IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 14, 2020
Lyle W. Cayce
Clerk

No. 18-10025
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RYAN DENNIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-577

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

In December 2008, a jury convicted Ryan Dennis of possessing a firearm after a felony conviction, in violation of 18 U.S.C. § 922(g)(1). Although the statutory *maximum* for such an offense is generally ten years in prison, 18 U.S.C. § 924(a)(2), because Dennis was found to have had three prior convictions for violent felonies under the Armed Career Criminal Act (ACCA),

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

id. § 924(e), he was subject to a statutory *minimum* of fifteen years. The district court sentenced Dennis under the ACCA to 288 months in prison, to be followed by a three-year supervised release term. We affirmed on direct appeal, and the Supreme Court denied certiorari. *United States v. Dennis*, 365 F. App'x 591, 592–95 (5th Cir.), *cert. denied*, 561 U.S. 1016 (2010). Dennis filed an unsuccessful § 2255 motion, and we denied a certificate of appealability (COA).

In 2016, Dennis moved for authorization to file a second or successive § 2255 motion, arguing that he was improperly sentenced under the ACCA in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). We granted authorization to file. *In re Dennis*, Case No. 16-10581 (5th Cir. Jun. 28, 2016). The district court denied relief on the merits, concluding that, even without relying on the residual clause, Dennis's criminal history met the requirements for three violent felonies under the still-valid portions of the ACCA. Dennis timely appealed.

Although the Government does not address this issue in any detail in its briefing and the district court did not address it directly, we are required to address our jurisdiction sua sponte, if necessary. *See United States v. Wiese*, 896 F.3d 720, 723 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1328 (2019); *Solsona v. Warden, F.C.I.*, 821 F.2d 1129, 1132 n.2 (5th Cir. 1987); *see also United States v. Ricks*, 756 F. App'x 488, 489 (5th Cir.) (addressing the jurisdictional issue for a successive § 2255 motion based on *Johnson* after granting a COA as to the district court's merits determination), *cert. denied*, 140 S. Ct. 327 (2019).

"A second or successive habeas application must meet strict procedural requirements before a district court can properly reach the merits of the application." *Wiese*, 896 F.3d at 723; *see* 28 U.S.C. §§ 2244(b), 2255(h). A prisoner pursuing a successive § 2255 motion must pass through two jurisdictional "gates" to have his motion heard on the merits. *Wiese*, 896 F.3d

at 723. Dennis has passed through the first gate by obtaining our authorization to file a successive motion. *See id*. While Dennis was required to make only a prima facie showing to obtain authorization for the successive motion from this court, to pass through the second gate, he "must actually prove at the district court level that the relief he seeks relies . . . on a new, retroactive rule of constitutional law." *Wiese*, 896 F.3d at 723; *see* 28 U.S.C. § 2255(h)(2).[1]

A prisoner making a *Johnson* claim must prove that "it was more likely than not that he was sentenced under the residual clause." *United States v. Clay*, 921 F.3d 550, 559 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 866 (2020). If he fails to make that showing, we have jurisdiction only for the purpose of correcting the district court's error in considering the cause of action. *Wiese*, 896 F.3d at 723, 726 (noting also that in such a situation, this court would vacate the district court's judgment and dismiss the successive § 2255 motion for lack of jurisdiction).

In considering the jurisdictional question at issue here, we "must look to the law at the time of sentencing to determine whether a sentence was imposed under" the now-invalid residual clause or one of the remaining clauses. *Wiese*, 896 F.3d at 724; *see also Clay*, 921 F.3d at 556. We may also consider the sentencing record, the legal landscape at the time of sentencing, the pre-sentence report (PSR), and other relevant materials before the sentencing court. *Wiese*, 896 F.3d at 725. Changes to the law that occurred after sentencing should not be considered, unless the change is a new rule of

[1] Dennis maintains that despite the language in *Wiese*, the second gateway is not in fact "jurisdictional" and that the Government has waived or forfeited the issue by not raising it before the district court. We are bound by our precedent, not the position of the U.S. Department of Justice cited by Dennis.

constitutional law announced by the Supreme Court and made retroactive to cases on collateral review. *Id.* at 725–26.

According to the charging instruments, in February 1996 Dennis caused bodily injury to a victim by striking him with a firearm and used or exhibited a deadly weapon while committing the assault. On July 20, 2004, Dennis intentionally or knowingly threatened bodily injury to two separate victims and used or exhibited a deadly weapon during the assaults. In a separate event on July 23, 2004, Dennis threatened imminent bodily injury to a victim and used a deadly weapon during the assault. Dennis argues that his prior Texas aggravated assault convictions are not violent felonies because assault under Texas Penal Code § 22.01 can be committed in ways that do not necessarily involve the use of physical force and can be committed with recklessness as opposed to specific intent to use force. He thus contends that, at the time of his sentencing, the law would have established that assault did not include as an element the requisite use of force.

We conclude that Dennis has failed to show that it is "more likely than not" that the sentencing court relied upon the residual clause. The record does not reflect that the sentencing court considered the residual clause. While we have held that the district court is not permitted to rely solely on the PSR's characterization of a prior conviction for sentence-enhancement purposes, *see United States v. Garza-Lopez*, 410 F.3d 268, 273–75 (5th Cir. 2005), in *Wiese* we noted that this court may look to the PSR in determining whether the sentencing court relied on the residual clause. 896 F.3d at 725. The PSR reflects that Dennis was convicted of aggravated assault with a deadly weapon, which is codified at § 22.02(a)(2) of the Texas Penal Code.[2] Looking at "the

[2] Dennis contends that the district court was not permitted to rely upon the PSR, but the issue here is whether Dennis has shown that the district court relied upon the residual clause. The PSR supports that the district court did not.

landscape," it is true that at the time of Dennis's sentencing in 2009, we had held that a violation of § 22.01, standing alone, did not fall under the elements clause in U.S.S.G. § 2L1.2 because it may be committed by acts that do not involve violence or a direct use of force. *See United States v. Villegas-Hernandez*, 468 F.3d 874, 878–85 (5th Cir. 2006).[3] But we had reached a different conclusion (albeit addressing an enumerated-offense issue) where the aggravating factor was a deadly weapon. *See United States v. Guillen-Alvarez*, 489 F.3d 197, 199–201 (5th Cir. 2007) (holding that aggravated assault with a deadly weapon (a knife) is categorically a crime of violence for purposes of § 2L1.2(b)(1)(A)(ii)). Opinions issued after Dennis's sentencing also suggest that "the landscape" was not reliant on the residual clause. *See, e.g.*, *United States v. Guzman*, 797 F.3d 346, 347–48 (5th Cir. 2015) (per curiam).

As we held in *Clay*, "if 'it is unclear from the record whether the sentencing court had relied on the residual clause,' the prisoner—who bears the burden of proof—'loses.'" 921 F.3d at 558 (quoting *Beeman v. United States*, 871 F.3d 1215, 1224–25 (11th Cir. 2017)); *see also United States v. Medina*, No. 17-11176, 2020 WL 414815, at *3 (5th Cir. Jan. 24, 2020) (per curiam). We conclude that Dennis failed to meet his burden. Therefore, we conclude that the district court lacked jurisdiction to address the merits of Dennis's claims.[4] We thus MODIFY the district court's determination not to grant relief to

[3] The relevant holding was overruled in part in *United States v. Reyes-Contreras*, 910 F.3d 169, 181–82 (5th Cir. 2018) (en banc), but, of course, we recognize that the analysis in the current case focuses on the sentencing hearing which predated *Reyes-Contreras*, such that *Villegas-Hernandez* was good law at the time.

[4] If we did have jurisdiction, we would affirm the district court on the merits. *See United States v. Combs*, 772 F. App'x 108, 109–10 (5th Cir. 2019) (citing *United States v. Albin Torres*, 923 F.3d 420, 423–25 (5th Cir. 2019)), *petition for cert. filed* (U.S. Sept. 9, 2019) (No. 19-5908); *see also United States v. Gomez Gomez*, 917 F.3d 332, 333–34 (5th Cir. 2019) (holding that Texas aggravated assault qualifies as a crime of violence under 18 U.S.C. § 16(a) because it includes as an element the use of force), *petition for cert. filed* (U.S. July 19, 2019) (No. 19-5325).

change it from a denial of Dennis's successive § 2255 to a dismissal on the ground that it lacked jurisdiction and, as modified, AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
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No. 18-10025
Summary Calendar

D.C. Docket No. 4:16-CV-577

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RYAN DENNIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before WIENER, HAYNES, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10025

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RYAN DENNIS,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion April 14, 2020 , 5 Cir., _____ , _____ F.3d _____)

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Dated: 6-13-2020

ENTERED FOR THE COURT:

____/s/ Catharina Haynes_____
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10581

In re: RYAN DENNIS,

Movant

A True Copy
Certified order issued Jun 28, 2016

Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Fort Worth to consider
a successive 28 U.S.C. § 2255 motion

Before CLEMENT, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:

Ryan Dennis, federal prisoner # 38032-177, moves for authorization to file a successive 28 U.S.C. § 2255 motion. He may file a successive motion if he makes a prima facie showing that his motion contains either "newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty," or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); *see Reyes-Requena v. United States*, 243 F.3d 893, 897-98 (5th Cir. 2001).

Dennis relies on the new rule prong, invoking *Johnson v. United States*, 135 S. Ct. 2551, 2555-63 (2015), which struck down the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague. He contends that his enhanced sentence under the

ACCA appears to be based upon *Johnson* error because all of his prior Texas convictions for aggravated assault under TEX. PENAL CODE § 22.02 could only be violent felonies under the residual clause.

Johnson announced a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1261-65 (2016); *Johnson*, 135 S. Ct. at 2560. The rule announced by *Johnson* was previously unavailable. *See, e.g.*, *Johnson*, 135 S. Ct. at 2563, *overruling James v. United States*, 550 U.S. 192, 210 n.6 (2007).

Our assessment of Dennis's motion is limited by the records available to us, and we express no view of the ultimate merit of his claim. We have sufficient information, however, to conclude that Dennis has made the requisite prima facie showing for authorization to proceed further under § 2255(h)(2). *See Reyes-Requena*, 243 F.3d at 899.

IT IS ORDERED that the motion for authorization is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Dennis has failed to make the showing required to file such a motion. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was received in this court, unless the district court determines that an earlier filing date should apply. *See Spotville v. Cain,* 149 F.3d 374, 376 (5th Cir. 1998) (prisoner mailbox rule). The federal public defender's motion to appoint counsel is DENIED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RYAN DENNIS	§	
	§	
VS.	§	ACTION NO. 4:16-CV-577-Y
	§	(Crim. No. 4:08-CR-109-Y
UNITED STATES OF AMERICA	§	

ORDER DENYING MOTION TO VACATE SENTENCE

Pending before the Court is defendant Ryan Dennis's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (doc. 1). After review of the motion, the related briefs, and the applicable law, the Court concludes that the motion should be denied.

In December 2008, a jury convicted Dennis of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On March 17, 2009, he was sentenced to 288 months in prison. His sentence was enhanced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e), due to his three prior convictions under Texas law for aggravated assault with a deadly weapon. Dennis appealed his conviction, but the United States Court of Appeals for the Fifth Circuit affirmed. He thereafter filed his first § 2255 motion, which was denied, and that denial was affirmed by the Fifth Circuit.

After the United States Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2251 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), Dennis timely filed the pending second § 2255 motion. The motion was transferred to the Fifth Circuit, which granted Dennis authorization to pursue the motion. Dennis contends that his sentence enhancements under the ACCA are no longer valid

in light of the Supreme Court's decisions in *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243 (2016) (holding that a prior conviction under state law does not qualify as the generic form of a predicate violent felony offense enumerated in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element).

After review, the Court concludes that Dennis's argument is foreclosed by Fifth Circuit precedent. In *United States v. Shepherd*, 848 F.3d 425 (5th Cir. 2017), the Fifth Circuit concluded that the district court did not err in holding that the defendant's conviction for aggravated assault under Texas law was a "crime of violence" under U.S.S.G. §4B1.2. That sentencing guideline defines "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." This definition is identical to the first prong of the definition of "violent felony" under the ACCA. *See* 18 U.S.C. § 924(e)(2)(B)(I). Citing *United States v. Guzman*, 797 Fl3d 346, 348 (5th Cir. 2015), the Fifth Circuit noted that it had already

> found no plain error in holding that a defendant's Texas conviction for aggravated assault has as an element the threatened use of physical force against the person of another. . . . [and that] the Supreme Court's recent decision in *Mathis* . . . does not cast doubt on our evaluation of the aggravated assault statute under the guidelines. Because we have already held in *Guillen-Alvarez*, 489 F.3d [197,] 200-01 [(5th Cir. 2007)] that Tex. Penal Code 22.02(a)(2) qualifies as a conviction for the enumerated offense of aggravated assault and is a crime of violence, it is 'irrelevant whether the challenged statutory alternatives are considered means or elements." *United States v. Villasenor-Ortiz*, No. 16-10366, [675] Fed.

> Appx. [424], [428], 2017 WL 113917, at *3 (5th Cir. Jan. 11, 2017).

Shepherd, 848 F.3d at 427-28; *cf. United States v. Lerma*, No. 16-41467, 2017 WL 6379724, *7 (5th Cir. Dec. 14, 2017) (concluding that under Texas's aggravated-robbery statute, "threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft with intent to obtain or maintain control of the property, has as an element the threatened use of physical force against the person of another" under the "use of force" prong of the definition of "violent felony" under the ACCA).

As a result, because Dennis's aggravated-assault convictions under Texas law remain predicate offenses under the ACCA, 18 U.S.C. § 924(e)(B)(2)(i), even after the decisions in *Johnson* and *Mathis*, the Court concludes that Dennis's successive § 2255 motion should be and hereby is DENIED. The Court further concludes that reasonable jurists would not find this decision debatable or wrong, and therefore declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b); *McGowen v. Thaler*, 675 F.3d 482, 498 (5th Cir. 2012).

SIGNED December 19, 2017.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10025

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

RYAN DENNIS,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Ryan Dennis, federal prisoner #38032-177, was convicted of possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). The district court sentenced him to 288 months in prison under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on his Texas convictions of aggravated assault with a deadly weapon. This court granted Dennis authorization to file a successive 28 U.S.C. § 2255 motion raising a claim that his

Texas convictions no longer qualify as predicate offenses under the ACCA in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of § 924(e)(2)(B)(ii) is unconstitutionally vague. The district court denied relief.

Dennis moves for a certificate of appealability ("COA") to appeal the denial of his § 2255 motion. To obtain a COA, Dennis must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the district court has rejected the constitutional claims on the merits, "[t]he [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. The decision whether to grant a COA is made "without full consideration of the factual or legal bases adduced in support of the claims" and without deciding the merits of the appeal. *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Because Dennis has made the required showing, a COA is GRANTED on whether, after *Johnson*, Dennis no longer qualifies for sentencing under the ACCA based on his convictions of Texas aggravated assault and whether relief in a successive § 2255 proceeding is therefore warranted. *See Slack*, 529 U.S. at 484. The clerk will issue a briefing notice.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge