No. _____

In The Supreme Court of the United States

CHRISTOPHER EARL ODEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595 (2000), this Court held that a petitioner may obtain a certificate of appealability by showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. To meet that standard, is it necessary, as the Eleventh Circuit Court of Appeals required, for the petitioner to show that his claim is not foreclosed by binding circuit precedent?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal and State Cases **Page(s)**

United States Code **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Christopher Oden respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The district court's memorandum opinion and order denying Mr. Oden's motion to vacate pursuant to 28 U.S.C. § 2255 and application for Certificate of Appealability are included in Appendix A.

The Eleventh Circuit's order denying the application for a Certificate of Appealability is included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit denied Mr. Oden's application for Certificate of Appealability July 6, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition raises an issue concerning the interpretation of 28 U.S.C. § 2253, which states:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

INTRODUCTION

Mr. Oden filed a motion under 28 U.S.C. § 2255 to vacate his 188-month sentence, arguing that the sentence exceeded the statutory maximum because his Georgia Burglary convictions did not qualify as violent felonies under the Armed Career Criminal Act (ACCA). During the pendency of his motion, the Eleventh Circuit issued an opinion in *United States v. Gundy*, ruling in a 2-1 decision that Georgia Burglary convictions qualify as violent felonies. 842 F.3d 1156 (11th Cir. 2017). The district court denied Mr. Oden's motion and application for a certificate of appealability.

Mr. Oden applied to the Eleventh Circuit for a certificate of appealability but was denied. The reason for the denial was simple: Mr. Oden sought to challenge *Gundy*. The Eleventh Circuit followed its established rule that "[N]o COA should

issue where the claim is foreclosed by binding circuit precedent." Appx. B, at 2. This broad rule is inconsistent with the standard enumerated by this Court for granting a Certificate of Appealability. For these reasons, Mr. Oden requests that this Court grant his writ of certiorari.

STATEMENT OF THE CASE

1. Federal Criminal Charges. In May 2012, Mr. Oden was charged with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty to the charge in June 2012. The Presentence Investigation Report ("PSR") recommended that Mr. Oden's sentence be enhanced under the ACCA, 18 U.S.C. § 924(e). The ACCA provides for an increased sentence for a defendant who is convicted under 18 U.S.C. § 922(g)(1) and has three prior violent felonies or serious drug offenses.

The PSR counted the following convictions as violent felonies for application of the ACCA: 2005 Alabama burglary, third degree and 2007 Georgia burglary (four counts). Without the ACCA enhancement, the maximum sentence Mr. Oden could have received was 10 years (120 months). *See* 18 U.S.C. § 924(a)(2). However, as an armed career criminal, he faced a mandatory minimum 15-year (180-month) sentence and a statutory maximum sentence of life. *See* 18 U.S.C. § 924(e)(1).

The Court sentenced Mr. Oden to a total sentence of 188 months. Mr. Oden did not appeal his conviction or sentence.

2. Section 2255 Proceedings in District Court. On June 14, 2016, Mr. Oden moved under 28 U.S.C. § 2255 to vacate his sentence in light of *Johnson v.*

United States, 135 S. Ct. 2251 (2015). Slightly less than a year earlier, on June 26, 2015, this Court had held in *Johnson* that the residual clause of the definition of "violent felony" in the ACCA is void for vagueness. 135 S. Ct. at 2563. Mr. Oden argued that, in light of *Johnson*, he was entitled to be resentenced without the ACCA enhancement because his convictions for Alabama and Georgia burglary no longer qualified as violent felonies under the ACCA. Without these convictions qualifying as violent felonies under the ACCA, he does not have three or more serious drug offenses or violent felonies. *Id.* Therefore, he argued, he is not subject to the ACCA enhancement and his 188-month sentence is above the statutory maximum of 120 months. 18 U.S.C. § 924(a)(2).

At the parties' joint request, the district court stayed the action on July 19, 2016, awaiting a decision by the Eleventh Circuit in either of two pending cases addressing similar arguments regarding whether Georgia burglary qualified as an ACCA predicate. In February 2017, the Eleventh Circuit decided *United States v. Gundy,* 842 F.3d 1156 (11th Cir. 2017). After this Court's denial of a petition for writ of certiorari as to the *Gundy* decision, the district court ordered the parties to submit arguments.

On November 15, 2017, the district court issued an order dismissing the action. The accompanying memorandum opinion denied Mr. Oden's motion under § 2255 and denied him a COA. The court stated that the intervening precedent in *Gundy* effectively determined the case:

> As set out in the PSR and adopted by the Court, each of Oden's four Georgia burglary are convictions for generic burglary because the

> indictments for each of those convictions all charged him with burglarizing traditional "buildings," i.e. T&D Mechanical, Inc. and Tom's Foods, Inc. See PSR, ¶ 32 (reviewing indictments). *Accord Gundy*, 842 F.3d at 1168-69 (looking to indictments to conclude that Gundy was convicted of generic robbery under Georgia law). Because Oden has four qualifying violent-felony predicate offenses, his sentence was validly enhanced under the ACCA.

