IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13593-A

MELVIN SCOTT MORMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Alabama

ORDER:

Melvin Morman is a federal prisoner serving a 188-month sentence for stealing firearms from a federal firearms licensee, 18 U.S.C. § 922(u), and being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1) and 924(e). Morman was subject to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

Morman filed a timely 28 U.S.C. § 2255 motion to vacate, asserting that he no longer qualified as an armed career criminal because, after the U.S. Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his prior Alabama convictions for third-degree burglary were not ACCA predicate offenses. He argued that this Court's decision in *United States v. Matthews*, 466 F.3d 1271 (11th Cir. 2006) (holding that Florida burglary qualified as a crime of violence under the ACCA's residual clause), proved that the sentencing court relied on the residual

clause when it concluded that his Alabama burglary convictions were violent felonies under the ACCA.

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).

Pursuant to the ACCA, any person who violates 18 U.S.C. § 922(g), and has 3 previous convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year 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). The first prong of this definition is called the "elements clause," while the second prong contains the "enumerated-crimes" clause and, finally, what is commonly called the "residual clause." *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

The Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. In order to prove a *Johnson* claim, the movant must show that, more likely than not, the sentencing court's use of the residual clause led to the enhancement of his sentence. *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). "[I]f it is just as likely that the sentencing court

relied on the elements or enumerated crimes clauses, solely or as an alternative basis for the enhancement, then the movant has failed to show that his enhancement was due to use of the residual clause." *Id.* When it is unclear which clause the sentencing court relied on, the movant has not satisfied his burden. *Id.* at 1224-25.

To prove that he was sentenced under the residual clause, a movant may point to precedent at the time of his sentencing "holding, or otherwise making obvious, that [his predicate conviction] qualified as a violent felony only under the residual clause." *Id.* at 1224 & n.5. "[A] sentencing court's decision today" that a prior offense no longer qualifies as a violent felony under the elements clause or enumerated-offenses clause "would be a decision that casts very little light, if any, on the key question of historical fact." *Id.* "[I]f the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." *Id.*

At the time of Morman's sentencing, this Court had held that a conviction under Florida burglary was a violent felony under the ACCA's residual clause. *Matthews*, 466 F.3d at 1275-76. However, in *Matthews*, this Court specifically stated that it was not addressing whether that crime also would qualify under the ACCA's enumerated-crimes clause. *Id.* at 1276. The Alabama third-degree burglary statute is similarly worded to the Florida burglary statute, but, at the time of Morman's sentencing, this Court had not addressed whether Alabama third-degree burglary was a violent felony under the ACCA.

The district court did not err by denying Morman's § 2255 motion because he did not meet his burden of showing that the sentencing court relied solely on the residual clause. *See Beeman*, 871 F.3d at 1221. First, the sentencing record does not indicate which ACCA clause the court relied on. Second, Morman's reliance on *Matthews* is insufficient to show that the sentencing

court relied solely on the residual clause, as *Matthews* concerned a conviction for Florida burglary, not Alabama third-degree burglary, and this Court specifically left open the question of whether Florida's burglary statute, which is similarly-worded to the Alabama third-degree burglary statute, qualified as a violent felony under the enumerated-crimes clause. *Matthews*, 466 F.3d at 1276. Furthermore, there was no case in this Circuit, at the time, holding that Alabama third-degree robbery qualified as a violent felony only under the ACCA's residual clause. Accordingly, reasonable jurists would not debate that Morman failed to make the requisite showing in his § 2255 motion, and his COA motion is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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David J. Smith
Clerk of Court

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December 11, 2018

Debra P. Hackett
U.S. District Court
PO BOX 711
MONTGOMERY, AL 36101-0711

Appeal Number: 18-13593-A
Case Style: Melvin Morman v. USA
District Court Docket No: 3:16-cv-00483-WKW-CSC
Secondary Case Number: 3:06-cr-00175-WKW-CSC-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: Denise E. O'Guin, A
Phone #: (404) 335-6188

Enclosure(s)

DIS-4 Multi-purpose dismissal letter