No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

****

JERRY SCOTT HILL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

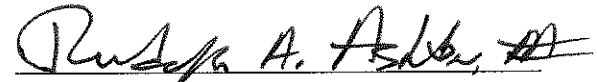
MOTION TO PROCEED IN FORMA PAUPERIS

****

Petitioner, Jerry Scott Hill, by his undersigned counsel, requests leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006 and Rule 44, Fed. R. CR. P.

This the 30th day of August, 2019.

Respectfully submitted,



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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

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JERRY SCOTT HILL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT NORTH CAROLINA ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY (AWDWIKISI) CONSTITUTES A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT (ACCA), IN LIGHT OF THE SUPREME COURT DECISION IN JOHNSON v. UNITED STATES.

II. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO ALLOW A CERTIFICATE OF APPEALABILITY, IN FINDING THAT PETITIONER'S TWO PRIOR CONVICTIONS OF NORTH CAROLINA BREAKING OR ENTERING (B&E&L) WERE VIOLENT FELONIES UNDER ACCA BECAUSE THEY FIT THE GENERIC DEFINITION OF BURGLARY, AND IN DISMISSING THE APPEAL.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF CASES AND STATUTES

CASES

CASES (continued)

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry Scott Hill respectfully prays this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, issued on June 6, 2019, affirming the petitioner's judgment in part and dismissing his appeal in part.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit for which review is sought is United States v. Jerry Scott Hill, No. 17-6022 (4th Cir., June 6, 2019). The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to this petition as Appendix A. The judgment is reproduced as Appendix B. The mandate is reproduced as Appendix C.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's judgment and sentence was issued on June 6, 2019. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner Jerry Scott Hill was convicted of one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). (App. D). Due to alleged prior violent felonies, he was sentenced under the Armed Career Criminal Act (ACCA) to a prison term of 262 months, pursuant to 18 U.S.C. §924(e). (App. F). Petitioner contends his sentence deprives him of liberty without due process of law under the Fifth Amendment of the United States Constitution. (App. G). Also, the following state statutes are applicable to the issues herein: N.C.G.S. § 14-51 – Burglary (App. H); N.C.G.S. § 14-52 – Punishment for Burglary (App. I); and N.C.G.S. § 14-54 – Breaking or Entering. (App. J).

STATEMENT OF THE CASE

Procedural History

On March 17, 2010 Jerry Scott Hill was charged in an indictment in the Eastern District of North Carolina with possession of a firearm by a felon on or about October 25, 2009 pursuant to 18 U.S.C. § 922(g). (App. D). A superseding indictment was filed on October 20, 2010, and count three charged him with the original count of possession of firearm by a felon on or about October 25, 2009. The case came on for trial on February 1, 2011 in New Bern, North Carolina before the Honorable Louise W. Flanagan, District Court Judge. On February 3, 2011 the jury found the petitioner guilty of count three.

The case came on for sentencing on April 29, 2011. Mr. Hill was found to be an armed career criminal based upon two prior breaking or entering convictions (B&E&L) and one prior conviction of assault with a deadly weapon with intent to kill inflicting serious injury. (AWDWIKISI). He received a sentence of 262 months. On May 3, 2011 his notice of appeal was filed. In an unpublished opinion entered on May 4, 2012, Mr. Hill's conviction and sentence were affirmed.

On February 5, 2013 Jerry Scott Hill filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. The Petition was dismissed by Order filed on November 25, 2013.

On November 24, 2015 the petitioner sent a letter to the District Court Judge requesting a review of his case under the recent decision of the United States Supreme Court in Johnson v. United States. He also asked the Court to appoint

new counsel to assist him. A motion under 28 U.S.C. § 2244 requesting an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2255 was filed in the Fourth Circuit Court of Appeals on June 7, 2016. On June 24, 2016 the Fourth Circuit Court of Appeals entered an Order granting authorization for Mr. Hill to file a second or successive § 2255 petition, thus permitting consideration of the motion by the district court.

On June 27, 2016 the successive 28 U.S.C. § 2255 motion herein was filed pursuant to the above order. The Government was directed to file an answer. On August 4, 2016 the Government filed a motion to dismiss, accompanied by a memorandum in support of its motion to dismiss. By Order and Judgment filed on December 8, 2016, the Petitioner's motion to vacate was denied, the Government's motion to dismiss was granted, and the Court granted a certificate of appealability as to the AWDWIKISI charge only.

Petitioner again appealed. The case was held in abeyance several times based upon other pending cases, the last of which was awaiting this court's decision in United States v. Stitt. Briefing then resumed.

In an unpublished opinion delivered on June 6, 2019 the Fourth Circuit Court of Appeals affirmed in part the dismissal of the AWDWIKISI issue and dismissed in part the issue regarding the two breaking or entering prior convictions. The Fourth Circuit denied Hill's pending motion to expand the certificate of appealability.

Statement of Facts

The Presentence Report, filed under seal, found the Petitioner Jerry Scott Hill to be an armed career criminal based upon three (3) prior convictions in paragraphs 11, 14, and 18. In paragraph 11, Mr. Hill pled guilty in Johnston County File No. 88-CRS-2589 to breaking or entering and larceny, said offense occurring on March 21, 1988 when he was age 16. He received a 13 year sentence, suspended with five years probation. On June 12, 1989 the probation was revoked. In paragraph 14 Mr. Hill pled guilty on June 12, 1989 to felonious breaking or entering and larceny in Johnston County File No. 89-CRS-2922, said offense occurring on March 27, 1989 when he was age 17. He received a sentence of 9 years custody.[1]

In paragraph 18 of the Presentence Report, the Petitioner pled guilty on June 12, 1989 to assault with a deadly weapon with intent to kill inflicting serious injury in Johnston County File No. 89-CRS-3298. He received an 18 year consecutive sentence to 89-CRS-2918, which was a larceny of motor vehicle conviction in paragraph 16. That sentence was consecutive to the sentence in paragraph 14 of the Presentence Report.

Further facts will be developed in the argument portion of this petition.

[1] Please note that the probation in paragraph 11 was revoked on that same date.

REASONS FOR GRANTING THE PETITION

I. IN LIGHT OF THE SUPREME COURT DECISION IN JOHNSON v. UNITED STATES, THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT NORTH CARLOLINA ASSAULT WITH A DEADLY WEAPON WITH INTENT TO KILL INFLICTING SERIOUS INJURY (AWDWIKISI) CONSTITUTES A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT (ACCA).

This case arises from a second petition filed by Jerry Scott Hill wherein he sought to vacate his sentence. The basis of Mr. Hill's petition is that under the recent decision of the United States Supreme Court in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed 2d 569 (2015), his prior convictions were no longer violent felonies and he was entitled to a new sentencing hearing. This issue is significant because Mr. Hill received a sentence of 262 months, whereas the maximum sentence without the enhanced classification was 10 years or 120 months. See 18 U.S.C. § 924(a)(2). (App. E).

In Johnson v. United States, this Court held that the residual clause of the Armed Career Criminal Act (ACCA) 18 U.S.C. § 924(e)(2)(B)(ii) (App. F), is void for vagueness and violates due process. In Welch v. United States, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), this Court held that Johnson announced a new substantive rule that has retroactive effect in cases on collateral review. There is no dispute that AWDWIKISI does not fall within the offenses enumerated under 18 U.S.C. § 924(e)(2)(B)(ii). Since it no longer qualifies as a violent felony under the residual clause, the offense herein only qualifies as a violent felony, if at all, under the "force clause".

The Fourth Circuit held this case in abeyance pending a decision in United States v. Townsend, which opinion was filed on March 30, 2018. United States v. Townsend, 886 F.3d 441 (4th Cir. 2018). Townsend held that a prior North Carolina conviction for assault with a deadly weapon with intent to kill inflicting serious injury categorically qualified as a "violent felony" under ACCA. The Fourth Circuit in Townsend noted that the defendant therein relied upon the statement by the North Carolina Supreme Court in State v. Jones, 353 N.C. 159, 166, 538 S.E.2d 917, 923 (2000), that "culpable or criminal negligence may be used to satisfy the intent requisites for certain dangerous felonies, such as manslaughter, assault with a deadly weapon with intent to kill, and AWDWISI." The Fourth Circuit in Townsend declined to adopt this interpretation. It took the position that the statement relied upon by Mr. Townsend was dicta. 886 F.3d at 446-447.

In the instant case, the District Court Judge, applying the categorical approach, found that the North Carolina Supreme Court's position in State v. Jones as enunciated above, was dicta, and therefore did not follow it. While the Fourth Circuit opinion herein did not note the District Court's similar interpretation of State v. Jones, it affirmed her decision based on its own decision in State v. Townsend.

It is respectfully urged that the above reasoning in Jones is more than mere dicta, and that the District Court and Fourth Circuit were obligated to follow the North Carolina Supreme Court's construction of its state statutes. See United States v. Henriquez, 757 F.3d 144, 148 (4th Cir. 2014), citing

Johnson v. Frankell, 520 U.S. 911, 916, 117 S.Ct. 1800, 1803-1804, 138 L.Ed.2d 108 (1997).

State v. Jones was a tragic case where the intoxicated defendant struck a vehicle occupied by six Wake Forest University students head on, killing two of them and seriously injuring three others. The issue was whether the assault with a deadly weapon inflicting serious injury convictions could serve as underlying felonies for the first-degree murder convictions. The Supreme Court held they could not, noting it was aware of no circumstance in which culpable or criminal negligence has served to satisfy the intent element of first-degree murder, a capital offense in North Carolina. The North Carolina Supreme Court addressed this as follows:

> "From the outset, we recognize that our analysis of defendant's conviction for AWDWISI demonstrates that culpable or criminal negligence may be used to satisfy the intent requisites for certain dangerous felonies, such as manslaughter, assault with a deadly weapon with intent to kill and AWDWISI. *See* N.C.G.S. § 14-32; *Eason*, 242 N.C. at 65, 86 S.E.2d at 778; *State v. Sudderth,* 184 N.C. 753, 755, 114 S.E. 828, 829 (1922). However, we are aware of no circumstance in which such negligence has served to satisfy the intent element of first-degree murder, a capital offense in North Carolina. Moreover, in interpreting our state's homicide statute, N.C.G.S. § 14-17, we can find no language suggesting that the legislature either contemplated or intended such a result."

353 N.C. at 166, 538 S.E.2d at 923.

Jerry Scott Hill contends that the Jones case held that specific, actual intent on the part of the perpetrator was necessary to support a first-degree murder conviction but that culpable or criminal negligence could not. However Jones further held that culpable or criminal negligence may satisfy the intent requisites of

lesser dangerous felonies such as manslaughter, assault with a deadly weapon with intent to kill, and assault with a deadly weapon inflicting serious injury. Mr. Hill therefore contends that Jones attempted to make this distinction clear, and therefore the reference to "dicta" was inappropriate.

It is respectfully urged that under the categorical approach and the North Carolina Supreme Court's decision in State v. Jones, a conviction for North Carolina AWDWIKISI can be sustained on a showing of culpable negligence, and therefore would not qualify as a violent felony under ACCA. Petitioner prays that this Court allow his petition to consider this issue.

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO ALLOW A CERTIFICATE OF APPEALABILITY, IN FINDING THAT PETITIONER'S TWO PRIOR CONVICTIONS OF NORTH CAROLINA BREAKING OR ENTERING (B&E&L) WERE VIOLENT FELONIES UNDER ACCA BECAUSE THEY FIT THE GENERIC DEFINITION OF BURGLARY, AND IN DISMISSING THE APPEAL.

Petitioner Jerry Scott Hill respectfully contends that the District Court erred in finding that his two prior felony convictions for breaking or entering and larceny (B&E&L) qualified as violent felonies under the Armed Career Criminal Act (ACCA), and the Fourth Circuit Court of Appeals erred in dismissing this claim. Petitioner urges that the elements of B&E&L under North Carolina law are substantially less egregious than the elements of burglary, and more expansive than the generic definition of burglary, and therefore his prior B&E&L convictions should not have been classified as enumerated violent felonies. Furthermore, he urges that the certificate of appealability should have been expanded to include this very important issue.

Certificate of Appealability

Although the District Court Judge allowed a certificate of appealability on the assault with a deadly weapon with intent to kill inflicting serious injury prior conviction, she declined to issue a certificate of appealability on the two prior B&E&L convictions. Petitioner filed his opening brief on March 16, 2017. He did not file a separate motion to expand the certificate of appealability, however noted in the brief that such a motion would be filed if necessary. After the case came off abeyance earlier this year, the Government filed a motion to dismiss the appeal. Petitioner responded and filed a separate motion to expand the certificate of appealability.

In dismissing Mr. Hill's appeal, the Fourth Circuit held that where the District Court denies relief on the merits, as here, the movant must demonstrate that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong, citing Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). The Fourth Circuit then held that Petitioner could not make such a showing and accordingly denied his motion to expand the certificate of appealability.

Petitioner would respectfully call to this Court's attention its later decision in Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). This Court held that to obtain a certificate of appealability, a habeas petitioner must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to

deserve encouragement to proceed further. It further noted that the issuance of a certificate of appealability (COA) does not require showing that the appeal will succeed; and accordingly, a Court of Appeals should not decline application for a COA merely because it believes the applicant will not demonstrate entitlement to relief. 537 U.S. at 337, 123 S.Ct. at 1039-1040.

While this Court's decision in Johnson only invalidated the residual clause, it nonetheless affected the entire realm of violent felony definitions under the ACCA. It is urged that it opened the door for further scrutinization of the "use of force clause" and what is or is not an "enumerated offense". The reason this thorough examination is required impacts the primary goal of sentencing, to establish fair and uniform sentencing for offenders committing similar crimes and having similar backgrounds. In discussing the residual clause and apparent arbitrary enforcement, the Supreme Court in Johnson held:

> "We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law."

135 S.Ct. at 2557.

With the ever changing landscape regarding violent felonies under the ACCA, and in particular "burglary" in this instance, it is respectfully contended that the Fourth Circuit should have expanded the certificate of appealability in this case to address this issue. It is contended that Petitioner, as movant, demonstrated

that reasonable jurists would find the District Court's assessment of the constitutional claims clearly debatable, if not wrong.

A. Elements of B&E&L vs. Burglary.

The District Court based its decision on the Fourth Circuit opinion in United States v. Mungro, 754 F.3d 267 (4th Cir. 2014) (holding that North Carolina's offense of breaking or entering qualifies as generic burglary under the ACCA). Petitioner asked the Fourth Circuit to revisit Mungro. This invitation was declined by the refusal to expand the certificate of appealability and the dismissal of Petitioner's appeal as to this claim.

Petitioner contends that there are significant differences between breaking or entering offenses and burglary offenses under North Carolina law. One of the pivotal problems is defining the generic offense of burglary in the federal court when the 50 states each have their own definitions of what is generic or common law burglary.

The United States Supreme Court has defined the generic offense of burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 599, 110 S.Ct. 2143, 2158, 109 L.Ed.2d 607 (1990). Generic burglary does not include burglary of a boat or motor vehicle Shepard v. United States, 544 U.S. 13, 15-16, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005), or a "land, water, or air vehicle" Mathis v. United States, 579 U.S. ___, 136 S.Ct. 2243, 2250, 195 L.Ed.2d 604 (2016).

Compare the above definition of burglary to burglary in North Carolina. In United States v. Scheetz, 293 F.3d 175, 187 (4th Cir. 2002), the Fourth Circuit stated that under North Carolina state law, a burglary is defined under the common law. The common law of North Carolina defines burglary as the breaking and entering into an occupied dwelling in the nighttime with the intent to commit a felony therein. The Fourth Circuit quoted the North Carolina Supreme Court case of State v. Parker, 350 N.C. 411, 516 S.E.2d 106 (1999), cert. denied, 528 U.S. 1084, 120 S.Ct. 808, 145 L.Ed.2d 681 (2000). In State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996), the North Carolina Supreme Court defined the elements of first degree burglary as (1) the breaking (2) and entering (3) in the nighttime (4) into the dwelling house or sleeping compartment (5) of another (6) which is actually occupied at the time of the offense (7) with the intent to commit a felony therein. The Supreme Court in Singletary went on to note "[T]he law of burglary was designed to protect the habitation of men, where they repose and sleep, from meditated harm", quoting State v. Surles, 230 N.C. 272, 275, 52 S.E.2d 880, 882 (1949). 344 N.C. at 101, 472 S.E.2d at 899.

To categorize breaking or entering and larceny as a burglary, as the Fourth Circuit does in Mungro, misses the purpose and intent of the sentence enhancement under 18 U.S.C. § 924(e). (App. F). The purpose of the enhanced sentence is to provide a lengthier prison sentence for repeat offenders with prior convictions of violent felonies or serious drug offenses. Violent offenders should be those limited few who have felonies in their background that involve the use of physical force or

physical injury to another individual. The punishment for burglary in North Carolina under N.C.G.S. § 14-51 and § 14-52 (App. H, I) is substantially greater than the punishment for breaking or entering and larceny in North Carolina under N.C.G.S. § 14-54(a). (App. J.) The reason is that burglary involves breaking and entering of a "dwelling" in the "nighttime". If the dwelling is occupied it is first degree burglary, and if unoccupied it is second degree burglary. The reason burglary is so much more serious than ordinary breaking or entering is because it involves a personal abode, normally occupied, and a secretive, nighttime entering.

Because the elements of B&E&L under North Carolina law are substantially less egregious than the elements of burglary, and more expansive than the generic definition of burglary, Mr. Hill's B&E&L convictions should not have been classified as enumerated violent felonies.

B. The Applicability of United States v. Stitt.

The Fourth Circuit decision herein held that this Court's decision in United States v. Stitt, ___ U.S. ___, 139 S.Ct. 399, 202 L.Ed.2d 364 (2018), did not affect their prior holding in United States v. Mungro. Petitioner disagrees.

In Stitt this Court upheld ACCA enhancements for defendants with prior burglary convictions in Tennessee and Arkansas. It held that burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation qualifies as the enumerated violent felony of burglary. The key element in Stitt appeared to be whether the structure was habitable, not movable. It noted that Congress viewed burglary as an inherently dangerous crime because

burglary creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate, citing Taylor v. United States, 495 U.S. at 588, 110 S.Ct. at 2153. It further found that an offender that breaks into a mobile home, an RV, a camping tent, a vehicle, or another structure that is adapted for or customarily used for lodging runs a similar or greater risk of violent confrontation, citing United States v. Spring, 80 F.3d 1450, 1462 (10th Cir. 1996). Stitt, 139 S.Ct. at 406.

Jerry Scott Hill also contends that the North Carolina breaking or entering and larceny statute, N.C.G.S. § 14-54 is substantially more expansive than the generic definition of burglary. To be convicted of burglary in North Carolina (and it is contended generically) there must be a breaking element *and* an entering element, whereas the offense of felonious breaking *or* entering requires that the State only prove that *either* breaking *or* entering took place. See State v. Brown, 176 N.C. App. 72, 76, 626 S.E.2d 307, 312, cert. denied, 360 N.C. 538, 634 S.E.2d 221 (2006). The defendant in Brown was convicted of both felonious breaking or entering and first degree burglary. He argued on appeal that the trial court erred in denying his motions to dismiss for insufficiency of the evidence as to the burglary and felonious breaking or entering charges. In affirming his convictions, the North Carolina Court of Appeals outlined the elements as follows:

> "'The elements of burglary in the first degree are the breaking and entering, in the nighttime, into a dwelling house or a room used as a sleeping apartment, which is actually occupied at the time of the offense, with the intent to commit a felony therein.' *State v. Simpson*, 303 N.C. 439, 449, 279 S.E.2d 542, 548 (1981); *see also* N.C.

> Gen. Stat. § 14-51 (2005) (defining first degree burglary). The essential elements of felonious breaking or entering are '(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.' *State v. Williams*, 330 N.C. 579, 585, 411 S.E.2d 814, 818 (1992); *see also* N.C. Gen. Stat. § 14-54(a) (2005) (defining felonious breaking or entering). Although the offense of burglary includes both a breaking element and an entering element, *Simpson*, 303 N.C. at 449, 279 S.E.2d at 548, the offense of felonious breaking or entering requires that the State only prove that *either* breaking or entering took place. *State v. Myrick*, 306 N.C. 110, 114, 291 S.E. 2d 577, 579 (1982)."

176 N.C. App. at 76, 626 S.E.2d at 311-312.

Interestingly, the Fourth Circuit noted the difference between breaking *or* entering and breaking *and* entering in United States v. Carr, 592 F.3d 636 (4th Cir. 2010). The issue in Carr was whether the defendant's prior breaking or entering crimes were on occasions different from one another. Therefore the distinction between *and* and *or* was significant. The Fourth Circuit noted that in North Carolina the breaking of a store window with the requisite intent to commit a felony therein completes the offense, even though the defendant abandons his purpose without actually entering the building. A more complete explanation of this issue is recited below:

> "As an initial matter, we believe that Carr's argument rests on a faulty premise. Throughout his briefs, Carr refers to the 13 crimes as 'breaking and entering' and, as set forth above, he contends that it is factually possible for the crimes to have occurred simultaneously. However, as we have noted, Carr was actually convicted under § 14-54(a) of felonious breaking *or* entering. This is an important distinction because '[t]he essential elements of felonious breaking or entering are (1) the breaking *or* entering (2) of any building (3) with the intent to commit any felony or larceny therein.' *State v. Williams*, 330 N.C.

> 579, 411 S.E.2d 814, 818 (1992) (emphasis added). Thus, 'the crime described in § 14-54 allows conviction on a showing of 'breaking *or* entering,' not breaking *and* entering,' *United States v. Bowden*, 975 F.2d 1080, 1084 (4th Cir. 1992) (emphasis in original); and it is therefore complete upon *either* a breaking or an entry, *State v. Myrick*, 306 N.C. 110, 291 S.E.2d 577, 579 (1982). Moreover, it is immaterial whether the defendant actually completed the crime of larceny, *State v. Smith*, 66 N.C. App. 570, 312 S.E.2d 222, 225 (1984); *see also State v. Jones*, 272 N.C. 108, 157 S.E.2d 610, 611 (1967) ('The breaking of the store window with the requisite intent to commit a felony therein completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building.'). Thus, when Carr either broke into or entered each storage unit, his crime related to that unit was complete at that point regardless of whether he later returned to that unit."

592 F.3d at 644.

Carr was decided before Johnson, Mathis, and Stitt. The fact that North Carolina breaking or entering contemplates the offense in the disjunctive, necessarily expands the criminality beyond generic burglary which requires entry.

In Mathis v. United States, 136 S.Ct. at 2250, the Supreme Court decided that Iowa's burglary statute covered more conduct than generic burglary. The holding in Mathis was reaffirmed in United States v. Stitt, 139 S.Ct. at 407. Jerry Scott Hill urges that because North Carolina's felony breaking or entering statute may be violated without actually entering, it is broader and covers more conduct than generic burglary which requires that the structure, whatever it may be, be entered.

For the foregoing reasons, Petitioner Jerry Scott Hill respectfully contends that the Fourth Circuit erred in refusing to expand the certificate of appealability and dismissing the appeal on this ground. It further erred in failing to re-visit the decision in United States v. Mungro and finding that this Court's decision in United States v. Stitt was not applicable. North Carolina's B&E&L statute is more expansive than generic burglary and therefore should not be a violent felony under the ACCA. The Supreme Court needs to hear this issue.

CONCLUSION

For the foregoing reasons, Petitioner Jerry Scott Hill respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit affirming his judgment and sentence.

This the 30th day of August, 2019.

DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC
Counsel for Petitioner Jerry Scott Hill

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

****

JERRY SCOTT HILL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

****

ENTRY OF APPEARANCE

and

CERTIFICATE OF SERVICE

****

I, Rudolph A. Ashton, III, a member of the North Carolina State Bar, having been appointed to represent the Petitioner in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court in respect to this Petition for a Writ of Certiorari.

I, Rudolph A. Ashton, III, do swear or declare that on this date, the 30th day of August, 2019, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached motion for leave to proceed *in forma pauperis* and petition for a writ of certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing in an envelope containing the above documents in the United States mail properly addressed to each of them and

with first-class postage prepaid. The names and addresses of those served are as follows:

Jennifer P. May-Parker, AUSA
Phillip A. Rubin, AUSA
Office of the United States Attorney
150 Fayetteville Street, Suite 2100
Wells Fargo Building
Raleigh, NC 27601

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington DC 20530-0001

This the 30th day of August, 2019.

Respectfully submitted,

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Subscribed and Sworn to Before Me

This the 30th day of August, 2019.

TERESA K. LEWIS NOTARY PUBLIC CRAVEN COUNTY, NC

Notary Public

My Commission Expires: 03/19/2024

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6022

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY SCOTT HILL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:10-cr-00080-FL-1; 5:16-cv-00600-FL)

Submitted: June 3, 2019 Decided: June 6, 2019

Before GREGORY, Chief Judge, and WILKINSON and KING, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Rudolph A. Ashton, III, DUNN PITTMAN SKINNER & CUSHMAN, PLLC, New Bern, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Phillip A. Rubin, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jerry Scott Hill appeals from the denial of relief on his authorized successive 28 U.S.C. § 2255 (2012) motion in which he challenged his sentence under the Armed Career Criminal Act. Hill was convicted by a jury of possessing a firearm as a convicted felon, 18 U.S.C. § 922(g) (2012), and was sentenced as an armed career criminal to 262 months' imprisonment.

Hill now claims that his prior North Carolina convictions for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and breaking and entering no longer qualify as violent felonies in the wake of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court granted a certificate of appealability as to Hill's challenge to the use of his AWDIKISI conviction as a predicate offense for his ACCA enhancement. In *United States v. Townsend*, 886 F.3d 441, 442 (4th Cir. 2018), this court determined that a "prior conviction for North Carolina [AWDWIKISI] is categorically a violent felony under the force clause of the ACCA." Thus, under *Townsend*, Hill's AWDWIKISI conviction was properly counted as an ACCA predicate offense. Because we find that Hill's appeal as to this issue is not "manifestly unsubstantial," *see* 4th Cir. R. 27(f)(1), we deny the Government's motion for summary affirmance. Nevertheless, we affirm the district court's ruling as to this issue.

Turning to Hill's claim that the district court improperly counted his two convictions for breaking and entering as violent felonies for purposes of the ACCA, Hill may not appeal the district court's order dismissing this claim unless a circuit justice or

judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). In cases where the district court denies relief on the merits, as here, the movant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Because the Supreme Court's decision in *United States v. Stitt*, 139 S. Ct. 399 (2018) does not affect our prior holding in *United States v. Mungro*, 754 F.3d 267, 272 (4th Cir. 2014) (holding that North Carolina's offense of breaking or entering qualifies as generic burglary under the ACCA), we find that Hill cannot make such a showing. Accordingly, we deny Hill's motion to expand the certificate of appealability and dismiss his appeal as to this claim. In light of this disposition, we deny the Government's motion to dismiss as moot. *Stitt*, 139 S. Ct. at 407. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART; DISMISSED IN PART

App. B

FILED: June 6, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6022
(5:10-cr-00080-FL-1)
(5:16-cv-00600-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERRY SCOTT HILL

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part. A certificate of appealability is denied and the appeal is dismissed in part.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

App. C

FILED: July 29, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6022
(5:10-cr-00080-FL-1)
(5:16-cv-00600-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERRY SCOTT HILL

Defendant - Appellant

MANDATE

The judgment of this court, entered June 6, 2019, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:10-CR-80-FL-1
No. 5:16-CV-600-FL

JERRY SCOTT HILL,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence, made pursuant to 28 U.S.C. § 2255 (DE 114), which challenges petitioner's Armed Career Criminal Act (ACCA) sentencing enhancement in light of Johnson v. United States, 135 S. Ct. 2551 (2015). Also before the court is the government's motion to dismiss, made pursuant to Federal Rule of Civil Procedure 12(b)(6). (DE 118). The issues raised are ripe for ruling. For the reasons that follow, the court denies petitioner's motion to vacate and grants the government's motion to dismiss.

BACKGROUND

On February 3, 2011, petitioner was convicted following a jury trial of possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924. Prior to sentencing, the United States Probation Office prepared and published a Presentence Investigation Report ("PSR"), which describes in detail petitioner's background, including his criminal history. Based on petitioner's criminal history, the PSR determined that petitioner was an "armed career criminal" and that his statutory minimum sentence was 15 years, under 18 U.S.C. § 924(e)(1). (DE 65, ¶¶ 48, 52). In petitioner's criminal history, the PSR identified two North Carolina felony convictions for "Breaking

and Entering," and one North Carolina felony conviction for "Assault With a Deadly Weapon With Intent to Kill Inflicting Serious Injury." (Id. ¶¶ 11, 14, 18).

The court sentenced petitioner on April 29, 2011, to a term of imprisonment of 262 months, adopting the PSR without change. (See DE 72, 73). Petitioner appealed, and the Fourth Circuit affirmed.

Petitioner filed the instant motion to vacate on June 27, 2016, arguing that he can no longer be classified as an Armed Career Criminal because he does not have qualifying predicate convictions following Johnson. The government moves to dismiss on the basis that petitioner qualifies as an Armed Career Criminal on the basis of petitioner's convictions for breaking and entering, and assault with a deadly weapon with intent to kill inflicting serious injury.

COURT'S DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." § 2255(a). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." § 2255(b).

B. Analysis

1. Breaking and Entering

Johnson invalidated the "residual clause" contained in the definition of "violent felony" in the ACCA. 135 S.Ct. at 2555-56, 2563 (quoting 18 U.S.C. § 924(e)(2)(B)). Johnson, however, "does not call into question application of the [ACCA] to the four enumerated offenses or the remainder of the [ACCA's] definition of a violent felony." Id. at 2563. One of those enumerated offenses that constitutes a "violent felony" under the ACCA is "burglary." 18 U.S.C. § 924(e)(2)(B)(ii). It is well-established in this circuit that the North Carolina offense of "breaking and entering" qualifies as burglary. United States v. Mungro, 754 F.3d 267, 268, 272 (4th Cir. 2014). Accordingly, Johnson has no impact on the status of petitioner's breaking and entering conviction as an Armed Career Criminal predicate.

Petitioner argues, nonetheless, that this court should revisit the determination made in Mungro that the North Carolina offense of breaking and entering qualifies as burglary. This argument fails for multiple reasons. First, this argument, which could have been raised prior to Johnson, is in effect a separate claim for relief that is procedurally defaulted and time-barred. See 28 U.S.C. § 2255(f); United States v. Frady, 456 U.S. 152, 165 (1982).[1] Second, this court is bound by Mungro, regardless of petitioner's contention that it was wrongly decided. See 754 F.3d at 268, 272 (holding that the North Carolina offense of "breaking or entering" "qualif[ies] as burglary and,

[1] Petitioner contends that the Fourth Circuit in Mungro suggested in footnote one in that opinion that "breaking and entering" qualified as a violent felony under the residual clause. Footnote one of Mungro, however, does not so state. Rather, it states in full: "The term ['violent felony'] also covers any offense that 'has as an element the use, attempted use, or threatened use of physical force against the person of another,' 'is ... 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)." 754 F.3d at 268 n. 1. The Fourth Circuit did not apply the residual clause to determine whether "breaking and entering" qualified as a violent felony. See id.

thus, as a predicate offense under the ACCA"). Petitioner's suggestion that the Fourth Circuit erroneously interpreted North Carolina law in existence at the time of Mungro may be directed more properly to the Fourth Circuit itself.

Petitioner contends that the reasoning in Mungro is called into question by another Fourth Circuit panel opinion decided six days before Mungro, in United States v. Martin, 753 F.3d 485 (4th Cir. 2014). Martin, however, is inapposite, because the government in that case conceded that the offense at issue, Maryland fourth degree burglary, under Md. Code Ann., Crim. Law § 6-205(a), did not constitute the enumerated crime of burglary of a dwelling. 753 F.3d at 488. The court analyzed the offense under the residual clause, and determined that it did not qualify as an ACCA predicate. Id. at 494.

In sum, petitioner's challenge to use of his breaking and entering convictions as ACCA predicates is both procedurally barred and without merit.

2. Assault With a Deadly Weapon With Intent to Kill Inflicting Serious Injury

The court turns next to petitioner's contention that his prior conviction for "Assault With a Deadly Weapon With Intent to Kill Inflicting Serious Injury" set forth at paragraph 18 of the PSR (hereinafter "AWDWIKISI"), does not constitute a "violent felony" under the ACCA.

Before Johnson, the Fourth Circuit regularly held or stated that various North Carolina assault with deadly weapon convictions constituted violent felonies under the ACCA, either based upon the residual clause or without discussing in isolation the remainder of the ACCA definition of "violent felony." See, e.g., United States v. Boykin, 669 F.3d 467, 469 (4th Cir. 2012) (stating predicate conviction for "assault with a deadly weapon inflicting serious injury" is a violent felony for purposes of the ACCA); United States v. Williams, 187 F.3d 429, 430 (4th Cir. 1999) (holding

that "assault with a deadly weapon with the intent to kill" is a violent felony under the ACCA); see also United States v. Brady, 438 F. App'x 191, 193 (4th Cir. 2011) (holding that "assault with a deadly weapon inflicting serious injury" is a violent felony under the ACCA); United States v. Harris, 458 F. App'x 297, 300 (4th Cir. 2011) (holding that "assault with a deadly weapon on a government official" is an ACCA predicate).

Where the residual clause of the ACCA now is unavailable after Johnson, the government contends that AWDWIKISI constitutes a violent felony instead under the "use of force" provision of the ACCA. Under the "use of force" provision, a prior conviction may count as a "violent felony" under the ACCA if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). "Use of physical force" against another requires "a higher degree of intent than negligent or merely accidental conduct." Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). Likewise, "[r]ecklessness, like negligence, is not enough to support a determination that a crime is a 'crime of violence.'" United States v. Vinson, 805 F.3d 120, 125 (4th Cir. 2015) (quotations omitted); see also United States v. Travis, 149 F. Supp. 3d 596, 599 (E.D.N.C. 2016) ("defendant must have purposefully or knowingly applied the requisite force against his victim; negligently or recklessly applied force falls outside the scope of the 'use of physical force' provision"). In addition, "the phrase 'physical force' means violent force – that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010).

To determine if petitioner's AWDWIKISI conviction constitutes a "violent felony" under the "use of force" provision, the court must apply "the familiar categorical approach," under which the court must "look only to the fact of conviction and the statutory definition of the prior offense,

focusing on the elements of the prior offense rather than the conduct underlying the conviction." Vinson, 805 F.3d at 123 (internal quotations omitted). In analyzing the elements of the offense at issue, the court may look also to relevant interpretations of the offense by the North Carolina Supreme Court. See id. at 125. The court may also consider the North Carolina pattern jury instructions. See id. at 126; United States v. Gardner, 823 F.3d 793, 802-803 (4th Cir. 2016).

The statute criminalizing AWDWIKISI states that "Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon." N.C. Gen. Stat. § 14-32(a). "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." State v. Tirado, 358 N.C. 551, 579 (2004) (citing N.C. Gen. Stat. § 14-32(a)); see N.C. Pattern Instructions – Crim. 208.10 (same elements).

A conviction of the AWDWIKISI offense "requires proof of a specific intent or mental state." State v. Tate, 294 N.C. 189, 196 (1978) (quotations omitted); see State v. Irick, 291 N.C. 480, 502 (1977) (stating that AWDWIKISI is "a specific intent crime"). Thus, "a specific intent to kill [is] a necessary element in the proof" of an AWDWIKISI conviction, and it is "the distinguishing characteristic between [AWDWIKISI] and the lesser offense of assault with a deadly weapon." State v. Parks, 290 N.C. 748, 754 (1976).

This court previously has held that the offense of assault with a deadly weapon inflicting serious injury ("AWDWISI"), a separate offense under N.C. Gen. Stat. § 14-32(b), is not a violent felony under the ACCA, because such offense lacks a specific intent element, and requires only "culpable or criminal negligence" for a conviction. See United States v. Geddie, 125 F. Supp. 3d

592, 599-601 (E.D.N.C. 2015). AWDWIKISI, by contrast, contains that missing element of specific intent to kill. See, e.g., Tirado, 358 N.C. at 579. As such, AWDWIKISI meets the requirement of the "use of force" provision that force must be "used" with "a higher degree of intent than negligent or merely accidental conduct." Leocal, 543 U.S. at 9; see Geddie, 125 F. Supp. 3d. at 601 (suggesting that force must be "used" with "at an irreducible minimum, a reckless state of mind").

In addition, the "use of a deadly weapon" element of the AWDWIKISI offense, coupled with the "intent to kill," Tirado, 358 N.C. at 579, also meets the requirement that a qualifying offense must involve "force capable of causing physical pain or injury to another person," Johnson, 559 U.S. at 140. See United States v. Smith, 638 F. App'x 216, 219 (4th Cir. 2016) (holding that North Carolina "malicious assault in a secret manner" offense involving "the use of a 'deadly weapon' with 'intent to kill,' entails 'force capable of causing physical pain or injury to another person,' . . . and therefore qualifies as a 'violent felony' under the force clause").

In sum, petitioner's AWDWIKISI conviction properly constitutes a predicate offense under the ACCA.

Petitioner argues, nonetheless, that AWDWIKISI does not constitute a violent felony because such a conviction can be obtained by a showing of culpable or criminal negligence. In support of this proposition, petitioner cites a statement by the North Carolina Supreme Court in United States v. Jones, 353 N.C. 159 (2000), that "culpable or criminal negligence may be used to satisfy the intent requisites for certain dangerous felonies, such as manslaughter, assault with a deadly weapon with intent to kill and AWDWISI." State v. Jones, 353 N.C. 159, 166 (2000). This statement is inapposite for several reasons.

First, the statement in Jones is dicta. In Jones, the court held that the offense of AWDWISI under consideration in that case lacked the requisite intent to qualify as a predicate for felony murder. See 353 N.C. at 169. The court was not presented with an offense of AWDWIKISI, at issue here. See id. at 164. Second, as set forth above, North Carolina Supreme Court cases prior to Jones state unequivocally that AWDWIKISI is a "specific intent" crime, requiring specific "intent to kill," not mere carelessness, culpable negligence, or recklessness. See Parks, 290 N.C. at 754; Irick, 291 N.C. at 502; Tate, 294 N.C. at 196. Third, later in the same opinion in Jones, the Supreme Court seemingly qualified its earlier statement in dicta, by stating more specifically that crimes including "assault with a deadly weapon with intent to kill or with intent to inflict serious injury, . . . whether individually typed as specific intent or general intent in nature, have required actual intent on the part of the perpetrator." Jones, 353 N.C. at 168. Thus, in the end, Jones does not detract from the conclusion that AWDWIKISI meets the mens rea requirements for a violent felony under the ACCA.

Petitioner also cites to the Fourth Circuit opinion in Vinson for the proposition that "North Carolina law permits convictions for all forms of assault . . . in cases where the defendant's conduct does not rise even to the level of recklessness." 805 F.3d at 126. Vinson, however, like Jones, concerned a different offense, assault on a female, under N.C. Gen. Stat. § 14-33(c)(2). See id. at 124. Vinson did not address in any respect assaults with deadly weapons with intent to kill. See id. at 124-126. Accordingly, the holding in Vinson is inapposite. Moreover, in light of the limited nature of the court's holding in Vinson, it appears the Fourth Circuit's reference in dicta to "all forms of assault," properly should be read as a reference to all forms of generic assault, which, as noted in Vinson, comprise "three different definitions" or "formulations": (1) "attempted battery"

formulation, (2) "show of violence" formulation, and (3) "completed battery" formulation. See id. at 124-125.

Indeed, as noted above, this court and the Fourth Circuit have since Vinson determined that certain forms of North Carolina assault offenses do qualify as violent felonies under the ACCA. See Smith, 638 F. App'x at 219 (holding that North Carolina "malicious assault in a secret manner" offense constitutes ACCA predicate); United States v. McMillian, 652 F. App'x 186, 193 (4th Cir. 2016) (holding that Vinson does not control determination of whether North Carolina "assault by strangulation" constitutes an ACCA predicate); Travis, 149 F. Supp. 3d at 600-01 (same). While the unpublished Fourth Circuit decisions are not binding on this court, they are nonetheless persuasive.

In sum, petitioner's AWDWIKISI prior conviction (PSR ¶18) qualifies as an ACCA predicate offense. Therefore, where petitioner has three qualifying predicate convictions, petitioner's challenge to his Armed Career Criminal status is without merit, and petitioner's § 2255 motion must be dismissed as a matter of law.

C. Certificate of Appealability

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. See Miller–El v. Cockrell, 537 U.S. 322, 336–38 (2003); Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of

appealability is warranted on the issue of whether AWDWIKISI constitutes a violent felony under the ACCA.

CONCLUSION

Based on the foregoing, the court DENIES petitioner's motion to vacate (DE 114) and GRANTS the government's motion to dismiss petitioner's motion to vacate. (DE 118). The court GRANTS a certificate of appealability. The clerk is DIRECTED to close this case.

SO ORDERED, this the 8th day of December, 2016.

LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

JERRY SCOTT HILL
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:10-CR-80-1FL
Civil Case No. 5:16-CV-600-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the government's motion to dismiss.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on December 8, 2016, that the court denies the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss is granted. A certificate of appealability is granted.

This Judgment Filed and Entered on December 8, 2016, with service on

Seth Morgan Wood (via CM/ECF Notice of Electronic Filing)
James M. Ayers, II (via CM/ECF Notice of Electronic Filing)

December 8, 2016

Julie Richards Johnston, Clerk

/s/ Susan Tripp
By: Susan Tripp, Deputy Clerk

mortars, antitank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern;

"(9) that the existing licensing system under the Federal Firearms Act [former sections 901 to 910 of Title 15] does not provide adequate license fees or proper standards for the granting or denial of licenses, and that this has led to licenses being issued to persons not reasonably entitled thereto, thus distorting the purposes of the licensing system.

"(b) The Congress further hereby declares that the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title [enacting this chapter and repealing sections 901 to 910 of Title 15]."

Administration and Enforcement by Attorney General

Pub.L. 90-618,Title I, § 103, Oct. 22, 1968, 82 Stat. 1226, as amended Pub.L. 107-296, Title XI, § 1112(s), Nov. 25, 2002, 116 Stat. 2279, provided that: "The administration and enforcement of the amendment made by this title [amending this chapter] shall be vested in the Attorney General."

Section 903 of Pub.L. 90-351 provided that: "The administration and enforcement of the amendment made by this title [enacting this chapter and provisions set out as notes under this section] shall be vested in the Secretary of the Treasury."

Modification of Other Laws

Section 104 of Pub.L. 90-618 provided that: "Nothing in this title or the amendment made thereby [amending this chapter] shall be construed as modifying or affecting any provision of—

"(a) the National Firearms Act (chapter 53 of the Internal Revenue Code of 1954) [section 5801 et seq. of Title 26];

"(b) section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934), as amended, relating to munitions control; or

"(c) section 1715 of title 18, United States Code, relating to nonmailable firearms."

Section 904 of Pub.L. 90-351 provided that: "Nothing in this title or amendment made thereby [enacting this chapter and provisions set out as notes under this section] shall be construed as modifying or affecting any provision of—

"(a) the National Firearms Act (chapter 53 of the Internal Revenue Code of 1954); or

"(b) section 414 of the Mutual Security Act of 1954 (22 U.S.C. 1934), as amended, relating to munitions control; or

"(c) section 1715 of title 18, United States Code, relating to nonmailable firearms."

§ 922. Unlawful acts

(a) It shall be unlawful—

(1) for any person—

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-

barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless—

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General; [1]

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of

this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are .....

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who [2] has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment—

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm—

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection—

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Attorney General, that is—

(i) constructed of, during the 12–month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17–4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

[Amendment by Pub.L. 105–277, Div. A, § 101(b) [Title I, § 119(d)], effective 180 days after Oct. 21, 1998, see Div. A, § 101(b) [Title I, § 119(e)] of Pub.L. 105–277, set out as a note under 18 U.S.C.A. § 921.]

§ 924. Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) 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).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in further-

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS

ARTICLE 14

Burglary and Other Housebreakings

Section

United States Code Annotated

Embezzlement and theft, federal crimes and offenses, see 18 U.S.C.A. § 641 et seq.
Robbery and burglary, federal crimes and offenses, see 18 U.S.C.A. § 2111 et seq.

§ 14–51. First and second degree burglary

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question.

Amended by Laws 1969, c. 543, § 1.

Cross References

DNA sample required for DNA analysis upon arrest, see § 15A–266.3A.

Research References

Encyclopedias

Strong's N.C. Index 4th, Burglary and Unlawful Breakings § 6, Use of Force to Prevent or Terminate Forcible or Unlawful Entry.

Strong's N.C. Index 4th, Burglary and Unlawful Breakings § 10, Dwelling House.

Strong's N.C. Index 4th, Homicide § 102, Applicability of Doctrine of Retreat to Person in Own Home or Place of Business; Where Right to Stand Ground Applies.

§ 14–52. Punishment for burglary

Burglary in the first degree shall be punishable as a Class D felony, and burglary in the second degree shall be punishable as a Class G felony.

Amended by Laws 1949, c. 299, § 2; Laws 1973, c. 1201, § 3; Laws 1977, c. 871, § 2; Laws 1979, c. 672; Laws 1979, c. 760, § 5; Laws 1979 (2nd Sess.), c. 1316, § 47; Laws 1981, c. 63, § 1, Laws 1981, c. 179, § 14; Laws 1993, c. 539, § 1151, eff. Oct. 1, 1994; Laws 1994, (1st Ex. Sess.), c. 24, § 14(c), eff. March 26, 1994.

Historical and Statutory Notes

Laws 1993, c. 539, § 1359, provides:

"This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." [Amended by Laws 1994, Ex.Sess., c. 24, § 14(c), eff. March 26, 1994.]

Laws 1993, c. 539, was ratified July 24, 1993.

Cross References

Felony sentencing and punishment, see § 15A–1340.10 et seq.
Forfeiture of gain acquired through commission of felony, see § 14–2.3.
Forfeiture of licensing privileges after felony conviction, see § 15A–1331.1.

Library References

Burglary ⇐1.
Criminal Law ⇐27.
Westlaw Topic Nos. 67, 110.

C.J.S. Burglary §§ 1 to 4, 11 to 24, 28 to 48.
C.J.S. Criminal Law §§ 12, 14 to 16.

Research References

Encyclopedias

Strong's N.C. Index 4th, Burglary and Unlawful Breakings § 183, Generally; Authority.

Notes of Decisions

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1. Cruel or unusual punishment

Imposition of life imprisonment upon conviction of first-degree burglary was within limits affixed by statute and was not cruel and unusual in a constitutional sense. State v. Sweezy, 1976, 230 S.E.2d 524, 291 N.C. 366. Burglary ⇐ 49; Sentencing And Punishment ⇐ 1486

Single sentence of 30 years to life for felonious escape and second-degree burglary, being within the range authorized by the burglary statute, did not constitute cruel and unusual punishment. State v. Edwards, 1973, 193

clearly separate and distinct crimes, neither one a lesser included offense of the other. State v. Smith, 1984, 312 S.E.2d 222, 66 N.C.App. 570, review denied 315 S.E.2d 708, 310 N.C. 747. Indictment And Information ⇐ 191(2); Indictment And Information ⇐ 191(5)

Elements of felonious breaking or entering include: (1) breaking or entering a building (2) with intent to commit any felony or larceny therein. State v. Smith, 1984, 312 S.E.2d 222, 66 N.C.App. 570, review denied 315 S.E.2d 708, 310 N.C. 747. Burglary ⇐ 2

A defendant convicted of felonious breaking or entering need not have completed the crime of larceny. State v. Smith, 1984, 312 S.E.2d 222, 66 N.C.App. 570, review denied 315 S.E.2d 708, 310 N.C. 747. Burglary ⇐ 2

Legislature intended to make breaking or entering with intent to commit larceny or any felony a more serious crime than breaking or entering without such intent and to make larceny committed pursuant to a breaking or entering a more serious crime than simple larceny. State v. Smith, 1984, 312 S.E.2d 222, 66 N.C.App. 570, review denied 315 S.E.2d 708, 310 N.C. 747. Burglary ⇐ 3; Larceny ⇐ 1

2. Instructions

An instruction to the jury "that if they believe the defendants, however they may have got into the house, broke out of it, they were guilty," is erroneous because it took from the consideration of the jury the question whether defendants were guilty of the breaking and entering charged in the indictment, and because the indictment contained no charge of a breaking out of the house. State v. McPherson, 1874, 70 N.C. 239, 16 Am.Rep. 769. Burglary ⇐ 46(3)

§ 14-54. Breaking or entering buildings generally

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

(a1) Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.

(b) Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

Amended by Laws 1955, c. 1015; Laws 1969, c. 543, § 3; Laws 1979, c. 760, § 5; Laws 1979 (2nd Sess.), c. 1316, § 47; Laws 1981, c. 63, § 1, Laws 1981, c. 179, § 14; Laws 1993, c. 539, § 26, eff. Oct. 1, 1994; Laws 1994, (1st Ex.Sess.), c. 24, § 14(c), eff. March 26, 1994; S.L. 2013-95, § 1, eff. Dec. 1, 2013.

Historical and Statutory Notes

Laws 1993, c. 539, § 1359, provides:

"This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." [Amended by Laws 1994, Ex.Sess., c. 24, § 14(c), eff. March 26, 1994.]

Laws 1993, c. 539, was ratified July 24, 1993.

S.L. 2013-95, § 1, inserted subsec. (a1).

S.L. 2013-95, § 2, provides:

"This act becomes effective December 1, 2013, and applies to offenses committed on or after that date."

Cross References

Felony sentencing and punishment, see § 15A-1340.10 et seq.
Forfeiture of gain acquired through commission of felony, see § 14-2.3.
Forfeiture of licensing privileges after felony conviction, see § 15A-1331.1.
Misdemeanor sentencing and punishment, see § 15A-1340.20 et seq.