FILED
United States Court of Appeals
Tenth Circuit

April 2, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HADORI KARMEN CHANTEL WILLIAMS,

Defendant - Appellant.

No. 20-6027
(D.C. Nos. 5:19-CV-00982-R &
5:15-CR-00174-R-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **BALDOCK**, and **MORITZ**, Circuit Judges.**

Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 in the Western District of Oklahoma alleging ineffective assistance of counsel and challenging his armed career criminal sentence. The district court dismissed the action as untimely and denied Defendant a certificate of appealability. Now, Defendant requests a certificate of appealability from this Court. Exercising

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

"Appendix A"

jurisdiction under 28 U.S.C. § 2253(a), we deny Defendant a certificate of appealability and dismiss Defendant's appeal.

If a district court denies a motion to vacate on procedural grounds without reaching the defendant's underlying constitutional claim, a certificate of appealability will issue when the defendant shows "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" *and* "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *see also United States v. Crooks*, 769 F. App'x 569, 571 (10th Cir. 2019) (unpublished). The defendant must satisfy both parts of this threshold inquiry before we can hear the merits of the appeal. *Gibson v. Klinger*, 232 F.3d 799, 802 (10th Cir. 2000).

In this case, the district court dismissed Defendant's motion to vacate as untimely. After carefully reviewing Defendant's request for a certificate of appealability, the district court's order of dismissal, and the record on appeal, we agree that Defendant's claims are barred by 28 U.S.C. § 2255's one-year statute of limitations. Defendant attempts to escape this conclusion by arguing he is entitled to equitable tolling because he is actually innocent and failure to address his claims would result in a miscarriage of justice.

While § 2255's one-year limitation period is subject to equitable tolling in certain circumstances, including when an inmate is actually innocent, Defendant fails to show he is actually innocent of being a felon in possession of a firearm. Rather, Defendant argues he should not have been sentenced as an armed career criminal.

Relying on *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018), Defendant argues his prior state convictions for second degree burglary and attempted first degree burglary should not have been considered crimes of violence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). We have held, however, that "[p]ossible misuse of a prior conviction as a predicate offense under the sentencing guidelines does not demonstrate actual innocence." *Sandlain v. English*, 714 F. App'x 827, 831 (10th Cir. 2017) (unpublished). Thus, Defendant's attempt to circumvent the one-year limitation period through a showing of actual innocence fails.

Moreover, as the district court notes in its order of dismissal, equitable tolling applies when "an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *United States v. Gabaldon*, 522 F.3d 1121, 1124 (citing *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000)). In this case, Defendant has not shown any extraordinary circumstance caused his failure to timely file. Although he relies on *United States v. Hamilton* to argue he only recently discovered his prior state convictions do not qualify as crimes of violence under the ACCA, *Hamilton* was decided on May 4, 2018. 889 F.3d 688. Defendant did not file his motion to vacate until October 26, 2019. Defendant provides no explanation as to why he delayed in filing his motion to vacate until more than one year after this Court issued its decision in *Hamilton*. He certainly has not shown he pursued his claims diligently, or that his failure to timely file was caused by extraordinary circumstances beyond his control. *See Gabaldon*, 522 F.3d at 1124.

Accordingly, for substantially the same reasons set forth in the district court's order, we hold that no reasonable jurist would find it "debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478. Therefore, we GRANT Defendant's motion to proceed *in forma pauperis*, DENY Defendant's request for a certificate of appealability, and DISMISS this appeal.

Entered for the Court

Bobby R. Baldock
Circuit Judge

TRULINCS 29573064 - WILLIAMS, HADORI KARMEN - Unit: LVN-B-B

FROM: Smith, Randi
TO: 29573064
SUBJECT: Bae
DATE: 02/14/2020 01:51:05 AM

Before the Court are various filings by Defendant Hadori Williams in support of his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 51).1 Section 2255 provides that "[a] prisoner in custody under sentence of a court established by Act of Congress 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 ... may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a).

Defendant pled guilty to two counts of a three-count indictment, in exchange for dismissal of the third count. On June 2, 2016, the Court sentenced Mr. Williams to one hundred eighty months imprisonment, sixty months on Count 1, possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a), and one-hundred eighty months

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Defendant filed an initial motion under § 2255 and a brief in support on October 25, 2019 (Doc.Nos. 51 and 52). The Court questioned whether the Motion, filed more than one year after Defendant's conviction became final, was timely and ordered him to respond, which he did. (Doc.Nos. 55 and 56) (two apparently identical filings). Thereafter the Court ordered the United States to respond, which it did (Doc.No. 58). Defendant filed his reply on February 3, 2020. The Court has reviewed all of the parties' submissions regarding the § 2255 motion

Count 3, felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), to run concurrently. (Doc.No. 46). Defendant did not appeal from the judgment and conviction, and accordingly, his conviction became final fourteen days later, June 16, 2016, when the time for seeking an appeal expired. See United States v. Prows, 448 F.3d 1223, 1227-28 (10th Cir. 2006)("If the defendant does not file an appeal, the criminal conviction becomes final upon the expiration of the time in which to take a direct criminal appeal."). 28 U.S.C. § 2255(f) sets forth the statute of limitations for a § 2255 motion:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of
(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

As noted above, the Court ordered Defendant to show cause why his Motion should not be dismissed as untimely in light of the passage of more than three years between his conviction and the instant motion. In response, Defendant relies on United States v. Davis, 139 S.Ct. 2319 (2019) and § 2255(f)(3). In Davis, the Supreme Court invalidated the residual clause of § 924(c), as unconstitutionally vague. Defendant, however, was not sentenced under § 924(c); rather, he was sentenced under § 924(e), and the residual clause of § 924(e), § 924(e)(2)(B)(ii), was invalidated by the Supreme Court in 2015 prior to

Defendant's conviction.2 Johnson v. United States, 135 S. Ct. 2551 (2015). Accordingly, Defendant cannot rely on Davis to extend the statute of limitations period under § 2255(f)(3). Furthermore, because the sentence in this case was imposed after Johnson, the Court did not rely on the residual clause of § 924(e), but rather, his burglary convictions were considered under the enumerated clause of 18 U.S.C. § 924(e)(2)(B)(ii), specifically the "that is burglary" provision. The enumerated clause has not been invalidated.

The better interpretation of Defendant's argument is that his sentence was unconstitutional because his state convictions for second degree burglary and attempted

"Appendix B"

lumped the two convictions together under Hamilton

first degree burglary should not have been considered crimes of violence under the ACCA, because the statutory definitions are broader than the generic definition of burglary. See (Doc. No. 55, p. 8). In support of this argument Defendant cites to United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018). Hamilton addressed the merits of Defendant's claim, specifically finding that a conviction for second degree burglary is not categorically a crime of violence under the ACCA. The holding in Hamilton does not provide Defendant a route for avoiding the one-year statute of limitations period, because Hamilton is not a Supreme Court case, the Supreme Court has not considered this issue, and only the Supreme Court can declare a new constitutional law retroactive. United States v. Cartwright, No. 10-CR-0104-CVE, 2019 WL 6717020, *2 (N.D. Okla. Dec. 10, 2019). Furthermore, "even if this were a new constitutional right, defendant's motion is outside the one-year statute of limitations period, as Hamilton was decided on May 4, 2018." Id.

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The ACCA's residual clause provided that a "'violent felony' means any crime ... , that is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

Similarly, Defendant's § 2255 ineffective assistance of counsel claim is time barred. Strickland v. Washington, 466 U.S. 668 (1984), which set forth the standard for ineffective assistance of counsel claims was clearly decided long before Defendant's conviction became final.3
Finally, Defendant argues that actual innocence provides a basis for avoidance of the statute of limitations period. The period set forth in § 2255(f) is subject to equitable tolling in certain circumstances, including when a prisoner is actually innocent. United States v. Gabaldon, 522 F.3d 1121, 1124 (10th Cir. 2008). Defendant, however, does not argue he was actually innocent of being a felon in possession of a firearm, he argues that the ACCA sentencing enhancement was in error. Such a claim is one of legal, not actual, innocence, and thus is not sufficient to overcome the statutory one-year time limit. United States v. Burks, 643 F. App'x 757, 758 (10th Cir. 2016) (unpublished) (rejecting similar claim). Additionally, the alleged ineffective assistance of counsel during plea and sentencing does not provide a basis for equitable tolling of the one-year limitations period. See e.g. Faircloth v. Raemisch, 692 F. App'x 513, 523 (10th Cir. 2017) (unpublished) (holding that an attorney's incorrect advice regarding tolling of AEDPA's statute of limitations does not amount to the type of extraordinary circumstance that warrants equitable tolling). Furthermore, even if extraordinary circumstances existed, petitioner has set forth no facts indicating that he pursued his claims with due diligence. See Yang v. Archuleta, 525 F.3d 925, 930 (10th Cir. 2008)(a petitioner "must allege with specificity the

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Defendant argues in his Reply that the Government did not dispute that counsel was the cause for his procedural default. (Doc.No. 60, p. 2). The issue here is not procedural default or whether Defendant can establish cause and prejudice to overcome such default. Rather, the issue is whether Plaintiff's claims are timely under § 2255(f)(1)-(4).

steps he took to diligently pursue his federal claims" (internal quotation marks and citation omitted)).
The Court has considered the claims raised in defendant's § 2255 motion and the related filings and concludes his motion should be dismissed as time-barred. Rule 11 of the Rules Governing Section 2255 Proceedings instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Pursuant to 28 U.S.C. § 2253, the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," and the court "indicates which specific issue or issues satisfy [that] showing." A petitioner can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). After considering the record in this case, the Court concludes that a certificate of appealability should not issue because Defendant has not made a substantial showing of the denial of a constitutional right. The record is devoid of any

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authority suggesting that the Tenth Circuit Court of Appeals would resolve the issues in this case differently.

IT IS THEREFORE ORDERED that defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is dismissed as time-barred. A separate judgment shall be entered accordingly.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HADORI KARMEN WILLIAMS,	)	
	)	
APPELLANT,	)	
	)	
	)	
	)	
-vs-	)	CASE NO. _____
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
APPELLEE.	)	

REQUEST FOR A CERTIFICATE OF APPEALABILITY

Comes Now Hadori Karmen Williams, pro se, and, pursuant to 28 U.S.C. §2253, respectfully requests that this Court issue a Certificate Of Appealability on the following issues:

1. Whether, in light of Bousley v. United States, 523 U.S. 614 (1998); and United States v. Bowen, No. 17-1011 (10th Cir. 2019), Mr. Williams' 28 U.S.C. §2255 Motion to Vacate was timely if he was actually innocent of 18 U.S.C. §924(e)?
2. Whether the District Court's dismissal of Mr. Williams' §2255 Motion to Vacate resulted in a complete miscarriage of justice in Light of Davis v. United States, 417 U.S. 333, 346-47 (1974); and United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009)?
3. Whether Mr. Williams, in light of United States v. Permenter, 969 F.2d 911 (10th Cir. 1992); and United States v. Green, 55 F.3d 1513, 1516 (10th Cir. 1995), constitutes an armed career criminal? and,

" Appendix C "

4. Whether United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018), creates a new rule of constitutional law which should be made retroactive to cases on collateral review?

Under 28 U.S.C. §2253, Mr. Williams must obtain a Certificate of Appealability (COA) before he may proceed in this Court. A COA may issue, "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); See Miller El v. Cockrell, 537 U.S. 322, 335-36 (2003); see also Adams v. LeMaster, 223 F.3d 1177, 1179 (10th Cir. 2000)("[W]hen the district court denies a habeas petitioner on procedural grounds without reaching the prisoner's underlying constitutional claim, a [COA] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." (quoting Slack v. McDanile, 529 U.S. 473, 484 (2000)). But see Davis v. United States, 417 U.S. 333, 345 (1974), holding to the contrary that, in the district court, a prisoner is entitled to habeas release if he can show 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 that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law,** or is otherwise subject to collateral attack...." 28 U.S.C. §2255."

This Court should conclude that reasonable jurists could debate whether the District Court's procedural ruling dismissing Mr. Williams' Motion to Vacate as untimely was correct, and that jurists of reason could find it debatable whether Mr. Williams states valid claims of the denial of his Constitutional rights.

This Court should further find that the Motion should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further.

PROCEDURAL HISTORY

Mr. Williams pleaded guilty in 2016 to being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g)(1), and possession of marijuana, in violation of 18 U.S.C. §841(b)(1)(B). The district court sentenced Mr. Williams to 180 months, 60 months on the marijuana offense, and 180 months on the firearms offense. The sentences were ordered to be served concurrently. The Government and the Probation Office argued for an increased sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e)(2). Possession of a firearm by a felon ordinarily carries a maximum statutory penalty of 120 Months. See 18 U.S.C. §924 (a)(2). Under the ACCA, a defendant who qualifies as an "armed career criminal" is subject to a mandatory prison term of 180 months . See §924(e)(1). Relying in part on Mr. Williams' prior Oklahoma State convictions for **attempted first degree burglary**, in violation of Okla.Stat. tit. 21, §§ 42 and 1435; and his prior Oklahoma State conviction for **second degree burglary**, in violation of Okla. Stat. tit. 21, §1435, the district court concluded that Mr. Williams' enumerated felonies made him an armed career criminal. His attorney did not object. As such, Mr. W illiams was sentenced to 180 months imprisonment, several years over the statutory maximum for §922(g)(1) convictions. Mr. Williams did not appeal the conviction and sentence, although he insisted that his attorney do so on the basis that attempted burglary and second degree burglary were not qualifying felony convictions under the ACCA.

Three years later, Mr. Williams filed his first and only §2255 Motion to

Vacate. He alleged that his attorney was ineffective for not objecting to his sentencing as an armed career criminal in light of United States v. Permenter, 969 F.2d 915 (10th Cir. 1992); and United States v. Green, 55. F3d 1513, 1516 (10th Cir. 1995); and United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018). See Mr. Williams' §2255 Motion to Vacate, Doc. 51, at pp. 4 and 5; see also his Brief in Support of §2255 Motion to Vacate, Doc. 52, at p. 1 ("Argument One"). Mr. Williams asserted that his Motion was timely because they "are both Constitutional and Jurisdictional And both are without time constraints. Jurisdictional Issues can be raised at any time. The one year AEDPA is not applicable to this Motion." Id at p. 10. The district court ordered Mr. Williams to show cause why his Motion should not be dismissed as untimely. Doc. 53. Mr. Williams responded by asserting his Motion was timely and should not be dismissed because: (1) United States v. Bowen, No. 17-1011 (10th Cir. 2019) made the United States Supreme Court decision in United States v. Davis, No. 18-431 (2019) retroactive; Doc. 55, at p. 2; (2) under the procedural default rule and the actual or factual innocence doctrine, his claim was timely, Id. at pp. 3-5; (3) his attorney's ineffectiveness was the cause for the claim not being filed in a timely manner, and he was prejudiced by the loss of an appeal he requested the attorney to file, Id. at pp. 5 and 6; (4) that his sentence was illegal and a complete miscarriage of justice, the district court did not have jurisdiction to impose the sentence under federal law, and that the district court possessed the inherent authority (power) to correct the sentence, Id. at pp. 7-8; second degree burglary under Okla.Stat. tit. 21, §1435 is not a qualifying offense for purposes of §924(e)(1) and Mr. Williams is therefore innocent of that §924(e) conviction, citing United States v. Green, 55 F.3d 1513, 1516 (10th Cir. 1995)(overruled on other grounds); and United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018). Doc. 51 at p. 8.

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Thereafter, the district court ordered the Government to respond, Doc. 57, which they did, Doc. 58. In its response, the Government argued that United States v. Davis, 139 S.Ct. 2319 (2019), had no impact upon Mr. Williams' ACCA enhanced sentence; that Mr. Williams' argument did not fall within the exception for actual or factual innocence; and that the United States Supreme Court had not considered the issue presented in United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018). Based on those arguments, the Government urged the district court to find that Mr. Williams' Motion to Vacate was untimely and that Mr. Williams had not established any exceptions, therefore, the Motion to Vacate had to be dismissed.

The district court invited Mr. Williams to reply to the Government's Response, Doc. 59. Mr. Williams filed his Reply on February 3, 2020, Doc. 60. In his Reply, Mr. Williams submitted Statements of Facts that were undisputed by the Government, and material to the case. Id. at pp. 2 and 3, 4, and 6. He also reiterated that his sentence is illegal and a complete miscarriage of justice, Id. at pp. 4 and 5. He reiterated that the district court enhanced his sentence under §924(e) without jurisdiction, Id. at p. 6. He reiterated that he was actually innocent of §924(e) et seq. Doc. 60, at pp. 6-8. And he reiterated that his attorney was the cause of his Motion to Vacate being untimely, and the cause of Mr. Williams' failure to file a direct appeal, despite being told to do so. Id. at p. 3.

The district court dismissed Mr. Williams' §2255 Motion as untimely. Doc. 61. It held that Mr. Williams could not rely on Davis, 139 S.Ct. 2319 (2019) to extend the statute of limitations period under §2255(f)(3), Id. It held that although United States v. Hamilton, 889 F.3d 688 (10th Circuit 2018) addresses the merits of Mr. Williams' claim, "specifically finding that a conviction for second degree burglary is not categorically a crime of violence under the ACCA[,]"

Hamilton does not provide Mr. Williams a route for avoiding the one year period of limitations because Hamilton is not a Supreme Court case, that Court has not considered the issue, and only the Supreme Court can declare a new constitutional law retroactive, citing United States v. Cartwright, No. 10-CR-0104-CVE, 2019 WL 6717020 *2 (N.D. Okla. Dec. 10, 2019), Doc. 61. The district court also ruled that Mr. Williams' ineffective assistance of counsel claim was time barred. Id. And, while holding that the limitations period in §2255 is subject to equitable tolling when a prisoner is actually innocent, Citing United States v. Gabaldon, 522 F.3d 1121, 1124 (10th Cir. 2008), the Court said, Mr. Williams did not argue he was actually innocent of being a felon in possession of a firearm, but argued, instead, that the ACCA enhancement was error, making the claim one of "legal innocence" as opposed to "actual innocence" and not sufficient to toll the limitations period to §2255(f)(3), citing United States v. Burk, 643 F. App'x, 757, 758 (10th Cir. 2016)(unpublished)(rejecting a similar claim).

The district court did not address Mr. Williams' claims that: (1) his sentence is illegal because it exceeds that stautory maximum, constituting a complete miscarriage of justice, which must be corrected, Doc. 55 and 56, at p. 4; (2) his sentence is illegal because it was imposed without authority of law (jurisdiction) in light of United States v. Permenter, supra, and United States v. Green, supra, Id. at pp. 7, 8; (3) the district court possessed the inherent authority to correct the enhancement error despite §2255(f)(3)'s limitation period, Id.; and, (4) Mr. Williams' attempted first degree burglary conviction claim relied on United States v. Permenter, while his second degree burglary conviction claim relied on United States v. Green and United States v. Hamilton. Doc. 55 and 56, at pp. 3-4, and Doc. 60, at pp. 2, 6 (Permenter), and Doc. 55 and 56 at pp. 8-9, and Doc. 60, at pp. 2, 5 (Green and Hamilton). The district court's order treats the two separate claims as though they were one claim, and painted them both with the same Hamilton brush.

WHETHER, IN LIGHT OF BOUSLEY v. UNITED STATES, 523 U.S. 614(1998) AND UNITED STATES V. BOWEN, NO. 17-1011 (10th Cir. 2019), MR WILLIAMS' 28 U.S.C.§2255 MOTION TO VACATE WAS TIMELY IF HE WAS ACTUALLY INNOCENT OF 18 U.S.C. §924(e)?

