United States v. Buckner

United States Court of Appeals for the Fourth Circuit

February 28, 2018, Submitted; March 12, 2018, Decided

No. 17-6498

Reporter

714 Fed. Appx. 273 *; 2018 U.S. App. LEXIS 6059 **; 2018 WL 1256085

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHN ELWOOD BUCKNER, a/k/a Bear, a/k/a John Branch, Defendant - Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from the United States District Court for the District of South Carolina, at Charleston. (2:00-cr-00398-PMD-2; 2:16-cv-01098-PMD). Patrick Michael Duffy, Senior District Judge.

Hill v. Sepanek, 2017 U.S. Dist. LEXIS 1916 (E.D. Ky., Jan. 6, 2017)

Disposition: DISMISSED.

Counsel: Alicia Vachira Penn, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, South Carolina, for Appellant.

Sean Kittrell, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, South Carolina, for Appellee.

Judges: Before DUNCAN and AGEE, Circuit Judges, and SHEDD, Senior Circuit Judge.

Opinion

[*273] PER CURIAM:

John Elwood Buckner seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive **[**2]** procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

[*274] We have independently reviewed the record and conclude that Buckner has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Elwood Buckner,	)	
	)	Case No.: 2:00-cr-398-PMD-2
Petitioner,	)	
	)	**ORDER**
v.	)	
	)	
United States of America,	)	
	)	
Respondent.	)	
	)	

John Elwood Buckner moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 665). The Court previously stayed this matter pending the Supreme Court's decision in *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015), *cert. granted*, 2016 WL 1029080 (U.S. June 27, 2016) (No. 15-8544). Now that the Supreme Court has issued an opinion in *Beckles*, *see* No. 15-8544, 2017 WL 855781 (U.S. Mar. 6, 2017), the stay is lifted.

The central premise of Buckner's § 2255 motion is that U.S.S.G § 4B1.2(a)(2)'s residual clause is void for vagueness. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). The Supreme Court squarely rejected that argument in *Beckles*. 2017 WL 855781, at *__. Consequently, Buckner's § 2255 motion lacks merit.

For the foregoing reasons, it is **ORDERED** that Buckner's § 2255 motion is **DENIED**.[1]

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

March 6, 2017
Charleston, South Carolina

1. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that the merits of his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). Buckner has not satisfied that standard. Accordingly, the Court declines to issue a certificate of appealability. *See* R. 11(a), § 2255 Rules.

DENIED

April 11, 2017

PATRICK MICHAEL DUFFY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America,	)	CRIMINAL NO. 2:00-398
	)	
v.	)	
	)	
	)	**Motion for Reconsideration**
John Elwood Buckner	)	
	)	
	)	
_____	)	

Mr. Buckner asks this Court to reconsider its order dismissing his motion to vacate his sentence under 28 U.S.C. § 2255.

Mr. Buckner filed his motion to vacate his sentence under 28 U.S.C. § 2255 on April 8, 2016 and claimed relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In June this Court stayed the matter pending the Supreme Court's decision in *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015), *cert. granted*, 2016 WL 1029080 (U.S. June 27, 2016) (No. 15-8544). Once *Beckles* was decided in March, this Court lifted its stay and denied Mr. Buckner's motion on the ground that *Beckles* "squarely rejected" the argument that the residual clause of U.S.S.G § 4B1.2(a)(2) is void for vagueness. (ECF No. 401). In its denial, this Court also declined to issue a certificate of appealability. *Id.*

This denial overstates the reach of *Beckles.* The holding of *Beckles* is "that the **advisory** Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that §4B1.2(a)'s residual clause is not void for vagueness." 2017 WL 855781, at *__. (emphasis added). Mr. Buckner was sentenced on June 9, 2002 to a term of 250 months. (ECF

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America,	)	Criminal. No.: 2:00-398
	)	
vs.	)	
	)	**MOTION TO CORRECT SENTENCE**
John Elwood Buckner,	)	**UNDER 28 U.S.C. § 2255**
	)	
Defendant.	)	
	)	

The Defendant, John Elwood Buckner, respectfully moves under 28 U.S.C. § 2255 to vacate his sentence which was based on a conviction under 21 U.S.C. §846.

I. FACTS

On April 9, 2002 John Buckner was sentenced to 250 months for one count of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. §846. Dkt. 222. Buckner's presentence report ("PSR") identified him as a career offender under §4B1.1, claiming that he had "at least two prior felony convictions of…a crime of violence." Four of the convictions on Buckner's criminal history could have been relied upon at the time the report was written as crimes of violence. They are:

1986 2nd degree rape, Maryland

1988 assault with intent to murder, robbery with a deadly weapon, Maryland (concurrent)

1990 battery, Maryland

II. ARGUMENT

Three of Buckner's four prior convictions do not have as elements the use, attempted use, or threatened use of physical force against the person of another, or fall within the enumerated offenses in §4B1.2. These three convictions—2nd degree rape, assault with intent to murder, and

battery—are not predicate crimes of violence. Two predicate convictions are required for application of career offender status. Because the two 1988 convictions stem from the same set of facts and circumstances, they were not separately counted under §4A1.1(a), (b), or (c) and they count as one for purposes of career offender status.

A. *Johnson v. United States*, is retroactive and applies to cases on collateral review.

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court declared the residual clause of the Armed Career Criminal Act unconstitutionally vague, and struck it from the act. The Supreme Court stated that the part of the definition that states "or otherwise involves conduct that presents a serious potential risk of physical injury to another" denied fair notice to defendants, invited arbitrary enforcement by judges, and denied due process of law. *Id.* at 2557. In doing so, the Court overruled its contrary decisions in *James v. United States,* 550 U.S. 192 (2007), and *Sykes v. United States,* 131 S. Ct. 2267 (2011). 135 S. Ct. at 2561-63.

The stricken language from ACCA in *Johnson* that created crimes of violence when the convictions "otherwise involves conduct that presents a serious potential risk of physical injury to another" is identical to the residual clause language in career offender guideline § 4B1.2(a)(2) of "otherwise involves conduct that presents a serious potential risk of physical injury to another." Because the text of the residual clause in ACCA and in § 4B1.2(a)(2) is the same *Johnson* should affect both equally and the residual clause should also be struck from the guidelines as void for vagueness.

The Tenth Circuit has already concluded that the residual clause of the guidelines was unconstitutionally vague like the residual clause of ACCA. *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015). The Tenth Circuit pointed to concerns about judicial consistency,

and its own reliance on ACCA for guidance in interpreting § 4B1.2(a)(2) to declare, "If one iteration of the clause is unconstitutionally vague, so too is the other." *Id.*

The Second Circuit has utilized this same logic, stating that for the purposes of statutory interpretation, "authority interpreting one phrase frequently is found to be persuasive in interpreting the other phrase." *United States v. Brown,* 514 F.3d 256, 268 (2d Cir.2008).

The Government has conceded or Courts of Appeals have held that *Johnson* applies to the sentencing guidelines in the First, Second, Third, Sixth, Eighth, and Tenth Circuits. *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. 2015)(Gov't Supplemental Brief 2015 WL 4872453), *United States v. Townsend*, 2015 WL 9311394 (3d Cir. 2015), *United States v. Darden,* 605 F. App'x 545 (6th Cir. 2015), *United States v. Grayer*, 2015 WL 5472743 (Sixth Cir. 2015), *United States v. Taylor*, 803 F.3d 931 (8th Cir. 2015), *United States v. Madrid*, No. 14-2159 (10th Cir. 2015).

The Seventh Circuit has already held that Johnson announced a new substantive rule that is retroactive to cases on collateral review. *Price v. United States*, 795 F.3d 731 (7th Cir. 2015). After *Johnson*, none of Buckner's prior criminal convictions survive as predicate crimes of violence because they do not fit within the two remaining clauses of § 4B1.2, the force clause or the enumerated offenses clause.

B. Second degree rape is not a crime of violence under the force clause.

In 1986, Maryland's 2nd degree rape statute stated:

> (a) *What constitutes.*—A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force or threat of force against the will and without the consent of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless; or
>
> (3) Who is under 14 years of age and the person performing the act is at least four years older than the victim.

Md. Criminal Law Code Ann. Art. 27, §463 (1982). Because 2nd degree rape could be committed without invoking the use, attempted use, or threatened use of physical force against another, and is not an enumerated offense, it is not a crime of violence.

The Fourth Circuit has already held that a rape statute based on the absence of legally valid consent, that may be committed without physical force, is not categorically a crime of violence under §4B1.2. *United States v. Shell,* 789 F.3d 335 (4th Cir. 2015). The Fourth Circuit in *Shell* analyzed North Carolina's second-degree rape statute, which included its own force clause—"by force and against the will of the other person," and a statutory rape section—"who is mentally disabled, mentally incapacitated, or physically helpless." N.C. Gen. Stat. §14-27.3 (2004).

In its analysis, the Court pointed out that force, in the North Carolina statute, did not necessitate violent force because it included constructive force in the form of fear, fright, or coercion, proof of compulsion or threats of force. *Shell* at 339. It also stated that the statutory rape section did not satisfy the force clause because it did not require any sort of force at all, and instead was "predicated instead on the legal insufficiency of purported consent." *Id.* at 341. Thus, because the most innocent conduct covered by the North Carolina second degree rape statute would not qualify as a crime of violence for the purposes of the §4B1.2 enhancement, the statute was categorically overbroad and §4B1.2 did not apply. *Id.* at 339.

Maryland's second degree rape statute has the same problems as North Carolina's second degree rape statute. Both are categorically overbroad because they can be committed through the use of any force, not just violent force, and because they can be predicated on the legal insufficiency of purported consent. Just like North Carolina, Maryland's statute did not require physical force. Actual physical force was not an indispensable element of the crime. *Goldberg v.*

State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979). Acts or threats calculated to create a real and reasonable apprehension of imminent bodily harm were considered the equivalent of force. *Rusk v. State*, 43 Md. App. 476 (1979). Also like North Carolina, Maryland's statute includes statutory rape--of someone mentally defective or incapacitated, physically helpless, or under the age of 14. The most innocent conduct covered by Maryland's second degree rape statute would not qualify as a crime of violence under §4B1.2, so the statute is overbroad and this conviction cannot be designated a predicate offense.

C. Battery is not a crime of violence under the force clause.

Battery in Maryland was defined at common law as the "unlawful beating of another," and includes "any unlawful force used against a person of another, no matter how slight." *State v. Duckett*, 306 Md. 503, 510 (1986). The common law offense of battery included "kissing without consent, touching or tapping, jostling, and throwing water upon another." *Epps v. State*, 333 Md. 121, 127 (1993). It accommodates indirect applications of force such as directing a dog to attack or "exposing a helpless person to the inclemency of the weather." *Lamb v. State,* 93 Md. App. 422, 448 (1992)(internal quotation marks omitted). It has included the intentional throwing of a "relatively small amount of water onto the person of another at waist level or below, and with no great force." *Epps*, 333 Md. at 127.

To determine whether a state conviction qualifies as a crime of violence, the focus is on the elements of the state statute and not the specific facts underlying the conviction. *United States v. Carthorne,* 726 F.3d 503, 511 (4th Cir. 2013). This "categorical approach" looks at how the law defines the offense generically. *Descamps v. United States*, 133 S.Ct. 2276, 2285 (2013).

When it addressed battery in 1998, the Fourth Circuit hesitated over whether or not battery was a crime of violence under the force clause, because the word violent might exclude the minor

or slight touching that battery included. *United States v. Kirksey*, 138F.3d 120, 125 (4th Cir. 1998). It decided that "it remains unclear whether we can say categorically that the conduct encompassed in the crime of battery constitutes the use of physical force against the person of another to the degree required to constitute a crime of violence as used in U.S.S.G. §4B1.2(1)(i)." *Id.*

Since 1998, it has become clear that battery is not categorically a crime of violence because it includes the slight, minor, or indirect contact that does not justify the additional penalties associated with the designation of violent crime. In 2010 the Supreme Court in *Johnson v. United States,* 130 S.Ct. 1265, 1269 (2010), held that for a predicate conviction to satisfy the "force clause", there must be an element in the state statute of physical force. Physical force, for the purposes of the force clause, means violent force. *Id.* Violent force means force capable of causing physical pain or injury to another person. *Id*. at 1271.

This definition of violent force specifically excludes from consideration elements that involve the slightest offensive touching. *United States v. Aparicio-Soria*, 740 F.3d 152, 155 (4th Cir. 2014). In *Aparicio-Soria,* the Fourth Circuit found that that Maryland's resisting arrest statute only required "offensive physical contact" for a conviction. *Id.* This did not meet the definition of violent force capable of causing pain or injury to another. *Id.* Because Maryland's battery statute can be violated with the slightest offensive touching, it is overbroad and is not a crime of violence under the force clause.

E. Assault with intent to murder is not a crime of violence under the force clause.

In Maryland, the elements of common law assault with intent to murder are: proof of an assault and that it was with intent to murder—if death had occurred, the killing would have been murder. *Webb v. State*, 201 Md. 158 (1952). Specific intent to kill was not a necessary element.

Tate v. State, 236 Md. 312 (1964). Intent to commit grievous bodily harm was sufficient. *Simms v. State*, 4 Md. App. 160 (1968). Battery was not a necessary ingredient. *Jenkins v. State,* 3 Md. App. 243 (1968).

Because assault with intent to murder could be satisfied by the use of any force, not just physical force or violent force, force capable of causing physical pain or injury to another person as demanded by *Johnson*, it is not a crime of violence under the force clause. A drunk man with a loaded gun who threatened to kill the occupants of a house, and then broke the glass of a door to try to unlock it was sufficient evidence to support a conviction. *Beall v. State,* 203 Md. 380 (1953). This case does not provide the use of violent force against a person required by the 2010 *Johnson* case.

Another way assault with intent to murder could be satisfied without the use of violent force would be by leading a victim by the arm outside in below-freezing temperatures with the intent that he freeze to death. Because the most innocent conduct covered under the crime does not satisfy the requirements of violent force under the force clause, assault with intent to murder is not a predicate crime of violence.

III. CONCLUSION

Buckner does not have the two prior convictions of crimes of violence required for career offender status. He should be resentenced accordingly.

Respectfully submitted,

/s/ Alicia Vachira Penn
Assistant Federal Public Defender
P. O. Box 876
Charleston, SC 29402
(843)727-4148

April 8, 2016

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOHN ELWOOD BUCKNER	)	CRIMINAL NO.: 2:00-398
	)	
	)	
vs.	)	
	)	
	)	
UNITED STATES OF AMERICA	)	

COMES NOW the United States of America, by and through its undersigned counsel, and moves this Court to dismiss Petitioner's Motion to Set Aside Judgment, or in the alternative, to grant summary judgment in favor of the Government. The reasons supporting this motion are set forth in the accompanying memorandum in support.

Therefore, the undersigned respectfully requests that this Court dismiss Petitioner's motion, or in the alternative, grant summary judgment in favor of the Government.

Respectfully submitted,

WILLIAM N. NETTLES
UNITED STATES ATTORNEY

By: *s/ Sean Kittrell*
Sean Kittrell
Assistant United States Attorney
151 Meeting Street, Suite 200
Charleston, South Carolina 29401

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	Criminal Number: 2:00-398
	)	
	)	**GOVERNMENT'S RESPONSE AND**
-versus-	)	**MOTION TO DISMISS PETITIONER'S**
	)	**MOTION PURSUANT TO 28 U.S.C. 2255**
	)	
JOHN ELWOOD BUCKNER	)	

I. Overview

Comes now the United States of America, by and through its undersigned Assistant United States Attorney, and responds to the Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 filed by John Elwood Buckner (hereinafter "Buckner" or "the Defendant"). The government respectfully asserts that the §2255 motion should be dismissed. It is time barred as his judgment and conviction was filed on April 9, 2002. Second, he asserts a claim—that he is not a Career Offender under the U.S. Sentencing Guidelines—which is not cognizable in §2255 proceedings. Finally, he asserts relief pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015) which is not retroactively applicable in Guidelines cases. For these reasons, the motion should be dismissed.

II. Procedural Background

The Defendant was indicted on May 10, 2000 (Docket Entry #1). An enhancement pursuant to 21 U.S.C. §851 was filed on October 7, 2001. (Docket Entry #181). The Defendant pled guilty on October 17, 2001. (Docket Entry #192). The Defendant was sentenced to a term of imprisonment of 250 months on April 8, 2002. (Docket Entry #221, #222). The Judgment and Conviction was filed on April 9, 2002. (Docket Entry #222). On December 23, 2013 the Defendant made a motion to reduce his sentence. (Docket Entry #379). This was denied on

January 6, 2014. (Docket Entry #381). On April 8, 2016, he filed this §2255 motion. (Docket Entry #384).

III. Argument

The Defendant's §2255 petition fails on several grounds. First, it is time barred. Second, his claim that he was incorrectly determined to be a Career Offender under the U.S. Sentencing Guidelines is not cognizable in §2255 proceedings. Finally, he asserts relief pursuant to *Johnson v. United States*, 135 S.Ct. 2551 (2015) which is not retroactively applicable in Guidelines cases. Each of these grounds will be addressed below.

a. Buckner's Motion is Time Barred

The government asserts that Buckner's §2255 motion is time-barred. Prior to 1996, no time limitation existed as to a federal prisoner's ability to collaterally attack his conviction in a §2255 motion. *See United States v. Torres*, 211 F.3d 836, 838 (4th Cir. 2000). This changed in 1996 with Congress' enactment of the Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"). AEDPA amended 28 U.S.C. § 2255 to provide a one-year limitations period for the filing of §2255 motions. Section 2255 provides that the period of limitation will begin to run upon, inter alia, "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255[1]. Moreover, it is now clear that Petitioner's conviction was not final until the ninety-day period for filing a petition for a writ of certiorari had expired. *See Clay v. United States*, 537 U.S. 522 (2003); and *United States v. Quick*, 71 Fed.Appx. 975, 2003 WL 21958419 (4th Cir. 2003)(unpublished).

Petitioner's Judgment and Conviction was filed on April 9, 2002. However, Petitioner did not file the instant §2255 motion until April 8, 2016, which is clearly more than one year

[1] The remaining three parts of § 2255's statute of limitations are not relevant to this response.

from the date upon which his conviction became final. Accordingly, the Defendant's motion is procedurally time-barred.

b. Guidelines Errors are Not Cognizable on Collateral Review.

Buckner claims that he was incorrectly determined to be a career offender based on his evaluation of his predicate convictions. This claim is not cognizable in collateral proceedings. The Fourth Circuit has recently concluded that an erroneous application of the sentencing guidelines, including a career offender designation, is not cognizable on collateral review pursuant to § 2255. *See United States v. Foote*, 784 F.3d 931, 936 (4th Cir. 2015); *see also Gause v. United States*, 2016 WL 775298, at * 2 (D.S.C. 2016); *Syndab v. United States*, 2016 WL 562099, at * 2 (D.S.C. 2016).

c. The application of Johnson to the Sentencing Guidelines' residual clause produces procedural changes in the sentencing process that are not retroactive on collateral review.

Buckner's contention that his predicate convictions are subject to Johnson cannot be used to bootstrap jurisdiction for his untimely §2255. First, his prior convictions fall under the "force" clause and *Johnson* applies to the residual clause. Alone. "Today's decision does not call into question application of the [Armed Career Criminal] Act to the [Act's] four enumerated offenses, or to the remainder of the Act's definition of a violent felony." *Johnson v. United States*, 135 S.Ct. 2551 at 2563 (2015). *See also United States v. Smith,* No. 15-4218, 2016 WL 308636, at *1 (4th Cir. Jan. 26, 2016).

Second, to the extent that his convictions would rely on the residual clause, various district courts have held that the new rule announced in *Johnson* is procedural and non-watershed when applied to the Guidelines. *See Cummings v. United States*, 2016 WL 799267, at * 16 (E.D.Wis. Feb. 29, 2016); *United States v. Stork*, 2015 WL 8056023, at *6 (N.D. Ind. Dec. 4,

2015) (holding that "[b]ecause a new rule invalidating the residual clause of the Guidelines would be neither a substantive rule nor a watershed rule of criminal procedure, it would not apply retroactively to cases on collateral review, and thus offers [petitioner] no relief."), appeal docketed, No. 15-3785 (7th Cir. Dec. 15, 2015). In *Stork*, the district court rejected the argument that because Johnson's new rule is retroactive in the ACCA context, it must also be retroactive in the Guidelines context. 2015 WL 8056023, at *6-7 (emphasis in original) ("*Johnson* applies, if at all, by analogy, through which the resulting rule would be that the residual clause of the Guidelines is void for vagueness.... the retroactivity analysis is quite different in that context.").

Other district courts to consider the issue also have reached the conclusion that although *Johnson* may be substantive and apply retroactively in the ACCA context, *Johnson* represents a non-watershed procedural rule when applied to § 4B1.2(a)(2)'s residual clause. *See, e.g., Frazier v. United States*, 2016 WL 885082, at *6 (E.D. Tenn. Mar. 8, 2016) (concluding that "while *Johnson* effected a substantive change in the law by altering the range of lawful sentences under the ACCA, extension of that same reasoning to the Guidelines would result in only procedural changes to the sentencing process"); *Hallman v. United States*, 2016 WL 593817, at *5 (W.D.N.C. Feb. 12, 2016) (quoting *Schriro*, 542 U.S. at 352) (finding that *Johnson's* effect on § 4B1.2(a)(2)'s residual clause "did not 'narrow the scope of a criminal statute by interpreting its terms' or 'place particular conduct or persons covered by the statute beyond the State's power to punish'"), appeal docketed No. 16-6306 (4th Cir. Mar. 2, 2016); *United States v. Willoughby*, —— F. Supp. 3d ——, 2015 WL 7306338, at *7 (N.D. Ohio Nov. 18, 2015) (quoting *Schriro*, 542 U.S. at 352) (reasoning that because an advisory Guidelines sentence "must always fit within the limits set by Congress, an erroneous career-offender designation carries no risk that a defendant

'faces a punishment that the law cannot impose upon him' "), appeal docketed, No. 16-3080 (6th Cir. Jan. 28, 2016).

The application of *Johnson* to the Sentencing Guidelines' residual clause is not retroactive on collateral review. Consistent with *Teague v. Lane*, 489 U.S. 288 (1989), *Johnson*, if applied to the Sentencing Guidelines, is procedural and hence not retroactive on collateral review. Restrictive retroactivity principles govern when a defendant seeks to undo a final judgment on the basis of an intervening decision. *See generally Teague*. Under *Teague* and its progeny, courts generally refuse to apply (or announce) new rules of criminal procedure for the first time in cases on collateral review. *Id.* at 311. In order to grant collateral relief in a guidelines case based on *Johnson*, the court would have to announce or apply two new rules that were not established before *Johnson*: (1) that the guidelines' residual clause is unconstitutionally vague, and (2) that due process vagueness principles apply to the sentencing guidelines. Although the government agrees that both of these propositions represent the law after *Johnson*, neither proposition was dictated by the law as it existed before *Johnson*. And because these two propositions involve matters of sentencing procedure, the court, consistent with Teague, should not recognize and apply them in a collateral challenge to a sentence that was final before *Johnson*. In sum, *Johnson* does not apply retroactively in guidelines cases that were final before the decision was announced.

First, both the rules--(1) that the guidelines' residual clause is unconstitutionally vague, and (2) that due process vagueness principles apply to the sentencing guidelines--are new. No prior precedent dictated the conclusion that the guidelines' residual clause is unconstitutionally vague. To the contrary, the Supreme Court had twice rejected the argument that the identically worded residual clause in the ACCA was vague when that argument was pressed in dissenting

opinions. *See James v. United States*, 550 U.S. 192, 210 n.6 (2007); *Sykes v. United States,* 131 S. Ct. 2267, 2277 (2010). *Johnson* expressly "overrule[d] * * * [the] contrary holdings in *James* and *Sykes*," 135 S. Ct. at 2563, and "a decision announces a new rule if it expressly overrules a prior decision." *Graham v. Collins*, 506 U.S. 461, 467 (1993). Moreover, *Johnson* did not address whether its holding extended to the Sentencing Guidelines. Indeed, it nowhere mentioned the guidelines, even though the guidelines contain an identically worded residual clause in Section 4B1.2, and even though the government's supplemental brief in *Johnson* referred to Section 4B1.2's commentary in arguing that possession of a sawed-off shotgun poses an inherent risk of violence. *See* U.S. Supp. Br. 10, *Johnson v. United States*, No. 13-7120 (filed March 20, 2015). A rule adopted by a court of appeals that the career-offender guideline's residual clause is unconstitutionally vague in light of *Johnson* would therefore be a "new" rule.

Likewise, no prior precedent dictated, to all reasonable jurists, the conclusion that the Sentencing Guidelines are amenable to vagueness challenges. *United States v. Batchelder*, 442 U.S. 114 (1979), a pre-guidelines case, suggested that sentencing statutes that do not specify "with sufficient clarity the consequences of violating a given criminal statute" may be vulnerable to vagueness challenges, *id.* at 123, but that language was not necessary to the decision because the statute at issue "unambiguously specif[ied] * * * the penalties available upon conviction." Id. Authority that supports a proposition "in dictum" does not "'control[]' or 'dictate[]' [a] result" for *Teague* purposes. *Lambrix v. Singletary*, 520 U.S. 518, 529 (1997); *cf. Williams v. Taylor,* 529 U.S. 362, 412 (2000) (opinion of O'Connor, J., for the Court) (statutory provision limiting federal habeas corpus relief for state prisoners to cases where the lower court decision violates "clearly established Federal law," which incorporates Teague's "new rule" standards, refers "to holdings, as opposed to dicta").

Second, both the rules--(1) that the guidelines' residual clause is unconstitutionally vague, and (2) that due process vagueness principles apply to the sentencing guidelines—are procedural. Procedural rules "regulate[] only the manner of determining the defendant's culpability," *Schriro*, 542 U.S. at 353, or the manner of selecting an appropriate sentence. For example, a procedural rule of constitutional law includes a rule requiring facts to be treated as elements of a crime, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000), or a rule regulating the admissibility of certain evidence at trial, see Crawford v. Washington, 541 U.S. 36 (2004). Unlike substantive rules, these rules do not forbid prosecution or conviction for a crime or otherwise alter the permissible range of outcomes; rather, they concern how the ultimate determination (guilt or innocence or the appropriate sentence) must be reached. In the case of *Crawford*, for example, the rule requires an opportunity for cross-examination of an out-of-court declarant; in the case of *Apprendi* and its progeny, the rules require a jury finding as to the operative fact beyond a reasonable doubt. Neither changes the range of legally permissible outcomes.

New procedural rules therefore do not implicate the concerns that justify the retroactive application of new substantive rules: they do not produce a class of persons who have been convicted of non-criminal conduct or alter the range of sentences for which the defendant is eligible, but instead "merely raise the possibility" that the now-invalid procedure might have affected the course of the proceeding. *See Schriro*, 542 U.S. at 352. This "more speculative connection" to outcomes has led the Supreme Court to deny retroactive effect to new procedural rules in federal collateral review and thereby protect the finality of criminal judgments. *See Teague*, 489 U.S. at 311.

The effect of *Johnson* in the Guidelines context stands in contrast to the effect of *Johnson* under the ACCA. Under the ACCA, when a court relied on the residual clause to find that the defendant had the necessary three prior convictions, the defendant's sentence rose from a maximum of ten years to a minimum of 15 years. *Compare* 18 U.S.C. § 924(a)(2) *with* 18 U.S.C. § 924(e)(1). The constitutional rule announced in Johnson renders the 15-year minimum prison sentence illegal, and that change is substantive: it alters the permissible ranges of sentences. *See, e.g., Price v. United States*, 795 F.3d 731, 2015 WL 4621024, at *3 (7th Cir. Aug. 4, 2015) ("*Johnson*, we conclude, announced a new substantive rule [in an ACCA case because a] defendant who was sentenced under the residual clause necessarily bears a significant risk of facing a punishment that the law cannot impose upon him.").

Misapplications of the Sentencing Guidelines, in contrast, do not have the same consequences. A rule invalidating the crime-of-violence residual clause would establish that the defendant's guidelines range was incorrectly calculated, but it would not disturb the statutory boundaries for sentencing set by Congress for the crime. *See Mistretta v. United States*, 488 U.S. 361, 396 (1989) (Sentencing Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). Indeed, guidelines sentences must always be within the limits set by Congress; as a result, a guidelines sentence imposed on the basis of an incorrect guidelines range may be erroneous, but it is not illegal or unlawful as in a case involving prejudicial Johnson error under the ACCA. *See Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (*en banc*) (explaining that "Sun Bear's 360-month [guidelines] sentence," imposed on the basis of an error in classifying him as a mandatory career offender, "is not

unlawful" because "[a]n unlawful or illegal sentence is one imposed without, or in excess of, statutory authority").

An error in calculating the guidelines range does not, therefore, alter the statutory sentencing range or prevent reimposition of the same sentence without the career-offender enhancement. In cases describing appellate review under *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has characterized errors in calculating a defendant's advisory guidelines range as "procedural," rather than substantive. *See, e.g., Peugh*, 133 S. Ct. at 2083 ("Failing to calculate the correct [advisory] Guidelines range constitutes procedural error.") (*citing Gall v. United States,* 552 U.S. 38, 51 (2007)). That reflects the role of the Guidelines in the sentencing process: they are a step in imposing sentence, not a statutory direction on the range of available sentences. And although the meaning of "substance" and "procedure" can vary based on context, *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988), one court of appeals has relied on *Peugh's* reference to "procedural error" to conclude that new rules affecting the calculation of a defendant's advisory guidelines range are procedural and thus not retroactive on collateral review. *See Hawkins v. United States*, 724 F.3d 915, 917-918 (7th Cir. 2013) (supplemental opinion on denial of rehearing) (suggesting that because the Supreme Court described use of the incorrect guidelines range as "procedural error," the Ex Post Facto holding in *Peugh* would not be applied retroactively on collateral review); *see also Herrera-Gomez v. United States,* 755 F.3d 142, 146-147 (2nd Cir. 2014) (holding that *Peugh* announced a new, non-watershed procedural rule that could not support a second-or-successive Section 2255 motion).

Nor does *Johnson* qualify as a substantive rule on the theory that it expands the sentencer's discretion to consider a broader range of options than those that existed previously.

A rule invalidating a mandatory minimum statutory punishment illustrates this type of substantive rule. *See Miller v. Alabama*, 132 S. Ct. 2455 (2012) (invalidating mandatory life without parole for juvenile homicide defendants). That rationale does not apply with respect to an error in calculating a defendant's guidelines range, however, because courts always had discretion, in admittedly varying degrees, to consider a range of sentencing options in guidelines cases.

Before *Booker*, sentencing courts had the authority to "depart" from the guidelines range in appropriate cases. *See* U.S.S.G. § 5K2.0; *see also Koon v. United States*, 518 U.S. 81, 92 (1996); *Williams v. United States*, 503 U.S. 193, 205 (1992) ("The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court."). After *Booker,* sentencing courts have broader authority to "vary" from the now-advisory guidelines range, *see Booker*, 543 U.S. at 245-246, including, in particular, the career-offender guideline range. *See, e.g., Spencer v. United States,* 773 F.3d 1132, 1142 (11th Cir. 2014) (*en banc*) ("sentencing courts depart or vary from the guideline range more often when they sentence career offenders"). That judicial discretion to impose lesser sentences than called for by the Guidelines illustrates that an erroneous career-offender designation is a procedural step in a multi-step process that results in a court's selection of a sentence, not a substantive rule that expands or contracts the statutory range of outcomes. Accordingly, *Johnson's* application to the guidelines constitutes a procedural rule, not a substantive decision entitled to retroactive application in guidelines cases on collateral review.

A rule that the sentencing guidelines are subject to vagueness challenges is also procedural. It would dictate how Sentencing Guidelines must be framed in order to comply with

due process; it would not dictate any particular substantive outcomes. This is evident from the sentencing process in the federal system, which encompasses at least three steps: first, a court determines the applicable guidelines range by applying the guidelines to the facts; second, it determines whether any deviations from that range are warranted (either by way of a "departure" or, in the post-*Booker* era, a "variance"); and third, it determines the appropriate sentence. Because the calculation of the guidelines range is itself merely a step in the process whereby a judge determines the appropriate sentence to impose, a rule requiring that the sentencing range (at step one) be defined with a certain level of precision is a rule of process. It relates to the manner for determining the starting point for federal sentencing—the initial calculation of the sentencing range—but it does not dictate particular sentencing outcomes, or even alter the permissible range of outcomes. And this is particularly true for the advisory guidelines system in place after *Booker*: sentencing courts must calculate and consider the sentencing range, but the overarching obligation of a sentencing court is to impose a sentence that is sufficient but not greater than necessary to serve the purposes of sentencing. 18 U.S.C. § 3553(a); *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). A rule that the guidelines, particularly advisory ones, must satisfy due process vagueness standards therefore differs fundamentally and qualitatively from a holding that a particular criminal statute or sentencing provision is substantively vague.

Finally, neither rule--(1) that the guidelines' residual clause is unconstitutionally vague, and (2) that due process vagueness principles apply to the sentencing guidelines—is watershed. There is a narrow exception to the principle that new procedural rules do not apply retroactively to cases on collateral review for "watershed rule[s] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). To come within this "extremely narrow" exception, id., "a new rule must meet two

requirements: infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). Although the Supreme Court has never found that a new procedural rule qualifies as watershed, see *Whorton v. Bockting*, 549 U.S. 406, 417, 418 (2007), it has explained that the exception is intended for rules bearing the same "primacy and centrality" to the criminal justice process as the rule of *Gideon v. Wainwright,* 372 U.S. 335 (1963). *See, e.g., Saffle*, 494 U.S. at 495; *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (new rule deemed not to be watershed because it was "not on par" with the "sweeping rule of *Gideon*").

The new procedural rule that would result if *Johnson's* holding as to the residual clause were extended to the guidelines would not be "watershed." An error in calculating a defendant's guidelines range does not render the sentence unfair or unreliable in the way that a complete deprivation of the right to counsel renders a trial conducted without counsel unfair and unreliable. *See, e.g., United States v. Cronic,* 466 U.S. 648, 659 (1984) (complete denial of counsel at a critical stage renders the trial "unfair," and the "adversary process itself presumptively unreliable"). Moreover, *Johnson* in any event does not alter our understanding of the bedrock procedural elements essential to the fairness of a sentencing proceeding. Johnson did not recognize, for the first time, that the due process clause prohibits vague penal laws; rather, it merely extended that well-recognized constitutional principle, *see, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939), to hold a particular statutory enhancement unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2577. But new rules that merely apply a pre-existing legal principle in a new context do not "effect a sea change in criminal procedure comparable to that wrought by *Gideon*." *Panetti v. Stephens*, 727 F.3d 398, 414 (5th Cir. 2013).

Nor would a new procedural rule permitting vagueness challenges to the Guidelines rank as a watershed rule. A guideline would be reasonable if it directed the judge to impose a "substantially" greater sentence within a range if the defendant's conduct caused "serious bodily injury," or displayed a "significant disregard of the risk of injury," even though those qualitative terms afford considerable leeway in application. *Cf. Johnson*, 135 S. Ct. at 2561 (distinguishing case-specific determinations). A rule that requires Sentencing Guidelines to conform to a particular level of precision therefore is an incremental change in sentencing procedure, not a critical component of sentencing "accuracy." And in any event, a rule that vagueness principles apply to the Sentencing Guidelines would not alter our understanding of the "bedrock" elements of sentencing. A rule allowing Guidelines to be challenged on vagueness grounds would not compel the States to adopt sentencing guidelines in the way *Gideon* compelled States to provide counsel for indigent defendants. And such a rule would be relatively narrow: it would pertain only to guidelines that employ indeterminate terminology as measured against "an idealized ordinary case," rather than actual facts. *See Johnson*, 135 S. Ct. at 2561 ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."). Such a rule lacks the sort of far-reaching, across-the-board ramifications that inhere in the Gideon rule. Accordingly, the *Johnson* rule "has none of the primacy and centrality of the rule adopted in *Gideon*." *Saffle*, 494 U.S. at 495; *see also Whorton*, 549 U.S. at 421 (rule at issue "is not in the same category with *Gideon*").

For all the forgoing reasons, Buckner's motion must be dismissed because the application of *Johnson* to the Sentencing Guidelines' residual clause produces procedural changes in the sentencing process that are not retroactive on collateral review.

CONCLUSION

Therefore, based on the foregoing argument and established law, the United States respectfully requests that this Court dismiss Buckner's Motion.

Respectfully submitted,

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DISTRICT OF SOUTH CAROLINA

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America,	)	Criminal. No.: 2:00-398
	)	
	)	
vs.	)	**DEFENSE RESPONSE TO**
	)	**GOVERNMENT'S MOTION**
John Elwood Buckner,	)	
	)	
Defendant.	)	
	)	

Mr. Buckner's 2255 motion is not time barred, his claim is cognizable, and *Johnson v. United States,* 135 S.Ct. 2551 (2015) is retroactively applicable to Guidelines cases. The Government's assertions in its response and motion to dismiss are incorrect and should be disregarded.

I. Mr. Buckner's Motion is Not Time Barred

> Title 28 U.S.C. § 2255(f)(3) provides that a one-year period of limitation runs from 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

Title 28 U.S.C. § 2255(f)(3). *Johnson* was decided on June 26, 2015. Mr. Buckner's §2255 was filed on April 8, 2016, before June 26, 2016.

II. *Johnson* Applies to Career Offender

On April 18, 2016 the Supreme Court held that *Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257 (2016). This Court has now held in *In re Hubbard,* 2016 WL 3181417 (4th Cir. June 8, 2016) that "the rule in *Johnson* is substantive with respect to its application of the Sentencing Guidelines and therefore applies retroactively". *Id.* at *7.

The harm addressed by *Johnson* was that the vagueness of the language in the ACCA made it impossible to apply fairly. *Johnson* at 2557. Thus, the arbitrary determination of who should be subject to a potential statutory sentencing range of 15 years to life instead of a range of 0-10 years violated due process. *Id.* The Court in *Johnson* further signaled that the Fifth Amendment's prohibition against vagueness, and the importance of protecting due process in order to achieve fair play and settled rules of law, applied "not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.*

This harm is the same harm propounded by an incorrect determination of a defendant's Guideline range. A district court is required to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States,* 552 U.S. 38, 49 (2007). It "*must* begin [it's] analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States,* 133 S.Ct. 2072 (2013). Because the Guidelines have such a central role in sentencing, "an error related to the Guidelines can be particularly serious." *Molina-Martinez v. United States,* 136 S.Ct. 1338 (2016). Statistics collected by the Federal Sentencing Commission prove that the guidelines are "not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* at 10.

The 4th Circuit has held it is appropriate to authorize a second or successive § 2255 motion in career offender cases because the holding in *Johnson* regarding ACCA's residual clause applies to the similar language in the Sentencing Guidelines. *In re Hubbard,* 2016 WL 3181417 (4th Cir. June 8, 2016. In *Hubbard,* the Fourth Circuit granted Mr. Hubbard's request to file a successive § 2255 because "application of *Johnson*…might render the career-offender residual clause that was applicable at the time…unconstitutional, and because the rule in *Johnson* is substantive with

respect to its application to the Sentencing Guidelines and therefore applies retroactively." *Hubbard* at *7.

The 3rd, 6th, and 10th Circuits have applied *Johnson* to invalidate the Guidelines' residual clause. *United States v. Townsend,* No. 14-3652, 2015 WL 9311394, at *4 & n.14 (3rd Cir. Dec. 23, 2015)("We are guided…by our own circuit precedent interpreting the residual clauses in the Guidelines and the ACCA in light of their identical wording and by the Government's concession that Townsend should be resentenced"); *United States v. Pawlak,* No. 15-3566 (6th Cir. May 13, 2016)("In our view, *Johnson's* rationale applies with equal force to the Guidelines' residual clause"); *United States v. Madrid,* 805 F.3d 1211 (10th Cir. 2015)("If one iteration of the clause is unconstitutionally vague, so too is the other").

The 2nd, 7th, and 8th Circuits have accepted the government's concession that *Johnson* applied to the Guidelines and remanded for resentencing. *United States v. Maldonado,* No. 12-3487-cr, 2016 WL 229833, at *3 (2nd Cir. Jan. 20, 2016) (proceeding "on the assumption that the Supreme Court's reasoning with respect to the ACCA's residual clause applies to the identically worded Guideline §4B1.2(a)(2)'s residual clause"); *Ramirez v. United States,* 799 F.3d 845, 856 (7th Cir. 2015)("We proceed on the assumption that the Supreme Court's reasoning applies to section 4B1.2 as well"); *United States v. Taylor,* 803 F.3d 931 (8th Cir. 2015) (per curiam).

The 1st, 6th, 7th, 8th, and 11th Circuits have all held that the ACCA's residual clause and the Guideline's residual clause must be interpreted in the same way, and have applied decisions interpreting the two provisions interchangeably. *United States v. Velazquez,* 777 F.3d 91, n.1 (1st Cir. 2015); *United States v. Travis,* 747 F.3d 1312, n.2 (11th Cir. 2014); *United States v. Boose,* 739 F.3d 1185, 1187 n.1 (8th Cir. 2014); *United States v. Meeks,* 664 F.3d 1067, n.1 (6th Cir. 2012); *United States v. Griffin,* 652 F.3d 793, 802 (7th Cir. 2011).

The vagueness of the residual clause in the guidelines and in the ACCA both alters the range of conduct and class of persons that the law seeks to punish. The ruling in *Johnson* applies to the guidelines, is substantive, and applies to collateral review.

III. Conclusion

Mr. Buckner's release date for his original sentence is December 31, 2018. He has been incarcerated since 2000, and has already served over 193 months. He was 33 years old when his PSR was written, and he is now 48 years old. He asks this Court to grant him the time served sentence he is eligible for.

Respectfully submitted,

/s/ Alicia Vachira Penn
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June 28, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Elwood Buckner,	)	
	)	Case No.: 2:00-cr-398-PMD
Petitioner,	)	
	)	**ORDER**
v.	)	
	)	
United States of America,	)	
	)	
Respondent.	)	
	)	

John Elwood Buckner, a federal prisoner, moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 384). The United States ("Government") has filed a motion to dismiss or, in the alternative, for summary judgment (ECF No. 387). For the reasons stated herein, the Court transfers Buckner's § 2255 motion to the United States Court of Appeals for the Fourth Circuit.

In October 2001, Buckner pled guilty to one count of conspiring to distribute controlled substances. *See* 21 U.S.C. § 846. The Court sentenced Buckner the following April. At sentencing, the Court determined Buckner had at least two prior felony convictions for crimes of violence and thus was a career offender under the United States Sentencing Guidelines. *See* U.S.S.G. §§ 4B1.1, 4B1.2(a) (2000). Applying the career-offender sentencing enhancement, the Court sentenced Buckner to 250 months in prison.

In March 2005, Buckner filed a *pro se* § 2255 motion, alleging his sentence was unconstitutional under authorities such as *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). On the Government's motion, this Court dismissed Buckner's § 2255 motion as untimely. *See Buckner v. United States*, No. 2:05-cv-705-

PMD, slip op. (D.S.C. Nov. 10, 2005), *appeal dismissed sub nom. United States v. Buckner*, 167 F. App'x 979 (4th Cir. 2006) (per curiam).

This time aided by counsel, Buckner filed the instant § 2255 motion in April 2016. Buckner contends that his career-offender designation is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Government contends that Buckner's § 2255 motion is untimely, that career-offender designations may not be challenged in § 2255 proceedings, and that *Johnson* is not retroactively applicable to attacks of career-offender designations.

At this time, the Court cannot address either side's arguments. Before a district court can entertain a "second or successive" § 2255 motion, the court of appeals must issue an order authorizing the district court to consider such a motion. 28 U.S.C. §§ 2244(b), 2255(h). A § 2255 motion attacking a particular sentence is successive if it is filed after an earlier § 2255 motion attacking that same sentence was denied on the merits. *See, e.g.*, *Anderson v. Holland*, No. 2:13-cv-1115-JFA-BHH, 2013 WL 4496073, at *5 (D.S.C. Aug. 20, 2013) ("To be considered successive, the second or subsequent petition must be a second attack on the same [sentence], and the first petition must have been finally adjudicated on the merits."). This Court's order dismissing Buckner's first § 2255 motion as untimely constitutes denial on the merits. *See White v. United States*, 53 F. Supp. 3d 830, 834 (D.S.C. 2014) (stating "[t]he dismissal of a first § 2255 motion as untimely constitutes an adjudication on the merits" and collecting cases), *appeal dismissed*, 622 F. App'x 227 (4th Cir. 2015) (per curiam). Thus, Buckner's current § 2255 motion is successive. Nothing in the record indicates that the Fourth Circuit has authorized review.

When a district court receives an unauthorized successive § 2255 motion, it "must either dismiss the motion for lack of jurisdiction or transfer it to" the Fourth Circuit so that court can

"perform [its] gatekeeping function under § 2244(b)(3)." *United States v. Winestock*, 340 F.3d 200, 207 (4th Cir. 2003). Between the Fourth Circuit's recent order addressing *Johnson*'s potential retroactive application to collateral attacks on career-offender designations, *see In re Hubbard*, No. 15-276, 2016 WL 3181417 (4th Cir. June 8, 2016), and the statute-of-limitations issue that dismissal might create, the Court finds that transfer is the more just option in this instance.

It is therefore **ORDERED** that the Clerk transfer Buckner's current § 2255 motion to the Fourth Circuit. This Court will hold this matter in abeyance pending the Fourth Circuit's decision.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

July 7, 2016
Charleston, South Carolina

FILED: July 26, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-9960
(2:00-cr-00398-PMD-2)

In re: JOHN ELWOOD BUCKNER,

Movant.

O R D E R

John Elwood Buckner has filed a motion pursuant to 28 U.S.C. §§ 2244(b), 2255(h) (2012) for authorization to file a second or successive 28 U.S.C. § 2255 (2012) motion. Buckner has made a prima facie showing that the new rule of constitutional law announced in Johnson v. United States, 135 S. Ct. 2551 (2015), and held to apply retroactively to cases on collateral review by Welch v. United States, 136 S. Ct. 1257 (2016), may apply to his case. See In re Hubbard, __ F.3d __, No. 15-276, 2016 WL 3181417 (4th Cir. June 8, 2016). We grant authorization for Buckner to file a second or successive § 2255 motion, thus permitting consideration of the motion by the district court in the first instance. We express no view as to the timeliness of a § 2255 motion filed pursuant to this grant of authorization.

Entered at the direction of the panel: Judge Shedd, Judge Duncan, and Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Elwood Buckner,	)	
	)	Case No.: 2:00-cr-398-PMD-2
Petitioner,	)	
	)	**ORDER**
v.	)	
	)	
United States of America,	)	
	)	
Respondent.	)	
	)	

John Elwood Buckner, a federal prisoner, moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 384). The United States ("Government") has filed a motion to dismiss or, in the alternative, for summary judgment (ECF No. 387). For the reasons stated herein, the Court denies the Government's motion and orders additional briefing.

In October 2001, Buckner pled guilty to one count of conspiring to distribute controlled substances. *See* 21 U.S.C. § 846. The Court sentenced Buckner the following April. At sentencing, the Court determined Buckner had at least two prior felony convictions for crimes of violence and thus was a career offender under the United States Sentencing Guidelines. *See* U.S.S.G. §§ 4B1.1, 4B1.2(a) (2000). Applying the career-offender sentencing enhancement, the Court sentenced Buckner to 250 months in prison.

In March 2005, Buckner filed a *pro se* § 2255 motion, alleging his sentence was unconstitutional under authorities such as *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). On the Government's motion, this Court dismissed Buckner's § 2255 motion as untimely. *See Buckner v. United States*, No. 2:05-cv-705-PMD, slip op. (D.S.C. Nov. 10, 2005), *appeal dismissed sub nom. United States v. Buckner*, 167 F. App'x 979 (4th Cir. 2006) (per curiam).

This time aided by counsel, Buckner filed the instant § 2255 motion on April 8, 2016.[1] In his motion, Buckner contends that after *Johnson v. United States*, 135 S. Ct. 2551 (2015), his career-offender designation is unconstitutional and therefore he must be resentenced to a shorter prison term.

The Government seeks dismissal on three grounds unrelated to the merits. It contends that (1) Buckner's § 2255 motion is untimely; (2) Buckner cannot use § 2255 to challenge a Guidelines enhancement; and (3) *Johnson* is not retroactively applicable to Guidelines challenges on collateral review. The Court finds that the Fourth Circuit's decision in *In re Hubbard* undercuts those arguments. *See* No. 15-276, 2016 WL 3181417, at *4, 7 (4th Cir. June 8, 2016). Because the Government asserts no other grounds for dismissal, the Court **DENIES** its motion.

The pre-sentence report prepared for Buckner's sentencing included several felony convictions in Maryland that supported Buckner's career-offender designation. Buckner contends that three of those convictions—second-degree rape, assault with intent to murder, and battery—can no longer constitute predicate "crimes of violence" under § 4B1.2(a), and that once those convictions are disregarded, he does not have enough predicate offenses to be deemed a career offender.

Buckner's attack on the three convictions is two-pronged. He first contends, and the Government appears to agree, that those three convictions cannot validly fall under the residual clause in § 4B1.2(a)(2) because it is unconstitutionally vague. Second, Buckner argues that none of the three convictions fits within the remaining portions of § 4B1.2(a). The Government has

1. Buckner filed the motion without first obtaining the Fourth Circuit's authorization. *See* 28 U.S.C. §§ 2244(b), 2255(h). Finding the motion to be "second or successive," *see id.*, this Court concluded it lacked jurisdiction over the motion and transferred the matter to the Fourth Circuit so that an authorization decision could be made. On July 26, 2016, the Fourth Circuit granted Buckner authorization to proceed with the instant § 2255 motion in this Court.

not yet offered its view on that question. The Court therefore **ORDERS** the Government to submit a brief addressing the merits of whether the three convictions at issue constitute crimes of violence under the remaining portions of § 4B1.2(a). The Government's brief shall be filed no later than August 31, 2016. Any response Buckner may wish to file shall be due seven days after the Government files its brief.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

August 19, 2016
Charleston, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA	)	Criminal Number: 2:00-398
	)	
	)	**GOVERNMENT'S SUPPLEMENTAL**
-versus-	)	**RESPONSE AND MOTION TO STAY**
	)	
	)	
JOHN ELWOOD BUCKNER	)	

The United States of America, by its undersigned counsel, moves this Court to stay the pending 28 U.S.C. § 2255 petition until the matter of *Beckles v. United States* (S.Ct. No. 15-8544) is resolved. The Defendant was indicted on May 10, 2000 (Docket Entry #1). An enhancement pursuant to 21 U.S.C. §851 was filed on October 7, 2001. (Docket Entry #181). The Defendant pled guilty on October 17, 2001. (Docket Entry #192). The Defendant was sentenced to a term of imprisonment of 250 months on April 8, 2002. (Docket Entry #221, #222). The Judgment and Conviction was filed on April 9, 2002. (Docket Entry #222). On December 23, 2013 the Defendant made a motion to reduce his sentence. (Docket Entry #379). This was denied on January 6, 2014. (Docket Entry #381). On April 8, 2016, he filed this §2255 motion. (Docket Entry #384). The government responded and noted that the Fourth Circuit held that an erroneous application of the sentencing guidelines, including a career offender designation, is not cognizable on collateral review pursuant to § 2255. *See United States v. Foote*, 784 F.3d 931, 936 (4th Cir. 2015); *see also Gause v. United States*, 2016 WL 775298, at * 2 (D.S.C. 2016); *Syndab v. United States*, 2016 WL 562099, at * 2 (D.S.C. 2016).[1]

[1] In fact, that holding is binding on the District Court. *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); see also, e.g., *United States v. Spinks*, 770 F.3d 285, 289-90 (4th Cir. 2014).

On June 27, 2016, the United States Supreme Court granted certiorari to decide whether the holding in *Johnson v. United States*, 135 S.Ct. 2551 (2015), applies to the residual clause of the career offender guideline [U.S.S.G. § 4B1.2(a)(2)] and if so, whether it applies retroactively on collateral review. The Fourth Circuit has recently noted that the application of *Johnson* to the career offender guideline remains undecided in this Circuit. *United States v. Coulter*, No. 14-4271, 2016 WL ___, fn. * (4th Cir. July 5, 2016) (*per curiam unpublished opinion*) ("This court has not yet determined whether the holding in *Johnson* similarly invalidates the residual clause in USSG § 4B1.2(a)(2)); *but see In re Hubbard*, No. 15-276, 2016 WL 3181417 (4th Cir. June 8, 2016) (concluding that Hubbard made a prima facie showing that the Supreme Court's decision in *Johnson* could apply to 18 U.S.C. § 16(b)).");[2] *see also United States v. Duckett*, 8:13-00264-HMH, ECF# 39 (D.S.C. June 28, 2016) ("The United States Court of Appeals for the Fourth Circuit has not decided whether *Johnson* applies to the U.S.S.G.").

In Buckner's motion to vacate the judgment in this case and correct his sentence, he argues that he no longer qualifies as a career offender under United States Sentencing Guideline § 4B1.1. Specifically, Buckner argues that his Maryland convictions for 2nd degree rape (1986), assault with intent to murder and robbery with a deadly weapon (1988) and battery (1990) cannot be classified as crimes of violence under the career offender guideline.[3] In light of the fact that

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2 The *Coulter* opinion is attached hereto as **Exhibit A** in accordance with Local Civil Rule 7.05.

3 The Court instructed the government to assert whether the three convictions at issue constitute crimes of violence under the remaining portions of § 4B1.2(a). With regard to the 1990 simple battery conviction, it may well be that this would not count. *See United States v. Royal*, 731 F.3d 333, 341-342 (4th Cir. 2013) (Maryland's second degree assault offense from 1997 could not be a predicate offense under the ACCA because it did not comport with the ACCA's definition of a "violent felony"); *United States. v. Vinson*, 794 F.3d 418, 430 n.12 (4th Cir. 2015) (Even if the completed-battery form of assault did have alternate elements under Maryland law, the offense

the *Beckles* decision will have a significant impact on the issue in the case, the undersigned respectfully requests that this matter be stayed pending the Supreme Court's decision. Other courts within this district have stayed § 2255 petitions challenging career offender designations. *See United States v. Deonta Carpenter*, 3:07-cr-1521-JFA; *United States v. Andre Jerome Brice*, 3:12-cr-850-CMC; *United States v. Nicholas Mason*, 4:07-cr-01423-RBH; *United States v. Allen Dashun Sheppard*, 8:11-cr-816-HMH; *United States v. Irvin Maurice Hazel*, 2:05-722-DCN; *United States v. Kendrick Nygel Ford*, 3:08-cr-00538-JFA. Therefore, a stay of Allen's § 2255 petition pending the Supreme Court's decision in *Beckles* is also appropriate here.

Additionally, the United States of America moves this Court to stay its current response deadline in the pending 28 U.S.C. § 2255 petition until the Court rules upon the government's request to stay the entire § 2255 petition.[4]

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still would not have been divisible in *United States v. Aparicio–Soria,* 740 F.3d 152, 154–55 (4th Cir. 2014) because there would be no matching category, since battery can be predicated on an "offensive touching" not amounting to violent force.). The rape conviction may or may not count. *See United States v. Chacon*, 533 F.3d 250 (4th Cir. 2008) (Maryland second-degree rape offense did not have "as an element the use, attempted use, or threatened use of physical force," and so did not fall within § 2L1.2's "force clause" but it nevertheless qualified as a "forcible sex offense [ ]" within the meaning of § 2L1.2 application note); but *see United States v. Snell*, 789 F.3d 335 (4th Cir. 2015). Finally, the assault with intent to murder and robbery with a deadly weapon should count. *United States v. Battle*, 494 Fed.Appx. 404 (4th Cir. 2012) (concluding that his 1991 Maryland conviction for assault with intent to murder categorically qualifies as a violent felony); *United States v. Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) (holding that Maryland common law robbery was a "crime of violence" under the force clause of the career offender provision in the sentencing guidelines). Therefore, the Defendant would likely be a career offender. The government respectfully requests additional time to make a determination as to whether or not these convictions all constitute crimes of violence and therefore respectfully reserves the right to further brief these convictions.

4 While the government requests a stay in the briefing pending resolution of the stay of the petition, this Court has the inherent power to rule on the stay of the petition without briefing from the opposing party. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) ("A motion to stay proceedings is not expressly provided for by the Federal Rules of by statute, although a district court has the inherent discretion to recognize such a motion under its general equity powers."); *Crown Cent. Petroleum Corp. v. Dep't of Energy*, 102 F.R.D. 95, 98

Respectfully,

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September 21, 2016

(D. Md. 1984) ("A federal court has inherent power to stay, *sua sponte*, an action before it.") (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

John Elwood Buckner, Petitioner, v. United States of America, Respondent.	)	Case No.: 2:00-cr-398-PMD-2 **ORDER**

John Elwood Buckner, a federal prisoner, moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 384). The United States ("Government") has filed a motion to stay (ECF No. 399). For the reasons stated herein, the Court grants the Government's motion.

In October 2001, Buckner pled guilty to one count of conspiring to distribute controlled substances. *See* 21 U.S.C. § 846. At sentencing, the Court determined Buckner had at least two prior felony convictions for crimes of violence and thus was a career offender under the United States Sentencing Guidelines. *See* U.S.S.G. §§ 4B1.1, 4B1.2(a) (2000). Applying the career-offender sentencing enhancement, the Court sentenced Buckner to 250 months in prison.

In March 2005, Buckner filed a *pro se* § 2255 motion, alleging his sentence was unconstitutional under authorities such as *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). On the Government's motion, this Court dismissed Buckner's § 2255 motion as untimely. *See Buckner v. United States*, No. 2:05-cv-705-PMD, slip op. (D.S.C. Nov. 10, 2005), *appeal dismissed sub nom. United States v. Buckner*, 167 F. App'x 979 (4th Cir. 2006) (per curiam).

This time aided by counsel, Buckner filed the instant § 2255 motion on April 8, 2016.[1] In his motion, Buckner contends that after *Johnson v. United States*, 135 S. Ct. 2551 (2015), his career-offender designation is unconstitutional and therefore he must be resentenced to a shorter prison term.

Initially, the Government moved for dismissal on three grounds unrelated to the merits. On August 19, the Court denied the Government's motion and ordered the Government to submit a brief addressing whether Buckner's prior convictions constitute crimes of violence under the force clause or the enumerated-offense clause of U.S.S.G § 4B1.2(a). Instead of filing such a brief, the Government filed its motion to stay.

The Supreme Court is currently poised to decide whether *Johnson*'s holding extends to § 4B1.2(a)(2) and whether *Johnson* applies retroactively to collateral challenges of sentences enhanced under § 4B1.2(a)(2)'s residual clause. *See Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015) (per curiam), *cert. granted*, 2016 WL 1029080 (U.S. June 27, 2016) (No. 15-8544). The Government contends the Supreme Court's decision in *Beckles* will affect the outcome of Buckner's § 2255 motion and therefore this Court should stay proceedings until that decision is issued.

Beckles will affect the outcome here only if no more than one of Buckner's prior convictions qualifies as a crime of violence under § 4B1.2(a)(2)'s other clauses. That, in essence, is the issue that the Court asked the Government to brief. In a footnote to its motion to stay, the Government has suggested some of Buckner's convictions "may well" no longer qualify

1. Buckner filed the motion without first obtaining the Fourth Circuit's authorization. *See* 28 U.S.C. §§ 2244(b), 2255(h). Finding the motion to be "second or successive," *see id.*, this Court concluded it lacked jurisdiction over the motion and transferred the matter to the Fourth Circuit so that an authorization decision could be made. On July 26, 2016, the Fourth Circuit granted Buckner authorization to proceed with the instant § 2255 motion in this Court.

or "may or may not" qualify, but it would like additional time to make a final determination of its position on the issue. (Mot. Stay, ECF No. 399, at 2–3 n.3.)

Because Buckner has not opposed the Government's requests, the Court will stay this matter pending a decision in *Beckles*, and it will allow the Government additional time to submit a brief. If the Government determines its position is that Buckner's career-offender designation would survive even a defense-friendly decision in *Beckles*, it shall file a brief so stating before the *Beckles* decision is issued.

AND IT IS SO ORDERED.

PATRICK MICHAEL DUFFY
United States District Judge

October 13, 2016
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America,	)	CRIMINAL NO. 2:00-398
	)	
v.	)	
	)	
	)	**Motion for Reconsideration**
John Elwood Buckner	)	
	)	
	)	
_____	)	

Mr. Buckner asks this Court to reconsider its order dismissing his motion to vacate his sentence under 28 U.S.C. § 2255.

Mr. Buckner filed his motion to vacate his sentence under 28 U.S.C. § 2255 on April 8, 2016 and claimed relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). In June this Court stayed the matter pending the Supreme Court's decision in *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015), *cert. granted*, 2016 WL 1029080 (U.S. June 27, 2016) (No. 15-8544). Once *Beckles* was decided in March, this Court lifted its stay and denied Mr. Buckner's motion on the ground that *Beckles* "squarely rejected" the argument that the residual clause of U.S.S.G § 4B1.2(a)(2) is void for vagueness. (ECF No. 401). In its denial, this Court also declined to issue a certificate of appealability. *Id.*

This denial overstates the reach of *Beckles.* The holding of *Beckles* is "that the **advisory** Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that §4B1.2(a)'s residual clause is not void for vagueness." 2017 WL 855781, at *__. (emphasis added). Mr. Buckner was sentenced on June 9, 2002 to a term of 250 months. (ECF

No. 222). At this point in time, the guidelines were mandatory. It was not until 2005, when *United States v. Booker* was decided, that the guidelines became advisory. 543 U.S. 220, 245 (2005).

Beckles distinguishes and separates the advisory Guidelines from the Armed Career Criminal Act by pointing out

> [u]nlike the ACA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause

2017 WL 855781, at *__. The same justification does not hold for cases pre-*Booker*, when the guidelines were mandatory, and not advisory. Thus, Mr. Buckner's claim is still cognizable after *Beckles*. He asks this Court to reconsider its decision, order the government to brief its argument on whether Mr. Buckner's prior convictions can be classified as crimes of violence under the career offender guideline, and then rule accordingly.

Respectfully submitted,

s/ *Alicia Vachira Penn*

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March 17, 2017

FILED: August 16, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6498
(2:00-cr-00398-PMD-2)
(2:16-cv-01098-PMD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHN ELWOOD BUCKNER, a/k/a Bear, a/k/a John Branch

Defendant - Appellant

O R D E R

For reasons appearing to the court, this case is placed in abeyance pending a decision by this court in United States v. Thilo Brown, No. 16-7056, which was heard at oral argument on May 11, 2017.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk