

No. 17A264

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, _____

RAYMOND A. WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

RAYMOND A. WHITE,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 15-00564-CV-W-GAF
	)	Case No. 12-00064-CR-W-GAF
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Presently before the Court is Movant Raymond A. White’s (“Movant”) Amended Motion to Vacate, Correct, or Set Aside a Sentence pursuant to 28 U.S.C. § 2255. (Doc. # 20). Movant argues that, following recent Supreme Court’s decisions, he does not qualify as a career offender or as an armed career criminal, and therefore his sentence violates due process. (*Id.*). Respondent United States of America (the “Government”) opposes. (Doc. # 23). For the reasons set forth below, Movant’s Motion is DENIED.

DISCUSSION

I. FACTS

On April 18, 2013, Movant pled guilty to two counts of a six-count indictment, specifically possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (“Count 1”) and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (“Count 2”). (No. 12-00064-CR-W-GAF, Docs. ## 32-33). Movant’s presentence investigation report (the “PSR”) was prepared and calculated his sentencing guideline range between 262 to 327 months on each count. (*Id.*, PSR ¶ 62). This recommendation included sentencing enhancements because it was determined that Movant

qualified as both an armed career criminal under 18 U.S.C. § 924(e) and as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1(b). (*Id.*, PSR ¶¶ 28-29). Movant was considered an armed career criminal and a career offender because of his prior felony convictions of possession of a short-barreled shotgun; second-degree robbery under Missouri law; and delivery of a controlled substance. (*Id.*, PSR ¶¶ 21). On September 10, 2014, the Court sentenced Movant to 188 months on each count, to be served concurrently. (*Id.*, Doc. #43).

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a movant may collaterally attack his sentence on four grounds: “(1) ‘that the sentence was imposed in violation of the Constitution or laws of the United States,’ (2) ‘that the court was without jurisdiction to impose such sentence,’ (3) ‘that the sentence was in excess of the maximum authorized by law,’ and (4) that the sentence ‘is otherwise subject to collateral attack.’” *Hill v. United States*, 368 U.S. 424, 426-427 (1962) (quoting 28 U.S.C. § 2255). Arguments that might warrant reversal on direct appeal do not necessarily support collateral attack. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994).

III. ANALYSIS

The Government concedes that, following *Johnson v. United States*, --U.S.--, 135 S. Ct. 2551 (2015), Movant’s sentence pursuant to the armed career criminal enhancement on Count 2 is improper because he does not meet the definition of “armed career criminal.” (Doc. # 23). Federal law prohibits convicted felons from possessing firearms and punishes a “violation of this ban by up to 10 years’ imprisonment.” *Johnson*, 135 S. Ct. at 2555. If, however, an individual is found guilty of being a felon in possession of a firearm and “has three or more earlier convictions for a ‘serious drug offense’ or a ‘violent felony,’ the Armed Career Criminal Act [the

“ACCA”] increases his prison term to a minimum of 15 years and a maximum of life.” *Id.* A violent felony is defined as:

any crime punishable by imprisonment for a term exceeding one year, . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). “The closing words of this definition, italicized above, have come to be known as the Act’s residual clause.” *Johnson*, 135 S. Ct. at 2556. In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague. *Id.* at 2563.

Johnson involved the application of the residual clause to the crime of unlawful possession of a short-barreled shotgun. *Id.* at 2556. The Government has thus conceded that Movant’s prior conviction for possession of a short-barreled shotgun no longer qualifies as a “violent felony” under the ACCA. (Doc. # 23, p. 2). Therefore, Movant does not have three or more prior convictions for a “serious drug offense” and/or a “violent felony,” and his maximum term of imprisonment under Count 2 is 120 months. Consequently, his sentence of 188 months on Count 2 is improper because it exceeds statutory authority. *See Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011).

However, this does not end the inquiry. Section 2255 relief is inappropriate where the same sentence could be imposed again even if the movant is granted the § 2255 relief he requests. *Olten v. United States*, 565 F. App’x 558, 561 (8th Cir. 2014). In *Olten*, the Eighth Circuit determined that the movant’s sentence had been improperly enhanced under the ACCA. *Id.* at 560. The movant argued that because of this, his sentence should be vacated. *Id.* The Eighth Circuit disagreed, reasoning that although the movant’s sentence on his felon in

possession charge was improper, he was also convicted of another charge. *Id.* at 561. The sentence on the second charge could have been imposed consecutively to the movant's sentence on the felon in possession charge, and resulted in the same sentence. *Id.* The Court concluded that, as a result, the movant was not entitled to § 2255 relief. *Id.*

Like in *Olten*, Movant's enhanced sentence under Count 2 was improper. However, Movant also pled guilty to Count 1 of his indictment. (Case No. 12-00064-CR-W-GAF, Docs. ## 32-33). His sentence on Count 1 was also 188 months. Thus, Movant is entitled to relief only if his sentence of 188 months on Count 1 is also improper.

Movant argues that his sentence on Count 1 is also improper. Unlike the ACCA, a career offender needs only two prior felony convictions of either a crime of violence or a controlled substance offense to qualify for an enhancement. U.S. Sentencing Guidelines Manual § 4B1.1(a). Under the sentencing guidelines, a defendant is considered a career offender if he satisfies three factors:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id. The first two factors are not in dispute. Nor does Movant dispute that he has one prior conviction for a controlled substance offense. Accordingly, if either of Movant's other prior convictions (possession of a short-barreled shotgun or second-degree robbery) is a crime of violence, the career offender enhancement will still apply.

Movant argues his convictions for possession of a short-barreled shot gun and second-degree robbery do not constitute "crimes of violence" under the sentencing guidelines. Movant contends that the analysis the Supreme Court used in *Johnson* to find the residual clause of the

definition of “violent felony” in the ACCA as void for vagueness should also apply to the identical language used to define “crime of violence” in the sentencing guidelines’ career offender provision.¹ Therefore, he argues, his conviction for possession of a short-barreled shotgun is not a crime of violence. Movant further contends that second-degree robbery under Missouri law is not a crime of violence because Missouri law does not require violent force as an element of the crime. Accordingly, Movant argues, he does not qualify for the career offender enhancement, and his sentence on Count 1 is improper.

For purposes of this Order, the Court will assume without deciding that the Supreme Court’s holdings and analysis regarding the definition of “violent felony” as used in the ACCA are equally applicable to the definition of “crime of violence” as used in the sentencing guidelines. As the Government points out, the law is not settled on the applicability of *Johnson* to the sentencing guidelines. See *Richardson v. United States*, No. 15-3188, 2015 WL 8956210 (8th Cir. Dec. 16, 2015). Whether *Johnson* is applicable to the sentencing guidelines is irrelevant here because second-degree robbery under Missouri law is a crime of violence as explained below.

Assuming *Johnson* applies to the sentencing guidelines, possession of a short-barreled shotgun is not a crime of violence. See *Johnson*, 135 S. Ct. at 2559-60. However, second-degree robbery under Missouri law could still qualify as a crime of violence “if the conviction necessarily involved ‘the use, attempted use, or threatened use of physical force against the person of another,’ [or] otherwise encompassed the generic definition of one of the enumerated

¹ Like the definition of “violent felony” in the ACCA, “crime of violence” is defined as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” U.S. Sentencing Guidelines Manual § 4B1.2(a).

offenses in Application Note 1 of the Commentary to section 4B1.2” *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (emphasis in original) (quoting U.S. Sentencing Guidelines Manual § 4B1.2(a)(1)). Robbery is one of the enumerated offenses. U.S. Sentencing Guidelines Manual § 4B1.2 cmt. n.1.

Movant failed to address whether robbery in the second degree under Missouri law fits within the generic definition of an enumerated offense.² Rather, Movant focused his arguments on whether second-degree robbery “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S. Sentencing Guidelines Manual § 4B1.2(a). The Court need not reach Movant’s argument because second-degree robbery under Missouri law fits within the generic definition of robbery.

The “first step in applying the crime-of-violence definition of section 4B1.2(a), then, is to determine whether to apply the categorical or modified categorical approach.” *Ossana*, 638 F.3d at 899. Under the categorical approach, courts “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.” *Descamps v. United States*, --U.S.--, --, 133 S. Ct. 2276, 2281 (2013). Courts do not assess the offense “in terms of how an individual offender might have committed it on a particular occasion,” but rather “in terms of how the law defines the offense.” *Johnson*, 135 S. Ct. at 2557 (quotation omitted). However, if the underlying statute is a so-called “divisible statute” and encompasses multiple crimes, including some that do not qualify as a crime of violence, then the modified categorical approach is applied, which allows courts to examine a limited class of record materials to determine which crime was actually committed. *Descamps*, 133 S. Ct. at 2281; *see also Ossana*, 638 F.3d at 899-900.

² In fact, Movant went so far as to say that “[r]obbery is not an enumerated offense in USSG § 4B1.2.” (Doc. # 20, p. 5).

Movant correctly states that the Missouri statute defining the crime of robbery in the second degree is indivisible, and therefore, the categorical approach applies. (Doc. # 20, p. 5). See *Descamps*, 133 S. Ct. at 2285-86. Thus, the Court must compare the Missouri robbery statutes – §§ 569.010, 569.030, and 570.030.1 of the Missouri Revised Statutes – to the elements of the generic crime of robbery to determine if second-degree robbery is a crime of violence under the guidelines. “If the relevant statute has the same elements as the ‘generic’ [] crime, then the prior conviction can serve as [a career offender] predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is ‘necessarily . . . guilty of all the [generic crime’s] elements.’” *Descamps*, 133 S. Ct. at 2283 (third alternation in original) (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)). “But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as [a career offender] predicate, even if the defendant actually committed the offense in its generic form.” *Id.*

Under Missouri law, “[a] person commits the crime of robbery in the second degree when he forcibly steals property.” Mo. Rev. Stat. § 569.030. “[A] person ‘forcibly steals,’ and thereby commits robbery, when, in the course of stealing, . . . he uses or threatens the immediate use of physical force upon another person for the purpose of: (a) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (b) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.” Mo. Rev. Stat. § 569.010(1). “A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.” Mo. Rev. Stat. § 570.030.1.

The Eighth Circuit has not had the opportunity to address the generic definition of robbery; however, a handful of other circuits have. The Fifth Circuit has said the following:

Although the precise state definitions vary, the generic form of robbery “may be thought of as aggravated larceny,” containing at least the elements of “misappropriation of property under circumstances involving [immediate] danger to the person.” The immediate danger element is what makes robbery “deserving of greater punishment than that provided for larceny” and extortion, and has been implemented by the states in two main ways. The majority of states require property to be taken from a person or a person’s presence by means of force or putting in fear.

United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006) *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (alternation in original) (quoting Wayne R. LaFare, *Substantive Criminal Law* § 20.3 intro., (d)(2) (2d ed. 2003); *see also United States v. Ortiz-Rojas*, 575 F. App’x 494, 495 (5th Cir. 2014) (reaffirming generic definition of robbery). Under this definition, “there need not be a direct threat to the person of another—instead, intimidation or ‘putting in fear’ of potential injury suffices.” *United States v. Lockley*, 632 F.3d 1238, 1243 (11th Cir. 2011) (quoting *Santiesteban-Hernandez*, 469 F.3d at 380). The Second, Ninth, Tenth, and Eleventh Circuits have all cited the Fifth Circuit’s generic definition of robbery with approval. *See, e.g., id.*; *United States v. Velasquez-Bosque*, 601 F.3d 955, 958 (9th Cir. 2010); *United States v. Walker*, 595 F.3d 441, 446 (2d Cir. 2010); *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009).

The crime of second-degree robbery under Missouri law fits squarely within the generic definition of robbery. To commit a crime of second-degree robbery, the defendant must misappropriate property or services by using physical force or by threatening the immediate use of physical force, *i.e.* putting in fear of potential injury. Thus, it contains all of the essential elements of the generic definition of robbery. The statute does not sweep more broadly than the generic definition. If anything, Missouri’s law is narrower than the generic definition because it

explicitly outlines when the defendant must use or threaten the physical force during the course of the forcible stealing to constitute second-degree robbery. Thus, second-degree robbery under Missouri law is a crime of violence for purposes of the sentencing guidelines.

Because Movant has a prior conviction for a controlled substance offense and at least one prior conviction for a crime of violence, he qualifies for the career offender enhancement. Therefore, the Court had the correct guidelines calculations on Count 1 when sentencing Movant to 188 months on that count and that sentence is not illegal. Because Movant's sentence of 188 months on Count 1 would remain intact, relief for his improper sentence on Count 2 is inappropriate. *See Olten*, 565 F. App'x at 561 (relief denied where the same sentence could result by imposing consecutive terms of imprisonment on two counts).

IV. EVIDENTIARY HEARING AND CERTIFICATE OF APPEALABILITY

A movant is not entitled to an evidentiary hearing on a § 2255 motion if the motion and the files and record of the case conclusively show he is entitled to no relief. *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008). No hearing is required "where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007). It is clear, from the above discussion, an evidentiary hearing is not necessary to resolve Movant's claims. Movant's claims fail as a matter of law.

Additionally, a movant can appeal a decision to the Eighth Circuit only if a court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if a movant can make a substantial showing of a denial of a constitutional right. *Id.* § 2253(c)(2). To meet this standard, a movant must show reasonable jurists could debate whether the issues should have been resolved in a different manner or the issues deserve further

proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). As discussed above, Movant's claims fail as a matter of law, and the merits of his claims are not debatable among jurists or deserving of further proceedings.

CONCLUSION

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Movant no longer qualifies as an armed career criminal under the ACCA. Therefore, his sentence on Count 2 is improper. Even assuming the analysis of "violent felony" in *Johnson* applies to the term "crime of violence" in the sentencing guidelines, Movant still meets the definition of career offender because he has a prior conviction for a controlled substance offense and his prior conviction for second-degree robbery under Missouri law is a crime of violence. Thus, his sentence of 188 months on Count 1 is proper. Accordingly, relief is not warranted and Movant's Motion is DENIED, no evidentiary hearing is necessary, and no certificate of appealability shall be issued.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 28, 2016

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

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

Appellant's application for certificate of appealability is granted on Count 2 and appellant's application for certificate of appealability is denied on Count 1. A briefing schedule will be established.

June 21, 2016

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

/s/ Michael E. Gans

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**UNITED STATES COURT OF APPEALS
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No: 16-1375

Raymond A. White

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

JUDGMENT

Before COLLOTON, ARNOLD and KELLY, 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 in its entirety. The appeal is dismissed.

June 24, 2016

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**

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

Before COLLOTON, ARNOLD and KELLY, Circuit Judges.

Granting motion to hold case in abeyance filed by Mr. William Charles Kenney. Case 16-1375 placed in abeyance pending decision 15-8544, 15-3507 and 16-1028 from Supreme Court of the United States. Judge Colloton would deny the motion.

August 23, 2016

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**

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. The motion to remove case from abeyance and for leave to file an amended application is denied as moot.

June 20, 2017

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 WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

RAYMOND A. WHITE,	)	
	)	
Movant,	)	
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vs.	)	Case No. 15-00564-CV-W-GAF
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Presently before the Court is Movant Raymond A. White’s (“Movant”) Amended Motion to Vacate, Correct, or Set Aside a Sentence pursuant to 28 U.S.C. § 2255. (Doc. # 20). Movant argues that, following recent Supreme Court’s decisions, he does not qualify as a career offender or as an armed career criminal, and therefore his sentence violates due process. (*Id.*). Respondent United States of America (the “Government”) opposes. (Doc. # 23). For the reasons set forth below, Movant’s Motion is DENIED.

DISCUSSION

I. FACTS

On April 18, 2013, Movant pled guilty to two counts of a six-count indictment, specifically possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) (“Count 1”) and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1) (“Count 2”). (No. 12-00064-CR-W-GAF, Docs. ## 32-33). Movant’s presentence investigation report (the “PSR”) was prepared and calculated his sentencing guideline range between 262 to 327 months on each count. (*Id.*, PSR ¶ 62). This recommendation included sentencing enhancements because it was determined that Movant

qualified as both an armed career criminal under 18 U.S.C. § 924(e) and as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1(b). (*Id.*, PSR ¶¶ 28-29). Movant was considered an armed career criminal and a career offender because of his prior felony convictions of possession of a short-barreled shotgun; second-degree robbery under Missouri law; and delivery of a controlled substance. (*Id.*, PSR ¶¶ 21). On September 10, 2014, the Court sentenced Movant to 188 months on each count, to be served concurrently. (*Id.*, Doc. #43).

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a movant may collaterally attack his sentence on four grounds: “(1) ‘that the sentence was imposed in violation of the Constitution or laws of the United States,’ (2) ‘that the court was without jurisdiction to impose such sentence,’ (3) ‘that the sentence was in excess of the maximum authorized by law,’ and (4) that the sentence ‘is otherwise subject to collateral attack.’” *Hill v. United States*, 368 U.S. 424, 426-427 (1962) (quoting 28 U.S.C. § 2255). Arguments that might warrant reversal on direct appeal do not necessarily support collateral attack. *United States v. Frady*, 456 U.S. 152, 165 (1982); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994).

III. ANALYSIS

The Government concedes that, following *Johnson v. United States*, --U.S.--, 135 S. Ct. 2551 (2015), Movant’s sentence pursuant to the armed career criminal enhancement on Count 2 is improper because he does not meet the definition of “armed career criminal.” (Doc. # 23). Federal law prohibits convicted felons from possessing firearms and punishes a “violation of this ban by up to 10 years’ imprisonment.” *Johnson*, 135 S. Ct. at 2555. If, however, an individual is found guilty of being a felon in possession of a firearm and “has three or more earlier convictions for a ‘serious drug offense’ or a ‘violent felony,’ the Armed Career Criminal Act [the

“ACCA”] increases his prison term to a minimum of 15 years and a maximum of life.” *Id.* A violent felony is defined as:

any crime punishable by imprisonment for a term exceeding one year, . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). “The closing words of this definition, italicized above, have come to be known as the Act’s residual clause.” *Johnson*, 135 S. Ct. at 2556. In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague. *Id.* at 2563.

Johnson involved the application of the residual clause to the crime of unlawful possession of a short-barreled shotgun. *Id.* at 2556. The Government has thus conceded that Movant’s prior conviction for possession of a short-barreled shotgun no longer qualifies as a “violent felony” under the ACCA. (Doc. # 23, p. 2). Therefore, Movant does not have three or more prior convictions for a “serious drug offense” and/or a “violent felony,” and his maximum term of imprisonment under Count 2 is 120 months. Consequently, his sentence of 188 months on Count 2 is improper because it exceeds statutory authority. *See Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011).

However, this does not end the inquiry. Section 2255 relief is inappropriate where the same sentence could be imposed again even if the movant is granted the § 2255 relief he requests. *Olten v. United States*, 565 F. App’x 558, 561 (8th Cir. 2014). In *Olten*, the Eighth Circuit determined that the movant’s sentence had been improperly enhanced under the ACCA. *Id.* at 560. The movant argued that because of this, his sentence should be vacated. *Id.* The Eighth Circuit disagreed, reasoning that although the movant’s sentence on his felon in

possession charge was improper, he was also convicted of another charge. *Id.* at 561. The sentence on the second charge could have been imposed consecutively to the movant's sentence on the felon in possession charge, and resulted in the same sentence. *Id.* The Court concluded that, as a result, the movant was not entitled to § 2255 relief. *Id.*

Like in *Olten*, Movant's enhanced sentence under Count 2 was improper. However, Movant also pled guilty to Count 1 of his indictment. (Case No. 12-00064-CR-W-GAF, Docs. ## 32-33). His sentence on Count 1 was also 188 months. Thus, Movant is entitled to relief only if his sentence of 188 months on Count 1 is also improper.

Movant argues that his sentence on Count 1 is also improper. Unlike the ACCA, a career offender needs only two prior felony convictions of either a crime of violence or a controlled substance offense to qualify for an enhancement. U.S. Sentencing Guidelines Manual § 4B1.1(a). Under the sentencing guidelines, a defendant is considered a career offender if he satisfies three factors:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Id. The first two factors are not in dispute. Nor does Movant dispute that he has one prior conviction for a controlled substance offense. Accordingly, if either of Movant's other prior convictions (possession of a short-barreled shotgun or second-degree robbery) is a crime of violence, the career offender enhancement will still apply.

Movant argues his convictions for possession of a short-barreled shot gun and second-degree robbery do not constitute "crimes of violence" under the sentencing guidelines. Movant contends that the analysis the Supreme Court used in *Johnson* to find the residual clause of the

definition of “violent felony” in the ACCA as void for vagueness should also apply to the identical language used to define “crime of violence” in the sentencing guidelines’ career offender provision.¹ Therefore, he argues, his conviction for possession of a short-barreled shotgun is not a crime of violence. Movant further contends that second-degree robbery under Missouri law is not a crime of violence because Missouri law does not require violent force as an element of the crime. Accordingly, Movant argues, he does not qualify for the career offender enhancement, and his sentence on Count 1 is improper.

For purposes of this Order, the Court will assume without deciding that the Supreme Court’s holdings and analysis regarding the definition of “violent felony” as used in the ACCA are equally applicable to the definition of “crime of violence” as used in the sentencing guidelines. As the Government points out, the law is not settled on the applicability of *Johnson* to the sentencing guidelines. See *Richardson v. United States*, No. 15-3188, 2015 WL 8956210 (8th Cir. Dec. 16, 2015). Whether *Johnson* is applicable to the sentencing guidelines is irrelevant here because second-degree robbery under Missouri law is a crime of violence as explained below.

Assuming *Johnson* applies to the sentencing guidelines, possession of a short-barreled shotgun is not a crime of violence. See *Johnson*, 135 S. Ct. at 2559-60. However, second-degree robbery under Missouri law could still qualify as a crime of violence “if the conviction necessarily involved ‘the use, attempted use, or threatened use of physical force against the person of another,’ [or] otherwise encompassed the generic definition of one of the enumerated

¹ Like the definition of “violent felony” in the ACCA, “crime of violence” is defined as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” U.S. Sentencing Guidelines Manual § 4B1.2(a).

offenses in Application Note 1 of the Commentary to section 4B1.2” *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (emphasis in original) (quoting U.S. Sentencing Guidelines Manual § 4B1.2(a)(1)). Robbery is one of the enumerated offenses. U.S. Sentencing Guidelines Manual § 4B1.2 cmt. n.1.

Movant failed to address whether robbery in the second degree under Missouri law fits within the generic definition of an enumerated offense.² Rather, Movant focused his arguments on whether second-degree robbery “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S. Sentencing Guidelines Manual § 4B1.2(a). The Court need not reach Movant’s argument because second-degree robbery under Missouri law fits within the generic definition of robbery.

The “first step in applying the crime-of-violence definition of section 4B1.2(a), then, is to determine whether to apply the categorical or modified categorical approach.” *Ossana*, 638 F.3d at 899. Under the categorical approach, courts “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.” *Descamps v. United States*, --U.S.--, --, 133 S. Ct. 2276, 2281 (2013). Courts do not assess the offense “in terms of how an individual offender might have committed it on a particular occasion,” but rather “in terms of how the law defines the offense.” *Johnson*, 135 S. Ct. at 2557 (quotation omitted). However, if the underlying statute is a so-called “divisible statute” and encompasses multiple crimes, including some that do not qualify as a crime of violence, then the modified categorical approach is applied, which allows courts to examine a limited class of record materials to determine which crime was actually committed. *Descamps*, 133 S. Ct. at 2281; *see also Ossana*, 638 F.3d at 899-900.

² In fact, Movant went so far as to say that “[r]obbery is not an enumerated offense in USSG § 4B1.2.” (Doc. # 20, p. 5).

Movant correctly states that the Missouri statute defining the crime of robbery in the second degree is indivisible, and therefore, the categorical approach applies. (Doc. # 20, p. 5). See *Descamps*, 133 S. Ct. at 2285-86. Thus, the Court must compare the Missouri robbery statutes – §§ 569.010, 569.030, and 570.030.1 of the Missouri Revised Statutes – to the elements of the generic crime of robbery to determine if second-degree robbery is a crime of violence under the guidelines. “If the relevant statute has the same elements as the ‘generic’ [] crime, then the prior conviction can serve as [a career offender] predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is ‘necessarily . . . guilty of all the [generic crime’s] elements.’” *Descamps*, 133 S. Ct. at 2283 (third alternation in original) (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)). “But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as [a career offender] predicate, even if the defendant actually committed the offense in its generic form.” *Id.*

Under Missouri law, “[a] person commits the crime of robbery in the second degree when he forcibly steals property.” Mo. Rev. Stat. § 569.030. “[A] person ‘forcibly steals,’ and thereby commits robbery, when, in the course of stealing, . . . he uses or threatens the immediate use of physical force upon another person for the purpose of: (a) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (b) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.” Mo. Rev. Stat. § 569.010(1). “A person commits the crime of stealing if he or she appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.” Mo. Rev. Stat. § 570.030.1.

The Eighth Circuit has not had the opportunity to address the generic definition of robbery; however, a handful of other circuits have. The Fifth Circuit has said the following:

Although the precise state definitions vary, the generic form of robbery “may be thought of as aggravated larceny,” containing at least the elements of “misappropriation of property under circumstances involving [immediate] danger to the person.” The immediate danger element is what makes robbery “deserving of greater punishment than that provided for larceny” and extortion, and has been implemented by the states in two main ways. The majority of states require property to be taken from a person or a person’s presence by means of force or putting in fear.

United States v. Santiesteban-Hernandez, 469 F.3d 376, 380 (5th Cir. 2006) *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (alternation in original) (quoting Wayne R. LaFare, Substantive Criminal Law § 20.3 intro., (d)(2) (2d ed. 2003); *see also United States v. Ortiz-Rojas*, 575 F. App’x 494, 495 (5th Cir. 2014) (reaffirming generic definition of robbery). Under this definition, “there need not be a direct threat to the person of another—instead, intimidation or ‘putting in fear’ of potential injury suffices.” *United States v. Lockley*, 632 F.3d 1238, 1243 (11th Cir. 2011) (quoting *Santiesteban-Hernandez*, 469 F.3d at 380). The Second, Ninth, Tenth, and Eleventh Circuits have all cited the Fifth Circuit’s generic definition of robbery with approval. *See, e.g., id.*; *United States v. Velasquez-Bosque*, 601 F.3d 955, 958 (9th Cir. 2010); *United States v. Walker*, 595 F.3d 441, 446 (2d Cir. 2010); *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233 (10th Cir. 2009).

The crime of second-degree robbery under Missouri law fits squarely within the generic definition of robbery. To commit a crime of second-degree robbery, the defendant must misappropriate property or services by using physical force or by threatening the immediate use of physical force, *i.e.* putting in fear of potential injury. Thus, it contains all of the essential elements of the generic definition of robbery. The statute does not sweep more broadly than the generic definition. If anything, Missouri’s law is narrower than the generic definition because it

explicitly outlines when the defendant must use or threaten the physical force during the course of the forcible stealing to constitute second-degree robbery. Thus, second-degree robbery under Missouri law is a crime of violence for purposes of the sentencing guidelines.

Because Movant has a prior conviction for a controlled substance offense and at least one prior conviction for a crime of violence, he qualifies for the career offender enhancement. Therefore, the Court had the correct guidelines calculations on Count 1 when sentencing Movant to 188 months on that count and that sentence is not illegal. Because Movant's sentence of 188 months on Count 1 would remain intact, relief for his improper sentence on Count 2 is inappropriate. See *Olten*, 565 F. App'x at 561 (relief denied where the same sentence could result by imposing consecutive terms of imprisonment on two counts).

IV. EVIDENTIARY HEARING AND CERTIFICATE OF APPEALABILITY

A movant is not entitled to an evidentiary hearing on a § 2255 motion if the motion and the files and record of the case conclusively show he is entitled to no relief. *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008). No hearing is required "where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based." *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007). It is clear, from the above discussion, an evidentiary hearing is not necessary to resolve Movant's claims. Movant's claims fail as a matter of law.

Additionally, a movant can appeal a decision to the Eighth Circuit only if a court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if a movant can make a substantial showing of a denial of a constitutional right. *Id.* § 2253(c)(2). To meet this standard, a movant must show reasonable jurists could debate whether the issues should have been resolved in a different manner or the issues deserve further

proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). As discussed above, Movant's claims fail as a matter of law, and the merits of his claims are not debatable among jurists or deserving of further proceedings.

CONCLUSION

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Movant no longer qualifies as an armed career criminal under the ACCA. Therefore, his sentence on Count 2 is improper. Even assuming the analysis of "violent felony" in *Johnson* applies to the term "crime of violence" in the sentencing guidelines, Movant still meets the definition of career offender because he has a prior conviction for a controlled substance offense and his prior conviction for second-degree robbery under Missouri law is a crime of violence. Thus, his sentence of 188 months on Count 1 is proper. Accordingly, relief is not warranted and Movant's Motion is DENIED, no evidentiary hearing is necessary, and no certificate of appealability shall be issued.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: January 28, 2016

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

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

Appellant's application for certificate of appealability is granted on Count 2 and appellant's application for certificate of appealability is denied on Count 1. A briefing schedule will be established.

June 21, 2016

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

/s/ Michael E. Gans

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

No: 16-1375

Raymond A. White

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

JUDGMENT

Before COLLOTON, ARNOLD and KELLY, 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 in its entirety. The appeal is dismissed.

June 24, 2016

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**

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

Before COLLOTON, ARNOLD and KELLY, Circuit Judges.

Granting motion to hold case in abeyance filed by Mr. William Charles Kenney. Case 16-1375 placed in abeyance pending decision 15-8544, 15-3507 and 16-1028 from Supreme Court of the United States. Judge Colloton would deny the motion.

August 23, 2016

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**

No: 16-1375

Raymond A. White

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:15-cv-00564-GAF)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. The motion to remove case from abeyance and for leave to file an amended application is denied as moot.

June 20, 2017

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

/s/ Michael E. Gans