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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0102p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIAN D. WILLIAMS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-3211

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
Nos. 1:06-cr-00244-1; 1:16-cv-00520—Solomon Oliver Jr., District Judge.

Argued: June 13, 2018

Decided and Filed: May 24, 2019

Before: COLE, Chief Judge; MERRITT, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, and NALBANDIAN, Circuit Judges.[*]

COUNSEL

REARGUED EN BANC: Jeffrey B. Lazarus, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Michael A. Rotker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON SUPPLEMENTAL BRIEF:** Jeffrey B. Lazarus, FEDERAL PUBLIC DEFENDER'S OFFICE, Cleveland, Ohio, for Appellant. Michael A. Rotker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Rebecca C. Lutzko, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee.

The court delivered a PER CURIAM opinion. ROGERS, J. (pp. 3–4), delivered a separate concurring opinion.

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[*]This case was submitted to the en banc court prior to the commission dates of Judges Readler and Murphy.

OPINION

PER CURIAM. After pleading guilty to a felon in possession of a firearm charge, Brian Williams was sentenced as a career offender under the Armed Career Criminal Act ("ACCA") because of three previous qualifying convictions. *See* 18 U.S.C. § 924(e). Relevant here, Williams had been convicted previously of attempted felonious assault in violation of Ohio Revised Code §§ 2903.11 and 2923.02. After the Supreme Court invalidated the ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), Williams filed a successive § 2255 petition, arguing that his three convictions could no longer be considered predicate offenses under the ACCA. A panel of this court authorized the district court to consider whether Williams's conviction for attempted felonious assault qualified as a violent felony predicate under the ACCA, and if not, whether Williams is entitled to relief under *Johnson*. *In re Brian D. Williams*, No. 16-3411 (6th Cir. Oct. 27, 2016).

The district court held that Williams's felonious assault conviction was a predicate offense, concluding that it was bound by *United States v. Anderson*, 695 F.3d 390, 399–402 (6th Cir. 2012), which held that Ohio felonious assault is a violent felony under the ACCA's elements clause. *Williams v. United States*, Nos. 1:16 CV 520, 1:06 CR 244-1, 2017 WL 7792603, at *7 (N.D. Ohio Feb. 28, 2017). A panel of this court affirmed, agreeing that *Anderson* controlled the outcome of Williams's case. *Williams v. United States*, 875 F.3d 803, 805 (6th Cir. 2017). We granted rehearing en banc in this matter, but subsequently, the en banc court overruled *Anderson* and held that a conviction for Ohio felonious assault no longer categorically qualifies as a violent felony predicate under the ACCA's elements clause. *See United States v. Burris*, 912 F.3d 386, 406 (6th Cir. 2019). In light of the fact that *Anderson* has been overruled, we remand this case to the original panel to be decided consistent with this order.

CONCURRENCE

ROGERS, Circuit Judge, concurring in the remand. Sitting en banc, we may hold today that Ohio felonious assault under Ohio Revised Code § 2903.11(A)(1) is not a qualifying conviction under the Armed Career Criminal Act, notwithstanding the earlier contrary holding by a panel of our court in *United States v. Anderson*, 695 F.3d 390, 399–402 (6th Cir. 2012). In doing so, we may certainly rely on the intervening legal reasoning of the plurality in *United States v. Burris*, 912 F.3d 386, 396–402 (6th Cir. 2019), even though that part of the *Burris* opinion's analysis was not necessary to the decision to affirm in *Burris*, and was joined by only six of the eleven judges in the *Burris* majority.

Strictly speaking, however, we are on wobbly grounds as a matter of stare decisis law to reason instead that the en banc court in *Burris* has *already* "overruled *Anderson* and held" that Ohio felonious assault does not categorically qualify as an ACCA predicate offense. It is not entirely clear that *Burris* overruled *Anderson*. The treatment of *Anderson* in *Burris* was not necessary to the majority's decision to uphold Burris's sentence, as we did, on the ground that Ohio Revised Code § 2903.11(A)(2) qualifies as an ACCA predicate. See *Burris*, 912 F.3d at 410 (Rogers, J., concurring in part and in the judgment); *id.* at 410–11 (Kethledge, J., concurring in the judgment).

To be sure, the seven judges in *Burris* who did not vote to affirm agreed explicitly with the lead opinion's determination that *Anderson* was wrongly decided. 912 F.3d at 411–12 (Cole, C.J., concurring in part and dissenting in part). It could be argued that a plurality of judges voting to affirm, plus seven dissenting judges who agree with the plurality on one point, constitute a majority to create a binding precedent on that point of agreement. Such a theory of vote counting could be criticized as overly rigidifying stare decisis analysis in ways that may have untoward and unforeseeable consequences. But even setting those criticisms aside, the point of agreement in *Burris* (about *Anderson*) was dictum—and dictum is dictum no matter how many votes it gets.

Fortunately, we do not have to resolve these puzzling stare decisis questions. As an en banc court—with the question of whether Ohio Revised Code § 2903.11(A)(1) is an ACCA predicate now fairly before us—we may simply hold that *Anderson* was not correct. Because this case, unlike *Burris*, turns on whether *Anderson* is good law, what was dictum in *Burris* will here be holding. Unlike in *Burris*, the *Shepard* documents here do not make sufficiently clear whether Williams was convicted under Ohio Revised Code § 2903.11(A)(1) or § 2903.11(A)(2). So Williams qualifies as an armed career criminal only if both of those subsections satisfy the ACCA's elements clause. *Burris* holds that § 2903.11(A)(2) does satisfy the ACCA. 912 F.3d at 405–06. *Anderson* held that § 2903.11(A)(1) does also. 695 F.3d at 399–402. Rejecting *Anderson* is necessary to our decision today.

Taking today's decision as one to reject the *Anderson* holding for the reasons given by the lead opinion in *Burris*, 912 F.3d at 396–402, rather than as one deciding that the *Burris* opinions bind us to reach that conclusion, I concur.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk