

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1238

Richard Carl Wyatt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:16-cv-03064-MWB)

JUDGMENT

Before LOKEN, MURPHY and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

April 11, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Richard Carl Wyatt

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:16-cv-03064-MWB)

ORDER

The petition for rehearing by the panel is denied.

June 18, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RICHARD C. WYATT,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

No. C16-3064-MWB
No. CR97-3015-MWB

INITIAL REVIEW ORDER

I. INTRODUCTION AND BACKGROUND

Petitioner Richard C. Wyatt's *pro se* Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody requires me to determine whether, as Wyatt claims, he is entitled to relief under the United States Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015). In *Johnson*, 135 S. Ct. at 2557-58, the Supreme Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B), violates due process because it is unconstitutionally vague.¹ The Supreme Court has held

¹The ACCA authorizes enhanced penalties for defendants who have three or more prior convictions for "violent felonies" committed on different occasions. 18 U.S.C. § 924(e)(1). The ACCA defines three categories of offenses as violent felonies. First, violent felonies include all "offense[s] that ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). This category is known as the "elements clause." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016). Second, violent felonies include four enumerated offenses: burglary, arson, extortion, and offenses "involv[ing] use of explosives." 18 U.S.C. § 924(e)(2)(B)(ii). This category is known as the "enumerated clause." *United States v. Benedict*, 855 F.3d 880, 890 (8th Cir. 2017); *United States v. McFee*, 842 F.3d 842 F.3d 572, 574 (8th Cir. 2016).

that the *Johnson* decision is retroactive because it announced a new substantive rule of constitutional law. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

In a three-count indictment, Wyatt was charged with bank robbery, in violation of 18 U.S.C. § 2113(a), using and carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1), and possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g), 924(a)(2), and 924(e). Wyatt entered a plea of guilty to Counts 1, 2, and 3 of the indictment and was subsequently sentenced to a total term of 365 months' imprisonment on these charges, as well as bank robbery charges from the Eastern District of Wisconsin, the District of Missouri, the District of Nebraska, and the Southern District of Iowa. Wyatt was also ordered to pay \$26,975 in restitution and a \$900 special assessment.

Wyatt appealed his sentence, arguing two grounds for reversal: first, that he received ineffective assistance of counsel and, second, that I erred in my application of the sentencing guidelines concerning U.S.S.G. § 3C1.1 (obstruction) and § 3E1.1 (acceptance of responsibility), and abused my discretion in granting the prosecution's motion for an upward departure pursuant to U.S.S.G. § 4A1.3 (adequacy of criminal history category). The Eighth Circuit Court of Appeals affirmed Wyatt's sentence. *United States v. Wyatt*, 230 F.3d 1365, 1365 (8th Cir. 2000). Wyatt subsequently filed a Motion To Vacate Judgment Under 28 U.S.C. § 2255. Wyatt claimed that his counsel provided him with ineffective assistance in several ways. Following briefing, I denied Wyatt's original § 2255 motion on the merits, and denied him a certificate of appealability. Wyatt appealed the denial of a certificate of appealability. The Eighth Circuit Court of Appeals denied Wyatt's request for a certificate of appealability. On May 26, 2016, Wyatt filed the current § 2255 motion before me challenging his sentence in light of *Johnson*. Wyatt further requested that briefing and consideration of his § 2255 motion be stayed to permit him to seek leave of the Eighth Circuit Court of Appeals to file a second or successive § 2255. I granted Wyatt's request to stay consideration of his current § 2255. On November 21, 2017, the

Eighth Circuit Court of Appeals granted Wyatt's request to file a second or successive § 2255 motion. Accordingly, the stay concerning Wyatt's current § 2255 motion is lifted and it is specifically before me for initial review pursuant to Rule 4(b) of the Rules Governing § 2255 Proceedings for the United States District Courts, which provides:

The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States to file an answer, motion, or other response within a fixed time, or take other action the judge may order.

28 U.S.C. § 2255 Rule 4(b).

II. LEGAL ANALYSIS

Johnson is inapplicable under the facts of this case, because Wyatt's sentence was not based on the residual clause of the ACCA. Instead, Wyatt was sentenced based on the elements clause due to his bank robbery convictions under 18 U.S.C. § 2113(a) and (d). The Eighth Circuit Court of Appeals, and every other circuit to consider the question, has held that federal bank robbery categorically constitutes a crime of violence under the elements clause, not the residual clause. *See Holder v. United States*, 836 F.3d 891, 892 (8th Cir. 2016); *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016); *In re Sams*, 830 F.3d 1234, 1238 (11th Cir. 2016); *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016); *see also United States v. Mitchell*, No. 15-CR-47, 2015 WL 7283132, at *2 (E.D. Wisc. Nov. 17, 2015); *United States v. Strong*, 2015 WL 6394237, at *2 (W.D.N.C. Oct. 21, 2015). Accordingly, the prosecution proved that Wyatt has three predicate violent felony convictions. Consequently, Wyatt's armed career offender designation was not in error and he is not entitled to relief on his § 2255 motion. Wyatt's § 2255 motion is denied.

III. CERTIFICATE OF APPEALABILITY

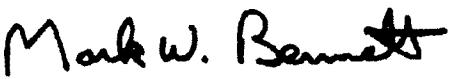
Wyatt must make a substantial showing of the denial of a constitutional right to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). “A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El v. Cockrell* that “[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Cockrell*, 537 U.S. at 338 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). I determine that Wyatt’s motion does not present questions of substance for appellate review and, therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, with respect to Wyatt’s claims, I do not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c). Should Wyatt wish to seek further review of his petition, he may request a certificate of appealability from a judge of the United States Court of Appeals for the Eighth Circuit. *See Tiedman v. Benson*, 122 F.3d 518, 520-22 (8th Cir. 1997).

IV. CONCLUSION

For the reasons discussed above, Wyatt’s Motion Under 28 U.S.C. § 2255 is denied in its entirety. This case is dismissed. No certificate of appealability will issue for any claim or contention in this case.

IT IS SO ORDERED.

DATED this 7th day of December, 2017.



MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA