

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEWARD JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

16-cv-533-bbc

11-cr-125-bbc

Petitioner Deward Johnson has filed a motion for a writ of habeas corpus under 28 U.S.C. § 2255, contending that his sentence was increased unlawfully. Petitioner bases his claim on the United States Supreme Court’s decision in Johnson v. United States, 135 S. Ct. 2551 (2015), that it was unconstitutional to increase a sentence under what is known as the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) of the Armed Career Criminal Act, because that clause was unconstitutionally vague.

Petitioner was not sentenced under this Act, but under the United States Sentencing Guidelines, § 4B1.1 and § 4B1.2(a)(2), which incorporate the residual clause as a basis for determining whether a defendant is a career offender under the guidelines. (In the wake of Johnson, the United States Sentencing Commission is amending § 4B1.2 to comply with the Court’s decision, but any such amendment will have no bearing on petitioner’s sentence.)

Petitioner has no basis for his motion because his sentence was not increased under

§ 924(e)(2)(B) or under U.S.S.G. § 4B1.2(a)(2). Rather, it was increased under subsection (b) of § 4B1.2, which provides that certain prior convictions for controlled substance offenses can be used to determine whether a defendant is a career offender under the guidelines. Petitioner was determined to be a career offender under the guidelines because he had two prior convictions for controlled substance offenses. The decision in Johnson has no effect on the validity of subsection (b) of § 4B1.2 and therefore no effect on petitioner's sentence.

Petitioner has suggested no other reason why his sentence should be vacated. Accordingly, his motion must be denied.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not

a close one. Petitioner is free to seek a certificate of appealability from the court of appeals under Fed. R. App. P. 22, but that court will not consider his request unless he first files a notice of appeal in this court and pays the filing fee for the appeal or obtains leave to proceed in forma pauperis.

ORDER

IT IS ORDERED that petitioner Deward Johnson's motion for post conviction relief is DENIED. Further, it is ordered that no certificate of appealability shall issue. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 19th day of August, 2016.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge