UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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July 05, 2018

Elizabeth Warren
U.S. District Court
U.S. Courthouse and Federal Building
2110 1ST ST
FORT MYERS, FL 33901

Appeal Number: 18-10928-B
Case Style: Alphonso Churchwell, Jr. v. USA
District Court Docket No: 2:16-cv-00512-JES-CM
Secondary Case Number: 2:03-cr-00118-JES-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Melanie Gaddis, B
Phone #: (404) 335-6187

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10928-B

ALPHONSO CHURCHWELL, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Alphonso Churchwell, Jr., is a federal prisoner serving a 188-month sentence, after pleading guilty in 2003 to possession with intent to distribute 5 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(B)(iii), and 18 U.S.C. § 2. He seeks a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP"), in order to appeal the dismissal of his counseled 28 U.S.C. § 2255 motion to vacate sentence.

Briefly, as background, the sentencing court found that Churchwell was a career offender under U.S.S.G. § 4B1.1 because he had at least 2 prior convictions for either a crime of violence or a controlled-substance offense, including (1) selling or delivering a controlled substance within 1,000 feet of a school; (2) resisting an officer with violence; and (3) aggravated assault on an officer, or, alternatively, aggravated fleeing and attempted eluding causing injury. Because Churchwell was sentenced in 2003, the Sentencing Guidelines were still mandatory. *See United*

States v. Booker, 543 U.S. 220, 246 (2005) (holding that the Sentencing Guidelines were advisory, not mandatory).

Churchwell argued in his § 2255 motion that the sentencing court had denied him due process by designating him as a career offender under § 4B1.1. Furthermore, he argued that, after *Johnson v. United States*, 135 S. Ct. 2551 (2015) —which struck down the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague—the definition of a crime of violence contained in § 4B1.1 was void for vagueness. The district court dismissed Churchwell's motion as (1) untimely filed; (2) not cognizable under § 2255 because his sentence did not exceed the statutory maximum; and (3) procedurally defaulted because Churchwell had failed to raise the claim on direct appeal. Alternatively, the district court denied Churchwell's claim on the merits, determining that *Johnson* does not apply to the mandatory Guidelines and that, even if it did, he had two prior serious drug offenses or violent felonies which qualified him for the career-offender enhancement under § 4B1.1.

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).

Regardless of whether Churchwell's claim is untimely, cognizable in a § 2255 proceeding, or procedurally defaulted, it is meritless. In *Beckles v. United States*, 137 S. Ct. 886, 894, 903 n.4 (2017), the Supreme Court determined that *Johnson* did not impact the advisory Guidelines, but left open the question as to whether the mandatory Guidelines could still be subject to a vagueness challenge. Accordingly, this Court's decision in *In re Griffin*, 823 F.3d

1350, 1354 (11th Cir. 2016), determining that the mandatory Guidelines were not impacted by *Johnson*, remains good law. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (explaining this Court's prior-panel-precedent rule); *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018) (explaining that the prior-panel-precedent rule extends to cases decided in the context of a second or successive § 2255 motion).

However, even if *Johnson* did impact the Sentencing Guidelines, it would not provide Churchwell relief because he has prior convictions for (1) selling or delivering a controlled substance within 1,000 feet of a school, which he does not dispute qualifies as a controlled substance offense; (2) resisting an officer with violence; and (3) aggravated assault on an officer or, alternatively, aggravated fleeing and attempted eluding causing injury. These prior convictions qualify him for § 4B1.1's career-offender enhancement. *See United States v. Fritts*, 841 F.3d 937, 940 (11th Cir. 2016) (holding that a conviction for resisting an officer with violence categorically qualifies as a crime of violence under § 4B1.2); *United States v. Golden*, 854 F.3d 1256, 1256-57 (11th Cir. 2017) (holding that an aggravated-assault conviction categorically qualifies as a crime of violence under the elements clause of § 4B1.2); *United States v. Martin*, 864 F.3d 1281, 1282 (11th Cir. 2017) (holding that a conviction for felony fleeing to elude qualifies as a crime of violence under the elements clause of § 4B1.2). Thus, Churchwell has at least two prior felony convictions for either a crime of violence or a controlled-substance offense that, under our binding precedent, currently qualify for career-offender sentencing under the Guidelines. Accordingly, his motion for a COA is DENIED, and his motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE