United States Court of Appeals
For the Eighth Circuit

No. 17-2367

Adam Joseph Winarske

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: October 18, 2018
Filed: January 14, 2019

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

Adam Joseph Winarske appeals the district court's[1] denial of his second motion to vacate his mandatory minimum fifteen-year sentence under the Armed Career

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[1]The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

Criminal Act ("ACCA"), arguing that his prior North Dakota burglary convictions are not "violent felonies" as defined in the ACCA. See 18 U.S.C. § 924(e). Reviewing the denial of a successive motion for relief under 28 U.S.C. § 2255 *de novo*, we affirm.

The ACCA defines "violent felony" to include a felony that "is burglary, arson, or extortion [the "enumerated-offenses clause"] or 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)(ii) (emphasis added). The Supreme Court has construed the word "burglary" in its generic sense, that is, as meaning "any crime, regardless of its 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." Taylor v. United States, 495 U.S. 575, 599 (1990). Under the applicable North Dakota statute, a person is guilty of felony burglary (Class B or class C) if he -

> willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

N.D. Cent. Code § 12.1-22-02(1). "Occupied structure" is defined to mean "a structure or vehicle [w]here any person lives or carries on business or other calling; or [w]hich is used for overnight accommodation of persons . . . regardless of whether a person is actually present." § 12.1-22-06(4).

In March 2012, Winarske pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The Presentence Investigation Report noted that Winarske had more than seven prior felony convictions, including five burglary convictions, and stated that he "is an armed career criminal." At sentencing, Winarske did not object to this determination. The district court, noting his "multiple

burglary convictions," found that Winarske had at least three prior "violent felony" convictions and imposed the ACCA's mandatory minimum sentence of fifteen years in prison. We affirmed the conviction. United States v. Winarske, 715 F.3d 1063 (8th Cir. 2013), cert. denied, 472 U.S. 1003 (2014).

In February 2015, Winarske filed a motion to vacate his sentence under 28 U.S.C. § 2255, arguing that he was improperly sentenced as an armed career criminal because the Supreme Court's recent decision in Descamps v. United States, 570 U.S. 254 (2013), established that North Dakota's burglary statute criminalizes more than generic burglary. The district court denied the motion, concluding (I) "the elements of Winarske's three class C felony convictions for burglary are the same as those of the generic definition of burglary,"[2] and (ii) Descamps did not alter this analysis because the elements of class C burglary "are listed as an undivided set of elements." United States v. Winarske, No. 1:11-cr-86-1, Order Denying . . . Habeas Relief at 6-7 (D.N.D. July 14, 2015). Winarske did not appeal this ruling.

In June 2016, we granted Winarske's application for authorization to file a second or successive § 2255 motion to assert a claim that he was improperly sentenced as an armed career criminal. Congress has severely limited successive § 2255 motions for post-conviction relief. We may not authorize such a motion unless it is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(2). Here, Winarske's application properly relied on Johnson v. United States, 135 S. Ct. 2551 (2015), a decision the Supreme Court made retroactive to cases on collateral review in Welch v. United States, 136 S. Ct. 1257 (2016). But simply citing a new rule is not enough. "The new rule must have a nexus to the right

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[2]When Winarske was sentenced, many cases had held that burglary was a violent felony under the ACCA's enumerated-offenses clause. See, e.g., United States v. Webster, 636 F.3d 916, 920 (8th Cir. 2011) (Maryland burglary); United States v. Sonczalla, 561 F.3d 842, 845-46 (8th Cir. 2009) (Minnesota burglary).

asserted in the motion." Donnell v. United States, 826 F.3d 1014, 1016 (8th Cir. 2016). Thus, even if authorization was properly granted, § 2244(b)(2)(A) requires dismissal of Winarske's successive motion, unless the claim in fact relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See Walker v. United States, 900 F.3d 1012, 1014 & n.2 (8th Cir. 2018).

Johnson held that the ACCA's residual clause was void for vagueness. The residual clause was not an issue when Winarske was sentenced as an armed career criminal, or when he challenged that determination in his first § 2255 motion. Rather, the question was whether his class C North Dakota burglary convictions were for generic burglary and therefore fell within the ACCA's enumerated-offenses clause. In arguing his second § 2255 motion to the district court, Winarske again argued that his burglary convictions no longer qualify as violent felonies because they do not fall within the enumerated offenses clause, relying now on Mathis v. United States, 136 S. Ct. 2243 (2016), as well as Descamps. The district court again rejected this argument on the merits and granted a certificate of appealability. United States v. Winarske, No. 1:11-cr-86-1, 2017 WL 1743550 (D.N.D. May 4, 2017).

On appeal, Winarske argues that Mathis established that the phrase "building or occupied structure" in North Dakota's burglary statute sets forth alternative means of committing the offense, not alternative elements of different offenses. Therefore, the North Dakota statute is overbroad because "occupied structure" is defined to include vehicles "where any person lives or carries on business or other calling," and generic burglary does not include burglary of any vehicle.[3] We decline to consider the merits of this enumerated-offenses-clause issue for three reasons.

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[3]This assertion is contrary to the Supreme Court's recent decision in United States v. Stitt, 139 S. Ct. 399 (2018), which may put in doubt our decision construing the North Dakota burglary statute in United States v. Kinney, 888 F.3d 360, 363-65 (8th Cir. 2018). We need not decide that issue here.

First, the new rule in Johnson has no nexus to this claim. See 135 S. Ct. at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses . . . ."); Stanley v. United States, 827 F.3d 562, 564 (7th Cir. 2016) ("the sole holding of Johnson is that the [ACCA's] residual clause is invalid"). Second, neither Mathis nor Descamps announced "a new rule of law, made retroactive to cases on collateral review by the Supreme Court," as § 2255(h)(2) and § 2244(b)(2)(A) require. Rather, "these decisions are simply the Supreme Court's latest interpretations of the categorical approach the Court has long applied in deciding whether a prior conviction is an ACCA violent felony." Martin v. United States, 904 F.3d 594, 597 (8th Cir. 2018), citing Mathis, 136 S. Ct. at 2257, and Descamps, 570 U.S. at 260. Third, in denying Winarske's first § 2255 motion, the district court held that his three class C felony burglary convictions fell within the ACCA's enumerated offenses clause. "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1); see In re Baptiste, 828 F.3d 1337, 1339 (11th Cir. 2016), citing cases applying § 2244(b)(1) to successive § 2255 motions.

For these reasons, the district court properly denied Winarske's successive § 2255 motion. The Order of the district court dated May 4, 2017, is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2367

Adam Joseph Winarske

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cv-00221-DLH)

JUDGMENT

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 14, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Adam Joseph Winarske, Petitioner, vs. United States of America, Respondent.	)	**ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE** Case Nos. 1:16-cv-221
United States of America, Plaintiff, vs. Adam Joseph Winarske, Defendant.	)	Case Nos. 1:11-cr-086

The Defendant is serving a 180-month sentence for possession of a firearm and ammunition by a convicted felon. On June 21, 2016, the Defendant received permission from the Eighth Circuit Court of Appeals to file a successive Section 2255 motion. See Docket No. 66. On June 22, 2016, the Defendant filed a "Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (*Johnson Claim.)*." See Docket No. 68. The Defendant's motion is based on the United States Supreme Court's holding in Johnson v. United States, 135 S. Ct. 2551 (2015). After an initial review of the motion, the Court ordered the Government to file a response. On July 25, 2016, the Government filed a response in opposition to the motion. See Docket No. 72. The Defendant filed a reply on August 9, 2016. See Docket No. 75. For the reasons set forth below, the motion is denied.

APPENDIX C

I. BACKGROUND

On August 24, 2011, a federal grand jury indicted Winarske on one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). See Docket No. 1. On March 13, 2012, Winarske entered an open, conditional guilty plea to the one count indictment. See Docket No. 36. A sentencing hearing was held on June 29, 2012, at which time it was determined that because Winarske had five prior burglary convictions in North Dakota and two corruption of a minor convictions, he qualified as an armed career criminal under Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). See Docket No. 42. No specific finding was made as to whether the offenses qualified under the "enumerated offenses clause," the "residual clause," or both. See Docket No. 51. The Court's finding that Winarske was an armed career criminal triggered a mandatory minimum sentence of 180-months. The advisory Sentencing Guideline range was determined to be 180-210 months. See Docket No. 38, p. 17. The Court sentenced Winarske to 180-months in prison, followed by 24 months of supervised release. See Docket No. 43. An appeal was taken and the conviction was affirmed. United States v. Winarske, 715 F.3d 1063, 1065 (8th Cir. 2013).

On June 22, 2016, Winarske filed a Section 2255 motion citing the recent opinion of the United States Supreme Court in Johnson v. United States, 135 S. Ct. 2551 (2015), as the basis for the motion. Prior to filing his Section 2255 motion, Winarske obtained permission from the Eighth Circuit Court of Appeals to file a successive Section 2255 motion challenging his sentence under the ACCA. Winarske contends that in the wake of *Johnson*, he no longer qualifies as an armed career criminal. The Government concedes the two corruption of a minor convictions no longer qualify as "violent felony" convictions because the *Johnson* decision declared the residual clause of the ACCA to be unconstitutional, and the offenses do not qualify

as a "violent felony" under any other section of the ACCA. The Government maintains Winarske's burglary convictions still qualify as 924(e) predicates under the "enumerated offenses clause" of the ACCA. The matter has been fully briefed and is ripe for a decision.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

In a case involving an ACCA conviction based on *Johnson*, "the movant carries the burden of showing that the Government did not prove by a preponderance of the evidence that his conviction fell under the ACCA." Redd v. United States, No. 4:16-CV-1665, 2017 WL 633850, at *2 (E.D. Mo. Feb. 16, 2017) (quoting Hardman v. United States, 149 F. Supp. 3d 1144, 1148 (W.D. Mo. 2016)). The movant need not show he was sentenced under the residual clause to maintain a Section 2255 claim under *Johnson*. United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017) (noting sentencing judges are not required to specify under which clause of

18 U.S.C. § 924(e)(2)(B) an offense qualified as a violent felony). A movant may rely on the new rule of constitutional law announced in *Johnson* if his sentence may have been predicated on the now void residual clause.

On a Section 2255 motion, the determination of whether a prior conviction qualifies as a predicate violent felony under the ACCA is subject to *de novo* review. Winston, 850 F.3d at 683; In re Chance, 831 F.3d 1335, 1338-39 (11th Cir. 2016). The court's review is not constrained to the law as it existed when the movant was sentenced, but should be made with the assistance of binding intervening precedent which clarifies the law. In re Chance, 831 F.3d at 1340; Winston, 850 F.3d at 683-84 (applying intervening case law); Redd, No. 4:16-CV-1665, 2017 WL 633850, at *4 n. 3. (noting decisions which clarify or apply existing law or a settled rule apply on collateral review). The burden remains on the movant to show that his sentence, in the wake of *Johnson*, is no longer authorized by the ACCA. In re Chance, 831 F.3d at 1341.

III. LEGAL DISCUSSION

The ACCA's 180-month mandatory minimum penalty applies when a defendant has at least three prior felony convictions for a "serious drug offense" or a "violent felony," as defined in 18 U.S.C. § 924(e)(2). Absent the armed career criminal finding, the maximum sentence for being a felon in possession of a firearm is ten years. See 18 U.S.C. § 924(a)(2). Winarske has five prior felony convictions for burglary under North Dakota law. The question before the Court is whether Winarske's five burglary convictions qualify as violent felonies under the ACCA's enumerated offenses clause. The ACCA defines "violent felony" as follows:

> (B) the term "violent felony" means 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.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The portion of this definition in bold is known as the "force clause" or "elements clause." The underlined portion of this definition is known as the "enumerated offenses clause." The italicized portion is known as the "residual clause."

In *Johnson,* the United States Supreme Court held the residual clause of the ACCA was vague, and the application of the residual clause violates the Constitution's guarantee of due process. Johnson, 135 S. Ct. at 2563. The holding of *Johnson* applies retroactively on collateral review. Welch v. United States, 136 S. Ct. 1257, 1268 (2016). However, the holding in *Johnson* does not apply to the advisory federal Sentencing Guidelines. Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding the Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause). Therefore, the residual clause no longer provides a basis for qualifying a prior conviction as a "violent felony" under the ACCA.

The crimes listed in the enumerated offense clause refer to the generic version of the offense, and not to all versions of offenses. See Taylor v. United States, 495 U.S. 575, 598 (1990); Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). In terms of burglary, the offense at issue in this case, the Supreme Court has said generic burglary consists of the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit an offense." Taylor, 495 U.S. at 599. In order to determine if a prior conviction qualifies, courts apply the "categorical approach." Taylor, 495 U.S. at 600; Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). The categorical approach requires comparing the elements of the offense of conviction to the elements of the generic offense. Taylor, 495 U.S. at 600; Descamps, 133 S.

Ct. at 2281. The particular facts underlying the prior conviction are not considered. Taylor, 495 U.S. at 600. The prior conviction qualifies only if the elements of the offense are the same or narrower than the elements of the generic offense. Descamps, 133 S. Ct. at 2281. If the statute is broader than the generic crime, a conviction under that statute cannot serve as a predicate offense under the ACCA. Id. at 2283.

However, in a narrow range of cases, the sentencing court may apply the "modified categorical approach" and look beyond the statutory elements to a limited class of documents to determine what the elements of the underlying offense were. Id. at 2283-84. "The modified categorical approach is available only when a statute lists alternative elements and thus defines multiple separate crimes" and reference to the statute alone does not disclose which version of the offense was charged. United States v. Bess, 655 Fed. App'x 518, 520 (8th Cir. 2016). Such a statute is "divisible," because it "comprises multiple, alternative versions of the crime." Descamps, 133 S. Ct. at 2284. The modified categorical approach may only be used when the elements of the offense are divisible and may not be used when the elements are indivisible. Id. at 2282. The limited class of documents the court may review to determine which alternative, with which elements, formed the basis of the prior conviction includes the charging document, jury instructions, plea agreement, and transcript of the plea colloquy. Id. at 2284. The court can then compare the elements of the prior conviction with the elements of the generic offense, just as is done when applying the categorical approach, and determine whether the prior conviction corresponds to the generic offense and thus qualifies as a violent felony. Id.; Mathis, 136 S. Ct. at 2249. The focus always remains on the elements, and the underlying facts remain irrelevant. Descamps, 133 S. Ct. at 2285; Mathis, 136 S. Ct. at 2253.

In some cases it can be difficult to determine whether the statute of conviction sets forth alternative elements, or alternative factual means, of satisfying a single element. Mathis, 136 S. Ct. at 2249. The distinction is important because the sentencing court may only look to the elements of the offense and not to the facts related to the defendant's conduct. Id. at 2251. For example, a statute may set forth various places that the crime of burglary could occur and satisfy an element of the offense, none of which are essential to the conviction. Id. at 2249. State court case law may provide the elements versus means answer. Id. at 2256. The statute itself may provide the answer because if the alternatives carry different punishments then they are clearly elements. Id. The statute may contain a list of "illustrative examples" that are simply means of commission and not elements that must be charged. Id. The statute may also identify things which must be charged, and thus are elements, and things which need not be charged, and thus are means. Id. The court may also "peek" at the record documents to determine whether the items listed in the statute are elements or means. If the statute and the record fail to provide a clear answer, the conviction does not qualify as a predicate offense for ACCA purposes. Id. at 2257.

The threshold question in this case is whether Winarske's three class C and two class B North Dakota burglary convictions qualify as violent felonies under the enumerated offenses clause of the ACCA. The parties dispute whether Winarske's burglary convictions qualify. It does not appear the Eighth Circuit Court of Appeals has ever had occasion to address North Dakota's burglary statute in relation to the ACCA. Winarske's burglary convictions occurred in 2004 and 2005. North Dakota's burglary statute was last amended in 1973. See N.D.C.C. § 12.1-22-02. Winarske's burglary convictions, which all resulted from guilty pleas, are as follows:

1) Burglary, Stark County (ND) District Court, Case No. 04K-1501, on January 20, 2005. Class C felony. This offense was committed on June 15, 2004. See Docket No. 40-1.

2) Burglary, Stark County (ND) District Court, Case No. 04K-1501, on January 20, 2005. Class C. felony. This offense was committed on July 1, 2004. See Docket No. 40-1

3) Burglary, Stark County (ND) District Court, Case No. 05K-598, on February 22, 2006. Class C felony. This offense was committed on May 12, 2005. See Docket No. 40-3.

4) Burglary, Stark County (ND) District Court, Case No. 05K-1108, on February 22, 2006. Class B felony. This offense was committed on May 20, 2005. See Docket No. 40-4.

5) Burglary, Stark County (ND) District Court, Case No. 05K-1188, on February 22, 2006. Class B felony. This offense was committed on May 20, 2005. See Docket No. 40-5.

A. THE CATEGORICAL APPROACH

Applying the "categorical approach" requires the Court to compare the elements of generic burglary with the elements of North Dakota's burglary statute. Generic burglary consists of the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit an offense." Taylor, 495 U.S. at 599. North Dakota's burglary statute provides as follows:

> 1. A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.
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> 2. Burglary is a class B felony if:
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> a. The offense is committed at night and is knowingly perpetrated in the dwelling of another; or
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> b. In effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or

> menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.
>
> Otherwise burglary is a class C felony.

N.D.C.C. § 12.1-22-02(1). The statute does not define the term "building." "Occupied structure" is defined as follows:

> 4. "Occupied structure" means a structure or vehicle:
>
> a. Where any person lives or carries on business or other calling; or
>
> b. Which is used for overnight accommodation of persons.
>
> c. Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present.

N.D.C.C. § 12.1-22-06 (emphasis added). The term dwelling is defined as follows:

> 2. "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being a person's home or place of lodging.

N.D.C.C. § 12.1-05-12.

Winarske contends North Dakota's burglary statute is broader than the generic version because the definition of "occupied structure" includes vehicles whereas the generic version applies only to a building or structure. The Government contends the vehicles referenced are those in which a person lives and uses as a residence, and thus the statute is not broader than the generic version. The dispute between the parties focuses on the first element of North Dakota's burglary statute which the Court will refer to as the locational element. See North Dakota Criminal Pattern Jury Instruction K-9.10 and K-9.12. There is no dispute that North Dakota's burglary statute satisfies the elements of generic burglary which require unlawful entry and an intent to commit a crime therein.

The Court agrees with Winarske that because North Dakota's burglary statute covers vehicles, it covers more conduct than generic burglary. Thus, Winarske's North Dakota burglary convictions do not qualify categorically as ACCA violent felonies. See Shepard v. United States, 544 U.S. 13, 15-16 (2005) (noting the ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle"); Mathis, 136 S. Ct. at 2250 (Iowa burglary statute covering "any building, structure, [or] land, water, or air vehicle" was broader than generic burglary); United States v. Bess, 655 Fed. App'x 518, 519 (8th Cir. 2016) (finding Missouri's second-degree burglary statute defined inhabitable structure to include a ship, trailer, sleeping car, airplane, or other vehicle or structure was broader than generic burglary).

The Eighth Circuit Court of Appeals has very recently rejected the Government's argument that vehicles in which a person lives or can be used for overnight accommodation fall within the definition of generic burglary. See United States v. Lamb, 847 F.3d 928, 931 (8th Cir. 2017) (finding Wisconsin's burglary statute which covers motor homes was "without question" broader than generic burglary); United States v. Sims, No. 16-1233, slip op. at 5 (8th Cir. April 27, 2017) (finding Arkansas' residential burglary statute which applies to vehicles in which a person lives or that are used for overnight accommodation was broader than generic burglary). The Eighth Circuit decision in *Sims* was just recently published and is directly on point. Further, the United States Supreme Court has never made an exception to the definition of generic burglary for vehicles of any sort, or for vehicles that have been adapted for some other use such as sleeping or conducting business.

The Missouri burglary statute which the Eighth Circuit Court of Appeals found was broader than generic burglary in *Bess* is virtually identical to North Dakota's class C burglary

statute. The Missouri burglary statute analyzed in *Bess* provided "[a] person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein." Mo. Rev. Stat. § 569.170.1. Although Missouri has since repealed its definition of "inhabitable structure," at the time *Bess* was decided, Missouri law defined "inhabitable structure" as follows:

> "Inhabitable structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:
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> (a) Where any person lives or carries on business or other calling; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
>
> (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present.

Mo. Rev. Stat. § 569.010(2) (emphasis added). The Eighth Circuit Court of Appeals in *Bess* reasoned that because this definition of "inhabitable structure" included "a ship, trailer, sleeping car, airplane, or other vehicle or structure" it covered a broader range of conduct than generic burglary. Bess, 655 Fed. App'x at 519 (emphasis added).

North Dakota's burglary statute and the Missouri second degree burglary statute found overbroad by the Eighth Circuit Court of Appeals in *Bess* are virtually identical. In addition, North Dakota's definition of "occupied structure" is similar to the relevant Missouri definition of "inhabitable structure." North Dakota's definition of "occupied structure" is not as broad as Missouri's definition of "inhabitable structure" because it does not refer to ships, trailers, sleeping cars, or airplanes. However, both definitions refer to vehicles which is enough to make both statutes broader than generic burglary. See Mathis, 136 S. Ct. at 2250 (burglary statute which covers "land, water, or air vehicle" is broader than generic burglary); Descamps, 133 S.

Ct. at 2284 (noting a burglary statute which covers automobiles is non-generic). Given the similarity in the two statutes which both cover vehicles, the Court concludes North Dakota's burglary statute is broader than generic burglary.

While the Government engages in linguistic gymnastics in an attempt to read the word "vehicle" out of North Dakota's definition of occupied structure, the Court is unpersuaded. The fact remains that the definition of "occupied structure" covers certain classes of vehicles which makes North Dakota's burglary statute broader than the generic version which does not cover any vehicles. Nevertheless, Winarske's burglary convictions may qualify as predicate offenses under the "modified categorical approach." See Descamps, 133 S. Ct. at 2284.

B. THE MODIFIED CATEGORICAL APPROACH

Before the Court can apply the "modified categorical approach," it must first determine whether the statute in question is divisible. See Bess, 655 Fed. App'x at 520. If the statute is not divisible, the Court is not allowed to apply the modified categorical approach. Id. A statute is only divisible if it lists alternative elements. Id. If the statute lists alternative means of satisfying an element, then it is not divisible, the modified categorical approach cannot be used, and the convictions in question do not qualify as ACCA predicates. Id. Since North Dakota's burglary statute is very similar to Missouri's burglary statute, the Court will look to case law interpreting Missouri's statute for guidance.

The question becomes whether the phrase "building or occupied structure, or a separately secured or occupied portion thereof" in North Dakota's burglary statute contains alternative elements or alternative means. While the divisibility determination may seem straight forward in theory, the actual inquiry has proven to be anything but simple. The Eighth Circuit has

determined that Missouri's second degree burglary statute contains two alternative elements: burglary "of a building" or "of an inhabitable structure." United States v. Sykes, 844 F.3d 712, 715 (8th Cir. 2016). The Eighth Circuit's holding was based on the use of the disjunctive "or" between the two phrases and without any review of Missouri state court decisions. Id. It was undisputed in *Sykes* the defendant had burglarized buildings rather than inhabitable structures and thus his Missouri second-degree burglary conviction were violent felonies for purposes of the ACCA. Id. at 715-16. A petition for rehearing *en banc* was denied on a 5-4 vote with the dissenting judges criticizing the lack of analysis on the divisibility issue. United States v. Sykes, No. 14-3139, 2017 WL 1314937, at *1-2 (8th Cir. Mar. 17, 2017). The holding in *Sykes* remains binding precedent for the time being. See United States v. Naylor, No. 16-2047, 2017 WL 1163645, at *2 (8th Cir. Mar. 28, 2017).

There does not appear to be any case law from the North Dakota Supreme Court which sheds light on the means versus elements question. The statute itself does not indicate what language must be charged. There is no difference in the penalty, which would be indicative of alternative elements, based on whether a "building" versus an "occupied structure" is charged. Most of the tools the United States Supreme Court in *Mathis* suggested the lower courts use in making a divisibility determination are lacking when analyzing North Dakota's class C burglary statute. The only difference between class C burglary and class B burglary is that Class B burglary requires proof of two additional elements. Compare North Dakota Criminal Pattern Jury Instruction K-9.10 with K-9.12. Those two additional elements relate to the structure being used as a dwelling and the use of force or a weapon and do not change the Court's divisibility analysis.

North Dakota's pattern jury instructions support the contention the statute contains at least two separate elements: "building or occupied structure" and "a separate secured or occupied portion of a building or occupied structure" which are listed as alternates in the instruction. See North Dakota Criminal Pattern Jury Instruction K-9.12. North Dakota has chosen to define "occupied structure," but has not defined "building" and has not defined the phrase "building or occupied structure" as one term. See N.D.C.C. § 12.1-22-06. The lack of a definition for the phrase "building or occupied structure" supports the contention the phrase contains separate elements rather than alternate means.

A "peek at the record" of documents shows a variation in the way burglary is charged and thus supports the idea that the statute lists alternate elements. See Docket Nos. 40-1, 403, 40-4, and 40-5. Available for review are the charging documents in relation to all five of Winarske's burglary convictions. In one case, the entire statutory phrase "building or occupied structure, or a separately secured or occupied portion thereof" was included in the charging document. See Docket No. 40-3. In another case, the phrase "building or occupied structure" was used. See Docket No. 40-4. In two cases the charging document alleged Winarske "willfully entered the Bauer Property Office at Century Apartments at 1156 21st Street West in Dickinson, or a separately secured or occupied portion thereof." See Docket No. 40-1. In yet another case, it was alleged that Winarske "willfully entered the occupied dwelling of another" with no reference at all to a "building or occupied structure." See Docket No. 40-5.

While reasonable persons could disagree as to the divisibility of North Dakota's burglary statute, the Court finds it is divisible. See Sykes, 844 F.3d at 715 (relying on the disjunctive nature of Missouri's burglary statute to find it listed alternative elements and thus was divisible). As the Court noted above, North Dakota's burglary statute and the Missouri burglary statute at

issue in *Bess* and *Sykes* are virtually identical. Section 12.1-22-02 of the North Dakota Century Code contains four distinct elements: "building," "occupied structure," "separately secured or occupied portion of a building," and "separately secured or occupied portion of an occupied structure." Any one of these elements could be charged and proven to satisfy the locational element of the statute. If the charging document only references burglary of a "building" it would equate with generic burglary while reference to an "occupied structure" would not. See Taylor, 495 U.S. at 599.

Another perspective is that the only North Dakota burglary convictions which could count as predicate violent felonies for purposes of the ACCA are ones which charge burglary of a "building" or a "separately secured or occupied portion of a building" and thus make no reference to an "occupied structure." A conviction under the "occupied structure" element of the statute would not qualify as a violent felony under the ACCA.

In applying the modified categorical approach after a finding that a statute is divisible, review is confined to a limited class of documents including the charging document, jury instructions, plea agreement, and plea colloquy. Sykes, 844 F.3d at 715. Of these documents, only the charging documents are available for review in this case. The United States Supreme Court has said lower courts may only look at the elements of the charge which the defendant pled guilty to and not the particular facts or factual basis for the plea. Taylor, 495 U.S. at 600-01 (rejecting the factual approach which permitted sentencing courts to look at "the facts of each defendant's conduct" in favor of a categorical elements only approach); Descamps, 133 S. Ct. at 2284 (stating the "factual basis" for the prior plea is not be considered when applying the modified categorical approach); Mathis, 136 S. Ct. at 2252 (adhering to an "elements-only

inquiry" which does not permit a judge to look at "what the defendant had actually done" or "explore the manner in which the defendant committed that offense").

In this case, applying the modified categorical approach and comparing the elements in the charging documents to the generic offense, the Court finds that three of Winarske's five burglary convictions still qualify as ACCA predicates. The inclusion of the term "occupied structure," which encompasses a limited class of vehicles, in the charging document in two of the cases puts those offenses outside the generic verison of burglary. See Docket Nos. 40-3 and 40-4. The other three charging documents make no reference to an "occupied structure" and thus comport with the generic version of burglary. See Docket Nos. 40-1 and 40-5. Accordingly, Winarske remains an armed career criminal, and he is not entitled to the relief he seeks.

III. CONCLUSION

For the reasons set forth above, the Defendant's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 68) is **DENIED.** Because reasonable persons may disagree as to whether Winarske's five burglary convictions qualify as violent felonies under the ACCA's enumerated offenses clause, the Court finds Winarske has satisfied the burden of making a "substantial showing of a denial of a constitutional right" as required by 28 U.S.C. § 2253 and a certificate of appealability should be issued. Accordingly, and pursuant to 28 U.S.C. § 2253, the Court **GRANTS** Winarske a certificate of appealability on the following issue presented to the Court, namely whether Winarske qualifies as an armed career criminal under the ACCA in light of Johnson v. United States, 135 S. Ct. 2551 (2015). The appeal may be taken *in forma pauperis*.

IT IS SO ORDERED.

Dated this 4th day of May, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court

Local 2255 Judgment (Rev. 6/16)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Adam Joseph Winarske Petitioner/Defendant v. United States of America Respondent/Plaintiff.	)	**JUDGMENT ON PETITION PURSUANT TO 28 U.S.C. § 2255** Criminal Case No. 1:11-cr-086 Civil Case No. 1:16-cv-221

IT IS ORDERED AND ADJUDGED that the Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 is dismissed, pursuant to the Order filed on May 4, 2017.

CLERK OF COURT

Date: May 4, 2017

/s/ Renee Hellwig, Deputy Clerk

Signature of Clerk or Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2367

Adam Joseph Winarske

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Bismarck
(1:16-cv-00221-DLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

March 25, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

pointing out some authority as to why we believe the particular convictions will count as predicates under 924(e), but it appears the defendant may very well not contest that, Your Honor.

11:55 THE COURT: So I have had a chance to -- I did read in its entirety the Defendant's Sentencing Memorandum. I'll be honest, I'm leafing through the United States' Sentencing Memorandum, which is 11 pages in length, plus attachments, but there doesn't -- there is no dispute about the defendant's

11:55 armed career criminal status.

MR. SCHMIDT: We discussed it. You know, what Adam's questions were initially when we got the draft was based on the fact that he was sentenced on the same date with regard to about four of the Stark County matters, but all of those

11:56 instances that he was charged arose on different dates. And I believe he now understands that even though they were sentenced at the same time, they were for separate cases because of separate offenses, and as a consequence are countable.

THE COURT: Do you understand that, sir?

11:56 THE DEFENDANT: Yes, Your Honor.

THE COURT: And unfortunately for you, in this circuit burglary convictions are considered to be crimes of violence. It doesn't matter whether it's a burglary of a residential building or a commercial building. It doesn't

11:56 matter whether it's a burglary of a vacant, abandoned building

or not. If it's a burglary and you're convicted of a burglary, it is considered to be a crime of violence. Do I necessarily agree with that in all cases? No, but that is the law in the Eighth Circuit, so when you have multiple burglary convictions on your record arising out of separate offenses, even though maybe sentenced all at once, that gets you that armed career criminal designation. Understood?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And being an armed career criminal is not something that one wants on their résumé because it carries some very serious consequences. Have you, Mr. Winarske, had an opportunity to review the Presentence Investigation Report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you've discussed that with your attorney, Mr. Schmidt?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any objections to the facts contained in the Presentence Report or the guideline calculations, Mr. Schmidt?

MR. SCHMIDT: Your Honor, the guideline calculations appear to be accurate. You know, with the adjusted base offense level of 30 and a criminal history category of 6, I believe, produces an advisory range of 168 to 210 months, and, of course, he's looking at a 15-year mandatory because of the nature of the charge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America, Plaintiff, vs. Adam Joseph Winarske, Defendant.	)	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:11-cr-86-1

Adam Joseph Winarske, Petitioner, vs. United States of America, Respondent.	)	Case No. 1:15-cv-14

Before the Court is Adam Joseph Winarske's "Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255" filed on February 3, 2015. See Docket No. 59. The Government filed a response in opposition on March 26, 2015. See Docket No. 61. Winarske filed a reply on April 20, 2015. See Docket No. 62. For the reasons outlined below, the motion is denied.

I. BACKGROUND

Winarske was indicted on August 24, 2011. See Docket No. 1. On March 13, 2012, Winarske pled guilty to one count of Possession of Firearm and Ammunition by a Convicted Felon in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). See Docket No. 36. The Court ordered a Presentence Investigation Report ("PSR") to be prepared prior to sentencing.

APPENDIX G

The PSR established an adjusted offense level of 30 and 14 criminal history points which placed Winarske in a criminal history category VI with an advisory sentence range of 168 to 210 months. See Docket No. 38. However, according to the PSR and the sentencing memorandums filed by Winarske and the Government, Winarske qualified as an "armed career criminal" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because he had at least three previous convictions for a violent felony or a serious drug offense. See Docket Nos. 38, 40, and 41. Subsequently, Winarske was subject to a sentencing enhancement which raised his sentence to a 15-year mandatory minimum with a maximum sentence of life imprisonment. See Docket No. 38.

A sentencing hearing was held on June 29, 2012. See Docket No. 42. The Court adopted the PSR without any changes. See Docket No. 44. The Court sentenced Winarske to 180-months imprisonment which was the mandatory minimum. See Docket No. 43. Winarske filed an appeal to the United States Court of Appeals for the Eighth Circuit from the judgment on July 11, 2012. See Docket No. 45. The Eighth Circuit affirmed the sentence on May 21, 2013. See Docket No. 54.

On January 29, 2015, Winarske filed the Section 2255 motion before the Court when he placed it in the prison mailing system. See Docket No. 59-2. The motion was received and filed by the Court on February 3, 2015. Id. Winarske was serving his sentence at the United States Penitentiary in Florence, Colorado, but has since been moved to the Federal Correctional Complex in Coleman, Florida. See Docket Nos. 59-2 and 63.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the

maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

III. LEGAL DISCUSSION

Winarske raises three claims in his Section 2255 motion. First, Winarske contends the recent ruling in Alleyne v. United States, 133 S.Ct. 2151 (2013) prohibits his consecutive fifteen year sentence.[1] See Docket No. 59. Second, Winarske submits he was never convicted of three violent felonies and therefore was wrongfully classified as an armed career criminal. Id. Third, Winarske asserts he received ineffective assistance of counsel when defense counsel failed to properly investigate exculpatory information. Id. Winarske requests that his conviction be vacated. In his reply brief, Winarske also requested to be appointed counsel, to have the Court hold an evidentiary hearing on all three grounds he raised in his Section 2255 motion, and for a sixty-day extension to file another reply due to his limited access to legal materials during his relocation to a different federal correctional facility. See Docket No. 62.

[1] In his petition, Winarske incorrectly stated the decision in Alleyne prohibits his consecutive five year sentence. See Docket No. 59. The Court notes Winarske is serving a fifteen year sentence, not a five year sentence.

A. ARMED CAREER CRIMINAL STATUS

Winarske asserts the District Court erroneously classified him as an armed career criminal under the ACCA. See Docket No. 59. Specifically Winarske contends he was never convicted of three violent felonies as required under 18 U.S.C. § 924(e). Id. The Government argues Winarske in fact had seven convictions for violent felonies that qualified under the ACCA, and therefore the Court properly classified Winarske as an armed career criminal. See Docket No. 61.

18 U.S.C. § 924(e)(1) states:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

The ACCA defines "violent felony" as:

> [A]ny 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[.]

18 U.S.C. § 924(2)(b).

The Government submits Winarske had seven separate prior violent felony convictions that properly designated him as an armed career criminal under the ACCA. See Docket No. 61.

1. Burglary, Stark County (ND) District Court, Case No. 04-K-1501, conviction on or about January 20, 2005. Winarske pled guilty to entering into Bauer Property Office at Century Apartments in Dickinson, North Dakota.

2 Burglary, Stark County (ND) District Court, Case No. 04-K-1501, conviction on or about January 20, 2005. Winarske pled guilty to entering into Bauer Property Office at Century Apartments in Dickinson, North Dakota.

3. Burglary/Theft of Property, Stark County (ND) District Court, Case No. 05K-598, conviction on or about February 22, 2006. Winarske pled guilty to breaking into Walco Vet Supplies in Dickinson, North Dakota at night.

4. Burglary, Stark County (ND) District Court, Case No. 05K-1108, conviction on or about February 22, 2006. Winarske pled guilty to entering the dwelling of Dave Bauer in Dickinson, North Dakota.

5. Burglary, Stark County (ND), District Court, Case No. 05K-1188, conviction on or about February 22, 2006. Winarske pled guilty

6. Corruption of a Minor, Stark County (ND) District Court, Case No 05K-647, on or about February 22, 2006. Winarske pled guilty to attempted sexual intercourse with a 14 year old girl.

7. Corruption of a Minor, Stark County (ND) District Court, Case No. 05K-647, on or about February 22, 2006. Winarske pled guilty to sexual contact with a different 14 year old girl from paragraph 6.

See Docket No. 38.

According to Winarske's criminal record, he has five convictions for burglary: three class C felony burglary convictions and two class B felony conviction burglaries. See Stark County District Court Case Nos. 04-K-1501, 05K-598, 05K-1108, and 05K-1188. In determining whether a defendant's previous conviction meets the definition for burglary for purposes of a Section 924(e) sentencing enhancement, the United States Supreme Court established a generic definition of burglary by which to compare against the particular burglary statute the defendant was convicted under. See Taylor v. United States, 495 U.S. 575, 600 (1990). The generic definition of burglary states:

> [A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its 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.

Taylor, 495 U.S. at 598. Under North Dakota state law, a class C felony burglary is defined as:

> A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the acts is not licensed,

invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.

N.D.C.C. 12.1-22-02(1).[2]

In comparing the language of the generic definition of burglary to the language of North Dakota's class C felony burglary definition, the Court notes both definitions contain the following main elements (1) an unlawful entry[3]; (2) into a building[4]; and (3) with the intent to commit a crime.[5] Accordingly, the Court finds that the elements of Winarske's three class C felony convictions for burglary are the same as those of the generic definition of burglary, and therefore qualify as prior "violent felonies" for purposes of Section 924(e) sentencing enhancements.

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[2] The class B felony burglary statute under North Dakota law provides:

Burglary is a class B felony if:

a. The offense is committed at night and is knowingly perpetrated in the dwelling of another; or

b. In effecting entry or while in the premises or in immediate flight therefrom, the actor inflicts or attempts to inflict bodily injury or physical restraint on another, or menaces another with imminent serious bodily injury, or is armed with a firearm, destructive device, or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

Otherwise burglary is a class C felony.

N.D.C.C. 12.1-22-02(2).

[3] The generic definition states an "unlawful or unprivileged entry" while the North Dakota class C felony language says "willfully enters or surreptitiously remains in a building . . . . when at the time the premises are not open to the public and the acts is not licensed, invited, or otherwise privileged to enter . . ." *Compare* Taylor, 495 U.S. at 598. *with* N.D.C.C. 12.1-22-02(1).

[4] The generic definition states an "entry into, or remaining in, a building or structure" while the North Dakota class C felony language says "in a building or occupied structure[.]" Id.

[5] The generic definition states a "with the intent to commit a crime" while the North Dakota class C felony language says "with intent to commit a crime" Id.

Because only three previous violent felony convictions are required for a defendant to be considered an armed career criminal, and Winarske has met that requirement merely though his three class C felony burglary convictions, the Court finds that Winarske's designation as an armed career criminal was proper. The Court need not address whether Winarske's class B felony burglary convictions or two corruption of a minor convictions constitute violent felonies for purposes of Section 924(e) because Winarske's three class C felony burglary convictions meet the requisite minimum convictions.

i. DESCAMPS V. UNITED STATES

Winarske contends the United States Supreme Court's ruling in Descamps v. United States, 133 S.Ct. 2276 (2013), is applicable because his burglary and corruption of a minor convictions are more broad than the generic definitions. See Docket No. 59. Therefore, Winarske asserts the North Dakota burglary and corruption of a minor statutes are divisible[6] and do not qualify as previous violent felonies for purposes of Section 924(e). Id. While North Dakota divided burglary into class C and class B designations under N.D.C.C. 12.1-22-02, the Court notes a class C definition for burglary is indivisible because the elements for that particular offense is listed as an undivided set of elements. Accordingly, Winarske's three class C felony burglary convictions qualify as violent felonies for the purposes of Section 924(e). The Court declines to discuss the implications of Descamps regarding Winarske's four other previous felony convictions because Winarske's three class C felony burglary convictions are sufficient for establishing him as an armed career criminal.

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[6] A divisible statute refers to a statute that comprises multiple, alternative versions of the crime while an indivisible statute has a single, undivided set of elements that is narrower than a generic predicate offense. Descamps, 133 S.Ct. at 2284.

ii. ALLEYNE V. UNITED STATES

Winarske submits the mandatory minimum sentence he received due to his ACCA designation violates the United States Supreme Court decision in Alleyne v. United States, 133 S.Ct. 2151, because any fact that increases a mandatory minimum sentence is considered an 'element' that must be submitted to the jury and found beyond a reasonable doubt. See Docket No. 59. The Government contends Alleyne is inapplicable because prior a conviction is considered to be a sentencing factor rather than an element of the offense. See Docket No. 61. Following the United State Supreme Court's decision in Alleyne, the Eighth Circuit Court of Appeals held that "the Court in Alleyne left intact the rule that enhancements based on the fact of a prior conviction *are an exception* to the general rule that facts increasing the prescribed range of penalties must be presented to a jury." United States of America v. Abrahamson, 731 F.3d 751-52 (8th Cir. 2013) (emphasis added). Therefore, the Court finds that Winarske's prior predicate convictions under the ACCA were properly considered sentencing factors and did not need to be submitted to a jury.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Winarske contends he had ineffective assistance of counsel because his counsel failed to obtain discovery materials and investigate properly. See Docket No. 59. Winarske also submits that his defense counsel failed to argue against his armed career criminal status in plea agreement negotiations. Id. Winarske further asserts his defense counsel failed to advise him of an entrapment defense. Id. The Government asserts that Winarske's defense counsel made the necessary efforts to investigate the case and properly presented the viable options for Winarske's case. The Court notes Winarske was represented by William D. Schmidt, an attorney with the Federal Public Defenders Office. See Docket Nos. 61-4, 61-5, and 61-6.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in Strickland v. Washington, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that defense counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). Merely showing a conceivable effect is not enough. Id. An increased prison term may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing.

Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690.

i. DISCOVERY MATERIALS AND INVESTIGATION

Winarske submits his defense counsel provided ineffective assistance of counsel because he failed to investigate the background of cooperating witness, Michael Fergel. See Docket No. 59. Winarske also alleges his defense counsel failed to hire an investigator or seek expert forensic assistance for his case. Id. The transcript from the July 13, 2012, suppression hearing reveals that Winarske's defense attorney cross-examined Officer Stein about Fergel's criminal background and communication with Winarske. See Docket Nos. 49 pgs. 10-11 and 52-54. The Court also notes Winarske was represented by William D. Schmidt, a federal public defender, and that the Federal Public Defender offices have investigators on staff. The Court finds that Winarske's defense counsel adequately investigated the background of Michael Fergel.

Additionally, Winarske claims his defense counsel did not obtain the text message records utilized in discovery. See Docket No. 59. In reviewing the record, the Court notes that on March 14, 2012, the United States Attorney's office sent Winarske's defense counsel a letter stating "As previously indicated, *all the text messages that were captured from Fergel's phone have been disclosed in* discovery." See Docket No. 61-3 (emphasis added); see also Docket Nos. 61-6 and 61-7. The Court finds the record indicates Winarske's defense attorney received the text message records disclosed in discovery.

ii. PLEA NEGOTIATIONS

Winarske claims his defense counsel failed to argue against his armed career criminal status in plea agreement negotiations. See Docket No. 59. As discussed above, the Court determined Winarske's designation as an armed career criminal was proper and that he was subject to a 15-year mandatory minimum. Accordingly, the Court finds Winarske's defense counsel was not ineffective in his plea negotiations.

iii. ENTRAPMENT

Winarske contends that defense counsel was ineffective for failing to explore and advise him about an entrapment defense. See Docket No. 59. Winarske submits that he would never have obtained a handgun but for the confidential informants "pleas and coercion." Id. The Eighth Circuit Court of Appeals stated "[i]f the claimed error is counsel's failure to notify the petitioner of a potential defense, the inquiry 'will largely depend on whether the affirmative defense likely would have succeeded at trial.'" Gumangan v. United States, 254 F.3d 701, 705 (8th Cir. 2001) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"The critical question to consider in evaluating an entrapment defense is whether the defendant was predisposed to committing the crime independent of the governments meddling." United States v. Brooks, 215 F.3d 842, 845 (8 th Cir. 2000) (citing Jacobson v. United States, 503 U.S. 540, 549 (1992). The Court must also "examine the extent to which the government instigated or induced the defendant's criminal activity." Id. "In considering a defendant's predisposition, the Court must analyze the defendant's personal background." Brooks, 215 F.3d at 845.

According to the PSR, on June 24, 2011, an F&L, Model Ranger, .38 special caliber revolver bearing the serial number #04473A, was stolen from the vehicle of Jeffrey Luptak in Bismarck,

North Dakota. See Docket No. 38. On that same date, Winarske contacted a male who was cooperating with the Bismarck Police Department via text message stating he had a .38 caliber revolver for sale. Id. Winarske made arrangements to sell the revolver to the cooperating witness and on June 29, 2011, met the cooperating witness in the Kirkwood Mall parking lot near Target in Bismarck. Id. Officers approached Winarske's vehicle in the parking lot and found the F&L, Model Ranger, .38 special caliber revolver bearing the serial number #044731A in addition to ammunition. Id. According to the PSR, Winarske admitted he was attempting to sell the weapon and knew it was stolen but that he was not the person that stole the firearm. Id.

As discussed above, Winarske has a long criminal history, including five felony burglary convictions, and therefore the Court may conclude Winarske has a propensity for engaging in criminal activity. See Docket No. 38. Although Winarske contends he would not have obtained a firearm but for Fergel's "pleads and coercion," there are no facts in the record to substantiate his allegations as the PSR indicates Winarske was the one who contacted the cooperating witness. See Docket No. 59. Therefore, there is no substantiated evidence of coercion or entrapment and Winarske's defense counsel was not ineffective regarding an alleged entrapment defense.

C. REQUESTS FOR AN EVIDENTIARY HEARING, APPOINTMENT OF COUNSEL, AND A FILING EXTENSION[7]

i. REQUEST FOR AN EVIDENTIARY HEARING

Winarske seeks an evidentiary hearing in order to argue the issues in his motion discussed above. See Docket No. 62. "An evidentiary hearing on a § 2255 petition may be denied if 'the motion and the files and the records of the case conclusively show that the prisoner is entitled to no

[7] Winarske did not file formal motions requesting counsel, an evidentiary hearing, or a filing extension but rather he made these requests in his reply brief. See Docket No. 62.

relief.'" Noe v. United States, 601 F.3d 784, 792 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(b)). "No hearing is required where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." Sinisterra v. United States, 600 F.3d 900, 906 (8th Cir. 2010) (quoting Watson v. United States, 493 F.3d 960, 963 (8th Cir. 2007)). The record clearly shows Winarske is not entitled to relief. Therefore, the Court finds that an evidentiary hearing is unnecessary.

ii. REQUEST FOR COUNSEL

Winarske has requested he be appointed counsel. See Docket No. 62. There is neither a constitutional nor statutory right to counsel in habeas proceedings. See Morris v. Dormire, 217 F.3d 556, 558 (8th Cir. 2000); United States v. Craycraft, 167 F.3d 451, 455 (8th Cir. 1999); Blair v. Armontrout, 916 F.2d 1310, 1332 (8th Cir. 1990); see also Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993) (explaining that a habeas corpus proceeding is a civil proceeding to which the Sixth Amendment right to counsel afforded for criminal proceedings does not apply). The court may nevertheless appoint counsel for a habeas petitioner at any time if it finds that "the interests of justice so require." See 18 U.S.C. § 3006A(a)(2).

If a court conducts an evidentiary hearing on the motion, the interests of justice require the movant be appointed counsel. See Rule 8(c), Rules Governing Section 2255 Cases in the United States District Courts; see also Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994). "If no evidentiary hearing is necessary, the appointment of counsel is discretionary." Abdullah, 18 F.3d at 573. In exercising its discretion, a court should determine whether, given the particular circumstances of the case, "the appointment of counsel would benefit the petitioner and the court to such an extent that 'the interests of justice so require' it." Id. (citing 18 U.S.C. § 3006A(a)(2) and

Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir. 1990)). A court should consider all relevant factors, including the factual complexity of the case and the movant's ability to investigate and present his claim when deciding whether to appoint counsel. See Abdullah, 18 F.3d at 573; see also Battle, 902 F.2d at 702; Johnson v. Williams, 788 F.2d 1319, 1322-23 (8th Cir. 1986).

In reviewing Winarske's petition and other filings, it is clear he adequately articulated his claims through written submissions. The issues raised are not so numerous or complex that the appointment of counsel would benefit either Winarske or the Court. In addition, as stated above Winarske is not entitled to an evidentiary hearing and therefore appointment of counsel for that reason is unnecessary. The Court finds that appointment of counsel is denied.

iii. REQUEST FOR EXTENSION OF TIME TO FILE

In the event the Court did not appoint Winarske counsel or hold an evidentiary hearing, Winarske requested a sixty-day extension to file another reply. See Docket No. 62. Specifically, Winarske asserted his access to resources were limited while drafting his reply brief because he had a pending redesignation to another facility. Id. As discussed above, the Court already found Winarske is not entitled to counsel and an evidentiary hearing is unnecessary. Although the Court recognizes Winarske's argument, the Court notes that Winarske's brief filed with the Motion to Vacate was well-reasoned, thorough, and articulated his legal arguments clearly. Therefore, the Court denies Winarske's request for additional time to file another reply brief because it is unnecessary in light of his previous thorough submission.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, the Court **DENIES** Winarske's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Docket No. 59). The Court also issues the following **ORDER**:

1) The Court certifies that an appeal from the denial of this motion may not be taken in forma pauperis because such a appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

2) Based upon the entire record before the Court, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, a certificate of appealability will not be issued by this Court. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). If the defendant desires further review of his motion he may request issuance of a certificate of appealability by a circuit judge of the Court of Appeals for the Eighth Circuit.

IT IS SO ORDERED.

Dated this 14th day of July, 2015.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court