

No. 17-5584

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Dec 14, 2017  
DEBORAH S. HUNT, Clerk

MICHAEL EDWARD MOORE, )  
 )  
Petitioner-Appellant, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Respondent-Appellee. )

O R D E R

Michael Edward Moore, a federal prisoner proceeding through counsel, moves this court for a certificate of appealability to pursue his appeal of a district court judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255.

In 2011, a jury convicted Moore of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1), and possessing a stolen firearm, in violation of 18 U.S.C. § 922(j). He was sentenced as an armed career criminal under the Armed Career Criminal Act (“ACCA”) based on his four prior convictions for violent felonies—namely, three burglary convictions under Tennessee Code Annotated § 39-14-402 and one aggravated burglary conviction under Tennessee Code Annotated § 39-14-403. Moore was sentenced to 235 months of imprisonment, to be followed by three years of supervised release. This court affirmed Moore’s convictions and sentence. *United States v. Moore*, 578 F. App’x 550 (6th Cir. 2014).

In May 2016, Moore filed a § 2255 motion to vacate, set aside, or correct his sentence, claiming that he no longer qualifies as a career offender in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the residual clause of the ACCA as unconstitutionally vague. To be sentenced under the ACCA, a defendant must have at least three

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prior convictions for a “violent felony” or a serious drug offense. The ACCA defines “violent felony” as an offense that is punishable by a term of imprisonment exceeding one year and either “has as an element the use, attempted use, or threatened use of physical force against the person of another” (use-of-force clause) or “is burglary, arson, or extortion, involves use of explosives” (enumerated-offense clause), “or otherwise involves conduct that presents a serious potential risk of physical injury to another” (residual clause). *See* 18 U.S.C. § 924(e)(2)(B).

Moore claims that his three prior burglary convictions fell under Tennessee Code Annotated § 39-14-402(a)(3) and that they qualified as predicate offenses only under the now-void residual clause. Contending that three of the four convictions that the district court used to enhance his sentence no longer qualify as predicate offenses, Moore argues that he cannot be sentenced under the ACCA and should be resentenced.

The district court denied the motion and declined to issue a certificate of appealability, reasoning that Moore’s prior burglary convictions qualified as ACCA predicate offenses independent of the residual clause. The district court determined that, pursuant to this court’s decision in *United States v. Priddy*, 808 F.3d 676, 685 (6th Cir. 2015), Moore’s convictions for Class D burglary are categorically violent felonies under the enumerated-offense clause. The district court concluded that Moore’s burglary convictions are unaffected by *Johnson* and thus Moore continues to qualify for application of the ACCA’s sentencing enhancement. Moore now moves for a certificate of appealability.

A certificate of appealability may be granted “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, 327 (2003). That standard is met when the movant demonstrates “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327.

The Tennessee burglary statute under which Moore was convicted in 2001 provides that a person commits a burglary when, “without the effective consent of the property owner,” he:

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- (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
  - (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
  - (3) Enters a building and commits or attempts to commit a felony, theft or assault;
- or
- (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a) (2000). The first three variants of Tennessee burglary, i.e., Tenn. Code Ann. § 39-14-402(a)(1), (a)(2), and (a)(3), are Class D felonies, Tenn. Code Ann. § 39-14-402(c), and this court has held that “the first three variants . . . qualify as generic burglary since they each involve ‘unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.’” *Priddy*, 808 F.3d at 684 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

Although the state court documents do not specify which subsection(s) of Tennessee Code Annotated § 39-14-402 Moore was convicted of violating, they indicate that all three burglary convictions were Class D felonies. Accordingly, pursuant to this court’s decision in *Priddy*, Moore’s burglary convictions qualify as generic burglary and thus are violent felonies under the ACCA’s enumerated-offense clause. *See id.* at 684-85; *see also United States v. Ferguson*, 868 F.3d 514, 515 (2017).

Moore acknowledges *Priddy* but argues that it was incorrectly decided. In doing so, Moore relies on the Fifth Circuit’s decision in *United States v. Bernel-Aveja*, 844 F.3d 206, 214 (5th Cir. 2016), which held that Ohio’s burglary statute was broader than and thus did not qualify as generic burglary because it included “unlawful entry with the intent to commit a crime on the premises formed *after* that unlawful entry,” (emphasis added), and the Eighth Circuit’s decision in *United States v. McArthur*, 850 F.3d 925, 939-40 (8th Cir. 2017), which noted that the definition of “generic burglary” requires that the defendant intend to commit a crime at the time of unlawful entry and held that, because Minnesota’s third-degree burglary statute lacks such an intent requirement, it does not qualify as a violent felony under the ACCA. These cases are not

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binding; *Priddy* is. Because this court has recently confirmed that *Priddy* requires this outcome, reasonable jurists could not debate the district court's conclusion that Moore's burglary convictions qualify as violent felonies under the enumerated-offense clause. *See Ferguson*, 868 F.3d at 515–16 (rejecting the defendant's argument that this court should overrule *Priddy* and hold that a Class D burglary conviction under Tennessee Code Annotated § 39-14-402(a)(1), (2), or (3) is not a violent felony under the ACCA).

Accordingly, the court **DENIES** the motion for a certificate of appealability and **DENIES** the motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk