

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10608-F

DARIUS ANDRE HOLMES,

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 ROSENBAUM, Circuit Judges.

BY THE COURT:

Darius Andre Holmes has filed a motion for reconsideration of this Court's order dated October 29, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* in the appeal of the denial of his 28 U.S.C. § 2255 motion. Because Mr. Holmes has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED.

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

ORDER:

Darius Andre Holmes, a federal prisoner serving a 262-month sentence for heroin distribution and possession of a fireman by a convicted felon, seeks a certificate of appealability from the District Court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255. This order denies the certificate and denies his motion to proceed in forma pauperis as moot.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); see 28 U.S.C. § 2253(c)(2). An

applicant makes this showing “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Miller-El, 537 U.S. at 327, 123 S. Ct. at 1034.

Mr. Holmes claims his counsel was ineffective for failing to investigate and object to the use of past convictions to enhance his sentence under the Armed Career Criminal Act (ACCA). Under ACCA, a defendant convicted of being a felon in possession of a firearm who has “three prior convictions . . . for a violent felony or a serious drug offense, or both” is subject to enhanced sentences. 18 U.S.C. § 924(e)(1). ACCA defines a serious drug offense as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance . . . , 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). ACCA defines “violent felony” as an offense that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another,” (2) “is burglary, arson, or extortion, [or] involves the use of explosives,” or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court struck down that last definition, known as the residual clause, as unconstitutionally vague in Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551,

2557 (2015). Johnson did not affect the constitutionality of the definition of “serious drug offense.”

Mr. Holmes says his counsel was ineffective for failing to raise a Johnson objection to his sentence. He moved under 28 U.S.C. § 2255 to have his sentence corrected. The District Court denied his motion after determining Mr. Holmes’ counsel was not ineffective for failing to object. Reasonable jurists would not debate that conclusion, because there was no valid objection to make. Mr. Holmes has at least three convictions for serious drug offenses. Specifically, Mr. Holmes has one conviction for possession of cocaine with intent to distribute and six convictions for sale of cocaine, all in violation of O.C.G.A. § 16-13-30(b), (d). These convictions still qualify as serious drug crimes after Johnson.

For these reasons, a certificate of appealability is DENIED and Mr. Holmes’ motion to proceed in forma pauperis is DENIED AS MOOT.



UNITED STATES CIRCUIT JUDGE

United States District Court
Southern District of Georgia

Darius Andre Holmes

JUDGMENT IN A CIVIL CASE

v.

CASE NUMBER: CV 417-147
CR 415-144

United States of America

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in accordance with this Court's order dated 1/31/18 adopting the Magistrate Judge's Report and Recommendation, the 2255 Petition is Denied. This case stands closed.

2/1/2018

Date

Scott L. Poff

Clerk



(By) Deputy Clerk



IN THE UNITED STATES DISTRICT COURT FOR DISTRICT COURT
THE SOUTHERN DISTRICT OF GEORGIA Southern District of Ga.
SAVANNAH DIVISION Filed in Office

DARIUS ANDRE HOLMES,

Petitioner,

v. UNITED STATES OF AMERICA,

Respondent.

1/31/2018

Deputy Clerk

CASE NOS. CV417-147
CR415-144

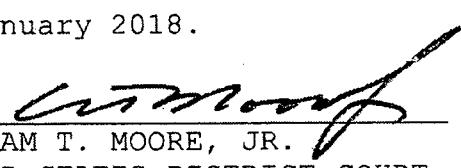
O R D E R

Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 5), to which objections have been filed (Doc. 8). After a careful de novo review of the record, the Court concludes that Petitioner's objections are without merit. Accordingly, the Report and Recommendation is ADOPTED as the Court's opinion in this case. As a result, Petitioner's 28 U.S.C. § 2255 petition is DENIED. In addition, Petitioner is not entitled to a Certificate of Appealability, rendering moot any request for in forma pauperis status on appeal. The Clerk of Court is DIRECTED to close this case.

In his objections, Petitioner advances the general argument that the Government is unable to establish that his prior convictions qualify as predicate offenses under the Armed Career Criminal Act ("ACCA") because the state

documents fail to identify the specific subsection of the state statute under which he was convicted. However, this Court has reviewed those documents and the record in this case, and is satisfied that Petitioner garnered at least three predicate offenses prior to his conviction in this case. Therefore, Petitioner's sentence was properly enhanced under the ACCA.

SO ORDERED this 31st day of January 2018.



WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

DARIUS ANDRE HOLMES,)
)
)
Movant,)
)
)
v.) CV417-147
)
) CR415-144
)
UNITED STATES OF AMERICA,)
)
)
Respondent.)

REPORT AND RECOMMENDATION

Darius Andre Holmes was convicted by a jury of violating 18 U.S.C. § 922(g) (possession of a firearm by a convicted felon) and 21 U.S.C. §§ 841(a)(1) & (b)(1)(C) (distribution of heroin), and given an enhanced sentence of 262 months under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *See* docs. 1¹ (indictment); 50 (superseding indictment); 85 (jury verdict); 106 (judgement for 262 months' imprisonment); 124 (mandate affirming judgment, filed April 4, 2017). Invoking 28 U.S.C. § 2255, he contends counsel was ineffective for failing to object to the findings of his Presentence Investigative Report or to argue (either in this Court or on appeal) that his ACCA-predicate

¹ The Court is citing to the criminal docket in CR415-144 unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

convictions² did not qualify as “crimes of violence” after *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015). Doc. 125 at 4-5.

I. ANALYSIS

A. The *Johnson* Decision

The ACCA provides enhanced penalties for defendants who are (1) convicted of being felons in possession of firearms in violation of 18 U.S.C. § 922(g), and (2) have “three prior convictions . . . for a violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e)(1). Plain vanilla, felon-in-possession convictions fetch a maximum 10 year sentence, *see* 18 U.S.C. § 922(a)(2), while the ACCA enhancement mandates a 15 year minimum (and a maximum of life). 18 U.S.C. § 924(e)(1).

To qualify as an ACCA “violent felony,” the crime must be an offense that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another”; (2) “is burglary,

² Holmes was previously convicted of aggravated assault (eight counts committed on the same occasion, and counted as a single predicate offense), sale of cocaine (six counts committed on different occasions), and possession with intent to distribute cocaine (one count). PSR at §§ 42, 46, 49, 50 & 53. He did not object to the PSR findings. PSR, Addendum; doc. 118 (sentencing transcript) at 4 (when asked whether he or counsel had any objections to the findings of the PSR, Holmes said “No sir.”).

arson, or extortion, [or] involves the use of explosives”; or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(i)-(ii). These three definitions are known, respectively, as (1) the elements clause, (2) enumerated crimes clause, and (3) residual clause. *Johnson* held that that “residual clause” was unconstitutionally vague. *See* 135 S. Ct. 2551, 2557. It said nothing, however, about ACCA enhancements predicated on convictions for “serious drug offenses” or “violent felonies” as defined by ACCA provisions other than the residual clause. *See, e.g., Johnson*, 135 S. Ct. at 2563 (“Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony,” much less its definition of “serious drug offense”). After *Johnson*, enhancements based on those offenses remain valid. *United States v. Tinker*, 618 F. App’x 635, 637 (11th Cir. 2015) (convictions that qualify as violent felonies under the “elements” clause of the ACCA, rather than the “residual” clause, survive *Johnson*).

B. Holmes’ Convictions

Holmes disputes that his ACCA-enhanced sentence survives *Johnson*. Doc. 125. But the *Johnson* decision only invalidated the

residual clause of the ACCA; serious drug offenses and violent felonies within the elements clause remain ACCA predicates.

A “serious drug offense” is defined as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance . . . , 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). Holmes concedes that his conviction for possession with intent to distribute cocaine in violation of O.C.G.A. § 16-13-30(b), (d) (*see* doc. 127, Exh. G) qualifies as an ACCA predicate offense. He disputes his other cocaine sale convictions, arguing that “sales” do not qualify as “distributing” within the meaning of the ACCA.” Doc. 125 at 15-24. He’s wrong.

Holmes’ three 2008 convictions and three 2012 convictions³ for Georgia sale of cocaine fit the § 924(e) definition of a “serious drug offense” because: (1) it was a state law crime, (2) selling is a form of

³ To determine the statutory basis for conviction, a court may consult certain “Shepard” documents such as charging documents, plea agreements, transcripts of plea colloquies, jury instructions, and verdict forms. *Johnson v. United States*, 559 U.S. 133, 144 (2010). Undisputed PSR facts may also be used in determining the statutory basis for conviction. *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. June 15, 2016) (citing *United States v. McCloud*, 818 F.3d 591, 595, 599 (11th Cir. 2016)); *United States v. Ramirez-Flores*, 743 F.3d 816, 820 (11th Cir. 2014); *United States v. Wade*, 458 F.3d 1273, 1277-78 (11th Cir. 2006).

distributing, (3) cocaine is a controlled substance, and (4) the crime was punishable by up to thirty years at the time he was convicted. *See, e.g.*, *Green v. United States*, 2017 WL 1100443 at *2 & n. 3 (S.D. Ga. Jan. 9, 2017). The statute provided “Except as authorized by this article, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell or possess with intent to distribute any controlled substance,” and it made such a violation “with respect to a controlled substance in Schedule I or narcotic drugs in Schedule II” punishable “by imprisonment for not less than five years nor more than 30 years” on the first offense. O.C.G.A. §§ 16-13-30(b), (d) (version in effect from 1990-2012); *Dennard v. State*, 265 Ga. App. 229, 229 (2004) (cocaine qualifies as narcotic drug). These offenses clearly remain qualifying “serious drug offenses” for ACCA sentence-enhancing purposes.

After *Johnson*, Holmes’ convictions for possession with intent to distribute cocaine and the sale of cocaine in violation of O.C.G.A. § 16-13-30(b) remain qualifying ACCA predicates. *See* doc. 127, Exhs. E, F, & G; *see also In re Williams*, 826 F.3d 1351, 1356 (2016) (prior convictions for a “felony drug offense” are “not even arguably affected by *Johnson*’s holding regarding the ACCA’s residual-clause definition of a violent

felony.”). That’s at least four⁴ qualifying ACCA-enhancing predicate

⁴ Holmes contends that his three 2012 convictions failed to specify the statutory subsection he was charged under,)and thus are too vague and uncertain to form the bases for an ACCA enhancement. Doc. 125 at 23-24. Even assuming, *arguendo*, that he is correct, (he still has four predicate serious drug offenses)i.e., his three 2008 convictions for sale of cocaine and 2012 conviction for possession with intent to distribute cocaine) that fully meet the three-offense threshold to qualify him as an armed career criminal.

Holmes also has a violent felony under his belt. Doc. 127, Exh. D (conviction for 8 counts of aggravated assault in violation of O.C.G.A. § 16-5-21 in 1992, committed simultaneously and (thus considered a single offense). Even though his cocaine possession and sale convictions are sufficient to qualify him as an armed career criminal, his violent felony bring his qualifying ACCA-predicate count up further still.

Holmes specifically contends that his aggravated assault conviction no longer counts post-*Johnson*. Doc. 125 at 15-24. But the ACCA categorizes as violent felonies those crimes that have “as an element the use, or attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(1)(2)(B)(i). Holmes’ 1992 conviction for aggravated assault comes under the ACCA’s elements clause; *Johnson*, which only invalidated the residual clause of the ACCA, is inapplicable here to unwind it.

At the time of his conviction, the Georgia statute provided that a person committed aggravated assault when he, “with a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” O.C.G.A. § 16-5-21(a)(2). Clearly, the state statute requires as an element the use of “threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(1)(2)(B)(i); *Hayward v. United States*, 2016 WL 5030373 at *3 (S.D. Ga. Sept. 19, 2016); *Neesmith v. United States*, 2016 WL 1688780 at * 2 n. 2 (S.D. Ga. Apr. 26, 2016). The Eleventh Circuit has held that an analogous Florida aggravated assault statute:

is categorically a violent felony under the ACCA’s elements clause. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337-38 & n. 6 (11th Cir. 2013), abrogated on other grounds by *Johnson*, 576 U.S. ___, 135 S. Ct. 2551. In *Turner*, we reasoned that an aggravated assault conviction “will always include as an element the threatened use of physical force against the person of another.” *Id.* at 1338 (quotations marks and alteration omitted). This Court noted that it was not necessary to review the underlying facts of the conviction to classify aggravated assault as a violent felony because, by its own terms, the offense required a threat to do violence to the person of another.

offenses. 18 U.S.C. § 924(e)(1). Holmes' claim that counsel was ineffective for failing to investigate and object to the PSR -- thus disqualifying these offenses from forming the basis of his armed career criminal enhancement -- is dead on arrival. Counsel cannot be deficient for failing to advance an utterly meritless argument to the court. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (there is no “constitutional right to compel appointed counsel to press nonfrivolous points”); *Denson v. United States*, 804 F.3d 1339, 1342 (11th Cir. 2015) (the failure to raise “a meritless objections does not constitute deficient performance”);

Hires, 825 F.3d 1297, 1301 (11th Cir. 2016).

Though unnecessary to a finding that Georgia aggravated assault (assault with a deadly weapon) is an ACCA-predicate offense, a review of the *Shepard* documents further underscore that Holmes was indeed convicted for a violent felony within the meaning of the ACCA’s elements clause. *Johnson*, 559 U.S. at 144 (to determine the statutory basis for conviction, a court may consult certain “*Shepard*” documents such as charging documents, plea agreements, transcripts of plea colloquies, jury instructions, and verdict forms); *Hires*, 825 F.3d at 1302 (undisputed facts contained in a Presentence Investigative Report may also be used in determining the statutory basis for conviction). Holmes was charged with, and convicted of, eight counts of aggravated assault in violation of O.C.G.A. § 16-5-21 for his participation of the shooting of John Baker, Gerald Horne, Eric Groover, Mario Mason, Patrick McCoy, Bobby Weathers, Dwight Wilcox, and George Williams with a sawed-off shotgun during a robbery. Doc. 125, Exh. D; PSR at ¶ 46.

That assault with a deadly weapon was indisputably a violent felony as contemplated by Congress, and unaffected by *Johnson*. And just as with his qualifying serious drug offenses, counsel was not ineffective for failing to argue otherwise. *See Jones*, 463 U.S. at 751 (there is no “constitutional right to compel appointed counsel to press nonfrivolous points”); *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (to prevail on an IAC claim, the claim itself “must have merit”); *Maitre v. Wainwright*, 811 F.2d 1430, 1434 (11th Cir. 1987) (same).

Nyhuis, 211 F.3d at 1344 (to prevail on an IAC claim, the claim itself “must have merit”); *Matire*, 811 F.2d at 1434 (same).

III. CONCLUSION

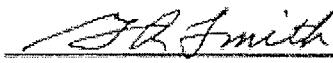
Darius Andre Holmes thus has passed the ACCA three-conviction threshold for enhancement as an armed career criminal, and counsel was not ineffective for failing to argue otherwise. Accordingly, his § 2255 motion should be **DENIED** on the merits.

This Report and Recommendation (R&R) is submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 72.3. Within 14 days of service, any party may file written objections to this R&R with the Court and serve a copy on all parties. The document should be captioned “Objections to Magistrate Judge’s Report and Recommendations.” Any request for additional time to file objections should be filed with the Clerk for consideration by the assigned district judge.

After the objections period has ended, the Clerk shall submit this R&R together with any objections to the assigned district judge. The district judge will review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are

advised that failure to timely file objections will result in the waiver of rights on appeal. 11th Cir. R. 3-1; *see Symonett v. V.A. Leasing Corp.*, 648 F. App'x 787, 790 (11th Cir. 2016); *Mitchell v. U.S.*, 612 F. App'x 542, 545 (11th Cir. 2015).

SO REPORTED AND RECOMMENDED, this 7th day of December, 2017.



UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA