

Petitioner's Appendices

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12246
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-00322-ODE,
1:02-cr-00551-ODE-AJB-1

JESSIE SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(September 12, 2018)

Before WILSON, ROSENBAUM, and HULL, Circuit Judges.

PER CURIAM:

Jessie Smith appeals the district court’s denial of his 28 U.S.C. § 2255 motion to vacate, which raised a challenge to his sentence under *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). The district court granted a certificate of appealability (“COA”) on the issue of whether Georgia’s robbery statute qualifies as a violent felony under the “elements clause” of the Armed Career Criminal Act (“ACCA”). After the district court’s decision but before the parties briefed this appeal, we issued *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), which held that a § 2255 movant, to obtain relief based on *Johnson*, must prove that it is more likely than not that his sentence was enhanced pursuant to the ACCA’s “residual clause.” After careful review, we affirm because Smith cannot meet his burden of proof under *Beeman*.

I.

Smith challenges his 262-month sentence of imprisonment for possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e). Smith’s presentence investigation report (“PSR”) classified him as an armed career criminal under the ACCA, 18 U.S.C. § 924(e), based on his prior convictions in Georgia for aggravated assault in 1974, robbery in 1974 and 1978, and burglary in 1986. Smith objected to his classification as an armed career criminal on several grounds, but not on the ground that the convictions did not qualify as violent felonies under the ACCA. At his sentencing in 2004, the district court overruled

his objections, adopted the PSR, and sentenced him to 262 months. We affirmed his conviction and sentence on direct appeal.

In February 2016, within one year of the *Johnson* decision, Smith filed a *pro se* § 2255 motion arguing, among other things, that his sentence should be vacated because it was based on the residual clause, which *Johnson* invalidated as unconstitutionally vague. Later, court-appointed counsel appeared on Smith's behalf and filed an amended § 2255 motion elaborating on the *Johnson* claim.

The district court denied Smith's § 2255 motion. According to the court, his prior robbery convictions qualified as violent felonies under the elements clause of the ACCA and his prior burglary conviction qualified under the enumerated offenses clause of the ACCA.¹ The court did not address the conviction for aggravated assault or whether Smith proved he was sentenced under the residual clause. Smith now appeals the denial of his § 2255 motion.

II.

In reviewing a district court's denial of a § 2255 motion, we review legal conclusions *de novo* and findings of fact for clear error. *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014) (*en banc*). Ordinarily, the scope of our review of an unsuccessful § 2255 motion is limited to the issues enumerated in the

¹ In its original order, the district court did not specify under which clause the robbery convictions qualified. In response to Smith's motion to alter or amend, Fed. R. Civ. P. 59(e), the court issued an order clarifying that the robbery convictions qualified under the elements clause. Smith appeals both orders, which we address jointly in this appeal.

COA. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). Nevertheless, we may affirm the judgment on any ground supported by the record, *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016), even if that ground is not encompassed within the COA. *See Jennings v. Stephens*, 135 S. Ct. 793, 802 (2015) (holding that no COA is required for “the defense of a judgment on alternative grounds”).

Ordinarily, a defendant who is convicted of violating § 922(g) may not be sentenced to more than 10 years in prison. 18 U.S.C. § 924(a)(2). But if the defendant has three or more prior convictions for a “violent felony” or “serious drug offense,” the ACCA requires a prison sentence of no less than 15 years. *Id.* § 924(e)(1). When Smith was sentenced in 2004, the ACCA defined the term “violent felony” as any felony that

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or **otherwise involves conduct that presents a serious potential risk of physical injury to another.**

Id. § 924(e)(2)(B) (emphasis added). We refer to the first prong of this definition as the “elements clause,” while the second prong contains what we refer to as the “enumerated offenses clause” and, in bold, the “residual clause.” *Beeman*, 871 F.3d at 1218.

In June 2015, the Supreme Court in *Johnson* struck down the residual clause of the ACCA as unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557–58, 2563. The Court later held that *Johnson* was retroactively applicable to cases on collateral review, paving the way for federal prisoners, like Smith here, to file § 2255 motions based on *Johnson*. *Welch v. United States*, 578 U.S. ___, ___, 136 S. Ct. 1257, 1268 (2016).

In *Beeman*, which we decided after the district court’s ruling in this case, we determined what a § 2255 movant must show to prove a *Johnson* claim. We held that “the movant must show that—more likely than not—it was use of the residual clause that led to the sentencing court’s enhancement of his sentence.” *Beeman*, 871 F.3d at 1221–22. Put differently, the movant must show that “the sentencing court relied solely on the residual clause” to enhance his sentence. *Id.* at 1221.

Whether a movant was sentenced on the basis of the residual clause is a “historical fact.” *Id.* at 1224 n.5. Evidence of that historical fact may include statements made by the parties, by the sentencing judge, or in the PSR. *See id.* at n.4. It may also include consideration of how courts viewed the statutes under which the movant had previously been convicted, and how courts interpreted other similar statutes at the time he received his ACCA enhancement. *See id.* at n.5. However, we explained that court decisions issued after the time of sentencing

“cast[] very little light, if any,” on the historical fact of “whether [the movant] was, in fact, sentenced under the residual clause only.” *Id.*

For a defendant to prove that his sentence “more likely than not” relied solely on the residual clause, it is not enough to show that it is “merely possible that the court relied on that clause to enhance the sentence.” *Id.* at 1221. Rather, if the record is unclear, and it is just as likely that the court relied on a different clause when it enhanced the defendant’s sentence, “then the movant has failed to show that his enhancement was due to use of the residual clause.” *Id.* at 1222.

III.

On appeal, Smith, who is represented by counsel, argues that his convictions for Georgia robbery, O.C.G.A. § 16-8-40, do not qualify as violent felonies under the elements clause because neither robbery by force nor robbery by intimidation requires the use, attempted use, or threatened use of *violent* physical force. The government responds that Smith’s convictions do qualify under the elements clause but that, in any case, *Beeman* compels that the district court’s judgment be affirmed on the alternative ground that Smith cannot show he was sentenced based on the residual clause.

In reply, Smith largely ignores *Beeman*, which he believes was wrongly decided, and continues to press his arguments under the elements clause. These

arguments, however, are not relevant to *Beeman*'s historical-fact inquiry.² To the extent he addresses *Beeman* at all, Smith maintains we should not consider it because the government did not raise a burden-of-proof defense before the district court, which he says amounts to waiver of that defense. But we cannot simply ignore controlling precedent, whether the government should have anticipated it or not. *See United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008) ("[W]e are bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court." (quotation marks omitted)).

So the question becomes whether we should remand Smith's case to the district court to apply the new standard in *Beeman* in the first instance. Faced with a similar situation, the *Beeman* panel declined to remand where the "record ma[de] clear" that the movant had not carried his burden of proving the *Johnson* claim on the merits and he "ha[d] not suggested . . . that a remand for an evidentiary hearing would do him any good." *Beeman*, 871 F.3d at 1221. Instead, the movant chose to proceed on the record as it existed at the time of appeal, so "we consider[ed] his *Johnson* claim on that record." *Id.*

² In *Beeman*, we distinguished between *Johnson* claims and *Descamps* claims. In a *Descamps* claim, the defendant asserts that he "was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause." *Beeman*, 871 F.3d at 1220. A *Johnson* claim, by contrast, "contends that the defendant was sentenced as an armed career criminal under the residual clause." *Id.* Smith's arguments regarding the elements clause appear to present a *Descamps* claim, not a *Johnson* claim. Any *Descamps* claim, however, is well outside the applicable limitations period. *See id.* at 1219–20.

Despite our normal preference for district courts to apply new standards in the first instance, we decline to remand here. Smith has not indicated that remanding his case to the district court to decide his § 2255 motion under *Beeman* “would do him any good.” *See id.* By failing to address the government’s arguments that *Beeman* compels our affirmance of the judgment denying his § 2255 motion, he effectively concedes he could not meet his burden on remand. And, in fact, he did concede that *Beeman* was basically dispositive in an earlier-filed motion to this Court. Without any suggestion by Smith as to what purpose remand would serve under the circumstances, we must conclude that, as in *Beeman*, “he has chosen to proceed on the basis of the record as it now exists, and we consider his *Johnson* claim on that record.” *Id.*

The record as it now exists makes clear that denial of Smith’s § 2255 motion was the correct result because Smith has not carried his burden of proving his *Johnson* claim on the merits. Nothing in the sentencing record gives any hint as to which ACCA clause or clauses the court used to apply the ACCA enhancement. Nor does Smith point to any precedent in 2004—when he was sentenced—holding or otherwise making obvious that a violation of Georgia’s robbery, burglary, or aggravated assault statutes “qualified as a violent felony only under the residual clause.” *See id.* at 1224. Because the record is unclear, and it is just as likely that the sentencing court relied on a different clause when it enhanced Smith’s

sentence, Smith “has failed to show that his enhancement was due to use of the residual clause.” *Id.* at 1222.

Given this record and our binding precedent, Smith failed to prove that his sentence was enhanced under the ACCA’s residual clause. He therefore cannot prevail on his *Johnson* claim, according to *Beeman*. So we affirm the denial of his § 2255 motion.

AFFIRMED.

FILED IN CHAMBERS
U.S.D.C. - Atlanta

APR 21 2017

James M. Hatten, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

CRIMINAL CASE NO.

v.

1:02-CR-551-ODE

JESSIE LEE SMITH

ORDER

This closed criminal case is before the Court on Defendant Jessie Lee Smith's Motion to Alter or Amend Judgment [Doc. 70]. For the reasons stated below, Smith's Motion to Alter or Amend Judgment [Doc. 70] is DENIED.

I. Background

On February 1, 2016 Smith filed a *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 49]. On May 9, 2016 the United States of America (hereinafter "the Government") filed a Response [Doc. 56]. On June 9, 2016 this Court issued an Order appointing counsel for Smith [Doc. 61]. On July 7, 2016 Smith's counsel filed an Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 64].

On March 21, 2017 this Court issued an order denying both Smith's *pro se* § 2255 Motion and Smith's counseled Amended § 2255 Motion [Doc. 68]. Specifically, the Court found that Smith's prior convictions for Georgia robbery and burglary were valid predicate felonies under the Armed Career Criminal Act ("ACCA"), and thus Smith was properly sentenced as an Armed Career Criminal [*Id.* at 4-7]. On March 28, 2017 Smith filed a Motion to Alter or Amend the Court's March 21, 2017 Order [Doc. 70].

II. Discussion

A. Legal Standard

Under Fed. R. Civ. P. 59(e), a party may bring a motion to alter or amend judgment within 28 days of entry of the judgment. In this Circuit: “[t]he only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact. [A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010) (quoting Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (per curiam)) (citations omitted).

The ACCA provides enhanced sentences for a person who violates 18 U.S.C. § 922(g)(1) and has three previous convictions for a violent felony or serious drug offense. 18 U.S.C. § 924(e)(1). The ACCA defines violent felony as:

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). Subsection (i) of the above definition is known as the elements clause, the first part of subsection (ii) is known as the enumerated offenses clause, and the final clause quoted above, that beginning with “or otherwise involves conduct,” is known as the residual clause of the ACCA. United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012). The residual clause of the ACCA has been found unconstitutionally vague such that increasing a sentence under

the residual clause is unconstitutional. Johnson v. United States, 135 S. Ct. 2551 (2015).

To decide whether a conviction qualifies as a predicate violent felony under the ACCA, courts begin with the categorical approach. Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). Under the categorical approach, the elements of the statute petitioner was convicted under are compared with the elements of the generic offense; only when the statutory elements are the same as or narrower than the elements of the generic offense is the crime of conviction an ACCA predicate felony. Id. at 2283 (citing Taylor v. United States, 495 U.S. 575, 599 (1990)).

If the statutory crime is broader than the generic crime, the Court must determine whether the statutory crime is divisible or indivisible. See id. at 2281. A non-generic indivisible crime--one which has only one set of elements--is not an ACCA predicate felony. See id. at 2283. Divisible crimes--where the crime has one or more alternative elements--are looked at through the modified categorical approach. Id. at 2281. Under the modified categorical approach, the Court can look at specific documents from the purported predicate offenses including "'charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.'" United States v. Howard, 742 F.3d 1334, 1347 (11th Cir. 2014) (quoting Johnson v. United States, 559 U.S. 133, 144 (2010)). The purpose of reviewing those documents is to determine whether the petitioner was found guilty of an offense whose elements are the same as those of an ACCA predicate felony. See id. If so, the offense of conviction is an ACCA predicate offense. See id.

B. Smith's Motion to Alter or Amend

Here, Smith's sole basis for altering or amending the Court's March 21, 2017 Order is that the Court clearly erred in evaluating Smith's Georgia robbery convictions against the generic definition of robbery rather than against the ACCA's elements clause [Doc. 70 at 2-6]. Even assuming Smith is correct that the Court erred in not evaluating his Georgia robbery convictions against the ACCA's elements clause, his Georgia robbery convictions would nonetheless be valid ACCA predicate felonies because they meet the ACCA's elements clause definition of a violent felony.

For Smith's Georgia robbery convictions to qualify as "violent felonies" pursuant to the first prong of the ACCA, they must have as an element the use, attempted use, or threatened use of "physical force." The United States Supreme Court has defined physical force to mean "violent force--that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010). The Georgia case law shows that Georgia robbery meets this requirement.

Generic robbery is the trespassory taking and carrying away by means of force or causing fear of the personal property of another from the other's person or presence with intent to steal the property. Wayne R. LaFave, Substantive Criminal Law § 20.3 (2d ed. 1986 and Supp. 2016). The statute in effect at the time of Smith's robbery convictions defined robbery as follows:

[a] person commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another (a) by use of force; or (b) by intimidation, by the use of threat or coercion, or by

placing such person in fear of immediate serious bodily injury to himself or to another; or (c) by sudden snatching.

Ga. Code Ann. § 26-1901 (1977 Revision).

The statute under which Smith was convicted thus defines robbery more broadly than generic robbery because in addition to the generic definition of robbery as taking by force or intimidation, the Georgia statute allows for robbery by sudden snatching. The Georgia statute is also divisible as it allows for the taking to occur in one of three ways. Because the crime of conviction is a non-generic, divisible crime, the Court turns to the documents underlying the convictions to determine if Smith was convicted of a version of Georgia robbery that matches the ACCA elements clause.

The indictment for Smith's 1974 robbery charges that Smith "did unlawfully, with intent to commit theft, by force and by intimidation, and by placing Alton Hale in fear of receiving an immediate serious bodily injury to himself, take from his person and immediate presence one hundred and eighty dollars . . . [which was] the property of the said person" [Doc. 56-3 at 3]. The indictment for the 1978 robbery charges that Smith:

did unlawfully, with intent to commit theft, by force, by intimidation and by placing Helen E. Bowen in fear of receiving immediate serious bodily injury to herself, take from the person and immediate presence of the said Helen E. Bowen one ladies purse and two dollars . . . [which was] the property of Helen E. Bowen

[Doc. 56-4 at 3]. These indictments indicate that Smith's convictions were for robbery by force and/or robbery by intimidation.

According to the Georgia Supreme Court: "'[f]orce implies actual personal violence, a struggle and a personal

outrage. . . . Intimidation . . . is constructive force.' . . . 'Force, [] in the sense in which it is used in defining the offense of robbery, consists in personal violence or that degree of force that is necessary to remove articles so attached to the person or clothing as to create resistance, however slight.'" Henderson v. State, 209 Ga. 72, 74 (Ga. 1952) (citations omitted); see Johnson, 559 U.S. at 138 (noting that federal courts are "bound" by a state supreme court's "interpretation of state law, including its determination of the elements" of a criminal offense "in determining whether a felony conviction . . . meets the definition of 'violent felony' in 18 U.S.C. § 924(e)(2)(B)(i)").

Categorically, therefore, Smith's prior convictions for robbery by force required proof of "personal violence or [a] degree of force." No matter the degree, this conviction necessitated "the use, attempted use, or threatened use of physical force." Further, Smith's convictions for robbery by intimidation categorically required "constructive force." Georgia courts have expanded on this concept, holding that intimidation is "'attended with such circumstances of terror--such threatening by word or gesture, as in common experience, [is] likely to create an apprehension of danger.'" Jackson v. State, 175 Ga. App. 843, 843 (Ga. Ct. App. 1985) (quoting Long v. State, 12 Ga. 293, 321 (Ga. 1852)); see also 2 Ga. Jury Instructions--Criminal § 2.60.40 (providing that robbery by intimidation requires "putting the alleged victim (or another) under such fear as would create in the mind of the victim (or another) an apprehension of danger to life or limb."). This language certainly requires at least the "threatened use of physical force."

Assuming arguendo that the Court incorrectly measured Smith's prior Georgia robbery convictions against the generic definition of robbery rather than against the ACCA's elements clause in deciding that they qualified as ACCA predicate felonies, the Court's conclusion remains the same. Because Smith's convictions for Georgia robbery by force and/or intimidation had as elements "the use, attempted use, or threatened use of physical force against the person of another," those convictions were proper ACCA predicate felonies, and Smith was properly sentenced as an Armed Career Criminal. On that basis, Smith's Motion to Alter or Amend Judgment [Doc. 70] is DENIED.

III. Conclusion

In conclusion for the reasons stated above, Defendant Jessie Lee Smith's Motion to Alter or Amend Judgment [Doc. 70] is DENIED.

SO ORDERED this 21 day of April, 2017.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

FILED IN CHAMBERS
U.S.D.C. - Atlanta

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAR 21 2017

UNITED STATES OF AMERICA

v.

JESSIE LEE SMITH

CRIMINAL CASE NO.

1:02-CR-551-ODE

By James M. Hatten, Clerk
Angele Deputy Clerk

ORDER

This closed criminal case is before the Court on Defendant Smith's *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 49] and Defendant Smith's counseled Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 64]. For the reasons stated below, Smith's *pro se* Motion under 28 U.S.C. § 2255 [Doc. 49] and Smith's counseled Amended Motion under 28 U.S.C. § 2255 [Doc. 64] are DENIED.

I. Background

On September 2, 2003 a jury found Smith guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e) [Docs. 32, 56 at 1-2]. Prior to Smith's sentencing, the United States Probation Office prepared a Presentence Investigation Report (PSR). The PSR calculated that Smith was an Armed Career Criminal based upon Georgia state law convictions in (1) 1974 for robbery; aggravated assault with intent to rob, (2) 1978 for robbery, and (3) 1986 for burglary [Doc. 57-1 ¶ 15 (citing Doc. 57-1 ¶¶ 17, 18, 27)]. Because Smith's prior convictions qualified him as an Armed Career Criminal, the PSR calculated his Total Offense Level under the United States Sentencing Guidelines to be 34 [Doc. 57-1

¶ 15]. Smith objected to applying the Armed Career Criminal Sentencing Guidelines to his case [Id.]. With Smith's Criminal History Category of VI, the PSR calculated his Guidelines Sentence Range as 262 to 327 months' imprisonment [Id. at 20].

Smith's sentencing hearing was held January 15, 2004 [Doc. 39]. At sentencing Smith objected to his classification as an Armed Career Criminal; the Court overruled his objection [Doc. 56-2 at 14-15]. The Court found that Smith's Total Offense Level was 34 with a Criminal History Category of VI, which resulted in a Guidelines Sentence Range of 262 to 327 months' imprisonment [Id. at 16-17, 24]. The Court sentenced Smith to 262 months' imprisonment [Id. at 24, Doc. 40].

Smith appealed his sentence to the United States Court of Appeals for the Eleventh Circuit [Doc. 41]. On October 12, 2004 the Eleventh Circuit issued an Opinion affirming this Court [Doc. 47]. Smith then filed a petition for a writ of certiorari to the United States Supreme Court [Doc. 56-1 at 4]. The Supreme Court vacated the Eleventh Circuit's Opinion and remanded to the Eleventh Circuit for reconsideration in light of United States v. Booker, 543 U.S. 220 (2005) [Doc. 48 at 3]. In an Opinion dated June 9, 2005 the Eleventh Circuit reinstated and affirmed its earlier Opinion in this case [Doc. 48].

On February 1, 2016 Smith filed a *pro se* § 2255 Motion [Doc. 49]. On May 9, 2016 the United States (hereinafter "the Government") filed a Response [Doc. 56]. On June 9, 2016 this Court issued an Order appointing counsel for Smith [Doc. 61]. On July 7, 2016 Smith's counsel filed an Amended § 2255 Motion [Doc. 64]. These two Motions are thus ripe before the Court.

II. Discussion

A. Legal Standard

The Armed Career Criminal Act (ACCA) provides enhanced sentences for a person who violates 18 U.S.C. § 922(g)(1) and has three previous convictions for a violent felony or serious drug offense. 18 U.S.C. § 924(e)(1). The ACCA defines violent felony as:

any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924 (e)(2)(B). Subsection (i) of the above definition is known as the elements clause, the first part of subsection (ii) is known as the enumerated offenses clause, and the final clause quoted above, that beginning with "or otherwise involves conduct" is known as the residual clause of the ACCA. Johnson v. United States, 135 S. Ct. 2551 (2015) held that the residual clause of the ACCA was unconstitutionally vague, and thus that increasing a sentence under the clause was unconstitutional. Johnson is retroactive to cases on collateral review. Welch v. United States, 136 S. Ct. 1257 (2016).

To decide whether a conviction qualifies as a predicate violent felony under the ACCA, courts begin with the categorical approach. Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). Under the categorical approach, the elements of the statute petitioner was convicted under are compared with the elements of the generic offense; only when the statutory elements are the same as or narrower than the elements of the generic offense is the crime of conviction

an ACCA predicate felony. Id. at 2283 (citing Taylor v. United States, 495 U.S. 575, 599 (1990)).

If the statutory crime is broader than the generic crime, the Court must determine whether the statutory crime is divisible or indivisible. See id. at 2281. A non-generic indivisible crime--one which has only one set of elements--is not an ACCA predicate felony. See id. at 2283. Divisible crimes--where the crime has one or more alternative elements--are looked at through the modified categorical approach. Id. at 2281. Under the modified categorical approach, the Court can look at specific documents from the purported predicate offenses including "'charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.'" United States v. Howard, 742 F.3d 1334, 1347 (11th Cir. 2014) (quoting Johnson v. United States, 559 U.S. 133, 144 (2010)). The purpose of reviewing those documents is to determine whether the petitioner was found guilty of an offense whose elements are the same as those of the generic offense. Id. If so, the offense of conviction is an ACCA predicate offense. Id.

B. Discussion

In his *pro se* § 2255 Motion Smith argues that in light of Johnson, 135 S. Ct. 2551, Smith's convictions for robbery, burglary, and robbery/aggravated assault no longer qualify as ACCA predicate felonies, and thus he is not an Armed Career Criminal and should be resentenced [Doc. 49]. The Government contests only the convictions for robbery and burglary, not that for assault, because if the Court finds that the two robbery convictions, which were under the same statute, are not proper predicate felonies, Smith is not an Armed

Career Criminal [Doc. 56 at 9 n.6]. The Government contends that the robbery and burglary convictions are proper predicate felonies under the ACCA, and thus Smith's Motion should be denied [Doc. 56]. Smith's counseled § 2255 argues that Smith's convictions for robbery and burglary under Georgia law do not qualify as ACCA predicate felonies in light of Johnson [Doc. 64].

1. Smith's Robbery Convictions

Generic robbery is the trespassory taking and carrying away by means of force or causing fear of the personal property of another from the other's person or presence with intent to steal the property. Wayne R. LaFave, Substantive Criminal Law § 20.3 (2d ed. 1986 and Supp. 2016). The statute in effect at the time of Smith's robbery convictions defined robbery as follows:

[a] person commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another (a) by use of force; or (b) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or (c) by sudden snatching.

Ga. Code Ann. § 26-1901 (1977 Revision).

The statute under which Smith was convicted defines robbery more broadly than generic robbery because in addition to the generic definition of robbery as taking by force or intimidation, the Georgia statute allows for robbery by sudden snatching. The Georgia statute is also divisible as it allows for the taking to occur in one of three ways.

Because the crime of conviction is a non-generic, divisible crime, the Court turns to the documents underlying the convictions to determine if Smith was convicted of a version of Georgia robbery that matches the generic definition of robbery. The indictment for the

1974 robbery charges that Smith "did unlawfully, with intent to commit theft, by force and by intimidation, and by placing Alton Hale in fear of receiving an immediate serious bodily injury to himself, take from his person and immediate presence one hundred and eighty dollars [which was] the property of said person." [Doc. 56-3 at 3]. The indictment for the 1978 robbery charges that Smith:

did unlawfully, with intent to commit theft, by force, by intimidation and by placing Helen E. Bowen in fear of receiving immediate serious bodily injury to herself, take from the person and immediate presence of the said Helen E. Bowen one ladies purse and two dollars . . . [which was] the property of Helen E. Bowen

[Doc. 56-4 at 3]. These indictments indicate that the elements of the Georgia law robberies Smith was convicted of matched the elements of the generic definition of robbery as a taking by force or fear from another's person the other's personal property with intent to steal the property. For these reasons, Smith's 1974 and 1978 robberies are valid ACCA predicates. See In re Herman McClouden, No. 16-13525-J (11th Cir. July 12, 2016 at 5-6) (implying that Georgia robbery could be an ACCA predicate felony).

2. Smith's Burglary Conviction

The generic definition of burglary includes "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 598 (1990). If the statute of the purported ACCA predicate felony has the basic elements of generic burglary, the burglary is a predicate felony for ACCA purposes. Id. at 599.

The Georgia statute under which Smith was convicted defines burglary as follows:

[a] person commits burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, aircraft, watercraft, or other such structure designed for use as the dwelling of another, or enters or remains within any other building, railroad car, aircraft or any room or any part thereof.

Ga. Code. Ann. § 26-1601 (1977 Revision). That statute criminalizes conduct broader than the generic definition of burglary because it includes burglary not just in buildings or structures, but also in vehicles, railroad cars, watercraft and aircraft. United States v. Gundy, 842 F.3d 1156, 1165 (11th Cir. 2016). Further, the statute is divisible because the statute includes alternative locations for the burglary as elements of the crime. Id. at 1166-68.

Because the statute under which Smith was convicted is a non-generic, divisible statute, the Court looks to the documents underlying the conviction to determine if the burglary Smith was convicted of meets the generic definition of burglary. Those documents reveal that the Smith was charged with "unlawfully, without authority, enter[ing] into the dwelling house of Larry Pinyan with intent to commit a theft therein" [Doc. 56-5 at 4]. Smith was thus convicted of a Georgia law burglary whose statutory elements match those of generic burglary as an unlawful entry into a building with intent to commit a crime. As such, Smith's 1986 burglary conviction is a valid ACCA predicate felony.

Because Smith's convictions under Georgia law for 1974 and 1978 robberies and for a 1986 burglary are valid ACCA predicate felonies, Smith's § 2255 Motion [Doc. 49] is DENIED, and Smith's Amended § 2255 Motion [Doc. 64] is DENIED.

III. Conclusion

For the reasons stated above, Smith's *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 49] is DENIED. Smith's counseled Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Doc. 64] is also DENIED.

SO ORDERED this 21 day of March, 2017.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE