IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY L. VAN CANNON,

OPINION AND ORDER

Petitioner,

16-cv-433-bbc
08-cr-185-bbc

v.

UNITED STATES OF AMERICA,

Respondent.

- -

Petitioner Jerry Van Cannon was convicted in 2009 of possessing a firearm in violation of 18 U.S.C. § 922(g)(1) after having been convicted previously of at least three felonies that were either serious drug offenses or violent felonies. Because his record made him an armed career criminal, he was given an enhanced sentence of 15 years under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2). Had the enhancement not applied, petitioner would have faced a maximum term of 10 years.

Petitioner did not appeal his sentence, but now seeks post conviction relief under 28 U.S.C. § 2255, relying on Johnson v. United States, 135 S. Ct. 2551 (2015), and Mathis v. United States, 186 S. Ct. 2243 (2016). In particular, petitioner contends that his conviction for attempted burglary does not qualify as a violent felony under Johnson and that his two

second degree burglary convictions are not violent felonies under Mathis. I agree with petitioner that, under Johnson, his conviction for attempted burglary does not qualify as a violent felony under the Armed Career Criminal Act. However, I cannot consider the merits of petitioner's argument under Mathis because I conclude that Mathis is not retroactive. This means that petitioner still has four predicate convictions and that his motion for post conviction relief must be denied.

BACKGROUND

At sentencing in 2009, petitioner was found to be an armed career criminal because he had been convicted in federal court of possessing a firearm after having been convicted in federal court of a crime punishable by a term exceeding a year, in violation of 18 U.S.C. § 922(g)(1). In addition, he had been convicted previously of at least three crimes that are either violent felonies or serious drug offenses under 18 U.S.C. § 924(e)(2). In fact, petitioner had five qualifying prior convictions: armed robbery, a serious drug offense, attempted second degree burglary in Iowa, second degree burglary in Iowa and second degree burglary in Minnesota. He was sentenced to the minimum term of 15 years and did not appeal from his sentence.

On June 20, 2016, petitioner filed a motion for post conviction relief, contending that his second degree burglary and attempted burglary convictions should not have been classified as violent felonies under Johnson because they were not crimes of violence. The government agreed that, in light of Johnson and Mathis, the two burglaries did not appear to qualify as

Armed Career Criminal Act crimes, but pointed out that even if they were eliminated from consideration, petitioner would still have three predicate convictions, preventing him from showing that his sentence should be reduced.

I denied petitioner's motion for post conviction relief, finding first that he had no claim under Johnson. This was an error: I overlooked the fact that one of petitioner's prior convictions was for *attempted* burglary and not for actual burglary and that the Court had held explicitly in Johnson that attempted burglary was not a predicate crime under § 924(e)(2), overruling its contrary opinion in James v. United States, 550 U.S. 192 (2007), to the contrary. Instead, I treated both of the Iowa burglary convictions as convictions for second degree burglary and concluded that neither conviction could be counted under Mathis, 136 S. Ct. 2243, because Iowa's s burglary statute included elements that extended beyond the generic definition of burglary set out in Taylor v. United States, 495 U.S. 575 (1990). However, I agreed with the government that although these two convictions could no longer be counted as predicate offenses, petitioner still had three valid convictions that made him an armed career criminal. Accordingly, judgment was entered for the government.

A month later, I became aware of a decision by the Court of Appeals for the Eighth Circuit, holding that, for Armed Career Criminal Act purposes, Minnesota's burglary statute extended beyond the definition in Taylor and, for that reason, his third degree burglary conviction could not be counted as a predicate offense. I reopened petitioner's case and requested Federal Defender Services to represent petitioner for additional briefing, which has now been completed.

OPINION

A. Armed Career Criminal Act

The Armed Career Criminal Act requires sentencing judges to impose sentences of at least 15 years to life on defendants found to have violated 18 U.S.C. § 922(g)(1) and to have three previous convictions for either a violent felony or a serious drug offense, or both. "Violent felonies" are defined in 18 U.S.C. § 924(e)(2) as crimes that have as an element either "the use, attempted use, or threatened use of physical force against the person of another," involve "burglary, arson or extortion," "or *otherwise involves conduct that presents a serious potential risk of physical injury to another."* (Emphasis added.) The italicized provision is usually referred to as the "residual clause" of § 924(e)(2); the other provisions are known in order as the "elements" clause and the "enumerated clause."

At intervals over a period of almost ten years, the Supreme Court debated the treatment and coverage of the residual clause of the Armed Career Criminal Act. It found that the conduct covered attempted burglary, James, 550 U.S. 192, but not drunken driving, Begay v. United States, 553 U.S. 137 (2008), or failure to report to a penal institution, Chambers v. United States, 555 U.S. 122 (2009), but that it did cover vehicular flight from a law enforcement officer, Sykes v. United States, 564 U.S. 1 (2011).

In 2016, the Court abandoned the effort to determine the scope of the "serious potential risk" provision on a case-by-case basis. It held in Johnson, 135 S. Ct. at 2554, that the residual clause was so vague "that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." In the future, instead of

trying to determine whether a defendant's conduct matched the specific facts of any crime, sentencing courts were to use the "categorical approach," set out in Taylor v. United States, 495 U.S. 575 (1990), looking only to the statutory definition of the prior offense, and not to the particular facts underlying those convictions." Johnson, 135 S. Ct. at 2554. The Court added that the sentencing court's job is to assess "whether a [particular] crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" Id. (quoting Begay, 553 U.S. at 141 (2008)).

B. Petitioner's Prior Convictions

Petitioner does not contend that his two prior convictions for armed robbery and for a serious drug offense would be affected by the decisions in Johnson or in Mathis. However, he argues correctly that his conviction for attempted burglary is no longer a predicate offense.. As noted, the Court held in Johnson that attempted burglary was not a violent felony, id. at 2563, overruling James, 550 U.S. 192.

Petitioner's challenge to his two remaining convictions for second degree burglary has noting to do with the residual clause at issue in Johnson. He contends that these convictions fall under Mathis, 136 S .Ct. 2251, which held that a "burglary" could be a predicate violent felony offense under the Armed Career Criminal Act only if it contained the following elements and no others: an "unlawful entry into a building or structure without consent and with intent to commit a crime." Thus, a burglary would not qualify as a predicate crime of burglary under the

Act if it criminalized entry into a building or structure *or land, water or air vehicle,* as Iowa did under Iowa Code § 702.12 (2013). Id. (citing Taylor, 495 U.S. at 602)). As the Court explained in Mathis, "those listed locations are not alternative elements, going toward the creation of separate crimes . . . [but] alternative ways of satisfying a since locational element." Id. at 2250. Since Mathis was decided, the Court of Appeals for the Eighth Circuit held in McArthur v. United States, 850 F.3d 925 (8th Cir. 2017), that a Minnesota statute criminalizing third degree burglary did not qualify as a predicate crime. The court found the statute "divisible, that is, it set forth two alternative versions of the way in which the crime of third degree burglary could be committed: either by entering a building without consent and with intent to steal or commit a felony or gross misdemeanor while in the building" *or* by "enter[ing] a building without consent and steal[ing] or commit[ting] a felony or gross misdemean while in the building." Id. at 939.

Petitioner's Minnesota conviction was for second degree burglary. Although there are differences in the statute governing second and third degree burglary, both crimes distinguish between the act of entering without consent and *with intent* and the act of entering without consent and stealing *with no mention of intent*.

C. Effect of Johnson and Mathis

In the October 11, 2016 opinion in this case, dkt. #7, I made the assumption that the holding in Mathis would apply to similar challenges to predicate burglary convictions on collateral review, just as the holding in Johnson applied to convictions grounded on the residual

clause. On reflection, I believe that this assumption was wrong because Mathis is not retroactive. First, the Supreme Court has not issued an express ruling finding Mathis retroactive. In contrast, after the Court held the residual clause unconstitutional in Johnson, 135 S. Ct. 2551, it issued a ruling making it explicit that holding applied retroactively to prior convictions that had been based on the residual clause. Welch v. United States, 136 S. Ct. 1237 (2016).

Second, the decision in Mathis does not meet the criteria for retroactivity. Instead of recognizing a new right that has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, 28 U.S.C. § 2255(f)(3), the Court merely reaffirmed its 1990 holding in Taylor, 495 U.S. 575, that "a prior conviction cannot qualify as an [Armed Career Criminal Act] predicate if its elements are broader than those of a listed generic offense." Mathis, 136 S. Ct. at 2251. Thus, it is irrelevant that petitioner filed his motion for post conviction relief within a year of the date on which Mathis was decided because the Supreme Court's decision in that case did not start the running of a new limitations period under § 2255(f)(3). In other words, this is not an issue on which "new law has been made since the time of the appeal." Davis v. United States, 417 U.S. 333, 342 (1974) (holding that collateral relief from a federal conviction is available when there is intervening change in substantive law). Instead, petitioner is raising an issue that has been settled since the Court decided in Taylor, 27 years ago, that for Armed Career Criminal Act purposes, "burglaries" are limited to those whose elements make up the generic form of the offense, that is, unlawful entry into a building or structure without consent and with intent to commit a crime. Mathis, 136 S. Ct. at 2247 ("For more than 25 years, our decisions have held that the prior crime qualifies as

an ACCA predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense."). Accordingly, I conclude that petitioner has no ground on which to argue that he is raising an issue of new law and that his motion for collateral relief must be denied.

This conclusion seems straightforward, but the court of appeals' language in a recent case, Holt v. United States, 843 F.3d 720 (7th Cir. 2016), gives me pause. Holt filed a collateral attack on an old sentence imposed on him under the Armed Career Criminal Act, contending that the sentencing court had erred in attributing a prior burglary offense to him. His motion was denied, but shortly afterward the court of appeals found that the particular version of the burglary offense of the Illinois statutes at issue was not a violent felony "because it did not satisfy the definition of burglary used in Mathis" for indivisible statutes." Id. at 721 (citing United States v. Haney, 840 F.3d 472 (7th Cir. 2016)). After supplemental briefing, the court of appeals concluded that the motion was petitioner's second collateral attack and could not be heard unless the court were to certify that it rested on newly discovered evidence or was "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that has previously been unavailable." § 2255(h)(2). The court of appeals added that "substantive decisions such as Mathis presumptively apply retroactively on collateral review," id. (citing Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Davis, 417 U.S. 333 (1974)), but did not explain why it considered Mathis a new substantive rule of federal constitutional dimensions.

Petitioner's challenge to his Minnesota second degree burglary conviction suffers from the same problems as his challenge to his Iowa conviction: it not a new rule of constitutional law and it has not been made retroactive to cases like his.

D. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means 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) (internal quotations and citations omitted). In this case, I cannot say that petitioner has failed to make a substantial showing of a denial of a constitutional right, so the certificate will issue.

ORDER

IT IS ORDERED that

Petitioner Jerry L. Van Cannon's motion for post conviction relief is DENIED. A certificate of appealability shall issue.

Dated this 10th day of July, 2017.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge