consult a limited class of documents [from the record] to determine which alternative formed the basis of the defendant's prior conviction." *Id*. By invoking these documents, which include the charging paper, jury instructions, terms of a plea agreement, or transcript of colloquy between a judge and defendant, "[t]he court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." *Descamps*, 133 S.Ct. at 2281, 2284.

A court's first task, then, is to decide whether a statute is divisible and thus whether to employ the categorical or modified-categorical approach. "A statute is considered divisible only if it creates multiple offenses by setting forth alternative elements." *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016); *also see United States v. Gardner*, 823 F.3d 793, 802 (4th Cir. 2016) ("A crime is not divisible simply because it may be

accomplished through alternative means, but only when alternative elements create distinct crimes.") The key distinction, as the Supreme Court clarified in *Mathis*, is between elements and means. "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S.Ct. at 2248 (quotations omitted). "[T]hey are what the defendant necessarily admits when he pleads guilty." *Id*. By contrast, means are "various factual ways of committing some component of the offense." *Id.* at 2249. "If the listed items are alternative means of satisfying an element, then the statue is not divisible and the categorical approach must be applied . . . If the alternatives are elements, then the modified categorical approach should be applied." *Titties*, 2017 WL 1102867, at *6.

Aside from clarifying this elements-means distinction, *Mathis* also offered "several tools for deciding whether an alternatively phrased criminal law lists elements or means." *Id*. One of those ways, *Mathis* explained, was to look to state-law decisions. The Tenth Circuit has also approved examining a state's uniform jury instructions. *See, e.g., id*. at *9 (consulting Oklahoma's Uniform Jury Instructions for the crime of feloniously pointing a firearm to determine if the crime qualified as a violent felony).

C. Mr. Sumrall's Prior Conviction for Witness Intimidation

The Court's work, then, begins with Oklahoma's statute for witness intimidation. When Mr. Sumrall pled guilty to witness intimidation in violation of Okla. Stat. tit. 21, § 645, the statute was written as follows:

> A. Every person who willfully prevents any person from giving testimony who has been duly summoned or subpoenaed or endorsed on the criminal information or juvenile petition as

> a witness, or who makes a report of abuse or neglect . . . or who is a witness to any reported crime, or threatens or procures physical or mental harm through force or fear with the intent to prevent any witness from appearing in court to give his testimony, or to alter his testimony is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than ten (10) years in the State Penitentiary.
>
> B. Every person who threatens physical harm through force or fear or causes or procures physical harm to be done to any person or harasses any person or causes a person to be harassed because of testimony given by such person in any civil or criminal trial or proceeding, or who makes a report of abuse or neglect . . . is, upon conviction, guilty of a felony punishable by not less than one (1) year nor more than ten (10) years in the State Penitentiary.

As the Oklahoma Court of Criminal Appeals has explained, the statute clearly lays out two separate offenses: intimidating a witness (or the attempt to) before the person testifies—codified in subsection A—and intimidating a witness (or the attempt to) after the person testifies—codified in subsection B. *See Pinkley v. State*, 49 P.3d 756, 759–60 (Okla. Crim. 2002). Further, the Court can be sure from Oklahoma's Uniform Jury Instructions that the statute sets out four potential set of elements under which a Defendant may face charges. (For convenience, the Court will label them as Sets A through D).

Set A:

First, willfully;

Second, prevented/ (attempted to prevent);

Third, a person who (has been duly summoned/subpoenaed/ (endorsed on a (criminal information)/(juvenile petition))/(has made a report of abuse/neglect required by law)/(is a witness to a reported crime);

Fourth, from testifying/(producing a record/ document/object).

Set B:

First, willfully;

Second, threatened/procured;

Third, physical/mental harm;

Fourth, through force/fear;

Fifth, to a person;

Sixth, [with the intent to prevent the person from appearing in court to testify/produce a record/document/object]

OR

Sixth, [with the intent to make the person alter that person's testimony].

