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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15293-A

JAMES LACONTE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

James Laconte is a federal prisoner who is serving a 188-month sentence after pleading guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He seeks a certificate of appealability ("COA") in order to appeal the denial of his counseled 28 U.S.C. § 2255 motion to vacate sentence.

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).

In his motion, Laconte argued that, following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his sentence should not have been enhanced under the

Armed Career Criminal Act (“ACCA”). Although he conceded that his two prior Florida drug convictions qualified as serious drug offenses under the ACCA, he argued that his other three prior criminal convictions—one for aggravated battery, under Fla. Stat. Ann. § 748.045(1)(a)(2), one for aggravated assault, and one for strong-arm robbery—no longer constituted violent felonies under the ACCA. The district court denied this claim on the merits, concluding that under this Court’s precedent, each prior criminal conviction qualified as a violent felony.

Reasonable jurists would not debate the district court’s denial of this claim. Laconte conceded before the district court that he was responsible for two prior serious drug offenses. As for his other three prior felony offenses, all still qualify under Circuit precedent after *Johnson*. First, we have held that aggravated battery under § 748.045(1)(a)(2) qualifies as a violent felony under the elements clause of the ACCA. *See In re Rogers*, 825 F.3d 1335, 1341 (11th Cir. 2016). Second, we have held that a Florida conviction for aggravated assault is categorically a violent felony under the elements clause of the ACCA. *Id.* Third, we have held that a Florida conviction for strong-arm robbery is a violent felony under the elements clause of the ACCA. *United States v. Seabrooks*, 839 F.3d 1326, 1345 (11th Cir. 2016). Therefore, Laconte had at least three qualifying serious drug offenses or violent felonies, as required to receive an enhanced sentence under the ACCA. 18 U.S.C. § 924(e)(1).

Accordingly, because reasonable jurists would not debate the district court’s denial of Laconte’s § 2255 motion, his motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:16-CV-81090-ROSENBERG/WHITE

JAMES LACONTE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

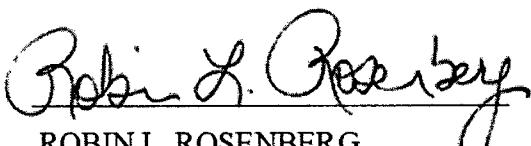
This matter is before the Court upon Movant's Amended Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255, DE 8, which was previously referred to the Honorable Patrick A. White for a Report and Recommendation on any dispositive matters, DE 3. On August 29, 2017, Judge White issued a Report and Recommendation recommending that Movant's motion be denied. DE 17. Movant filed objections. DE 18. Respondent filed a Response to Movant's Objections, DE 19, and Objections to the Report and Recommendation, DE 20. The Court has conducted a *de novo* review of Magistrate Judge White's Report and Recommendation, the objections, and the record and is otherwise fully advised in the premises. Upon review, the Court finds Judge White's recommendations that Movant's motion be denied to be correct.

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge White's Report and Recommendation [DE 17] is hereby **ADOPTED**, in so far as the Motion should be denied;
2. Movant's Motion [DE 8] is **DENIED**;
3. No certificate of appealability shall issue;

4. All other pending motions are **DENIED AS MOOT**; and
5. The Clerk of the Court is directed to **CLOSE THIS CASE**.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 25th day of September, 2017.



ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies furnished to Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-81090-CV-ROSENBERG
(12-80177-CR-ROSENBERG)
MAGISTRATE JUDGE P.A. WHITE

JAMES LACONTE, :
Movant, :
v. :
UNITED STATES OF AMERICA, :
Respondent. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

This matter is before the Court on the *pro se* movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 attacking his sentence for possession of a firearm by a convicted felon following a guilty plea in criminal case number 12-80177-CR-ROSENBERG. The case comes to the court after the Eleventh Circuit granted the movant's application to file a second or successive § 2255 motion. In his application the movant sought leave to challenge his sentence under the Armed Career Criminal Act ("ACCA"). The Eleventh Circuit granted leave to challenge the ACCA sentence and denied leave to pursue the challenge to the § 924(c) conviction.

This cause has been referred to the undersigned for consideration and report pursuant to Administrative Order 2003-19.

Upon review of the Eleventh Circuit's order the Public Defender's Office was appointed to represent the movant. The assistant public defender filed an amended motion conceding that the movant's Florida drug convictions qualified as serious drug

offense, but argued that none of the movant's other convictions qualified as crimes of violence. The government filed a response to the motion arguing that the movant's claim was procedurally defaulted and otherwise without merit because he had the requisite three prior felony convictions of either serious drug offense or crime of violence. The government addressed the movant's prior convictions for aggravated battery, aggravated assault and strong armed robbery. The public defender filed a reply arguing that the movant's convictions for aggravated battery, aggravated assault, and strong arm robbery no longer qualify as predicate violent felonies under the ACCA.

The Court has reviewed the *pro se* habeas petition, the government response, the public defender's reply, the Presentence Investigation Report ("PSI"), and all pertinent portions of the underlying criminal file.

II. Claim

The petitioner raised the following claim in his Section 2255 motion:

1. The imposition of the mandatory-minimum sentence under the ACCA was unconstitutional in light of Johnson v. United States, --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) because his prior convictions for aggravated battery, escape, aggravated assault and strong armed robbery no longer qualify as predicate violent felonies.

III. Procedural History

The relevant procedural history of the underlying criminal case is as follows. The movant was charged with possession of a firearm by a convicted felon. (CR-DE# 1). The movant entered a plea

of guilty. (CR-DE# 24). The PSI that was prepared for sentencing provided for a sentencing range of 188 to 235 months. (PSI ¶94). The movant was determined to be an armed career criminal based on his prior convictions for violent felonies or serious drug offenses. (PSI ¶34). Among the prior convictions the PSI listed in the Criminal History section were the following: Aggravated Battery, Sale of Cocaine, Delivery of Cocaine, Strong Armed Robbery, and Aggravated Assault(Deadly Weapon). (PSI ¶¶ 33, 34, 42, 44,47). He was sentenced as an armed career criminal to 188 months imprisonment. (CR-DE# 29). No appeal was taken.

The movant filed a prior motion to vacate in March 2016 which was docketed in case number 16-8035-CV-RYSKAMP. That motion was denied as untimely. (CR-DE# 217).

The movant filed his application to file a successive motion with the Eleventh Circuit on May 23, 2016, within one year of the decision in Johnson. As noted earlier he was granted leave to file this successive motion.

IV. Discussion

Post-conviction relief is available to a federal prisoner under 28 U.S.C. §2255 where "the sentence was imposed in violation of the Constitution or laws of the United States, or ... the court was without jurisdiction to impose such sentence, or ... the sentence was in excess of the maximum authorized by law." 28 U.S.C. §2255(a). Here the movant contends that his sentence was imposed in violation of the Constitution because the residual clause of the ACCA has been found unconstitutional.

The movant was properly classified as an armed career criminal. His reliance on Johnson is misplaced. In Johnson the

Court held that the residual clause of the ACCA was unconstitutionally vague and deprived defendants of due process. Johnson, 135 S.Ct. at 2557. The movant argues that under Johnson his prior state convictions for aggravated battery, aggravated assault, and strong armed robbery no longer qualify as predicate violent felonies for armed career criminal designation under 18 U.S.C. § 924(e). A review of the PSI shows that the court did not need to resort to the residual clause of the ACCA in determining that the movant's convictions qualified as violent felonies.

The PSI provided that the movant qualified as an armed career criminal due to the movant's prior convictions. Among those convictions were two qualifying serious drug offenses as well as convictions for aggravated battery, strong armed robbery and aggravated assault. The movant has properly not contested that his drug convictions qualify as serious drug offenses.

The movant's challenge to his conviction for aggravated battery is without merit. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 (11th Cir. 2013), abrogated on other grounds by Johnson v. United States, ___ U.S. ___, ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); see also In re Rogers, No. 16-12626-J, 2016 WL 3362057, at *3 (11th Cir. June 17, 2016); In re Hires, No. 16-12744-J, 2016 WL 3342668 (11th Cir. June 15, 2016).

In two published decisions, the Eleventh Circuit has directly held that a conviction for aggravated battery under Fla. Stat. §784.045(1)(a)(2) qualifies as a violent felony under the elements clause of the ACCA. In re Rogers, 825 F. 3d 1335, 1341 (11th Cir. 2016); Turner v. Warden Coleman FCI (Med.), 709 F. 3d 1328, 1341 (11th Cir. 2013), abrogated on other grounds by Johnson, 135 S. Ct.

2551. Petitioner's conviction for aggravated battery still qualifies as a violent felony without the ACCA's residual clause, which was determined to be unconstitutional in Johnson.

Similarly the movant's challenge to his aggravated assault conviction is also without merit. The Eleventh Circuit has found that aggravated assault constitutes a violent felony under the elements clause of the ACCA. See Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-38 & n.6 (11th Cir. 2013); In re Rogers, 825 F.3d 1335, 1341 (11th Cir. 2016) (recognizing Turner as binding precedent on the issue). In both Turner and Rogers the court held that aggravated assault is categorically a violent felony. In light of this binding precedent, the court must find that the movant's prior Florida conviction for aggravated assault also is a violent felony under the elements clause of the ACCA.

The argument challenging the use of his prior conviction for strong armed robbery is also meritless based on controlling Eleventh Circuit precedent. Prior to the issuance of Johnson the Eleventh Circuit had found that a Florida robbery conviction qualified as a violent felony under the sentencing guidelines definition. See United States v. Lockley, 632 F3d 1238 (11th Cir. 2001). In three decisions issued after Johnson, the Eleventh Circuit addressed the question of whether robbery under Florida law is categorically a violent felony under the ACCA. See United States v. Seabrooks, 839 F3d 1326 (11th Cir. 2016); United States v. Fritts, 841 F.3d 937 (11th Cir. 2016); and United States v. Conde, 2017WL1485021 (11th Cir. April 26, 2017). In Seabrooks, the three judge panel all agreed that Lockley was controlling in its determination of whether a robbery under Florida law was a crime of violence under the ACCA elements clause. Seabrooks at 1346 (J. Martin concurring) ("[T]his panel opinion stands only for the

proposition that our Circuit precedent in [Lockley] requires Mr. Seabrooks 1997 Florida convictions for armed robbery to be counted in support of is [ACCA] sentence.") In Fritts the court reiterated that under Florida law "robbery is categorically a crime of violence under the elements of even the least culpable of these acts criminalized by Florida Statutes §812.13(1)". Fritts at 941. In light of this binding precedent, the court must find that the movant's prior Florida conviction for robbery is a violent felony under the elements clause of the ACCA.

Under binding Eleventh Circuit precedent the movant's convictions for aggravated battery, aggravated assault and strong armed robbery all qualify as violent felonies under the elements clause of the ACCA. The movant has conceded that his prior Florida drug convictions qualify as serious drug offenses. Since the movant was properly classified as an armed career criminal without resort to the residual clause of the ACCA, the movant's reliance on Johnson is misplaced. He was properly sentenced as an armed career criminal and his claim should be denied.

V. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts provides: "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Rules Governing Section 2255 Cases.

The petitioner in this case fails to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §

2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (explaining the meaning of this term) (citation omitted). Therefore, it is recommended that the Court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Rule 11(a), Rules Governing Section 2254 Cases. If there is an objection to this recommendation by either party, that party may bring such argument to the attention of the district judge in the objections permitted to this report and recommendation.

VI. Conclusion

Based on the foregoing, it is recommended that the motion to vacate be denied with prejudice and this case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 29th day of August, 2017



UNITED STATES MAGISTRATE JUDGE

cc:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15293-A

JAMES LACONTE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

James Laconte has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated March 21, 2018, denying his counseled motion for a certificate of appealability in the appeal of the denial of his motion to vacate sentence, 28 U.S.C. § 2255. Because Laconte has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.