

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA     )  
  )  
                          v.             )     1:12-cr-00084-JAW  
  )  
LAUREN MACARTHUR             )

**ORDER DENYING DEFENDANT’S MOTIONS FOR ATTORNEY DAVID  
BENEMAN TO FILE CLAIMS AND FOR APPOINTMENT OF COUNSEL**

The Court rejects the Defendant’s demand that the Court order an attorney to file a claim that he should not have been deemed subject to the provisions of the Armed Career Criminal Act and should not have been sentenced based on the Armed Career Criminal guidelines provision. The Court determines that because the Defendant had previously been convicted of seven burglaries under state laws that are consistent with the definition of generic burglary, the ACCA was applicable to the instant felon-in-possession offense. It also determines that the Armed Career Criminal guidelines provision was not used to calculate his guidelines sentence range.

**I. PROCEDURAL HISTORY**

On March 17, 2014, this Court sentenced Lauren MacArthur to 216 months of incarceration, five years of supervised release, and a \$200.00 special assessment based on his convictions for possession of a firearm by a felon, a violation of 18 U.S.C. § 922(g)(1), and possession of stolen firearms, a violation of 18 U.S.C. § 922(j). *J.* (ECF No. 78) (*J.*). At his sentencing hearing, the Court counted two of his prior convictions as “crimes of violence” under United States Sentencing Guideline

(U.S.S.G.) § 2K2.1, thereby making him an Armed Career Criminal and raising his base offense level to 26. *See United States v. MacArthur*, 805 F.3d 385, 386 (1st Cir. 2015). Mr. MacArthur's criminal history category was VI. *Tr. of Proceedings, Sentencing Proceedings* 50:19 (ECF No. 86) (*Sentencing Tr.*). His guidelines range for imprisonment was 262 to 327 months. *Id.* 50:20-22. This Court's sentence was forty-six months under the bottom of the guidelines range. *J.* at 2. Mr. MacArthur appealed his sentence to the Court of Appeals for the First Circuit, and on November 9, 2015, the First Circuit affirmed the sentence. *MacArthur*, 805 F.3d at 391.

On March 7, 2016, Mr. MacArthur moved this Court to appoint counsel for him, contending that *Johnson v. United States*, 576 U.S. \_\_\_, 135 S. Ct. 2551 (2015) might apply to his case and requesting counsel be appointed to represent him. *Pet. for Legal Counsel on Said Facts Below* (ECF No. 91). On March 7, 2016, the Magistrate Judge appointed David R. Beneman, the Federal Defender, to review his case to determine whether *Johnson* afforded Mr. MacArthur a basis for post-conviction relief. *Order Appointing Counsel* (ECF No. 92). On March 29, 2016, Federal Defender Beneman moved to withdraw as Mr. MacArthur's counsel on the ground that Mr. MacArthur's sentence "does not involve a potential *Johnson* claim." *Mot. to Withdraw* at 3 (ECF No. 94) (*Mot. to Withdraw*). Mr. Beneman observed that Mr. MacArthur is still well within the one year date of the denial of his direct appeal should he choose to proceed with a 28 U.S.C. § 2255 petition. *Id.* The Court granted Mr. Beneman's motion on March 31, 2016. *Order* (ECF No. 95).

On March 31, 2016, Mr. MacArthur filed a motion to force Mr. Beneman to brief ineffectiveness of counsel claims against both his trial and appellate counsel. *Pet. for Legal Counsel David Beneman to Also Br. the Issue of Strickland v. Washington* (ECF No. 96) (*Def.'s Mot.*). Then on April 28, 2016, Mr. MacArthur filed a motion to appoint counsel to represent him on his attack against the application of the Armed Career Criminal Act in his case. *Pet. for Appointment of Counsel on Said Facts Below* (ECF No. 97) (*Def.'s Pet.*). These motions are currently before the Court.

## **II. LAUREN MCARTHUR'S SENTENCING HEARING AND APPEAL**

### **A. The Indictment and Guilty Plea**

On May 17, 2012, a federal grand jury issued a two-count indictment against Mr. MacArthur: (1) for being a felon in possession, and (2) for possession of stolen firearms. *Indictment* (ECF No. 4) (*Indictment*). On November 26, 2012, Mr. MacArthur pleaded guilty to both counts. *Min. Entry* (ECF No. 37).

### **B. The Sentencing Hearing**

#### **1. The Presentence Report**

On March 12, 2014, the Probation Office (PO) issued its third revised Presentence Investigation Report (PSR). The PO calculated Mr. MacArthur's guidelines sentence range under § 2K2.1 as follows:

- 1) Base Offense Level: noting that U.S.S.G. § 2K2.1(a)(1) applies, the PO began with an offense level of 26 because Mr. MacArthur had twice previously been convicted of crimes of violence and the weapons had high-capacity magazines present;

- 2) Stolen Firearms: as both firearms had been stolen, there was a two-level increase under § 2K2.1(b)(4)(A);
- 3) Connection with Another Felony: as Mr. MacArthur possessed the firearms in connection with another felony, namely a burglary, reckless endangerment, and eluding an officer, the offense level was increased by four levels under § 2K2.1(b)(6) for an adjusted offense level of 32;
- 4) As Mr. MacArthur recklessly created a substantial risk of serious bodily injury to another person in the course of fleeing from a law enforcement officer, two levels were added under § 3C1.2 for a total offense level of 34.

PSR at 5. The PO did not recommended a reduction based on Mr. MacArthur's acceptance of responsibility due to new criminal conduct. *Id.* ¶ 20. Mr. MacArthur's total criminal history score was 20, establishing a criminal history category of VI. *Id.* ¶¶ 46-47. For a criminal history category of VI and a total offense level of 34, Mr. MacArthur's guidelines sentence range was 262 to 327 months on Count I and 120 months on Count II. *Id.* ¶¶ 68-73.

## **2. The Sentencing Hearing**

At the sentencing hearing, the Court adopted the PO's guidelines calculations. *Sentencing Tr.* 50:5-51:12. The Court also granted a motion pursuant to U.S.S.G. § 5K1.1. *Id.* 6:22-7:1; 51:21-23. The Court imposed a sentence of 216 months, forty-six months below the bottom of the guidelines sentence range. *Id.* 62:12-13; *J.* at 2.

### C. The Appeal

Mr. MacArthur appealed his sentence to the Court of Appeals for the First Circuit. *Notice of Appeal* (ECF No. 80). On November 9, 2015, the First Circuit affirmed his sentence. *MacArthur*, 805 F.3d at 391. On appeal, Mr. MacArthur challenged the Court’s calculation of the applicable sentencing guidelines range, arguing that it should not have treated two prior burglary convictions as crimes of violence under U.S.S.G. § 2K2.1(a)(1). *Id.* at 386. Section 2K2.1 provides for a base offense level of 26 if:

(a)(1)(A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; . . . and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . .

U.S.S.G. 2K2.1(a)(1)(A)-(B).<sup>1</sup> On appeal, Mr. MacArthur observed that the term “crime of violence” is defined, among other things, as “burglary of a dwelling.” *MacArthur*, 805 F.3d at 388 (quoting U.S.S.G. 2K2.1 cmt. n.1).

Mr. MacArthur argued on appeal that because he was convicted under Maine’s burglary statute, 17-A M.R.S. § 401, he could have committed the burglary by entering a “structure,” not a “dwelling.”<sup>2</sup> *Id.* But the First Circuit made short work

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<sup>1</sup> Mr. MacArthur has not and does not contest the finding that the offense involved a semiautomatic firearm capable of accepting a large capacity magazine.

<sup>2</sup> The Maine statute reads:

A. The person enters or surreptitiously remains in a structure knowing that that person is not licensed or privileged to do so, with the intent to commit a crime therein. Violation of this paragraph is a Class C crime; or

B. The person violates paragraph A and:

....

(4) The violation is against a structure that is a dwelling place. Violation of this subparagraph is a Class B crime . . . .

of that argument because the PSR set forth detailed descriptions of the burglaries, which clarified that at least two of Mr. MacArthur’s prior burglary convictions were in fact of dwellings. *PSR* ¶ 32 (“The defendant was convicted of entering a dwelling occupied by Casey Libby”); ¶ 33 (“The defendant was convicted of entering the dwelling of Rick Whitney”); ¶ 38 (“The defendant was convicted of entering the dwellings of Dale Fiske and John Farrington and taking firearms. . . . MacArthur was also convicted of entering the home of George Strout and taking a firearm”); ¶ 39 (“The defendant was convicted of entering the home of Bion and Lisa Tolman and taking a firearm”). The First Circuit pointed out that Mr. MacArthur was asked about the contents of the PSR and that he admitted the contents were accurate. *MacArthur*, 805 F.3d at 389. The *MacArthur* Court concluded that “the district court was given no reason not to rely on the express descriptions of the burglary convictions as instances in which MacArthur was indeed convicted of entering a dwelling.” *Id.* The First Circuit rejected Mr. MacArthur’s claim that the Court erred when it considered his prior burglary convictions as “crimes of violence” under U.S.S.G. § 2K2.1. *Id.*

### III. LAUREN MACARTHUR’S ARGUMENT

In his motions, Mr. MacArthur observes that the maximum penalty for a violation of 18 U.S.C. § 922(g) is ten years. *Def.’s Mot.* at 1; *Def.’s Pet.* at 2. By contrast, the minimum sentence under the Armed Career Criminal Act (ACCA) is fifteen years and the maximum is life. *Id.* Compare 18 U.S.C. § 924(a)(2) (ten-year

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17-A M.R.S. § 401(1)(A)-(B)(4).

maximum), *with* 18 U.S.C. § 924(e)(1) (fifteen-year minimum). Mr. MacArthur insists that he was “NEVER found to be an ACCA at sentencing.” *Def.’s Mot.* at 2. He also complains that his defense lawyers at both the trial and appellate levels failed to question whether he was properly subject to the ACCA. *Id.* at 2-3. If he was not subject to the ACCA, he contends that the statutory maximum for his offense should be ten years and that he is overserving by eight years. *Id.* at 3.

#### IV. DISCUSSION

##### A. Armed Career Criminal Statutory Status

The criminal law can occasionally be complicated, and this is one of those occasions. Mr. MacArthur’s confusion about the relationship between the ACCA and the sentencing guidelines is understandable but not a basis to challenge his sentence.

Mr. MacArthur was charged with violating the ACCA. *Indictment* at 3 (“The defendant thus violated Title 18, United States Code, Sections 922(g)(1) and 924(e)”). The synopsis for count one, the felon in possession count, was consistent with an ACCA charge. *Second Am. Synopsis* at 1 (ECF No. 27) (“Imprisonment for not less than 15 years”). During his Rule 11 hearing, the Court expressly advised Mr. MacArthur that the statutory penalties of the ACCA applied:

THE COURT: Now, by pleading guilty to these crimes, you’re subject to the following penalties, and I want you to listen carefully to what I’m saying here because there are some - - there’s a significant mandatory minimum jail term as to Count I.

Count 1, which is the possession by a felon count, requires me to place you in jail for not less than 15 years, and you could be in jail for the rest of your life . . . . First, do you understand that these are the penalties that may be applicable to the possession of a firearm by a felon charge that is set forth in Count 1?

THE DEFENDANT: Yes.

*Tr. of Proceedings, Rule 11 Proceedings* 7:6-24 (ECF No. 87). In the PSR, the PO listed twenty-one adult criminal matters, leading to forty-one separate convictions. PSR ¶¶ 25-44A. The PO concluded that Mr. MacArthur was “an armed career criminal.” *Id.* ¶ 47. There was no objection to this determination by defense counsel at either the trial or appellate level.

Nor should there have been. The ACCA is applicable to “a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony . . .” Mr. MacArthur is correct that there is a slight difference between the ACCA’s definition of “violent felony” and the sentencing guidelines’ definition of “crime of violence.” *Compare* 18 U.S.C. § 922(e)(2)(B) (defining “violent felony” as “any crime punishable by imprisonment for a term exceeding one year . . . that (ii) is burglary . . .”), *with* U.S.S.G. § 2K2.1 cmt. n.1 (referring to U.S.S.G. § 4B1.2), *and* U.S.S.G. § 4B1.2(a)(2) (defining “crime of violence” in part as “burglary of a dwelling”). The ACCA definition of “violent felony” is, therefore, slightly broader than the guidelines definition of “crime of violence” because it does not require that the burglary be of a dwelling.<sup>3</sup> *United States v. Duquette*, 778 F.3d 314, 318 (1st Cir.

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<sup>3</sup> In his motion, Mr. MacArthur says that Mr. Beneman is “sadly mistaken if he thinks that all burglar[ies] count for purpose[s] of the ACCA.” *Def.’s Pet.* at 1.

First, not all of the cases that Mr. MacArthur cites stand for this proposition. In *United States v. Petrucelli*, No. 14-13469, 2016 U.S. App. LEXIS 251 (11th Cir. Jan. 6, 2016), for example, the Eleventh Circuit only concluded that the defendant’s conviction for aggravated fleeing and eluding could not count as an ACCA predicate under the invalidated residual clause following *Johnson v. United States*, 576 U.S. \_\_\_, 135 S. Ct. 2551 (2015). *Petrucelli*, 2016 U.S. App. LEXIS 251, at \*4.

Mr. MacArthur is correct that some state burglary statutes have been interpreted as being broader than the generic definition of burglary and therefore convictions under those statutes do not automatically count as predicate burglaries. *See, e.g., United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016). But these cases do not assist Mr. MacArthur because they do not address the Maine statute. All of Mr. MacArthur’s prior burglary convictions were under the Maine burglary statute, and the First Circuit has held that the Maine statutory definition of burglary “substantially

2015) (“[T]he Guidelines’s career offender provisions are concerned with a definition of burglary that is ‘narrower’ than the ACCA’s definition of that crime”) (quoting *United States v. Giggey*, 551 F.3d 27, 36 (1st Cir. 2008)). Mr. MacArthur’s criminal history, the accuracy of which he admitted at his sentencing hearing, contains seven prior convictions for burglary. PSR ¶¶ 32 (one count), 33 (one count), 38 (four counts), 39 (one count).

Mr. MacArthur’s contention that he should not have come under the ACCA is not justified by the record.

**B. The Sentencing Guidelines’ Firearms Possession and the Armed Career Criminal Provisions**

The sentencing guidelines contain two provisions potentially applicable to Mr. MacArthur’s sentence: U.S.S.G. § 4B1.4, Armed Career Criminal provision; and U.S.S.G. § 2K2.1, the firearms possession provision. Mr. MacArthur was sentenced under § 2K2.1, the firearms possession provision, not § 4B1.4, the Armed Career Criminal provision. As earlier noted, Mr. MacArthur’s guidelines sentencing range was fixed by chapters two and three of the guidelines, applying a base offense level of 26 under § 2K2.1(a)(1), a two-level stolen firearms enhancement under § 2K2.1(b)(4)(A), a four-level possession in connection with another felony offense enhancement under § 2K2.1(b)(6), and a two-level substantial risk of death or serious bodily injury enhancement under § 3C1.2—all for a total offense level of 34. Under § 4B1.4(b), the guidelines provide that a court must apply the greatest enhancement

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corresponds to ‘generic’ burglary.” *Duquette*, 778 F.3d at 318 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

among a number of alternatives, including computations under chapters two and three, which is what occurred in Mr. MacArthur's case. Thus, Mr. MacArthur was sentenced based on a non-ACCA guidelines calculation.

In other words, while Mr. MacArthur did qualify as an Armed Career Criminal, the ACCA provisions did not enhance his offense level. "If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied." U.S.S.G. § 4B1.4 cmt. background. But for Mr. MacArthur, the greatest offense level was the one "applicable from Chapters Two and Three." U.S.S.G. § 4B1.4(b)(1); *see also Statement of Reasons Attach. 1 Findings Affecting Sentencing*, at 1-2 (ECF No. 79) (calculating offense level from Chapters Two and Three without applying the ACCA enhancement). Indeed, Mr. Beneman made this point in his motion to withdraw on the *Johnson* issue:

Although MacArthur met the definition for application of the Armed Career Criminal Act (ACCA) raising the applicable statutory penalties from a ten year maximum to fifteen years to life, his advisory Guideline range was higher using the non-ACCA calculation. . . . There is no Guideline adjustment to MacArthur's sentence under ACCA because the applicable chapter two and three guidelines are higher.

*Mot. to Withdraw* (citations omitted).

## V. CONCLUSION

Having addressed the confusion at the crux of Mr. MacArthur's motion, the Court refuses to have Mr. Beneman brief the ineffectiveness issue or to appoint counsel to represent Mr. MacArthur in what appears to be a hopeless motion. At the same time, if Mr. MacArthur wishes to file his own petition on this or other grounds,

he is free to do so. He must do so by himself and on a timely basis. The Court DENIES Lauren F. MacArthur's Petition for Legal Counsel David Beneman to Also Brief the Issue of Strickland v. Washington (ECF No. 96) and his Petition for Appointment of Counsel on Said Facts Below (ECF No. 97).

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
UNITED STATES DISTRICT JUDGE

Dated this 3rd day of May, 2016