No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY M. SLUSSSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX

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895 F.3d 437
United States Court of Appeals, Sixth Circuit.

Larry M. SLUSSER, Petitioner–Appellant,
v.
UNITED STATES of America,
Respondent–Appellee.

No. 17-5070
|
Argued: June 6, 2018
|
Decided and Filed: July 10, 2018
|
Rehearing En Banc Denied August 22, 2018

Synopsis
Background: Defendant pleaded guilty to being felon in possession of firearm and received mandatory sentence of 180 months' imprisonment under Armed Career Criminal Act (ACCA). After his first motion to vacate was denied, 2015 WL 5254110, the United States District Court for the Eastern District of Tennessee, Nos. 3:11–cr–00078–1, 3:16–cv–00531, Thomas A. Varlan, Chief Judge, 2016 WL 6892757, dismissed defendant's second motion to vacate. Defendant appealed.

The Court of Appeals, Bernice Bouie Donald, Circuit Judge, held that defendant's waiver of his right to challenge his sentence through motion to vacate, as part of his knowing and voluntary plea agreement, precluded his collateral attack on his 180-month sentence.

Affirmed.

***438** Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. Nos. 3:11–cr–00078–1; 3:16–cv–00531—Thomas A. Varlan, Chief District Judge.

Attorneys and Law Firms

ARGUED: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. ON BRIEF: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

Before: COOK and DONALD, Circuit Judges; HALE, District Judge*

* The Honorable David J. Hale, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

BERNICE BOUIE DONALD, Circuit Judge.

Larry Slusser appeals the district court's dismissal of his second or successive motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Slusser challenges his designation as an armed career criminal. We granted a certificate of appealability ("COA") to consider one issue: whether Slusser's 1999 Tennessee conviction for Class C aggravated assault no longer qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA"). Slusser, however, waived his right to challenge his designation as an armed career criminal through a § 2255 motion as part of his negotiated plea agreement. Therefore, we **AFFIRM**.

I.

Slusser pleaded guilty in 2011 to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). As part of his plea agreement, Slusser waived his right to "file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack [his] conviction[ ] and/or resulting sentence," except challenges involving ineffective assistance of counsel or prosecutorial misconduct. The district court determined that he had at least three prior convictions for violent felonies or serious drug offenses and sentenced him to a mandatory sentence of 180 months under the ACCA. The district court

pointed to three prior convictions as qualifying ACCA predicates: a 1994 burglary; 2011 delivery of cocaine; and 1999 aggravated assault and burglary.[1] Slusser did not appeal his conviction or sentence.

[1] Slusser had several other prior convictions that the district court did not cite to when concluding that he was an armed career criminal.

In 2012, Slusser filed an initial § 2255 motion, arguing that he received ineffective assistance of counsel and that the prosecutor engaged in misconduct. The district court denied the motion, and we declined to issue a certificate of appealability. ***439** *Slusser v. United States*, No. 15–6241 (6th Cir. June 20, 2016) (order), *cert. denied*, —— U.S. ——, 137 S.Ct. 1216, 197 L.Ed.2d 257 (2017). Slusser filed an application in this Court in 2016 for authorization to file a second or successive § 2255 motion, claiming that he was entitled to relief after the Supreme Court invalidated the residual clause of the ACCA in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2251, 192 L.Ed.2d 569 (2015). We granted Slusser's motion and authorized the district court to consider his § 2255 motion, finding that Slusser established a *prima facie* showing that he may be entitled to relief under *Johnson*. *Slusser v. United States*, No. 16–5671 (6th Cir. Aug. 18, 2016) (order). The district court denied his motion and certified that an appeal would not be taken in good faith.

On appeal, Slusser continues to contend that his prior convictions no longer qualify as ACCA-predicate offenses after *Johnson*. We granted a COA to consider his challenge as to whether his 1999 Tennessee conviction for Class C aggravated assault is a violent felony post-*Johnson*.

II.

This Court applies de novo review to the question of whether a defendant waives his right to collaterally attack his sentence. *Davila v. United States*, 258 F.3d 448, 450 (6th Cir. 2001). We also review de novo a district court's legal determination as to whether a predicate conviction is a "violent felony" under the ACCA. *Braden v. United States*, 817 F.3d 926, 930 (6th Cir. 2016) (quoting *United States v. Kemmerling*, 612 F. App'x 373, 375 (6th Cir. 2015)). "The denial of the § 2255 motion ... may be affirmed 'on any grounds supported by the record even if different from the reasons of the district court.' " *Cox v. United States*, 695 F. App'x 851, 853 (6th Cir. 2017) (quoting *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002)), *cert denied*, —— U.S. ——, 138 S. Ct. 1282, 200 L.Ed.2d 477 (2018).

The government first argues that this Court cannot answer the ultimate question of whether Slusser's prior aggravated assault conviction qualifies as a violent felony because Slusser waived his right to challenge his sentence through a § 2255 motion as part of his plea agreement. Slusser makes no argument that undermines whether his plea agreement was knowing and voluntary but instead argues that he did not waive his right to challenge a sentence that is in excess of the statutory maximum.

It is well-settled that a knowing and voluntary waiver of a collateral attack is enforceable. *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999). Slusser contends that an exception to the enforcement of such waivers exists when the challenge is to a sentence that exceeds the statutory maximum. Slusser cites to *United States v. Caruthers*, where this Court noted in *dicta* that "an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded." 458 F.3d 459, 472 (6th Cir. 2006), *abrogated on other grounds by Cradler v. United States*, 891 F.3d 659 (6th Cir. 2018); *see also Watson*, 165 F.3d at 489 (noting that there is no "principled means of distinguishing" between a collateral attack and a waiver of a defendant's right to appeal). Yet, Slusser fails to distinguish the posture of his challenge with our previous holdings that a *Johnson*-based collateral attack on an illegal sentence does not undermine the knowing and voluntary waiver of "any right, even a constitutional right, by means of a plea agreement." *Cox*, 695 F. App'x at 853; *accord United States v. Morrison*, 852 F.3d 488, 490–91 (6th Cir. 2017) ("[A]fter the Supreme Court voided for vagueness the 'residual ***440** clause' in the ACCA's definition of 'violent felony,' courts routinely enforced the appeal waivers of prisoners who stood to benefit." (internal citation omitted)).

The indication in *Caruthers* that appellate waiver does not preclude a collateral attack on an above-statutory-maximum sentence was *dicta*, not the holding of the Court. We generally treat *dicta* as non-binding. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737–38, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). The other cases cited by Slusser, including *Curtis v. United States*, 699 F. App'x 546, 547 (6th Cir. 2017) and *United States v. Page*, 662 F. App'x 337, 339 (6th Cir. 2016), are distinguishable. The panel in *Curtis* left the question of waiver for the district court to determine. 699 F. App'x at 547. In *Page*, the panel

considered a challenge to whether the defendant's plea was knowing and voluntary. 662 F. App'x at 339–40. Our decision in *Cox* to enforce a substantially identical waiver under similar circumstances is instructive. 695 F. App'x at 853–54.

A voluntary plea agreement "allocates risk," and "[t]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." *Morrison*, 852 F.3d at 490 (quoting *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005)). "By waiving the right to appeal, a defendant assumes the risk that a shift in the legal landscape may engender buyer's remorse." *Id.* (citing *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005)). Slusser waived his right to collaterally attack his sentence, including his designation as an armed career criminal. The subsequent developments in this area of the law "do[ ] not suddenly make [his] plea involuntary or unknowing or otherwise undo its binding nature." *Bradley*, 400 F.3d at 463. We, therefore, enforce Slusser's waiver and need not reach the merits of his challenge.

III.

