
A P P E N D I X A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11279-A

JAMES RODNEY SHUMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

James Rodney Shuman has filed a "Petition for Rehearing and Petition for Rehearing En Banc," which we have construed as a motion for reconsideration of this Court's order dated November 9, 2017, denying his motions for a certificate of appealability, leave to proceed *in forma pauperis*, and appointment of counsel. Because Shuman has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

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NOV 09 2017

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David J. Smith
Clerk

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ORDER:

James Rodney Shuman is a federal prisoner, currently serving a sentence of 210 months' imprisonment after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Mr. Shuman was sentenced pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), based on three prior controlled-substances convictions: (1) two Georgia convictions for sale of a schedule II controlled substance, in violation of O.C.G.A. § 16-13-30(b); and (2) one federal conviction for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). Mr. Shuman's plea agreement with the government included an appeal waiver and collateral attack waiver, in which he "entirely waive[d] his right to collaterally attack his conviction and sentence on any ground and by any method, including but not limited to a 28 U.S.C. § 2255 motion." Mr. Shuman did not file a direct appeal.

On November 7, 2016, Mr. Shuman filed the instant motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255. He argued that, in light of the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), his Georgia convictions for sale of a schedule II controlled substance no longer qualified as predicate serious drug offenses under § 924(e). He argued that O.C.G.A. § 16-13-30(b) "criminalizes a greater swath of conduct than the elements of the relevant U.S. Sentencing Guidelines offense" and was "broader in scope than the generic (Model Penal Code) offense." Specifically, he argued that O.C.G.A. § 16-13-3(b)—which makes it unlawful to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute a controlled substance—was divisible, under *Mathis*, into seven separate offenses. He further argued that, because his convictions were "for sale" of a controlled substance, they failed to meet the ACCA's definition of a "serious drug offense." He asserted that, by specifically defining that term to include state law offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," the ACCA limited serious drug offenses to statutes that contained only those specific elements.

The government responded and argued that Mr. Shuman's claim was: (1) barred by the collateral attack waiver in his plea agreement; (2) procedurally defaulted because he failed to raise it on direct appeal and could not show cause and prejudice to excuse his default; and (3) meritless, as his Georgia drug convictions clearly fell under the ACCA's definition of "serious drug offense."

A magistrate judge entered a report and recommendation ("R&R"), recommending that the district court deny Mr. Shuman's motion. The magistrate judge concluded that, assuming that Mr. Shuman's claim was not barred by the collateral attack waiver in his plea agreement, his

claim that his Georgia convictions no longer qualified as predicate offenses was meritless, as the convictions met the ACCA's definition of serious drug offense.

Over Mr. Shuman's objections, the district court adopted the magistrate judge's R&R, and denied his § 2255 motion. The court subsequently denied him a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") on appeal. Mr. Shuman now seeks a COA and IFP status from this Court.

DISCUSSION:

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

As an initial matter, although the government argued that Mr. Shuman's claims were procedurally defaulted and barred by the collateral attack waiver in her plea agreement, neither the magistrate judge, nor the district court, relied on these arguments to deny Mr. Shuman's motion. Rather, they assumed that these procedural hurdles did not bar his claims, and addressed them on the merits. Thus, regardless of these other potential bases for denying Mr. Shuman relief, a COA would be warranted if reasonable jurists could debate the district court's resolution of the case on the merits.

Under the ACCA, any person who violates 18 U.S.C. § 922(g), and has 3 previous convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). A "serious drug offense" includes a state law offense "involving manufacturing, distributing, or possessing with intent to distribute a

controlled substance, (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A)(ii). Subsection (11) of section 102 of the Controlled Substances Act defines “distribute” as “to deliver (other than by administering or dispensing) a controlled substance or a listed chemical.” 21 U.S.C. § 802(11). Subsection (8), in turn, defines “deliver” as “the actual, constructive, or attempted transfer of a controlled substance or a listed chemical.” *Id.* § 802(8).

Here, Mr. Shuman’s Georgia drug convictions resulted from his sale of oxycodone, a Georgia schedule II controlled substance. *See* O.C.G.A. § 16-13-26(1)(A)(xiv). Mr. Shuman was convicted pursuant to O.C.G.A. § 16-13-30(b), which makes it “unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute any controlled substance.” That statute further provides that “any person to violates subsection (b) . . . with respect to a controlled substance in Schedule I or narcotic drugs in Schedule II . . . shall be punished by imprisonment for not less than five years nor more than 30 years.” O.C.G.A. § 16-13-30(d). Notably, the final disposition from the Georgia Superior Court indicates that Mr. Shuman’s convictions were specifically for the “sale” of a controlled substance. The Georgia Controlled Substances Act does not define “sell.” *See* O.C.G.A. § 16-13-21.

Reasonable jurists would not debate the district court’s determination that Mr. Shuman’s Georgia convictions for sale of oxycodone fall within the ACCA’s definition of “serious drug offense.” Mr. Shuman does not dispute that these convictions were (1) state law offenses, (2) with a maximum term of imprisonment of ten years or more. Rather, he argues that they do not meet the third prong of the ACCA’s definition: that the convictions involve “manufacturing,

distributing, or possessing with intent to manufacture or distribute, a controlled substance.” This argument rests on Mr. Shuman’s assertion that a law making it unlawful to “sell” a controlled substance categorically is not an offense that involves “distributing” a controlled substance.¹ Mr. Shuman does not point to any legal authority to support this assertion.

However, this Court has held that the language of the state statute need not “exactly match” the specific acts listed in the ACCA definition. *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016) (noting that the ACCA’s use of the term “involving” indicates that the definition of a serious drug offense might include state offenses that do not have the specific elements listed in the ACCA). Moreover, it appears that this Court has long assumed, albeit without ever explicitly holding, that a conviction for “selling” a controlled substance qualifies as an offense that involves “distributing” a controlled substance. *See, e.g., In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016) (“Hires’s conviction for sale of cocaine is a serious drug offense.”). This assumption is in line with the ACCA’s definition of “distribute,” as defined by reference to the Controlled Substances Act. Thus, the district court correctly concluded that Mr. Shuman’s Georgia convictions qualified as serious drug offenses, and *Johnson* and *Mathis* had no impact on the validity of his enhanced sentence under the ACCA.

Accordingly, Mr. Shuman’s motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His

¹ Mr. Shuman also argued that O.C.G.A. § 16-13-30(b) is divisible into seven separate crimes: (1) manufacturing, (2) delivering, (3) distributing, (4) dispensing, (5) administering, (6) selling, and (7) possessing with intent to distribute. However, the divisibility analysis is not relevant to the ultimate outcome of Mr. Shuman’s motion, which turns on whether reasonable jurists could debate whether a conviction for “selling” a controlled substance is necessarily a conviction that involves “distributing” a controlled substance. If he is correct that a conviction under a statute that makes it unlawful to “sell” a controlled substance is not one that involves “distributing,” then the divisibility question would only be relevant to whether *any* conviction under O.C.G.A. § 16-13-30(b) would be disqualified, or only those convictions specifically for “selling.” As it is undisputed that his conviction was for selling, the divisibility inquiry is not relevant.

motions for leave to proceed *in forma pauperis* on appeal and for appointment of counsel are
DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE