

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

JASON A. KRUMWIEDE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

08-cr- 90-bbc

Petitioner Jason A. Krumwiede has filed a timely motion for post conviction relief under 28 U.S.C. § 2255, contending that he was sentenced improperly. He has also asked for the appointment of counsel to represent him on this motion.

The court files show that petitioner was sentenced on November 25, 2008, on two counts of violating 18 U.S.C. § 922: one of stealing firearms from a federally licensed dealer, in violation of § 922(u) and one count of being a felon in possession of a firearm and ammunition, in violation of § 922(g). His offense level was increased because the offense involved a semiautomatic firearm capable of accepting a large capacity magazine and he had a prior conviction for a crime of violence (burglary of a dwelling, party to a crime).

In support of his motion, petitioner cites the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), in which the Court held that the residual clause in § 924(e)(2)(B)(ii) was unconstitutionally vague. Johnson's holding does not apply to

petitioner's case because this court did not rely on the residual clause in finding that petitioner had a prior conviction for a felony "crime of violence." Instead, it relied on the provision in U.S.S.G. § 2K2.1 that required the court to increase petitioner's sentence because of the type of firearm involved in the offense and petitioner's prior conviction for burglary of a dwelling.

Petitioner contends that if he were to be sentenced today for the crimes he committed in 2008, he would not have received as long a sentence as he did because "crimes of violence' no longer qualify for a level 22 [under the sentencing guidelines.]" He is wrong. The decision in Johnson has no effect on crimes of violence or the increase in his sentence under § 2K2.1; it was concerned only with the residual clause in § 924(e)(2)(B)(ii) and the residual clause had nothing to do with petitioner's sentence. Accordingly, petitioner's motion must be denied and, since the motion will not be going forward, his motion for appointment of counsel will be denied as well.

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). In this

case, petitioner has not made the necessary showing, so no certificate will issue. 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.

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.

ORDER

IT IS ORDERED that petitioner Jason A. Krumwiede's motion for post conviction relief under 28 U.S.C. § 2255 is DISMISSED and his motion for appointment of counsel is DENIED. No certificate of appealability shall issue. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 27th day of July, 2016.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge