APPENDIX A

Order

Robert Homrich v. United States of America,
No. 17-1612 (6th Cir., December 8, 2017)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-1612

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT HOMRICH,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
UNITED STATES OF AMERICA,	)	MICHIGAN
	)	
Respondent-Appellee.	)	
	)	

O R D E R

Before: CLAY, McKEAGUE, and DONALD, Circuit Judges.

Robert Homrich, a federal prisoner represented by counsel, appeals the district court's judgment denying his motion to vacate under 28 U.S.C. § 2255. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 1993, a jury found Homrich guilty of conspiring to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841 and 846. The district court determined that Homrich was a career offender based in part on its finding that his 1981 Colorado conviction for attempted second-degree burglary was a crime of violence under the residual clause in USSG § 4B1.2. Because he was a career offender, Homrich's total offense level was 37 and his criminal history category was VI, resulting in a sentencing range of 360 months to life under the guidelines, which were mandatory at the time. In 1994, the district court sentenced Homrich to 360 months in prison. We affirmed the district court's judgment. Homrich unsuccessfully sought relief under § 2255.

In 2015, Homrich moved this court for authorization to file a second or successive motion to vacate, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), he should not be subject to an enhanced sentence as a career offender because his prior conviction for attempted second-degree burglary no longer qualified as a crime of violence. In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act, which defines "violent felony" to include a felony that involves conduct that presents a serious potential risk of physical injury to another, is unconstitutionally vague. *Id.* at 2555, 2563. Section 4B1.2, at the time of Homrich's sentencing, used an identical residual clause in its definition of "crime of violence." We granted Homrich authorization to file his proposed motion in the district court, and he did so. The district court dismissed the motion, concluding that Homrich failed to show that his claim relied on a new rule of constitutional law, made retroactive to cases on collateral review, that was previously unavailable.

On appeal, Homrich argues that the district court erred by concluding that he is not entitled to relief under *Johnson*. When reviewing the denial of a motion under § 2255, we review legal conclusions de novo and factual findings for clear error. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). A district court must dismiss a claim in a second or successive motion to vacate unless the movant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *See* 28 U.S.C. § 2244(b)(4); *Tyler v. Cain*, 533 U.S. 656, 660–61 & n.3 (2001); *In re Embry*, 831 F.3d 377, 378 (6th Cir. 2016).

The district court properly dismissed Homrich's motion to vacate because *Johnson* did not announce a new, retroactive rule of constitutional law that invalidated the residual clause in § 4B1.2 of the mandatory sentencing guidelines. *See Raybon v. United States*, 867 F.3d 625, 629–30 (6th Cir. 2017).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Order of the United States District Court
for the Western District of Michigan
United States of America v. Bobby Homrich,
Case No. 1:93-cr-16 (May 24, 2017)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -v- BOBBY HOMRICH, Defendant-Petitioner.	)	No. 1:93-cr-16 HONORABLE PAUL L. MALONEY

OPINION AND ORDER

I.

In 1994, Bobby Homrich was convicted by jury of conspiracy to distribute marijuana, cocaine, and heroin. (ECF No. 232.) He was sentenced to 360 months of imprisonment. (*See id.*) Mr. Homrich was given an enhancement as a "career offender" within the meaning of § 4B1.1 of the "mandatory" sentencing guidelines for two prior crimes of violence, one of which qualified under the "residual clause." (*See id.*) After an initial non-meritorious habeas petition (*see* ECF No. 383), Mr. Homrich was denied authorization to file successive petitions over the course of many years. (*See, e.g.*, ECF Nos. 436, 459, 512.)

However, in June 2015, the Supreme Court announced its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which declared the residual clause of the Armed Career Criminals Act unconstitutionally vague.[1]

Mr. Homrich, like many others, viewed *Johnson* as providing an avenue to collaterally attack his sentence, which reflected his status as a "career offender." He filed a motion for

[1] Nearly one year later, the Supreme Court clarified "that *Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016).

authorization to file a successive habeas petition with the Sixth Circuit Court of Appeals. (*See* ECF No. 619.) In March 2016, he received his authorization. (*Id.*) The order notes that "[t]he fact that the career-offender Guideline's residual clause had the same force of law as did the ACCA's at the time of Homrich's sentencing is sufficient to establish a prima facie showing that Homrich is entitled to relief." (*Id.* at PageID.415.)

The Sixth Circuit subsequently invalidated "the identically-worded Guideline § 4B1.2(a)(2)'s residual clause," and held that "*Johnson's* rationale applies with equal force to the Guidelines' residual clause" for cases on direct review. *United States v. Pawlak*, 822 F.3d 902, 907–08 (6th Cir. 2016). However, after a circuit split on the issue,[2] the Supreme Court found otherwise, holding that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause . . . ." *Beckles v. United States*, 137 S. Ct. 886, 890 (2017).[3] The Supreme Court remained silent as to the mandatory Guidelines.

Even in *Pawlak*, however, the Sixth Circuit Court of Appeals did not hold that *Johnson* applied *retroactively* to career-offender guideline cases on collateral review; in fact, the Sixth has made reading tea leaves somewhat difficult.[4]

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[2] *Compare, e.g., In re Griffin*, 823 F.3d 1350 (11th Cir. 2016) (denying authorization); *Donnell v. United States*, 826 F.3d 1014 (8th Cir. 2016) (same); *with In re Hubbard*, 825 F.3d 225 (4th Cir. 2016) (authorizing successive § 2255 motion); *In re Encinias*, 821 F.3d 1224 (10th Cir. 2016) (per curiam) (same).

[3] This Court stayed proceedings until *Beckles* was announced (*see* ECF No. 639), and subsequently ordered the parties to submit supplemental briefs (*see* ECF Nos. 642–44).

[4] At times, like here, petitioners received successive authorization. *In re Homrich*, No. 15-1999, slip op. at 3 (6th Cir. Mar. 28, 2016) ("The fact that the career-offender Guideline's residual clause had the same force of law as did the ACCA's at the time of Homrich's sentencing is sufficient to establish a prima facie showing that Homrich is entitled to relief."). At other times, a petitioner was denied authorization. *See In re Lewis*, No. 15-3915, slip op. at 3 (6th Cir. June 29, 2016) ("We agree that *Johnson* announced a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, *see In re Watkins*, 810 F.3d 375, 383–84 (6th Cir. 2015)—but only with regard to individuals sentenced under the ACCA. . . . The similarly worded Guidelines' definition may be unconstitutionally vague. . . . But even if it is, there is no Supreme Court precedent making such 'a new rule of constitutional law . . . retroactive to

II.

A successive motion brought under 28 U.S.C. § 2255 that seeks relief pursuant to "a new rule of constitutional law" must satisfy an important condition; the "new rule," by the plain statutory text, must be "made retroactive to cases on collateral review *by the Supreme Court*." 28 U.S.C. § 2255(h)(2) (emphasis added). The Supreme Court has remarked on this language in the context of the identically worded § 2244(b)(2)(A):

> Quite significantly, under this provision, the Supreme Court is the only entity that can "ma[k]e" a new rule retroactive. The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court.
>
> The only way the Supreme Court can, by itself, "lay out and construct" a rule's retroactive effect, or "cause" that effect "to exist, occur, or appear," is through a holding. The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court. *We thus conclude that a new rule is not "made retroactive to cases on collateral review" unless the Supreme Court holds it to be retroactive.*

Tyler v. Cain, 533 U.S. 656, 663 (2001) (emphasis added).

Several truths forecast that Mr. Homrich may be entitled to relief; but each truth meets a more compelling answer requiring a district court to deny relief today.

True, the Sixth Circuit authorized Mr. Homrich's successive filing because he "establish[ed] a prima facie showing that [he] is entitled to relief." *In re Homrich*, slip op. at

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cases on collateral review,' 28 U.S.C. § 2255(h)(2). Lewis has therefore not made the requisite prima facie showing.").

3. "[A] court of appeals may authorize such a filing only if it determines that the applicant makes a 'prima facie showing' that the application satisfies the statutory standard." *Cain*, 533 U.S. at 661 n.3. "But to survive dismissal in district court, the applicant must actually 'sho[w]' that the claim satisfies the standard." *Id.*

True, too, the Supreme Court has held that *Johnson* announced a new substantive rule made retroactive to cases on collateral review. *Welch*, 136 S. Ct. at 1268. However, *Welch* only held—indeed, it *could* only "hold," *Cain*, 533 U.S. at 663—that "*Johnson* changed the substantive reach of the *Armed Career Criminal Act*," and therefore announced a retroactive rule in that statutory context. *Welch*, 136 S. Ct. at 1265.

True, yet again, the Sixth Circuit applied *Johnson* to strike down the residual clause in § 4B1.2(a)—and reasoned why *Johnson* demanded the "prospective" death of that clause. *Pawlak*, 822 F.3d at 902. But the Supreme Court disagreed. *Beckles*, 137 S. Ct. at 890.

True, once more, the so-called mandatory Guidelines share many distinguishing features with "laws that fix the permissible sentences." *Beckles*, 136 S. Ct. at 892. However, the Sixth previously held that even mandatory Guidelines "are not subject to a vagueness challenge" because "they are directives to judges and not to citizens." *United States v. Smith*, 73 F.3d 1414, 1417–18 (6th Cir. 1996) (quoting *United States v. Salas*, 1994 WL 24982, at *2 (6th Cir. Jan. 27, 1994)). Moreover, the Sixth has remained mute on any *retroactive* effect for "career offender" cases on collateral review—even those sentenced under the mandatory guideline regime—and at times, the Sixth has sent mixed signals. *See supra* note 3.

True, as a final point, in *In re Watkins*, 810 F.3d 375, 381 (6th Cir. 2015), the Sixth Circuit cited approvingly to Justice O'Connor's concurrence in *Cain*, 553 U.S. 663, 668–69,

in which she postulated that a lower court "may 'm[a]ke' a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." However, Justice O'Connor still noted that "'the holdings must *dictate*[,]' *i.e.,* 'permit no other conclusion than that the rule is retroactive.'" *Watkins*, 810 F.3d at 381 (citing *Cain*, 533 U.S. at 669 (O'Connor, J., concurring)).

Even crediting Justice O'Connor's concurrence as the controlling opinion, *compare Cain*, 533 U.S. at 663 *with id.* at 669 (O'Connor, J., concurring), this Court is unable to conclude that *Johnson* "permit[s] no other conclusion than that the rule [in *Johnson*] is retroactive" to § 4B1.2(a)(2) of the Guidelines. The fact that the lower courts were split roughly even *before Beckles*[5] reinforces the conclusion that in a post-*Beckles* world—full of mandatory-guideline confusion—*Johnson* does not "dictate" retroactivity in this context.

A federal district court should not today announce that *Johnson* applies retroactively to collateral cases challenging federal sentencing enhancements under § 4B1.2(a)(2)—even if the case arose during a "mandatory" regime—when the anti-derivative question of whether *Johnson* even *touched* any guideline remains an "open question" before the Supreme Court. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., dissenting) ("The Court's adherence to

[5] *Compare, e.g., Fife v. United States*, No. 1:03-cr-00149, 2016 WL 3745762 (S.D. Ohio July 13, 2016); *United States v. Hawkins*, No. 8:13-cr-00343, 2016 WL 3645154 (D. Neb. June 30, 2016); *United States v. Hoopes*, No. 3:11-cr-00425, 2016 WL 3638114 (D. Or. July 5, 2016); *Townsley v. United States*, No. 3:14-cr-146, slip op. (M.D. Pa. June 23, 2016); *United States v. Ramirez*, No. 10-10008, __ F. Supp. 3d __, 2016 WL 3014646 (D. Mass May 24, 2016); *Moring v. United States*, No. 2:09-cr-20473, 2016 WL 918050, at *5 (W.D. Tenn. Mar. 8, 2016); *with, e.g., Cowan v. United States*, No. 4:11-cr-003, 2016 WL 3129288 (W.D. Mo. June 2, 2016); *Frazier v. United States*, No. 1:09-cr-188, 2016 WL 885082 (E.D. Tenn. Mar. 8, 2016); *Cummings v. United States*, No. 15-cv-1219, 2016 WL 799267 (E.D. Wis. Feb. 29, 2016); *United States v. Cervantes*, No. 4:11-cr-3099, 2016 WL 715796 (D. Neb. Feb. 22, 2016); *Hallman v. United States*, No. 3:15-cv-00468, 2016 WL 593817 (W.D.N.C. Feb. 12, 2016); *United States v. Stork*, No. 3:10-cr-132, 2015 WL 8056023 (N.D. Ind. Dec. 4, 2015); *United States v. Willoughby*, No. 3:10-cr-431, 2015 WL 7306338 (N.D. Ohio Nov. 18, 2015).

the formalistic distinction between mandatory and advisory guidelines **at least leaves open the question** whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005)—that is, during the period in which the Guidelines *did* 'fix the permissible range of sentences,' *ante*, at 892—may mount vagueness attacks on their sentences." (emphasis added)); *compare id. with Watkins*, 810 F.3d at 381 (citing *Cain*, 533 U.S. at 669 (O'Connor, J., concurring)) ("'[T]he holdings must *dictate*[,]' *i.e.,* 'permit no other conclusion than that the rule is retroactive.'").[6]

Admittedly, assuming Mr. Homrich is entitled to relief, a denial would cause injustice as resentencing would likely set him free. *See Landis v. North American Co.*, 299 U.S. 248, 255 (1936). However, that argument assumes too much. In addition to the glaring contextual differences between the procedural posture of *Landis* and Mr. Homrich's successive § 2255 motion here,[7] "[t]he new rule [in *Johnson*] becomes retroactive [to § 4B1.2(a) of the Guidelines], not by the decisions of the lower court," *see, e.g.*, *Fife*, 2016 WL 3745762, "or by the combined action of the Supreme Court and lower courts," *see, e.g., Welch*, 136 S. Ct. at 1257, *Johnson*, 135 S. Ct. at 2551, *Peugh*, 133 S. Ct. 2072, (2013), *Pawlak*, 822 F.3d at 902, "but simply by the action of the Supreme Court." *Cain*, 533 U.S. at 663. The *Supreme Court's* decisions, *see, e.g., Beckles*, 137 S. Ct. at 890; *Welch*, 136 S. Ct. at 1257, *Johnson*,

[6] Interestingly, *Booker* itself was never made retroactive. *See, e.g., In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007) ("*Booker* announced neither a substantive rule nor a watershed rule of procedure and therefore is not retroactive . . . ."); *see id.* at 1304 ("If the Sentencing Guidelines were, as he claims, incorporated into the criminal code, then the Guidelines would be mandatory—the very opposite of what *Booker* holds. Instead, *Booker* merely requires that the sentencing judge consider the Guidelines.").

[7] The court is not convinced that a pre-AEDPA, 1936 decision has any bearing on this particular situation, where the Supreme Court "is the only entity that can 'ma[k]e' a new rule retroactive." *Cain*, 533 U.S. at 663.

135 S. Ct. at 2551, *Peugh*, 133 S. Ct. at 2072, do not "permit no other conclusion than that the rule [announced in *Johnson*] is retroactive" to § 4B1.2(a) of the mandatory Guidelines.

This Court sympathizes with Mr. Homrich and other similarly situated prisoners. However, expedience and forecasted justice must yield to caution and precedent; and we all, Mr. Homrich probably most, will anxiously await the Supreme Court's (or the Sixth Circuit's) final word.

CERTIFICATE OF APPEALABILITY

A district court must issue a certificate of appealability either at the time the petition for writ of habeas corpus is denied or upon the filing of a notice of appeal. *Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) (per curiam).

A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). To satisfy this standard, the petitioner must show 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.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). Courts should undertake an individualized determination of each claim presented by the petitioner when considering whether to issue a certificate of appealability. *Murphy v. Ohio*, 551 F.3d 485, 492 (6th Cir. 2009).

There never was a more appropriate case for a certificate of appealability. Reasonable jurists could indeed (and will) debate whether the petition should have been resolved in a different manner. Accordingly, the Court **GRANTS** Homrich a certificate of appealability.

The Court also humbly requests that the Sixth Circuit Court of Appeals give Mr. Homrich's petition expedited consideration. If he is indeed entitled to relief, he would likely receive a sentence of time served because his guideline range at the time of sentencing far exceeds what he would receive today.

ORDER

For the reasons contained in the accompanying opinion, Defendant's motion for relief under 28 U.S.C. § 2255 is **DENIED** but a certificate of appealability is **GRANTED**.

IT IS SO ORDERED.

Date: May 24, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge