

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

GLENN ALLEN SMITH,)
Petitioner,)
vs.) Case No. 1:16cv36HEA
UNITED STATES OF AMERICA,)
Respondent.)

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Petitioner's motion to Vacate, Set Aside or Correct Sentence [Doc. #1] pursuant to 28 U.S.C. § 2255, wherein he asserts *Johnson v. United States*, 135 S. Ct. 2551 (2015) is applicable. The United States of America has responded to the motion. For the reasons set forth below the Motion will be denied.

Facts and Background

On January 9, 2007, Petitioner entered a plea of guilty to the offense of Possession Of Methamphetamine With the Intent to Distribute in violation of 21 U.S.C. § 841(a)(1). A Presentence Investigation Report was prepared and provided to the court. Petitioner appeared on April 10, 2007 for sentencing. Petitioner was found to be a career offender and was sentenced to a within-Guidelines term of imprisonment of 188 months.

The Presentence Investigation Report found Petitioner to be a career offender under U.S.S.G. § 4B1.1(a), resulting in a Total Offense Level of 29. The convictions that were classified as career offender predicates were: (1) a crime of violence conviction for First Degree Burglary; (2) a controlled substance offense of Manufacture of a Controlled Substance. The Criminal History Category was VI since he was classified as a career offender and the resulting sentencing range was 151 to 188 months.

Petitioner’s Claim

Petitioner claims that he is entitled to relief under the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). His suggestion is that *Johnson* should be applied retroactively to his case to reduce his sentence.

Discussion

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that the residual clause in the definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. The Supreme Court has since determined that *Johnson* announced a new substantive rule of constitutional law that applies retroactively on collateral review in cases involving ACCA-enhanced sentences. *United States v. Welch*, 136 S. Ct. 1257 (2016). However, the Court’s holding in *Welch* that *Johnson* applies retroactively in ACCA cases on collateral review does not govern the separate question of whether *Johnson* applies retroactively to claims based on the Sentencing Guidelines. Unlike the ACCA, a Guidelines classification does not “prescribe[] punishment.” *Welch*, 136 S. Ct. at 1268.

A Career Offender is determined as follows:

(a) A defendant is a career offender if (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.

U.S.S.G. § 4B1.1(a).

A “crime of violence” is defined in the Guidelines as follows:

(a) the term “crime of violence” means 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.S.G. § 4B1.2(a) (emphasis furnished).

Here, the Sentencing Guidelines provide that one of the enumerated crimes that may be used as a Career Offender predicate conviction is “burglary of a dwelling.” The crux of Petitioner’s offense conduct regarding his First Degree Burglary conviction was that the Petitioner “burglarized a home and stole property.” P.S.R. ¶ 28. Clearly this is an “enumerated” crime. It is specifically set out in paragraph 2 of U.S.S.G. § 4B1.2(a).

In *Donnell v. United States*, 826 F.3d 1014 (8th Cir. 2016), the defendant applied for leave to file a successive petition based upon *Johnson*, seeking to extend *Johnson* and *Welch* by urging that the residual clause of the career offender provisions in the sentencing guidelines was unconstitutionally vague and that this extension should be applied retroactively to cases on collateral review. *Id.* The motion was denied and the

Court concluded that “Donnell’s successive motion seeks to assert a new right that has not been recognized by the Supreme Court or made retroactive on collateral review.” *Id.*

Donnell forecloses the issue raised here by Petitioner, holding that defendants are not entitled to apply *Johnson* retroactively to cases on collateral review. In refusing to allow Donnell permission to file his successive 2255 Petition, the Court noted that “[f]or Donnell’s successive motion to succeed, therefore, the post-conviction court must announce a second new rule that extends *Johnson* to the sentencing guidelines.” *Id.* at * 1. The *Donnell* Court declined to find that this “second new rule” exists and denied Donnell permission to file his successive § 2255 Petition.

Considering the Court’s holding in *Donnell*, Petitioner, may not apply the holding of *Johnson* in a retroactive fashion to attack his career offender sentence on collateral review. He has not shown that there is a new rule of constitutional law, made retroactively applicable to cases on collateral review.

Conclusion

Based upon the foregoing analysis, Petitioner has failed to establish he is entitled to a hearing and has failed to present any basis upon which the Court may grant relief.

Certificate of Appealability

The federal statute governing certificates of appealability provides that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

A substantial showing of the denial of a constitutional right requires that “issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Based on the record, and the law as discussed herein, the Court finds that Movant has not made a substantial showing of the denial of a constitutional right.

Accordingly,

IT IS HEREBY ORDERED that this action is **DENIED** in all respects.

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability.

Dated this 3rd day of April, 2017.



HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE