

APPENDIX 1A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**JOHN WILLIE JOHNSON
03945-043**

PETITIONER

V.

**CRIMINAL NO. 3:01-CR-167-HTW- FKB-4
CIVIL NO. 3:16-CV-481- HTW**

UNITED STATES OF AMERICA

ORDER

Before this court is the motion filed by the Petitioner John Willie Johnson, through counsel. [doc. no. 42]. Johnson, (hereinafter “Petitioner”) invokes the provisions of § 28 U.S.C. § 2255 in an attempt to have his federal sentence vacated, set aside or reduced in light of the United States Supreme Court’s ruling in *Johnson v. United States*, 135 S.Ct. 2251 (2015) and its progeny. The government opposes the motion and has filed a brief in response.

The strictures of Title 28 U.S.C. § 2255(b) govern the matter of hearings, holding that one is not necessary if the motion, files and record or recollection of the case show the defendant is not entitled to relief. 28 U.S.C. § 2255; *United States v. Green*, 882 F.2d 999, 1008 (5th Cir. 1989); *United States v. Raetzsch*, 781 F.2d 1149, 1151 (5th Cir. 1986); *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985); *United States v. Guerra*, 588 F.2d 519 (5th Cir. 1979). This court has determined that a hearing in this matter is not necessary.

Petitioner's § 2255 Claims

The Petitioner filed his motion, through counsel, under Title 28 U.S.C. § 2255¹, seeking to have his sentence vacated, set aside or corrected. Johnson was convicted on March 27, 2003, for being a felon in possession of a firearm under Title 18 U.S.C. § 922(g)(1). This conviction resulted in an enhanced sentence pursuant to Title 18 U.S.C. § 924(e)(1), under the provisions of the Armed Career Criminal Act (“ACCA”).² The enhancement provision required that a minimum sentence of fifteen years (180 months) should be imposed. Johnson was sentenced to 190 months to be followed by five years of supervised release.

Johnson filed this petition under § 2255 requesting that his case should be reopened for further sentencing proceedings in light of the United States Supreme Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015). In *Johnson*, the States Supreme Court held that the term “violent felony” as defined in the residual clause of the ACCA was unconstitutionally vague. The United States Supreme Court later held, in *United States v. Welch*, that Johnson is retroactively applicable to cases on collateral review. *Welch*, 136 S.Ct. 1257 (2016).

The petitioner here contends that after *Johnson*, one or more of the “violent felonies” that brought him under the “armed career criminal” provision of the ACCA are no longer allowable

¹ 28 U.S.C. §2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

...

² The ACCA provides at (e)(2)(B):

(B) the term “violent felony” means any crime punishable by imprisonment for a term 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; ... (emphasis added).

for use to enhance his sentence. The government disagrees, asserting that at least three of the petitioner's previous state court convictions qualify as violent felonies under 18 U.S.C. § 924(e)(2)(B)(i),³ the clause referred to as the "elements clause."

Petitioner's four previous felony convictions relied on to support Johnson's status as an armed career criminal are as follows.

- 1) A Mississippi state court conviction for "armed robbery" PSR, p. 6, ¶ 26.
- 2) A Mississippi state court conviction for "Possession of Cocaine with Intent to Distribute." PSR, p. 7, ¶ 32
- 3) A Mississippi state court conviction for "simple assault on a law enforcement officer." PSR, p. 8, ¶ 34.
- 4) A federal court conviction for "possession of an unregistered firearm." PSR, p. 9, ¶ 38.

Petitioner challenges three of his prior convictions, asserting that the "armed robbery" conviction, the conviction for "simple assault on a law enforcement officer," and the conviction for "possession of an unregistered firearm" no longer qualify as "violent felonies" under Title 18 U.S.C. § 924(3)(2)(B). He does not challenge that his conviction for possession of cocaine with intent to distribute qualifies as a "serious drug offense" under 18 U.S.C. § 924(e)(1).⁴

³ Title 18 U.S.C. § 924(e)(2)(B) provides:

(e)(2)(B) the term "violent felony" means 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; . . .

⁴ Title 18 U.S.C. § 924(e)(1) provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not

Courts employ a categorical approach when classifying a prior conviction for sentencing enhancement purposes. *Taylor v. United States*, 495 U.S. 575,602 (1990). The court looks to the elements of the statute of conviction, not the defendant’s specific conduct in committing the crime. *United States v. Campbell*, No. 17-50383, 2019 WL 4282376, at *3 (5th Cir. Sept. 10, 2019).

This court first analyzes Petitioner’s armed robbery conviction in light of *Johnson*. In *Johnson* the United States Supreme Court invalidated the residual clause of 18 U.S.C. §924(e), which defines “violent felony,” holding that it was unconstitutionally vague. The ACCA’s definition of violent felony consists of three parts. Subsection (i) of 924((e)(2)(B) is referred to as the elements clause. It defines a violent felony as a crime punishable by more than one year and which “has as an element the use, attempted use, or threatened use of physical force against the person of another.” Title 18 U.S.C. § 924(e)(2)(B). This clause was **not** invalidated by the Supreme Court in *Johnson*. The Government contends that subsection (e)(2)(B)(i) applies to Petitioner’s conviction for robbery. This court agrees.

To determine whether petitioner’s prior conviction for robbery qualifies as a crime of violence under the ACCA, the Court must look to the statutory definition of the offense charged, rather than the defendant’s actual conduct in committing the offense. *United States v. Velasco*, 465 F.3d 633, 638 (5th Cir. 2006). See also *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (en banc). Petitioner was convicted of armed robbery in case no. Q-782 in the Circuit Court of Hinds County, Mississippi, on March 5, 1980, as stated in the Presentence Investigation Report. This was not the subject of objection by the defendant/petitioner. Mississippi’s “armed robbery” statute, Miss. Code Ann. §97-3-79, states as follows.

suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will, *by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon* shall be guilty of robbery. . . .

Mississippi Code Ann. §97-3-79 (emphasis added).

The commission of armed robbery in Mississippi requires either actual violence to the person, or putting the victim in fear of immediate injury, *See, e.g., Murphy v. State*, 868 So.2d 1030, 1037 (Miss. Ct. App. 2003) by exhibition of a deadly weapon. If the statute is divisible, and the Government contends it is, the court uses the modified categorical approach to decide if the elements of a violent offense are met. Under this approach the court may use certain limited documents to determine the crime of convictions, such as the indictment, jury instructions, plea agreements and plea colloquies. *United States v. Burris*, 920 F.3d 942, 947 (5th Cir. 2019).⁵

Under either provision, the use of force is sufficient to qualify as a crime of violence. This statutory definition is not dependent upon the residual clause of the ACCA which is found in the latter part of subsection (ii). This definition of robbery fits squarely within the definition of “crime of violence” contained in subsection (i), the “elements clause.” *See Stokeling v. United States*, — U.S. —, 139 S. Ct. 544 (2019) (quoted in *United States v. Campbell*, No. 17-50383, 2019 WL 4282376, at *3 (5th Cir. Sept. 10, 2019).

This court next examines Petitioner’s claim that his conviction for simple assault on a law enforcement officer does not qualify as a “violent crime” under the ACCA, after the Supreme Court’s ruling in the *Johnson* case. As with Petitioner’s robbery convictions, the Government

⁵ The panel majority had previously held that Burris’s conviction for simple robbery was not a violent felony under the ACCA. *U.S. v. Burris*, 896 F.3d 320 (5th Cir. 2018) (opinion withdrawn). That opinion was withdrawn by *U.S. v. Burris*, 908 F.3d 152 (5th Cir. 2018). The current opinion, after rehearing, upholds Burris’s sentence under the ACCA. *U.S. v. Burris*, 920 F.3d 942 (2019).

contends that Petitioner's conviction for simple assault on a law enforcement officer does not fall under the residual clause, but is defined by the "elements" clause of the ACCA.

Petitioner was convicted in January of 1992, for simple assault on a law enforcement officer in Case No. 91-1-25 in the Circuit Court of Hinds County, Mississippi. The statute on simple assault, Miss. Code Ann. § 97-3-7, provides:

(1) A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment in the county jail for not more than six months, or both. Provided, however, a person convicted of simple assault upon a law enforcement officer or fireman while such law enforcement officer or fireman is acting within the scope of his duty and office shall be punished by a fine of not more than one thousand dollars (\$1,000.00) or by imprisonment for not more than five (5) years, or both.

Miss. Code Ann. § 97-3-7.

To be guilty of simple assault on a law enforcement officer under this statute, a defendant must meet the elements of subsection a) b) or c) defining simple assault. Then, if the simple assault was committed upon a law enforcement officer, the offense is elevated to a felony, that is, punishable by one year or more in prison.

