

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12874-FF

WILLIE LINDSEY SYLVESTER, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILLIAM PRYOR, JORDAN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Willie Sylvester, Jr., proceeding with the assistance of counsel, appeals the district court's denial of his 28 U.S.C. § 2255 motion challenging the validity of the appeal waiver in his plea agreement as well as his enhanced sentence under the Armed Career Criminal Act ("ACCA"). The government, in turn, has moved to dismiss Sylvester's appeal, or, in the alternative, for summary affirmance, asserting that even if Sylvester's appeal waiver did not preclude his challenge to his ACCA sentence, his appeal is meritless because in any event, he had three prior felony convictions that qualified as predicate offenses under the ACCA.

When reviewing the district court's denial of a motion to vacate under § 2255, we review legal conclusion *de novo* and findings of error for clear error. *Spencer v. United States*, 773 F.3d

1132, 1137 (11th Cir. 2014). We review *de novo* whether a defendant's prior convictions qualify as violent felonies under the ACCA. *United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015).

Under local rule 42-4, we may dismiss an appeal at any time if it appears that the appeal is frivolous and wholly without merit. *See* 11th Cir. R. 42-4.

Similarly, summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). Summary disposition is a tool available to us for cases or issues that do not warrant extended discussion. *See United States v. Paradies*, 98 F.3d 1266, 1277 n.13 (11th Cir. 1997) (determining that "other less meritorious issues [that] do not warrant discussion" are subject to summary affirmance) (quoting *United States v. Waymer*, 55 F.3d 564, 568 n.2 (11th Cir. 1996)).

Generally, a defendant convicted of possession of a firearm by a convicted felon in violation of § 922(g), faces a statutory maximum penalty of 10 years' imprisonment. *See* 18 U.S.C. § 924(a)(2). But when a defendant is convicted of violating § 922(g) and § 924(e), the ACCA, he is subject to a mandatory minimum penalty of 15 years' imprisonment and a maximum penalty of life imprisonment. *United States v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993).

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 sometimes 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).

In June 2015, 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. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes clause of the ACCA’s definition of a violent felony. *Id.* at 2563. In April 2016, the Supreme Court held in *Welch v. United States*, 136 S. Ct. 1257 (2016), that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch*, 136 S. Ct. at 1264-65, 1268.

Florida law makes it illegal for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Fla. Stat. Ann. § 893.13(1). We have held that a violation of § 893.13(1) is a “serious drug offense” under the ACCA. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015).

A person commits Florida aggravated battery if he commits battery and (1) “[i]ntentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement,” (2) “[u]ses a deadly weapon,” or (3) “the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was

pregnant.” Fla. Stat. Ann. § 784.045. We have previously determined that a Florida aggravated battery conviction qualifies as a violent felony under the elements clause because, under either of the first two alternatives in § 784.045, an aggravated battery “has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1341 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551 and as *recognized in United States v. Hill*, 799 F.3d 1318 (11th Cir. 2015); *see also* 18 U.S.C. § 924(e)(2)(B)(i).

Here, Count One of the indictment, charging Sylvester with a violation of § 922(g) and § 924(e), and to which he pled guilty pursuant to plea agreement, indicated that he had previously been convicted of two separate 1989 Florida convictions for delivery of cocaine, and a 1991 Florida conviction for aggravated battery.

Sylvester argues that while he knowing and voluntarily executed the plea agreement, he did not knowingly and voluntarily agree to waive his appellate right to challenge the constitutionality of his ACCA-enhanced sentence because at the time, he was not aware that a sentence enhanced under the ACCA’s residual clause was unconstitutional and, therefore, could not contemplate the consequences of waiving such right. Even if we assume, *arguendo*, that Sylvester’s appeal waiver is either invalid or does not bar the *Johnson*-claim he advances, his appeal still fails, because we concluded that *Johnson* would not accord him any relief.

Sylvester asserts that he is entitled to relief because *Johnson* rendered the ACCA’s residual clause void. However, he was still properly sentenced under the ACCA because the three predicate offenses indicated in the indictment are unaffected by the ACCA’s now-invalid residual clause. The indictment indicated that Sylvester had violated § 924(e) based on two 1989 Florida convictions for delivery of cocaine, and a 1991 Florida conviction for aggravated battery.

Sylvester did not specify a particular objection to the aggravated battery offense during sentencing, and he does not now challenge that the offense qualifies as a violent felony under the ACCA's elements clause. *See Turner*, 7096 F.3d at 1341. While *Turner* was decided before *Descamps*, § 784.045 is a divisible statute because it sets out multiple elements of the offense in the alternative. *See Fla. Stat. Ann. § 784.045*. Based on the PSI's account of the offense conduct, Sylvester was not convicted under the third prong of § 784.045 for battery on a pregnant woman, as the PSI indicates that he stabbed the victim in the hand in a bar after he was refused service. *See Fla. Stat. Ann. § 784.045*. Therefore, Sylvester's aggravated battery conviction qualified as a violent felony under the elements clause of the ACCA. *See Turner*, 709 F.3d at 1341.

Likewise, Sylvester's two convictions for delivery of cocaine qualify as "serious drug offenses" under the ACCA, and he does not challenge those convictions as ACCA predicate offenses either. *See Smith*, 775 F.3d at 1268 (holding that Fla. Stat. Ann. § 893.13(1) is a "serious drug offense" under the ACCA).

Accordingly, Sylvester had the requisite three predicate convictions for enhanced sentencing under the ACCA. Thus, notwithstanding the issue Sylvester raises regarding the validity of his appeal waiver, he was properly sentenced under the ACCA. As such, the government's position that Sylvester was properly sentenced as an armed career criminal, "is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case." *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Accordingly, we GRANT the government's motion for summary affirmance. The government's request to stay the briefing schedule is DENIED as moot.

**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

For rules and forms visit
www.ca11.uscourts.gov

April 27, 2017

James N. Hatten
Richard B. Russell Bldg & US Courthouse
2211 UNITED STATES COURTHOUSE
75 TED TURNER DR SW
STE 2211
ATLANTA, GA 30303-3309

Appeal Number: 14-12874-FF
Case Style: Willie Sylvester, Jr. v. USA
District Court Docket No: 1:12-cv-04448-RWS
Secondary Case Number: 1:07-cr-00345-RWS-GGB-1

The enclosed copy of this Court's Order of Dismissal 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: Janet K. Mohler, FF/lt
Phone #: (404) 335-6178

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

APPENDIX "B"

DISTRICT COURT'S ORDER DENYING 28 U.S.C. § 2255 MOTION

Constitutionality

WILLIE LINDSEY SYLVESTER, JR., Movant, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA
DIVISION

2014 U.S. Dist. LEXIS 55405

CRIMINAL INDICTMENT NO. 1:07-CR-0345-RWS-GGB-1, CIVIL FILE NO. 1:12-CV-4448-RWS-GGB

April 22, 2014, Decided

April 22, 2014, Filed

Editorial Information: Prior History

Sylvester v. United States, **2014** U.S. Dist. LEXIS 129042 (N.D. Ga., Jan. 2, **2014**)

Counsel

For USA (1:07-cr-00345-RWS-GGB All Defendants), Plaintiff: Todd C. Alley, LEAD ATTORNEY, Hawkins Parnell Thackston & Young, LLP-GA, Atlanta, GA; Tasheika Hinson, U.S. Attorney's Office-ATL, Atlanta, GA.

Willie Lindsey **Sylvester**, Jr. (1:12-cv-04448-RWS), Petitioner,

Pro se, Coleman, FL.

Judges: RICHARD W. **STORY**, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: RICHARD W. STORY

Opinion

MOTION TO VACATE 28 U.S.C. § 2255

ORDER ADOPTING MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

Movant is a federal prisoner serving a 188-month term of imprisonment based on his guilty plea and conviction for being a felon in possession of a firearm. The matter is before the Court on Movant's *pro se* 28 U.S.C. § 2255 motion, as amended, (Docs. 80, 81); the Magistrate Judge's Final Report and Recommendation, which recommends that the § 2255 motion and a certificate of appealability (COA) be denied, (Doc. 97); and Movant's objections and motion to alter or amend the Final Report and Recommendation, (Docs. 99, 100).

In reviewing a Magistrate Judge's Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent proper objection, the district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation," Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b).

I. Discussion

The grand jury sitting in the Northern District of Georgia charged Movant (1) in Count One with the knowing possession of a firearm after having been convicted of three felony offenses in Orange County, Florida - delivery of cocaine, Case Number 88-9153; delivery of cocaine, Case Number 89-10213; and aggravated battery, Case Number CR90-12816 - in violation of 18 U.S.C. §§ 922(g) and 924(e); (2) in Count Two with cocaine possession; and (3) in Count Three with possession of a firearm in furtherance of a drug trafficking crime. (Doc. 2.) Movant pleaded guilty to Count One. (Doc. 43, Guilty Plea and Plea Agreement.) Movant agreed that he was subject to a fifteen-year mandatory minimum sentence, (id. ¶ 3), and waived his appeal rights as follows:

"[Movant] voluntarily and expressly waives the right to appeal his sentence and the right to collaterally attack his sentence in any post-conviction proceeding on any ground, including a motion pursuant to 28 U.S.C. § 2255, except in the event of an upward departure from the applicable guideline range. The defendant also knowingly and voluntarily waives his rights to challenge his underlying state felony convictions which are used to enhance his federal sentence pursuant to 18 U.S.C. § 924(e), in any post-conviction proceeding on any ground. (Id. ¶ 6.) In exchange, the government agreed, among other things, to recommend a sentence at the low end of the applicable guideline range and to file a dismissal of Counts Two and Three. (Id. ¶¶ 9, 10.) The government noted during the plea hearing that Count Three would have carried a five-year sentence consecutive to the mandatory fifteen-year sentence for Count One. (Doc. 65 at 8.)

Also during the guilty-plea hearing, the Court thoroughly explained to Movant the rights that he was giving up by pleading guilty, including the right to go to trial and have the government prove beyond a reasonable doubt the charges against him. (Id. at 4-6.) Movant, under oath, stated that he was willing to give up those rights and plead guilty to Count One. (Id. at 6.) The government outlined the plea agreement - including the appeal waiver and the fact that Movant was subject to a mandatory minimum sentence of fifteen years. (Id. at 6-9.) Movant agreed that the government had correctly represented the plea agreement. (Id. at 9-10.) The government outlined the factual basis for Count One, including the facts of Movant's three prior felony convictions. (Id. at 13-14.) Movant admitted to the facts as alleged by the government. (Id. at 14-15.) The Court questioned Movant whether he understood that the Court was without authority to sentence him to less than the fifteen-year mandatory minimum sentence, and Movant informed the Court that he understood. (Id. at 16.) The Court thoroughly reviewed the appeal waiver and questioned Movant whether he understood that, except in two limited circumstances, he was giving up the right to review, and Movant stated that he understood. (Id. at 16-17.) The Court found that Movant's plea had a factual basis, was free of any coercion, and was knowing and voluntary, and the Court accepted Movant's guilty plea. (Id. at 19.) The Court sentenced Movant to a 188-month term of imprisonment, at the bottom of his 188-235 month guideline range. (Doc. 48; Doc. 69 at 2-3; see also Doc. 46 at 1.)

In his § 2255 motion, Movant claims that (1) his guilty plea was unintelligent and involuntary, (2) the district court lacked subject-matter jurisdiction to impose an enhanced sentence under the Armed Career Criminal Act (ACCA),¹ (3) he was constructively denied counsel during the plea bargaining stage, and (4) the ACCA is unconstitutional. (Doc. 81 at 5-6, 8-9.)

A. Grounds One and Three

Movant claims that he was constructively denied counsel during the plea bargaining stage, (Doc. 81 at 5, 8), and asserts that his guilty plea is invalid because he (1) did not know that counsel's advice to sign the appeal waiver was unethical, (2) did not realize that the convictions to which he stipulated did not qualify as ACCA predicates or that without his stipulation the government would have been required to produce evidence at sentencing to establish the nature of those convictions, (3) did not

know that the court could not sentence him below fifteen years, and (4) did not know that his appeal waiver foreclosed further review, (id. at 5 and Ground One.)

The Magistrate Judge reviewed the guilty plea transcript, found that the Rule Eleven colloquy confirmed that Movant's plea was knowing and voluntary, and found that Movant had failed to establish that counsel's assistance was deficient or that, but for counsel's alleged deficient representation, he would not have pleaded guilty. (Doc. 97 at 8-12.) The Magistrate Judge recommends that Grounds One and Three fail. (Id.)

Movant objects that the Magistrate Judge put undue reliance on the Rule Eleven colloquy without properly considering the erroneous advice that he received from counsel on (1) the ACCA predicates to which he stipulated, (2) what the government would have had to prove without the stipulations, and (3) his right to review. (Doc. 99 at 5.) Movant also objects that the Magistrate Judge incorrectly found that prejudice was lacking because he failed to show that there was a reasonable probability that he would not have pleaded guilty and asserts that prejudice also can be shown by demonstrating that there was a reasonable probability that he could have pleaded "differently," but did not because of counsel's deficiency. (Id. at 6.)²

A criminal defendant possesses a Sixth Amendment right to "reasonably effective" legal assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show constitutionally ineffective assistance of counsel, a petitioner must establish that (1) counsel's representation was deficient and (2) counsel's deficient representation prejudiced him. Id. at 690-92. To succeed on a claim that a guilty plea was obtained as the result of ineffective assistance of counsel, a petitioner must show that the advice he received from counsel "'fell below an objective standard of reasonableness'" and "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 57, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (quoting Strickland, 466 U.S. at 687-88). "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

Even if counsel had given deficient advice on the appeal waiver and Movant's right to review, there is no prejudice because the record otherwise demonstrates that Movant fully understood the rights that he was giving up by entering into the appeal waiver. As to counsel's allegedly deficient advice on the ACCA predicates, Movant presents nothing to indicate that the prior convictions at issue did not qualify as ACCA predicates, and he fails to give the Court any reason to find that counsel performed deficiently in allowing Movant to agree to the factual basis for, and plead guilty to, Count One. Moreover, Movant fails to convince the Court that it would have been rational in the circumstances to reject the plea agreement. There is no indication that the government was offering (or would have been willing to offer) any other agreement, and the plea agreement entered into entitled Movant to the government's dismissal of Counts Two and Three and the government's recommendation that he be sentenced at the low end of the 188 to 235 month guideline range. Absent those agreements, the government could have recommended a 235-month sentence and Count Three would have necessitated an additional *consecutive* sixty-months of imprisonment had Movant been convicted on that count at trial. The Court agrees with the Magistrate Judge that Grounds One and Three fail.

B. Ground Two

In Ground Two, Movant argues that the Court was without subject matter jurisdiction to impose an enhanced sentence under the ACCA by relying on Movant's stipulations and failing to determine independently whether Movant's prior convictions were qualifying convictions. (Doc. 81 at 6.) The

Magistrate Judge recommends that Ground Two fails based on Movant's valid appeal waiver. (Doc. 97 at 7-8.)

Movant objects that the Magistrate Judge incorrectly found that subject-matter jurisdiction could be waived. (Doc. 99 at 2-3.) Movant's attempt to skirt his appeal waiver by styling his challenge to his sentence as a matter of subject matter jurisdiction fails. When a defendant stipulates to the factual basis of a count to which he is pleading guilty, he does *not* thereby deprive the court of jurisdiction to impose sentence based on that stipulation. The Court is aware of no law that states otherwise. The Court possessed subject matter jurisdiction to consider during sentencing the factual basis to Count One, to which Movant pleaded guilty. See United States v. Kelly, 545 F. App'x 951, 954 (11th Cir. 2013) ("The district court was entitled to rely on Kelly's plea colloquy and the undisputed statements in the PSI in determining whether the factual basis for a career offender enhancement was satisfied."). Ground Two fails.

C. Ground Four

Movant claims that the ACCA is unconstitutional because it is vague and ambiguous as to what conduct is prohibited,³ it allows law enforcement randomly to select individuals for prosecution, and it prescribes cruel and unusual punishment. (Doc. 81, Ground Four.) The Magistrate Judge recommends that Ground Four fails based on Movant's valid appeal waiver. (Doc. 97 at 7-8.)

Movant objects that the Magistrate Judge incorrectly found that a challenge to the constitutionality of a statute could be waived. (Doc. 99 at 3-4.)

The constitutionality of a statute under which a defendant is convicted presents a jurisdictional issue that the defendant does not waive by pleading guilty. United States v. Saac, 632 F.3d 1203, 1208 (11th Cir. 2011) (citing United States v. Palacios-Casquete, 55 F.3d 557, 561 (11th Cir.1995)); see also United States v. Peter, 310 F.3d 709, 712-13 (11th Cir. 2002) (holding that the doctrine of procedural default does not apply to claim of jurisdictional error). It appears, however, that a valid appeal waiver would nonetheless bar such a claim. See United States v. Diveroli, 512 F. App'x 896, 901-02 (11th Cir. 2013) (holding that challenge to statute as vague was barred by valid appeal waiver); United States v. Maillet, 440 F. App'x 292, 294 (5th Cir. 2011) ("Maillet's constitutional challenge to the statute of conviction, however, is barred by his knowing and voluntary appeal waiver.")

Additionally, Movant's challenge to the ACCA otherwise fails. Section 924 of Title 18 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 suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

To avoid unconstitutional vagueness, a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." United States v. Wetherald, 636 F.3d 1315, 1326 (11th Cir. 2011) (quoting United States v. Fisher, 289 F.3d 1329, 1333 (11th Cir. 2002)) (internal quotation marks omitted). "Congress chose to frame ACCA in general and qualitative, rather than encyclopedic, terms." Sykes v. United States, __ U.S. __, 131 S. Ct. 2267, 2277, 180 L. Ed. 2d 60 (2011). The arguably *most* general phrase in § 924(e) is referred to as the residual clause and defines a violent felony as a crime that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). That phrase "states an intelligible principle

and provides guidance that allows a person to 'conform his or her conduct to the law.'" Sykes, __ U.S. at __, 131 S. Ct. at 2277 (quoting Chicago v. Morales, 527 U.S. 41, 58, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)); United States v. Gandy, 710 F.3d 1234, 1239 (11th Cir.) (holding that § 924(e)(2)(B)(ii) is not unconstitutionally vague), cert. denied, __ U.S. __, 134 S. Ct. 304, 187 L. Ed. 2d 216 (2013); see also United States v. Jackson, 491 F. App'x 554, 557 (6th Cir. 2012) (rejecting claim that § 924(e)(2)(A) - defining serious drug offenses - is unconstitutionally vague), cert. denied, __ U.S. __, 133 S. Ct. 1612, 185 L. Ed. 2d 600 (2013).

The Court has reviewed § 924(e) - set forth above - in light of Movant's nonspecific claim that it is unconstitutionally vague and has considered the above case law and discussion on the residual clause and concludes that Movant has not shown that § 924(e) in any way fails to give proper notice and set adequate boundaries. Additionally, § 924(e)'s mandatory fifteen-year term is not cruel and unusual punishment. United States v. Reynolds, 215 F.3d 1210, 1214 (11th Cir. 2000) ("[E]very circuit to have considered this issue has concluded that the 15-year minimum mandatory sentence under ACCA is neither disproportionate to the offense nor cruel and unusual punishment."). Ground Four fails.

II. Conclusion

Petitioner's objections fail, and the Court otherwise finds no clear error in the Magistrate Judge's recommendation. Accordingly,

IT IS ORDERED that Movant's objections, (Doc. 99), to the Magistrate Judge's Final Report and Recommendation are **OVERRULED** and that the Magistrate Judge's Final Report and Recommendation, (Doc. 97), is **ADOPTED**, with the clarifications as stated above.

IT IS ORDERED that the § 2255 motion, as amended, (Docs. 80, 81), the motion to alter or amend, (Doc. 100), and a certificate of appealability are **DENIED**.

IT IS SO ORDERED this 22nd day of April, 2014.

/s/ Richard W. Story

RICHARD W. STORY

UNITED STATES DISTRICT JUDGE

Footnotes

1

Under the ACCA, 18 U.S.C. § 924(e), "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, . . . shall be . . . imprisoned not less than fifteen years" 18 U.S.C. § 924(e)(1).

2

The Court does not address Movant's arguments that do not specifically identify a finding by the Magistrate Judge to which he objects. (See Doc. 99 at 6-9.)

3

Movant does not specify which portion of the ACCA is unconstitutionally vague.



lykcases

6

© 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved. Use of this product is subject to the restrictions and terms and conditions of the Matthew Bender Master Agreement.

48683019

APPENDIX "O"

ELEVENTH CIRCUIT ORDER GRANTING THE ISSUANCE OF A COA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-12874-F

WILLIE LINDSEY SYLVESTER, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Willie Sylvester, Jr., a federal prisoner proceeding pro se, seeks a certificate of appealability (COA) and leave to proceed in forma pauperis (IFP), in order to appeal the District Court's denial of his motion to vacate under 28 U.S.C. § 2255, motions for reconsideration under Federal Rule of Civil Procedure 59(e), and request for an evidentiary hearing. Mr. Sylvester is serving a 188-month sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e), after pleading guilty in 2009 to being a convicted felon in possession of a firearm. Mr. Sylvester

court to relitigate claims it had already denied. See Arthur, 500 F.3d at 1343; Mincey, 206 F.3d at 1137.

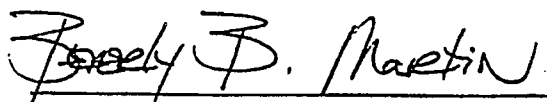
Second, even looking at the substance of Mr. Sylvester's claims, the court did not commit a manifest error. See Arthur, 500 F.3d at 1343. As noted above, even though we now know the ACCA is unconstitutionally vague, the court's decision to deny Mr. Sylvester's claim, at the time, was supported by binding precedent. See Sykes, 564 U.S. at ___, 131 S. Ct. at 2277. Likewise, Mr. Sylvester's direct challenge to his ACCA sentence was barred by his sentence appeal waiver. A COA is not warranted because the District Court did not abuse its discretion in denying Mr. Sylvester's Rule 59(e) motion. See Mincey, 206 F.3d at 1137.

IV. Conclusion

Mr. Sylvester's motion for a COA is GRANTED on the following issue only:

Whether Mr. Sylvester's sentence appeal waiver bars him from challenging the constitutionality of his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), in a 28 U.S.C. § 2255 motion.

Mr. Sylvester's motion for leave to proceed on appeal IFP is GRANTED.


UNITED STATES CIRCUIT JUDGE

APPENDIX "D"

THIS COURT'S GRANT OF AN EXTENSION OF TIME

TRULINCS 48883019 - AMODEO, FRANK T - Unit: COL-B-C

FROM: Davis, Christie
TO: 48883019
SUBJECT: Sylvester
DATE: 02/14/2018 09:21:05 AM

Supreme Court of the United States
No. 17A617
Title: Willie Lindsey Sylvester, Jr., Applicant
v.
United States
Docketed: December 7, 2017
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Numbers: (14-12874)

DATE PROCEEDINGS AND ORDERS

Nov 27 2017 Application (17A617) to extend the time to file a petition for a writ of certiorari from December 27, 2017 to February 18, 2018, submitted to Justice Thomas.

Main DocumentLower Court Orders/OpinionsProof of Service

Dec 13 2017 Application (17A617) granted by Justice Thomas extending the time to file until February 18, 2018.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: _____