

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12758-J

IN RE: JOSEPH WILLIAMS,

Petitioner.

Application for Leave to File a Second or Successive
Motion to Vacate, Set Aside,
or Correct Sentence, 28 U.S.C. § 2255(h)

Before: MARCUS, WILSON and MARTIN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A), Joseph Williams, who was sentenced in 2004, has filed an application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence, 28 U.S.C. § 2255. Such authorization may be granted only if this Court certifies that the second or successive motion contains a claim involving:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the

application satisfies the requirements of this subsection.” *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec’y, Dep’t of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court’s determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application, Williams indicates that he wishes to raise one claim in a second or successive § 2255 motion. He asserts that his claim relies upon the new rule of constitutional law announced in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d. 569 (2015), and *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, ___ L. Ed. 2d ___ (2016). (*Id.* at 4). He argues that the district court violated due process by sentencing him as an armed career criminal and a career offender based on prior convictions for crimes that do not qualify as “crimes of violence.”

The ACCA defines violent felony as any crime punishable by a term of imprisonment 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). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

On June 26, 2015, the Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 576 U.S.

at ___, 135 S. Ct. at 2557-58, 2563. The Supreme Court clarified that, in holding that the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at ___, 135 S. Ct. at 2563.

On April 18, 2016, the Supreme Court held in *Welch* that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65. The Court explained that, by striking down the ACCA's residual clause as void for vagueness, *Johnson* changed the ACCA's substantive reach and altered "the range of conduct or the class of persons that the [Act] punishes." *Id.* at ___, 136 S. Ct. at 1265 (brackets in original) (citation omitted). Applying the retroactivity framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and its progeny, the Court further stated that *Johnson* was not a procedural decision because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the [ACCA]." *Id.* Accordingly, the Court ruled that "*Johnson* is thus a substantive decision and so has retroactive effect under *Teague* in cases on collateral review." *Id.*

In light of the Supreme Court's holdings in *Johnson* and *Welch*, federal prisoners who can make a *prima facie* showing that they previously were sentenced, at least in part, in reliance on the ACCA's now-voided residual clause are entitled to file a second or successive § 2255 motion in the district court. See *In re Robinson*, No. 16-11304, manuscript op. at 2 (11th Cir. Apr. 19, 2016) (holding that *In re Franks*, 815 F.3d 1281 (11th Cir. 2016), which had held that *Johnson* claims brought by ACCA offenders cannot satisfy the statutory requirements of § 2255(h)(2), is no longer good law). However, merely alleging a basis that meets § 2255(h)'s requirements in the abstract only "represent[s] the minimum showing" necessary to file a successive § 2255 motion because, under § 2244(b)(3)(C), the applicant also must make "a

prima facie showing that the application satisfies the requirements of this subsection.” *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (granting a state death-row inmate’s successive application because he had proffered detailed evidence, in satisfaction of § 2244(b)(3)(C), that showed “a reasonable likelihood that [he] is mentally retarded” to support his proposed *Atkins* claim). Accordingly, it appears that it is not enough for a federal prisoner to simply identify *Johnson* as the basis for the claim or claims he seeks to raise in a second or successive § 2255 motion, but he also must show that he falls within the scope of the new substantive rule announced in *Johnson*. See, e.g., *id.*; 28 U.S.C. § 2244(b)(3)(C).

Career Offender

Section 4B1.1 of the Sentencing Guidelines provides that a defendant is classified as a career offender if he (1) was at least 18 years old at the time of the offense of conviction; (2) the offense of conviction was either a crime of violence or a controlled-substance offense; and (3) he had at least two prior felony convictions of either a crime of violence or a controlled-substance offense. U.S.S.G. § 4B1.1(a). The Guidelines define “crime of violence” as any offense under federal or state law that is punishable by imprisonment for more than one year and:

- (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.S.G. § 4B1.2(a)

In *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (mandate withheld), we held that the vagueness doctrine, upon which the Supreme Court invalidated the ACCA’s residual clause in *Johnson*, did not similarly apply to advisory Sentencing Guidelines. We explained that the vagueness doctrine applies both to statutes that define elements of crimes

and to statutes fixing sentences, but noted that “the advisory guidelines do neither.” *Id.* at 1194. We then emphasized that, because the pre-Guidelines sentencing scheme that gave plenary discretion to sentencing judges did not violate the notice requirement of the Due Process Clause, advisory guidelines that merely “inform a sentencing judge’s discretion also cannot violate the notice requirement.” *Id.* at 1194-95. We noted that no circuit had held in a published decision that advisory guidelines could be unconstitutionally vague, though one circuit had stated in *dicta* that guidelines could be void for vagueness when they were still mandatory, and in fact, four circuits had held that the guidelines—whether mandatory or advisory—could not be unconstitutionally vague. *Id.* at 1196. Finally, we explicitly rejected Matchett’s policy-based argument that allowing the identically worded residual clause in § 4B1.2(a) to stand would upend the sentencing process by forcing sentencing courts to apply a clause that *Johnson* determined to lack precise meaning. *Id.* at 1195. We explained that

Although *Johnson* abrogated the previous decisions of the Supreme Court interpreting the residual clause of the Armed Career Criminal Act, sentencing courts interpreting the residual clause of the guidelines must still adhere to the reasoning of cases interpreting the nearly identical language in the Act. [Matchett’s] policy concern is properly addressed to the United States Sentencing Commission

Id. at 1195-96.

Thereafter, in *In re Griffin*, No. 16-12012, manuscript op. at 7-10 (11th Cir. May 25, 2016), we held that an applicant seeking leave to raise a *Johnson*-based challenge to his career-offender enhancement, which was imposed when the Sentencing Guidelines were mandatory, did not make a *prima facie* showing that his claim satisfied the criteria of § 2255(h)(2) because he was not sentenced under the ACCA or beyond the statutory maximum for his crime. In doing so, we concluded that “logic and principles established in *Matchett* also govern . . . when the Guidelines were mandatory.” *Id.* at 7. We reasoned that the Guidelines,

whether advisory or mandatory, cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to limit and assist the sentencing judge's discretion. *Id.* at 7-8.

Furthermore, we concluded in *Griffin* that the Supreme Court's ruling in *Welch* did not "make[] *Johnson* retroactive for purposes of a second or successive § 2255 motion premised on the applicability of *Johnson* to a guidelines challenge, just because the guidelines challenge happens to be based on the residual clause." *Id.* at 8. We reasoned that, whereas the "application of *Johnson* to the ACCA was a substantive change in the law because it altered the statutory range of permissible sentences," a rule that extended *Johnson* to the residual clause of the career-offender guideline would only establish that the guideline range had been incorrectly calculated within the statutory boundaries. *Id.* at 8-9. Thus, the extension of *Johnson* to a guidelines context would only create changes in "how the sentencing procedural process is to be conducted—changes that are not entitled to retroactive effect in cases on collateral review in a second or successive § 2255 motion." *Id.* at 9.

Here, Williams has not satisfied the statutory criteria for filing a successive § 2255 motion as to his career-offender designation. First, even though the Supreme Court has held in *Welch* that *Johnson* applies retroactively to cases on collateral review, our binding precedent holds that *Welch* does not make *Johnson* retroactive for purposes of filing a successive § 2255 motion raising a *Johnson*-based challenge to the Sentencing Guidelines. *See Griffin*, No. 16-12012, manuscript op. at 8-9; *Welch*, 578 U.S. at ___, 136 S. Ct. at 1264-65.

Furthermore, Williams cannot make a *prima facie* showing that *Johnson* applies to him in light of our holdings in *Matchett* and *Griffin* that the Sentencing Guidelines—whether advisory or mandatory—cannot be unconstitutionally vague. *See Griffin*, No. 16-12012, manuscript op. at 7;

Matchett, 802 F.3d at 1195. Moreover, as discussed below, Williams still has at least three qualifying ACCA predicate offenses, and those same convictions would also satisfy the career-offender guideline's requirement of two crimes of violence or controlled-substance offenses, even if *Johnson* extended to the Guidelines.

Armed Career Criminal

Under the ACCA, a defendant is subject to a 15-year statutory minimum sentence if he has 3 previous convictions for a violent felony, serious drug offense, or both, committed on different occasions. 18 U.S.C. § 924(e)(1).

Williams also has failed to satisfy the statutory criteria for filing a successive § 2255 motion with respect to his designation as an armed career criminal. Even after *Johnson*, Williams still has at least three required predicate offenses under the ACCA. *Johnson* does not apply to the predicate convictions for (1) the sale, purchase, or delivery of cocaine, (2) possession of cannabis with intent to sell, purchase, or deliver, or (3) the sale of cocaine on or near a college or public park, as they were "serious drug offenses." See *id.* § 924(e)(2)(A). Additionally, his prior convictions for resisting an officer with violence are still valid predicate offenses after *Johnson*, as we recently has held that the Florida offense of resisting arrest with violence qualifies as a violent felony under the elements clause of the ACCA. See *United States v. Hill*, 799 F.3d 1318, 1322-23 (11th Cir. 2015).

Because Williams has failed to make a *prima facie* showing of either of the grounds set forth in 28 U.S.C. § 2255, his application for leave to file a second or successive motion is hereby DENIED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH WILLIAMS,

Petitioner,

v.

Case No: 5:15-cv-547-Oc-10PRL

WARDEN, FCC COLEMAN - USP I

Respondent.

ORDER DISMISSING CASE

Petitioner, *pro se*, is a federal inmate proceeding on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). Respondent requests dismissal of the petition for lack of jurisdiction. (Doc. 6). Petitioner filed a Reply to the Response. (Doc. 9). Petitioner argues that his sentence is invalid because five of his six prior drug convictions were not "serious drug offenses," his carrying a concealed weapon is not a violent felony based on United States v. Archer, 531 F.3d 1347 (11th Cir. 2008), and battery on law enforcement is not a violent felony based on United States v. Williams, 609 F.3d 1168 (11th Cir. 2010); therefore he only had only two, not three predicate offenses under the Armed Career Criminal Act (ACCA). (Doc. 1).

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that "[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." See also Rule 12, Rules Governing Section 2255

proceedings. Recently, sitting en banc the Eleventh Circuit overruled prior precedent and held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except on very narrow grounds not present in this case. McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1079 (11th Cir. 2017) (en banc) (quoting 28 U.S.C. § 2255(e)); Bernard v. FCC Coleman Warden, No. 15-13344 (11th Cir. April 24, 2017) (citing McCarthan, 851 F.3d at 1092-93).

Thus, pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts (directing *sua sponte* dismissal if the petition and records show that the moving party is not entitled to relief), this case is **DISMISSED**. See also 28 U.S.C. § 2255(b). The Clerk is directed to enter judgment dismissing this case without prejudice, terminate any pending motions,¹ and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 31st day of May, 2017.



UNITED STATES DISTRICT JUDGE

Copies to: Joseph Williams, *pro se*

¹ In Petitioner's motion to supplement (Doc. 11) he seeks to supplement his petition with the Supreme Court's ruling in Mathis v. United States, 136 S. Ct. 2243 (2016). Based on this Order, the motion to supplement is moot.

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

JOSEPH WILLIAMS,

Petitioner,

v.

Case No: 5:15-cv-547-Oc-10PRL

WARDEN, FCC COLEMAN - USP I

Respondent.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered on May 31, 2017, the Petition for Writ of Habeas

Corpus is dismissed.

ELIZABETH M. WARREN,
ACTING CLERK

s/E. Norvell, Deputy Clerk

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:
 - (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291:** Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).
 - (b) **In cases involving multiple parties or multiple claims,** a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).
 - (c) **Appeals pursuant to 28 U.S.C. Section 1292(a):** Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.
 - (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.
 - (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).
2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:
 - (a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.
 - (b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."
 - (c) **Fed.R.App.P.4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.
 - (d) **Fed.R.App.P.4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.
 - (e) **Fed.R.App.P.4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.
3. **Format of the notice of appeal:** Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.
4. **Effect of a notice of appeal:** A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

**Additional material
from this filing is
available in the
Clerk's Office.**