The Government contends that Petitioner is convicted under subpart (b). This is consistent with Petitioner's acknowledgment of the elements of his charge contained in his "Petition to Enter a Plea of Guilty" which stated as follows:

My lawyer advises me that the elements of the charge to which I am pleading guilty are as follows: willfully, attempting by physical menace to put another in fear of imminent serious bodily harm. In [the] present case [the] individual was uniformed police officer.

Petition to Enter Plea of Guilty [doc. no. 57-3].

Physical menace is the “threatened use of physical force,” thus meeting the criteria of subsection (i), the elements clause, which requires “the use, attempted use or threatened use of physical force.” 924 9(e)(2)(B)(i). Also, as stated in *Burris*, “[c]ausing bodily injury requires the use of physical force, so threatening or placing another in fear of imminent bodily injury likewise requires the “attempted use, or threatened use of physical force.” *United States v. Burris*, 920 F.3d 942, 948 (5th Cir. 2019)

The conviction of simple assault on a law enforcement officer has as an element, “the use, attempted use, or threatened use of physical force against another,” bringing this offense also, under the elements clause of the definition of a violent felony contained in 18 U.S.C. § 924(e)(2)(B).

CONCLUSION

Both of the offenses discussed are qualifying crimes of violence under the ACCA. Petitioner concedes that his conviction for possession of cocaine with intent to distribute qualifies as a “serious drug offense” under the ACCA. Petitioner, therefore, has at least three prior convictions that may be used to enhance his sentence under the ACCA, without resort to the invalidated residual clause. It thus becomes unnecessary to evaluate Petitioner’s claim that the conviction for possession of an unregistered firearm cannot be used to enhance his sentence under the ACCA. Petitioner’s motion under §2255 [**doc. no. 42**], is **denied**.

SO ORDERED AND ADJUDGED, this 30th day of September, 2019.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

APPENDIX 1B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

**JOHN WILLIE JOHNSON
03945-043**

PETITIONER

V.

**CRIMINAL NO. 3:01-CR-167-HTW- FKB-4
CIVIL NO. 3:16-CV-481- HTW**

UNITED STATES OF AMERICA

FINAL JUDGMENT

This court having previously entered its Order in this case, denying the motion under §2255 [doc. no. 42] and dismissing this case with prejudice, which order is incorporated herein by reference,

IT IS HEREBY ORDERED that Final Judgment be entered in this cause in accordance with Rule 58 of the Federal Rules of Civil Procedure, with prejudice.

IT IS FURTHER ORDERED, that a Certificate of Appealability should not issue. Defendant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED AND ADJUDGED, this the 30th day of September, 2019.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

APPENDIX 2

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 25, 2021

No. 19-60731

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN WILLIE JOHNSON, *also known as* DEWAYNE HENDERSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:16-CV-481

ORDER:

John Willie Johnson, federal prisoner # 03945-043, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his sentence for felony possession of a firearm. *See* 18 U.S.C. § 922(g). For a COA to issue, Johnson must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because dismissal was on the merits, Johnson will meet this standard if he shows "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

No. 19-60731

adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quotation omitted).

Johnson argues that, following *Johnson v. United States*, 576 U.S. 591 (2015), his prior Mississippi convictions for armed robbery, simple assault on a law enforcement officer, and possession of an unregistered firearm no longer constitute violent felonies under the Armed Career Criminal Act (ACCA). He contends the enhancements of his sentencing guidelines offense level and statutory mandatory minimum sentence—which were based upon the sentencing court’s determination that he was an armed career criminal—were therefore unconstitutional.

No jurist of reason would disagree that Johnson’s prior Mississippi convictions for armed robbery and simple assault on a law enforcement officer remain violent felonies under the ACCA. *See United States v. Williams*, 950 F.3d 328, 329 (5th Cir. 2020) (per curiam) (quoting 18 U.S.C. § 924(e)(2)(B)(i)) (citing *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc); *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017)); *United States v. Griffin*, 946 F.3d 759 (5th Cir. 2020) (per curiam). Johnson is not entitled to a COA on either claim. Furthermore, because at least three of Johnson’s convictions—armed robbery, assault, and possession of cocaine with intent to distribute—constitute ACCA predicate offenses, the court need not address his arguments that his conviction for possession of an unregistered firearm was not a violent felony under the ACCA and that U.S.S.G. § 4B1.4 was unconstitutionally applied because he was not an armed career criminal under 18 U.S.C. § 924(e). A COA is therefore DENIED.



ANDREW S. OLDHAM
United States Circuit Judge