FILED
United States Court of Appeals
Tenth Circuit

June 5, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC LAMONT JOHNSON,

Defendant - Appellant.

No. 17-2078
(D.C. Nos. 1:16-CV-00548-MV-CG and 1:03-CR-00477-MV-1)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Eric Johnson seeks a certificate of appealability (COA) to appeal the district court's orders denying his 28 U.S.C. § 2255 motion and his Federal Rule of Civil Procedure 59(e) motions. His appointed counsel also moves for leave to withdraw.[1] We deny Johnson's request for a COA to appeal the order denying his § 2255 motion, vacate the district court's order denying his Rule 59(e) motions, deny Johnson's

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* This order isn't binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

[1] After the district court denied his § 2255 motion, Johnson filed a notice of appeal through appointed counsel. But appointed counsel then moved for leave to withdraw, asserting that Johnson lacked any non-frivolous basis to appeal the district court's order. Because appointed counsel therefore played no role in preparing Johnson's request for a COA, we will liberally construe that request and Johnson's other pro se filings. But we won't act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

implied request for authorization to file a successive § 2255 motion, grant counsel's motion to withdraw, and dismiss this matter.

Background

Johnson pleaded guilty in federal district court to possessing a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). The district court found that Johnson was a career offender and increased his sentence pursuant to U.S.S.G. § 4B1.2(a)(2). Johnson filed a timely § 2255 motion, but the district court denied the motion, and we declined to grant Johnson a COA. *See United States v. Johnson*, 529 F. App'x 876 (10th Cir. 2013) (unpublished).

Three years later, Johnson sought permission to file a second or successive § 2255 motion. He argued that his sentence was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015), *abrogated by Beckles v. United States*, 137 S. Ct. 886 (2017). *Johnson* held that the residual clause of the Armed Career Criminal Act (ACCA) was unconstitutionally vague, 135 S. Ct. at 2563, and *Madrid* held that the residual clause in § 4B1.2(a)(2) of the Guidelines was also unconstitutionally vague, 805 F.3d at 1211. We granted Johnson's request, and a magistrate judge recommended granting Johnson's § 2255 motion.

After the magistrate judge issued her recommendation, the Supreme Court held in *Beckles* that "the advisory Guidelines are not subject to vagueness challenges." 137 S. Ct. at 890. In light of *Beckles*, the district court declined to adopt the magistrate judge's recommendation, denied Johnson's § 2255 motion, and declined

to grant Johnson a COA. Johnson filed a timely notice of appeal through counsel. Afterwards, Johnson submitted two pro se post-judgment motions, which we interpreted as timely Rule 59(e) motions. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."). As a result, we abated this appeal pending the district court's disposition of these motions. *See* Fed. R. App. P. 4(a)(4) (stating that notice of appeal "becomes effective" after post-judgment motions are disposed of).

The magistrate judge recommended denying both Rule 59(e) motions. The district court adopted the magistrate judge's recommendation, and Johnson filed a timely pro se notice of appeal.

Analysis

I. Johnson's § 2255 motion

To appeal the district court's order denying his § 2255 motion, Johnson must first obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). Doing so requires Johnson to "demonstrate that reasonable jurists would find the district court's assessment" of his motion "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Johnson fails to make this showing. No reasonable jurist could disagree with the district court's decision to deny Johnson's § 2255 motion. *See id.* In that motion, Johnson argued that § 4B1.2(a)(2) of the Guidelines is unconstitutionally vague, and therefore his sentencing enhancement was improper. But *Beckles* explicitly held that

the advisory Guidelines aren't subject to vagueness challenges. *See* 137 S. Ct. at 890. Thus, we decline to grant Johnson a COA on this basis.

II. Johnson's Rule 59(e) Motions

In Johnson's Rule 59(e) motions, he urged the district court to reconsider its decision to deny his § 2255 motion because, according to Johnson, his California conviction for voluntary manslaughter is no longer a crime of violence pursuant to the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

But this argument isn't within the scope of the second or successive § 2255 motion that we permitted Johnson to file. *See* § 2255(h); 28 U.S.C. § 2244(a)–(b). As such, the district court should have interpreted these Rule 59(e) motions, which raised new substantive challenges to Johnson's sentence, as successive § 2255 motions. *See United States v. Pedraza*, 466 F.3d 932, 934 (10th Cir. 2006) ("To the extent that the Rule 59(e) motion presented substantive argument reasserting a federal basis for relief from [defendant's] underlying conviction, the district court should have transferred the motion to this court as an additional request to file a second § 2255 motion."). Because the district court lacked jurisdiction to rule on Johnson's unauthorized successive § 2255 motions, we vacate the district court's ruling with respect to Johnson's Rule 59(e) motions. *See id.* at 933–34 (finding that Rule 59(e) motion constituted unauthorized second or successive § 2255 motion and vacating district court's order for lack of jurisdiction).

Nevertheless, although the district court lacked jurisdiction to rule on Johnson's Rule 59(e) motions, we elect to construe Johnson's notice of appeal

designating the order denying those motions "as an implied application to this court for leave to file a [successive] § 2255 motion." *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006); *cf. Spitznas v. Boone*, 464 F.3d 1213, 1219 (10th Cir. 2006) (stating that if "the district court has incorrectly treated a second or successive petition as a true Rule 60(b) motion and denied it on the merits, we will vacate the district court's order for lack of jurisdiction and construe the petitioner's appeal as an application to file a second or successive petition").

We will authorize a petitioner to file a second or successive § 2255 motion if the motion contains (1) "newly discovered evidence," or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h). Johnson's motions don't present new evidence. Nor do they cite a new rule of constitutional law that the Supreme Court has made retroactively applicable to cases on collateral review. Instead, Johnson's Rule 59(e) motions cite *Mathis*, which did not create a new rule of constitutional law. *See Mathis*, 136 S. Ct. at 2257 ("Our precedents make this a straightforward case. *For more than 25 years*, we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements." (emphasis added)); *United States v. Taylor*, 672 F. App'x 860, 864 (10th Cir. 2016) (unpublished) (stating *Mathis* didn't announce new rule). Thus, we deny Johnson's implicit request to file a successive § 2255 motion.

Conclusion

We deny Johnson's request for a COA, vacate the district court's order denying Johnson's Rule 59(e) motions, deny Johnson's implied request to file a successive § 2255 motion, and dismiss this matter. Finally, we grant appointed counsel's motion to withdraw.

Entered for the Court

Nancy L. Moritz
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ERIC LAMONT JOHNSON,

Defendant-Petitioner,

v.

No. CV 16-00548 MV/CG
No. CR 03-00477 MV

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

MEMORANDUM OPINION AND ORDER NOT ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on United States Magistrate Judge Carmen E. Garza's *Proposed Findings and Recommended Disposition* (the "PFRD"), (CV Doc. 19), filed November 14, 2016.[1] In the PFRD, Judge Garza concluded that Petitioner Eric Lamont Johnson was improperly sentenced under the United States Sentencing Guidelines and recommended that his *Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (the "Motion"), (CV Doc. 1), be granted. (CV Doc. 19 at 12).

The parties were notified that written objections to the PFRD were due within 14 days. (CV Doc. 19 at 12). Respondent United States of America filed *United States' Objections to the Magistrate Judge's Proposed Findings and Recommended Disposition* (the "Objections"), (Doc. 21), on November 25, 2016, and Petitioner filed his *Response to United States' Objections to Magistrate Judge's Proposed Findings and Recommended Disposition*, (Doc. 22), on November 30, 2016. After a *de novo* review of the record and the PFRD, the Court denies Petitioner's Motion.

[1] Documents referenced as "CV Doc. ____" are from case number CV 16-00548 MV/CG. Documents referenced as "CR Doc. ____" are from case number CR 03-00477 MV.

Appendix - B

I. Background

On October 21, 2004, Petitioner pled guilty to possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). (CR Doc. 144). Pursuant to the plea agreement, Respondent recommended Petitioner receive a 60 month sentence–the statutory minimum. (CR Doc. 147 at 6). However, Petitioner qualified as a career offender under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") based on prior convictions for crimes of violence. (CR Doc. 235 at 3). Specifically, Petitioner's convictions for being a prisoner in possession of a weapon qualified as crimes of violence under the residual clause in § 4B1.2(a)(2) of the Guidelines, which defined a crime of violence as any crime that "involves conduct that presents a serious potential risk of physical injury to another." (CR Doc. 235 at 3); U.S.S.G. § 4B1.2(a)(2) (2008). Because of Petitioner's career offender status, his Guideline sentence range was 360 months to life imprisonment. (CR Doc. 246 at 7, 10, 29, 32-33). Ultimately, Petitioner received a 180 month sentence in December, 2008. (CR Doc. 246 at 37, 40).

On June 9, 2016, Petitioner filed his Motion, arguing that he was unconstitutionally sentenced following the Supreme Court of the United States' ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and the Tenth Circuit Court of Appeals' ruling in *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015). (CV Doc. 9 at 3-5). In *Johnson*, the Supreme Court held that the residual clause in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. 135 S. Ct. at 2557. In *Madrid*, the Tenth Circuit concluded that the identical residual clause in § 4B1.2(a)(2) is also unconstitutionally vague and "cannot be used to justify" enhancing a criminal

defendant's sentence. 805 F.3d at 1210. The Tenth Circuit necessarily held in *Madrid* that the Guidelines may be void for vagueness. *Id.* at 1210-11. Petitioner argued that *Johnson* and *Madrid* are retroactively applicable to his case and he is entitled to be resentenced. (CV Doc. 9 at 8).

Respondent countered that *Johnson* is not retroactively applicable in collateral proceedings challenging the constitutionality of sentences enhanced under § 4B1.2(a)(2). (CV Doc. 12 at 4-10). According to Respondent, *Johnson*, as applied to § 4B1.2(a)(2), operated as a procedural rule that did not apply retroactively. (CV Doc. 12 at 4-10). In the alternative, Respondent requested the Court stay these proceedings pending the outcome of *Beckles v. United States*, 137 U.S. 886 (2017), which had not yet been decided.

On November 11, 2016, Judge Garza declined to stay these proceedings and recommended granting Petitioner's Motion. (CV Doc. 19 at 3, 12). Judge Garza denied a stay because Petitioner could have been eligible for release if the Court granted Petitioner's Motion. (CV Doc. 19 at 3) (citing *U.S. v. Miller*, No. 16-8080 (10th Cir. Nov. 2, 2016); *U.S. v. Carey*, No. 16-8093 (10th Cir. Nov. 4, 2016)). Further, Judge Garza concluded that *Johnson* and *Madrid* were retroactively applicable to Petitioner's sentence following the Supreme Court's decision in *Welch v. United States*, 136 S. Ct. 1257 (2016). Finally, Judge Garza examined the record and determined that Petitioner's sentence was enhanced, at least in part, in reliance on the unconstitutional residual clause in § 4B1.2(a)(2). (CV Doc. 19 at 10-11). Thus, because Petitioner was unconstitutionally sentenced and was eligible for relief under *Johnson*, Judge Garza recommended granting Petitioner's Motion. (CV Doc. 19 at 12).

Respondent timely objected to Judge Garza's PFRD. (CV Doc. 21). Respondent primarily objected to Judge Garza's declination to stay these proceedings. Respondent maintained that the more prudent course of action was to stay this case pending the Supreme Court's decision in *Beckles*. (CV Doc. 21 at 2). Finally, Respondent stated that if the Court denied a stay, the Court should reject Judge Garza's recommendation. (CV Doc 21 at 2-3). Respondent cites its prior brief but does not specifically object to any part of Judge Garza's analysis. (CV Doc. 21 at 3).

In response, Petitioner argued that a stay was inappropriate following the Tenth Circuit's orders in *United States v. Miller*, No. 16-8080 (10th Cir. Nov. 2, 2016), *United States v. Carey*, No. 16-9083 (10th Cir. Nov. 4, 2016), and *United States v. Smith*, No. 16-8091 (10th Cir. Nov. 9, 2016). Petitioner also cited his prior briefing in support of Judge Garza's PFRD. (CV Doc. 22 at 3).

On March 6, 2017, the Supreme Court decided *Beckles*, holding that the Guidelines are not subject to vagueness challenges and that the residual clause in § 4B1.2 is not unconstitutionally vague. 137 S. Ct. at 891-92. Specifically, the Court reasoned that "[b]ecause they merely guide the district courts' discretion, the Guidelines are not amenable to a vagueness challenge." *Id.* at 894. Thus, *Johnnson* is inapplicable to the Guidelines, and the Tenth Circuit's decision in *Madrid* has been abrogated. *Id.* at 892 n.2.

II. Analysis

Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a district judge may, under 28 U.S.C. § 636(b), refer a pretrial dispositive motion to a magistrate judge for proposed findings of fact and

recommendations for disposition. Within fourteen days of being served, a party may file objections to this recommendation. Rule 8(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. A party may respond to another party's objections within fourteen days of being served with a copy; the rule does not provide for a reply. FED. R. CIV. P. 72(b).[2]

When resolving objections to a magistrate judge's recommendation, the district judge must make a *de novo* determination regarding any part of the recommendation to which a party has properly objected. 28 U.S.C. § 636(b)(1)(C). Filing objections that address the primary issues in the case "advances the interests that underlie the Magistrate's Act, including judicial efficiency." *U.S. v. One Parcel of Real Prop., With Bldgs., Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1059 (10th Cir. 1996). Objections must be timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. *Id.* at 1060. Additionally, issues "raised for the first time in objections to the magistrate judge's recommendation are deemed waived." *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also U.S. v. Garfinkle*, 261 F.3d 1030, 1030-31 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.").

In this case, Respondent objected to Judge Garza's refusal to stay the case and to Judge Garza's ultimate recommendation. (CV Doc. 21 at 2-4). Because *Beckles* has been decided, the stay issue is mooted. Similarly, *Beckles* resolves the merits of Petitioner's Motion. Both Petitioner's Motion and Judge Garza's recommendation rested on the premises that *Johnson* applies to the Guidelines and that § 4B1.2(a)(2) is

[2] The Federal Rules of Civil Procedure may be applied to the extent that they are not inconsistent with any statutory provisions or the Rules Governing Section 2255 Proceedings. Rule 12 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

unconstitutionally vague. (CV Doc. 9 at 4-5; Doc. 19 at 4). *Beckles* unequivocally states that because the Guidelines are not subject to vagueness challenges, *Johnson* does not apply to the Guidelines and § 4B1.2(a)(2) is not unconstitutionally vague. 137 S. Ct. at 891-92. Thus, even if Petitioner was sentenced in reliance on the residual clause, he is ineligible for relief. *See U.S. v. Evans*, No. 16-1171 (10th Cir. Mar. 27, 2017) (unpublished) (affirming denial of § 2255 motion challenging sentence in light of *Beckles*); *U.S. v. Taylor*, No. 16-1350 (10th Cir. Mar. 13, 2017) (unpublished) (same).

III. Conclusion

For the foregoing reasons, the Court finds that one of Respondent's objections is moot and that Petitioner is ineligible for relief following *Beckles*.

IT IS THEREFORE ORDERED that Judge Garza's *Proposed Findings and Recommended Disposition*, (CV Doc. 19), should **NOT BE ADOPTED**. Petitioner's *Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody*, (CV Doc. 7), will be **DENIED**.

THE HONORABLE MARTHA VAZQUEZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ERIC LAMONT JOHNSON,

Plaintiff-Petitioner,

v.

No. CV 16-00548 MV/CG
No. CR 03-00477 MV

UNITED STATES OF AMERICA,

Defendant-Respondent.

PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on Petitioner Eric Lamont Johnson's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (the "Motion"), (CV Doc. 1, CR Doc. 314), filed June 9, 2016; Petitioner's *Memorandum of Law in Support of Motion to Vacate, Set Aside, or Correct Sentence*, (CV Doc. 9), filed August 16, 2016; Respondent United States' *Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence and Motion for a Stay of Proceedings until the Supreme Court issues its opinion in* Beckles v. United States, (CV Doc. 12), filed August 31, 2016; Petitioner's *Reply in Support of Motion to Vacate, Set Aside, or Correct Sentence and Response to Motion for a Stay of Proceedings*, (CV Doc. 15), filed September 19, 2016; and Petitioner's *Notice of Supplemental Authority*, (CV Doc. 18), filed November 3, 2016.[1] United States District Judge Martha Vazquez referred this case to Magistrate Judge Carmen E. Garza to perform legal analysis and recommend an ultimate disposition. (CV Doc. 11). Having considered the parties' filings and the relevant law, the Court **RECOMMENDS** that Petitioner's Motion be **GRANTED**, that his sentence be **VACATED**, and that he be **RESENTENCED**.

[1] Documents referenced as "CV Doc.__" are from case number 16-cv-548-MV-CG. Documents referenced as "CR Doc.__" are from case number 03-cr-477-MV.

Appendix-C

I. Background

On October 21, 2004, Petitioner pleaded guilty to possessing a firearm during or in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). (CR Doc. 144). Pursuant to a plea agreement, Respondent stipulated that Petitioner should have been sentenced to 60 months, the statutory minimum. (CR Doc. 147 at 6); *see* § 924(c)(1)(A)(i). This was not binding on the sentencing court. In December, 2008, the sentencing court found that Petitioner's previous convictions for voluntary manslaughter and being a prisoner in possession of a weapon qualified as "crimes of violence" under the United States Sentencing Guidelines ("U.S.S.G" or "Guidelines") § 4B1.1. (CR Doc. 246 at 32-33). Specifically, the sentencing court held that being a prisoner in possession of a weapon qualified as a crime of violence under the residual clause in § 4B1.2(a)(2), which defined a crime of violence in part as any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." (CR Doc. 235 at 3); U.S.S.G. § 4B1.2(a)(2) (2008). Based on his convictions for crimes of violence, Petitioner qualified as a career offender, with a Guidelines sentence range of 360 months to life imprisonment. (*See* CR Doc. 246 at 7, 10, 29, 32-33). Ultimately, Petitioner received points for acceptance of responsibility, reducing the Guidelines range to 262-327 months, and the sentencing court departed downward, sentencing Petitioner to 180 months. (*Id.* at 37, 40).

On June 9, 2016, Petitioner filed the instant Motion under 28 U.S.C. § 2255. Petitioner argues that following the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), § 4B1.2(a)(2) is unconstitutionally vague; therefore he is entitled to resentencing without being considered a career offender. (CV Doc. 1 at 4-5, 12).

Petitioner argues that *Johnson* applies retroactively to cases that were final before *Johnson* was decided, including cases where defendants are collaterally challenging their sentences. (CV Docs. 9 at 4-5; 15 at 1-6).

Respondent counters that *Johnson*, which did not discuss § 4B1.2(a)(2), is inapplicable in this case. (CV Doc. 12 at 2-4). Respondent argues that applying *Johnson* to § 4B1.2(a)(2) would result in a procedural rule without retroactive effect. (CV Doc. 12 at 4-10).

In the alternative, Respondent asks the Court to stay this case pending resolution of *Beckles v. United States*, No. 15-8544 (U.S. filed August 11, 2016). Because Petitioner could be eligible for release if the Court decides in his favor, the Court declines to stay this case. *See U.S. v. Miller*, No. 16-8080 (10th Cir. Nov. 2, 2016) (requiring district court to consider the merits of a § 2255 petition because Petitioner could be released following ruling in his favor), *U.S. v. Carey*, No. 16-8093 (10th Cir. Nov. 4, 2016) (same).

II. Analysis

a. Legal Standard

28 U.S.C. § 2255 provides that federal prisoners may challenge their sentences if they claim: (1) the sentence was imposed in violation of the United States Constitution or federal law; (2) the sentencing court had no jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized sentence; or (4) the sentence is otherwise subject to collateral review. § 2255(a). If the court finds that a sentence infringed the prisoner's constitutional rights and is subject to collateral review, the court

must vacate the sentence and discharge, resentence, or correct the sentence as the court believes appropriate. § 2255(b).

b. Whether Johnson *is retroactively effective on collateral review*

The primary issue before the Court is whether the ruling in *Johnson* as applied to § 4B1.2(a)(2) is retroactively applicable on collateral review. In *Johnson*, the Supreme Court held that the residual clause in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defined a "crime of violence," in part, as any crime that "involves conduct that presents a serious potential risk of physical injury to another." 28 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court concluded that this part of the definition, known as the residual clause, is unconstitutionally vague because it "denies fair notice to defendants" about what conduct violates the clause, and the clause "invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. As such, "imposing an increased sentence under the residual clause" of the ACCA is unconstitutional. *Id.* at 2563.

Following *Johnson*, prisoners convicted under the ACCA's residual clause challenged their already-final sentences in collateral proceedings. In *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), the Supreme Court held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. First, the Supreme Court noted that a new rule applies retroactively only if the rule is a substantive rule or a watershed procedural rule. *Id.* at 1264. The Supreme Court reasoned that *Johnson* "changed the substantive reach of [ACCA], altering 'the range of conduct or the class of persons that the [Act] punishes.'" *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353). After *Johnson* struck down the ACCA's residual clause,

"the same person engaging in the same conduct is no longer subject to the [ACCA] and faces at most 10 years in prison," rather than 15 years to life. *Id.* The Supreme Court further reasoned that the *Johnson* ruling could not be procedural because it "had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act." *Id.* Unlike procedural rules, "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied." *Id.* Therefore, the holding in *Johnson* was a substantive rule that applied retroactively on collateral review. *Id.*

Also following *Johnson*, defendants challenged the constitutionality of other, similarly worded residual clauses. In *Madrid v. United States*, the Tenth Circuit Court of Appeals extended the ruling in *Johnson* to the identical residual clause in § 4B1.2(a)(2). 805 F.3d 1204, 1210-11 (2015); *compare* U.S.S.G. § 4B1.2(a)(2) (2014) (a "crime of violence" includes one that "otherwise involves conduct that presents a serious potential risk of physical injury to another") *with* 18 U.S.C. § 924(e)(2)(B)(ii) (a "crime of violence" includes one that "otherwise involves conduct that presents a serious potential risk of physical injury to another"). The Tenth Circuit noted "[i]f one iteration of the clause is unconstitutionally vague, so too is the other," given their similarity. *Id.* at 1210. The Tenth Circuit so held even though the Guidelines are advisory, rather than statutory like the ACCA. *Id.* at 1211. The Tenth Circuit reasoned that the Guidelines are "a mandatory starting point" for sentencing and a district court may be "reversed for failing to correctly apply them." *Id.* Therefore, the holding in *Johnson* applied to both the ACCA and the Guidelines.

The defendant in *Madrid* appealed his sentence following a conviction for a drug crime. Similar to Petitioner, his sentence was enhanced under the Guidelines due to prior convictions for crimes of violence as defined by the residual clause in § 4B1.2(a)(2). *Id.* at 1207-08. However, unlike Petitioner, the defendant in *Madrid* directly appealed his sentence. *Id.* at 1206. Here, Petitioner has attacked his already-final sentence through a § 2255 petition–a collateral proceeding. Although *Welch* clearly held that *Johnson* is a substantive rule retroactively effective on collateral challenges to the ACCA, there is no analogue case for *Madrid* and § 4B1.2(a)(2). The question remains, and is now presented here, whether extending *Johnson* (and *Madrid*) to the residual clause in § 4B1.2(a)(2) is also a substantive rule that is retroactively applicable on collateral review.

Generally, "new constitutional rules of criminal procedure" do not apply to cases that were final before the rule was announced. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Two types of new rules, however, apply retroactively on collateral review: "substantive" rules, *Schriro v. Summerlin*, 542 U.S. 348 (2004), and "watershed rules of criminal procedure," *Saffle v. Parks*, 494 U.S. 484 (1990). A substantive rule "alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 351-352, 353 (citation omitted). Substantive rules accomplish this by "narrow[ing] the scope of a criminal statute by interpreting its terms" or "plac[ing] particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* Substantive rules "apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* (quoting *Bousley v. United*

States, 523 U.S. 614, 620 (1998)); *see Saffle*, 494 U.S. at 495 (proposed rule not substantive because it "would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons").

Procedural rules, on the other hand, "regulate only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original). Procedural rules "merely raise the possibility that someone convicted with the use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. Procedural rules are not normally applied retroactively. *Id.* Retroactivity is conferred only to "watershed" procedural rules, i.e. those rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. The Supreme Court often cites *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that criminal defendants have the constitutional right to counsel at trial for serious offenses, as an example of a watershed procedural rule. *Id.* Recently, the Supreme Court cautioned against "conflat[ing] a procedural requirement necessary to implement a substantive guarantee" with a regular procedural rule. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

Following these general rules, and in light of *Johnson*, *Welch*, and *Madrid*, applying *Johnson* to § 4B1.2(a)(2) announces a new substantive rule that must be effective retroactively on collateral review. The *Johnson* Court squarely held that "imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563. As the Court recognized in *Welch*, *Johnson* "alter[ed] the range of conduct or the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1265 (quoting *Schriro*, 542 U.S. at 351-352, 353 (citation omitted)). *Johnson* narrowed the scope of the ACCA by eliminating the

residual clause, thereby "plac[ing] particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro*, 542 U.S. at 351-352, 353 (citation omitted).

That same logic applies with equal force to § 4B1.2(a)(2). *Madrid* held that the residual clause in § 4B1.2(a)(2) is unconstitutionally vague. *Madrid*, 805 F.3d at 1211. Therefore, increasing a sentence under the residual clause of § 4B1.2(a)(2) also violates the United States Constitution's guarantee of due process. *See Johnson*, 135 S. Ct. at 2563. Finding § 4B1.2(a)(2) residual clause is unconstitutionally vague narrows the scope of the Guidelines by limiting the crimes that may be deemed "crimes of violence." This limits the sentencing court's ability to increase a sentence based on a career offender enhancement that is itself founded on residual clause crimes of violence. Extending *Johnson* to § 4B1.2(a)(2) "alters the range of conduct or the class of persons that the [Guidelines] punish[]" through a career offender enhancement. *Schriro*, 542 U.S. at 351-352, 353 (citation omitted). Therefore, applying the holding of *Johnson* to § 4B1.2(a)(2) announces a substantive rule that must be given retroactive effect on collateral review, including in this case.

Respondent argues that applying *Johnson* to the Guidelines would create a procedural rule because the Guidelines do not trigger mandatory minimums like the ACCA does. (CV Doc. 12 at 7). Respondent further argues that although miscalculation of the Guidelines range may be procedural error, it "is not illegal or unlawful as in a case" under the ACCA. (*Id.*). Finally, Respondent insists that a judge's authority to vary from the Guidelines means a sentencing enhancement is a mere procedural step. (*Id.* at 8-9).

The Tenth Circuit did not change its analysis in *Madrid* because the Guidelines are advisory, and that does not change the Court's analysis here. The Guidelines may be "illegal or unlawful" by being unconstitutionally vague, just as the ACCA was. *Madrid*, 805 F.3d at 1211. Further, they remain "the mandatory starting point for a sentencing determination," and a district court may be reversed for incorrectly applying them. *Id.* Thus, the Guidelines are very much a mandatory part of sentencing.

Further, Respondent commits the error the Supreme Court cautioned against in *Montgomery* by "conflat[ing] a procedural requirement necessary to implement a substantive guarantee" with a regular procedural rule. *Montgomery*, 136 S. Ct. at 734. Respondent argues that because miscalculation of a sentence is procedural, *Johnson*, as applied to § 4B1.2(a)(2), is procedural as well. (CV Doc. 12 at 7-8). However, *Welch* affirmed *Johnson*'s holding as a substantive rule. *Welch*, 136 S. Ct. at 1265. *Johnson* therefore created a substantive guarantee that a defendant may not have their sentenced increased through the use of a residual clause. *See Johnson*, 135 S. Ct. at 2563; *see also Golicov v. Lynch*, No. 16-9530, 2016 WL 4988012 (10th Cir. Sept. 19, 2016) (holding that the residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague under *Johnson*), *In re Hubbard*, 825 F.3d 225 (4th Cir. 2016) (holding that the residual clause in 18 U.S.C. § 924(e)(2)(B) is unconstitutionally vague under *Johnson*). Although a sentencing court utilizes § 4B1.2(a)(2) as part of the procedure of sentencing, that process does not transform *Johnson*'s constitutional, substantive guarantee into a procedural rule.

c. Whether Petitioner's sentence violated his constitutional rights

Having determined that *Johnson* applies to § 4B1.2(a)(2) retroactively and on collateral review, the final issue before the Court is whether Petitioner's sentence was increased in reliance on the residual clause in § 4B1.2(a)(2). If Petitioner's sentence was enhanced in reliance on the residual clause, Petitioner's sentence would violate his constitutional rights under *Johnson* and *Madrid* and Petitioner would be entitled to relief under § 2255(b). Petitioner contends that his sentence was enhanced because the sentencing court expressly relied on § 4B1.2(a)(2) in determining that being a prisoner in possession of a weapon is a crime of violence. (CV Doc. 9 at 5-6). Respondent did not argue that Petitioner's conviction for being a prisoner in possession of a weapon qualified as a crime of violence other than under the residual clause. Respondent only argued that Petitioner's sentence was lawful because *Johnson* does not apply in this case. (*See* CV Doc. 12). Nonetheless, the Court will review the record to determine whether Petitioner's sentence did in fact violate his constitutional rights.

At the sentencing hearing, the sentencing court found that Petitioner qualified as a career offender, in part because Petitioner had at least two prior convictions for crimes of violence, including being a prisoner in possession of a weapon. (*See* CR Doc. 236 at 32-33). Upon a motion for reconsideration, the sentencing court explicitly held that being a prisoner in possession of a weapon qualified as a crime of violence under the residual clause in § 4B1.2(a)(2). (CR Doc. 235 at 4). Because Petitioner qualified as a career offender, his base sentence increased from 60 months to 360 months to life. (CR Doc. 236 at 33-34).

Although Petitioner was eventually sentenced to only 180 months, the Court finds that Petitioner's sentence was enhanced because of the sentencing court's reliance on § 4B1.2(a)(2). The sentencing court expressly relied on the now-unconstitutional residual clause in determining that Petitioner was a career offender, which significantly increased Petitioner's base sentence. Without the residual clause in § 4B1.2(a)(2), Petitioner faced a 60 month sentence, which is what Respondent stipulated to, rather than 180 months or longer. The Court notes that the sentencing court discussed the reasons for Petitioner's sentence in detail and at length. (*See* CR Doc. 246 at 34-40). Nonetheless, following *Madrid*, the "residual clause [in 4B1.2(a)(2)] is unconstitutionally vague, and cannot be used to justify the enhancement" of Petitioner's sentence. *Madrid*, 805 F.3d at 1210. Thus, Petitioner's sentence violates Petitioner's constitutional rights and Petitioner is entitled to relief under § 2255(b).

III. Conclusion

For the foregoing reasons, the Court finds that *Johnson* announced a new, substantive rule that applies retroactively on collateral review to § 4B1.2(a)(2). Petitioner was unconstitutionally sentenced in explicit reliance on § 4B1.2(a)(2), and Respondent did not argue that Petitioner's predicate crimes qualified as a crime of violence under any other clause.

IT IS THEREFORE RECOMMENDED that Petitioner's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* be **GRANTED**, that his sentence be **VACATED**, and that Petitioner be **RESENTENCED** without relying on the residual clause in § 4B1.2(a)(2) to increase his sentence.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

THE HONORABLE CARMEN E. GARZA
UNITED STATES MAGISTRATE JUDGE

FILED
United States Court of Appeals
Tenth Circuit

June 20, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC LAMONT JOHNSON,

Defendant - Appellant.

No. 17-2078

ORDER

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Appellant's motion to reconsider, construed as a petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk