[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-14454
Non-Argument Calendar

D.C. Docket Nos. 3:16-cv-00464-RAH-SRW; 3:06-cr-00141-MEF-SRW-1

CLAUDE JEROME WILSON, II,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(September 28, 2021)

Before JORDAN, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Claude Jerome Wilson, II, a counseled federal prisoner, appeals the district court's denial of his motion to vacate his Armed Career Criminal Act ("ACCA") sentencing enhancement under 28 U.S.C. § 2255 in light of *Johnson v. United States*, 576 U.S. 591 (2015). He argues that his ACCA-enhanced sentence is unconstitutional because the record shows that the sentencing court could not have relied on the modified categorical approach in finding that his three Georgia burglary convictions constituted violent felonies and, thus, must have relied on the residual clause.

When reviewing a district court's denial of a 28 U.S.C. § 2255 motion, we review questions of law *de novo* and factual findings for clear error. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). Additionally, we review *de novo* whether a conviction is a violent felony under the ACCA. *Steiner v. United States*, 940 F.3d 1282, 1288 (11th Cir. 2019). Under the prior-panel-precedent rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by our Court sitting *en banc*. *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015). We may affirm on any ground supported by the record, regardless of the ground stated

in the district court's order or judgment. *Castillo v. United States*, 816 F.3d 1300, 1303 (11th Cir. 2016).

The ACCA mandates a minimum sentence of 15 years' imprisonment for any defendant convicted of being a felon in possession of a firearm who has 3 previous convictions "for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 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.

Id. § 924(e)(2)(B). The first prong of this definition is commonly referred to as the "elements clause," while the second prong contains the "enumerated crimes" 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 definition is unconstitutionally vague but clarified that its decision did not call into question the remainder of the definition. 576 U.S. at 597-98, 606. The Court later held that *Johnson* announced a new substantive rule that applied retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

In *Beeman v. United States*, we held that a § 2255 movant must prove that it was "more likely than not" that the use of the residual clause led the sentencing court to impose the ACCA enhancement. 871 F.3d 1215, 1221-22 (11th Cir. 2017). In doing so, we rejected the movant's premise that a *Johnson* movant had met his burden unless the record affirmatively showed that the district court relied upon the ACCA's elements clause. *Id.* at 1223. We stated that each case must be judged on its own facts and that different kinds of evidence could be used to show that a sentencing court relied on the residual clause. *Id.* at 1224 n.4. As examples, we stated that a record may contain direct evidence in the form of a sentencing judge's comments or findings indicating that the residual clause was essential to an ACCA enhancement. *Id.* Further, we stated that a record may contain sufficient circumstantial evidence, such as unobjected-to presentence investigation report ("PSI") statements recommending that the enumerated-offenses and elements clauses did not apply or concessions made by the prosecutor that those two clauses did not apply. *Id.*

We emphasized in *Beeman* that the relevant issue is one of historical fact—whether at the time of sentencing the defendant was sentenced solely under the residual clause. *Id.* at 1224 n.5. Accordingly, we noted that precedent issued after sentencing "casts very little light, if any, on the key question" of whether the defendant was, in fact, sentenced under only the residual clause. *Id.* We also

noted that if the law at the time of sentencing was clear that the defendant's prior conviction qualified as a violent felony under only the residual clause, such circumstantial evidence would strongly point towards finding that the defendant was sentenced under the residual clause. *Id.*

When the record is unclear as to which clause the sentencing court relied on, the § 2255 movant "loses." *Id.* at 1225 (quotation marks omitted). Even if the residual clause was the "most obvious clause under which the convictions qualified," that does not mean, even by implication, that the sentencing court could not have also relied on another clause. *See United States v. Pickett*, 916 F.3d 960, 965 (11th Cir. 2019).

To determine whether a predicate offense qualifies as a violent felony under the enumerated offenses clause, courts apply either the categorical approach or the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 260-61 (2013). Under the categorical approach, courts look only to the elements of the predicate offense and do not consider the defendant's conduct. *Id.* at 261. The modified categorical approach, first recognized in *Taylor v. United States*, 495 U.S. 575 (1990), allows courts to look to a limited class of documents—"*Shepard*" documents, which include the indictment, jury instructions, plea agreement, and plea colloquy—to determine under which version of the crime the defendant was convicted. *Id.*; *see Shepard v. United States*, 544 U.S. 13, 19, 26 (2005). To

determine which approach to apply, we must first decide whether a statute is divisible. *Descamps*, 570 U.S. at 261-63. A divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Id.* at 257

In *Taylor,* the Supreme Court concluded that a prior conviction could only qualify as "burglary" under the enumerated offenses clause if it was a "generic burglary," which requires an unlawful entry into a building or other structure. *Taylor*, 495 U.S. at 599; *see also United States v. Adams*, 91 F.3d 114, 115 (11th Cir. 1996). The Supreme Court further clarified that non-generic burglary laws are those that "define burglary more broadly, *e.g.*, by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." *Taylor*, 495 U.S. at 599. Further, the Court indicated that a prior conviction under a non-generic burglary statute could satisfy the enumerated offenses provision if the "indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict." *Id.* at 602.

District courts are permitted to use undisputed PSI facts, in addition to *Shepard* documents, to determine whether a prior conviction resulted from generic burglary. *In re Hires*, 825 F.3d 1297, 1302 (11th Cir. 2016); *see also Adams*,

91 F.3d at 115-116. In *Adams*, we held that the information in the PSI documenting guilty pleas for "burglarizing both dwellings and businesses" established that the movant's Georgia burglary convictions were generic and, thus, constituted predicate offenses for the purposes of enhancement. *Id.* at 116.

In 1981, when Wilson committed his burglaries, Georgia's burglary statute provided as follows:

> A person commits the offense of 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, 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 § 16-7-1(a) (1981). At the time of Wilson's federal sentencing in 2009, we recognized that Georgia's burglary statute was non-generic because it encompassed unlawful entry not just into buildings, but also into vehicles, railroad cars, and watercraft. *See United States v. Bennett*, 472 F.3d 825, 832 (11th Cir. 2006). In *United States v. Gundy*, we held that the alternative locational elements in the Georgia burglary statute were divisible. 842 F.3d 1156, 1168 (11th Cir. 2016). We also held that the defendant's state court indictments made clear that his Georgia burglary convictions were generic burglaries and thus qualified as violent felonies under the ACCA. *Id.* at 1169.

As a preliminary matter, the district court erred by stating that *Gundy* foreclosed Wilson's argument that his Georgia burglary convictions qualified as

violent felonies only under the residual clause because, in *Gundy*, the district court relied on state court indictments to find that the defendant's Georgia burglary convictions constituted violent felonies under the ACCA, while the sentencing court here could have relied only on the undisputed statements in the PSI. *See Gundy*, 842 F.3d at 1169. Nevertheless, we can affirm on any ground supported by the record, and as explained below, the district court properly found that Wilson failed to meet his burden under *Beeman*. *See Castillo*, 816 F.3d at 1303. While Wilson argues that *Beeman* was wrongly decided, we are bound by that decision unless and until is overruled or undermined to the point of abrogation by the Supreme Court or by our Court sitting *en banc*, which has not happened. *See In re Lambrix*, 776 F.3d at 794.

At the time of Wilson's sentencing, the Georgia burglary statute was non-generic and divisible because it listed multiple, alternative locational elements for the crime. *See Bennett*, 472 F.3d at 832; *Gundy*, 842 F.3d at 1168. Accordingly, the sentencing court could have used the modified categorical approach to determine whether Wilson's Georgia burglary convictions were generic burglaries, *i.e.,* involved an unlawful entry into a building or structure. *See Descamps*, 570 U.S. at 261-63. Thus, Wilson had the burden to show in his § 2255 proceedings that those convictions did not involve entry into a building or structure, which he failed to do. *See Beeman*, 871 F.3d at 1224 n.5.

While Wilson initially objected to the PSI on the basis of the ACCA enhancement, he withdrew that objection at sentencing, and therefore no facts regarding his Georgia burglary convictions were presented at sentencing. Thus, the sentencing court had only the undisputed PSI facts, on which it was permitted to rely, when determining whether those convictions qualified as generic burglaries. *See In re Hires*, 825 F.3d at 1302; *Adams*, 91 F.3d at 116. While the PSI stated only that Wilson unlawfully entered and committed burglary on three commercial properties, because no evidence was presented to the sentencing court that those burglaries did not involve Wilson entering a building or structure, the court could have concluded that the burglaries were generic and thus constituted predicate offenses. Because the evidence does not clearly explain what happened and Wilson had the burden of proof under *Beeman*, his claim fails. *See Beeman*, 871 F.3d at 1225 (holding that when the record is unclear as to which clause the sentencing court relied on, "the party with the burden loses" (quotation marks omitted)).

In sum, the legal landscape at the time of Wilson's sentencing indicates that the sentencing court could have relied on the enumerated offenses clause to apply the ACCA enhancement based on Wilson's three Georgia burglary convictions. Thus, Wilson failed to meet his burden to show that it was more likely than not that the sentencing court relied only on the residual clause as the basis for the

enhancement. Accordingly, the district court did not err in denying Wilson's § 2255 motion.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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September 28, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-14454-GG
Case Style: Claude Wilson, II v. USA
District Court Docket No: 3:16-cv-00464-RAH-SRW
Secondary Case Number: 3:06-cr-00141-MEF-SRW-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joseph Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Pet. App. 1b

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

CLAUDE JEROME WILSON, II,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO.: 3:16-CV-464-RAH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

I. Introduction

In 2009, Claude Jerome Wilson, II, ("Wilson") was sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his conviction for felon in possession of a firearm, *see* 18 U.S.C. §§ 922(g)(1), and his three qualifying prior convictions. *See* § 924(e) (imposing a fifteen-year mandatory minimum sentence on any defendant "who violates 922(g) . . . and has three previous convictions . . . for a violent felony or a serious drug offense, or both"). In 2015, the Supreme Court held that the definition of "violent felony" in the ACCA's residual clause, *see* § 924(e)(2)(B), is unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 606 (2015). In 2016, the Supreme Court held that *Johnson* is retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). After *Welch*, Wilson filed this timely § 2255 motion seeking relief

under *Johnson* on grounds that he no longer has three prior qualifying convictions under the ACCA and, thus, is not eligible for an enhanced sentence. He moves the court to grant his § 2255 motion, vacate his current sentence, and resentence him without consideration of the ACCA.

Before the Court is the Recommendation of the Magistrate Judge (Doc. 24) recommending the denial of Wilson's motion because he cannot show, as he must under *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017), that it is more likely than not that his sentence on his § 922(g)(1) conviction was enhanced under the ACCA's residual clause in violation of *Johnson*. Wilson has filed an objection. Based upon a de novo review of those portions of the Recommendation to which Wilson objects, *see* 28 U.S.C. § 636(b)(1), the Court overrules Wilson's objections, adopts the Recommendation, and denies Wilson's § 2255 motion.

II. DISCUSSION

In *Beeman*, the Eleventh Circuit held that, "[t]o prove a Johnson claim, 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." 871 F.3d at 1221–22. "[I]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, 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*. at 1222; *see also generally United States v. Pickett*, 916 F.3d

960, 963 (11th Cir. 2019) (explaining that *Beeman* "provided a precedential answer to what a [Johnson] movant needed to show to succeed on a § 2255 motion"). A *Johnson* movant's burden is tied to "historical fact" — whether at the time of sentencing the defendant was "sentenced solely per the residual clause." *Beeman*, 871 F.3d at 1224 n.5. Hence, a decision rendered after sentencing "casts very little light, if any, on the key question of historical fact." *Id*.

The Eleventh Circuit has explained that, under *Beeman*, "[t]o determine this 'historical fact,'" the § 2255 court "look[s] first to the record" and, if the record is not determinative, "to the case law at the time of sentencing." *Pickett*, 916 F.3d at 963. "Sometimes the answer will be clear — '[s]ome sentencing records may contain direct evidence: comments or findings by the sentencing judge indicating that the residual clause was relied on and was essential.'" *Id*. (quoting *Beeman*, 871 F.3d at 1224 n.4). The court "might also look elsewhere in the record, to a PSI, for example, to find 'circumstantial evidence.'" *Id*. at 963–64.

Here, the sentencing court found that Wilson had at least three qualifying prior convictions under the ACCA. Although the record is silent as to which of Wilson's prior convictions qualified, in this § 2255 proceeding, the parties agree the presentence report identified the following predicate convictions: (1) three 1981 Georgia convictions for burglary; (2) a 1996 Georgia conviction for escape; (3) a 1999 Georgia conviction for aggravated assault; and (4) a 1999 Georgia conviction

for robbery. Wilson argues that he has made the required showing under *Beeman* because, at the time of his sentencing hearing, his prior Georgia convictions for burglary only qualified as "violent felonies" under the now-void residual clause in § 924(e)(2)(B)(ii). The Magistrate Judge disagreed, concluding that the district court made no express finding that Wilson's Georgia burglary convictions qualified under either the residual clause or the enumerated offenses clause. (Doc. 24, p. 8.) In the Magistrate Judge's words: "Because it is apparent that Wilson's burglary convictions were for generic burglaries (and therefore qualified as violent felonies under the ACCA's enumerated offenses clause), and Wilson fails to show that the burglary convictions were found to be violent felonies based solely on the ACCA's residual clause, Wilson fails to meet his burden under *Beeman*." (*Id*., p. 9.) The Magistrate Judge also found that Wilson's Georgia convictions for aggravated assault and robbery also qualified as violent felonies for purposes of the ACCA.

First, Wilson objects to the Magistrate Judge's conclusion that he is not entitled to relief on the merits of his *Johnson* claim. Specifically, he argues that, at the time of his 2009 sentencing hearing, the three Georgia burglaries only qualified as "violent felonies" under the residual clause. As discussed in the Recommendation, Wilson's objection on this basis is foreclosed by *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), which held that Georgia's burglary statute is "non-generic" because it both criminalizes generic burglary and is broader than

generic burglary. In *Gundy*, the Supreme Court held that Georgia's non-generic burglary statute is divisible, with alternative locational elements. *Id*. at 1166-68. The Supreme Court further held that, if a limited class of documents, such as the indictment, jury instructions, or plea agreement, show that the elements of a Georgia conviction match generic burglary, the Georgia burglary conviction is properly deemed a generic burglary, qualifying it as a violent felony under the ACCA's enumerated-offenses clause. *Id*. at 1168.

In Wilson's case, the sentencing court made no express finding that the Georgia burglary convictions qualified under either the residual clause or the enumerated offenses clause. The presentence report, which was relied upon at sentencing without objection, sets forth the underlying facts of Wilson's three Georgia convictions; that is, his unlawful entry into three different commercial properties in Thomaston, Georgia. Thus, it is clear Wilson was convicted of three generic burglaries, *i.e*., offenses involving the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). *See Gundy*, 842 F.3d at 1164; *Avery v. United States*, 819 F. App'x 749 (11th Cir. 2020) (per curiam) (unpublished) (holding defendant's prior Georgia conviction for burglary of a building housing a business qualified as a violent felony under the ACCA's enumerated offenses clause).

As support for its position that Wilson was convicted of generic burglaries, the Government also submitted the indictment from the Georgia convictions in its Response to the § 2255 Motion. (*See* Doc. 13-8.) The indictment provides that the three burglary convictions were based on Wilson's separate entries into three different buildings housing businesses. Wilson objects to the Government's reliance on the Georgia indictment to establish that he was convicted of three separate burglaries of a commercial building housing a business. He argues that the Government may not create new "historical facts" by submitting *Shepard*[1] documents which it could have, but did not, submit at the sentencing hearing. (Doc. 30, p. 17.) It is arguable that, under certain circumstances, newly introduced *Shepard* documents may not be considered for the first time in a §2255 proceeding. *See Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019). The court, however, need not resolve the question of whether it may look to the newly introduced *Shepard* documents because the presentence report gave the sentencing court a sufficient foundation to conclude that Wilson was convicted of three generic burglaries.[2] Even without considering the information presented in the Georgia

[1] *Shepard v. United States*, 544 U.S. 13 (2005) (authorizing a sentencing court to examine a limited class of documents to determine whether the "necessarily admitted elements" to which the defendant pled guilty corresponded to the elements of the offense).

[2] *See Holifield v. United States*, 2:16-cv-445-WKW-SRW, Doc. 28 at p. 7 of 19 (noting that, although defendant's objection on the threshold issue of historical fact was strong, it was unnecessary to resolve the post-*Tribue* question because the "unobjected-to PSR statements gave the sentencing court a sufficient foundation to conclude that Mr. Holifield was convicted of manslaughter."). *See also Holifield v. United States*, No. 20-11782-G, 2020 WL 4743123 (11th Cir. Aug. 14, 2020) (unpublished) (denying the Certificate of Appealability, specifically referencing

indictment, the sentencing court considered the presentence report which referenced the burglaries of the three separate commercial properties.

It is Wilson's burden "to prove – that it was more likely than not – he in fact was sentenced . . . under the residual clause." *Beeman*, 871 F.3d at 1225. Under the *Beeman* standard, Wilson fails to show that the burglary convictions were found to be violent felonies based solely on the ACCA's residual clause. Therefore, to the extent the Magistrate Judge relies on the specific information in the presentence report, this Court agrees with the Magistrate Judge that the three burglary convictions, standing alone, authorize Wilson's sentence under the ACCA.

Wilson also objects on the basis that the aggravated assault and robbery offenses occurred on the same occasion and arise out of a single incident. Specifically, he argues that "one of these two convictions, but not both, could have qualified as an ACCA predicate offense at the time of [] Wilson's sentencing hearing." (Doc. 30, p. 20.) Title 18 U.S.C. § 924(e)(1) requires ACCA predicate offenses to have been committed "on occasions different from one another." Nonetheless, Wilson's objection does not alter the court's decision. The use of either one of these offenses as a qualifier establishes that Wilson had, in addition to the

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the presentence investigation report when determining the manslaughter convictions qualified as violent felonies under the ACCA's elements clause).

three burglary convictions, at least one more qualifying conviction. Thus, Wilson's objection on this basis is due to be overruled.

III. CONCLUSION

Accordingly, it is

ORDERED as follows:

1. The Objections (Doc. 30) are OVERRULED.

2. The Recommendation of the Magistrate Judge (Doc. 24) is ADOPTED.

3. The Motion (Doc. 1) is DENIED.

DONE, this 30th day of September, 2020.

/s/ R. Austin Huffaker, Jr.
R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

Pet. App. 1c

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

CLAUDE JEROME WILSON, II,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO.: 3:16-CV-464-RAH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Pending before the Court is the Petitioner's Application for a Certificate of Appealability. (Doc. 37.) Pursuant to 28 U.S.C. §2253(c), Petitioner Claude Jerome Wilson must obtain a Certificate of Appealability ("COA") prior to taking an appeal. To obtain a COA, a petitioner must make "a substantial showing of a denial of a constitutional right." 28 U.S.C. 2253(c)(2).

The Petitioner has made the requisite showing to obtain a COA on the sole issue of whether his 273-month sentence, which includes an Armed Career Criminal Act enhancement, is unconstitutional in light of *Johnson v. United States*, 576 U.S. 591 (2015).

Accordingly, it is

ORDERED that the Motion for Certificate of Appealability (Doc. 37) be and is hereby GRANTED with respect to the aforementioned issue.

DONE, this 30th day of November, 2020.

/s/ R. Austin Huffaker, Jr.
R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

Pet. App. 1d

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

CLAUDE JEROME WILSON II,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 3:16cv464-WKW
	)	[WO]
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION

Before the court is Petitioner Claude Jerome Wilson II's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence imposed in 2009 under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Doc. No. 1.[1] Through counsel, Wilson filed this § 2255 motion challenging his designation as an armed career criminal under the ACCA based upon the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Wilson argues that, under *Johnson*, in which the Supreme Court held that the residual clause of the "violent felony" definition in the ACCA is unconstitutional, he no longer has three prior convictions that qualify as ACCA predicates. He seeks resentencing without application of the ACCA.

II. BACKGROUND AND PROCEDURAL HISTORY

[1] References to document numbers assigned by the Clerk of Court in this action are designated as "Doc. No." Pinpoint citations are to the page of the electronically filed document in the court's CM/ECF filing system, which may not correspond to pagination on the hard copy of the document presented for filing.

In January 2009, a jury found Wilson guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). A conviction under § 922(g)(1) normally carries a sentence of not more than ten years' imprisonment. 18 U.S.C. § 924(a)(2). However, under the ACCA, an individual who violates § 922(g) and has three prior convictions for a violent felony, a serious drug offense, or both, is subject to an enhanced sentence of not less than fifteen years. 28 U.S.C. § 924(e)(1); *see also Descamps v. United States*, 570 U.S. 254, 258 (2013) (noting the typical statutory maximum sentence and the ACCA's heightened mandatory minimum for § 922(g) convictions).

In 2009, when Wilson was sentenced, the ACCA defined a "violent felony" as any crime punishable by imprisonment for a term exceeding one year 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, involves use of explosives"; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." 28 U.S.C. § 924(e)(2)(B). These definitions of "violent felony" fall into three respective categories: (1) the elements clause; (2) the enumerated-offenses clause; and (3) and the (now void) residual clause. *See In re Sams*, 830 F.3d 1234, 1236–37 (11th Cir. 2016).

Wilson's presentence investigation report ("PSI") stated that he had six prior "violent criminal convictions" that qualified as predicate convictions to subject him to an ACCA-enhanced sentence. Doc. No. 13-1 at 17. The PSI listed those convictions as (1) three 1982 Georgia convictions for burglary; (2) a 1996 Georgia conviction for escape; (3)

a 1999 Georgia conviction for aggravated assault; and (3) a 1999 Georgia conviction for robbery. Doc. No. 13-1 at 17; *see id*. at 5–8 ¶¶ 28, 32, 34 & 37. The PSI did not specify which clause of the ACCA's definition of "violent felony" a particular prior conviction fell under.

Wilson's sentencing hearing was held on June 11, 2009. Doc. No. 13-4. The district court adopted the findings in the PSI, specifically adopting the findings that Wilson's offense level was 33 and his criminal history category was VI, resulting in a sentencing guidelines range of from 235 to 293 months. Doc. No. 13-4 at 13. After hearing argument from the parties on the appropriate sentence, the district court sentenced Wilson under the ACCA to 273 months in prison. *Id* at 24. Although it adopted the findings in the PSI, the district court did not specify which of Wilson's prior convictions it relied on to sentence him under the ACCA, and the sentencing record does not reveal which ACCA definition of "violent felony" undergirds Wilson's enhanced sentence. Wilson did not appeal his conviction and sentence.

In June 2015, the Supreme Court held that the ACCA's residual clause is unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court reasoned: "[T]he indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." *Id*. at 2557. However, the Court "d[id] not call into question application of the [ACCA] to . . . the remainder of the Act's definition of a violent felony." *Id*. at 2563 (alterations added). Subsequently, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held

that the *Johnson* decision announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review.

On June 21, 2016, Wilson filed this § 2255 motion arguing that he is entitled to be resentenced without the ACCA enhancement because, he says, after *Johnson* his three Georgia convictions for burglary no longer qualify as violent felonies under the residual clause of the ACCA, and, without the residual clause, the classification of those burglary convictions under the remaining ACCA definitions of violent felony is also incorrect because burglary under the Georgia statute is not a generic burglary for purposes of the ACCA's enumerated-offenses clause.[2] Doc. No. 1. Wilson maintains that if his three Georgia burglary convictions are removed from consideration, he no longer has the requisite number (three) of prior convictions for violent felonies to qualify for sentencing under the ACCA.

The government argues that Wilson has five prior convictions constituting violent felonies under the ACCA, three of which—his Georgia convictions for burglary—qualify under the ACCA's enumerated-offenses clause, and two of which—his Georgia convictions for aggravated assault and robbery—qualify under the ACCA's elements clause. *See* Doc. No. 13 at 9–31. The government further argues that Wilson fails to show that the district court relied on the ACCA's now void residual clause to impose the ACCA enhancement. Accordingly, the government contends that Wilson is entitled to no relief under *Johnson*.

[2] Neither Wilson nor the government contends that his Georgia burglary conviction qualified as violent felonies under the ACCA's elements clause.

III. DISCUSSION

A. The Eleventh Circuit's *Beeman* Decision

In *Beeman* v. United States, 871 F.3d 1215 (11th Cir. 2017), the Eleventh Circuit held that a § 2255 movant bears the burden of proving a *Johnson* claim, stating:

> To prove a *Johnson* claim, a movant must establish that his sentence enhancement "turn[ed] on the validity of the residual clause." In other words, he must show that the clause actually adversely affected the sentence he received. Only if the movant would not have been sentenced as an armed career criminal absent the existence of the residual clause is there a *Johnson* violation. That will be the case only (1) if the sentencing court relied solely on the residual clause, as opposed to also or solely relying on either the enumerated offenses clause or elements clause (neither of which were called into question by *Johnson*) to qualify a prior conviction as a violent felony, and (2) if there were not at least three other prior convictions that could have qualified under either of those two clauses as a violent felony, or as a serious drug offense.

871 F.3d at 1221 (internal footnote and citation omitted). Because the "burden of proof and persuasion" was "critical" to its decision, the Eleventh Circuit in *Beeman* elaborated that, "[t]o prove a *Johnson* claim, 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." *Id.* at 1221–22. "If it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, 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.* at 1222. The Eleventh Circuit also emphasized that the movant must prove a "historical fact"—namely, that at the time of sentencing, the defendant was "sentenced solely per 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 cause or enumerated-

offenses clause "would be a decision that casts very little light, if any, on the key question of historical fact." *Id*. However, "if 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*. (emphasis added). Hence, it is the state of the law at the time of sentencing that principally guides consideration of whether the § 2255 movant was sentenced under the residual clause. *Id.*

B. Wilson's Georgia Burglary Convictions

Wilson contends that his three 1982 Georgia convictions for burglary do not qualify as violent felonies under the now-void residual clause of the ACCA and that, without the residual clause, the classification of those burglary convictions under the other ACCA definitions of violent felony is also incorrect because burglary under the Georgia statute is not generic burglary for purposes of the ACCA's enumerated-offenses clause.[3] Doc. No. 1 and 4–6.

[3] In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court established a uniform "burglary" definition for the purposes of sentencing under the ACCA. 495 U.S. at 592 ("We think that "burglary" in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."); *see also Descamps v. United States*, 570 U.S. 254, 260–61 (2013) ("We begin with *Taylor v. United States*, which established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses (e.g., burglary).") (citing *Taylor*, 495 U.S. 575). "Congress meant by 'burglary,'" the *Taylor* Court held, "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. Acknowledging that "the exact formulations vary" across states, the Court concluded that, with regard to the ACCA, "the generic, contemporary meaning of burglary contains 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." *Id*. (citing W. LaFave & A. Scott, *Substantive Criminal Law* § 8.13(a), (c), (e)). Thus, "a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id*. at 599.

At the time of Wilson's Georgia convictions for burglary, Georgia's burglary statute provided:

> A person commits the offense of 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, 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.

O.C.G.A. § 16-7-1(a) (1980).[4]

In *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016), the Eleventh Circuit held that Georgia's burglary statute is non-generic because it both criminalizes generic burglary and is broader than generic burglary (also criminalizing entry into vehicles, railroad cars, watercraft, or aircraft). *Id*. at 1164–65. The Court then held that Georgia's non-generic burglary statute is divisible, with alternative locational elements. *Id*. at 1166–68. Thus, the Court held that, if a limited class of documents (such as indictment, jury instructions, or plea agreement) show that the elements of the Georgia conviction at issue matches generic burglary, the Georgia burglary conviction is properly deemed a generic burglary, qualifying it as violent felony under the ACCA's enumerated-offenses clause.[5] *Id*. at 1168. *See United States v. Pearsey*, 701 F. App'x 773, 775–76 (11th Cir 2017) (citing *Gundy* in holding that petitioner's prior Georgia burglary convictions, where indictment charged

[4] Georgia's burglary statute was amended on July 1, 2012, and had not been amended prior to that since 1980. *See* 2012 Ga. Laws 899; 1980 Ga. Laws 770.

[5] This is known as the "modified categorical approach." The modified categorical approach allows courts to review a limited class of documents from the state proceedings (known as "*Shepard* documents") to find out if the state court convicted the defendant of the generic offense. *See Shepard v. United States*, 544 U.S. 13 (2005); *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013).

petitioner with burglarizing a dwelling, were for generic burglary and qualified as violent felonies under the ACCA's enumerated-offenses clause); *Pruteanu v. U.S. Attorney Gen.*, 713 F. App'x 945, 947–48 (11th Cir. 2017) (reaffirming holding in *Gundy*).

Johnson entitles petitioners to collateral relief from ACCA-enhanced sentences that were based solely on the residual clause. *See Beeman*, 871 F.3d at 1221. In Wilson's case, the district court made no express finding that Wilson's Georgia burglary convictions qualified under either the residual clause or the enumerated-offenses clause. The PSI also does not state which clause Wilson's burglary convictions qualified under, and neither Wilson's counsel nor counsel for the government argued at sentencing which clause applied to qualify the burglary convictions as violent felonies under the ACCA.[6] However, the evidence on this question indicates that Wilson's Georgia burglary convictions were for generic burglaries that qualified as violent felonies under the ACCA's enumerated-offenses clause. The PSI reflects that the underlying facts of Wilson's three Georgia burglary convictions involved his unlawful entry into three different commercial properties in Thomaston, Georgia: a Trailways Bus Station, Keenan Auto Parts, and the Golden Alms. Doc. No. 13-1 at 6, ¶ 32. With its response to Wilson's § 2255 motion, the government has submitted the indictment from Wilson's Georgia burglary convictions, which reflects that the three convictions were based on Wilson's separate entries into three different buildings housing businesses. *See* Doc. No. 13-8. Thus, it is evident that Wilson was convicted of

[6] Neither party argues that a Georgia burglary conviction qualifies as a violent felony under the ACCA's elements clause.

three generic burglaries—i.e., offenses involving the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990); *see Gundy*, 842 F.3d at 1164.

Because it is apparent that Wilson's Georgia burglary convictions were for generic burglaries (and therefore qualified as violent felonies under the ACCA's enumerated-offenses clause), and Wilson fails to show that the burglary convictions were found to be violent felonies based solely on the ACCA's residual clause, Wilson fails to meet his burden under *Beeman*. His *Johnson* claim regarding his Georgia burglary convictions therefore fails. The three burglary convictions, standing alone, were sufficient to authorize Wilson's sentence under the ACCA, and Wilson is entitled to no relief. As discussed below, Wilson's Georgia convictions for aggravated assault and robbery also qualified as violent felonies for purposes of the ACCA.

C. Wilson's Georgia Conviction for Aggravated Assault

In addition to Wilson's three Georgia burglary convictions, the district court could properly rely on Wilson's 1999 Georgia conviction for aggravated assault as a violent felony for purposes of the ACCA.[7] At the time of Wilson's Georgia conviction for aggravated assault, the relevant Georgia statute provided:

> (a) A person commits the offense of aggravated assault when he assaults:
>
> (1) With intent to murder, to rape, or to rob;

[7] This court notes that Wilson does not argue that the district court could not rely on his Georgia conviction for aggravated assault as a predicate violent felony for purposes of the ACCA.

> (2) 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.
>
> (3) A person or persons without legal justification by discharging a firearm from within a motor vehicle.

O.C.G.A. § 16-5-21(a).[8] Under Georgia law, an assault occurs when someone "(1) Attempts to commit a violent injury to the person of another; or (2) Commits an act which places another in reasonable apprehension of immediately receiving a violent injury." O.C.G.A. § 16-5-20. The Georgia Supreme Court has held that "[a]ggravated assault has two elements: (1) commission of a simple assault as defined by O.C.G.A. § 16-5-20; and (2) the presence of one of three statutory aggravators." *Guyse v. State*, 286 Ga. 574, 576 (2010); *see* O.C.G.A. § 16-5-21(a).

The Eleventh Circuit has held that a conviction under a Florida aggravated assault statute analogous to the Georgia statute is categorically a violent felony under the ACCA's elements clause. *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337–38 (11th Cir. 2013), *abrogated on other grounds by Johnson v. United States*, 135 S.Ct. 2551 (2015). In *Turner,* the Court reasoned that an aggravated assault conviction "will always include as an element the threatened use of physical force against the person of another." 709 F.3d at 1338 (quotation marks and alteration omitted). The Court in *Turner* noted that it was unnecessary 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

[8] Wilson's PSI describes the underlying facts of his Georgia aggravated assault conviction as follows: "Records reflect the defendant physically assaulted the victim by striking her with his fists and then choking her. He then took her purse which contained approximately $120." Doc. No. 13-1 at 8, ¶ 37.

to the person of another. *See In re Hires*, 825 F.3d 1297, 1301 (11th Cir. 2016). "Post-*Johnson*, convictions for aggravated assault remain enhancement-triggering violent felonies under [the] ACCA's elements clause. That clause 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.'" *Green v. United States*, 2017 WL 110043, at *3 (S.D. Ga. 2017). The Georgia aggravated assault statute requires as an element the use or threatened use of physical force against the person of another. *See Green*, 2017 WL 110043, at *3 (finding conviction under Georgia's aggravated assault statute to categorically constitute a violent felony under ACCA's elements clause); *Hayward v. United States*, 2016 WL 5030373, at *3 (S.D. Ga. 2016) (same); *Brown v. United States*, 2016 WL 7013531, at *2 (S.D. Ga. 2016) (same). Wilson's 1999 Georgia conviction for aggravated assault was an ACCA enhancement-triggering conviction.[9]

D. Wilson's Georgia Robbery Conviction

The district court could also rely on Wilson's 1999 Georgia robbery conviction as a violent felony for purposes of the ACCA.[10] The Georgia robbery statute provides:

> (a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another:

[9] Wilson also does not point to any evidence that the district court in fact relied on the ACCA's residual clause to conclude that his Georgia aggravated assault conviction was a violent felony for purposes of ACCA enhancement. *See Beeman v. United States*, 817 F.3d 1215, 1223 (11th Cir. 2017) (holding that "[t]o prove a Johnson claim, 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.").

[10] Wilson does not argue that the district court could not rely on his Georgia conviction for robbery by force as a predicate violent felony for purposes of the ACCA.

> (1) By use of force;
>
> (2) 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
>
> (3) By sudden snatching.

O.C.G.A. § 16-8-40.

Robbery in Georgia can be committed in one three of ways: by use of force; by intimidation, threat or coercion, or placing a person in fear of immediate bodily injury; or by "sudden snatching." O.C.G.A. § 16-8-40. Given the disjunctive listing of statutory elements, Georgia robbery does not categorically qualify as a violent felony. *In re: Herman McClouden*, No. 16-13525-J (11th Cir. 2016), copy available at *McClouden v. United States*, 2016 WL 5109530 at *4 (S.D. Ga. 2016) (stating that where the defendant commits robbery by "sudden snatching," the statute does not require the use of violent, physical force and thus is not a violent felony under the ACCA's elements clause). Instead, Georgia robbery must be analyzed under the modified categorical approach. *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013) (the modified categorical approach is used when a statute is "divisible," such that it "sets out one or more elements of the offense in the alternative").

Robbery by force under the Georgia statute occurswhen "[a] person . . . with the intent to commit theft . . . takes property of another from the person of another or the immediate presence of another . . . by force." O.C.G.A. § 16-8-40(a)(1). On the statute's elements, a Georgia conviction for robbery by force constitutes an enhancement-triggering violent felony under the ACCA's elements clause, because the crime has as an element the

use, or attempted use, or threatened use of physical force against the person of another. Wilson's PSI reflects that he physically assaulted his robbery victim by striking her with his fists and choking her in the commission of his robbery.[11] Doc. No. 13-1 at 8, ¶ 37. Thus, it is evident that Wilson was convicted of committing a robbery by force, which qualifies as a violent felony under the ACCA's elements clause. Further, Wilson points to no evidence that the district court relied on the ACCA's residual clause to conclude that his Georgia robbery conviction was a violent felony for purposes of ACCA enhancement. *See Beeman*, 817 F.3d at 1223 (11th Cir. 2017). Wilson's 1999 Georgia robbery conviction was an ACCA enhancement-triggering conviction, one of five prior convictions that constituted violent felonies for purposes of the ACCA. Because Wilson has at least three prior convictions that qualify as ACCA predicates, his *Johnson* claim fails and he is not entitled to resentencing.

IV. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that Wilson's § 2255 motion be DENIED and that this action DISMISSED with prejudice.

It is further

ORDERED that on or before May 29, 2019, the parties may file objections to the Recommendation. A party must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made. Frivolous, conclusive, or

[11] The government's response to Wilson's § 2255 motion contains the indictment charging Wilson with robbery. The indictment alleges that Wilson struck the victim about the body in effecting the robbery. *See* Doc. No. 13-6 at 5 & 10.

general objections will not be considered. Failure to file a written objections to the Magistrate Judge's findings and recommendations under the provisions of 28 U.S.C. § 636(b)(1) shall bar a party from a *de novo* determination by the District Court of factual and legal issues covered in the Recommendation and waives the right of a party to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. 11th Cir. R. 3-1; *see Resolution Trust Co. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

Done, on this the 13th day of May, 2019.

/s/ Susan Russ Walker
Susan Russ Walker
United States Magistrate Judge