Set C:

First, willfully;

Second, (threatened physical harm through force/fear)/(caused/procured physical harm to be done) to a person;

Third, because of (testimony given by the person in a civil/criminal trial/proceeding)/(a report of abuse/neglect required by law).

Set D:

First, willfully;

Second, (harassed a person)/(caused a person to be harassed);

> Third, because of (testimony given by the person in a civil/criminal trial/proceeding)/(a report of abuse/neglect required by law).

Oklahoma Uniform Jury Instructions–Criminal, § 3-39. Oklahoma's statute for witness intimidation therefore "list[s] elements in the alterative, and thereby defines multiple crimes." *Mathis*, 136 S.Ct. at 2249. And because the statue "sets out one or more elements of the offense in the alternative," it is divisible. *Descamps*, 133 S.Ct. at 2281. As a result, the Court "requires a way of figuring out which of the alternative elements listed . . . was integral to the defendant's conviction (that is, which was necessarily found or admitted)." *Mathis*, 136 S.Ct. at 2250. That statute thus demand the modified-categorical approach, which permits the court to glance at Mr. Sumrall's charging documents.

Those documents reveal that Mr. Sumrall pled guilty to the elements in Set B. *See* Doc. 210–6 (Information) (charging Mr. Sumrall with "willfully and unlawfully threaten[ing] physical harm through force or fear . . . with the intent to prevent the witness from testifying by threating to kill [the witness]." The question is therefore this: does Set B encompass crimes that do not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B)(i)? Here, it is clear that it does. A conviction under the statute does not require that the defendant have used, attempted to use, or threatened to use force. Rather, a defendant may violate the statute by putting another in a state of fear.

So to be clear, there would surely be some instances where the threatened use of force could be of the kind referenced in the elements clause, i.e., "violent force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v.*

United States, 559 U.S. 133, 140 (2010). Imagine a defendant who threatens to kill a designated witness should they testify. That would count as the threatened use of violent, physical force. On the other hand, a person could violate the statute with non-violent conduct in many ways. A defendant attempting to dissuade a designated witness from testifying could threaten to blast a car horn outside the witness's home at odd hours of the night. He could threaten to litter the witness's yard with offensive signage or even to ostracize a person from a social club or group of friends. He might even stoop to threatening to expose a witness's extramarital affair. In fairness, all of this threatened conduct would be unpleasant. Some would be annoying. Some nefarious. Some outrageous. None, however, would have "as an element the use, attempted use, or threatened use of physical force against the person of another" to qualify it as a violent felony under § 924(e)(2)(B)(i). So though not a violent felony under the ACCA, the conduct would still be grounds for conviction under Oklahoma's witness-intimidation statute because all involve a defendant (1) willfully (2) threatening (3) a person with (4) mental harm (5) through fear with (6) the intent to prevent the person from testifying.

This mismatch of elements between Oklahoma's witness-intimidation statute and the elements clause compels the Court to find that Mr. Sumrall lacks three prior convictions that qualify as ACCA-predicate offenses. 18 U.S.C. § 924(a)(2). Because Mr. Sumrall's original sentence of 188 months "was in excess of the maximum authorized by law," 28 U.S.C. § 2255 entitles him to relief. Where a § 2255 claim has merit, district courts have the discretion to choose between discharging the petitioner, resentencing the petitioner, correcting the petitioner's sentence, or granting petitioner a new trial. 28 U.S.C. § 2255.

Because Defendant has already served more than ten years, the court finds that correction of Petitioner's sentence is the most appropriate form of relief. As a result, his motion will be GRANTED and the Judgment and Commitment dated December 5, 2015 [Doc. No. 214] is VACATED.

An amended judgment and commitment shall be entered forthwith sentencing Defendant to 120 months imprisonment. The Bureau of Prisons is hereby directed to immediately release Defendant Curtis Reed Summrall from custody.

IT IS SO ORDERED this 6th day of April 2017.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE