

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

A.C. JACKSON,)
Petitioner,)
) **No. 1:17-cv-713**
v.)
) **ERIC D. WILSON**
Respondent.)

ORDER

Petitioner, A.C. Jackson, a federal inmate housed in the Eastern District of Virginia and proceeding *pro se*, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the application of the Armed Career Criminal Act (“ACCA”) enhancement to his sentence must be vacated. For the reasons that follow, the petition must be construed as an unauthorized, successive motion to vacate pursuant to 28 U.S.C. § 2255. Accordingly, the motion must be dismissed without prejudice.

I.

Petitioner asserts that he is presently incarcerated in this district pursuant to a conviction entered in the United States District Court for the Eastern District of Missouri. Pet. at 1. A review of the court's PACER system reveals that Petitioner was found guilty following a jury trial of two counts of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g). Case No. 1:13CR00067SNLJ. Because he qualified as a "career offender" under the ACCA, on April 10, 2014, petitioner received a sentencing enhancement and was sentenced to serve a total of 210 months in prison, followed by a three-year term of supervised release. His sentence was enhanced under the ACCA based on his previous "violent felony" convictions, namely three

prior robbery convictions and one prior burglary conviction. On direct appeal, petitioner did not challenge his ACCA enhancement; rather, the sole argument raised on appeal was that the district court erred in denying a motion to suppress. On May 5, 2015, the Eighth Circuit issued a published opinion, finding no error and affirming the district court. *United States v. Jackson*, 784 F.3d 1227 (8th Cir. 2015). On June 10, 2015, the Eighth Circuit denied rehearing *en banc*.

On June 22, 2015, petitioner filed a motion to vacate pursuant to 28 U.S.C. § 2255, reasserting his argument that the district court erred in denying his motion to suppress. On November 5, 2015, the district court denied the § 2255 motion. *See Jackson*, No. 1:15CV00115 SNLJ, 2015 WL 6750807 (E.D. Mo. Nov. 5, 2015). Petitioner apparently did not appeal this decision.¹ Thereafter, he filed a petition for authorization to file a successive habeas application in the Eastern District of Missouri.² On May 19, 2017, the Eighth Circuit denied that request for authorization. *See Jackson*, No. 17-1214 (8th Cir. May 19, 2017). Approximately one month later, on June 22, 2017, petitioner filed the instant § 2241 petition in this district, contending that

¹ A review of the PACER system shows that no appeal was filed.

² The record is unclear as to the precise date petitioner filed his successive § 2255 motion. But that date may be estimated because (1) § 2244 requires that a request for authorization to file a successive § 2255 motion be resolved within 30 days, and (2) the Eighth Circuit denied authorization on May 19, 2017. *See* 28 U.S.C. § 2244(b)(3)(D). It therefore follows that petitioner filed his motion sometime after mid-April 2017. Given this, petitioner's § 2255 motion would have been untimely insofar as he sought to invoke the Supreme Court's decision in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), which invalidated the ACCA's residual clause defining a violent felony. Indeed, petitioner's successive § 2255 motion was likely time-barred because *Johnson* was announced on Friday, June 26, 2015, and thus petitioner's deadline to file any § 2255 motions based on *Johnson* was Monday, June 27, 2016. *See* 28 U.S.C. § 2255(f)(3) (providing a one-year limitations period from the date the new "right asserted [by the petitioner] was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

he is entitled to resentencing because the application of the ACCA to enhance his sentence was invalid because the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015).³ Petitioner further asserts that the remedy available under § 2255 is inadequate or ineffective to redress this claim, such that his petition is properly considered pursuant to § 2241.

II.

A motion pursuant to 28 U.S.C. § 2255 provides the primary means of collateral attack on the imposition of a federal conviction and sentence. *Rice v. Rivera*, 617 F.3d 802, 807 (4th Cir. 2010) (“[I]t is well established that defendants convicted in federal court are obliged to seek habeas relief from their convictions and sentences through § 2255.”). Importantly, however, the Antiterrorism and Effective Death Penalty Act of 1996 restricted the jurisdiction of district courts to hear second or successive applications for § 2255 federal habeas corpus relief by establishing a “gatekeeping mechanism.” *Felker v. Turpin*, 518 U.S. 651, 657 (1996). Thus, “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

Nevertheless, a federal inmate may proceed under 28 U.S.C. § 2241 instead of § 2255 if

³ The ACCA's residual clause defined “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that “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)(ii). The Supreme Court's *Johnson* decision did not affect the constitutionality of the ACCA's “force clause,” which defines a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § 924(c)(2)(B)(i).

the inmate demonstrates that the remedy afforded by § 2255 “is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e).⁴ For instance, “attacks on the execution of a sentence are properly raised in a § 2241 petition.” *In re Vial*, 115 F.3d 1192, 1194 n.5 (4th Cir. 1997). The § 2255(e) exception, however, is narrow; a federal inmate may proceed under § 2241 to challenge his conviction or sentence “in only very limited circumstances.” *United States v. Poole*, 531 F.3d 263, 369 (4th Cir. 2008). Indeed, the Fourth Circuit has emphasized that “the remedy afforded by § 2255 is not rendered inadequate or ineffective merely because an individual has been unable to obtain relief under that provision, or because an individual is procedurally barred from filing a § 2255 motion.” *Id.* (citations omitted).

Notably, the Fourth Circuit uses a conjunctive, three-part test to determine when “§ 2255 is inadequate and ineffective” such that “§ 2241 may be utilized” instead. *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000). Specifically, a petitioner may use § 2241 in lieu of § 2255 if:

(1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner’s direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law.

Id. The Fourth Circuit formulated this test expressly to provide a remedy for the “fundamental defect presented by a situation in which an individual is incarcerated for conduct that is not criminal but, through no fault of his own, he has no source of redress.” *Id.* at 333 n.3.

Put simply, petitioner’s *Johnson* claim is not cognizable under § 2241 because petitioner cannot satisfy the second and third prongs of the *Jones* criteria.

⁴ This exception is known as the “savings clause” to the limitations imposed by § 2255. *In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000).

III.

To begin with, petitioner cannot satisfy the second *Jones* criterion, namely that “the substantive law changed such that the conduct of which the prisoner was convicted is [no longer] deemed not to be criminal[.]” *Id.* at 333. In other words, petitioner must show that he is actually innocent of the predicate offenses that triggered his sentencing enhancement. In this respect, Fourth Circuit precedent teaches that the savings clause does *not* extend to claims of innocence of a sentencing factor. *See Poole*, 531 F.3d at 267 (“Fourth Circuit precedent has likewise not extended the reach of the savings clause to those petitioners challenging only their sentence.”). Indeed, as the Fourth Circuit has stated, “[a]ctual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from actual innocence of the predicate crimes, and not from the legal classification of the predicate crimes.” *United States v. Pettiford*, 612 F.3d 270, 284 (4th Cir. 2010). Here, petitioner cannot show that the substantive law changed such that his predicate crimes—three robberies and a burglary—were no longer deemed criminal; rather, petitioner argues only that changes in the law have altered the classifications of his prior convictions such that they are no longer deemed violent felonies under the ACCA. But the Fourth Circuit’s *Pettiford* decision expressly foreclosed such an argument. *See* 612 F.3d at 284. Thus, the instant § 2241 petition is properly construed as a successive § 2255 motion.

There is yet another independent ground for concluding that the § 2241 petition here must be construed as a § 2255 motion: petitioner cannot satisfy the third prong of the *Jones* test. In this regard, petitioner must show that he failed to “satisfy the gatekeeping provisions of § 2255 because the new rule [on which he relies] is not one of constitutional law.” *Jones*, 226 F.3d at

333. In other words, under the *Jones* test, petitioner cannot use § 2241 if the Supreme Court's *Johnson* decision announced a new rule of constitutional law.⁵ Of course, petitioner cannot rely on § 2241 because, as the Supreme Court has made clear, *Johnson* is indeed a new rule of constitutional law. See *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding that *Johnson* announced a new substantive rule retroactively available on collateral review); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017) (observing that *Johnson* announced a "new rule of constitutional law"). Thus, petitioner fails the *Jones* test and his petition must be examined pursuant to § 2255.

Because the instant petition is properly construed as a successive § 2255 motion, this matter must be dismissed without prejudice because the "appropriate court of appeals" has not authorized this successive motion. See 28 U.S.C. § 2244(b)(3)(A).⁶ Moreover, it is worth noting that the appropriate court of appeals and the appropriate venue for petitioner's successive § 2255

⁵ The purpose of the third *Jones* prong is to ensure that a movant, like petitioner, does not use § 2241 to circumvent § 2255(f)(3)'s one-year limitations period. See 28 U.S.C. § 2255(f)(3) (providing a one-year limitations period from the date the new "right asserted [by the petitioner] was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

⁶ Of course, because petitioner filed this petition on June 22, 2017—nearly two years after the Supreme Court issued its *Johnson* opinion—it appears that the § 2255 motion would be barred as untimely. See 28 U.S.C. § 2255(f)(3); see also *supra* note 2. Thus, the motion would in any event be dismissed for lack of jurisdiction. Moreover, even if there were jurisdiction to review petitioner's § 2255 motion, it is unclear whether the Supreme Court's decision in *Johnson* would operate to invalidate petitioner's sentencing enhancement, as his three prior robbery convictions might qualify as violent felonies under the ACCA's *force* clause, not the residual clause. Cf. *United States v. Dace*, 842 F.3d 1067 (8th Cir. 2016) (noting that *second* degree robbery in Missouri does not fall under the Sentencing Guidelines' "force clause" (citing *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016); U.S.S.G. §§ 2K2.1 & 4B1.2)). But that is a merits question that need not—indeed cannot—be answered here, as there is no jurisdiction to hear the instant § 2255 motion.

motion are the Eighth Circuit Court of Appeals and the United States District Court for the Eastern District of Missouri, respectively.

IV.

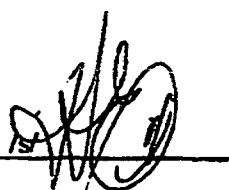
For the foregoing reasons,

It is hereby **ORDERED** that this petition is **DISMISSED WITHOUT PREJUDICE** to petitioner's right to move a panel of the United States Court of Appeals for the Eighth Circuit for an order authorizing the sentencing court to consider his § 2255 motion.

To appeal, petitioner must file a written notice of appeal with the Clerk's office within sixty (60) days of the date of this Order. A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order petitioner wishes to appeal. Petitioner need not explain the grounds for appeal until so directed by the court. Petitioner must also request a certificate of appealability from a circuit justice or judge. *See* 28 U.S.C. § 2253; Rule 22(b), Fed. R. App. P. For the reasons stated above, it is **ORDERED** that this Court expressly declines to issue such a certificate.

The Clerk is directed to send a copy of this Order to petitioner and to **CLOSE** this action.

Alexandria, Virginia
June 30, 2017



T. S. Ellis, III
United States District Judge

UNPUBLISHED

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

No. 17-6900

A. C. JACKSON,

Petitioner - Appellant,

v.

ERIC D. WILSON, Warden, FCC Petersburg,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T.S. Ellis, III, Senior District Judge. (1:17-cv-00713-TSE-IDD)

Submitted: October 17, 2017

Decided: October 20, 2017

Before FLOYD and HARRIS, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

A. C. Jackson, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A. C. Jackson, a federal inmate, seeks to appeal the district court's order treating his 28 U.S.C. § 2241 (2012) petition as a successive 28 U.S.C. § 2255 (2012) motion, and dismissing the motion for lack of jurisdiction. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Jackson has not made the requisite showing. Accordingly, we deny Jackson's motion for a certificate of appealability, deny leave to proceed in forma pauperis, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: October 20, 2017

UNITED STATES COURT OF APPEALS
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No. 17-6900
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v.

ERIC D. WILSON, Warden, FCC Petersburg

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: January 9, 2018

UNITED STATES COURT OF APPEALS
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O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Floyd, Judge Harris and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk