

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JAMES E. WALLACE,)
)
 Petitioner,)
)
 vs.) Case No. 4:16CV985 HEA
)
 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 February 22, 2013, Petitioner entered a plea of guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and §924(a)(2) in Case No. 4:12CR00409 HEA. By virtue of the plea agreement he waived “all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to Title 28, United States Code, Section 2255, except for claims of prosecutorial misconduct or ineffective assistance of counsel.” [Doc.25]

A Presentence Investigation Report was prepared which found Petitioner to have the following Missouri prior convictions for (1) **Burglary Second Degree under Docket No.: CR181-118F**: On or about July 31, 1981, in Audrain County, Missouri, the defendant, acting together, with Gary Dean Bise, knowingly entered unlawfully in *a building* located at 400 West Love Street in the City of Mexico, Missouri, possessed by W.B., for the purpose of committing the crime of stealing therein; (2) **Burglary First Degree, under Docket No.: CR183-50F**: On or about June 16, 1983, in Audrain County, Missouri, the defendant knowingly entered unlawfully in *a building* located at Missouri 22 Highway west of Mexico approximately one to one and one-half miles, possessed by R.A., doing business as Ron's Body Shop, for the purpose of committing the crime of stealing therein; (3) **Burglary Second Degree, under Docket No.: 184-81F**: On October 14, 1984, the defendant knowingly entered unlawfully in *a building* located at U.S. Highway 54 East in Vandiver Village, possessed by R.G. and P.H., for the purpose of committing the crime of stealing therein; (4) **Burglary Second Degree, under Docket No.: CR184-85F**: According to court records, as to Count 1, on July 17, 1984, the defendant knowingly entered unlawfully in *a building* located at U.S. Highway 54 South just south of Route D, possessed by L.D., doing business as Williamsburg Radiator, for the purpose of committing the crime of stealing therein; (5) **Unlawful Use of a Weapon-Exhibiting, under Docket No.41R01000009**: On or about May 10, 1999, in Randolph County, Missouri, the defendant knowingly exhibited, in the presence of one or more persons, a baseball bat, a weapon readily capable of lethal use, in an angry or threatening manner; (6) **Sale of Marijuana, under Docket No.: 03CR157175-01**: On or about

December 27, 2002, in Montgomery County, Missouri, the defendant knowingly sold more than five grams of marijuana, a controlled substance, to a law enforcement officer, knowing that it was a controlled substance. He was, therefore, classified as a Career Criminal and received a sentence of 84 months. Petitioner did not appeal his conviction or sentence to the Eighth Circuit Court of Appeals.

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). He argues that since the residual clause of the Armed Career Criminal statute is unconstitutional, *Johnson* should have direct impact upon his sentence as an Armed Career Criminal.

He asserts that, under *Johnson*, his convictions for burglary and unlawful use of a weapon (exhibiting) no longer qualify as violent felonies under the ACCA and, therefore, his sentence should be reduced.

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). The Court's holding in *Welch* makes *Johnson* applicable retroactively in ACCA cases on collateral review.

No part of Petitioner's sentence was based upon the residual clause. His prior convictions for burglaries of buildings, sale of a controlled substance and unlawful use of a weapon/exhibiting are serious drug offenses or violent felonies under the enumerated or elements/force clauses of the ACCA, all of which are unaffected by *Johnson*.

The ACCA provides that a defendant who violates 18 U.S.C. § 922(g) and has three prior convictions for a violent felony or serious drug offense is subject to a fifteen-year mandatory minimum sentence. 18 U.S.C. § 924(e). There are three specific “clauses” in the statute defining and delineating what type of prior crime qualifies as a “violent felony.” The ACCA’s three clauses are: (1) the “elements” clause: “has as an element the use, or attempted use, or threatened use of physical force against the person of another”; (2) the “enumerated offenses” clause: “is burglary, arson, or extortion, [or] involves use of explosives”; and (3) the “residual clause”: “or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B).

The Supreme Court concluded in *Johnson* that imposing an increased sentence under ACCA’s residual clause, *i.e.*, the provision that defines a “violent felony” to include an offense that “involves conduct that presents a serious potential risk of physical injury to another,” violates the Due Process Clause because the residual clause is impermissibly vague on its face. *Johnson*, 135 S. Ct. at 2556. The Court found that the inability of its own cases to develop a “principled and objective standard” demonstrated the residual clause’s “hopeless indeterminacy.” *Id.* at 2558. The Court concluded that “the indeterminacy of the wide-ranging inquiry required by the residual clause both

denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557. As such, the Court held that the residual clause is “vague in all its applications.” *Id.* at 2561.

Here, Petitioner was convicted of second degree burglaries under Missouri law in violation of Mo. Rev. Stat. § 569.170, which occurs when a defendant “knowingly enters unlawfully or knowing remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.” Recently, in *United States v. Sykes*, No. 14-3139, 2016 WL 7383744 (8th Cir. Dec. 21, 2016), the Eighth Circuit addressed whether Missouri’s second degree burglary statute constitutes a “generic burglary” such that it falls within the enumerated clause of § 924(e). *Sykes* unequivocally held that Missouri’s second-degree burglary of a building conformed to the elements of a generic burglary.

This is critical in the analysis here as the Supreme Court expressly noted in *Johnson* the ruling “does not call into question application of the [ACCA] to *** the remainder of the Act’s definition of a violent felony,” including a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), and a felony offense that “is burglary, arson, or extortion, [or] involves use of explosives,” 18 U.S.C. § 924(e)(2)(B)(ii).” *Johnson*, 135 S. Ct. at 2563.

Since Petitioner has three burglary convictions, the Court Will not elucidate on the issue of whether his Missouri conviction for Unlawful Use of a Weapon – Exhibiting, in violation of Mo. Rev. Stat. § 570.030.1(4) qualifies as a violent felony under the force clause.

This classification of his Sale of Marijuana offense is unaffected by *Johnson's* determination that the residual clause is unconstitutional. It is clearly a serious drug offense as defined in 18 U.S.C. § 924(e)(2)(A)(ii).

Conclusion

Based upon the foregoing analysis, Movant 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.

An Order of Dismissal will be filed separately.

Dated this 1st day of March, 2017.

A handwritten signature in cursive script, reading "Henry Edward Autrey", with a long horizontal flourish extending to the right.

HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE