

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DALTON ERIC CRUTCHFIELD,

Petitioner,

v.

No. 1:16-cv-01167-JDB-egb
No. 1:11-cr-10010-JDB-1

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING MOTION TO VACATE, SET ASIDE, AND CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

A motion to vacate, set aside, and correct sentence pursuant to 28 U.S.C. § 2255 was filed by the Petitioner, Dalton Eric Crutchfield, on June 17, 2016 (“Petition”).¹ (Case Number (“No.”) 1:16-cv-01167-JDB-egb, Docket Entry (“D.E.”) 1.) On September 1, 2017, the United States Probation Office issued a memorandum addressing, among other things, the impact of the recent decision of the Sixth Circuit Court of Appeals in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), on this case. On September 14, 2017, the Court directed the Government to respond to the Petition in light of *Stitt*. (*Id.*, D.E. 7.) The Government responded the following day, conceding that, in light of the decision, the relief sought by Crutchfield was warranted. (*Id.*, D.E. 8.) For good cause shown, the Petition is GRANTED. Further, the Clerk is DIRECTED to enter an order of production of the Petition and set a resentencing hearing.

¹ This filing was made by the Assistant Federal Defender on Petitioner's behalf. A second petition was filed by Crutchfield *pro se* on June 27, 2016. (D.E. 5.)

IT IS SO ORDERED this 25th day of September 2017.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

DALTON ERIC CRUTCHFIELD,

Petitioner,

CASE NUMBER: 1:16-1167-JDB-egb

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 9/25/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and this case is hereby closed.

Pursuant to this ruling, a re-sentencing proceeding will be set in Criminal Case No. 11-10010-01.

APPROVED:

s/J. Daniel Breen
United States District Judge

**THOMAS M. GOULD
CLERK**

**BY: s/ Evelyn Cheairs
DEPUTY CLERK**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

PATRICK JACKSON,)	
)	
Movant,)	
)	
V.	)	No. 16-cv-2430-SHL-cgc
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**ORDER GRANTING MOTION UNDER 28 U.S.C. § 2255 TO VACATE,
SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY**

Before the Court are Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 1), filed on June 16, 2016, and his Final Corrected Motion to Grant Motion to Vacate and to Set for Re-Sentencing Hearing (ECF No. 8), filed June 29, 2017. Movant contends that he is entitled to re-sentencing in light of the Sixth Circuit's opinion in United States v. Stitt, 2017 WL 2766326 (6th Cir. June 27, 2017), which held that a Tennessee aggravated burglary conviction is not a violent felony under the Armed Career Criminal Act ("ACCA"). Movant's sentence was enhanced under the ACCA. (Id.)

On June 30, 2017, the United States filed a Response (ECF No. 9), conceding that Movant's predicate offenses no longer qualify him as an armed career criminal, and that he is thus entitled to re-sentencing. The Court agrees with the parties and finds that Movant's sentence was enhanced under the Armed Career Criminal Act ("ACCA") based on prior convictions for aggravated burglary in Tennessee. Therefore, pursuant to Stitt, the Court hereby **GRANTS** the Motions and **VACATES** Movant's sentence.

The resentencing hearing shall occur on **Friday, August 18, 2017, at 10:30 a.m.** The Court **DIRECTS** the probation office to prepare a revised presentence report for Movant in advance of the resentencing hearing, and the Court **DIRECTS** the Government to issue a writ to secure the appearance of Mr. Rogers at the resentencing hearing.

IT IS SO ORDERED, this 7th day of July, 2016.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

PATRICK JACKSON,)	
)	
Petitioner,)	
)	
v.	)	No. 16-cv-2430-SHL-cgc
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (ECF No. 1), filed June 16, 2016,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Order Granting § 2255 Petition (ECF No. 10) filed July 7, 2017, Petitioner's claim is **GRANTED**, and a resentencing was held on August 28, 2017.

APPROVED:

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

August 30, 2017
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JOSEPH KEMMERLING,

Petitioner,

v.

No. 1:16-cv-01151-JDB-egb
No. 1: 14-cr-10040-JDB-1

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

A motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 was filed by the Petitioner, Joseph Kemmerling, on June 16, 2016 (the “Petition”). (Case Number 16-cv-1151, Docket Entry (“D.E.”) 1.) On June 30, 2017, Kemmerling filed an emergency motion requesting an immediate ruling for relief under Section 2255 pursuant to the recent decision of the Sixth Circuit Court of Appeals in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017). (*Id.*, D.E. 7.) The United States Probation Office issued a memorandum addressing *Stitt* on July 27, 2017. The Court ordered on October 3, 2017, that the Government respond to the Petition in light of *Stitt*. (*Id.*, D.E. 8.) The Government submitted its response on October 16, 2017, conceding that, in light of the Sixth Circuit’s ruling, the relief sought by Kemmerling may be warranted. (*Id.*, D.E. 9.)

For good cause shown, the Petition is GRANTED. Further, the Clerk is DIRECTED to enter an order of production and set a resentencing hearing in case number 1:14-cr-10040-JDB-1.

IT IS SO ORDERED this 20th day of October 2017.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

JOSEPH KEMMERLING,

Petitioner,

CASE NUMBER: 1:16-1151-JDB-egb

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 10/20/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in the criminal case file number 14-10040. This case is hereby closed.

APPROVED:

s/J. Daniel Breen
United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DEMARCUS ROGERS,)	
)	
Movant,)	
)	
v.	)	No. 16-cv-2492-SHL-cgc
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**ORDER GRANTING MOTION UNDER 28 U.S.C. § 2255 TO VACATE,
SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
FEDERAL CUSTODY**

Before the Court are Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 1), filed on June 23, 2016, and his Motion for Expedited Sentencing Hearing or Alternatively, to Release Movant on his Own Recognizance from Prison while his Sentencing Hearing is Pending (ECF No. 12), filed June 30, 2017. Movant contends that he is entitled to immediate release in light of the Sixth Circuit's opinion in United States v. Stitt, 2017 WL 2766326 (6th Cir. June 27, 2017), which held that a Tennessee aggravated burglary conviction is not a violent felony under the Armed Career Criminal Act ("ACCA"). Movant's sentence was enhanced under the ACCA. (ECF No. 12.)

On June 30, 2017, the United States filed a Response (ECF No. 13), conceding that Movant's predicate offenses no longer qualify him as an armed career criminal, and that he is thus entitled to immediate release. The Court agrees with the parties and finds that Movant's sentence was enhanced under the Armed Career Criminal Act ("ACCA") based on a prior conviction for aggravated burglary in Tennessee. Therefore, pursuant to Stitt, the Court hereby **GRANTS** the Motions and **VACATES** Movant's sentence.

The resentencing hearing shall occur on **July 28, 2017**, at **1:00 p.m.** The Court **DIRECTS** the Government to issue a writ to secure the appearance of Mr. Rogers, and **DIRECTS** the United States Marshals Service to insure that Mr. Rogers is transported to the jurisdiction in a timely manner.

IT IS SO ORDERED, this 6th day of July, 2016.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DEMARCUS ROGERS,)	
)	
Movant,)	
)	
v.	)	No. 16-cv-2492-SHL-cgc
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (ECF No. 1), filed June 23, 2016,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Order Granting § 2255 Petition (ECF No. 15) filed July 6, 2017, Movant's claim is **GRANTED**, and a resentencing was held on July 28, 2017.

APPROVED:

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

December 13, 2017
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

OWEN LEWIS FINCH,)	
)	
Movant,)	
)	
VS.	)	Civ. No. 15-1235-JDT-egb
	)	Crim. No. 07-10099-JDT
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER GRANTING MOTION PURSUANT TO 28 U.S.C. § 2255

On February 14, 2008, Owen Lewis Finch entered a guilty plea to one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g). (No. 07-10099, Crim. ECF Nos. 24, 25 & 26.) At the sentencing hearing this Court determined, based in part on prior Tennessee convictions for aggravated burglary and attempted aggravated burglary, that Finch qualified for an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *See also* U.S.S.G. § 4B1.4. Consequently, he was sentenced to a 180-month term of imprisonment and a three-year term of supervised release. (No. 07-10099, Crim. ECF Nos. 31, & 32.) In accordance with the plea agreement, Finch did not file an appeal.

On September 21, 2015, Finch filed a *pro se* § 2255 motion, contending that his sentence is unlawful under the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 1.) Counsel has made an appearance on Finch's behalf. (ECF No. 7.)

In *Johnson*, the Supreme Court held that the residual clause of the ACCA was unconstitutionally vague and that increasing a defendant's sentence under the clause is, therefore,

a denial of due process. 135 S. Ct. at 2563. The decision in *Johnson* later was held to be retroactive and thus applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

At the time of Finch's sentencing, it was the law in the Sixth Circuit that Tennessee aggravated burglary qualified as a categorical violent felony under the ACCA's enumerated offenses clause, not under the residual clause. *See United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007). However, the Sixth Circuit has now overruled *Nance* in *United States v. Stitt*, 860 F.3d 854, 860-61 (6th Cir. 2017) (en banc). The Court of Appeals held in *Stitt* that “[b]ecause Tennessee's aggravated-burglary statute is both broader than generic burglary under the categorical approach and indivisible, a conviction under the statute does not count as a violent felony under the ACCA.” *Id.* at 862. As a result of that decision, Finch's prior Tennessee convictions for aggravated burglary and attempted aggravated burglary can no longer be used as predicate offenses under either the enumerated offenses clause or the residual clause of the ACCA. Therefore, Finch no longer has the requisite number of prior convictions under the ACCA. He has filed a motion asking that consideration of his § 2255 motion be expedited. (ECF No. 10.)

Absent the ACCA enhancement the maximum prison sentence Finch could have received was 10 years or 120 months. In addition, under the current sentencing guidelines, Finch's total offense level is 19¹ and his criminal history category VI, making the advisory guideline range 63-78

¹ The base offense level for a conviction under 18 U.S.C. § 922(g) is 20 if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” U.S.S.G. § 2K2.1(a)(4)(A). According to the Presentence Report (PSR), Finch has a prior conviction for aggravated robbery that qualifies as a “crime of violence” under the current version of § 4B1.2(a), which defines that term for purposes of § 2K2.1. (PSR ¶ 34.) A 2-level increase is added pursuant to § 2K2.1(b)(4)(A) because the firearm in question was stolen. After also applying a 3-level reduction for acceptance of responsibility in accordance with § 3E1.1(b), the total offense level is 19.

months, which he has already served. A status conference with counsel was held on August 9, 2017, and the United States has now filed a response to the motion agreeing that under *Johnson* and *Stitt* Finch's prior convictions no longer qualify him as an armed career criminal and that, if the Court grants Finch's § 2255 motion on that basis, an amended criminal judgment should be entered sentencing him to time served. (ECF No. 15.)

Finch has also requested in his motion for immediate release that his term of supervised release be reduced from three years to one year. At the status conference, the Government objected to that request. Under the circumstances of this case, the Court finds that the original term of three years of supervised release is still appropriate.

Because the ACCA no longer applies to Finch, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE. The Clerk is directed to prepare an amended criminal judgment sentencing Finch to time served and three years of supervised release.

The Clerk is also directed to prepare a judgment in this civil case.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

OWEN LEWIS FINCH,

Movant,

CASE NUMBER: 1:15-cv-1235-JDT
In Re: 1:07-cr-10099-JDT

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 8/17/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in criminal file number 07-10099.

APPROVED:

s/James D. Todd
James D. Todd
United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

TEDDY NORRIS,)	
)	
Petitioner,)	
v.	)	No. 16-cv-2231-SHL
	)	No. 08-cr-20342-SHL
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**ORDER GRANTING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR
CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY**

Before the Court are Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 1), filed on April 8, 2016, and his Motion for Expedited Sentencing Hearing or Alternatively, to Release Movant on his own Recognizance (ECF No. 17), filed July 12, 2017. Movant contends that he is entitled to re-sentencing in light of the Sixth Circuit's opinion in United States v. Stitt, 2017 WL 2766326 (6th Cir. June 27, 2017), which held that a Tennessee aggravated burglary conviction is not a violent felony under the Armed Career Criminal Act ("ACCA"). Movant's sentence was enhanced under the ACCA. (Id.)

On July 13, 2017, the United States filed a Response (ECF No. 20), conceding that Movant's predicate offenses no longer qualify him as an armed career criminal, and that he is thus entitled to re-sentencing. The Court agrees with the parties and finds that Movant's sentence was enhanced under the Armed Career Criminal Act ("ACCA") based on prior convictions for aggravated burglary in Tennessee. Therefore, pursuant to Stitt, the Court hereby **GRANTS** the Motions and **VACATES** Movant's sentence.

The resentencing hearing shall occur on **Thursday, July 27, 2017, at 2:30 p.m.** The Court **DIRECTS** the probation office to prepare a revised presentence report for Movant in advance of the resentencing hearing, and the Court **DIRECTS** the Government to issue a writ to secure the appearance of Mr. Norris at the resentencing hearing.

IT IS SO ORDERED, this 13th day of July, 2017.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

TEDDY L. NORRIS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.))))))	No. 16-cv-2231-SHL
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JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 1), filed April 8, 2016,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, in accordance with the Order Granting § 2255 Motion (ECF No. 22), judgment is entered and the matter is hereby **DISMISSED WITH PREJUDICE**.

APPROVED:

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

July 28, 2017
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

MARCUS MANN,

Petitioner,

v.

No. 1:16-cv-01153-JDB-egb
No. 1:11-cr-10015-JDB-1

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

A motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 was filed by the Petitioner, Marcus Mann, on June 16, 2016 (the “Petition”). (Case Number 16-cv-1153, Docket Entry (“D.E.”) 1.) On August 23, 2017, the United States Probation Office issued a memorandum addressing, among other things, the impact of the recent decision of the Sixth Circuit Court of Appeals in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), on this case. The Court ordered on September 19, 2017, that the Government respond to the Petition in light of *Stitt*. (*Id.*, D.E. 7.) The Government submitted its response on September 29, 2017, conceding that, in light of the decision, the relief sought by Mann may be warranted. (*Id.*, D.E. 8.)

For good cause shown, the Petition is GRANTED. Further, the Clerk is DIRECTED to enter an order of production and set a resentencing hearing in case number 1:11-cr-10015-JDB-1.

IT IS SO ORDERED this 20th day of October 2017.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

MARCUS MANN,

Petitioner,

CASE NUMBER: 1:16-1153-JDB-egb

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 10/20/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in the criminal case file number 11-10015. This case is hereby closed.

APPROVED:

s/J. Daniel Breen
United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JERMEL FRANKLIN WILLIAMS,)	
)	
Movant,	)	Cv. No. 2:16-cv-2501-JPM-dkv
v.	)	Cr. No. 2:98-cr-20294-JPM-1
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**ORDER GRANTING MOTION PURSUANT TO 28 U.S.C. § 2255; DENYING A
CERTIFICATE OF APPEALABILITY; DENYING LEAVE TO APPEAL IN FORMA
PAUPERIS**

Before the Court is a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (“§ 2255 Motion”), filed by Movant, Jermel Franklin Williams, who is incarcerated at the USP Leavenworth in Leavenworth, Kansas. (§ 2255 Mot., *Williams v. United States*, No. 2:16-cv-2501-dkv (W.D. Tenn.), ECF No. 1.) For the reasons stated below, Movant’s § 2255 Motion is GRANTED.

On July 23, 1999, Movant was sentenced to 326 months imprisonment to be followed by five years of supervised release. (J. in a Criminal Case, *United States v. Williams*, No. 2:98-cr-20294-JPM-1 (W.D. Tenn.), ECF No. 32.) On June 30, 2017, Movant filed a Motion for Expedited Sentencing Hearing or Alternatively, to Release Movant on his Own Recognizance from Prison while his Sentencing Hearing is Pending, stating that he is entitled to relief under *United States v. Stitt*, 2017 WL 2766326 (6th Cir. June 27, 2017) (en banc). (*Williams v. United States*, No. 2:16-cv-2501-JPM-dkv (W.D. Tenn.), ECF No. 8.) In his Motion, Movant requested immediate release or, in the alternative, a resentencing hearing. (ECF No. 8 at PageID 52.) The Government filed a response on August 7, 2017, submitting that, under prevailing circuit case

law, Williams is entitled to relief from his sentence, and requesting that the Court vacate Williams's sentence and re-sentence him to time served, with a three-year period of supervised release. (ECF No. 10.) To date, Movant has served approximately 120 months in prison. (ECF No. 10 at PageID 95.)

Since Movant is entitled to relief on the *Stitt* issue raised in his § 2255 Motion, the Court GRANTS the § 2255 Motion. The sentence imposed on July 23, 1999, is VACATED. It is further ORDERED that Movant be sentenced to time served, effective August 21, 2017, followed by 3 years of supervised release, which may be modified at a later date, with all other conditions previously imposed. Accordingly, upon release, Movant is to report to the probation office in the district in which he is released to begin a term of three years of supervised release, unless said term of supervised release is subsequently amended by the Court.

Twenty-eight U.S.C. § 2253 requires the district court to evaluate the appealability of its final order in a § 2255 proceeding and to issue a certificate of appealability (“COA”) “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate. The COA must indicate the specific issue(s) that satisfy the required showing. 28 U.S.C. § 2253(c)(3). A “substantial showing” is made when the movant demonstrates “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also* *Henley v. Bell*, 308 F. App’x 989, 990 (6th Cir. 2009) (per curiam) (same). Courts should not issue a COA as a matter of course.

Miller-El, 537 U.S. at 337 (“Our holding should not be misconstrued as directing that a COA always must issue.”).

Movant has not requested a certificate of appealability nor demonstrated that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.” *Miller-El*, 537 U.S. at 336. Because any appeal by Williams on the issue raised in his § 2255 Motion does not merit further review, the Court DENIES a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. §§ 1915(a)-(b), does not apply to appeals brought under § 2255. *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). *Id.* at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). Rule 24(a) also provides, however, that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. See Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal *in forma pauperis* is DENIED.¹

¹ If Movant files a notice of appeal, he must also pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

IT IS SO ORDERED, this 9th day of August, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

KEVOUS RAMON MCKINNEY,)	
)	
Movant,)	
)	
VS.	)	Civ. No. 16-1157-JDT-egb
	)	Crim. No. 03-10083-JDT
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER GRANTING MOTION PURSUANT TO 28 U.S.C. § 2255

On May 19, 2004, Kevous Ramon McKinney entered a guilty plea to one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g). (No. 03-10083, Crim. ECF Nos. 28 & 31.) At sentencing this Court determined, based primarily on his three prior Tennessee state-court convictions for aggravated burglary, that McKinney qualified for an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *See also* U.S.S.G. § 4B1.4. He was sentenced to a 211-month term of imprisonment and a three-year term of supervised release. (No. 03-10083, Crim. ECF Nos. 37 & 38.)

McKinney filed a direct appeal, and the Court of Appeals affirmed the conviction but vacated the judgment and remanded for re-sentencing in accordance with *United States v. Booker*, 543 U.S. 220 (2005). *United States v. McKinney*, 138 F. App'x 724 (6th Cir. 2005). On re-sentencing, this Court again sentenced McKinney to a 211-month term of

imprisonment under the ACCA. (No. 03-10083, Crim. ECF Nos. 49 & 50.) On appeal, the Sixth Circuit affirmed. *United States v. McKinney*, No. 05-6462 (6th Cir. July 5, 2006), *cert. denied*, 549 U.S. 1026 (2006).

On June 6, 2016, through counsel, McKinney filed a motion pursuant to 28 U.S.C. § 2255 contending that his sentence is unlawful under the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 1.) In *Johnson*, the Supreme Court held that the residual clause of the ACCA was unconstitutionally vague and that increasing a defendant's sentence under the clause is, therefore, a denial of due process. 135 S. Ct. at 2563. The decision in *Johnson* later was held to be retroactive and thus applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

At the time of McKinney's re-sentencing, it was the law in the Sixth Circuit that Tennessee aggravated burglary qualified as a categorical violent felony under the ACCA's enumerated offenses clause, not under the residual clause. *See United States v. Sawyers*, 409 F.3d 732 (2005), *cited in United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007). However, the Sixth Circuit has now overruled *Nance* in *United States v. Stitt*, — F.3d —, 2017 WL 2766326, *5-6 (6th Cir. June 27, 2017) (en banc). In *Stitt*, the Court of Appeals held that “[b]ecause Tennessee's aggravated-burglary statute is both broader than generic burglary under the categorical approach and indivisible, a conviction under the statute does not count as a violent felony under the ACCA.” *Id.* at *7. As a result of that decision, McKinney's prior Tennessee convictions for aggravated burglary can no longer be used as predicate offenses under either the enumerated offenses clause or the residual clause of the

ACCA. Therefore, McKinney no longer qualifies as an armed career criminal and is entitled to relief under § 2255.

McKinney has filed a motion asking that he be granted immediate release from incarceration. (ECF No. 6.) Absent the ACCA enhancement, the maximum prison sentence McKinney could have received was 10 years or 120 months, which he has already served. The United States has filed a response agreeing that if the Court grants McKinney's § 2255 motion an amended criminal judgment should be entered sentencing him to time served. (ECF No. 8.)

Because McKinney no longer qualifies for an enhanced sentence under the ACCA, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE. The Clerk is directed to prepare an amended criminal judgment sentencing McKinney to time served and three years of supervised release.

The Clerk is also directed to prepare a judgment in this civil case.
IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

KEVOUS RAMON MCKINNEY,

Movant,

CASE NUMBER: 1:16-cv-1157-JDT
1:03-cr-10083-JDT

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 7/12/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in criminal file number 03-10083.

APPROVED:

s/ James D. Todd
United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LARRY EUGENE AMMONS,)
)
Petitioner,)
)
v.) Cv. No. 16-02473
) Cr. No. 06-20062
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

Before the Court is Larry Ammons's June 29, 2017 Emergency Motion to Request Immediate Ruling on Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (the "Emergency Motion"). (Cv. ECF No. 9.) The United States (the "Government") responded on June 29, 2017. (ECF No. 10.)

Following a jury trial, Ammons was convicted on five counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (Cr. ECF Nos. 87, 103.) At the time of his sentencing, Ammons was an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA") because he had numerous prior ACCA-predicate convictions. The Government represents that those convictions included one conviction for Tennessee burglary, one conviction for Tennessee felony escape, and ten convictions for Tennessee aggravated burglary. (Cv. ECF

No. 10 at 2.) On December 22, 2008, the Court sentenced Ammons to 215 months, followed by three years' supervised release. (Cr. ECF No. 135.) Had Ammons not been an armed career criminal, he would have been subject to a statutory maximum sentence of 120 months in prison. See 18 U.S.C. § 924(a)(2).

On June 20, 2016, Ammons filed a second or successive motion seeking to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (the "§ 2255 Motion"). (Cv. ECF No. 1.) Ammons's sole ground for relief is that he is entitled to be resentenced under Johnson v. United States, 135 S. Ct. 2551 (2015). In Johnson, the Supreme Court held that a sentence imposed under the residual clause of the ACCA violates due process. Id. at 2563. In Welch v. United States, the Supreme Court applied its holding in Johnson retroactively to ACCA cases on collateral review. 136 S. Ct. 1257, 1268 (2016). See also In re Watkins, 810 F.3d 375, 383-84 (6th Cir. 2015) (same). Ammons contends that he is entitled to be resentenced because, after Johnson, he no longer has at least three prior ACCA-predicate convictions and, therefore, is no longer an armed career criminal.

On December 28, 2016, the United States Court of Appeals for the Sixth Circuit granted Ammons's motion filed in that court seeking an order authorizing this Court to consider a second or successive § 2255 motion. (Cv. ECF No. 7.) The Court

of Appeals noted that the ACCA-predicate status of Ammons's aggravated burglary convictions had been called into question by that court's grant of en banc rehearing in United States v. Stitt, 646 F. App'x 454 (6th Cir. 2016). The court explained that, "[i]f Ammons's convictions for aggravated burglary and escape no longer qualify as predicate offenses, he would lack the three predicate offenses necessary to impose the ACCA enhancement." (Cv. ECF No. 7 at 2-3.)

On June 27, 2017, the Sixth Circuit overruled United States v. Nance, 481 F.3d 882 (6th Cir. 2007), and held that Tennessee aggravated burglary no longer qualifies as an ACCA-predicate offense. United States v. Stitt, ___ F.3d ___, No. 14-6158, 2017 WL 2766326, at *1 (6th Cir. June 27, 2017).

In his Emergency Motion, Ammons asks the Court to grant his § 2255 Motion in light of Stitt and order that he be resentenced to a time-served sentence because he has served longer than the 120-month statutory maximum authorized absent an ACCA-sentencing enhancement. (Cv. ECF No. 9.) The Government agrees that, after Stitt, Ammons is no longer an armed career criminal, that Ammons's sentence in Criminal Case No. 06-20062 should be vacated, and that Ammons should be resentenced to time served

with a three-year period of supervised release.¹ (Cv. ECF No. 10 at 1, 5.)

The Stitt court has not yet issued a mandate. The Government contends that “Stitt was wrongly decided” and that “it is quite possible the Supreme Court will review the matter.” (Id. at 3-4.) Although the Government may seek a stay of the issuance of the mandate so that it may file a petition for writ of certiorari in the Supreme Court, this Court should not defer ruling on Ammons’s § 2255 Motion or his Emergency Motion. “A decision from which an appeal is pending in a higher court should be followed, on the principle of stare decisis, until it is reversed.” Bryan A. Garner et al., The Law of Judicial Precedent 258 (2016). For now, Stitt is binding on this Court.

After Johnson and Stitt, Ammons no longer qualifies as an armed career criminal under the ACCA. Ammons is entitled to relief under Johnson. The § 2255 Motion is GRANTED.² The judgment in Criminal Case No. 06-20062 is VACATED.

The Court in its discretion may correct a sentence without requiring the production of the prisoner. See 28 U.S.C.

¹ The Government concedes that, after Johnson, Ammons’s felony escape conviction no longer qualifies as an ACCA-predicate conviction. (Cv. ECF No. 10 at 4.)

² Ammons’s June 20, 2016 Motion for Leave to File Motion Under § 2255 and Hold in Abeyance Pending Decision on § 2244 Motion in Order to Preserve Johnson Claim is DENIED as moot. (Cv. ECF No. 5.)

§ 2255(c). Ammons has served more than the ten-year statutory maximum term under 18 U.S.C. § 924(a)(2). The Emergency Motion is GRANTED. Ammons is sentenced to time served, to be followed by a three-year period of supervised release. All other terms and conditions the Court imposed in its Judgment in Criminal Case No. 06-20062 are reimposed. This order shall take effect 10 days from entry.

So ordered this 11th day of July, 2017.

/s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LARRY AMMONS,

Petitioner, Cv. No. 2:16-cv-2473-SHM
v. Cr. No. 2:06-cr-20062-SHM

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order docketed July 11, 2017.

APPROVED:

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

July 11, 2017
DATE

THOMAS M. GOULD
CLERK

s/ Zandra Frazier
(BY) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

MICHAEL LEMONS,

Petitioner,

v.

No. 1:16-cv-01158-JDB-egb

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING MOTION TO VACATE, SET ASIDE, AND CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

A motion to vacate, set aside, and correct sentence pursuant to 28 U.S.C. § 2255 was filed by the Petitioner, Michael Lemons, on June 17, 2016 (the “Petition”). (Docket Entry (“D.E.”) 1.) On June 29, 2017, he filed an emergency motion requesting an immediate ruling on the Petition based on the Sixth Circuit Court of Appeals’ June 27, 2017, ruling in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017). (D.E. 7.) The Government responded the following day, conceding that, in light of the decision, the relief requested by the Petitioner was warranted. (D.E. 8.) Accordingly, a resentencing hearing was conducted in Lemons’ criminal case (Case No. 1:08-cr-10102-JDB-1 (“Criminal Case”)) on July 21, 2017, at which he was sentenced to time served, two years supervised release, and a \$100 special assessment. (Criminal Case D.E. 60.) An amended judgment was entered on July 24, 2017. (*Id.* D.E. 62.) Based on the foregoing, the Petition is GRANTED.

IT IS SO ORDERED this 3rd day of August 2017.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

MICHAEL LEMONS,
Petitioner,

v.

CASE NUMBER: 1:16-cv-1158 JDB/egb

UNITED STATES OF AMERICA,
Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 8/3/2017, the motion to vacate, set aside, and correct sentence pursuant to 28 U.S.C. § 2255 is GRANTED.

APPROVED:

s/J. Daniel Breen
Chief United States District Judge

THOMAS M. GOULD
CLERK

BY: s/Cassandra Ikerd
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

MICHAEL ROBERTS,

Petitioner,

v.

No. 1:16-cv-01156-JDB-egb
1:12-cr-10061-JDB-1

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING MOTION TO VACATE, SET ASIDE, AND CORRECT SENTENCE
UNDER 28 U.S.C. § 2255

A motion to vacate, set aside, and correct sentence pursuant to 28 U.S.C. § 2255 was filed by the Petitioner, Michael Roberts, on June 16, 2016 (the “Petition”). (Case No. 1:16-cv-01156-JDB-egb, Docket Entry (“D.E.”) 1.) On July 7, 2017, he moved for resentencing based on the Sixth Circuit Court of Appeals’ June 27, 2017, ruling in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017). (*Id.*, D.E. 8.) The Government responded on August 23, 2017, conceding that, in light of the decision, the relief sought by Roberts was warranted. (*Id.*, D.E. 13.) For good cause shown, the Petition is GRANTED. Further, the Clerk is DIRECTED to enter an order of production and set a resentencing hearing in Case No. 1:12-cr-10061-JDB-1.

IT IS SO ORDERED this 14th day of September 2017.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

MICHAEL ROBERTS,

Petitioner,

CASE NUMBER: 1:16-1156-JDB-egb

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 9/14/2017, the motion under 28 U.S.C. § 2255 is GRANTED and this case is hereby closed.

Pursuant to this ruling, a re-sentencing proceeding will be set in Criminal Case No. 12-10061-01.

APPROVED:

s/J. Daniel Breen
United States District Judge

THOMAS M. GOULD
CLERK

BY: *s/ Evelyn Cheairs*
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**ORDER GRANTING MOVANT'S 28 U.S.C. § 2255 PETITION FOR RELIEF
AND ORDER SETTING MATTER FOR RESENTENCING**

Before the Court is a petition for relief pursuant to 28 U.S.C. § 2255 filed by Movant Darryl Merriweather, Bureau of Prisons Register No. 24910-076, an inmate housed at FCI Talladega, Alabama. (ECF No. 1). On August 24, 2017, the United States filed a Response to the § 2255 Motion to Vacate Sentence. (ECF No. 12). Upon review, the Court finds the Movant's petition for § 2255 relief should be Granted.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Criminal Case No. 11-cr-20288-STA

On November 30, 2011, a federal grand jury returned a one-count indictment charging Darryl Merriweather with being a felon in possession of ammunition in violation of 18 U.S.C. §922(g). (ECF No. 1). On August 30, 2012, a federal grand jury returned a Superseding Indictment against Merriweather adding Count 2, an additional violation of 18 U.S.C. § 922 (g)(3). (ECF No. 31). Pursuant to a plea agreement, Merriweather pleaded guilty to Count 1 of the Superseding Indictment and waived his right to appeal or challenge the sentence as long as the

sentence imposed did not exceed 180 months. The Government agreed to move to dismiss Count 2. (ECF No. 36). In accordance with the plea agreement, the Honorable S. Thomas Anderson sentenced Merriweather as an Armed Career Criminal to a 180-month period of incarceration with three years of supervised release for the conviction charged in Count 1, a violation 18 U.S.C. § 922(g)(1), as an Armed Career Criminal. The sentence was based on Criminal History Category VI, a Total Offense Level of 30 and Sentencing Guideline Range of 180-210 months. (November 7, 2012 PSR & ECF Nos. 44 & 45). As agreed in the waiver provision of the plea agreement, Merriweather did not file a direct appeal.

B. Civil Case No. 16-2683-JTF

On August 23, 2016, Merriweather, proceeding with the assistance of counsel, filed the instant petition and supporting memorandum of law for habeas relief to correct, amend or set aside his sentence under *Johnson v. United States*, 135 S.Ct. 2551 (2015) and *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017). (ECF Nos. 1 & 1-2). On August 24, 2017, the United States filed a Response (“Answer”) to the instant § 2255 motion to vacate the sentence. With reservations, the United States concedes that the ruling in *Stitt* is binding precedent and has agreed that under that holding, Merriweather’s prior convictions for aggravated burglary and attempted aggravated burglary are not violent predicate felonies for purposes of the ACCA. While disagreeing with the Sixth Circuit’s ruling in *Stitt*, the Government asserts that until the Supreme Court reviews this issue, “the law on whether convictions under statutes like Tennessee’s aggravated burglary statute qualify as ACCA predicates remains unsettled.” Nevertheless, the Government agrees to the Court granting Merriweather’s petition for relief and setting the case for resentencing in accordance with *Stitt*. (ECF No. 12, pp. 3-5).

II. LEGAL STANDARD

Relief under Section 2255(a) provides that:

[a] prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). The statute does not “encompass all claimed errors in conviction and sentencing.” *United States v. Addonizio*, 442 U.S. 178, 185 (1979); *Meirovitz v. United States*, 688 F.3d 369, 370 (8th Cir. 2020). However, a petitioner must allege “(1) an error of constitutional magnitude; 2) a sentence imposed outside the statutory limits; or 3) an error of fact or law that was so fundamental as to render the entire proceedings invalid.” *Shaw v. United States*, 604 Fed. Appx. 473, 476 (6th Cir. 2015) (*quoting Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001)), *cert. denied*, 135 S.Ct. 2914 (2015). Generally, in order for a § 2255 motion to be considered timely, it must be filed within one year of the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme or made retroactively applicable on collateral review, as in *Johnson*; or the date upon which the judgment of conviction becomes final, or the latter of the two. See 28 U.S.C. § 2255 (f)(1)-(4). A judgment of conviction becomes final when the Defendant’s time for filing a notice of appeal expires, specifically fourteen days following the conviction. *Sanchez- Castellano v. United States*, 358 F.3d 424, 427 (6th Cir. 2004) (“when a federal criminal defendant does not appeal to the court of appeals, the judgment becomes final upon the expiration of the period in which the defendant could have appealed to the court of appeals, even when no notice of appeal was filed.”) *See Fed. R. App. P. 4(b)(1)*.

III. ANALYSIS

Merriweather challenges his sentence under the enhanced provisions of the Armed Career Criminal Act (“ACCA”) or 18 U.S.C. § 924 (e)(2)(B) and seeks a reduction in his 180 month

sentence to a sentence within the guideline range as a non-career offender for a conviction under 18 U.S.C. 922(g). *See United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017). (Civil Case, ECF No. 1).¹ In 2013, Merriweather was deemed an Armed Career Offender pursuant to 18 U.S.C. § 924 (e) based on one prior Tennessee state court conviction for Burglary, four separate Tennessee state court convictions of Criminal Attempt: Aggravated Burglary, one for Aggravated Burglary and one conviction of Burglary of a Building. (PSR & Crim. ECF No. 45). Merriweather asserts that under *Stitt*, his Tennessee state convictions for aggravated burglary and possibly burglary-building do not constitute appropriate enumerated predicate offenses under the ACCA. He also argues that in the alternative, none of these convictions constitute predicate felony offenses under the invalidated residual clause, or “use of physical force” provision, under *Johnson*. *Johnson*, 559 U.S. at 140. (ECF No. 1-2, pp. 4-18). Again, based on *Stitt*, the Government does not oppose the motion. (ECF No. 12).

The Court observes that Merriweather’s sentence was imposed on January 28, 2013. The *Johnson* decision was rendered on June 26, 2015, and provided a substantive change in constitutional law as it pertains to sentences that were enhanced under the ACCA. As such, Merriweather’s § 2255 petition should have been filed by June 27, 2016, in order to be timely filed. Instead, it was filed on August 23, 2016. (Cv. Case, ECF No. 1). However, the record reflects Merriweather’s attempts to contact defense counsel on or about June 14, 2016, in order to timely file his § 2255 motion for relief. In his efforts, Merriweather indicated the time restraints and the impending deadline to file a petition for relief under *Johnson*. (Crim. ECF No. 47). Therefore, the Court finds in this instance the limitations period is subject to equitable tolling. Merriweather has demonstrated that he has diligently pursued his rights by attempting to contact

¹ For a conviction of a § 922(g) offense, a defendant having a Criminal History Category of VI, a Total Offense Level of 17, and a Criminal History Category of VI is subject to a sentencing guideline range of 51 to 63 months. U.S. Sentencing Guidelines Manual § 2K2.1 (a)(4) (2013).

counsel; and that an extraordinary circumstance stood in the way in prevention of the timely filing, the lack of response from his defense counsel. *Jones v. United States*, 689 F.3d 621, 626-27 (6th Cir. 2012) and *Hall v. Warden*, 663 F.3d 745, 749 (6th Cir. 2011). The petitioner must typically demonstrate more than his status as a pro se or his limited access to a law library to qualify as extraordinary circumstances. However, “[t]he flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices. *Jones*, 689 F.3d at 627 (quoting *Hall*, 663 F.3d at 751 and *Holland*, 130 S.Ct 2549, 2563 (2010)). Therefore, the Court is willing to toll the statute of limitations in order to consider Merriweather’s petition.

Since Merriweather’s petition for relief was filed, the Sixth Circuit issued the *en banc* decision in *Stitt* that a conviction of aggravated burglary under Tennessee law, Tenn. Code Ann. § 39-14-401, *et seq.* does not qualify as a violent felony predicate offense under the ACCA. *United States v. Stitt*, 860 F.3d at 861-62 (reversed and remanded for resentencing; and overruling *United States v. Nance*, 481 F.3d 882 (2007). *See also United States v. Mathis*, 786 F.3d 1068, 1070 (8th Cir. 2015). Expanding on the various definitions of “burglary,” the Sixth Circuit reasoned that not every state law conviction for burglary qualifies as a violent felony under the categorical approach and therefore may not justify the fifteen year minimum sentence under the ACCA. The Sixth Circuit also found that “Tennessee’s aggravated-burglary statute is both broader than generic burglary under the categorical approach and indivisible, [and therefore] a conviction under the statute does not count as a violent felony under the ACCA.” Upon review of the convictions taken into account in sentencing Merriweather, the aggravated burglary offenses comprised five of his seven prior convictions. Excluding those convictions, two convictions for burglary and burglary of a building remain which are also questionable as categorical offenses for purposes of the ACCA under the *Johnson* and *Stitt* decisions. The Court finds that eliminating the

aggravated burglary offenses as predicate offenses allows Merriweather to be resentenced as a non-career offender. Merriweather's motion for relief pursuant to 28 U.S.C. § 2255 should be Granted.

CONCLUSION

After considering the § 2255 motion, the response thereto and the recent changes in reference to Tennessee aggravated burglary convictions for ACCA purposes, the Court finds that Merriweather's motion for § 2255 relief, ECF No. 1, should be Granted and the matter set for resentencing. Therefore, the Court directs the United States Probation Office to prepare an Amended Pre-Sentence Report for this case within the next thirty days.

IT IS SO ORDERED on this 5th day of September, 2017.

s/John T. Fowlkes, Jr.

JOHN T. FOWLKES, JR.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DARRYL MERRIWEATHER,

Movant,

v.

Cv. No. 16-2683-JTF

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order Granting Movant's 28 U.S.C. 2255 Petition for Relief entered on September 5, 2017 and subsequent resentencing in the associated Case 2:11-cr-20288.

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

December 20, 2018
DATE

THOMAS M. GOULD
CLERK

s/Lorri J. Fentress
(BY) LAW CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

RICHARD HUGHES,)	
)	
Movant,	)	Cv. No. 2:16-cv-2424-JPM-tmp
v.	)	Cr. No. 2:08-cr-20194-JPM-1
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**ORDER GRANTING MOTION PURSUANT TO 28 U.S.C. § 2255; DENYING A
CERTIFICATE OF APPEALABILITY; DENYING LEAVE TO APPEAL IN FORMA
PAUPERIS**

Before the Court is a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (“§ 2255 Motion”), filed by Movant, Richard Hughes, Bureau of Prisons register number 22379-076, who is incarcerated at the USP Hazelton in Bruceton Mills, West Virginia. (§ 2255 Mot., *Hughes v. United States*, No. 2:16-cv-2424-tmp (W.D. Tenn.), ECF No. 1.) For the reasons stated below, Movant’s § 2255 Motion is GRANTED.

On October 7, 2010, Movant was sentenced to 180 months imprisonment to be followed by three years of supervised release. (J. in a Criminal Case, *United States v. Hughes*, No. 2:08-cr-20194-JPM-1 (W.D. Tenn.), ECF No. 76.) On July 6, 2017, Movant filed a Motion for Expedited Sentencing Hearing or Alternatively, to Release Movant on his Own Recognizance from Prison while his Sentencing Hearing is Pending, stating that he is entitled to relief under *United States v. Stitt*, 2017 WL 2766326 (6th Cir. June 27, 2017) (en banc). (*Hughes v. United States*, No. 2:16-cv-2424-JPM-tmp (W.D. Tenn.), ECF No. 11.) In his Motion, Movant requested a revised sentence of time served followed by three years of supervised release with all

other conditions previously imposed. (ECF No. 11 at PageID 70.) The Court set a sentencing hearing for August 8, 2017 and directed the Government to respond to Movant's Motion on July 6, 2017. (ECF No. 12.) The Government filed a response on July 18, 2017, submitting that, under prevailing circuit case law, Hughes is entitled to relief from his sentence, and requesting that the Court vacate Hughes' sentence and re-sentence him to time served, with a three-year period of supervised release. (ECF No. 13.)

To date, Movant has served approximately 81 months in prison. (ECF No. 13 at PageID 77.) In light of the relief due under *Stitt*, Movant's applicable guideline range would be 30 to 37 months. (See Probation Office Memo, Oct. 4, 2016, at 3.)

Since Movant is entitled to relief on the *Stitt* issue raised in his § 2255 Motion, the Court GRANTS the § 2255 Motion. The sentence imposed on October 7, 2010, is VACATED. It is further ORDERED that Movant be sentenced to time served, effective July 31, 2017, followed by 3 years of supervised release with all other conditions previously imposed.

Twenty-eight U.S.C. § 2253 requires the district court to evaluate the appealability of its final order in a § 2255 proceeding and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate. The COA must indicate the specific issue(s) that satisfy the required showing. 28 U.S.C. § 2253(c)(3). A "substantial showing" is made when the movant demonstrates "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also* *Henley v. Bell*, 308 F. App'x 989, 990

(6th Cir. 2009) (per curiam) (same). Courts should not issue a COA as a matter of course. *Miller-El*, 537 U.S. at 337 (“Our holding should not be misconstrued as directing that a COA always must issue.”).

Movant has not requested a certificate of appealability nor demonstrated that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner.” *Miller-El*, 537 U.S. at 336. Because any appeal by Hughes on the issue raised in his § 2255 Motion does not merit further review, the Court DENIES a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. §§ 1915(a)-(b), does not apply to appeals brought under § 2255. *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). *Id.* at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). Rule 24(a) also provides, however, that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. See Fed. R. App. P. 24(a) (4)-(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal *in forma pauperis* is DENIED.¹

¹ If Movant files a notice of appeal, he must also pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

IT IS SO ORDERED, this 19th day of July, 2017.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (ECF No. 1), filed June 15, 2016, and the Court having filed an Order granting Movant's § 2255 Motion (ECF No. 14),

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Order Granting Motion Pursuant to 28 U.S.C. § 2255 (ECF No. 14), Movant's sentence imposed on October 7, 2010 is vacated and Movant is sentenced to time served, effective July 31, 2017, followed by 3 years of supervised release.

APPROVED:

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

July 19, 2017
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KEITH KEGLAR,)
)
Petitioner,)
)
v.) Cv. No. 16-02447
) Cr. No. 11-20233
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

Before the Court is Keith Keglar's June 29, 2017 Motion to Set for Resentencing in Light of Stitt (the "Resentencing Motion"). (Cv. ECF No. 12.) The United States (the "Government") responded on June 30, 2017. (ECF No. 13.)

Following a jury trial, Keglar was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). (Cr. ECF No. 39.) At the time of his sentencing, Keglar was an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA") because he had five prior ACCA-predicate convictions, including two convictions for Tennessee aggravated burglary and one conviction for Tennessee criminal attempt: aggravated burglary. (PSR ¶¶ 20, 27-28, 34, 40.) On January 18, 2013, the Court sentenced Keglar to 235 months, followed by three years' supervised release.

(Cr. ECF No. 59.) Had Keglar not been an armed career criminal, he would have been subject to a statutory maximum sentence of 120 months in prison. See 18 U.S.C. § 924(a)(2).

On June 16, 2016, Keglar filed a second or successive motion seeking to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (the “§ 2255 Motion”). (Cv. ECF No. 1.) Keglar’s sole ground for relief is that he is entitled to be resentenced under Johnson v. United States, 135 S. Ct. 2551 (2015). In Johnson, the Supreme Court held that a sentence imposed under the residual clause of the ACCA violates due process. Id. at 2563. In Welch v. United States, the Supreme Court applied its holding in Johnson retroactively to ACCA cases on collateral review. 136 S. Ct. 1257, 1268 (2016). See also In re Watkins, 810 F.3d 375, 383-84 (6th Cir. 2015) (same). Keglar contends that he is entitled to be resentenced because, after Johnson, he no longer has at least three prior ACCA-predicate convictions and, therefore, is no longer an armed career criminal.

On December 21, 2016, the United States Court of Appeals for the Sixth Circuit granted Keglar’s motion filed in that court seeking an order authorizing this Court to consider a second or successive § 2255 motion. (Cv. ECF No. 9.) The Court of Appeals noted that Keglar’s conviction for criminal attempt: aggravated burglary no longer qualifies as an ACCA-predicate

conviction after Johnson. The Court of Appeals noted that the ACCA-predicate status of Keglar's two aggravated burglary convictions had been called into question by that court's grant of en banc rehearing in United States v. Stitt, 646 F. App'x 454 (6th Cir. 2016).

On June 27, 2017, the Sixth Circuit overruled United States v. Nance, 481 F.3d 882 (6th Cir. 2007), and held that Tennessee aggravated burglary no longer qualifies as an ACCA-predicate offense. United States v. Stitt, ___ F.3d ___, No. 14-6158, 2017 WL 2766326, at *1 (6th Cir. June 27, 2017).

In his Resentencing Motion, Keglar asks the Court to grant his § 2255 Motion in light of Stitt and order that this matter be set for resentencing immediately. (Cv. ECF No. 12.) The Government agrees that, after Stitt, Keglar is no longer an armed career criminal and that Keglar's sentence in Criminal Case No. 11-20233 should be vacated and the matter set for resentencing. (Cv. ECF No. 13 at 1, 4.)

The Stitt court has not yet issued a mandate. The Government contends that "Stitt was wrongly decided" and that "it is quite possible the Supreme Court will review the matter." (Id. at 3-4.) Although the Government may seek a stay of the issuance of the mandate so that it may file a petition for writ of certiorari in the Supreme Court, this Court should not defer ruling on Keglar's § 2255 Motion or his Resentencing Motion. "A

decision from which an appeal is pending in a higher court should be followed, on the principle of stare decisis, until it is reversed." Bryan A. Garner et al., The Law of Judicial Precedent 258 (2016). For now, Stitt is binding on this Court.

After Johnson and Stitt, Keglar no longer qualifies as an armed career criminal under the ACCA. Keglar is entitled to relief under Johnson. The § 2255 Motion is GRANTED.¹ The judgment in Criminal Case No. 11-20233 is VACATED, and the matter will be set for resentencing. The Resentencing Motion is GRANTED. The Probation Office is directed to prepare a Supplemental Presentence Investigation Report. The parties may file position papers once the Report has been prepared.

This order is an "order granting a future resentencing" and "does not complete the § 2255 proceeding[s]." United States v. Hadden, 475 F.3d 652, 662 (4th Cir. 2007). Upon resentencing and entry of a new judgment in Criminal Case No. 11-20233, the Court will enter judgment in these § 2255 proceedings. See generally id. at 659-666 (discussing appealability of orders in § 2255 proceedings granting in part and denying in part the § 2255 motion); Ajan v. United States, 731 F.3d 629, 631-32 (6th Cir. 2013) (citing Hadden approvingly).

¹ Keglar's June 16, 2016 Motion for Leave to File Motion Under § 2255 and Hold in Abeyance Pending Decision on § 2244 Motion in Order to Preserve Claim is DENIED as moot. (Cv. ECF No. 5.)

So ordered this 11th day of July, 2017.

/s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KEITH KEGLAR,

Petitioner,

v.

Cv. No. 16-2447-SHM
Cr. No. 11-20233-SHM

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order, docketed July 11, 2017, granting petitioner's motion under 28 U.S.C. § 2255.

APPROVED:

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

September 18, 2017
DATE

THOMAS M. GOULD
CLERK

s/ Zandra Frazier
(By) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

TIMOTHY WAYNE BOHANNON,)	
)	
Movant,)	
)	
VS.	)	Civ. No. 13-1255-JDT-egb
	)	Crim. No. 05-10080-JDT
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER GRANTING MOTION PURSUANT TO 28 U.S.C. § 2255

Timothy Wayne Bohannon was convicted by a jury on September 24, 2007, on two counts of possessing firearms after having been convicted of a felony, in violation of 18 U.S.C. § 922(g). (No. 05-10080, Crim. ECF Nos. 38 & 39.) At sentencing this Court determined, based on his prior Tennessee state-court convictions for aggravated burglary, that Bohannon qualified for an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). *See also* U.S.S.G. § 4B1.4. He was sentenced to a 180-month term of imprisonment and a three-year term of supervised release. (No. 05-10080, Crim. ECF Nos. 46 & 47.) Bohannon filed an appeal, but it was later voluntarily dismissed. (*Id.*, Crim. ECF No. 58, *United States v. Bohannon*, No. 08-5016 (6th Cir. Feb. 11, 2008).)

Bohannon filed a *pro se* motion pursuant to 28 U.S.C. § 2255 on September 9, 2013. (ECF No. 1.) Relying on the decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), he contended that his ACCA-enhanced sentence was unlawful. Bohannon filed a

supplemental § 2255 motion on August 21, 2015, arguing that his sentence also was unlawful under the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 15.) On October 15, 2015, U.S. District Judge J. Daniel Breen denied Bohannon's *Descamps* claim as untimely and found that he was not entitled to relief under *Johnson* because his prior aggravated burglaries were categorical violent felonies under the ACCA's enumerated offenses clause. (ECF No. 16.) Bohannon appealed, and the Sixth Circuit granted a certificate of appealability on the *Johnson* claim. (ECF No. 20.) The Court of Appeals subsequently granted the parties' joint motion to vacate and remand based on the decisions in *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243 (2016), and the grant of rehearing in *United States v. Stitt*, 637 F. App'x 927 (6th Cir. 2016), *vacated and reh'g en banc granted*, 2016 WL 1658598 (6th Cir. Apr. 27, 2016). (ECF No. 22, *Bohannon v. United States*, No. 15-6420 (6th Cir. Oct. 4, 2016).) The case was then reassigned to the undersigned Judge. (ECF No. 23.)

Counsel was appointed for the Movant (ECF No. 24), and the Court held a status conference on October 13, 2016. After discussion, the Court determined that whether Bohannon's Tennessee convictions for aggravated burglary could still be used to qualify him as an armed career criminal would depend on the outcome of the rehearing in *Stitt*; therefore, the case was held in abeyance. (ECF No. 26.) The Sixth Circuit has now issued its *en banc* decision in *Stitt*, holding that a conviction under Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403, is not a violent felony for purposes of the ACCA. *United States v. Stitt*, — F.3d —, 2017 WL 2766326 (6th Cir. June 27, 2017).

Bohannon has filed a motion asking that his § 2255 motion be granted immediately and that an amended judgment for time served be entered in the criminal case. (ECF No. 34.) The United States does not oppose that motion. (ECF No. 35.) Therefore, because Bohannon no longer qualifies as an armed career criminal under the ACCA, he is entitled to relief from the enhanced sentence that was imposed pursuant to that statute. The motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE. The Clerk is directed to prepare an amended criminal judgment sentencing Bohannon to time served and three years of supervised release.

The Clerk is also directed to prepare a judgment in this civil case.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

TIMOTHY WAYNE BOHANNON,

Petitioner,

CASE NUMBER: 1:13-cv-1255-JDT
1:05-cr-10080-JDT

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 6/30/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in criminal file number 05-10080.

APPROVED:

s/ James D. Todd
United States District Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LEO BEARDEN,)
)
Petitioner,)
)
v.) No. 16-cv-02472-SHM
) No. 04-cr-20195-SHM
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

Before the Court is Leo Bearden's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (the "§ 2255 Motion"), filed on June 20, 2016. (ECF No. 1; see also Mem. in Supp. of Mot. to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255, ECF No. 1-2 ("Mem. ISO § 2255 Mot.").) The United States (the "Government") responded on July 24, 2017. (Resp. of the United States to Def.'s Mot. to Vacate Sentence, ECF No. 13 ("§ 2255 Resp.").)

On June 9, 2005, Bearden pled guilty to one count of violating 18 U.S.C. § 922(g) by being a felon in possession of a firearm. (Order on Change of Plea, ECF No. 83 in 04-20195;¹ see

¹ References to "04-20195" are to filings in United States v. Bearden, Case No. 2:04-cr-20195 (W.D. Tenn.), and references to "08-02166" are to filings in Bearden v. United States, Case No. 2:08-cv-02166 (W.D. Tenn.).

also Indictment, ECF No. 7 in 04-20195.) At his sentencing, Bearden was determined to be an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (the "ACCA") because he had three prior convictions for violent felonies. (Presentence Investigation Report ¶ 20 in 04-20195 ("PSR").) He had one conviction for aggravated burglary under Tennessee law (id. ¶ 29) and two convictions for aggravated robbery under Tennessee law (id. ¶¶ 31, 33). On September 19, 2005, the Court sentenced Bearden to 180 months in prison followed by three years of supervised release. (J. in a Criminal Case 2-3, ECF No. 87 in 04-20195.) Had Bearden not been an armed career criminal, he would have been subject to a statutory maximum sentence of 120 months in prison. 18 U.S.C. § 924(a)(2).

The § 2255 Motion is Bearden's second § 2255 motion. His first was filed in March 2008 and was denied in December 2010. (See, e.g., Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, ECF No. 1 in 08-02166; J., ECF No. 15 in 08-02166.) If a prisoner seeks to file a second or successive § 2255 motion, the court of appeals must first certify that the motion contains:

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

On October 31, 2016, the U.S. Court of Appeals for the Sixth Circuit, pursuant to motion by Bearden, authorized the filing of a second § 2255 motion. Order 2, In re Bearden, No. 16-5933 (6th Cir. Oct. 31, 2016). The Court may consider Bearden's second motion.

The § 2255 Motion presents one ground. Bearden argues that, under Johnson v. United States, 135 S. Ct. 2551 (2015), a conviction for aggravated burglary under Tennessee law does not count as a violent felony for purposes of § 924(e). (§ 2255 Mot. 5; Mem. ISO § 2255 Mot. 4-20.)

The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (a) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-force clause"); (b) "is burglary, arson, or extortion, [or] involves use of explosives" (the "enumerated-offenses clause"); or (c) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). Id. § 924(e)(2)(B).

In Johnson, the Supreme Court held that a sentence imposed under the residual clause of the ACCA violates due process. 135 S. Ct. at 2563. In Welch v. United States, the Supreme Court applied its holding in Johnson retroactively to ACCA cases on collateral review. 136 S. Ct. 1257, 1268 (2016). On June 27, 2017, the Sixth Circuit decided United States v. Stitt, holding that aggravated burglary under Tennessee law no longer qualifies as a violent felony under § 924(e). United States v. Stitt, 860 F.3d 854, 857 (6th Cir. 2017).

Following the Stitt decision, on July 10, 2017, Bearden filed a motion requesting an "immediate ruling" on the § 2255 Motion. (Def.'s Emergency Mot. Requesting Immediate Ruling on Mot. to Vacate, Set Aside or Correct Sentence Under 28 U.S.C. § 2255, ECF No. 11 ("Emergency Motion").) The Court ordered the Government to respond to the § 2255 Motion. (Order Directing United States to Respond, ECF No. 12.) The Government filed its § 2255 Response on July 24, 2017.

The § 2255 Response states that the Government "agrees that under circuit case law, Bearden is entitled to relief from his sentence." (Id. at 1.) The Government also states that, "[i]f the Court agrees . . . , it should vacate Bearden's sentence and resentence him to time served, with a three-year period of supervised release." (Id.)

The Stitt court has not yet issued a mandate. The Government contends that "Stitt was wrongly decided" and that "it is quite possible the Supreme Court will review the matter 'soon.'" (Id. at 3 (quoting Stitt, 2017 WL 2766326, at *10-11 (Boggs, J., concurring).) Although the Government may seek a stay of the issuance of the mandate so that it may file a petition for writ of certiorari in the U.S. Supreme Court, this Court should not defer ruling on Bearden's § 2255 request. "A decision from which an appeal is pending in a higher court should be followed, on the principle of stare decisis, until it is reversed." Bryan A. Garner et al., The Law of Judicial Precedent 258 (2016). For now, Stitt is binding on this Court.

After Johnson and Stitt, Bearden no longer qualifies as an armed career criminal under the ACCA. Bearden is entitled to relief under Johnson. The § 2255 Motion is GRANTED.² The sentence in Criminal Case No. 04-20195 is VACATED.

The Court in its discretion may correct a sentence without requiring the production of the prisoner. See 28 U.S.C. § 2255(c). Bearden has already served more than 120 months in prison -- the maximum statutory sentence for a § 922(g) violation. 18 U.S.C. § 924(a)(2). The Government agrees that a

² Because the Court is granting the § 2255 Motion, the Emergency Motion is DENIED as moot, as is Bearden's Motion for Leave to File Motion Under § 2255 and Hold in Abeyance Pending Decision on § 2244 Motion in Order to Preserve Johnson Claim, ECF No. 5.

time-served sentence is appropriate. Bearden is sentenced to time served, to be followed by a three-year period of supervised release. All other terms and conditions the Court imposed in its Judgment in Criminal Case No. 04-20195 are reimposed.

So ordered this 26th day of July, 2017.

/s/ Samuel H. Mays, Jr. _____
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LEO BEARDEN,

Petitioner,

v.

Cv. No. 16-2472-SHM
Cr. No. 04-20195-SHM

UNITED STATES OF AMERICA,

Respondent.

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Order, docketed July 26, 2017, granting petitioner's motion under 28 U.S.C. § 2255.

APPROVED:

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

July 26, 2017
DATE

THOMAS M. GOULD
CLERK

s/ Zandra Frazier
(By) DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

MICHAEL DEWAYNE COX,

Petitioner,

v.

No. 16-1220
08-10055

UNITED STATES OF AMERICA,

Respondent.

ORDER GRANTING PETITIONER'S EMERGENCY MOTION REQUESTING IMMEDIATE RULING ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 AND GRANTING MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

On August 2, 2016, the Petitioner, Michael Dewayne Cox, filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (the “Petition”). (D.E. 1.) On June 27, 2017, the United States Court of Appeals for the Sixth Circuit ruled *en banc*, in *United States v. Stitt*, ____ F.3d ___, 2017 WL 2766326 (6th Cir. June 27, 2017), that the crime of aggravated burglary in Tennessee is not a violent felony and, thus, does not qualify as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (“ACCA”).

Cox was sentenced in 2009 to imprisonment for 180 months after pleading guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). (Case No. 1:08-cr-10055-JDB, D.E. 43.) While the default statutory sentencing range for a § 922(g) violation is zero to ten years imprisonment, the Court found, based on his five prior convictions in Tennessee for aggravated burglary, that he qualified for the ACCA’s enhanced mandatory minimum sentence of 180 months for defendants with three previous violent felony convictions.

Three days after the Sixth Circuit's decision in *Stitt*, Cox moved for an emergency ruling on the Petition (D.E. 6), arguing that, in light of the appellate court's determination, he was entitled to immediate release, as he had been in federal custody for more than 120 months, the statutory maximum to which he could have been subject had he not been sentenced under the ACCA. The Government, with some reservations, concedes that an order granting the Petition is the appropriate remedy under *Stitt*.

Accordingly, the motion for an emergency ruling and the Petition are hereby GRANTED and Cox's sentence is VACATED. The Court imposes a sentence of time served, effective immediately, without the necessity for a formal resentencing or otherwise requiring the production of the prisoner. Further, the three-year period of supervised release, along with other conditions referenced in the Court's original judgment, is reimposed.

IT IS SO ORDERED this 12th day of July 2017.

s. J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

United States District Court
WESTERN DISTRICT OF TENNESSEE
Eastern Division

JUDGMENT IN A CIVIL CASE

MICHAEL DEWAYNE COX,

Petitioner,

CASE NUMBER: 1:16-1220-JDB
1:08-10055-JDB

v.

UNITED STATES OF AMERICA,

Respondent.

Decision by Court. This action came before the Court and the issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order entered in the above-styled matter on 7/12/2017, the motion under 28 U.S.C. § 2255 is GRANTED. The judgment in the criminal proceeding is hereby SET ASIDE and an amended judgment shall be entered in criminal file number 08-10055.

APPROVED:

s/J. Daniel Breen
United States District Court Judge

THOMAS M. GOULD
CLERK

BY: s/ Evelyn Cheairs
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

Wilson Jones,)
)
Petitioner,)
)
v.) Cv. No. 2:14-cv-02693-JPM-tmp
) Cr. No. 2:09-cr-20406-JPM-1
UNITED STATES OF AMERICA,)
)
Respondent.)
)

ORDER GRANTING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255

The cause is before the Court on Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (ECF No. 1), filed September 8, 2014. Jones was sentenced under the Armed Career Criminal Act ("ACCA") and seeks relief under § 2255 on the contention that he does not have the three violent felonies that are required to support the ACCA sentencing enhancement. (ECF No. 1.) The United States concedes that "under current case law Jones does not have the three requisite predicates for ACCA status." (ECF No. 44 at PageID 158.) Accordingly, Jones's petition is GRANTED, and he will be resentenced at a time to be established in a setting letter.

SO ORDERED, this 9th day of August, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

Wilson Jones,)
)
Petitioner,)
)
v.) Cv. No. 2:14-cv-02693-JPM-tmp
) Cr. No. 2:09-cr-20406-JPM-1
UNITED STATES OF AMERICA,)
)
Respondent.)
)

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (ECF No. 1), filed September 8, 2014, and the Court having filed an Order Granting Petitioner's § 2255 Motion (ECF No. 47),

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Order Granting Motion Pursuant to 28 U.S.C. § 2255 (ECF No. 47), Petitioner's Motion (ECF No. 1) is GRANTED. The Court will set Jones's re-scheduling by a separate order.

SO ORDERED, this 9th day of August, 2018.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

DERECK DAWSON,)
)
)
Movant,)
)
)
v.) No. 2:16-cv-02448-JTF-cgc
) No. 03-cr-20275
UNITED STATES OF AMERICA,)
)
)
Respondent.)

**ORDER GRANTING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE
UNDER 28 U.S.C. § 2255**

Before the Court is Dereck Dawson’s (“Movant”) Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255 (“2255 Motion”) filed on June 16, 2016. (ECF No. 4). On June 28, 2017, Movant filed a Motion for Immediate Sentencing Hearing, or in the alternative, to Release Movant on his own Recognizance. (ECF No. 11). The United States of America (the “Government”) filed a Response to this motion on June 29, 2017. (ECF No. 12). Subsequently, Movant filed a Corrected Motion for Immediate Release, or in the alternative, to Release Movant on his own Recognizance on June 29, 2017. (ECF No. 13).

In the Government’s Response to Movant’s motion, it agreed that under circuit case law, *United States v. Stitt*, Nos. 17a0113p.06, 14-6158, 2017 U.S. App. LEXIS 11403 (6th Cir. June 27, 2017), Movant is entitled to relief. Therefore, Movant’s 2255 Motion is **GRANTED**. His sentence is **VACATED**, and he shall be resentenced to time served. Movant’s supervised release terms and conditions shall remain in place.

IT IS SO ORDERED this 6th day of July, 2017.

s/John T. Fowlkes, Jr.

JOHN T. FOWLKES, JR.

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DERECK DAWSON,

Movant,

v.

**Case No. 2:16-cv-02448-JTF-cgc
(Related Case 2:03-cr-20275-JTF-1)**

UNITED STATES,

Respondent.

JUDGMENT

DECISION BY COURT. This action came for consideration before the Court. The issues have been duly considered, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed in accordance with the Third Amended Judgment entered by this Court in Movant's related criminal case on July 20, 2017. (ECF Nos. 109 & 110.)

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

July 20, 2017
DATE

THOMAS M. GOULD
CLERK

s/Devon C. Muse
(BY)LAW CLERK