

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:06CR00067-001
)	
v.)	OPINION AND ORDER
)	
TERRY DEAN LESTER,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for United States; Nancy C. Dickenson, Assistant Federal Public Defender, Abingdon, Virginia, for Defendant.

Terry Dean Lester, previously sentenced by this court following his guilty plea to illegal possession of a firearm, 18 U.S.C. § 922(g), has filed a motion under 28 U.S.C. § 2255, contending that his sentence under the provisions of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), is invalid. For the reasons that follow, I will deny the motion.

I.

At his sentencing on November 13, 2007, Lester was found by the court to be an armed career criminal pursuant to the ACCA. The ACCA provides that a person convicted of a violation of § 922(g), who “has three previous convictions by

any court . . . for a violent felony or a serious drug offense . . . shall be . . . imprisoned not less than fifteen years.” 18 U.S.C. § 924(e)(1).

As shown by the probation officer’s Presentence Investigation Report (“PSR”), Lester had a prior criminal record including three Virginia burglary convictions, the offenses having occurred in 1984 and 1985. There was no objection to the probation officer’s recommendation in the PSR that Lester be sentenced as an armed career criminal. At sentencing, the following colloquy occurred in that regard:

[DEFENSE COUNSEL]: Your Honor, Mr. Lester’s case is a very sad case. Our office has had Mr. Lester’s case for over a year, and we have pondered and discussed and thought and tried to find some way to avoid the armed career criminal designation, and I would just ask the Court if there is something that we have overlooked in his case that would avoid that designation, I hope that the Court would so advise. Unfortunately, Mr. Lester has three prior convictions for breaking and entering, and he was found with a firearm when he was trying to commit suicide, and that puts him right in the category, I believe, of being an armed career criminal. While Mr. Lester does not fit the characteristics of many of the other defendants who fit into that category, Mr. Lester has worked hard all his life, he has maintained employment, he has supported his family. His ex-wife has written a kind letter in support of Mr. Lester, indicating that the children that he adopted, who were her grandchildren, very much want to be a part of his life. So our request today is, Your Honor, if the Court must determine that Mr. Lester is an armed career criminal, we would ask that the Court sentence him to 180 months.

.....

THE COURT: Well, let me just say, before I pronounce sentence on the defendant, that I personally oppose mandatory minimum sentences as in this case. I think, as counsel has pointed out, the particular unfairness of it here is that the predicate offenses, the three predicate offenses occurred, according to the presentence report, when Mr. Lester was 21 years old; they occurred during a sort of crime spree that he engaged in of breaking and entering back when he was in that young age. And while his record since then has not been spotless by any means, and includes a state conviction for possession of a firearm as a convicted felon, for which he was placed on probation, it's also obvious that Mr. Lester has had a long-standing alcohol problem that has contributed to his current difficulties. But like all of us in our society, you must follow the law. And Congress has required me to impose a mandatory minimum sentence of 15 years imprisonment in this case. I have no discretion in that regard. I regret that, particularly in this case, but that is my duty, and I must follow it.

(Sentencing Tr. 13-14, Nov. 13, 2007, ECF No. 64.)

Lester was sentenced to the ACCA's mandatory minimum term of 180 months imprisonment. Lester unsuccessfully appealed his sentence. *United States v. Lester*, 293 F. App'x 194 (4th Cir. 2008) (unpublished).

On September 8, 2015, following *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Federal Public Defender for this district was appointed by the court to represent Lester in connection with a possible § 2255 motion. On March 4, 2016, a § 2255 motion was filed by the Federal Public Defender, contending that Lester's ACCA predicates are invalid because a Virginia burglary does not qualify as a

generic burglary. The government has filed a Motion to Dismiss and the issues have been fully briefed and are ripe for decision.¹

II.

Prior to *Johnson*, the term “violent felony” was defined as

any crime punishable by imprisonment for a term exceeding one year . . . that —

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first clause is referred to as the “force clause.” The first portion of the second clause is known as the “enumerated crime clause.” The second portion of that clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”) is called the “residual clause” and was found to be unconstitutionally vague in *Johnson*. The force and enumerated crime clauses were untouched by *Johnson*. The holding in *Johnson*

¹ In deciding a § 2255 motion, the court need not hold an evidentiary hearing if “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). Neither party has requested an evidentiary hearing. I have thoroughly reviewed the motions, files, and records in this case and find that no such hearing is necessary.

was made retroactive to cases on collateral review in a decision by the Supreme Court in *Welch v. United States*, 136 S. Ct. 1257 (2016).

I recently held that a Virginia burglary does not qualify as an enumerated offense because the Virginia statute is broader than the generic burglary of the enumerated crime clause and because the statute is not divisible, meaning that it lists “multiple, alternative means of satisfying one (or more) of its elements.” *United States v. Gambill*, No. 1:10CR00013, 2016 WL 5865057, at *2 (W.D. Va. Oct. 7, 2016) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)). For the same reasons relied upon in *Gambill*, Lester argues that his Virginia burglary convictions are invalid as ACCA predicates.

In addition to contending that Virginia burglary offenses are valid predicates under the ACCA, the government argues that the *Johnson* holding applies only to the residual clause and Lester has not shown that his burglary convictions were treated at sentencing as falling under that clause. Since the movant in an § 2255 proceeding “must shoulder the burden of showing” constitutional error, *United States v. Frady*, 456 U.S. 152, 170 (1982), the government contends that *Johnson* does not apply to him. Accordingly, the government asserts that Lester’s motion “does not raise a *Johnson* claim and is time barred.” (United States’ Am. Mot. to Dismiss 1, ECF No. 88.) In addition, the government contends that Lester’s claim

is defaulted, since it was not raised on direct review and Lester has not shown either cause or prejudice, or that he is actually innocent, in order to overcome that default.

III.

I agree with the government that *Johnson* does not apply to Lester's case. Even though I found in *Gambill* that a Virginia burglary conviction is not a proper predicate under the enumerated crimes clause, relying on the later statutory constructions of the ACCA provided in *Mathis* and *Descamps v. United States*, 133 S. Ct. 2276 (2013), I did so without any reliance on *Johnson*.²

Section 2255 provides that a one-year limitation period is triggered by one of four conditions, whichever occurs the latest:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

² *Gambill*, 2016 WL 5865057, at *2 n.1.

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Since *Johnson* does not apply to Lester, he cannot rely on clause (3) above. He did not file his motion within one year of the date his convictions became final, and thus his claim is barred. Because Lester's motion thus fails, it is unnecessary for me to reach the government's other arguments.

IV.

For the reasons stated, the United States' Motion to Dismiss in Response to Petitioner's Motion for Relief Pursuant to Title 28, United States Code, Section 2255 (ECF No. 78) and United States' Amended Motion to Dismiss in Response to Petitioner's Motion for Relief Pursuant to Title 28, United States Code, Section 2255 (ECF No. 88) are GRANTED and the Motion for Relief Pursuant to 28 U.S.C. § 2255 (ECF No. 74) is DENIED. The defendant's Emergency Motion for Hearing or Ruling on Petition (ECF No. 90) is GRANTED to the extent that the court has now ruled on the § 2255 motion.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). After reviewing the claim presented in light of the applicable standard, I find that a certificate of appealability is not warranted and therefore is DENIED.

It is so **ORDERED**.

ENTER: November 8, 2016

/s/ JAMES P. JONES
United States District Judge