APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-1701

STEVEN DOTSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:14-cv-1648 — **William T. Lawrence**, *Judge*.

ARGUED OCTOBER 3, 2019 —
DECIDED FEBRUARY 3, 2020

Before WOOD, *Chief Judge*, and BARRETT and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. The Presentence Investigation Report on Steven Dotson listed six prior felony convictions, three of which the Probation Office identified as qualifying him for the enhanced mandatory minimum sentence of 15 years' imprisonment under the Armed Career Criminal Act. The PSR was silent on whether any of Dotson's other three convictions so qualified, and nobody raised the question at sentencing. The district court agreed with

the Probation Office and sentenced Dotson as a career offender to 188 months (15 years and 8 months).

In recent years, federal courts have seen a floodtide of litigation over what qualifies as an ACCA predicate. Dotson, too, has watched these developments, and he reacted by pursuing post-conviction relief under 28 U.S.C. § 2255. The district court denied relief, determining that Dotson has *four* qualifying ACCA predicates—the three originally designated as such in the PSR and one additional for burglary under Indiana law. Since the district court's decision, the law has continued to evolve and has since knocked out one of the three predicates the Probation Office originally determined qualified Dotson as an armed career criminal. The question presented is whether the government can save the enhanced sentence by substituting another of Dotson's convictions—one listed in the PSR as part of Dotson's criminal history but not designated as or found by the district court to be an ACCA predicate at sentencing.

In the circumstances before us, the answer is yes, owing not only to the substituted conviction being included in the indictment and later the PSR, but also to Dotson himself recognizing in legal filings and apparently believing (although mistakenly) that his Indiana burglary conviction had served as an ACCA predicate at his original sentencing. So, while we affirm, our decision is narrow and limited. The record leaves us no doubt Dotson believed his Indiana burglary conviction could serve to support and preserve his enhanced sentence.

I

In March 2011, a grand jury indicted Dotson for possessing a firearm following a prior felony conviction, a violation of 18 U.S.C. § 922(g). The indictment listed six prior felony convictions and likewise alleged that Dotson qualified for the minimum sentence Congress mandated in the Armed Career Criminal Act. See 18 U.S.C. § 924(e) (requiring a 15-year minimum sentence for anyone who violates § 922(g) and has three prior convictions for "a violent felony or a serious drug offense").

Following Dotson's conviction at a bench trial, the case proceeded to sentencing. The PSR recommended finding that Dotson qualified as an armed career criminal on the basis of these three convictions:

1. Armed Robbery (Indiana 1992)
2. Dealing in Cocaine (Indiana 1993)
3. Attempted Robbery (Indiana 2007)

A separate portion of the PSR recounted Dotson's full criminal history by listing these same three felonies and the three others contained in the indictment:

4. Burglary (Indiana 1993)
5. Possession of Marijuana (Indiana 2000)
6. Theft and Receipt of Stolen Property (Indiana 2001)

In the end, the PSR came to a recommended guidelines range of 235 to 293 months—driven largely by Dotson qualifying as an armed career criminal. See U.S.S.G. § 4B1.4.

At sentencing neither party objected to the PSR's account of Dotson's criminal history or determination that he qualified as an armed career criminal for both statutory and guidelines purposes. Following its application of the factors in 18 U.S.C. § 3553(a) and mindful of the 15-year mandatory minimum Congress prescribed in ACCA, the district court sentenced Dotson to 188 months. We affirmed on direct review. See *United States v. Dotson*, 712 F.3d 369 (7th Cir. 2013).

In October 2014, Dotson invoked 28 U.S.C. § 2255 and sought a reduced sentence. Pointing to the Supreme Court's decision in *Descamps v. United States*, 570 U.S. 254 (2013), he argued that his 1993 Indiana burglary conviction (#4 in our list above) no longer qualified as an ACCA predicate. That position reflected a misunderstanding on Dotson's part, for the district court at sentencing never considered or found that the Indiana burglary qualified as a violent felony. In a supplemental filing, Dotson also questioned whether his Indiana dealing in cocaine offense (#2) was an ACCA predicate.

The district court responded to Dotson's motion by appointing counsel. Dotson's counsel then repeated the same mistake in an amended § 2255 motion, arguing that neither the 1993 Indiana burglary conviction (#4) nor the 2007 Indiana attempted robbery conviction (#3) qualified as violent felony predicates. Nobody caught that the 1993 Indiana burglary conviction (#4) was not part of the basis on which the sentencing judge found Dotson to be an armed career criminal.

For its part, the district court likewise committed the same mistake, denying Dotson's § 2255 motion because, even if the 1993 Indiana dealing in cocaine conviction (#2) somehow did not constitute a serious drug offense within the meaning of § 924(e), his 1992 Indiana armed robbery (#1), 2007 Indiana attempted robbery (#3), *and* 1993 Indiana burglary (#4) convictions remained ACCA predicates. Put another way, in ruling on Dotson's § 2255 motion, the district court started from the express (but mistaken) premise that it previously "found" at sentencing that Dotson "had three or more prior convictions that qualified as 'violent felonies' [or serious drug offenses]," including offenses #1 (armed robbery), #2 (dealing in cocaine), #3 (attempted robbery), *and* #4 (burglary). Nobody caught the mistake.

After the district court's denial of Dotson's § 2255 motion and request for a certificate of appealability, this court held that an Indiana conviction for attempted robbery is not a "crime of violence" within the meaning of ACCA. See *United States v. D.D.B.*, 903 F.3d 684, 692–93 (7th Cir. 2018). Dotson then sought, and we granted, a certificate of appealability in light of *D.D.B.*

II

What happened during Dotson's present appeal frames the issue now before us. Our decision in *D.D.B.* meant that Dotson's 2007 Indiana attempted robbery conviction (#3) no longer qualifies as an ACCA predicate. From there, however, the government points to our decision in *United States v. Perry*, 862 F.3d 620 (7th Cir. 2017), where we held that Indiana burglary qualifies as a violent felony under ACCA, and

urges us to rely upon—or, more accurately, to substitute—Dotson's 1993 Indiana burglary conviction (#4) to sustain his sentence as an armed career criminal. The government's requests and reasoning are straightforward: with the Indiana attempted robbery conviction (#3) out because of *D.D.B.* but the burglary conviction (#4) remaining a violent felony, Dotson still has three qualifying predicates (#1, #2, and #4) and remains an armed career criminal.

Not before now have we considered whether the government can substitute ACCA predicates after sentencing to save an enhanced sentence. We came the closest to the issue in *Light v. Caraway*, 761 F.3d 809 (7th Cir. 2014), and take some direction from our approach there.

Augustus Light had at least four adult felony convictions, three of which the PSR identified as ACCA predicates. See *id.* at 811. At sentencing, and without expressly stating which convictions qualified as ACCA predicates, the district court followed the Probation Office's recommendation and sentenced Light as a career offender. The Supreme Court then decided several cases addressing what did and did not qualify as ACCA predicates. The Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), had the effect of showing that Light's prior conviction for criminal vehicular operation under Minnesota law was not a qualifying violent felony under ACCA. But three years later came *Sykes v. United States*, 564 U.S. 1 (2011), which had the opposite effect for Light. *Sykes* made clear that Light's conviction under Minnesota law for fleeing in a car from a police officer—an offense that was not an ACCA predicate under the law in place

at the time of Light's sentencing—did constitute a violent felony within the meaning of § 924(e). *Light*, 761 F.3d at 814.

The "net change" of these legal developments, we determined, was "zero." *Id.* This meant Light remained an armed career criminal: "Through intervening changes in the law, one of his prior predicate offenses for the ACCA enhancement no longer qualifies, but one that was not previously a qualifying predicate offense has become eligible." *Id.* More to it, we failed to "see why Light is entitled to a one-way ratchet, subject only to changes in law that benefit him but immune from changes in law that are not helpful." *Id.* at 817. Nor were we persuaded by Light's contention of unfair notice—that the substituted offense (the fleeing-in-a-vehicle offense) was not an ACCA predicate at the time of sentencing. Given "the numerous recent cases elaborating on the scope of the ACCA's residual clause," we explained, Light could not claim any "undue surprise" that the changes in law could work in both directions to leave his sentence undisturbed. *Id.*

At the very least, *Light* counsels that our analysis here should ask whether fundamental unfairness arising from a lack of notice would befall Dotson by allowing his 1993 Indiana burglary conviction (#4) to sustain his sentence as an armed career criminal. On the record before us, we cannot answer the question in Dotson's favor.

First, recall that the indictment listed the burglary conviction among other prior felonies as part of charging a violation of § 922(g) *and* § 924(e)—the latter being an express reference to ACCA. The

indictment, in short, informed Dotson the government may rely on his burglary conviction (#4) to show he had three qualifying ACCA predicates and thus would face an enhanced sentence upon a conviction.

Second, and more importantly, Dotson himself submitted at least four filings reflecting the belief, albeit a mistaken one, that the district court had counted the 1993 burglary conviction (#4) as a qualifying ACCA predicate at the original sentencing. He then saw his appointed counsel make the same mistake.

The punchline, then, is that these circumstances are far afield from a scenario where a defendant may be able to make a credible showing of undue surprise from allowing the substitution of a particular felony conviction not relied upon at sentencing to save an ACCA sentence otherwise called into question by subsequent developments in the law. Dotson more than knew of this possibility: he and his counsel represented it as reality in several legal filings in the course of these § 2255 proceedings. In these circumstances, we see no unfairness in leaving intact Dotson's sentence as an armed career criminal.

We prefer this narrower reasoning to the broader strokes the Eleventh Circuit painted with in deciding the same question in *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019). The court there held that, in opposing a § 2255 motion, the government may rely on a conviction to serve as an ACCA predicate even if the conviction was not among those listed in the PSR as, or determined at sentencing to be, a predicate. See *id.* at 1332 (observing that the defendant "raised no objection to his ACCA enhancement" and emphasizing

that "the government did not waive reliance on other convictions in the [PSR] as ACCA predicates simply by not objecting to the [PSR] on the grounds that Tribue had more qualifying convictions than the three that the probation officer had identified as supporting the ACCA enhancement"). The Tenth Circuit seems to have reached a similar conclusion. See *United States v. Garcia*, 877 F.3d 944, 956 (10th Cir. 2017) (allowing, without express consideration of the issue, the post-sentencing substitution of a prior conviction not designated in the PSR as a violent felony predicate to save an ACCA sentence), abrog'd on other grounds by *United States v. Ash*, 917 F.3d 1238 (10th Cir. 2019).

By contrast, the Fourth Circuit has held that the government could not support an ACCA enhancement with a conviction listed in the PSR but not previously designated at sentencing as a predicate. See *United States v. Hodge*, 902 F.3d 420, 427 (4th Cir. 2018). The court rooted its holding in the unfairness of the defendant having no notice—no reason at sentencing—to believe the court or government may react to a change in the law favorable to the defendant by relying on another of his prior convictions to preserve the ACCA sentence. The court put its holding this way: "when the Government or the sentencing court chooses to specify which of the convictions listed in the PSR it is using to support an ACCA enhancement, it thereby narrows the defendant's notice of potential ACCA predicates from all convictions listed in the PSR to those convictions specifically identified as such." *Id.* at 428.

While not siding with the Fourth Circuit's broader holding, we agree with its concerns about notice to defendants. Fair notice underpins due process

precisely because it prevents surprise and affords opportunities to respond. Those principles are not offended here: Dotson himself believed and represented in multiple legal submissions that the district court counted his 1993 Indiana burglary conviction (#4) as an ACCA predicate at his original sentencing. While his view was mistaken, allowing the burglary conviction to sustain his sentence does not in our view offend principles of fair notice on these unusual facts.

So, too, do we worry about the consequences of a holding that, as a practical matter, risks producing expansive litigation at sentencing over whether each and every prior felony in a defendant's criminal history constitutes a qualifying ACCA predicate. The law in this area, at the risk of great understatement, is dizzyingly complex. The last outcome we want to risk is sentencing hearings turning into full-blown, prolonged, and extraordinarily difficult exercises over questions where the answers may never matter. Judicial resources warrant better investment.

For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STEVEN DOTSON,	)	
Petitioner,	)	
	)	Case No. 1:14-cv-
vs.	)	1648-WTL-MPB
	)	
UNITED STATES OF AMERICA.	)	

Entry Denying Motion for Relief Pursuant to 28 U.S.C. § 2255 and Denying Certificate of Appealability

For the reasons explained in this Entry, the amended motion of Steven Dotson ("Mr. Dotson") for relief pursuant to 28 U.S.C. § 2255 must be **denied** and the action dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

I. The § 2255 Motion

Background

Mr. Dotson was convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1), on January 10, 2012, after a bench trial in the United States District Court for the Southern District of Indiana. *United States v. Dotson*, 1:11-cr-056-WTL-DML-1, Crim. Case, Dkt. No. 43. He was sentenced to a term of 188 months to be followed by a 5 year term of supervised release. The 188 month sentence was

based on the Court's finding that Mr. Dotson was an armed career criminal under 18 U.S.C. § 924(e) (Armed Career Criminal Act) ("ACCA"). Judgment was entered August 20, 2012. Crim Case, Dkt. No. 56. The Seventh Circuit Court of Appeals affirmed the conviction on April 4, 2013. *United States v. Dotson*, 712 F.3d 369 (7th Cir. 2013). Mr. Dotson's petition for writ of certiorari was denied by the United States Supreme Court on October 7, 2013. *Dotson v. United States*, 134 S.Ct. 238 (2013).

The Court found Mr. Dotson to be an armed career criminal after finding that he had three or more prior convictions that qualified as "violent felonies." Those Indiana convictions included burglary, armed robbery, dealing in cocaine, and attempted robbery. In his amended motion to vacate under § 2255, Mr. Dotson claims that two of his predicate offenses, burglary and attempted robbery, are not violent felonies under the ACCA. Dkt. No. 39; Dkt. No. 45. The United States opposes his amended § 2255 motion.

As noted, throughout this litigation, Mr. Dotson has not challenged two of his four predicate offenses: armed robbery and dealing in cocaine. In Mr. Dotson's reply, Dkt. No. 54, for the first time since this action was filed in 2014, he argues that his dealing in cocaine conviction is not a serious drug felony conviction. Even if this argument had not been waived by being raised only in the reply, the Court need not consider it on the merits because Mr. Dotson has three other predicate violent felonies: burglary, armed robbery, and attempted robbery.

Discussion

The ACCA "imposes a 15-year minimum sentence on defendants convicted of illegally possessing a firearm,…who also have at least three prior convictions for a 'violent felony' or a 'serious drug offense.'" *United States v. Foster*, 877 F.3d 343, 344 (7th Cir. 2017). "ACCA defines 'violent felony' in relevant part as any felony that 'is burglary.' 18 U.S.C. § 924(e)(2)(B)(ii)." *Id.* "The term 'burglary' in § 924(e)(2)(B)(ii), however, refers only to crimes that fit within 'generic' burglary, which the Supreme Court has defined as 'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'" *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)). "Determining whether burglary under a given state's law is a violent felony presents a categorical question that focuses exclusively on the state crime's elements and not on the facts underlying the conviction." *Id.* (citing *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016)). "The state crime's elements must be the same as, or narrower than, the elements of generic burglary, so that the crime covers no more conduct than the generic offense." *Id*.

The Seventh Circuit has determined that an Indiana Class C burglary conviction is a valid predicate offense under § 924(e)(2)(B)(ii). *United States v. Perry*, 862 F.3d 620, 624 (7th Cir. 2017); *Foster*, 877 F.3d at 344 ("We recently held in *United States v. Perry*, 862 F.3d 620, 624 (7th Cir. 2017), that Indiana Class C burglary is a violent felony because it is at least as narrow as generic burglary."). Mr. Dotson's burglary conviction in 1993, No. 49G06-9301-

CF-007715, was a C felony. *Perry* controls the outcome here.

In addition, with regard to the conviction of attempted robbery, the Seventh Circuit has declared that the "law of the circuit" is "[w]hen a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony." *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017). This holding was foreshadowed in 2016 in *United States v. Armour*, 840 F.3d 904, 909, n. 3 (7th Cir. 2016) (noting that "[a]n attempt conviction requires proof of intent to carry out all elements of the crime, including, for violent offenses, threats or use of violence."), and in Judge Hamilton's concurring opinion in *Morris v. United States*, 827 F.3d 696, 699 (7th Cir. 2016) (concluding that "an attempt to commit a crime should be treated as an attempt to carry out acts that satisfy *each element of the completed crime*."). Mr. Dotson's prior felony of attempted robbery qualifies as a valid predicate offense.

Conclusion

Mr. Dotson is not entitled to relief pursuant to 28 U.S.C. § 2255. The amended motion for relief pursuant to § 2255 is therefore **DENIED.** Judgment consistent with this Entry shall now issue.

This Entry shall also be entered on the docket in the underlying criminal action, No. 1:11-cr-00056-WTL-DML-1.

II. Certificate of Appealability

Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the *Rules Governing § 2255 Proceedings*, and 28 U.S.C. § 2253(c), the Court finds

that Mr. Dotson has failed to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court therefore **DENIES** a certificate of appealability.

IT IS SO ORDERED.

/s/ William T. Lawrence

Date: 3/9/18

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution:

Electronically registered counsel

Steven Dotson, #09940-028
FCI Terre Haute
P. O. Box 33
Terre Haute, IN 47808

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 7, 2020

Before

DIANE P. WOOD, *Chief Judge*

AMY C. BARRETT, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 18-1701

STEVE DOTSON, *Petitioner-Appellant,* *v.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. 1:14-cv-1648
	William T. Lawrence, *Judge*.

O R D E R

Petitioner-appellant filed a petition for rehearing and rehearing *en banc* on March 19, 2020. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment V

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

APPENDIX E

18 U.S.C.A. § 922. Unlawful acts

* * *

(g) It shall be unlawful for any person—

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

(2) who is a fugitive from justice;

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

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

(5) who, being an alien—

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

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

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

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

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

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

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

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

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

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

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

* * *

18 U.S.C.A. § 924. Unlawful acts

* * *

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

* * *

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

(2) As used in this subsection—

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

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

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled

substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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