

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM LEM POSEY, II,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX A:

Opinion of the Sixth Circuit Court of Appeals in Petitioner-Appellant's case
William Lem Posey, II, v. United States of America
Appeal No. 17-6374

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 17-6374, *William Posey, II v. USA*
Originating Case No. : 3:16-cv-01503 : 3:94-cr-00096-1

Dear Counsel and Mr. Holley:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti
Case Manager
Direct Dial No. 513-564-7012

cc: Mr. Keith Throckmorton

Enclosure

No mandate to issue

No. 17-6374

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM LEM POSEY, II,)
Petitioner-Appellant,)
v.) OR D E R
UNITED STATES OF AMERICA,)
Respondent-Appellee.)

William Lem Posey, II, a federal prisoner proceeding through counsel, appeals the district court's order denying his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. This court construes Posey's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2).

In 1998, Posey pleaded guilty to armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and attempted escape from federal custody, in violation of 18 U.S.C. § 751(a). Posey's presentence report assigned him a career-offender enhancement. *See* USSG § 4B1.1. The district court sentenced Posey to a 188-month term of imprisonment. He did not appeal.

In 2016, Posey, proceeding through counsel, filed the current § 2255 motion arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), his career-offender designation was no longer valid. In *Johnson*, the Supreme Court held that the residual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. Posey was not sentenced under the ACCA but argued that the residual clause of the definition of crime of violence in USSG § 4B1.2 was subject to a similar vagueness challenge and that his convictions

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for armed bank robbery and attempted escape could not count towards his career-offender designation in light of the alleged invalidity of section 4B1.2's residual clause. In response, the government argued that Posey's motion was barred by § 2255's one-year limitations period. *See* 28 U.S.C. § 2255(f).

The district court denied Posey's motion. The court recognized that, in *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court determined that the guidelines are not subject to vagueness challenges, *see id.* at 890. The district court noted, however, that *Beckles* was not dispositive of Posey's motion because Posey was sentenced when the guidelines were mandatory, prior to *United States v. Booker*, 543 U.S. 220 (2005). *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) (noting that the majority's opinion "leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [Booker] . . . may mount vagueness attacks on their sentences"). Although the district court found that *Beckles* did not resolve Posey's claim, the court found the claim to be untimely. The court therefore denied Posey's motion and declined to issue a COA.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA from the denial of a motion to vacate on procedural grounds, an applicant must show that reasonable jurists would find it "debatable whether the petitioner states a valid claim of the denial of a constitutional right" and "would find it debatable whether the district court was correct in its procedural ruling." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate whether the district court was correct in finding that Posey's motion was time-barred. Actions arising under § 2255 have a one-year limitations period, with the period ordinarily commencing on the date on which the movant's judgment became final. *See* 28 U.S.C. § 2255(f)(1). Because Posey did not appeal his sentence, his

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judgment became final when his time for pursuing a direct appeal expired. *See Sanchez-Castellano v. United States*, 358 F.3d 424, 427 (6th Cir. 2004). Posey's judgment therefore became final in 1998, long before he filed the current motion in 2016. To the extent that Posey relied on a right that "has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," however, his motion could have been timely. 28 U.S.C. § 2255(f)(3). But *Johnson* did not create such a right for federal habeas petitioners, like Posey, who maintain that the pre-*Booker* mandatory guidelines are unconstitutional. *See Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017) (holding that, because the constitutionality of the pre-*Booker* mandatory guidelines after *Beckles* "is an open question," *Johnson* did not recognize a new right for petitioners attacking the constitutionality of the pre-*Booker* guidelines). Posey has not otherwise clearly identified any basis on which his motion was timely. Accordingly, reasonable jurists would not debate whether the district court was correct in dismissing Posey's motion as untimely. *See Slack*, 529 U.S. at 484.

For the foregoing reasons, Posey's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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APPENDIX B:

Order of the U.S. District Court,
Middle District of Tennessee,
in Petitioner-Appellant's case,
William Lem Posey, II, v. United States
No. 16-0150321

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIAM LEM POSEY, II,

Petitioner,

v.

Criminal Case Number 94-00096
Civil Case Number 16-01503
Honorable David M. Lawson

UNITED STATES OF AMERICA,

Respondent.

ORDER DENYING MOTION TO VACATE SENTENCE

The petitioner was sentenced on October 11, 1996 to a prison term of 188 months following his guilty plea to armed bank robbery and attempted escape from federal custody. 18 U.S.C. § 2113(a) and (d) and 18 U.S.C. § 751(a). His sentencing guideline range was determined by the career offender provisions of the Sentencing Guideline Manual, U.S.S.G. § 4B1.1 (2003). The petitioner previously had committed at least two crimes of violence, as defined by the Sentencing Guideline Manual as either a crime that “has as an element the use, or attempted use, or threatened use of physical force against” another person, or “involves conduct that presents a serious potential risk of physical injury to another.” *See* 4B1.2(a)(1), (2) (2003).

On June 22, 2016, Posey filed a motion to vacate his sentence under 28 U.S.C. § 2255. In his motion, he argues that he is entitled to resentencing under the rule announced by the Supreme Court in *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551 (2015), which was made retroactive to cases on collateral review by its decision in *Welch v. United States*, --- U.S. ---, 136 S. Ct. 1257, 1268 (2016). In *Johnson*, the Supreme Court held that a similar phrase in the Armed Career Criminal Act (ACCA) — which defined a violent felony as a crime that “involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii), known

as the “residual clause”—was unconstitutionally vague, and therefore “an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution’s guarantee of due process.” *Johnson*, 135 S. Ct. at 2555-56.

The petitioner, of course, was not sentenced under the ACCA. But he argues that his sentencing guideline range calculation — and therefore his sentence — was defective, because the definitional language in U.S.S.G. § 4B1.2(a)(2) used in his career offender determination is nearly identical to the ACCA’s residual clause found unconstitutional in *Johnson*. And on May 13, 2016, the Sixth Circuit held that the *Johnson* rationale applied with equal force to the residual clause in U.S.S.G. § 4B1.2(a)(2). *United States v. Pawlak*, 822 F.3d 902, 907 (6th Cir. 2016).

Pawlak, however, no longer helps the petitioner’s cause. The Supreme Court held recently that the *advisory* sentencing guidelines are not subject to the vagueness challenge identified in *Johnson*, because, unlike the ACCA, “the *advisory* Guidelines do not fix the permissible range of sentences.” *Beckles v. United States*, --- U.S. ---, 137 S. Ct. 886, 892, 897 (2017), *abrogating* *United States v. Pawlak*, 822 F.3d 902 (6th Cir. 2016).

But *Beckles* does not answer the question posed in this case, because the Court’s reasoning is premised on the *advisory* nature of the Sentencing Guidelines. In 2005, the Court declared the Guidelines *advisory* — where they previously had been considered mandatory — in *United States v. Booker*, 543 U.S. 220, 245 (2005). Posey was sentenced in 1996, when the sentencing guidelines were “binding on district courts.” *Beckles*, 137 S. Ct. at 894. The *Beckles* Court made clear that its decision declared “only that the *advisory* Sentencing Guidelines . . . are not subject to a challenge under the void-for-vagueness doctrine.” *Id.* at 895 (emphasis added). Indeed, Justice Sotomayor noted in her concurrence that the Court left “open the question whether defendants sentenced to

terms of imprisonment before our decision in [*Booker*] — that is, during the period in which the Guidelines did fix the permissible range of sentences, may mount vagueness attacks on their sentences.” *Id.* at 903.

However, there is yet another obstacle between the petitioner and the merits of his argument that the career offender’s residual clause is unconstitutional: section 2255’s statute of limitations. That one-year statute of limitations is measured from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Because the petitioner did not appeal his 1996 conviction or sentence, it became “final” fourteen days after the judgment was entered, Fed. R. App. P. 4(b)(1); *Sanchez-Castellano v. United States*, 358 F.3d 424, 427-28 (6th Cir. 2004); his motion was filed well beyond one year after that date. The only other provision that could apply is subsection (3). To trigger that section, the motion must be based on a “right” that was “newly recognized by the Supreme Court” within one year of the motion’s filing date, and that right must have been “made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3). For most challenges to pre-*Booker* sentences based on an attack against the career offender provisions of the Guidelines, however, the Sixth Circuit has foreclosed that avenue as well.

In *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017), the court observed that, according to the Supreme Court, whether the pre-*Booker* guidelines are subject to vagueness challenges is an open question. And “[b]ecause it is an open question, it is not a ‘right’ that ‘has been newly recognized by the Supreme Court’ let alone one that was ‘made retroactively applicable to cases on collateral review.’” *Id.* at 630 (quoting 28 U.S.C. § 2255(f)(3)). “In other words, “[b]ecause the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague — and did not do so in *Johnson*,” subsection (f)(3) will not restart the one-year clock. *Id.* at 630.

The petitioner’s motion to vacate his sentence was filed out of time and must be denied for that reason.

Accordingly, it is **ORDERED** that the motion to vacate sentence [dkt. #1] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge
Sitting by special designation

Dated: October 18, 2017