The court did not issue a COA, stating that Mr. Oden had "not made the requisite showing," in support.

3. Eleventh Circuit Proceedings. Mr. Oden applied for a Certificate of Appealability from the Eleventh Circuit. First, he argued that *Gundy* was wrongly decided and should be reversed. Second, he argued that the Eleventh Circuit's rule requiring denial of a COA that argues to reverse binding precedent conflicts with this Court's precedents defining the standard for granting COAs. The Eleventh Circuit denied that application. It stated:

> "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).
>
> As Mr. Oden acknowledges, his argument that his Georgia burglary convictions do not constitute violent felonies is foreclosed by binding precedent. *See United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 66 (2017) (holding that burglary of a building or dwelling under Georgia law constitutes a violent felony under the enumerated crimes clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)). Accordingly, his motion for a COA is DENIED.

REASONS FOR GRANTING THE PETITION

This case raises an important federal question that has been decided in a way that conflicts with relevant decisions of this Court:

The Eleventh Circuit rule mandating denial of a COA that seeks reversal of binding Circuit precedent conflicts with this Court's decisions in *Slack* and *Miller-El* setting out the standard for issuance of a COA.

A court should issue a COA only when the requirements of 28 U.S.C. § 2253 are satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). To obtain a COA, a petitioner must make "a substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make this showing, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner *or that the issues presented were adequate to deserve encouragement to proceed further.*" *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604) (alterations omitted) (emphasis added).

In applying the "reasonable jurists" standard, the Eleventh Circuit has stated that no COA should issue if the claim is foreclosed by binding circuit precedent. *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007). The stated rationale for this rule is that binding precedent "ends any debate among reasonable jurists about the correctness of the district court's decision." *Hamilton v. Sec'y, Florida Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015).

This binding precedent rule is inconsistent with this Court's precedents because it effectively eliminates the alternative grounds for granting a COA based on the presence of an issue adequate to deserve encouragement to proceed further. Binding circuit precedent may end debate about the correctness of the lower court decision; it does not, however, end debate about whether the issues presented are adequate to deserve further debate. For instance, decisions by other circuit courts or state courts may create questions about the wisdom of a circuit courts' own precedent. However, under the binding precedent rule applied by the Eleventh Circuit, a panel would have no power to grant a COA even where that panel believed it presented issues worthy of reconsidering.

This Court's disjunctive phrasing of the COA standard implies that there are some issues which do not satisfy the first clause but do the second, meaning issues on which no reasonable jurist would disagree with the correctness of the lower court decision, but nonetheless do deserve encouragement to proceed further. *See Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336. A rule that denies any application for a COA raising an issue controlled by binding precedent is inconsistent with the standard enumerated by this Court and renders the second clause of the COA standard mere surplussage. *See Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336.

The denial of Mr. Oden's application illustrates how this Eleventh Circuit rule operates to categorically deny COAs to petitioners who are eligible for a COA under this Court's standard. Mr. Oden's petition raised the issue of whether Georgia burglary qualifies as a violent felony. There remains vigorous debate among

reasonable jurists as to the underlying issue of whether the Georgia burglary statute is divisible. Although the *Gundy* opinion squarely addressed this question, Judge Jill Pryor's dissent in that case explores not only the reasoning for disagreement with the majority, but also the broad consequences of the majority opinion for so many defendants. *Gundy*, 842 F.3d at 1179 ("[T]housands of defendants stand to have their sentences increased by at least five years each based on the majority's decision today."). The *Gundy* majority recognized that reasonable judges could differ on the appropriate conclusion, stating, "If nothing else, perhaps the discussions in the majority opinion and the dissent arguably suggest that Georgia law may not be as clear as either concludes." *Id.* at 1170. Furthermore, the defendant in *Gundy* did not seek en banc review, and therefore the decision was not reviewed by the full Eleventh Circuit.

In addition, the debate among the Eleventh Circuit panel in *Gundy* reflects similar debates occurring within and among the Circuit Courts. Others Courts have concluded that another burglary statute employing a disjunctive standard similar to Georgia's is divisible. *See United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) (holding that Wisconsin burglary offense is indivisible, stating that the language "building or dwelling" identified two means of committing a single crime rather than alternative elements); *United States v. Lamb*, 847 F.3d 928, 932 (8th Cir. 2017) (deferring to Seventh Circuit's determination that Wisconsin burglary offense is indivisible). *But see United States v. Sykes*, 844 F.3d 712, 715 (8th Cir. 2016) (holding that Missouri burglary statute requiring entering a "building or inhabitable

structure," was divisible), *petition for cert. filed* (U.S. June 19, 2017) (No. 16-9604). This debate may lead a court to conclude that a petition raising such issues is deserving of encouragement to proceed further. However, the binding precedent rule precludes granting a COA in such circumstances.

In this way, this misapplication of this Court's precedents could deny relief to many potentially meritorious petitions. The binding precedent rule forces the circuit court, whether at panel review or en banc review, to deny a COA. This is true even where the court agrees with the petitioner that the precedent at issues bears reexamination. A petitioner simply has no recourse to challenge that precedent.

Despite the presence of controlling precedent, the issues Mr. Oden raised are significant and deserving of further debate. He has met the threshold standard to grant a COA as set out by this Court. However, the Eleventh Circuit's binding precedent rule required the panel reviewing his application to deny the COA. In this way, the Eleventh Circuit's binding precedent rule conflicts with this Court's decisions on an important federal question.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 4th day of October, 2018.

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Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHRISTOPHER EARL ODEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 2:16-cv-8060-VEH**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION

I. Procedural History

On June 14, 2016, Christopher Earl Oden filed with a counseled motion pursuant to 28 U.S.C. §2255. (Doc. 1). He asks this court to vacate the sentence imposed upon him on September 25, 2012, in case 2:12-CR-201-JHH-RRA[1]. (Crim. Doc. 12). Mr. Oden was found guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (*Id.*). At sentencing, the court applied the Armed Career Criminal Act ("ACCA")[2] enhancement based upon its finding that Mr. Oden had three or more prior convictions that qualified as "violent felonies" under the ACCA. Without that enhancement, the statutory maximum sentence authorized by

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[1] The sentencing judge has since retired. This matter was randomly assigned to the undersigned district judge.

[2] 18 U.S.C. § 924(e).

law (absent other statutory provisions, none of which are at issue in this case) was 120 months.

At the parties' joint request (Doc. 5), this Court stayed this action on July 19, 2016, pending a decision by the Eleventh Circuit Court of Appeals in either of the following cases: *United States v. Heard*, No. 15-10612, or *United States v. Gundy*, No. 14-13113. The Eleventh Circuit decided *United States v. Gundy,* 842 F.3d 1156 (11th Cir. 2017) in a published opinion issued on February 22, 2017. On February 23, 2017, the Government notified the Court of the *Gundy* decision. (Doc. 7). The Court lifted the stay and ordered Mr. Oden to show cause why his petition should not be dismissed or denied in light of that decision. (Doc. 8). Mr. Oden replied on March 13, 2017. (Doc. 9). However, on June 16, 2017, the parties advised the Court that a petition for writ of certiorari as to the *Gundy* decision was pending before the United States Supreme Court and asked this Court to further stay this action pending a decision by the Supreme Court. (*See* Docs. 11 and 13). The Court agreed and accordingly stayed this action again. (Doc. 14). On October 4, 2017, the Government advised this Court that the Gundy petition had been denied. (Doc. 15). On November 6, 2017, the Court ordered the parties to show cause why the stay should not be lifted and to file any remaining arguments. (Doc. 16). The parties have now done so. (Docs. 17 and 18). The matter is therefore ripe for submission.

II. Issue Presented

The premise for Mr. Oden's motion is that application of the ACCA enhancement to him was error in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), as made retroactively applicable by *Welch v. United States*, 136 S. Ct. 1257 (2016). (Doc. 1 at 3)("In light of *Johnson v. United States* [...] and *Welch v. United States* [...], Mr. Oden is entitled to be resentenced without the ACCA enhancement because his Alabama and Georgia burglary convictions no longer qualify as violent felonies.").

III. THE UNDERLYING CRIMINAL CASE[3]

2. The Underlying Criminal Case. In May 2012, Mr. Oden was charged with one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). (Crim. Doc. 1).

   a. He pleaded guilty to the charge in June 2012. (Crim. Doc. 9.)

   b. The Presentence Investigation Report ("PSR") recommended that Mr. Oden's sentence be enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). (PSR, ¶ 17). The ACCA provides for an increased sentence for a defendant who is convicted under 18 U.S.C. § 922(g)(1) and has three prior violent felony or serious drug offense convictions. The PSR counted the following convictions as violent felonies for application of the ACCA:

      i. 2005 Alabama burglary, third degree, *id.* ¶¶ 19, 31;

      ii. 2007 Georgia burglary (four counts), *id.* at ¶¶ 19, 32.

   c. Without the ACCA enhancement, the maximum sentence Mr.

[3] This section is copied verbatim from the motion (including numbering), as it is not disputed by the Government and it is consistent with the court record.

Oden could have received was 10 years (120 months). *See* 18 U.S.C. § 924(a)(2). However, as an armed career criminal, he faced a mandatory minimum 15-year (180-month) sentence and a statutory maximum sentence of life. *See* 18 U.S.C. § 924(e)(1).

d. The Court sentenced Mr. Oden to 172 months and 20 days in prison, which included credit for 15 months and 10 days he had served related to Jefferson County, Alabama case CC-11-4420. (Crim. Doc. 12.)

3. Direct Appeal. Mr. Oden did not appeal his conviction or sentence.

4. Post-Conviction Litigation. The instant motion is Mr. Oden's first motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence.

IV. Analysis

Mr. Oden initially argued that none of Mr. Oden's burglary convictions (one under Alabama law and four under Georgia law) qualify, after *Johnson*, as violent felonies under the ACCA and thus he should be resentenced without application of the ACCA enhancement. (Doc. 1). However, in light of the intervening binding decision of the Eleventh Circuit Court of Appeals in *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2017), he now argues he "does not disagree with the government's description of *Gundy* or his PSR and leaves the merits of the § 2255 claim to the Court in light of *Gundy*." (Doc. 9 at 5; *see also* Doc. 18).[4] In sum, because Mr. Oden had four Georgia burglary convictions, at this point the parties

[4] Further, the Government has stated that the petition is timely and in any event has affirmatively waived any timeliness defense. (Doc. 11).

are not arguing about Mr. Oden's singular Alabama burglary conviction or any procedural bar.

In *Gundy*, the Eleventh Circuit Court of Appeals that held that Georgia burglary is divisible into generic and nongeneric forms of burglary, so that a conviction for Georgia burglary may be deemed a conviction for generic burglary *i.e.*, unlawfully entering a building or structure with the intent to commit a theft, if the conviction is supported by *Shepard* documents. *United States v. Gundy*, 842 F.3d at 1166-69. As set out in the PSR and adopted by the Court, each of Oden's four Georgia burglary are convictions for generic burglary because the indictments for each of those convictions all charged him with burglarizing traditional "buildings," i.e. T&D Mechanical, Inc. and Tom's Foods, Inc. See PSR, ¶ 32 (reviewing indictments). *Accord Gundy*, 842 F. 3d at 1168-69 (looking to indictments to conclude that Gundy was convicted of generic robbery under Georgia law). Because Oden has four qualifying violent-felony predicate offenses, his sentence was validly enhanced under the ACCA.

V. Conclusion

Because Oden has, after retroactive application of the holding in *Johnson*, four prior convictions for Georgia burglary that qualify as predicate convictions for purposes of the ACCA enhanced penalty, his motion is due to be, and hereby is, **DENIED**. This case will be **DISMISSED WITH PREJUDICE**. Additionally, the

Court finds that Oden is not entitled to a certificate of appealability.

A prisoner seeking a motion to vacate has no absolute entitlement to appeal a district court's denial of his petition. *See* 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). *Id.* "A [COA] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, defendant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.' " *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). Oden has not made the requisite showing in these circumstances.

DONE and **ORDERED** this the 15th day of November, 2017.

VIRGINIA EMERSON HOPKINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CHRISTOPHER EARL ODEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No.: 2:16-cv-8060-VEH**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

ORDER OF DISMISSAL

In accord with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** that the motion to vacate and a certificate of appealability are **DENIED**.

This action is hereby **DISMISSED WITH PREJUDICE**.

DONE and **ORDERED** this the 15th day of November, 2017.

VIRGINIA EMERSON HOPKINS
United States District Judge

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10187-E

CHRISTOPHER EARL ODEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ORDER:

Christopher Earl Oden is a federal prisoner serving a 188-month sentence for possession of a firearm by a convicted felon. His sentence was enhanced pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), as he had four prior convictions for burglary of a building in Georgia, which the sentencing court deemed to be violent felonies. He filed a 28 U.S.C. § 2255 motion to vacate his sentence, arguing that this enhancement was invalid, in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because Georgia burglary no longer constitutes a violent felony under the ACCA. The district court denied his motion, and he now moves this Court for a certificate of appealability ("COA").

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) (quotation omitted). "[N]o COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted).

As Mr. Oden acknowledges, his argument that his Georgia burglary convictions do not constitute violent felonies is foreclosed by binding precedent. *See United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 66 (2017) (holding that burglary of a building or dwelling under Georgia law constitutes a violent felony under the enumerated crimes clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)). Accordingly, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE