NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1393

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT WILLIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: COLE, Chief Judge; GIBBONS and BUSH, Circuit Judges.

Robert Willis, a pro se federal prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

A jury found Willis guilty of distributing cocaine base and distributing cocaine base within 1,000 feet of a school or playground, both in violation of 21 U.S.C. §§ 841(a)(1) and 860(a); and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The district court determined that Willis was an armed career criminal pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The district court imposed concurrent prison terms of 224 months. We affirmed the district court's judgment and sentence. *United States v. Willis*, No. 06-1872 (6th Cir. Mar. 22, 2007) (order). In 2009, Willis filed a § 2255 motion to vacate,

which was denied as untimely. In 2012, Willis filed a motion for authorization to file a second or successive § 2255 motion, which this court denied.

In 2015, Willis filed another motion to vacate, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he should not be subject to an enhanced sentence as an armed career criminal because his prior Michigan conviction for escape no longer qualified as a "violent felony" under 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court held that the residual clause of the ACCA, which defines "violent felony" to include a felony that involves conduct that presents a "serious potential risk of physical injury to another," is unconstitutionally vague. *Id.* at 2555, 2563. We granted Willis's motion for authorization.

The government filed a response to Willis's motion, arguing that *Johnson* did not result in a change in Willis's sentence because he is serving a sentence on another count that is equal to the contested sentence; even if resentenced today, he had three qualifying ACCA predicate offenses; and *Johnson* does not apply retroactively to the calculation of Willis's guidelines range for his drug distribution offenses.

The district court reviewed the pleadings and concluded that Willis was not entitled to relief pursuant to *Johnson*. The district court determined that Willis's prior conviction for prison escape had been counted under the residual clause of the ACCA and that it no longer qualified as a predicate offense. Nevertheless, the district court concluded that Willis could not establish that *Johnson*'s invalidation of the residual clause made a difference in his sentence because he also had a prior violent felony conviction in Michigan for breaking and entering an occupied building, which remained valid and still subjected him to the ACCA enhancement when counted with his two prior convictions for felony drug offenses. The district court denied the § 2255 motion and denied a certificate of appealability ("COA").

We subsequently granted Willis a COA on the following claim: whether he remained subject to the ACCA enhancement in light of his prior Michigan conviction for breaking and entering an occupied building. On appeal, Willis asserts that his burglary conviction no longer qualifies as a predicate offense because it is broader than generic burglary. He also claims that his burglary conviction cannot be counted as a prior offense because it occurred more than

fifteen years before his current offense. Willis appears to make several other arguments relating to the accuracy of information in his presentence report and the government's compliance with the requirements of 21 U.S.C. § 851 but, because these arguments were not certified for appeal, they will not be considered.

A prisoner who moves to vacate his sentence under § 2255 must show that the "sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such sentence, that the sentence was in excess of the maximum authorized by law, or that it is otherwise subject to collateral attack." 28 U.S.C. § 2255. We review the district court's denial of a motion to vacate under § 2255 de novo. *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003).

The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the "elements clause," while the second prong contains the "enumerated crimes." The third prong, known as the "residual clause" was invalidated in *Johnson*. 135 S. Ct. at 2557-58. *Johnson* did not affect the elements clause or enumerated crimes, and its holding did not alter the proper classification of drug offenses. *Id.* at 2563.

For an offense to qualify as "burglary" for the purposes of the ACCA, it must fit "the generic, contemporary meaning of burglary," which includes "the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 8.13(a), (c), (e) (1986)).

Willis's prior conviction occurred in Michigan in 1988, in violation of Michigan Compiled Laws § 750.110. The 1988 version of that statute stated that "[a]ny person who breaks and enters any occupied dwelling house, with intent to commit any felony or larceny therein, shall be guilty of a felony punishable by imprisonment . . . of not more than 15 years." We

concluded in 1991 in *United States v. Fish*, 928 F.2d 185 (6th Cir. 1991), that the 1988 version of the statute qualified as "burglary" as used in the ACCA's list of enumerated offenses. *See id.* at 187-88 (relying on *Taylor*, 495 U.S. at 597).

Michigan amended section 750.110 in 1994, and the new provision encompasses breaking and entering places that are not "buildings," including tents, boats, railroad cars, etc. *See* Mich. Comp. Laws § 750.110(1) (1994). In *United States v. Ritchey*, 840 F.3d 310 (6th Cir. 2016), this court held that the amended version of the statute no longer qualifies as burglary under the ACCA. *Id.* at 321. The *Ritchey* decision abrogated *Fish* to the extent that it was at odds with *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016), in which the Supreme Court held that "a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense." *See Ritchey*, 840 F.3d at 316. The *Ritchey* decision did not, however, overrule *Fish*. *See Spengler v. Worthington Cylinders*, 615 F.3d 481, 490 n.4 (6th Cir. 2010) ("It is well-established that one panel cannot overrule a pre-existing decision of another panel of this Court.") (citing *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). As a result, *Fish* remains the law of the circuit. The district court therefore did not err in concluding that Willis's prior burglary conviction was a qualifying predicate offense for ACCA purposes and that he was not entitled to resentencing.

Finally, Willis's argument that his 1988 burglary conviction cannot be counted as a predicate offense because it occurred more than fifteen years before his instant offenses lacks merit. The provision he cites, USSG § 4A1.2, applies to the calculation of a defendant's criminal history, not to the determination of prior offenses under the ACCA. *See* USSG § 4B1.4, comment. (n.1).

The judgment of the district court is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-1393

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 10, 2018
DEBORAH S. HUNT, Clerk

ROBERT WILLIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: COLE, Chief Judge; GIBBONS and BUSH, Circuit Judges.

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WILLIS,

Movant,

Case No. 1:15-cv-857

v.

HON. GORDON J. QUIST

UNITED STATES OF AMERICA,

Respondent.
_____/

OPINION

This matter comes before the Court on Movant's motion to vacate, set aside or correct sentence under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2255. (ECF No. 1.) On January 31, 2017, the United States Court of Appeals for the Sixth Circuit granted Movant's motion for authorization to proceed with a second or successive § 2255 motion, in light of *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). (ECF No. 7.) For the reasons that follow, Movant's § 2255 motion is denied.

I.

On February 8, 2005, a grand jury returned an indictment for conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B)(iii); and distribution of cocaine within 1000 feet of a school, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 860(a). (*United States v. Willis*, No. 1:05-CR-18, ECF No. 25.) A superseding indictment added a felon-in-possession charge, in violation of 18 U.S.C. §§ 922(g)(1), 921(a), and 924(e). (*Id.* at ECF No. 148.) The Government dismissed the conspiracy charge by motion. (*Id.* at ECF Nos. 156, 159.) Movant went to trial, and a jury found him guilty on all three remaining charges. (*Id.* at ECF No.

176.) The Court sentenced Movant to 224 months in prison followed by six years of supervised release. (*Id.* at ECF No. 180.) Movant appealed, and the Sixth Circuit denied his appeal. Then, Movant filed a petition for a rehearing en banc. On August 2, 2007, the Sixth Circuit denied this petition. *United States v. Willis*, 232 F. App'x 527 (6th Cir. 2007). Movant filed a § 2255 petition on November 23, 2009 (*Willis v. United States*, No. 1:09-cv-1068, ECF No. 1), which the Court denied as time-barred (*id.* at ECF Nos. 9, 10, 11). On December 6, 2012, Movant sought leave to file a second or successive petition, which the Sixth Circuit denied. (ECF No. 10). On July 20, 2015, Movant filed the instant § 2255 motion (ECF No. 1), and the Sixth Circuit has authorized this Court to hear the successive § 2255 motion (ECF No. 7).

II.

A prisoner who moves to vacate his sentence under § 2255 must show that the sentence was imposed in violation of the Constitution or laws of the United States, that the court was without jurisdiction to impose such a sentence, that the sentence was in excess of the maximum authorized by law, or that it is otherwise subject to collateral attack. 28 U.S.C. § 2255. To prevail on a § 2255 motion "'a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict.'" *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005) (quoting *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003)).

Non-constitutional errors are generally outside the scope of § 2255 relief. *United States v. Cofield*, 233 F.3d 405, 407 (6th Cir. 2000). A petitioner can prevail on a § 2255 motion alleging non-constitutional error only by establishing a "fundamental defect which inherently results in a complete miscarriage of justice, or, an error so egregious that it amounts to a violation of due process." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (quoting *United States v. Ferguson*, 918 F.2d 627, 630 (6th Cir. 1990) (internal quotations omitted)).

As a general rule, claims not raised on direct appeal are procedurally defaulted and may not be raised on collateral review unless the petitioner shows either (1) "cause" and "actual prejudice" or (2) "actual innocence." *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Bousley v. United States*, 523 U.S. 614, 621–22 (1998); *United States v. Frady*, 456 U.S. 152, 167–68 (1982).

III.

Although the Sixth Circuit authorized Movant's successive petition, this Court must make its own determination as to whether Movant has satisfied AEDPA's gate-keeping requirements. "AEDPA requires a district court to dismiss a claim in a second or successive application unless . . . the applicant 'shows' that the 'claim relies on a new rule of constitutional law, *made retroactive to cases on collateral review by the Supreme Court*, that was previously unavailable.'" *Tyler v. Cain*, 533 U.S. 656, 660-61 (quoting 28 U.S.C. § 2244(b)(2)(A)) (emphasis in original); *see also Goldblum v. Klein*, 510 F.3d 204, 219-20 (3d Cir. 2007) ("Congress did not intend that the court of appeals' preliminary authorization determine how a district court conduct its subsequent analysis."). This requirement is different from the one that applicants must satisfy in order to receive permission from the court of appeals to file a second or successive petition. *Id.* at 661 n.3. The court of appeals may authorize a successive filing if the applicant makes a *prima facie* showing that he satisfies the statutory standard. *Id.* To survive dismissal in district court, however, the applicant must actually *show* that the claim satisfies the standard. *Id.* (emphasis added).

Movant relies upon *Johnson v. United States*, 135 S. Ct. 2551 (2015), to argue that this Court improperly sentenced him under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The ACCA provides for a mandatory minimum sentence of 15 years for a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony" or a "serious drug offense." *Id.* The ACCA has defined violent felony as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. In *Johnson*, the Supreme Court held that the ACCA's residual clause violated due process. *Johnson*, 135 S. Ct. at 2557. Movant argues that, because the Court determined that one of his prior convictions was a violent felony under the residual clause, he is entitled to relief from judgment.

To satisfy his burden, Movant must show not only that he was sentenced using the residual clause, but also that the use of the clause made a difference in his sentence. *In re Moore*, 830 F.3d 1268, 1271-72 (11th Cir. 2016); *Stanley v. United States*, 827 F.3d 562, 566 (7th Cir. 2016). Although the Court sentenced Movant under the residual clause using a prior conviction of prison escape,[1] Movant cannot show that this actually affected his sentence because Movant also had a prior violent felony conviction for breaking and entering an occupied building.[2]

In *Taylor v. United States*, 495 U.S. 575, 591 (1990), the Supreme Court reviewed the meaning of the term "burglary" as used in the ACCA. The Court explained that a person has been convicted of burglary for the purposes of the § 924(e) enhancement if he "is convicted of any crime, regardless of exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* Subsequently, the Sixth Circuit explained, "[c]omparing the elements of [Michigan's breaking and entering statute] to the Supreme Court's definition of 'burglary' in *Taylor*, we conclude that defendant's convictions

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[1] At the time of sentencing, Movant's escape conviction constituted a violent felony, so the pre-sentence report did not rely on Movant's earlier breaking and entering conviction to calculate his sentence. Later, the Sixth Circuit held that escape did not constitute a crime of violence under the residual clause. *United States v. Covington*, 738 F.3d 759, 767 (6th Cir. 2014).

[2] *Johnson* expressly left non-residual-clause portions of the ACCA intact, including the enumerated-offenses clause in the definition of "violent felony," which lists the offense of burglary. *Johnson*, 135 S. Ct. at 2563.

for breaking and entering of an occupied dwelling . . . qualify as 'burglary.'" *United States v. Fish*, 928 F.2d 185, 188 (6th Cir. 1991).

In 1988, Movant was convicted of breaking and entering an occupied dwelling in violation of Mich. Comp. Laws § 750.110. (ECF No. 10-1.) The statute at the time of Movant's conviction stated that "[a]ny person who breaks and enters any occupied dwelling house, with intent to commit any felony or larceny therein, shall be guilty of a felony punishable by imprisonment[.]" Mich. Comp. Laws 750.110. Thus, Movant's prior conviction qualifies as a burglary, which is an enumerated violent felony offense in the ACCA.[3]

Movant also has two prior convictions for possession with intent to distribute cocaine. (*United States v. Willis*, No. 1:05-cr-18, ECF No. 365, PageID.1783-1786.) The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance[.]" 28 U.S.C. § 924(e)(2)(A). Both of Movant's prior Michigan drug convictions qualify as a "serious drug offense" under the ACCA. As such, Movant has a prior violent felony conviction for burglary and two prior serious drug offense convictions. Although the Court initially sentenced Movant under the ACCA's residual clause for his escape conviction, Movant has failed to satisfy his burden of showing that the clause made a difference in his sentence. Movant has three predicate convictions under the ACCA, all of which were not affected by *Johnson*. Thus, the Court properly applied the ACCA's enhancements when calculating Movant's sentence.

Movant also argues that, in light of *Johnson*, the Court improperly calculated his Guidelines

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[3]In *United States v. Ritchey*, 840 F.3d 310 (6th Cir. 2016), the Sixth Circuit held that Michigan's breaking and entering statute did not qualify as burglary under the ACCA; the court relied upon *Mathis v. United States*, 136 S. Ct. 2243 (2016), to reach its conclusion. But the *Ritchey* court reviewed a later, amended version of the statute than the one under which Movant was convicted. The later statute includes provisions that are broader than generic burglary. The statute Movant was sentenced under does not include those broader provisions at issue in *Ritchey*. Thus, it is consistent with generic burglary under *Mathis*, and *Fish* controls.

range under U.S.S.G. § 4B1.2(a). In *Beckles v. United States*, __ U.S. ___, 2017 WL 855781 (Mar. 6, 2017), the Supreme Court held that the Guidelines, including § 4B1.2(a), are not subject to vagueness challenges. Thus, Movant's claim is without merit.

IV.

For the reasons stated above, Movant's motion to vacate, set aside, or correct the sentence imposed upon his by this Court will be denied. Because the Court finds that the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255(b), no evidentiary hearing is required.

Pursuant to 28 U.S.C. § 2253(c), the Court must also assess whether to issue a certificate of appealability. To warrant the grant of a certificate of appealability, Movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Sixth Circuit has disapproved of the issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted." *Id.* at 467. Because Movant cannot make a substantial showing of the denial of a federal constitutional right with respect to his claim, a certificate of appealability will be denied.

A judgment and order will enter in accordance with this opinion.

Dated: March 9, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WILLIS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

Case No. 1:15-cv-857

HON. GORDON J. QUIST

ORDER

In accordance with the opinion entered on this date:

IT IS HEREBY ORDERED that Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (ECF No. 1) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

Dated: March 9, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WILLIS,

Movant,

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Respondent.
_____/

Case No. 1:15-cv-857

HON. GORDON J. QUIST

JUDGMENT

In accordance with the opinion and order entered on this date:

IT IS HEREBY ORDERED that **JUDGMENT** is entered in favor of Respondent because Movant's claims are without merit.

Dated: March 9, 2017

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

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