

A P P E N D I X A

C . O . A D E N I A L A N D F I L I N G

FILED: October 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Rec
10/24/17

No. 17-7037
(4:02-cr-00030-HCM-FBS-1)
(4:16-cv-00055-HCM)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMAR RASHAAD HODGE, a/k/a Black J, a/k/a Dennis Jordan

Defendant - Appellant

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

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7037

RPC 10/26/17

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMAR RASHAAD HODGE, a/k/a Black J, a/k/a Dennis Jordan,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Henry Coke Morgan, Jr., Senior District Judge. (4:02-cr-00030-HCM-FBS-1; 4:16-cv-00055-HCM)

Submitted: October 19, 2017

Decided: October 24, 2017

Before NIEMEYER, MOTZ, and KING, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Jamar Rashaad Hodge, Appellant Pro Se. Robert Edward Bradenham, II, Howard Jacob Zlotnick, Assistant United States Attorneys, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jamar Rashaad Hodge seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. 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.

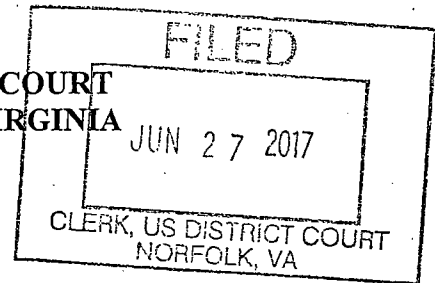
We have independently reviewed the record and conclude that Hodge has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this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

DISMISSED

A P P E N D I X B

2 2 5 5 D E N I A L O R D E R

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division



JAMAR RASHAAD HODGE,

Petitioner,

v.

Criminal No: 4:02cr30

UNITED STATES of AMERICA,

Respondent.

ORDER

This matter is before the Court on pro se Petitioner Jamar Rashaad Hodge's ("Petitioner's") Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), Docs. 58, 63; the United States of America's (the "Government's") Motion to Dismiss, Doc. 50; and the Government's Supplemental Motion to Dismiss, Doc. 65. For the reasons stated herein, the Court **DENIES** Petitioner's § 2255 Motion, **DENIES** the Government's Motion to Dismiss **AS MOOT**, and **GRANTS** the Government's Supplemental Motion to Dismiss.

In addition, the Court **FINDS** that no hearing is necessary because "the motion[s] and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).

I. BACKGROUND

On March 8, 2002, a grand jury indicted Petitioner on twenty-nine (29) counts related to drug trafficking, murder, and firearms. Doc. 1. A superseding indictment on August 9, 2005

charged Petitioner with twenty-five (25) counts. Doc. 9. On March 8, 2006, he pled guilty to two (2) counts of the indictment: (1) Conspiracy to Distribute and Possess with Intent to Distribute 50 Grams or More of Cocaine Base and 500 Grams or More of Cocaine, and (2) Murder with a Firearm in Relation to Drug Trafficking. See Doc. 39–40.

On July 12, 2006, this Court sentenced Petitioner to three hundred sixty (360) months imprisonment on Count One and life imprisonment on Count Two, to run consecutively to the sentence on Count One. Doc. 45. Petitioner subsequently pled guilty to murder in state court and was sentenced to twenty years in the Virginia State Penitentiary, to run consecutively to the federal sentence. See Doc. 47 at 3. On December 30, 2010, the Court GRANTED the Government’s Motion for a reduction in Petitioner’s sentence, reducing the sentence on Count One from life imprisonment to three hundred sixty (360) months imprisonment. Doc. 57

On June 15, 2016, Petitioner filed the instant § 2255 Motion. Doc. 58. The Court ORDERED the Government to respond on June 21, 2016, Doc. 59, and the Government filed the instant Motion to Dismiss on August 10, 2016, Doc. 61. On July 22, 2016, Petitioner filed a Motion to Appoint Counsel. Doc. 60. On August 22, 2016, Petitioner responded to the Government’s Motion, Doc. 62, and requested leave to supplement his § 2255 Motion, Doc. 63. The Court GRANTED LEAVE to supplement and DENIED the Motion to Appoint Counsel on December 13, 2016. Doc. 64. The Government filed its Supplemental Motion to Dismiss on January 26, 2017. Doc. 65. Petitioner responded on February 10, 2017. See Docs. 66–67.

II. LEGAL STANDARD

A. § 2255

Section 2255 is designed to correct fundamental constitutional or jurisdictional errors, which would otherwise “inherently result[] in a complete miscarriage of justice.” United States

v. Addonizio, 422 U.S. 178, 185 (1979). In order to move the Court to vacate, set aside or correct a sentence under § 2255, a petitioner must prove that one of the following occurred: (1) that his sentence was imposed in violation of the Constitution or laws of the United States; (2) that the Court was without jurisdiction to impose such a sentence; (3) that the sentence was in excess of the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A petitioner bears the burden of proving his grounds for collateral review of his sentence by a preponderance of the evidence. Jacobs v. United States, 350 F.2d 571, 574 (4th Cir. 1965); Hall v. United States, 30 F. Supp. 2d 883, 889 (E.D. Va. 1998). “Generally, an evidentiary hearing is required under 28 U.S.C. § 2255 unless it is clear from the pleadings, files, and records that a movant is not entitled to relief.” United States v. Witherspoon, 231 F.3d 923, 925–26 (4th Cir. 2000); see also 28 U.S.C. § 2255(b).

A prisoner must file a § 2255 motion within a one (1) year period of limitation, which runs from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted 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; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). A prisoner’s conviction is not final while it is on appeal. See Clay v. United States, 537 U.S. 522, 525 (2003).

The scope of a § 2255 collateral attack is far more limited than an appeal, and thus a “collateral challenge may not do service for an appeal.” United States v. Frady, 456 U.S. 152, 165 (1982). “[T]o obtain collateral relief based on trial errors to which no contemporaneous

objection was made, a convicted defendant must show both (1) ‘cause’ excusing his double procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.” Id. at 167. Although the doctrine of procedural default generally bars claims not previously raised, a freestanding claim of ineffective assistance of counsel may be properly asserted for the first time in a § 2255 petition. United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991).

B. Johnson v. United States

On June 26, 2015, the Supreme Court in Johnson v. United States held that the residual clause in 18 U.S.C. § 924(e) of the Armed Career Criminal Act (“ACCA”) defining a “crime of violence” was unconstitutionally vague. 135 S. Ct. 2551, 2557 (2015). On April 18, 2016, the Supreme Court in Welch v. United States made Johnson retroactive. 136 S. Ct. 1257, 1268 (2016). Applying the time limit of 28 U.S.C. § 2255(f)(3), prisoners’ § 2255 motions claiming retroactive applicability of Johnson were timely if filed by Monday, June 27, 2016.¹

C. Guideline Amendments

18 U.S.C. § 3582(c)(2) authorizes the Court to reduce a sentence after a Sentencing Commission amendment “if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” The Guidelines state that a reduction is not consistent with its policy statements if “none of the amendments in [§ 1B1.10(d)] are applicable.” U.S. Sentencing Guidelines Manual § 1B1.10(a)(2)(A) (U.S. Sentencing Comm’n 2016) (“U.S.S.G. § 1B1.10(a)(2)(A)”). The Court is not always bound by the list of amendments in U.S.S.G. § 1B1.10 when giving retroactive effect to clarifying amendments to the Guidelines. United States v. Capers, 61 F.3d 1100, 1109 (4th Cir. 1995). The Court may give retroactive effect to any clarifying amendment in sentencing and on direct appeal. Id.

¹ June 26, 2016, one year from the Supreme Court’s Johnson decision, was a Sunday. A filing deadline falling on a Sunday is extended to the following Monday. See Fed. R. Civ. P. 6(a)(1)(C); Fed. R. Crim. P. 45(a)(1)(C).

III. ANALYSIS

Petitioner raises two grounds for his § 2255 Motion: relief under Johnson, and relief under Amendment 794.

A. Relief under Johnson

Petitioner seeks relief from his 18 U.S.C. § 924(j) (“§ 924(j)”) conviction under Johnson. Doc. 58 at 4. The Government argues that Petitioner is not entitled to relief because the holding in Johnson does not extend to convictions under 18 U.S.C. § 924(c) (“§ 924(c)”). Doc. 61 at 2–3.² The Court does not need to reach the issues of whether Johnson extends to § 924(c) or § 924(j) or whether the § 2255 Motion is otherwise timely because Petitioner is not entitled to any relief under Johnson regardless of the Court’s holdings on those issues.

“Section 924(c) prohibits the possession of a firearm in furtherance of a crime of violence or a drug trafficking crime.” United States v. Hare, 820 F.3d 93, 106 (4th Cir. 2016). Johnson only addressed crimes of violence, and even if it extended to § 924(c), it would not affect defendants who possessed a firearm in furtherance of a drug trafficking crime. See id. Here, Petitioner pled guilty to murder with a firearm in relation to drug trafficking. See Docs. 39–40. He was convicted under § 924(j) because of a drug trafficking crime, and he would not be entitled to any relief under Johnson. Thus, the Court **DENIES** Petitioner’s § 2255 Motion as to relief under Johnson. Because the Court does not reach the question of whether Johnson extends to § 924(c) and because that was the only argument that the Government offered regarding Johnson in its Motion to Dismiss, the Court **DENIES** the Government’s Motion to Dismiss, Doc. 61, **AS MOOT** based on the Court’s holding on the merits of Petitioner’s § 2255 Motion under Johnson.

² The Government discusses § 924(c) because a violation of § 924(j) requires a violation of § 924(c) with additional elements. See 18 U.S.C. § 924(j).

B. Relief under Amendment 794

Petitioner seeks a two (2) to four (4) point reduction for a minor role in a conspiracy pursuant to U.S.S.G. § 3B1.2 in light of Amendment 794, which amended the commentary to that section. See Doc. 63 at 4–6. The Government argues that he is not entitled to any reduction under U.S.S.G. § 3B1.2 because the text of that section was applicable at the time of his sentencing and because the amendment is not available under a § 3582 Motion. Doc. 65 at 2–3. Petitioner responds that the Court’s initial failure to apply § 3B1.2 was a procedural due process violation because the Court did not use the proper standard when considering that reduction, and the Court has the authority to correct such violations. Doc. 67 at 2. He also recognizes that the amendment is not available under § 3582, stating that such procedural barrier is why he has raised the issue under § 2255. Doc. 67 at 3–4.

Two procedural problems constrain the Court’s consideration of this issue. First, it appears that Petitioner did not appeal his sentence, let alone challenge this issue on direct appeal. Thus, he has procedurally defaulted this argument. He has made no showing to overcome a procedural default. Second, he is correct that the Guidelines do not bar consideration under § 2255, but he omits the relevant standard for raising the issue under § 2255: miscarriage of justice. See United States v. Goines, 357 F.3d 469, 477 (4th Cir. 2004). Misapplication of guidelines, without more, does not amount to a miscarriage of justice. See id.; see also United States v. Mikalajunas, 186 F.3d 490, 496–97 (4th Cir. 1999). Thus, while he could technically raise the issue under § 2255 if he met the relevant standard, he offers no additional facts that would show a miscarriage of justice. In light of these two procedural flaws, the Court need not consider the merits of his § 2255 Motion as to Amendment 794. Thus, the Court **DENIES** Petitioner’s § 2255 Motion as to Amendment 794 and **GRANTS** the Government’s

Supplemental Motion to Dismiss, Doc. 65.

In addition, further exploration of the procedural issues is unnecessary because even if Petitioner could overcome those procedural hurdles, he would not be entitled to any relief. The significant change from Amendment 794 is that Courts must compare a defendant to the average participant in the conspiracy at issue in his case rather than to the average participant in similar offenses. See United States v. Ruiz, No. 16-4585, --- F. App'x ----, 2017 WL 1507797, at *1 (4th Cir. Apr. 27, 2017). In Petitioner's case, the Presentence Investigative Report ("PSR") and the Court considered Petitioner's culpability in relation to the average participant in his conspiracy. PSR at 27. Given the same facts and the same standard, the Court would reach the same conclusion: Petitioner is entitled to no reduction under U.S.S.G. § 3B1.2.

IV. CONCLUSION

For the reasons stated herein, the Court **DENIES** Petitioner's § 2255 Motion, Docs. 58, 63; **DENIES** the Government's Motion to Dismiss, Doc. 61, **AS MOOT**; and **GRANTS** the Government's Supplemental Motion to Dismiss, Doc. 65.

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural issue, the Court **DENIES** a certificate of appealability.

Petitioner is **ADVISED** that he may appeal this Order by forwarding a written notice of appeal to the Clerk, United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within sixty (60) days from the date of this Order. To proceed in forma pauperis on appeal, Petitioner must submit an application to proceed in forma pauperis to the Clerk, United States Court of Appeals for the Fourth Circuit, 1100 E. Main Street, Richmond, Virginia 23219.

The Clerk is **REQUESTED** to send a copy of this Order to Petitioner and to the counsel
of record.

It is so **ORDERED**.

/s/
Henry Coke Morgan, Jr.
Senior United States District Judge
HENRY COKE MORGAN, JR. *HCM*
SENIOR UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
June 26, 2017

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