

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10482
Non-Argument Calendar

D.C. Docket Nos. 4:15-cv-00599-RH-CAS; 4:13-cr-00008-RH-CAS-1

KARIM MUHAMMAD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(April 9, 2019)

Before MARCUS, ROSENBAUM and JULIE CARNES, Circuit Judges.

PER CURIAM:

Petitioner Karim Muhammad, a federal prisoner, appeals the denial of his *pro se* 28 U.S.C. § 2255 motion to vacate his 180-month sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (“ACCA”). In his motion to vacate, Petitioner argued that he no longer had three predicate convictions for his ACCA sentence after the Supreme Court invalidated the ACCA’s residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Because our precedent forecloses Petitioner’s arguments, we affirm the district court’s denial of his motion to vacate.

I. BACKGROUND

In 2013, a federal grand jury indicted Petitioner on one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Petitioner pled guilty pursuant to a written plea agreement, acknowledging that he faced a 15-year mandatory minimum sentence under the ACCA due to his prior felony convictions.

A probation officer prepared a Presentence Investigation Report (“PSI”), which concluded that Petitioner qualified as an armed career criminal based on his prior Florida convictions for (1) second-degree murder, (2) possession of cocaine with intent to sell, (3) armed burglary of a dwelling and armed robbery with a firearm, and (4) aggravated battery (great bodily harm). Petitioner “admit[ted] to the accuracy of the list of his prior convictions” and did not object to his armed

career criminal enhancement. Accordingly, the district court adopted the guideline calculations and sentenced Petitioner to the statutory minimum of 180 months' imprisonment. Petitioner did not appeal.

In 2015, Petitioner filed a *pro se* 28 U.S.C. § 2255 motion to vacate his sentence based on *Johnson*. Without requiring a response from the Government, a magistrate judge prepared a report and recommendation ("R&R"), which recommended that the district court deny Petitioner's § 2255 motion because *Johnson*'s invalidation of the residual clause did not affect whether Petitioner's prior convictions listed in the PSI qualified as ACCA predicates. Over Petitioner's objections, the district court adopted the R&R, concluding that Petitioner's conviction for cocaine possession with intent to sell qualified as a "serious drug offense" and that the remaining offenses qualified as "violent felonies" under the ACCA's elements clause. The district court denied a certificate of appealability ("COA"), but we granted a COA on the issue of whether Petitioner "has at least two violent felonies, in combination with his serious drug offense, to qualify him as an armed career criminal, absent the ACCA's residual clause."

II. DISCUSSION

A. Standard of Review

When reviewing a district court's denial of a § 2255 motion, we review legal issues *de novo* and factual findings for clear error. *Hylor v. United States*, 896

F.3d 1219, 1221 (11th Cir. 2018). We review *de novo* whether a particular conviction qualifies as a violent felony under the ACCA. *Id.* “Our review is limited to the issue specified in the certificate of appealability.” *Castillo v. United States*, 816 F.3d 1300, 1306 (11th Cir. 2016).

B. Whether Petitioner Has at Least Two Prior Convictions for a “Violent Felony,” in Addition to His Conviction for a “Serious Drug Offense”

Under the ACCA, a defendant convicted of being a felon in possession of a firearm who has three or more prior convictions for a “serious drug offense” or “violent felony” faces a mandatory minimum sentence of 15 years’ imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines a “violent felony” as any crime punishable by more than one year in prison 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)(i), (ii). We refer to the first part of this definition as the “elements clause,” while the second part contains the “enumerated crimes” and the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

When evaluating whether a state offense qualifies as a “violent felony” under the ACCA’s elements clause, we apply the “categorical approach.” *Hylor*, 896 F.3d at 1222. Under the categorical approach, we may consider only the

elements of a defendant’s prior conviction, not the particular facts underlying the conviction. *Descamps v. United States*, 570 U.S. 254, 261 (2013). Where a statute is divisible, meaning that it sets out elements in the alternative, we may employ the “modified categorical approach” as “a tool for implementing the categorical approach.” *Id.* at 261–62. Under the “modified categorical approach,” we may examine a limited class of state-court documents, including charging documents, jury instructions, and statements made at guilty plea proceedings, “to determine which of a statute’s alternative elements formed the basis of the defendant’s prior conviction.” *Id.* “[W]e have held that a sentencing court applying the modified categorical approach may consider undisputed facts contained in the PSI.” *United States v. Ramirez-Flores*, 743 F.3d 816, 823 (11th Cir. 2014).

An offense qualifies as a “violent felony” under the elements clause only if the offense cannot be accomplished without the use, attempted use, or threatened use of physical force. *United States v. Deshazor*, 882 F.3d 1352, 1357 (11th Cir. 2018), *cert. denied* (U.S. Feb. 25, 2019). The Supreme Court has “held that ‘physical force’ means ‘violent force—that is, force capable of causing physical pain or injury to another person.’” *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019) (quoting *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010)). In deciding whether an element requires physical force, we must focus on the least

culpable conduct criminalized by the statute. *Deshazor*, 882 F.3d at 1357 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)).

On appeal, Petitioner contends that his prior Florida convictions for second-degree murder, aggravated battery causing great bodily harm, and armed robbery¹ do not qualify as violent felonies under the ACCA's elements clause.²

Accordingly, he argues that he was improperly sentenced under the ACCA because he does not have at least two violent felonies, in addition to his conviction for a serious drug offense.³

¹ The undisputed facts in the PSI indicate that Petitioner's convictions for armed robbery and armed burglary of a dwelling arose from the same incident. Accordingly, if either of his conviction qualifies as a "violent felony" under the ACCA's elements clause, it can serve as one of the three ACCA predicates. *See* 18 U.S.C. § 924(e)(1) (providing for a 15-year sentence where a person has three previous convictions for a violent felony or a serious drug offense "committed on occasions different from one another"); *see also Turner v. Warden Coleman FCI (Medium)*, 709 F.3d 1328, 1337 (11th Cir. 2013) ("Turner's convictions under Florida law for aggravated assault and shooting into an occupied building arose from the same incident; therefore, if either conviction constitutes a violent felony, it can serve as one of the three predicate offenses for purposes of the ACCA." (citations omitted)), *abrogated on other grounds by Johnson*, 135 S. Ct. 2551.

² We note that Petitioner purports to assert a *Johnson* claim, but he in fact asserts a *Descamps* claim because he argues that his prior convictions do not qualify under the elements clause. *See Beeman v. United States*, 871 F.3d 1215, 1220 (11th Cir. 2017) ("A *Johnson* claim contends that the defendant was sentenced as an armed career criminal under the residual clause, while a *Descamps* claim asserts that the defendant was incorrectly sentenced as an armed career criminal under the elements or enumerated offenses clause."), *cert. denied*, No. 18-6385 (U.S. Feb. 19, 2019). The Government has not asserted a timeliness challenge to Petitioner's *Descamps* claim.

³ We note that the undisputed facts in Petitioner's PSI show that he had a prior Florida conviction for possession with intent to sell cocaine, which we have held qualifies as a "serious drug offense" under the ACCA. *United States v. Joyner*, 882 F.3d 1369, 1377 n.4 (11th Cir. 2018) (citing *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014)), *cert. denied*, No. 17-9128 (U.S. Feb. 25, 2019). In any event, any argument that Petitioner's drug conviction did not qualify as an ACCA predicate is beyond the scope of the COA. *See Castillo*, 816 F.3d at 1306.

Petitioner's arguments are meritless. Our precedent establishes that each of Petitioner's prior convictions qualifies as a "violent felony" under the ACCA's elements clause. *United States v. Jones*, 906 F.3d 1325, 1329 (11th Cir. 2018) (holding that Florida second-degree murder is a violent felony under the elements clause), *cert. denied*, No. 18-7116 (U.S. Feb. 19, 2019); *Turner*, 709 F.3d at 1341 (holding that Florida aggravated battery causing great bodily harm is a violent felony under the elements clause); *United States v. Fritts*, 841 F.3d 937, 943–44 (11th Cir. 2016) (holding that Florida armed robbery qualifies as a violent felony under the elements clause); *see also Stokeling*, 139 S. Ct. at 554–55 (holding that Florida robbery qualifies as a violent felony under the ACCA's elements clause). Although Petitioner argues that we should reassess our previous holdings, we are bound by our circuit precedent unless and until it is overruled by the Supreme Court or this Court sitting en banc. *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003).

III. CONCLUSION

The district court correctly determined that Petitioner was an armed career criminal because he had sustained at least two violent felonies, in combination with his serious drug offense. We therefore **AFFIRM** the district court's denial of Petitioner's § 2255 motion to vacate his ACCA sentence.

As a final matter, we GRANT Petitioner's pending motion to file a reply brief out of time and have considered his reply in adjudicating this appeal.

AFFIRMED.