Slusser does not challenge that his plea agreement, including his waiver of his right to collaterally attack his conviction under § 2255, was entered into knowingly and voluntarily. While this Court has noted in *dicta* that a waiver may be unenforceable for challenges to sentences over the statutory maximum, several panels of this Court have held otherwise. Because Slusser waived his right to present a challenge to his sentence, the panel need not reach the merits of whether Slusser's prior 1999 Tennessee aggravated assault conviction qualifies as a violent felony. We affirm.

All Citations

895 F.3d 437

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No. 17-5070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 22, 2018
DEBORAH S. HUNT, Clerk

LARRY M. SLUSSER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

BEFORE: COOK and DONALD, Circuit Judges; HALE, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable David J. Hale, United States District Judge for the Western District of Kentucky, sitting by designation.

No. 17-5070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY M. SLUSSER,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	O R D E R
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

Larry M. Slusser, a federal prisoner represented by counsel, moves this court for a certificate of appealability to pursue his appeal of a district court judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. He also moves to proceed in forma pauperis on appeal.

In 2011, Slusser pleaded guilty to possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced under the Armed Career Criminal Act ("ACCA") to a mandatory minimum term of imprisonment of 180 months on the basis that he had at least three prior convictions for violent felonies or serious drug offenses. *See* 18 U.S.C. § 924(e). Although Slusser had several prior convictions, the district court cited the following three as qualifying predicate offenses: burglary in 1994; delivery of cocaine in 2001; and aggravated assault and burglary in 1999. Slusser did not appeal.

In 2012, Slusser filed a § 2255 motion to vacate, set aside, or correct his sentence, raising prosecutorial misconduct and ineffective-assistance-of-counsel claims. The district court denied the motion, and we declined to issue a certificate of appealability, *Slusser v. United States*, No. 15-6241 (6th Cir. June 20, 2016) (order), *cert. denied*, 137 S. Ct. 1216 (2017). In April 2017, Slusser filed a motion in the district court, seeking to re-open the § 2255 motion that he filed in

2012 and asking the district court to reconsider his ineffective-assistance-of-counsel claims. The motion remains pending.

Meanwhile, in 2016, Slusser filed an application in this court for authorization to file a second or successive § 2255 motion in the district court. In his application, Slusser claimed that he was entitled to relief from his enhanced sentence on the basis of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the residual clause of the ACCA as unconstitutionally vague. To be sentenced under the ACCA, a defendant must have at least three prior convictions for a "violent felony" or a serious drug offense. The ACCA defines "violent felony" as an offense that is punishable by a term of imprisonment exceeding one year and either "has as an element the use, attempted use, or threatened use of physical force against the person of another" (use-of-force clause) or "is burglary, arson, or extortion, involves use of explosives" (enumerated-offense clause), "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (residual clause). *See* 18 U.S.C. § 924(e)(2)(B).

We granted Slusser's application and remanded Slusser's second or successive § 2255 motion to the district court. *In re Slusser*, No. 16-5671 (6th Cir. Aug. 18, 2016) (order). In his motion, Slusser claimed that his prior state convictions for burglary and aggravated assault qualified as predicate offenses only under the now-void residual clause. On the basis that two of the three convictions that the district court used to enhance his sentence no longer qualified as predicate offenses, Slusser argued that he cannot be sentenced under the ACCA and should be resentenced.

The district court denied the motion and declined to issue a certificate of appealability, reasoning that at least three of Slusser's prior convictions qualified as ACCA predicate offenses independent of the residual clause. First, the district court determined that, pursuant to our decision in *United States v. Priddy*, 808 F.3d 676, 684-85 (6th Cir. 2015), Slusser's 1994 conviction for Class D burglary is categorically a violent felony under the enumerated-offense clause. Second, the district court concluded that Slusser's 1999 aggravated assault conviction constituted a Class C felony that involves the "intentional or knowing use or threatened use of

force" and thus qualifies as a violent felony under the use-of-force clause. Finally, the district court reasoned that it need not determine whether Slusser's 1993 aggravated-assault conviction or his various aggravated-burglary convictions qualified as predicate offenses: given that Slusser's 1994 burglary conviction, 1999 aggravated assault conviction, and 2001 delivery of cocaine conviction (which is unaffected by *Johnson* and thus remains a serious drug offense under the ACCA) amount to three ACCA predicate offenses, a sentencing enhancement was warranted.

Slusser now moves this court for a certificate of appealability. He claims that the district court erred when it concluded that (1) his 1994 burglary conviction met the generic definition of "burglary" and thus is a predicate offense, and (2) his 1999 aggravated assault conviction qualifies as a violent felony. As a result, Slusser claims, he is being unconstitutionally subjected to a sentence five years higher than the applicable statutory maximum.

Before a certificate of appealability may be granted, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We use a categorical approach to determine whether a conviction under a criminal statute qualifies as a predicate offense under the ACCA. *United States v. Stitt*, --- F.3d ----, 2017 WL 2766326, at *2 (6th Cir. 2017) (en banc). In doing so, we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—i.e., the offense as commonly understood." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). However, when the conviction involves violation of a "divisible" statute—one that comprises multiple, alternative versions of the crime—we resort to the "modified categorical approach" under which we "consult a limited class of documents, such as indictments and jury instructions, to determine which [element] formed the basis of the defendant's prior conviction." *Id.*; *see also*

Shepard v. United States, 544 U.S. 13, 16-17 (2005). These documents are commonly referred to as *Shepard* documents. *See United States v. Denson*, 728 F.3d 603, 608 (6th Cir. 2013).

Slusser first claims that his burglary conviction no longer qualifies as a predicate offense. The Tennessee burglary statute under which Slusser was convicted in 1994 provides that a person commits a burglary when, "without, the effective consent of the property owner," he:

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft;
> (2) Remains concealed, with the intent to commit a felony or theft, in a building;
> (3) Enters a building and commits or attempts to commit a felony or theft; or
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony or theft.

Tenn. Code Ann. § 39-14-402(a) (1990). We have found that "the first three variants of Tennessee burglary, i.e., Tenn. Code Ann. § 39-14-402(a)(1), (a)(2), and (a)(3), qualify as generic burglary under the enumerated-offense clause since they each involve 'unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" *Priddy*, 808 F.3d at 684 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)), *overruled in part on other grounds by Stitt*, --- F.3d ----, 2017 WL 2766326, at *1 (en banc).

Slusser was convicted of violating Tennessee Code Annotated § 39-14-402(a)(3). Accordingly, pursuant to our decision in *Priddy*, his burglary conviction qualifies as generic burglary and thus is a violent felony under the ACCA's enumerated-offense clause. *See Priddy*, 808 F.3d at 684-85. Slusser acknowledges *Priddy* but argues that it was incorrectly decided. In doing so, Slusser relies on the Fifth Circuit's decision in *United States v. Herrera-Montes*, 490 F.3d 390, 392 & n.2 (5th Cir. 2007), which noted that the definition of "generic burglary" requires that the defendant intend to commit a crime at the time of unlawful entry and held that, because Tennessee Code Annotated § 39-14-402(a)(3) lacks such an intent requirement, it does not qualify as a crime of violence under the sentencing guidelines. That case is neither binding nor persuasive. Because *Priddy* controls, reasonable jurists could not debate the district court's

conclusion that Slusser's conviction under Tennessee Code Annotated § 39-14-402(a)(3) qualified as a violent felony under the enumerated-offense clause.

Slusser next claims that, in the very least, it is unclear whether his aggravated assault conviction qualifies as a violent felony. The Tennessee aggravated assault statute under which Slusser was convicted in 1999 provides:

> (a) A person commits aggravated assault who:
> (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and;
> (A) Causes serious bodily injury to another; or
> (B) Uses or displays a deadly weapon; or
>
> (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:
> (A) Causes serious bodily injury to another; or
> (B) Uses or displays a deadly weapon
>
> (b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect such child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-302
>
> (c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against such individual or individuals.

Tenn. Code Ann. § 39-13-102 (1999). Subsections (a)(1), (b), and (c) were Class C felonies, while subsection (a)(2) was a Class D felony. Tenn. Code Ann. § 39-13-102(d)(1) (1999).

The state court judgment indicates that Slusser pleaded guilty to Class C aggravated assault; it did not, however, specify to which subsection Slusser pleaded guilty. The presentence report purportedly states that the guilty plea arose following an incident in which Slusser pointed a handgun at an officer who was attempting to arrest him. Based on these facts, the district court determined that—because Slusser displayed a handgun, a "deadly weapon," in the presence of an officer—Slusser had been convicted under subsection (a)(1)(b), and not subsections (b) or (c)

(the other Class C options). The district court concluded that a conviction under subsection (a)(1)(b) categorically involves the intentional or knowing use or threatened use of force and thus qualifies as a violent felony under the ACCA's use-of-force clause. *See Braden v. United States*, 817 F.3d 926, 933 (6th Cir. 2016) (construing 1998 version of § 39-13-102, which had language identical to the 1999 version, and holding that a conviction under § 39-13-102(a)(1)(b)—i.e. intentionally or knowingly committing an assault while using or displaying a deadly weapon—qualifies as a violent felony under the ACCA's use-of-force clause).[1]

Slusser argues that it is unclear which subsection of § 39-13-102 he pleaded guilty to and thus it is unclear whether his aggravated assault conviction qualifies as a predicate offense under the ACCA's enumerated-clause or use-of-force clause, or rather fails to qualify as an ACCA predicate offense in view of *Johnson*. Although, during sentencing, Slusser did not object to the information in the presentence report—i.e., that he pointed a handgun at an officer—we have held that courts should not consider factual statements in a presentence report to determine whether a prior conviction constitutes a "crime of violence"—even if the defendant did not object to the presentence report. *United States v. Wynn*, 579 F.3d 567, 576-77 (6th Cir. 2009); *see also In re Sargent*, 837 F.3d 675, 678 n.2 (6th Cir. 2016) ("[W]e have repeatedly held that [a presentence report] is not a permissible *Shepard* document."). The presentence report therefore cannot be used to determine which subsection of the aggravated assault statute Slusser was convicted of violating. The only available *Shepard* document is the state court judgment, which, while noting that Slusser pleaded guilty to Class C aggravated assault, failed to specify which

[1] In a footnote, the district court alternatively reasoned that, pursuant to our decision in *United States v. Cooper*, a conviction under subsection (a)(1) also qualifies as a violent felony under the enumerated-offense clause. 739 F.3d 873, 882 (6th Cir. 2014) (construing identically worded 1998 version of § 39-13-102(a)(1)). But *Cooper* involved the enumerated-offense clause in the sentencing guidelines, USSG § 4B1.2(a), which now includes "aggravated assault" as one of the enumerated offenses (and formerly included that offense as an example of a crime of violence in the comments). Meanwhile, the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii)—which is the provision that matters here—does not mention aggravated assault as an enumerated offense; it lists only burglary, arson, extortion, and crimes involving explosives. *See United States v. Bell*, 612 F. App'x 378, 379 (6th Cir. 2015) (per curiam).

subsection of § 39-13-102 Slusser pleaded guilty to and similarly failed to identify the factual basis for Slusser's conviction. In other words, the record lacks any documents indicating which subsection of § 39-13-102 Slusser was convicted of violating, as subsections (a)(1), (b), and (c) all qualify as Class C felonies.

The nature of Slusser's aggravated assault conviction therefore is unclear, and the conviction may no longer qualify as a predicate offense for ACCA enhancement. Indeed, if Slusser in fact pleaded guilty to subsection (b) or (c)—as opposed to subsection (a)(1)(B)—then his conviction may not qualify as a predicate offense. *See United States v. Bell*, 612 F. App'x 378, 379 (6th Cir. 2015) (noting that "[t]he government previously conceded that . . . § 39-13-102(c)[] . . . does not categorically meet the 'use of force' clause requirements"). The district court's conclusion that Slusser's aggravated assault conviction categorically qualifies as a violent felony therefore is debatable among jurists of reason.

Accordingly, we **GRANT** a certificate of appealability as to Slusser's claim that his aggravated assault conviction does not qualify as a predicate offense under the ACCA, **DENY** a certificate of appealability as to his claim that his burglary conviction does not qualify as a violent felony, and **GRANT** Slusser's motion to proceed in forma pauperis on appeal. The clerk's office is directed to issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

2016 WL 6892757
Only the Westlaw citation is currently available.
United States District Court,
E.D. Tennessee.

Larry Michael Slusser, Petitioner,
v.
United States of America, Respondent.

Nos.: 3:11-CR-78-TAV-HBG-1, 3:16-CV-531-TAV
|
Filed 11/22/2016

Attorneys and Law Firms

Larry Michael Slusser, Edgefield, SC, pro se.

MEMORANDUM OPINION

Thomas A. Varlan, CHIEF UNITED STATES DISTRICT JUDGE

***1** Before the Court is Petitioner's duly authorized successive motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 64]. The petition relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.*]. The United States responded in opposition on September 28, 2016 [Doc. 66]; Petitioner replied in turn [Doc. 68]. For the reasons below, the petition [Doc. 64] will be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

In 2011, Petitioner pled guilty to, and was subsequently convicted of, possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) [Docs. 12, 14]. Based on nine prior Tennessee convictions—two for aggravated assault, one for Class D burglary, one for drug trafficking, and five for aggravated burglary—the United States Probation Office deemed Petitioner to be an armed career criminal subject to the ACCA's fifteen-year mandatory minimum sentence [Presentence Investigation Report ¶¶ 35, 36, 38–41]. In accordance with that designation, this Court sentenced Petitioner to 180 months' incarceration [Doc. 24].

Petitioner did not appeal, instead filing a collateral challenge asserting numerous grounds of prosecutorial misconduct and ineffective assistance of counsel [Doc. 34]. This Court denied and dismissed that original petition on September 9, 2015 [Docs. 57, 58]. On August 26, 2016, the Sixth Circuit transferred the instant, duly authorized successive petition challenging the propriety of Petitioner sentence in light of the *Johnson* decision [Doc. 64 (suggesting that an undisclosed number of his prior convictions no longer qualify as ACCA predicate offenses)].

II. TIMELINESS OF PETITIONER'S CLAIMS

Section 2255(f) places a one-year statute of limitations on all petitions for collateral relief under § 2255 running from either: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f). Supreme Court precedent makes clear that *Johnson*'s invalidation of the ACCA residual clause amounted to a new rule made retroactively applicable on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1265 (U.S. 2016) ("*Johnson* is ... a substantive decision and so has retroactive effect ... in cases on collateral review."); *In re Windy Watkins*, 810 F.3d 375, 380–81 (6th Cir. 2015) (finding *Johnson* constitutes a new substantive rule of constitutional law made retroactively applicable on collateral review and thus triggers § 2255(h)(2)'s requirement for certification of a second or successive petition). Petitioner submitted the instant petition within subsection (f)(3)'s window.

III. STANDARD OF REVIEW

***2** The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law ... so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

IV. ANALYSIS

The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior 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) (emphasis added). The provision defines "serious drug offense" as any "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The Act goes on to define "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" (the "use-of-physical-force clause"); (2) "is burglary, arson, or extortion, involves the use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). 18 U.S.C. § 924(e)(2)(B). Only the third portion of the above definition—the residual clause—was held to be unconstitutionally vague by the Supreme Court in *Johnson*. 135 S. Ct. at 2563. The Court went on to make clear, however, that its decision did not call into question the remainder of the ACCA's definition of violent felony—the use-of-physical-force and enumerated-offense clauses. *Id.*; *United States v. Priddy*, 808 F.3d 676, 682–83 (6th Cir. 2015). Nor does *Johnson* disrupt the use of a prior serious drug offense as an independent form of ACCA predicate conviction. *See, e.g., United States v. Smith*, No. 10-CR-20058, 2015 WL 5729114, at *9–13 (E.D. Mich. Sept. 20, 2015) (noting that *Johnson* does not affect a defendant's categorization as an armed career criminal based on his or her prior serious drug offenses).

The validity of Petitioner's sentence thus depends on whether three or more of his prior convictions qualify as "serious drug offenses" under § 924(e)(2)(A) or, in alternative, "violent felonies" under one of the unaffected provisions of § 924(e)(2)(B). *See, e.g., United States v. Ozier*, 796 F.3d 597, 604 (6th Cir. 2015) (explaining courts need not decide what import, if any, *Johnson* has on the Sentencing Guidelines' residual clause where the petitioner's prior convictions qualify as predicate offenses independent of the residual clause), *overruled on other grounds by Mathis v. United States*, 136 S. Ct. 2243, 2251 n.1 (2016). To determine whether an offense qualifies under one of the above provisions, courts must first identify the precise crime of conviction by employing a "categorical approach," looking "only to the statutory definitions—elements—of a defendant's prior offense, and not to the particular facts underlying [each individual] conviction[ ]." *Descamps v. United States*, 133 S. Ct. 2276, 2283, 2285 (2013). When the conviction involves violation of a "divisible" statute—one which comprises multiple, alternative versions of the crime—courts resort to the "modified categorical approach" under which they "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction." *Id.* at 2281.

***3** Review of Petitioner's PSR reveals that at least three of his prior convictions categorically qualify as ACCA predicate offenses independent of the now-defunct residual clause. As a result, Petitioner has failed to demonstrate an entitlement to collateral relief.

As an initial matter, the Court notes that one of the convictions designated as a predicate offense supporting ACCA enhancement was a Tennessee conviction for Class D burglary. Binding Sixth Circuit precedent makes clear that the offense categorically qualifies as a predicate conviction under the enumerated-offense clause. *See, e.g., Priddy*, 808 F.3d at 685 (finding that post-1989 Tennessee Class D burglary is categorically a violent felony under the ACCA's enumerated offense clause).[1] Likewise, Petitioner's prior conviction for drug trafficking remains a serious drug offense under § 924(e)(2)(A)(ii). *See, e.g., United States v. Jenkins*, 613 Fed.Appx. 754, 755 (10th Cir. 2015) (deeming the *Johnson* decision "irrelevant"

where a defendant's ACCA enhancement stemmed from prior drug offenses).

[1] Tennessee revised its burglary statutes on November 1, 1989, as part of the State's comprehensive criminal code revision. *See, e.g.*, *State v. Langford*, 994 S.W. 2d 126, 127–28 (Tenn. 1999). The pre-1989 version of the Tennessee Code criminalized six types of burglary offenses: (1) first-degree burglary, Tenn. Code Ann. § 39-3-401 (1982); (2) breaking after entry, Tenn. Code Ann. § 39-3-402 (1982); (3) second-degree burglary, Tenn. Code Ann. § 39-3-403 (1982); (4) third-degree burglary, Tenn. Code Ann. § 39-3-404(a)(1) (1982); (5) safecracking, Tenn. Code Ann. § 39-3-404(b)(1) (1982); and (6) breaking into vehicles, Tenn. Code Ann. § 39-3-406 (1982). Tennessee law now prohibits only three types of burglary: (1) burglary, Tenn. Code Ann. § 39-14-402 (2016); (2) aggravated burglary, Tenn. Code Ann. § 39-14-403 (2016); and (3) especially aggravated burglary, Tenn. Code Ann. § 39-14-404 (2016).

At the time Petitioner committed his aggravated assault offenses, Tennessee defined the crime as follows:

> (a) A person commits aggravated assault who:
>
> (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and;
>
> (A) Causes serious bodily injury to another; or
>
> (B) Uses or displays a deadly weapon; or
>
> (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:
>
> (A) Causes serious bodily injury to another; or
>
> (B) Uses or displays a deadly weapon
>
> (b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect such child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-302
>
> (c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against such individual or individuals.

Tenn. Code Ann. § 39-13-102 (1999).[2] The statute went on to specify that a violation of "subdivision (a)(1) [was] a Class C felony," and that violation of "subdivision (a)(2) [was] a Class D felony." Tenn. Code Ann. § 39-13-102(d)(1) (1999).

[2] The versions of Tennessee Code Annotated § 39-13-102 in effect at the time of Petitioner's 1993 aggravated assault and 1999 aggravated assault were identical except for the fact that the latter version expounded on the types of victims which the court should consider as an "enhancement factor" under subsection (d). *Compare* Tenn. Code Ann. § 39-13-102 (1993), *with* Tenn. Code Ann. § 39-113-102 (1999).

***4** The statute is divisible because it lists several different variants of the offense. *See, e.g.*, *United States v. Cooper*, 739 F.3d 873, 879 (6th Cir. 2014) (recognizing that Tenn. Code Ann. § 39-13-102 "can be offended in a number of ways"). The judgment for Petitioner's 1999 aggravated assault offense indicates that conviction involved a violation of Tennessee Code Annotated § 39-13-102(a)(1) [Doc. 66-1 (demonstrating that Petitioner was convicted of the Class C variant—Tennessee Code Annotated § 39-13-102(a)(1)), PSR ¶ 39 (explaining that the charge stemmed from an incident in which Petitioner pointed a handgun at an officer who was attempting to arrest him)].[3] This variant categorically involves the intentional or knowing use or threatened use of violent force. *See* Tenn. Code Ann. § 39-11-106(5) (2003) (defining "deadly weapon" as either "a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or ... [a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury"); *see also United States v. Arender*, 560 Fed.Appx. 648, 649 (8th Cir. 2014) (finding that a Tennessee aggravated assault conviction based on display of a deadly weapon had "as an element the threatened use of physical force[,] ... capable of causing pain or injury"). Because violations of Tenn. Code Ann. § 39-13-102(a)(1) qualify as violent felonies under the use-of-physical force clause, Petitioner's 1999 aggravated assault conviction was properly categorized as an ACCA predicate offense.[4]

[3] Petitioner does not contest the accuracy of the information contained in his presentence report, but only the propriety of the Court's decision to use the predicate offenses listed therein as grounds for ACCA enhancement. Further, Petitioner has not met his burden on collateral review by supplementing the record with evidence that he was convicted of a non-generic variant of aggravated assault or identifying any other reason to doubt the accuracy of the representations contained in

his PSR.

[4] Violations of Tennessee Code Annotated § 39-13-102(a)(1) alternatively qualify as crimes of violence under the enumerated offense clause. *See* U.S. Sentencing Guideline § 4B1.2, cmt. n. 1 (specifically listing aggravated assault as an example of an enumerated crime of violence); *see also United States v. Cooper*, 739 F.3d 873, 878 (6th Cir. 2014) (same).

Because at least three prior convictions qualify as ACCA predicate offenses independent of the defunct residual provision, this Court finds that it need not determine whether Petitioner's 1993 aggravated assault conviction or five aggravated burglary convictions do as well.

V. CONCLUSION

For the reasons discussed above, the § 2255 motion [Doc. 64] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER ACCORDINGLY.

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