

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-11231
Non-Argument Calendar

D.C. Docket No. 5:14-cv-00396-WTH-PRL

MICKEY LEE MOODY,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN—LOW,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, JILL PRYOR and FAY, Circuit Judges.

PER CURIAM:

Mickey Lee Moody's appeal of the dismissal of his 28 U.S.C. § 2241 petition for habeas corpus under the savings clause of 28 U.S.C. § 2255(e) is pending before this court. As we explain hereinafter, the applicable law has changed, and Moody has been released from custody, which results in the dismissal of this appeal as moot.

Moody was serving a statutory-mandatory-minimum, fifteen-year-imprisonment sentence for pleading guilty under a plea agreement to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He had been sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on three ACCA predicate crimes, including a 1982 Alabama conviction for third-degree burglary. On direct appeal, Moody argued the district judge had erred in concluding his Alabama third-degree-burglary conviction qualified as an ACCA predicate crime. This court affirmed Moody's sentence, because Alabama third-degree burglary included the elements of generic burglary, making it a qualifying crime under the ACCA. *United States v. Moody*, 216 F. App'x 952, 952 (11th Cir. 2007).

In 2008, Moody filed a pro se motion to vacate his sentence under 28 U.S.C. § 2255 and argued his counsel was ineffective for allowing his third-degree-burglary conviction to be used as an ACCA predicate crime. The district judge denied Moody's § 2255 motion and his request for a certificate of appealability;

this court also denied Moody a certificate of appealability. In 2014, Moody filed a § 2241 pro se habeas corpus petition under the savings clause of § 2255(e) and argued his Alabama third-degree-burglary conviction did not qualify as a violent felony to enhance his sentence under the ACCA. The district judge dismissed Moody's petition for lack of subject matter jurisdiction. His appeal from that dismissal is pending in this court.

In the course of Moody's appeals, the controlling Supreme Court and circuit law has changed. The Supreme Court held a conviction for burglary in violation of California Penal Code § 459 is broader than "generic burglary" and does not qualify as "burglary" under the enumerated-offenses clause of the ACCA "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii). *Descamps v. United States*, 133 S. Ct. 2276, 2292 (2013). After *Descamps*, our court held a conviction for Alabama third-degree burglary "cannot qualify as generic burglary under the ACCA." *United States v. Howard*, 742 F.3d 1334, 1349 (11th Cir. 2014). Because the Supreme Court had "declared the residual clause of the ACCA to be unconstitutionally vague," we then held there is no "basis for characterizing the Alabama third degree burglary statute as a violent felony under the ACCA." *United States v. Nelson*, 813 F.3d 981, 982 (11th Cir. 2015) (citing *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015)).

While the appeal of the dismissal of his § 2241 petition was pending, Moody filed two counseled requests for authorization (“RFA”) to file a second or successive § 2255 motion to vacate his sentence under *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Johnson*. He argued he is entitled to be resentenced without the ACCA enhancement, because his Alabama third-degree-burglary conviction does not qualify as a “violent felony,” a “crime punishable by imprisonment for a term exceeding one year” under the ACCA. 18 U.S.C. § 924(e)(2)(B). “Even though the legal issue raised in a § 2255 motion was determined against the applicant on the merits on direct appeal, the applicant may nevertheless be entitled to collateral review on the legal issue *upon showing an intervening change in the law.*” *Rozier v. United States*, 701 F.3d 681, 684 (11th Cir. 2012) (quoting *Davis v. United States*, 417 U.S. 333, 342, 94 S. Ct. 2298, 2303 (1974)) (alterations and internal quotation marks omitted). Our court consolidated Moody’s RFAs and granted his application to file a second or successive motion under 28 U.S.C. § 2255(h), because he had made a prima facie showing he would benefit from *Johnson*. *In re Mickey Lee Moody*, Nos. 16-12459, 16-12752 (11th Cir. June 11, 2016).

Thereafter, the district judge determined Moody is not an Armed Career Criminal eligible for the ACCA sentencing enhancement, granted his § 2255 motion, and dismissed his case with prejudice. On August 4, 2016, the judge

entered an amended judgment and sentenced Moody to time served and three years of supervised release. Moody was released from custody on August 12, 2016, and by letter of that date notified our Clerk of Court of his new address. Consequently, Moody's pending appeal from his § 2241 petition brought under the savings clause of § 2255(e) is moot and hereby is DISMISSED.