In Johnson v. United States, 133 S.Ct. 2551 (2015), the Supreme Court declared the residual clause of the ACCA (18 U.S.C. §924(e)(2)(B)(ii) to be unconstitutionally vague. Johnson, 133 S.Ct. at 2557. The ACCA's residual clause allowed a prior felony conviction to qualify as a violent felony for purposes of enhancing a defendants sentence if the prior felony conviction "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." Johnson's holding that the ACCA's residual clause was unconstitutionally vague applied equally to the residual clause in 18 U.S.C. §16B. Sessions v. Dimaya, 584 U.S. ____ (Slip Op. at 11). The ACCA's definition of a violent felony is materially indistinguishable from §16's definition of a crime of violence. Moreover, long before the Supreme Court's decision in Dimaya, the Tenth Circuit had already held that the residual clause contained in §16B was void after Johnson. See Galicov v. Lynch, 837 F.3d 1065 (10th Cir. 2016); cf. United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015); and In re Encinias, 821 F.3d 1224 (10th Cir. 2016)(permitting second and successive 18 U.S.C. §2255 Motion on Johnson claims). See also Dimaya v. Lynch, 803 F.3d 1110, 1115 (9th Cir. 2015). For years, almost every court in the country understood 18 U.S.C. §924(c)(3)(B) "to require exactly the same categorical approach that the Supreme Court found problematic in the residual clause of the ACCA and §16." United States v. Davis, 139 S.Ct. 2319 (2019)(Slip Op., at 7, citing cases); see also United States v. Munro, 394 F.3d 865, 870 (10th Cir. 2005). Clearly, therefore, the language applying to §924(e) applies equally to § 924(c) and §16.

In United States v. Bowen , No. 17-1011 (10th Cir. 2019), the Tenth Circuit joined the Eleventh Circuit, ruling that United States v. Davis, 139 S.Ct. 2319 (2019), is a new rule of constitutional interpretation, and declaring Davis retroactive to cases on collateral review.

Bowen was convicted in 2007 of aiding and abetting the retaliation against a witness, in violation of 18 U.S.C. §1513(b)(2)(count I); conspiracy to retaliate against a witness, in violation of 18 U.S.C. §371 and §1513(e)(count ii); and possession and brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §924(c)(1)(A)(ii).

Bowen filed his §2255 Motion to Vacate claiming that his witness retailiation convictions could only qualify as crimes of violence under the residual clause of §924 (c) and, as such, his brandishing conviction should be vacated in light of Davis. Prior to the Tenth Circuit's ruling, the district court had found that witness retaliation was a crime of violence under the elements clause; that the retaliation conspiracy was not a crime of violence under the elements clause; and that Bowen's §2255 Motion to Vacate was untimely because Bowen was not "asserting a right newly recognized by the Supreme Court in Johnson." Bowen appealed the dismissal of his §2255 Motion and he was granted a COA.

The Tenth Circuit ordered Supplemental Briefing post-Davis. In that briefing, both parties agreed that Bowen's §2255 Motion was timely if he was actually innocent of the 924(c)(1) offense. The Tenth Circuit said:

> "Although the district court concluded that Bowen's §2255 motion was untimely, the United States now asserts that if 'Bowen [is] actually innocent of his §924(c) offense[,]....he would overcome the procedural bar of timeliness.' Aplee. 28(j) Letter (filed Aug. 27, 2018) Bowen agrees. See Aplt. Supp. Reply Br. at 5 (filed July 26, 2019)("[I]t appears that the parties agree that, unless the offense of witness retaliation necessarily

> requires violent physical force, Mr. Bowen is actually innocent, and any time bar is excused.").

Bowen, No. 17-1011, at Section II.

Based on the parties agreement, the Tenth Circuit assumed without deciding that Bowen's §2255 Motion was timely if he was actually innocent of the §924(c)(1) offense. Cf. Day v. Mcdonough, 547 U.S. 198, 202 (2006)("[W]e would count it an abuse of discretion to override [the government's] deliberate waiver of a limitations defense")."

In the instant case, Mr. Williams asserted that he was actually innocent of his §924(e) offense because Okla.Stat. tit. §§42 (attempt) and 1435 (burglary) were not crimes of violence or violent felonies for purposes of §924(e). See Doc. 55 at pp. 3, 4, and 8; Doc. 60 at pp. 6-8. Accordingly, if attempted burglary and second degree burglary are not violent felonies or crimes of violence, Mr. Williams is actually innocent of the §924(e)(1) offense.

The district court determined that equitable tolling, in certain circumstances, including actual innocence, is proper, citing United States v. Gabaldon, 522 F.3d 1121, 1124 (10th Cir. 2008). However, the district court construed the facts of Mr. Williams' claim to constitute one of legal innocence, as opposed to actual innocence, and that the claim was not sufficient to overcome §2255(f)(3)'s limitation period, citing United States v. Burk, 643 F. App'x 757, 758 (10th Cir. 2016)(unpublished); and Faircloth v Raemisch, 692 F.App'x 513, 523 (10th Cir. 2017)(unpublished).

The Government, relying on a Seventh Circuit decision, In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998); and an Eleventh Circuit decision, Williams v. Warden, 713 F.3d 1332, 1345-46 (11th Cir. 2013), did not argue that actual innocence in the Tenth Circuit is not available to Mr. Williams. It argued that in other circuits "a challenge to counting of prior convictions under the ACCA does not constitute a claim of actual innocence" citing United States v. pettiford,

612 F.3d 270, 284 (4th Cir. 2010)(holding that challenging the classification of an ACCA predicate conviction "is not cognizable as a claim of actual innocence").

The Tenth Circuit spoke on the issue in Bowen, at footnote 2. It recognized that the Tenth Circuit nor the Supreme Court has definitively resolved whether a claim of actual innocence based on a new statutory interpretation can overcome §2255's statute of limitations, citing Bousley v. United States, 523 U.S. 614, 623 (1998)(holding that a §2255 movant could be actually innocent based on a new statutory interpretation, but remanding "to permit the defendant to attempt to make a showing of actual innocence"); Batrez Gradiz v Gonzales, 490 F.3d 1206, 1209 (10th Cir. 2007)(recognizing that a statutory-interpretaion-based claim of actual innocence could excuse lack of exhaustion in an appeal of an order of removal).

The Government's defense was "Mr. Williams is not arguing that he is actually innocent of a crime; he is arguing that his prior convictions for second degree burglary should not be counted under the ACCA." The Government did not invoke a particular defense. Instead, it cited caselaw from other Circuits. The Government's failure to invoke a defense that speciffically argued that Mr. Williams cannot claim actual innocence of a §924(e)(1) offense in the Tenth Circuit should be counted as a waiver of that defense.

Mr. Williams submits that the district court's ruling is at odds with Bousley, where the Court recognized actual innocence or factual innocence in the §924(c) context as opposed to legal innocence. The district court's order also contradicts this Court's limited recognition of the actual innocence exception in the §924(c) context in Bowen, supra.

Because attempted burglary under Okla.Stat. tit. 21, §§42 and 1435; and second degree burglary under Okla.Stat. tit. 21, §1435, are not qualifying violent felonies for §924(e) purposes, (See Permenter, supra, holding that the Oklahoma attempt statute does not fulfill Taylor's categorical requirements, and convictions

obtained under that statute may not serve as the predicate for an enhanced sentence under the ACCA); and Green, supra, (holding that because §1435 "defines burglary in terms broader than the [generic] definition, [a prior §1435] conviction cannot as a categorical matter provide a basis for enhancement under the ACCA."), Mr. Williams, Like Mr. Bousley, and Mr. Bowen, is actually innocent of §924(e)(1).

WHETHER THE DISTRICT COURT'S DISMISSAL OF MR. WILLIAMS' §2255 MOTION TO VACATE RESULTED IN A COMPLETE MISCARRIAGE OF JUSTICE IN LIGHT OF DAVIS V. UNITED STATES, 417 U.S. 333, 346-47 (1974); AND UNITED STATES V. SHIPP, 589 F.3d 1084, 1091 (10th Cir. 2009), AND IF SO, DOES THAT MISCARRIAGE OF JUSTICE OVERCOME §2255's LIMITATION PERIOD

In United States v. Titties, 852 F.3d 1257 (10th Cir. 2017), the Tenth Circuit held that a prior Oklahoma States felony for feloniously pointing a firearm, in violation of Okla.Stat. tit, 21, §1289.16 (1995), was not categorically a violent felony under the ACCA. Titties, 852 F.3d at 1268-69. The court determined that because Mr. Titties no longer had the requisite three prior violent felony convictions to warrant an ACCA enhancement due to the Court's finding that those prior convictions were non-qualifying, his sentence was rendered illegal. Id. at 1269. The Court reasoned that "[w]ithout the enhancement, the maximum sentence for Mr. Titties' offense was 120 months, see 18 U.S.C. 924(a)(2), which meant his sentence of 188 months was illegal. See Gonzalez-Huerta, 403 F.3d at 739, n.10 (explaining that a sentence is illegal 'where the terms of incarceration exceeds the statutory maximum')." Titties, 852 F.3d at 1275. The Court further explained that an illegal sentence is per se reversible error. Id. In United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009), the Court held that the improper application of an ACCA sentence violated Due Process and "inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief...."

citing Davis v. United States, 417 U.S. 333, 346-47 (1974).

Mr. Williams' prior Oklahoma State felony conviction for attempted burglary and second degree burglary never qualified as violent felonies for purposes of ACCA predicates in Mr. Williams' case. He does not have the requisite prior felony convictions to justify a 180 months sentence. Mr. Williams received 60 months for possession of marijuana, and 180 months for an ACCA enhanced felon in possession of a firearm conviction (18 U.S.C. §§922(g)(1), 924(a)(2), and 924(e)(1). Since Mr. Williams' prior Oklahoma States convictions for attempted burglary and second degree burglary do not qualify him as an armed career criminal, the maximum sentence he could have received for being a felon in possession of a firearm was 120 months. See 18 U.S.C. §924(a)(2). Accordingly, his sentence above the maximum penalty violated his Due Process rights and is illegal. Titties, 852 F.3d at 1269; Gonzalez-Huerta, 403 F.3d at 739, n.10; Ship, 589 F.3d at 1091. See also Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011)(en banc)("An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority[, and] is an error of law resulting in a fundamental miscarriage of justice....").

The district court, like the Government in this case, chose not to address Mr. Williams' claim that his sentence was illegal and constituted a complete miscarriage of justice, presenting exceptional circumstances for equitable tolling and justifying relief. So, for the foregoing reasons, Mr. Williams requests this Court to make those determinations, vacate his sentence, and remand to the district court for resentencing.

WHETHER MR. WILLIAMS, IN LIGHT OF UNITED STATES v. PERMENTER, 969 F.2d (10th Cir. 1992); AND UNITED STATES v. GREEN, 55 F.3d 1513, 1516 (10th Cir. 1995), CONSTITUTES AN ARMED CAREER CRIMINAL AND, IF NOT WHETHER THE DISTRICT COURT ACTED WITHOUT JURISDICTION (AUTHORITY OF LAW) WHEN IT SENTENCED HIM AS SUCH; AND DOES SUCH SENTENCE CONSTITUTE EXCEPTIONAL CIRCUMSTANCES JUSTIFYING RELIEF

Under the ACCA, "any three prior convictions for violent felonies may provide

the basis for imposition of the mandatory minimum penalty of fifteen years." Permenter, 969 F.2d at 912. "'Violent felony' means any crime...that...is burglary, arsomn, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...." 18 U.S.C. §924(e)(2)(B). The first part of the clause is often called the "enumerated clause," because it enumerates certain generic crimes--such as burglary--that Congress chose to cover. The final part of the clause, often called the residual clause, once offered a catchall to sweep in otherwise uncovered convictions, but the Supreme Court struck it down in Johnson v. United States, 576 U.S. ____, ____ (Slip Op., at 15). The elements clause and the enumerated clause are now the only channels by which a prior conviction can qualify as an ACCA "violent felony." See Stokeling v. United States, ____ U.S. ____, ____ (Slip op., at 2, Sotomayor dissenting). The District Court's order dismissing Mr. Williams' ¶2255 Motion made it clear, [Mr. Williams'] burglary convictions were considered under the enumerated clause of 18 U.S.C. §924(e)(2)(B)(ii), specifically the 'that is burglary provision.'" Id. at p. 3.

In Permenter, the defendant pleaded guilty to the charge of possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g)(1). The district court in that case enhanced his sentence under §924(e)(2) based on three prior Oklahoma States convictions, one of which was attempted burglary. The defendant appealed and the Tenth Circuit reversed the district court's sentence and remanded for resentencing. The Tenth Circuit determined that the conviction for attempted burglary was not a conviction of a violent felony and, thus, could not serve as part of the predicate for imposition of sentence under the ACCA. The attempt burglary conviction was in violation of Okla.Stat. tit. 21, §§42 and 1435, which provided a broader definition than that recognized by decisional law. Id. at 911.

In United States v. Green, 55 F.3d 1513 (10th Cir. 1995), the defendant appealed his ACCA sentence to the Tenth Circuit and asked whether secondegree burglary under Okla.Stat. tit. 21, §1435 sweeps more broadly than the ACCA definition--that is, if some conduct would garner a conviction but would not satisfy the enumerated offenses clause definition. Titties, 852 F.3d at 1266. The court held that because §1435 defines burglary in terms broader than the generic definition, a prior conviction under §1435 cannot as a categorical matter provide a basis for an enhancement under tha ACCA. Green, 55 F.3d at 1516. Permenter was decided July 9, 1992. Green was decided June 2, 1995. Both were good law at the time Mr. Williams was sentenced.

In United States v. Prigdeon, 153 U.S. 48, 62 (1897), the Supreme Court helld that Pridgeon's sentence of "hard labor" was an illegal sentence that had to be corrected. It held that the sentence had to be correct because federal law did not authorize the district court to impose a sentence of "hard labor." The Supreme Court held that the district court, in imposing a sentence of hard labor did not have jurisdiction to do so because federal law did not authorize the court to do so. Id. at 62.

Mr. Willliams was sentenced on June 2, 2015. Both Permenter and Green were the law in effect at the time of Mr. Williams' sentencing. As outlined above, neither case authorized an ACCA sentence for Mr. Williams' §922(g)(1) conviction based on Oklahoma attempted burglary or Oklahoma second degree burglary. Consequently, neither case authorized the district court to determine that Mr. Williams was an armed career criminal, warranting an ACCA enhanced sentence.

This Court must reverse the sentence and remand for resentencing.

WHETHER UNITED STATES v. HAMILTON, 889 F.3d 688 (10th Cir. 2018), CREATES A NEW RULE OF CONSTITUTIONAL INTERPRETATION WHICH SHOULD BE MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW

In applying §2255(f)(3), the district court found that the Supreme Court has not considered the issue addressed in United States v. Hamilton, 889 F.3d 688 (10th Cir. 2018), and that only the Supreme Court can declare a new constitutional law retroactive. Order at p. 3, Doc. 61, at p. 3, Citing United States v. Cartwright; No. 10-CR-0104-CVE, 2019 WL 6717020, *2 (N.D. OKLA. Dec. 10, 2019). Accordingly, the district court determined that Mr. Williams did not satisfy the requirements of §2255(f)(3) and his motion was untimely. Mr. Williams asserts that reasonable jurists would disagree.

Although the district court found that Mr. Williams' §2255 Motion was untimely because it was filed more than one year after his conviction had become final, the district court was incorrect that only the Supreme Court can declare a new constitutional rule of law retroactive. That standard applies only where a Motion qualifies as a second or successive §2255 Motion, because §2255(h) applies in that circumstance. Browning v. United States, 241 F.3d 1262, 1264 (10th Cir. 2001)(en banc)("We hold that while a Teague analysis remains applicable to initial applications raising new rules of constitutional law under section 2255, the proper test on a second or successive application is merely to ask whether the rule has been made retroactive by the Supreme Court. We further hold that a rule is 'made retroactive' by the Court only if the Court actually applies the rule retroactively, or makes some explicit statement regarding retroactivity."); 28 U.S.C. §2255(h)(2)("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain ... a new rule of constitutional law, made retroactive

to cases on collateral review by the Supreme Court, that was previously unavailable.").

Because Mr. Williams' §2255 Motion is his first, he need only satisfy §2255(f), not the more stringent standard of §2255(h). Section 2255(f) only requires that the right be "made retroactive[]," while §2255(h) explicitly requires that the rule is "made retroactive by the Supreme Court." §2255(f), (h). Under §2255(f)(3), a panel of the Court of Appeals can apply the Teague analysis in the first instance and determine for themselves whether a new rule applies retroactively to the initial habeas petition. United States v. Chang Hong, 671 F.3d 1147, 1156 n. 10 (10th Cir. 2011("We have held 'Teague's retroactivity analysis ... determines whether the new rule is applicable to an initial motion for collateral habeas relief.'")(quoting Browning, 241 F.3d at 1264).

Mr. Williams invites the Court to visit the issue of whether United States v. Hamilton presents a new rule of constitutional law that applies retroactively to an initial §2255 motion for collateral relief. Hamilton Changed the rule in United States v. Green, that the modified categorical approach was the proper approach in determining whether a crime was categorically a violent felony under the ACCA. Green reached that conclusion without first considering whether §1435 was divisible. Green, 55 F.3d at 1516. Green was subsequently overruled by Descamps v. United States, 570 U.S. 254 (2013), and Mathis v. United States, ___ U.S. ____, 136 S.Ct. 2243 (2016), to the extent that it stands for the proposition that a court can analyze §1435 under the modified categorical approach without first determining whether the statute is divisible. Hamilton, 889 F.3d at n.7. This Court made the correction to Green's rule in a footnote. Mr. Williams extends an opportunity for the Court to fully address the matter.

Other Circuit Courts of Appeals, including this one, have recognized that

they possess the authority to expand a COA to cover uncertified, underlying constitutional claims asserted by a habeas movant. See Adams v. LeMasters, 223 F.3d at 1179-80 (expanding COA containing only procedural questions to include the underlying constitutional issue); see also Villot v. Varner, 373 F.3d 327 337 n.13 (3d Cir. 2004)(exercising discretion sua sponte to expand the scope of the certificate of appealability granted by motions panel, citing 3d Circuit LAR. 22.1(b)); Valerio v Crawford, 306 F.3d 742, 764 (9th Cir. 2004) ("Although neither AEDPA nor [Fed. R. Crim. P. 22] specifically so provides, not only has the power to grant a COA where the district court has denied it as to all issues, but also to expand a COA to include additional issues when the district court has granted a COA as to some but not all issues."); Nardi v Stewart, 354 F.3d 1134, 1136-40 (9th Cir. 2004)(expanding a COA to include a claim that both the district court and a motion panel previously declined to certify); franklin v. Hightower, 215 F.3d 1196, 1199 (11th Cir. 2000)(affirming the panel's ability to revisit a judge's determination of a procedural motion, including a COA, to confirm that it complies with applicable standards and to cure any deficiencies).

For all of the foregoing reasons, this Court should Grant a Certificate of Appealability.

Dated: _____ Respectfully,

_____
Hadori Karmen Williams
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United States Penitentiary
P.O. Box 1000
Leavenworth, Kansas 66048-1000

Certificate of Mailing

I, Hadori Williams, do hereby certify that a true and correct copy of the foregoing Request For Certificate Of Appealability was mailed on this ____ Day of _____2020, postage pre-paid, addressed to: Ashley Altschüler, Asst. U.S. Atty, 210 Park Ave. Ste. 400, Oklahoma City, Ok. 73102.

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