IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RANDY DEMPSEY,
Movant,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Cause No. A-06-CR-060-SS
A-16-CV-704-SS

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Movant Randy Dempsey's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [#48], Dempsey's Memorandum in Support [#50], the Government's Response [#58] in opposition, Dempsey's Reply [#59] in support, and the Government's Supplementation of the Record [#61]. Having considered the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

On March 21, 2006, Dempsey was charged in a one-count Indictment with Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g). Mem. Supp. [#50] at 1. On June 26, 2006, Dempsey pleaded guilty to the Indictment. Resp. [#58] at 1. There is no plea agreement in this case. Mem. Supp. [#50] at 1. The Presentence Investigation Report (PSR) recommended Dempsey's statutory mandatory minimum sentence be calculated pursuant to the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), on the basis of Dempsey's three prior convictions: two for burglary in violation of Texas Penal Code § 30.02(a)(1) and one for aggravated robbery in violation of Texas Penal Code § 29.03. *Id.* at 2; Resp. [#58] at 2

(citing PSR ¶¶ 73–74); Not. Seek Enhancement [#16] at 1. On September 5, 2006, the Court sentenced Dempsey to 188 months' imprisonment followed by a 5-year term of supervised release. Mem. Supp. [#50] at 2; Resp. [#58] at 2–3. Dempsey did not appeal his conviction or sentence. Mem. Supp. [#50] at 2.

On May 31, 2016, Dempsey filed the instant § 2255 motion premised upon the Supreme Court's holding in *Johnson v. United States* (*Johnson II*), 135 S. Ct. 2551 (2015), made retroactive by the Supreme Court's holding in *Welch v. United States*, 136 S. Ct. 1257 (2016).[1] Dempsey argues he is entitled to a new sentence because his prior convictions are not violent felonies under the ACCA.

Analysis

I. Section 2255—Legal Standard

Generally, there are four grounds upon which a defendant may move to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255: (1) the imposition of a sentence in violation of the Constitution or the laws of the United States; (2) a lack of jurisdiction of the district court that imposed the sentence; (3) the imposition of a sentence in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255; *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996). Section 2255 is an extraordinary measure; it cannot be used for errors that are not constitutional or jurisdictional if those errors could have been raised on direct appeal. *United States v. Stumpf*, 900 F.2d 842, 845 (5th Cir. 1990). If the error is not of constitutional or jurisdictional magnitude, the movant must show the error could not have been raised on direct appeal and would, if condoned, "result in a complete miscarriage

[1] Dempsey filed his first § 2255 motion on August 28, 2007, arguing he did not commit burglary. *Dempsey v. United States*, No. 1:07-cv-732-SS (W.D. Tex. Jan. 1, 2008). After this Court denied that motion, Dempsey filed his second § 2255 motion on October 2, 2014. Mot. Vac. [#38] at 1. The Fifth Circuit denied Dempsey authorization to file a successive § 2255 motion. Order of Feb. 20, 2015 [#45] at 1. After *Johnson II*, however, the Fifth Circuit authorized Dempsey to file the instant § 2255 motion. Order of June 16, 2016 [#47].

of justice." *United States v. Smith*, 32 F.3d 194, 196 (5th Cir. 1994). In addition, a defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show both "cause" for his procedural default, and "actual prejudice" resulting from the error. *Placente*, 81 F.3d at 558.

II. Application

A. Reconsideration of Dempsey's Armed Career Criminal Status

The ACCA provides that a person who possesses a gun in violation of § 922(g) and has three previous convictions for a "violent felony" or a "serious drug offense" faces a higher sentencing range than would otherwise apply. 18 U.S.C. § 924(e). The ACCA defines "violent felony" as "any 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. § 924(e)(2)(B)(i)–(ii) (emphasis added). Clause (i) is known as the "elements clause." *Welch*, 136 S. Ct. at 1261. The italicized portion of clause (ii) is referred to as the "residual clause." In *Johnson II*, the Supreme Court held that the residual clause was "unconstitutionally vague." 135 S. Ct. at 2557. Imposing an enhanced sentence based on the residual clause, therefore, violates due process. *Id.* at 2556–57.

The issue in this case is whether Dempsey's two burglary convictions and one aggravated robbery conviction qualify as violent felonies under the ACCA. As explained below, the Court concludes Dempey's prior convictions qualify as violent felonies, and thus, his sentence was appropriately enhanced under the ACCA.

1. Burglary in Violation of Texas Penal Code § 30.02(a)(1)

Section 924(e)(2)(B)(ii) defines "violent felony" to include any felony that is "burglary, arson, or extortion." To determine whether a prior conviction qualifies as one of these offenses, courts generally apply the "categorical approach" adopted in *Taylor v. United States*, 495 U.S. 575, 600–02 (1990). Under the categorical approach, courts "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). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* In contrast, if the statute "sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Id.* at 2283; *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("[Courts] focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case.").

Some statutes, however, are "'divisible,' meaning a single statute 'define[s] multiple crimes.'" *United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017) (citing *Mathis*, 136 S. Ct. at 2249). Because a divisible statute has multiple alternative elements, courts apply a "modified categorical approach." *Mathis*, 136 S. Ct. at 2249. Under the modified categorical approach, courts may examine "a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id.* These documents are commonly referred to as *Shepard* documents. *See Shepard v. United States*, 544 U.S. 13, 30–31 (2005). Once the court identifies

the defendant's specific crime, the court applies the categorical approach. *Mathis*, 136 S. Ct. at 2249.

A person commits burglary under Texas Penal Code § 30.02(a) if, "without the effective consent of the owner," he:

> (1) enters a habitation . . . not then open to the public, with intent to commit a felony or theft . . . or
>
> (2) remains concealed, with intent to commit a felony or theft . . . in a . . . habitation; or
>
> (3) enters a . . . habitation and commits or attempts to commit a felony or theft . . . .[2]

The Supreme Court describes the generic version of burglary under § 924(e) as: "an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598; *Mathis*, 136 S. Ct. at 2248.

In *United States v. Constante*, the Fifth Circuit determined § 30.02(a) is a divisible statute and the modified categorical approach applies. 544 F.3d 584, 586–87 (5th Cir. 2008) (applying modified categorical analysis to the Texas burglary statute); *see also United States v. Conde-Castaneda*, 753 F.3d 172, 176 (5th Cir. 2014) (same). Further, the Fifth Circuit concluded that because § 30.02(a)(1) requires specific intent to commit a felony, that subsection matches the definition of generic burglary, which requires an "intent to commit a crime." *Id.* On the other hand, the Fifth Circuit found § 30.02(a)(3) does not require specific intent and therefore "does not qualify" as generic burglary. *Id.*

Here, the *Shepard* documents indicate Dempsey was convicted twice under § 30.02(a)(1). The indictments for Dempsey's two burglary convictions state, he "did then and there unlawfully

[2] The Texas statute was amended after Dempsey's conviction and now prohibits entering a building or habitation without consent and committing or attempting to commit "a felony, theft, or an assault." The amendment is immaterial here.

with intent to commit theft, enter a habitation owned by . . . a person having a greater right to possession of the habitation than the Defendant . . . without any consent of any kind." Supp. Record [#61] at 19, 26. Further, the judgments for each conviction state Dempsey was convicted of "Burglary of a habitation with intent to commit theft." *Id.* at 21, 30. This language from the indictments and judgments tracks § 30.02(a)(1). *See United States v. Hernandez-Borjas*, 641 F. App'x 367, 370 (5th Cir. 2016) (finding defendant was convicted under § 30.02(a)(1) where indictment stated, defendant "did then and there, with intent to commit the felony offense of Aggravated Assault, enter a habitation, without the effective consent of [the owner]" and the judgment reflected, defendant pleaded guilty to "BURGLARY OF HABITATION, A LESSER INCLUDED OFFENSE"). Because § 30.02(a)(1) qualifies as generic burglary, Dempsey's two burglary convictions constitute violent felonies under the ACCA. *See Conde-Castaneda*, 753 F.3d at 176.

Dempsey's argument regarding the Supreme Court's holding in *Mathis* is unavailing. *See* Mem. Supp. [#50] at 6–7, 7 n.2. As the Government points out, the Fifth Circuit has foreclosed this argument. *See United States v. Uribe*, 838 F.3d 667, 670–71 (5th Cir. 2016) (concluding *Mathis* did not disturb *Conde-Castaneda* and applying the modified categorical approach to the Texas burglary statute); *see also United States v. Bryant*, 669 F. App'x 238, 239 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1114, 197 L. Ed. 2d 216 (2017) (citing *Uribe* and applying the modified categorical approach to Texas burglary conviction). Thus, any argument that *Mathis* somehow changes the ACCA analysis for Texas burglary falls flat.[3]

In sum, the Court finds Dempsey's two burglary convictions are violent felonies under the ACCA. A sentence, however, may only be enhanced if a defendant has three prior ACCA

[3] Notably, Dempsey's Reply, filed two months after *Uribe*, does not mention the decision and contains no further arguments regarding the divisibility of the Texas burglary statute. *See* Reply [#59] at 1–3.

convictions, and therefore the Court must determine whether Dempsey's remaining aggravated robbery conviction constitutes an ACCA violent felony.

2. Aggravated Robbery in Violation of Texas Penal Code § 29.03

Because, unlike burglary, aggravated robbery is not an enumerated offense in § 924(e)(2)(B)(ii), it must fit within one of the ACCA's other definitions of "violent felony" in order to qualify as a sentence-enhancing offense. The parties agree Dempsey's aggravated robbery conviction no longer qualifies as an ACCA violent felony under the now-unconstitutional residual clause. Mem. Supp. [#50] at 4–5; Resp. [#58] at 5. However, the parties disagree whether Dempsey's aggravated robbery conviction is a violent felony under the ACCA's elements clause. Mem. Supp. [#50] at 4–5; Reply [#59] at 2–3; Resp. [#58] at 3–13.

Under the elements clause, an offense constitutes a violent felony if it includes "as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(2)(B)(i). The phrase "physical force," as used within the elements clause, means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States* (*Johnson I*), 559 U.S. 133, 140 (2010). The Government claims Texas aggravated robbery satisfies the elements clause; Dempsey argues it does not.

In Texas, a person commits aggravated robbery "if he commits robbery as defined in Section 29.02" and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or dead, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

TEX. PENAL CODE § 29.03(a)(1)–(3). Thus, the Texas aggravated robbery statute requires a person commit robbery and meet one of the additional requirements in § 29.03(a)(1)–(3).

The Texas aggravated robbery statute is divisible. *See United States v. Lerma*, 16-41467, 2017 WL 6379724, at *5 (5th Cir. Dec. 14, 2017). Specifically, the Fifth Circuit determined § 29.03 recites four separate crimes of aggravated robbery:

Crime No. 1 § 29.03(a)(1)	robbery and serious bodily injury
Crime No. 2 § 29.03(a)(2)	robbery and defendant uses a deadly weapon
Crime No. 3 § 29.03(a)(2)	robbery and defendant exhibits a deadly weapon
Crime No. 4 § 29.03(a)(3)	robbery and victim is 65 years of age or older or disabled

See id. The Court must apply the modified categorical approach to determine which of the above crimes Dempsey was convicted of. *See id.* at *6.

Here, the *Shepard* documents reflect Dempsey was convicted of Crime No. 2 under § 29.03(a)(2). Specifically, Dempsey was indicted and convicted of intentionally and knowingly using a deadly weapon—a firearm—in the commission of a robbery. *See* Supp. Record [#61] at 67, 68 (finding "Defendant guilty of the offense as charged in the indictment Aggravated Robbery" and 'that a deadly weapon was used in the commission of said offense, to-wit: a firearm"); Resp. [#58] at 4 n.2 (quoting the indictment from PSR ¶ 33: "[Dempsey] 'did then and there intentionally and knowingly, while in the course of committing theft of property and with intent to obtain and maintain control over property, threaten and place [the victim] in fear of

imminent bodily injury and death and said defendant did then and there use and exhibit a deadly weapon, to wit: a firearm.'").

Contrary to Dempsey's arguments, robbery with use of a deadly weapon under § 29.03(a)(2) is a violent felony under the elements clause in § 924(e)(2)(B)(i). The Fifth Circuit recently addressed this precise issue in *Lerma:*

> There can be no question that a crime under Texas Penal Code § 29.03(a)(2), that is, threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against the person of another.

Lerma, 2017 WL 6379724, at *7. Therefore, Dempsey's aggravated robbery qualifies as a "violent felony" under the elements clause of the ACCA.

Conclusion

Having reviewed the relevant law, the Court finds Dempsey's two Texas burglary convictions are violent felonies under § 924(e)(2)(B)(ii), and Dempsey's Texas aggravated robbery conviction constitutes a violent felony under § 924(e)(2)(B)(i). Thus, Dempsey's Dempsey's sentence was properly enhanced under the ACCA.

Accordingly,

IT IS ORDERED that Movant Randy Dempsey's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 [#64] is DENIED; and

IT IS FINALLY ORDERED that a certificate of appealability is DENIED.

SIGNED this the 6th day of February 2018.

Sam Sparks

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RANDY DEMPSEY,
Movant,

-vs-

UNITED STATES OF AMERICA,
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Cause No. A-06-CR-060-SS
A-16-CV-704-SS

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Movant Randy Dempsey's Motion for Reconsideration [#67], Dempsey's Amended Motion for Reconsideration [#69], and the Government's Response [#70] in opposition. Having considered the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

Previously, the Court denied Dempsey's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. *See* Order of Feb. 7, 2018 [#64]. The Court concluded Dempsey's sentence was properly enhanced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), on the basis of his three prior convictions: two for burglary in violation of Texas Penal Code § 30.02(a)(1) and one for aggravated robbery in violation of Texas Penal Code § 29.03. *Id.* at 3–9. Dempsey appealed the following day. *See* Appeal Notice [#66].

The Court relied upon *United States v. Uribe*, 38 F.3d 667, 670–71 (5th Cir. 2016) in determining Dempsey's two burglary convictions constituted violent felonies under the ACCA. *Id.* at 6. Less than two weeks after the Court's Order, the Fifth Circuit, sitting *en banc*, overruled

Uribe in *United States v. Herrold*, 883 F.3d 517, 23 (Feb. 20, 2018), holding the Texas burglary statute is indivisible and broader than the ACCA's generic burglary counterpart.

On February 26, 2018, shortly after the *Herrold* decision, Dempsey filed a *pro se* motion for reconsideration. *See* Mot. Reconsideration [#67]. The Federal Public Defender subsequently filed an amended motion for reconsideration. *See* Am. Mot. Reconsideration [#69]. The Government filed a response in opposition. *See* Resp. [#70].

Analysis[1]

Federal Rule of Civil Procedure 59(e) gives a party twenty-eight days after entry of a judgment to file a motion asking the court to alter or amend that judgment. FED. R. CIV. P. 59(e). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment," but instead is intended to allow a court to correct manifest errors of law or fact, to correct inadvertent clerical errors, or to present newly discovered evidence. *Id.*

In the context of a § 2255 motion, however, a defendant bringing a Rule 59(e) motion may run afoul of the prohibition on second or successive § 2255 motions. *See United States v. Brown*, 547 F. App'x 637, 641 (5th Cir. 2013). If the motion challenges "a court's procedural ruling which precluded a merits determination, such as when a ruling is based on an alleged failure to exhaust, a procedural default, or a time-bar determination," then the motion may be considered under the Rule 59(e) standard. *Id.* By contrast, if the motion raises a new claim or attacks the Court's order on the merits, then it is considered a successive § 2255 motion. *Id.*

[1] The Court has jurisdiction to consider and deny Dempsey's motions for reconsideration despite the pending appeal. *See* Fed. R. App. P. 4(B)(i); *see also Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 329 (5th Cir. 2004) (stating a district court may consider or deny a Rule 60(b) motion after a notice of appeal is filed).

Dempsey's motion attacks the Court's previous order on the merits, applying the Fifth Circuit's new holding in *Herrold*. Accordingly, Dempsey's motion is properly characterized as a successive § 2255 motion, not a Rule 59(e) motion. While the Court agrees its previous ruling denying Dempsey's § 2255 motion would no longer stand in light of *Herrold*, Dempsey is required to seek and acquire the approval of the Fifth Circuit before filing another § 2255 motion before this Court. *See United States v. Johnson*, 303 F. App'x 241, 242 (5th Cir. 2008); 28 U.S.C. § 2255(h).

Conclusion

Accordingly,

IT IS ORDERED that Movant Randy Dempsey's Motion for Reconsideration [#67] is DISMISSED as moot in light of his amended motion;

IT IS FURTHER ORDERED that Movant Randy Dempsey's Amended Motion for Reconsideration [#70] is DENIED; and

IT IS FINALLY ORDERED that a certificate of appealability is DENIED.

SIGNED this the 9th day of May 2018.

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE