A P P E N D I X

APPENDIX

A-1

No. 15-2040

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: ROGER CLAY SWAIN,

Movant.

O R D E R

Before: GUY, MOORE, and McKEAGUE, Circuit Judges.

Roger Clay Swain, a federal prisoner proceeding pro se, moves this court for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h).

In 2003, Swain pleaded guilty to possession with intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Swain as a career offender to 262 months of imprisonment. Swain did not appeal.

In 2005, Swain filed a pleading construed as a 28 U.S.C. § 2255 motion, in which he challenged his sentence in light of *United States v. Booker*, 543 U.S. 220, 245 (2005). The district court denied the § 2255 motion as being without merit. Swain did not appeal. Subsequently, Swain filed a petition for a writ of audita querela, again arguing that he was entitled to resentencing in light of *Booker*. The district court denied the petition. Swain also filed several unsuccessful motions seeking a reduction of his sentence.

In August 2015, Swain filed a motion for an order authorizing the district court to consider a second or successive § 2255 motion, arguing that his sentence is invalid in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He argues that his prior Michigan conviction for assault with intent to rob while being armed, under Michigan

Compiled Laws ("MCL") § 750.89, no longer qualifies as a crime of violence as defined by United States Sentencing Guidelines ("USSG") § 4B1.2.

Before we may grant a request to file a second or successive § 2255 motion, the movant must show:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Swain's reliance on *Johnson* meets the second requirement for obtaining authorization to file a second or successive § 2255 motion. He argues that his prior conviction for assault with intent to rob while being armed in violation of M.C.L. § 750.89 no longer qualifies as a crime of violence because the holding in *Johnson* invalidates the residual clause of USSG § 4B1.2. He also argues that the record does not reflect that he actually used or threatened to use a firearm, knife, or destructive device.

The career offender sentence enhancement applies if a defendant was at least 18 years old when he committed the underlying offense, the offense is a felony "crime of violence," and he has been convicted of at least two prior felony "crime[s] of violence." USSG § 4B1.1(a). A crime of violence is defined as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," (2) is arson, burglary of a dwelling, extortion, or involves the use of explosives, or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a). The third clause is known as the "residual clause." In *Johnson*, 135 S. Ct. at 2563, the Supreme Court held that the identically worded residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. *Compare* USSG § 4B1.2(a)(2) *with* 18 U.S.C. § 924(e)(2)(B).

The government argues that *Johnson* does not apply to Swain's case because he was not sentenced under the ACCA, and *Johnson* did not announce a new rule of constitutional law when

applied to the guidelines. However, this court has previously interpreted both residual clauses identically. *See, e.g.*, *United States v. Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999). Furthermore, although *Johnson* addressed only the residual clause of the ACCA, this court has applied its holding to the residual clause of § 4B1.2(a)(2). *See, e.g.*, *United States v. Harbin*, 610 F. App'x 562, 563 (6th Cir. 2015) (per curiam); *United States v. Darden*, 605 F. App'x 545, 546 (6th Cir. 2015) (per curiam). Therefore, *Johnson* is applicable to Swain's case. A claim based on *Johnson* may warrant the filing of a second or successive § 2255 motion because that case announced a new, previously unavailable, and retroactively applicable rule of constitutional law. *See In re Watkins*, 810 F.3d 375, 383-84 (6th Cir. 2015). Because the record does not reflect that Swain's prior conviction would still qualify as a crime of violence under the remaining clauses of § 4B1.2, he is entitled to pursue a claim that *Johnson* invalidates his sentence.

Accordingly, Swain's application for authorization to file a second or successive § 2255 motion to vacate his sentence is **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: February 22, 2016

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Re: Case No. 15-2040, *In re: Roger Swain*
Originating Case No. : 2:05-cv-10062 : 1:03-cr-20031-1

Dear Counsel and Mr. Swain:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Leon T. Korotko
Case Manager
Direct Dial No. 513-564-7014

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

A-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROGER CLAY SWAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

Criminal Case Number 03-20031
Civil Case Number 16-10911
Honorable David M. Lawson

ORDER DENYING MOTION TO VACATE SENTENCE

The petitioner was sentenced on February 24, 2004 to a prison term of 262 months following his guilty plea to distributing more than 50 grams of crack cocaine. 21 U.S.C. § 841(b)(1)(A)(iii) (2002). 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 a felony controlled substance offense. He also had committed a crime 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 March 11, 2016, Swain 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). Swain was sentenced in 2004, 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.

Because of the caselaw development since the petitioner's and government's motion papers were filed, the Court ordered the government to file a supplemental response to the petitioner's motion to vacate addressing whether the *mandatory* Sentencing Guidelines' residual clause in the career offender section was unconstitutionally vague under *Johnson*. The government filed its response and the petitioner filed a reply to the response. Viewing those filings, there is a fair argument that *Johnson*'s holding applies to the crime-of-violence definition in the pre-*Booker* guidelines.

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 2004 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. #49] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: September 26, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on September 26, 2017.

s/Susan Pinkowski
SUSAN PINKOWSKI

A-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROGER CLAY SWAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

Criminal Case Number 03-20031
Civil Case Number 16-10911
Honorable David M. Lawson

ORDER DENYING CERTIFICATE OF APPEALABILITY

The petitioner filed a motion under 28 U.S.C. § 2255 on March 11, 2016. On September 26, 2017, the Court entered an order denying that motion as untimely, because the Sixth Circuit has held that whether the mandatory Sentencing Guidelines are subject to a vagueness challenge is an open question. *Raybon v. United States*, --- F.3d ---, 2017 WL 3470389, at *2 (6th Cir. Aug. 14, 2017). Therefore, the Supreme Court has not announced a new rule of constitutional law made retroactive to matters on collateral review that would restart the one-year statute of limitations to file a motion to vacate under 28 U.S.C. § 2255. *Ibid*.

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, which was amended as of December 1, 2009:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Rule 11, Rules Governing Section 2255 Proceedings.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of appealability, "a 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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

The Court finds that reasonable jurists could not debate the Court's conclusion that the petitioner's motion to vacate is untimely, because the Sixth Circuit found that "the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague." *Raybon*, --- F.3d ---, 2017 WL 3470389, at *3. Therefore, the petitioner's motion is untimely and not subject to any exceptions under § 2255(f)(3). The Court therefore will deny a certificate of appealability.

Accordingly, it is **ORDERED** that a certificate of appealability is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: September 26, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on September 26, 2017.

s/Susan Pinkowski
SUSAN PINKOWSKI

A-4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: May 09, 2018

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Re: Case No. 17-2222, *Roger Swain v. USA*
Originating Case No. : 1:16-cv-10911 : 1:03-cr-20031-1

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Briston S. Mitchell
Case Manager
Direct Dial No. 513-564-7082

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

No. 17-2222

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER CLAY SWAIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
May 09, 2018
DEBORAH S. HUNT, Clerk

O R D E R

Roger Clay Swain, a federal prisoner represented by counsel, appeals a district court judgment dismissing his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The court construes the notice of appeal as a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

Less than one year before the Supreme Court held in *United States v. Booker*, 543 U.S. 220, 233 (2005), that the Sentencing Guidelines were advisory, Swain pleaded guilty to possessing with intent to distribute fifty grams or more of cocaine base. *See* 21 U.S.C. § 841(a)(1). The district court classified Swain under the then-mandatory Guidelines as a career offender, *see* USSG § 4B1.1(a), because of one prior "crime of violence"—a 1993 Michigan conviction for assault with intent to rob while armed—and a prior felony drug offense. On February 24, 2004, Swain was sentenced to 262 months in prison. He did not file a direct appeal in this court. He has filed one prior § 2255 motion.

In 2016, this court granted Swain's motion for an order authorizing the district court to consider a second or successive § 2255 motion that sought relief pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). *In re Swain*, No. 15-2040 (6th Cir. Feb. 22, 2016) (order).

In his pro se § 2255 motion, Swain asserted that his Michigan assault conviction, *see* Mich. Comp. Laws § 750.89, no longer qualified as a "crime of violence," *see* USSG § 4B1.2(a), in light of *Johnson*. In *Johnson*, the Supreme Court deemed unconstitutionally vague the Armed Career Criminal Act's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii) (2014), which extended the definition of a "violent felony" to include a felony that "involves conduct that presents a serious potential risk of physical injury to another." Section 4B1.2(a)(2) at all relevant times has contained an identical residual clause in its definition of "crime of violence."

The district court denied Swain's § 2255 motion, reasoning that it was untimely because more than one year had lapsed since the window for direct review of Swain's conviction had ended and no event had restarted the limitations period, such as a recognition by the Supreme Court that *Johnson* applies to the mandatory Guidelines. *See* 28 U.S.C. § 2255(f)(1), (f)(3); *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017). The district court declined to issue a COA.

An individual seeking a COA is required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), the Supreme Court explained:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

A prisoner must file a § 2255 motion within one year after the latest of certain events, including "the date on which the judgment of conviction becomes final" and "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." 28 U.S.C. § 2255(f)(1), (3).

Jurists of reason would agree that Swain's § 2255 motion is untimely. First, it was not filed within one year after the conclusion of direct review. *See* 28 U.S.C. § 2255(f)(1). At the time of Swain's conviction, a criminal defendant had ten days from the entry of judgment,

excluding weekends and holidays, to file a direct appeal in this court. *See* Fed. R. App. P. 4(b), 26(a)(2) (2003); *Sanchez-Castellano v. United States*, 358 F.3d 424, 427 (6th Cir. 2004). Consequently, Swain's opportunity to seek direct review ended March 9, 2004. Swain then had one year, i.e., until March 9, 2005, to file a § 2255 motion, but he did not do so. He instead waited eleven more years, until March 3, 2016, to file his § 2255 motion. Thus, his § 2255 motion is untimely under § 2255(f)(1).

Second, Swain did not file his § 2255 motion within one year of a right newly recognized by the Supreme Court. *See* 28 U.S.C. § 2255(f)(3). It "is an open question" whether the rule announced in *Johnson* applies to the mandatory Guidelines. *Raybon*, 867 F.3d at 629. "Because 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 § 2255(f)(3)). Thus, Swain's § 2255 motion cannot be deemed timely under § 2255(f)(3).

Accordingly, this court **DENIES** Swain's COA application.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk