

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 18-2815

Jerry W. Jenkins

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District ~~X~~ Court for the Western District of Missouri - Kansas City
(4:16-cv-00674-RK)

JUDGMENT

Before WOLLMAN, KELLY 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.

Appellant's motion for stay is denied.

December 17, 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
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

JERRY JENKINS,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

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Civ. No. 16-00674-CV-W-DW
Crim. No. 07-00385-01-CR-W-DW

ORDER

Before the Court is the Second or Successive Motion to Correct Sentence under 28 U.S.C. § 2255 (Doc. 1) filed by Movant Jerry Jenkins. The Government has filed a Response in Opposition (Doc. 7), and Movant has filed a Reply (Doc. 9) and a Supplemental Reply (Doc. 11). Movant asks that his sentence be vacated and he be resentenced pursuant to the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is unconstitutionally vague.¹ In light of Johnson, Movant claims that his previous convictions in Missouri for robbery in the second degree and sodomy no longer qualify as violent felonies under the ACCA. Movant does not challenge two other previous convictions that were found to be violent felonies – second degree robbery in California and attempted robbery/armed criminal action in Missouri.

The record shows that Movant was charged with, pleaded guilty to, and was convicted of the offense of forcible sodomy in violation of Section 566.060 R.S.Mo. He now challenges whether this conviction qualifies as a violent felony under the force clause of the ACCA. Under

¹ The Supreme Court subsequently held that Johnson applies retroactively to cases on collateral review. Welch v. United States, 136 S. Ct. 1257 (2016).

Missouri law, a person commits forcible sodomy by having deviate sexual intercourse with another person by the use of forcible compulsion. See Mo. Rev. Stat. § 566.060. The Eighth Circuit has held that “forcible compulsion,” as defined under Section 556.061(12), constitutes the “use of physical force against another person” as set forth in the force clause of the ACCA. United States v. Brown, 323 Fed. App’x 479, 481 (8th Cir. 2009). Thus, Movant’s conviction for forcible sodomy clearly qualifies as a violent felony under the force clause of the ACCA, regardless of the residual clause.

Consequently, the Court concludes that, post- Johnson, Movant has at least three predicate convictions for violent felonies supporting an enhanced sentence under the ACCA: (1) Missouri sodomy; (2) California second degree robbery; and (3) Missouri attempted robbery/armed criminal action.

Although this ends the discussion, Movant’s argument regarding his previous conviction for second degree robbery in Missouri fails as well. Although Movant received authorization from the Eighth Circuit to file a successive habeas application under 28 U.S.C. § 2255(h)(2), such an authorization is a “preliminary determination” to which the “district court must not defer.” Kamil Johnson v. United States, 720 F.3d 720 (8th Cir. 2013). Accordingly, “the district court must dismiss the motion that we have allowed the applicant to file, without reaching the merits of the motion, if the court finds that the movant has not satisfied the requirements for the filing of such a motion.” Id.

Movant cites a recent Eighth Circuit case for his assertion that Missouri’s statute for robbery in the second degree does not qualify as a violent felony. See United States v. Bell, 840 F.3d 963 (8th Cir. 2016) (holding that a Missouri second-degree robbery conviction does not

qualify as a “crime of violence” under the Sentencing Guidelines). Bell, however, was decided on direct appeal and was not a collateral attack under Section 2255.

In this matter, at sentencing, the Court found that Movant’s Missouri second-degree robbery conviction qualified as a violent felony under the ACCA. He did not raise any objection to this finding, nor did he appeal this issue. Now, his current argument rests not on Johnson v. United States, 135 S. Ct. 2551 (2015), which addressed the “residual clause” of the ACCA. Instead, Movant is relying on the Supreme Court’s decision in the earlier case of Johnson v. United States, 559 U.S. 133, 140 (2010) (“Johnson I”) which addressed the definition of “force” under the Guidelines. Although Johnson I was decided in 2010, Movant did not raise this issue in his first Section 2255 motion, filed on February 24, 2011. Therefore, despite the fact that he received authorization from the Eighth Circuit to file this second Section 2255 motion, this Court finds that he has “not satisfied the requirements for the filing of such a motion,” as the motion relies not on a “new rule of constitutional law” under Section 2255(h)(2), but rather on Johnson I, decided by the Supreme Court on March 2, 2010, over 6 years before Movant sought authorization to proceed. As a result, the Court will dismiss Movant’s claim regarding second-degree robbery without addressing the merits of his argument.

Based on the foregoing, after reviewing the parties’ briefing and the record, the Court concludes that Movant is not entitled to the relief requested. Thus, the motion will be denied without an evidentiary hearing. See Roundtree v. United States, 751 F.3d 923, 925 (8th Cir. 2014) (“A Section 2255 movant is entitled to an evidentiary hearing ... unless the motion, files, and record conclusively show he is not entitled to relief.”) (citation and internal quotation marks omitted). It is therefore ORDERED that the Second or Successive Motion to Correct Sentence

under 28 U.S.C. § 2255 (Doc. 1) is DENIED. A certificate of appealability will not issue, as there is no substantial showing of the denial of a constitutional right.

IT IS SO ORDERED.

Date: February 8, 2017

/s/ Dean Whipple
Dean Whipple
United States District Judge

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Jerry W. Jenkins — PETITIONER
(Your Name)

VS.

UNITED STATE OF AMERICAN RESPONDENT(S)

PROOF OF SERVICE

07- I, Jerry W. Jenkins, do swear or declare that on this date, ~~11-17~~ - 17, 20 19, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ~~11-17~~ 07-18-, 20 19

Jerry W. Jenkins
(Signature)