Appendix "1"

Opinion of the Eleventh Circuit Court of Appeals

CHRISTOPHER FRENCH, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
2018 U.S. App. LEXIS 11763
No. 16-15782 Non-Argument Calendar
May 3, 2018, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket Nos. 8:15-cv-02467-JSM-MAP; 8:09-cr-00434-JSM-MAP-1.French v. United States, 2016 U.S. Dist. LEXIS 107532 (M.D. Fla., Aug. 15, 2016)

Disposition:

VACATED AND REMANDED.

Counsel CHRISTOPHER FRENCH, Petitioner - Appellant, Pro se, COLEMAN, FL.

For UNITED STATES OF AMERICA, Respondent - Appellee: Germaine Seider, Arthur Lee Bentley, III, Stacie B. Harris, Francis D. Murray, U.S. Attorney's Office, TAMPA, FL.

Judges: Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

Opinion

PER CURIAM:

Christopher **French**, a federal prisoner proceeding *pro se*, appeals the dismissal of his motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. We granted a certificate of appealability ("COA") on the issue of whether the district court erred in dismissing as time-barred French's claim that he no longer qualifies as an armed career criminal after the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). **French** argues that the district court erred because his *Johnson*-based motion was timely under 28 U.S.C. § 2255(f)(3). We agree, and we vacate and remand.

I.

On January 12, 2010, the district court accepted French's plea of guilty to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). A few months later, **French** was sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), to the mandatory minimum sentence of fifteen years of imprisonment.

The ACCA requires a prison sentence of no less than fifteen years when a defendant who violates § 922(g) has three or more prior convictions for a "violent felony" or a "serious drug offense." 18

U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" to include any crime that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(ii). This part of the violent-felony definition is known as the "residual clause." *See Mays v. United States*, 817 F.3d 728, 730-31 (11th Cir. 2016). The remaining portions of the violent-felony definition are known as the "enumerated clause" and the "elements clause." *Id.* at 731.

French's ACCA sentence was based on four prior convictions for **aggravated** burglary in Tennessee. *See* Tenn. Code § 39-14-403. French's presentence investigation report ("PSR") designated these convictions as "violent felonies" but did not indicate under which ACCA clause they qualified. Likewise, the district court at sentencing did not indicate upon which clause the ACCA sentence was based. **French** did not pursue a direct appeal.

On June 26, 2015, the Supreme Court issued the *Johnson* decision, which held that the residual clause of the ACCA is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The Supreme Court went on to hold that *Johnson* is retroactively applicable to cases on collateral review. *Welch v. United States*, 578 U.S. __, 136 S. Ct. 1257, 1268, 194 L. Ed. 2d 387 (2016).

On October 19, 2015, **French** filed a *pro se* motion to correct his sentence under 28 U.S.C. § 2255. He argued that his ACCA sentence was invalid in light of *Johnson* and that he "no longer has the qualifying predicates needed to uphold his sentence." He contended that, after *Johnson*, his convictions for **aggravated** burglary no longer qualified as ACCA predicate offenses. In an attached memorandum, he argued that his prior convictions could not be used to enhance his sentence because they did not qualify under either the enumerated clause or the elements clause. And he asserted that his § 2255 motion was timely because it was filed within one year of *Johnson*.

The district court dismissed French's § 2255 motion, finding that it was not timely because it was not actually based on *Johnson*. The court determined that *Johnson* did not affect French's sentence because his Tennessee convictions for **aggravated** burglary qualified as ACCA predicates under the "enumerated clause," citing a Sixth Circuit decision issued after **French** was sentenced in 2010.

French appealed, and this Court granted a COA on the question of whether the district court erred in dismissing French's § 2255 motion as time-barred.

II.

A district court's determination that a § 2255 motion is time-barred is reviewed *de novo*. *Drury v. United States*, 507 F.3d 1295, 1296 (11th Cir. 2007). We liberally construe the filings of *pro se* parties. *Mederos v. United States*, 218 F.3d 1252, 1254 (11th Cir. 2000).

A § 2255 motion is timely if it is filed within one year of the latest of four possible triggering dates. 28 U.S.C. § 2255(f). The triggering date relevant to this case is "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." *Id.* § 2255(f)(3). It is undisputed that *Johnson* constituted a newly recognized right that has been made to apply retroactively on collateral review. *See Welch*, 136 S. Ct. at 1268. And French's § 2255 motion was clearly filed within a year of *Johnson*.

After the district court's decision in this case, and while French's appeal was pending, a panel of this Court decided *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017). *Beeman* involved a § 2255 motion that purported to rely on *Johnson* but was dismissed because the district court found it was actually based on *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). *Beeman*, 871 F.3d at 1218-19. The *Beeman* panel clarified that a claim based on *Descamps* would not trigger the one-year limitations provision of 28 U.S.C. § 2255(f)(3), but a claim based on

Johnson would. *Id.* at 1220.

To distinguish between the two types of claims, the panel explained that "[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 . . . under [the other] clause[s]." *Id.* The panel found that Beeman had raised a timely *Johnson* claim because he argued that his offense "historically qualified as an ACCA predicate under the ACCA's residual clause," and because he filed his motion just before the one-year anniversary of the *Johnson* decision. *Id.* at 1220-21 (alteration adopted). The panel then proceeded to consider the merits of the *Johnson* claim. *Id.* at 1221.

III.

Under § 2255(f)(3), French's § 2255 motion was timely if he "assert[ed] a *Johnson* claim." *Id.* at 1220. And he asserted a *Johnson* claim if he "contend[ed] that [he] was sentenced as an armed career criminal under the residual clause." *Id.* We conclude that he did.

In his § 2255 motion and a supporting memorandum, **French** made repeated references to *Johnson* and claimed that *Johnson* invalidated his ACCA sentence. He contended that, in light of *Johnson*, he "no longer has the qualifying predicates needed to uphold his sentence." And he asserted that his ACCA sentence could not stand because his prior convictions for **aggravated** battery did not qualify under either the enumerated clause or the elements clause. Thus, **French** clearly asserted that *Johnson* affected whether or not he qualified as an armed career criminal, which, when liberally construed, we read as an assertion that he was sentenced based on the residual clause. *See Mederos*, 218 F.3d at 1254. Plus, **French** specifically asserted that his § 2255 motion was timely because it was filed within one year of *Johnson*, which demonstrates his desire to raise a *Johnson* claim. *See Beeman*, 871 F.3d at 1221.

We disagree with the government that French's motion failed to raise a *Johnson* claim because he did not explicitly assert that his sentence was based on the residual clause. The government essentially faults **French** for failing to conform his § 2255 motion to *Beeman*. But *Beeman* was not decided until well after he filed for collateral relief. And, before *Beeman*, the showing required for a *Johnson* claim in a § 2255 motion was in dispute. *Compare In re Moore*, 830 F.3d 1268, 1273 (11th Cir. 2016), *with In re Chance*, 831 F.3d 1335, 1339 (11th Cir. 2016). More broadly, French's failure to expressly invoke the residual clause as the basis for his sentence is not fatal because his motion considered as a whole, with its repeated references to *Johnson*, is reasonably read to advocate that he was sentenced under the residual clause.

We therefore conclude that French's motion was timely because he raised a *Johnson* claim. That does not end our inquiry, however. In *Beeman*, after the panel held that the district court erred in finding the motion untimely, it evaluated the merits of the *Johnson* claim because Beeman said the factual record was sufficient to decide his claim. *See Beeman*, 871 F.3d at 1221. **French** makes no similar assertion here. Instead, he asks that we reverse the district court's untimeliness ruling and remand for the court to address the merits of his claim.

The district court did make a finding that French's prior offenses still qualify as ACCA predicate offenses after *Johnson*. However, the Sixth Circuit decision the court relied on, *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015), has since been abrogated by the court sitting *en banc*. *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (*en banc*) (holding that the Tennessee **aggravated** burglary statute is broader than the definition of generic burglary and does not qualify as an ACCA predicate offense).

More importantly, the district court did not have an opportunity to apply the new standard articulated

by *Beeman*, which requires a petitioner to show it is more likely than not that he was sentenced solely under the residual clause, *Beeman*, 871 F.3d at 1221-22, which the panel explained is "a historical fact." *Id.* at 1224 n.5. If **French** cannot make this showing, he is not entitled to relief even though his predicate convictions no longer qualify as violent felonies under current precedent. *See id.* at 1224-25 & n.5.

Because *Beeman* was decided after the district court ruled on French's petition, the parties had no occasion to address its impact and the court did not make the finding of "historical fact" on which French's *Johnson* claim depends. *See id.* We therefore find that a remand is appropriate, notwithstanding the government's claim that **French** cannot carry his burden under *Beeman. See Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1203 (11th Cir. 2015) (remanding after this Court adopted a new legal test "[t]o allow the district court to apply this test in the first instance and, if the district court desires, to give the parties an opportunity to further develop the record to address the components of the test"); *see also Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1213 (11th Cir. 2015) ("[W]e are a court of appeals. We do not make fact findings. We review them for clear error."). On remand, the district court should consider in the first instance whether **French** can show, as a historical fact, that he was more likely than not sentenced under the residual clause. *See Beeman*, 871 F.3d at 1221-22.

VACATED AND REMANDED.

Appendix "2"

Opinion of the United States District Court, Tampa, Florida

CHRISTOPHER FRENCH, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION
2016 U.S. Dist. LEXIS 107532
Case No: 8:15-cv-2467-T-30MAP,Crim. Case No: 8:09-cr-434-T-30MAP
August 15, 2016, Decided
August 15, 2016, Filed

Counsel Christopher French, Plaintiff (8:15-cv-02467-JSM-MAP), Pro se, COLEMAN, FL.

For USA, Defendant (8:15-cv-02467-JSM-MAP): Stacie B. Harris, LEAD ATTORNEY, Francis D. Murray, US Attorney's Office - FLM, Tampa, FL.

For USA, Plaintiff (8:09-cr-00434-JSM-MAP): Stacie B. Harris, LEAD ATTORNEY, US Attorney's Office - FLM, Tampa, FL.

Judges: JAMES S. MOODY, JR., UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JAMES S. MOODY, JR.

Opinion

ORDER OF DISMISSAL

THIS CAUSE is before the Court on Petitioner Christopher French's Motion, under 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct Sentence (CV Dkt. 1), and the Government's Response (CV Dkt. 7). Petitioner seeks relief in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), defining violent felony as a crime that "involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2563. Petitioner's motion makes other arguments, as well. Broadly construing the motion in Petitioner's favor, the Court interprets it as advancing three grounds for vacating Petitioner's sentence. Petitioner argues, first, that after *Johnson*, his prior criminal offenses no longer qualify as predicate offenses for enhanced sentencing under the ACCA. Second, he argues that the predicate offenses the Court used to enhance Petitioner's sentence under the ACCA were in fact only one offense, and thus Petitioner is not a career criminal as defined by the ACCA. And third, Petitioner argues that because his counsel did not raise this one-offense argument, Petitioner suffered from ineffective assistance of counsel. The Court has reviewed the Supreme Court's *Johnson* decision and other relevant law, Petitioner's motion, the Government's response, and the record. As explained below, Petitioner's claims fail on the merits and are likewise untimely. In short, although *Johnson* invalidated the characterization of certain crimes as felonies, the case had no effect on *Petitioner's* predicate felonies, and indeed there were four felonies, not one. Petitioner's motion will be denied.

BACKGROUND

On September 22, 2009, an indictment charged Petitioner with being a convicted felon and

knowingly possessing a firearm, a violation of 18 U.S.C. §§ 922(g)(1) and 924(e). On that sole count, Petitioner entered a plea of guilty, which the Court accepted. (CR Dkts. 26, 29, 30).

Petitioner was sentenced on April 2, 2010. (CR Dkt. 32). As indicated in a pre-sentence report, Petitioner had been previously convicted of four violent felonies-namely, **aggravated burglary** under **Tennessee** state law. On the basis of those convictions, the Court imposed a sentence of 180 months' imprisonment, 15 years, the statutory minimum for those who qualify as having three prior drug offenses or violent felony convictions under the ACCA. At the time of sentencing, the ACCA defined a "violent felony" as follows:

> Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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.Petitioner did not file a direct appeal.

DISCUSSION

Now Petitioner seeks relief under 28 U.S.C. § 2255, which permits prisoners in custody to collaterally challenge the sentences imposed on them as unconstitutional. Petitioner's motion was filed on October 19, 2015, well outside the one-year period within which to file such a motion, beginning on the day the judgment of conviction becomes final. *See* 28 U.S.C. § 2255(f)(1). Petitioner contends, however, that his motion is timely under § 2255(f)(3), which states that the one-year limitations period runs from "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." The newly recognized right asserted by Petitioner is the Supreme Court's recent decision in *Johnson*, 135 S. Ct. at 2563. There, the Supreme Court concluded that the final, "residual" clause of the ACCA was unconstitutionally vague. (CV Dkt. 1). And that right was made retroactive by another Supreme Court decision, *Welch v. United States*, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016). Petitioner argues that the retroactive *Johnson* holding applies to his sentence and, specifically, makes it unconstitutional.

The Court finds that it does not, primarily because Petitioner's reading of *Johnson* is too sweeping. *Johnson* invalidated only predicate felonies that fell within the ACCA's residual clause, those past offenses "involv[ing] conduct that presents a serious potential risk of physical injury to another." Offenses that met the ACCA's definition of "violent felony" in some other way were left untouched by the decision.

Among these offenses are Petitioner's four convictions, under **Tennessee** law, for **aggravated burglary**. That law, **Tennessee** Code 39-14-403, defines the crime of **aggravated burglary** as "burglary of a habitation." And habitation includes "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodations of persons." Tenn. Code Ann. § 39-14-401.

Meanwhile, the ACCA-the portion not invalidated by *Johnson*-enumerates certain offenses that qualify as "violent felonies." Among them is the offense of "burglary." The Supreme Court has held that "an offense constitutes 'burglary' for purposes of a § 924 sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury

instructions actually required the jury to find all the elements of generic burglary . . . ." *Taylor v. United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). "Generic burglary" is one "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. As the Court concluded in a more recent case, generic burglary is "the offense as commonly understood." *Descamps v. United States*, 133 S. Ct. 2276, 2292, 186 L. Ed. 2d 438 (2013).

The Court of Appeals for the Sixth Circuit has held that Tennessee's **aggravated burglary** offense, the one for which Petitioner was convicted, qualifies as generic burglary. *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015) (quoting *State v. Langford*, 994 S.W.2d 126 (Tenn. 1999) (interpreting statute to include "inten[t] to commit a felony)). And the Eleventh Circuit, while evaluating a similar Florida statute, has similarly concluded that "entering a structure with the intent to commit a crime . . . fits the definition of a generic burglary." *United States v. Bush*, 437 Fed. Appx 820, 822 (11th Cir. 2011); *see also Brand v. United States*, No. 8:14-cv-245-T-30TGW, 2014 U.S. Dist. LEXIS 88718, 2014 WL 2968682, *3 (M.D. Fla. June 30, 2014). Petitioner has advanced no compelling reason-and the Court can find no reason-why this precedent should not be followed. *See Brand*, 2014 U.S. Dist. LEXIS 88718, 2014 WL 2968682, at *3. The **Tennessee** law for which Petitioner was convicted four times constitutes a "generic burglary" as defined by the Supreme Court. It therefore falls within the definition of "burglary" as enumerated in the ACCA. *Johnson*, in other words, had no effect on the categorization of that offense as a violent felony. The new rule issued in *Johnson* does not apply to Petitioner's predicate offense and does not afford Petitioner any relief.

This conclusion also means that Petitioner's ACCA-enhancement claim, filed roughly five years after his sentence and conviction became final, is untimely. *See* 28 U.S.C. § 2255(f). So, too, are his second and third claims-that his convictions should only count as one conviction, and that his attorney was ineffective for failing to make this argument. *See* 28 U.S.C. § 2255(f); *see also Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir. 2013) (holding that habeas petitions should be reviewed for timeliness on a claim-by-claim basis). They can be denied on this basis alone, and because Petitioner has not presented newly discovered evidence or otherwise made a case for tolling the statute of limitations, the Court will deny the claims as untimely.

The Court can more easily bear the weight of this decision, and its preclusive effect, because Petitioner's second and third arguments, in any event, fail on the merits. According to the pre-sentence report, which, at his sentencing hearing, Petitioner acknowledged as being accurate, Petitioner pled guilty in 2000 to four counts of **aggravated burglary** in **Tennessee** state court. Again according to the pre-sentence report, those burglaries occurred on three different days to at least three different residences. (PSR, at ¶¶ 34-35). These findings are confirmed by the **Tennessee** indictment charging Petitioner in that case, copies of which the Government has provided with its response to Petitioner's motion. *See United States v. Sneed*, 600 F.3d 1326, 1333 (11th Cir. 2010) (approving the use of indictments to prove the on-different-occasions aspect of predicate offenses).

An ACCA enhancement requires predicate offenses that were committed "on occasions different from one another." 18 U.S.C. § 924(e). According to the Eleventh Circuit, offenses "are considered distinct if some temporal break occurs between them." *United States v. Weeks*, 711 F.3d 1255, 1262 (11th Cir. 2013). This is true "even when the gaps are small." *Id.*

Here, the gaps between offenses are indeed small, mere days apart, but they are gaps nonetheless. With indictments and judgments from the **Tennessee** courts, and the pre-sentence report, the Government has demonstrated that Petitioner's predicate offenses were distinct.

The Court acknowledges Petitioner's argument that he received only one concurrent sentence for these offenses. But the law does not view this kind of sentence merger the way Petitioner does, as

merging the convictions themselves. *See Weeks*, 711 F.3d at 1262. Because Petitioner's arguments regarding the distinctiveness of his predicate offenses are inconsistent with the law, his claim that his counsel was ineffective for failing to make these arguments must fail. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (concluding that courts need not evaluate the prejudice to a client caused by his counsel's performance if his counsel's performance was not objectively deficient).

CONCLUSION

For these reasons, it is **ORDERED AND ADJUDGED** that:

1. Petitioner Christopher French's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (CV Dkt. 1) is DENIED.

2. The Clerk is directed to deny all pending motions and close this case.

3. The Clerk is directed to terminate from pending status the motion to vacate found at Dkt. 34 in the underlying criminal case, case number 8:09-cr-434-T-30MAP.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). A district court must first issue a certificate of appealability ("COA"). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, Petitioner "'must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong,'" *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (internal quotation marks omitted). Petitioner has failed to meet this burden.

Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in forma pauperis.

DONE and **ORDERED** in Tampa, Florida on this 15th day of August 15, 2016.

/s/ James S. Moody, Jr.

JAMES S. MOODY, JR.

UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.