

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6169

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARL RAY MCNEIL, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Fox, Senior District Judge. (7:02-cr-00098-FL-1; 7:14-cv-00168-F)

Submitted: August 16, 2016

Decided: September 13, 2016

Before NIEMEYER, MOTZ, and HARRIS, Circuit Judges.

Dismissed in part; vacated and remanded in part by unpublished per curiam opinion.

Carl Ray McNeil, Jr., Appellant Pro Se. Jennifer P. May-Parker, Assistant United States Attorney, Seth Morgan Wood, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Carl Ray McNeil, Jr., noted this appeal from the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion and denying his motion to supplement his § 2255 motion. We granted a certificate of appealability limited to the issue of whether the district court erred when it denied as futile McNeil's motion to supplement, which raised a claim that his North Carolina convictions for common law robbery no longer qualified as a predicate offenses under 18 U.S.C. § 924(e) (2012) following the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2155 (2015).

After the district court's order, we held that North Carolina common law robbery "does not qualify categorically as a 'violent felony' under [§ 924(e)(2)(B)]." United States v. Gardner, ___ F.3d ___, ___, No. 14-4533, 2016 WL 2893881, at *5-7 (4th Cir. May 18, 2016). Based on Johnson and Gardner, the Government has conceded that McNeil would not be subject to the 15-year mandatory minimum of § 924(e) if he were sentenced today. Accordingly, we vacate the district court's order with respect to the denial of McNeil's motion to supplement his initial § 2255 filing and remand for consideration, in light of Gardner, of McNeil's challenge to the counting of his common law robbery convictions. We deny a certificate of appealability as to McNeil's remaining claims and dismiss that portion of 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 IN PART;
VACATED AND REMANDED IN PART