IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-2591

VERNON WILSON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

UNITED STATES' RESPONSE TO PETITION FOR PERMISSION TO FILE A SUCCESSIVE HABEAS PETITION

BACKGROUND

On March 3, 2011, a jury convicted Vernon Wilson, then-chief administrator of the Washington County Jail, of four counts of deprivation of rights under 18 U.S.C. 242[1] based on attacks he conducted and orchestrated against four inmates,

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[1] 18 U.S.C. 242 provides, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by

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and of two counts of making false statements under 18 U.S.C. 1001 for lying to FBI agents about the attacks. *United States* v. *Wilson*, 686 F.3d 868, 869 (8th Cir. 2012), cert. denied, 133 S. Ct. 873 (2013).

Wilson faced a sentencing guidelines range of 97 to 121 months for these convictions. The court sentenced him to 120 months on each of the four Section 242 counts and 60 months on each false-statement count, with all the sentences to run concurrently. *Wilson*, 686 F.3d at 869. The sentence included an enhancement based on "serious bodily injury" suffered by the victims. U.S.S.G. § 2A2.2(b)(3)(B).[2] One victim suffered a bloody and swollen face; another was

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> reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both.

[2] Wilson's sentence was based on Sentencing Guidelines § 2H1.1, applicable to violations of civil rights statutes, including 18 U.S.C. 242. *Wilson*, 686 F.3d at 872-873; see also U.S.S.G § 2H1.1, comment. That guideline states that a court should apply the base level for the underlying offense whenever doing so would result in a base level greater than 12. U.S.S.G. § 2H1.1(a)(1). Accordingly, the court applied the aggravated assault guideline, which yielded a base level of 14. U.S.S.G. § 2A2.2(a); *Wilson*, 686 F.3d at 873. The court added six levels because Wilson was acting under color of law or was a public official within the meaning of Section 2H1.1(b)(1), and five levels for serious bodily injury under Section 2A2.2(b)(3)(B). *Wilson*, 686 F.3d at 872-873. The court also added two levels, pursuant to Sentencing Guidelines § 3A1.3, because the victims were

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covered in blood, could barely stand up, and sustained gross swelling on his face and eye, a lacerated lip, multiple facial wounds, a swollen ear, and a fractured orbital bone; a third had his head beaten against a concrete wall. *Wilson*, 686 F.3d at 870-871. Wilson's convictions and sentence were affirmed on direct appeal. *Id*. at 874.

On October 25, 2013, Wilson filed a motion under 28 U.S.C. 2255 seeking to have his convictions and sentence vacated on the ground that he received ineffective assistance of counsel. *United States* v. *Wilson*, No. 4:13-cv-02164 (E.D. Mo.). The district court denied the motion on May 26, 2015, and denied a certificate of appealability from that ruling. Opin. *United States* v. *Wilson*, No. 4:13-cv-02164, 2015 WL 3416931, at *1 (E.D. Mo.). This Court likewise denied Wilson's application for a certificate of appealability on February 1, 2016. Judgment, *United States* v. *Wilson*, No. 15-2952. It then denied rehearing and rehearing en banc. Order, *United States* v. *Wilson*, No. 15-2952 (Mar. 23, 2016).

Wilson now seeks permission to file a successive Section 2255 motion, arguing that *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), renders his

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restrained. *Id*. at 871. Under Sentencing Guidelines § 3C1.1, the court added two levels for obstruction of justice. This yielded an offense level of 29 for the most serious count. Applying Sentencing Guidelines § 3D1.4, governing multiple-count adjustments, the court added one additional level for other counts.

conviction under 18 U.S.C. 242 "unconstitutionally vague" and "subject to vacation." Pet. 4, 9. That request should be denied.

DISCUSSION

To obtain authorization to file a successive 28 U.S.C. 2255 motion, "[t]he petitioner must make a prima facie showing that his petition falls within the scope of § 2255(h)(2)." *Woods* v. *United States*, 805 F.3d 1152, 1153 (8th Cir. 2015). Thus, Wilson must demonstrate that his claim involves (1) a new rule (2) of constitutional law that was (3) previously unavailable and that (4) has been made retroactive to cases on collateral review. 28 U.S.C. 2255(h)(2). He must also, of course, show that the new constitutional rule he identifies has some bearing on his case.

The Supreme Court held in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e) – which provided a sentence enhancement for prior convictions of a "violent felony" – was unconstitutionally vague and thus ran afoul of the Constitution's guarantee of due process. *Johnson*, 135 S. Ct. at 2557, 2563. The clause defined "violent felony" as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id*. at 2555-2556 (quoting 18 U.S.C. 924(e)(2)(B)). A prior Supreme Court decision had held that, in deciding whether a crime was "violent," courts are to look only to whether the

crime fell within a certain category and not to the facts underlying the actual prior conviction. *Id*. at 2562 (citing *Taylor* v. *United States*, 495 U.S. 575, 600 (1990)).

The *Johnson* Court explained that the clause was vague for two reasons. First, the Court was troubled that the clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." 135 S. Ct. at 2557. This "speculative" and abstract inquiry "assesses whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Ibid*. (citation and internal quotation marks omitted). Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id*. at 2558. "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Ibid*. The Court concluded that these two elements, in combination, produce "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Ibid*.[3]

[3] In *Welch* v. *United States*, 136 S. Ct. 1257, 1266 (2016), the Court held that *Johnson* announced a new substantive rule with retroactive effect on collateral review because it altered the scope of the ACCA, changing "the range of conduct or class of persons that the law punishes." This Court has permitted some successive Section 2255 motions, based on *Johnson*, for other defendants convicted and sentenced under the ACCA. See, *e.g.*, *Woods*, 805 F.3d at 1154; *Menteer* v. *United States*, 806 F.3d 1156, 1156-1157 (2015); *Richardson* v. *United States*, 623 F. App'x 841, 842 (2015).

The *Johnson* rule has no application here. As an initial matter, the *Johnson* rule has no bearing on a defendant's *conviction* (Cf. Pet. 4); it pertains to *sentencing* alone. 135 S. Ct. at 2563. Even so, the *Johnson* decision has no bearing on Wilson's sentence either, because Wilson's sentence did not rest on a provision with wording similar to that of the ACCA. Wilson's sentence was not enhanced because his crime was categorically a "violent felony" or because it created a "risk" of injury. His sentence was enhanced, under Sentencing Guidelines § 2A2.2(b)(3)(B), because of "bodily injury" that was actually suffered by his victims. *Wilson*, 686 F.3d at 873; U.S.S.G. § 2A2.2(b)(3)(B). Determining whether one or more of his victims suffered actual bodily injury required a straightforward evaluation of the facts; there was nothing abstract or speculative about that assessment. Cf. *Johnson*, 135 S. Ct. at 2558 (concluding that determining whether something is a "violent felony" rests on a "judge-imagined abstraction").

Furthermore, this Court has held that *Johnson* does not affect enhancements made under the Sentencing Guidelines. See *Richardson* v. *United States*, 623 F. App'x 841, 842 (2015). The Guidelines are advisory; and an enhancement under them does not amount to application of a statutory mandatory minimum as was the case in *Johnson*. And even if the Sentencing Guideline at issue here were arguably similar to the ACCA's residual clause, that would not bring Wilson's sentence

under *Johnson*'s purview. This Court has stated, after *Johnson*, that "[w]hether a vague advisory sentencing guideline could violate the Due Process Clause is an open question." *United States* v. *Ellis*, 815 F.3d 419, 421 (2016). Given that conclusion, Wilson cannot point to any new rule of constitutional law that invalidates his Guidelines enhancement. *Woods*, 805 F.3d at 1153.

Because Section 242 contains no residual clause similar to that of the ACCA, *Johnson* does not affect the application of the statute. Nor is there any basis to use this opportunity to extend *Johnson*'s holding to apply to situations like this one, because a defendant may not use a successive habeas proceeding as a forum to propose a new constitutional rule. See *Tyler* v. *Cain*, 533 U.S. 656, 667 (2001).

Respectfully submitted,

s/ April J. Anderson
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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2016, I filed the UNITED STATES' RESPONSE TO PETITION FOR PERMISSION TO FILE A SUCCESSIVE HABEAS PETITION with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I further certify that on the same date I sent a copy of the foregoing response to petitioner by First-Class mail, postage prepaid, at the following address:

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s/ April J. Anderson
APRIL J. ANDERSON
Attorney