IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JERRY L. VAN CANNON,

Petitioner,

ORDER

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

v.

UNITED STATES OF AMERICA,

Respondent.

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Petitioner Jerry L. Van Cannon filed a motion for post conviction relief under 28 U.S.C. § 2255 on June 20, 2016, contending that he had been sentenced improperly as an armed career criminal in 2009. At the time of his sentencing for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), petitioner had five prior convictions that were either violent felonies or serious drug offenses, so he qualified for armed career criminal status and a sentence of at least 15 years. After reviewing his motion, I concluded that two of petitioner's prior Iowa burglary convictions were no longer qualifying convictions in light of recent decisions by the Supreme Court. However, I believed that his prior Minnesota burglary conviction would still qualify as a violent felony under Taylor v. United States, 495 U.S. 575, 598-99 (1990), which defined generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Petitioner did not challenge the use of his two additional convictions, one for delivery of

controlled substances, which is a serious drug offense under 18 U.S.C. § 924(e)(2)(A)(ii), and a second for armed robbery, a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii).

In an opinion entered on October 11, 2016, I concluded that petitioner remained an armed career criminal under § 924(e) because he had three qualifying convictions. A few weeks later, I learned that the Court of Appeals for the Eighth Circuit had considered the Minnesota statute that petitioner had been convicted of violating, Minn. Stat. § 609.582, in United States v. McArthur, 836 F.3d 933 (8th Cir. 2016). The court of appeals noted that the statute set out two alternatives for committing burglary: (1) entering a building without consent *and* with intent to steal while inside or (2) entering into a building without consent and stealing or committing a felony or gross misdemeanor. The first alternative conformed with the definition of generic burglary set out in Taylor, which required that the intent to commit the crime must be present when the offender entered to building or other structure. The second did not: it could apply to a person who entered a building without consent but who had not formed an intent to steal at the time he entered.

McArthur calls into question my October 11 holding that petitioner remains an armed career criminal. In light of the new decision, I will reopen petitioner's challenge to his 2003 sentence for being a felon in possession of a firearm under 18 U.S.C. § 924(g)(1). Although the defendant in McArthur was charged with third degree burglary, whereas in this case, petitioner was charged with second degree burglary, the wording of the two provisions of the statute is similar enough treat them the same. (Petitioner did not appeal from the October decision so withdrawing and going forward with the case will not run afoul of the

general rule that only one court can act in a case at one time. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam) (filing of notice of appeal is "event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal").)

The probation office has begun a search for the records underlying petitioner's Minnesota conviction. If they are available, they may make it clear whether petitioner was sentenced under the first or second clause of subdivision 2 of Minn. Stat. § 609.582, which defines burglary in the second degree. Once it is known whether they still exist, I will schedule a telephone status conference with counsel to determine what steps need to be taken.

Because of the possibility that further proceedings will be required, I will ask the Federal Defender Services to recruit counsel to represent petitioner in this post conviction motion.

ORDER

IT IS ORDERED that the decision entered in this case on October 11, 2016 is WITHDRAWN. The Federal Defender Services is requested to appoint counsel to represent petitioner Jerry L. Van Cannon on his petition for post conviction relief. Both parties will be advised as soon as the probation office obtains the court records or learns that the records

no longer exist.

Entered this 16th day of November, 2016.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge