NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

Kirk Lurton Grummitt,
Jeremy Phelps,
Kurt Alan Campbell, and
Edward Lee Williams, - PETITIONERS,

vs.

United States of America - Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

KIRK LURTON GRUMMITT, Movant, vs. UNITED STATES OF AMERICA.	No. C16-0072-LRR No. CR03-0058-LRR ORDER

This matter appears before the court on the movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1), filed on May 6, 2016, and related filings (civil docket nos. 2-12), filed on various dates.

The court considered the record and the law, which includes but is not limited to the following: *Beckles v. United States*, ___, U.S. ___, ___ S. Ct. ___, 2017 WL 855781, at *6 (Mar. 6, 2017) (concluding that the United States Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause and holding that "[t]he residual clause in [§4B1.2(a)(2)] therefore is not void for vagueness"); *United States v. Frady*, 456 U.S. 152, 165 (1982) (stating that "a collateral challenge may not do service for an appeal"); *United States v. Brown*, No. 16-7056, 2017 WL 3585073, at *3, 2017 U.S. Dist. LEXIS 132848 (4th Cir. Aug. 21, 2017) (concluding that first § 2255 motion that sought to apply *Johnson* to the pre-*Booker* guidelines was outside the statute of limitation); *Raybon v. United States*, No. 16-2522, 2017 WL 3470389, at *2-3, 2017 U.S. App. LEXIS 15029 (6th Cir. Aug. 14, 2017) (concluding that movant could not rely on the statute of limitation as set forth in § 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as a career

offender under the residual clause of the mandatory Sentencing Guidelines"); *United States v. Benedict*, 855 F.3d 880, 888-89 (8th Cir. 2017) (holding that prior convictions qualified under the residual clause of USSG §4B1.2(a)(2) (2014)); In re *Sams*, 830 F.3d 1234, 1240 (11th Cir. 2016) (reiterating that mandatory sentencing guidelines are not subject to vagueness challenges and "*Welch* did not make *Johnson* retroactive for purposes of a successive § 2255 motion based on the Guidelines"); In re *Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (holding that the criteria for filing a successive § 2255 motion had not been met because *Welch* does not make *Johnson* retroactive for purposes of challenging the sentencing guidelines and mandatory sentencing guidelines cannot be unconstitutionally vague); *Donnell v. United States*, 826 F.3d 1014, 1017 (8th Cir. 2016) (refusing to create "a second rule that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the advisory sentencing guidelines"); In re *Griffin*, 823 F.3d 1350, 1354-55 (11th Cir. 2016) (explaining that sentencing guidelines, whether mandatory or advisory, only limit a judge's discretion and do not violate a defendant's right to due process by reason of being vague); *Headbird v. United States*, 813 F.3d 1092, 1097 (8th Cir. 2016) (upholding dismissal under § 2255(f) because *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), did not involve "newly recognized" right); *Richardson v. United States*, 623 F. App'x 841, 842-43 (8th Cir. 2015) (denying authorization to file a successive motion to vacate, set aside or correct sentence under § 2255 with respect to movant's challenge to his sentencing guidelines calculations because any extension of the rule in *Johnson* is not a new substantive rule under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)); *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (concluding that advisory sentencing guidelines, such as USSG §4B1.2(a)(2), cannot be unconstitutionally vague); *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (explaining that, although it appears to be broad, § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing" (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979))); *Never Misses a Shot v. United States*, 413 F.3d

to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings"); *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) (holding that sentencing guidelines are "not susceptible to" constitutional vagueness challenges). Having done so, the court concludes that, despite being sentenced pre-*Booker*, the movant's motion is time-barred because it does not assert a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

Therefore, the movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1) is denied. The clerk's office is directed to deny as moot the movant's other pending motion(s). As for a certificate of appealability, the movant has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability under 28 U.S.C. § 2253 will not issue.

IT IS SO ORDERED.

DATED this 2nd day of October, 2017.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JEREMY PHELPS, Movant, vs. UNITED STATES OF AMERICA.	No. C16-0080-LRR No. CR02-0010-LRR ORDER

This matter appears before the court on the movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1), filed on May 8, 2016, and related filings (civil docket nos. 2-9), filed on various dates.

The court considered the record and the law, which includes but is not limited to the following: *Beckles v. United States*, ___, U.S. ___, ___ S. Ct. ___, 2017 WL 855781, at *6 (Mar. 6, 2017) (concluding that the United States Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause and holding that "[t]he residual clause in [§4B1.2(a)(2)] therefore is not void for vagueness"); *United States v. Frady*, 456 U.S. 152, 165 (1982) (stating that "a collateral challenge may not do service for an appeal"); *United States v. Brown*, No. 16-7056, 2017 WL 3585073, at *3, 2017 U.S. Dist. LEXIS 132848 (4th Cir. Aug. 21, 2017) (concluding that first § 2255 motion that sought to apply *Johnson* to the pre-*Booker* guidelines was outside the statute of limitation); *Raybon v. United States*, No. 16-2522, 2017 WL 3470389, at *2-3, 2017 U.S. App. LEXIS 15029 (6th Cir. Aug. 14, 2017) (concluding that movant could not rely on the statute of limitation as set forth in § 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as a career

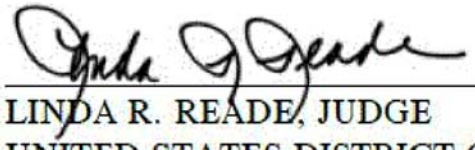
offender under the residual clause of the mandatory Sentencing Guidelines"); *United States v. Benedict*, 855 F.3d 880, 888-89 (8th Cir. 2017) (holding that prior convictions qualified under the residual clause of USSG §4B1.2(a)(2) (2014)); In re *Sams*, 830 F.3d 1234, 1240 (11th Cir. 2016) (reiterating that mandatory sentencing guidelines are not subject to vagueness challenges and "*Welch* did not make *Johnson* retroactive for purposes of a successive § 2255 motion based on the Guidelines"); In re *Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (holding that the criteria for filing a successive § 2255 motion had not been met because *Welch* does not make *Johnson* retroactive for purposes of challenging the sentencing guidelines and mandatory sentencing guidelines cannot be unconstitutionally vague); *Donnell v. United States*, 826 F.3d 1014, 1017 (8th Cir. 2016) (refusing to create "a second rule that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the advisory sentencing guidelines"); In re *Griffin*, 823 F.3d 1350, 1354-55 (11th Cir. 2016) (explaining that sentencing guidelines, whether mandatory or advisory, only limit a judge's discretion and do not violate a defendant's right to due process by reason of being vague); *Headbird v. United States*, 813 F.3d 1092, 1097 (8th Cir. 2016) (upholding dismissal under § 2255(f) because *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276 (2013), did not involve "newly recognized" right); *Richardson v. United States*, 623 F. App'x 841, 842-43 (8th Cir. 2015) (denying authorization to file a successive motion to vacate, set aside or correct sentence under § 2255 with respect to movant's challenge to his sentencing guidelines calculations because any extension of the rule in *Johnson* is not a new substantive rule under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)); *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (concluding that advisory sentencing guidelines, such as USSG §4B1.2(a)(2), cannot be unconstitutionally vague); *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (explaining that, although it appears to be broad, § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing" (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979))); *Never Misses a Shot v. United States*, 413 F.3d

781, 783 (8th Cir. 2005) (holding that "the 'new rule' announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings"); *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) (holding that sentencing guidelines are "not susceptible to" constitutional vagueness challenges). Having done so, the court concludes that, despite being sentenced pre-*Booker*, the movant's motion is time-barred because it does not assert a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

Therefore, the movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 (civil docket no. 1) is denied. The clerk's office is directed to deny as moot the movant's other pending motion(s). As for a certificate of appealability, the movant has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability under 28 U.S.C. § 2253 will not issue.

IT IS SO ORDERED.

DATED this 2nd day of October, 2017.



LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

CHARLES DEBILZAN, Petitioner,	No. C16-4040-MWB
KURT ALAN CAMPBELL Petitioner,	No. C16-4037-MWB
SCOTT DOUGLAS ROHRICK, Petitioner,	No. C16-4055-MWB
EDWARD LEE WILLIAMS, Petitioner,	No. C16-0087-MWB
ARTHUR VESEY, Petitioner,	No. C16-0105-MWB
FRANCISCO MARCOS QUIROGA, Petitioner,	No. C16-3059-MWB
JASON NATHANIEL WILLIAMSON, Petitioner,	No. C16-3060-MWB
SIDNEY CHARLES, Petitioner,	No. C16-4068-MWB
TRUONG NHAT NGUYEN, Petitioner,	No. C16-4070-MWB
DENNIS PUTZIER, Petitioner,	No. C16-4071-MWB
RONALD WEAVER, Petitioner,	No. C16-4072-MWB
JAIMY JOHN CHRISTENSON, Petitioner,	No. C16-3062-MWB
GEORGE EDWARD WINDSOR,	

Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. C16-4074-MWB **ORDER DENYING MOTIONS TO VACATE, SET ASIDE OR CORRECT SENTENCES PURSUANT TO 28 U.S.C. § 2255**

Petitioners have each filed a motion to vacate their respective sentence under 28 U.S.C. § 2255 in light of the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Johnson*, the United States Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") defining "violent felony" was unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2557. In *Welch*, 136 S. Ct. 1257 (2016), the United States Supreme Court made *Johnson's* holding retroactive to cases on collateral review. I have considered the record and the law, which includes, but is not limited to, the following*: Beckles v. United States*, ___, U.S. ___, ___ S. Ct. ___, 2017 WL 855781, at *6 (Mar. 6, 2017) (concluding that the United States Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause and holding that "[t]he residual clause in [§4B1.2(a)(2)] therefore is not void for vagueness"); *United States v. Frady*, 456 U.S. 152, 165 (1982) (stating that "a collateral challenge may not do service for an appeal"); *United States v. Brown*, No. 16-7056, 2017 WL 3585073, at *3, 2017 U.S. Dist. LEXIS 132848 (4th Cir. Aug. 21, 2017) (concluding that first § 2255 motion that sought to apply *Johnson* to the pre-*Booker* guidelines was outside the statute of limitation)*; Raybon v. United States*, No. 16-2522, 2017 WL 3470389, at *2-3, 2017 U.S. App. LEXIS 15029 (6th Cir. Aug. 14, 2017) (concluding that movant could not rely on the statute of limitation as set forth in § 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as a career offender under the residual clause of the mandatory Sentencing Guidelines"); *United States v. Benedict*, 855 F.3d 880, 888-89 (8th Cir. 2017) (holding that prior convictions qualified

under the residual clause of USSG §4B1.2(a)(2) (2014)); *In re Sams*, 830 F.3d 1234, 1240 (11th Cir. 2016) (reiterating that mandatory sentencing guidelines are not subject to vagueness challenges and "*Welch* did not make *Johnson* retroactive for purposes of a successive § 2255 motion based on the Guidelines"); *In re Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (holding that the criteria for filing a successive § 2255 motion had not been met because *Welch* does not make Johnson retroactive for purposes of challenging the sentencing guidelines and mandatory sentencing guidelines cannot be unconstitutionally vague); *Donnell v. United States*, 826 F.3d 1014, 1017 (8th Cir. 2016) (refusing to create "a second rule that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the advisory sentencing guidelines"); *In re Griffin*, 823 F.3d 1350, 1354-55 (11th Cir. 2016) (explaining that sentencing guidelines, whether mandatory or advisory, only limit a judge's discretion and do not violate a defendant's right to due process by reason of being vague); *Richardson v. United States*, 623 F. App'x 841, 842-43 (8th Cir. 2015) (denying authorization to file a successive motion to vacate, set aside, or correct sentence under § 2255 with respect to movant's challenge to his sentencing guidelines calculations because any extension of the rule in *Johnson* is not a new substantive rule under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)); *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (concluding that advisory sentencing guidelines, such as USSG §4B1.2(a)(2), cannot be unconstitutionally vague); *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (*en banc*) (explaining that, although it appears to be broad, § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing" (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979))); *Never Misses a Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005) (holding that "the 'new rule' announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings"); *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) (holding that sentencing guidelines are "not susceptible to" constitutional vagueness challenges). Having done so, I conclude that, despite being sentenced pre-*Booker*, each

petitioners' motion is time-barred because it does not assert a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

Therefore, each petitioners' motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied. As for a certificate of appealability, each of the petitioners has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability under 28 U.S.C. § 2253 will not issue to any petitioner.

IT IS SO ORDERED.

DATED this 4th day of October, 2017.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

CHARLES DEBILZAN, Petitioner,	No. C16-4040-MWB
KURT ALAN CAMPBELL Petitioner,	No. C16-4037-MWB
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Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. C16-4074-MWB **ORDER DENYING MOTIONS TO VACATE, SET ASIDE OR CORRECT SENTENCES PURSUANT TO 28 U.S.C. § 2255**

Petitioners have each filed a motion to vacate their respective sentence under 28 U.S.C. § 2255 in light of the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). In *Johnson*, the United States Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") defining "violent felony" was unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2557. In *Welch*, 136 S. Ct. 1257 (2016), the United States Supreme Court made *Johnson's* holding retroactive to cases on collateral review. I have considered the record and the law, which includes, but is not limited to, the following*: Beckles v. United States*, ___, U.S. ___, ___ S. Ct. ___, 2017 WL 855781, at *6 (Mar. 6, 2017) (concluding that the United States Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause and holding that "[t]he residual clause in [§4B1.2(a)(2)] therefore is not void for vagueness"); *United States v. Frady*, 456 U.S. 152, 165 (1982) (stating that "a collateral challenge may not do service for an appeal"); *United States v. Brown*, No. 16-7056, 2017 WL 3585073, at *3, 2017 U.S. Dist. LEXIS 132848 (4th Cir. Aug. 21, 2017) (concluding that first § 2255 motion that sought to apply *Johnson* to the pre-*Booker* guidelines was outside the statute of limitation)*; Raybon v. United States*, No. 16-2522, 2017 WL 3470389, at *2-3, 2017 U.S. App. LEXIS 15029 (6th Cir. Aug. 14, 2017) (concluding that movant could not rely on the statute of limitation as set forth in § 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as a career offender under the residual clause of the mandatory Sentencing Guidelines"); *United States v. Benedict*, 855 F.3d 880, 888-89 (8th Cir. 2017) (holding that prior convictions qualified

under the residual clause of USSG §4B1.2(a)(2) (2014)); *In re Sams*, 830 F.3d 1234, 1240 (11th Cir. 2016) (reiterating that mandatory sentencing guidelines are not subject to vagueness challenges and "*Welch* did not make *Johnson* retroactive for purposes of a successive § 2255 motion based on the Guidelines"); *In re Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (holding that the criteria for filing a successive § 2255 motion had not been met because *Welch* does not make Johnson retroactive for purposes of challenging the sentencing guidelines and mandatory sentencing guidelines cannot be unconstitutionally vague); *Donnell v. United States*, 826 F.3d 1014, 1017 (8th Cir. 2016) (refusing to create "a second rule that would apply *Johnson* and the constitutional vagueness doctrine to a provision of the advisory sentencing guidelines"); *In re Griffin*, 823 F.3d 1350, 1354-55 (11th Cir. 2016) (explaining that sentencing guidelines, whether mandatory or advisory, only limit a judge's discretion and do not violate a defendant's right to due process by reason of being vague); *Richardson v. United States*, 623 F. App'x 841, 842-43 (8th Cir. 2015) (denying authorization to file a successive motion to vacate, set aside, or correct sentence under § 2255 with respect to movant's challenge to his sentencing guidelines calculations because any extension of the rule in *Johnson* is not a new substantive rule under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)); *United States v. Matchett*, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (concluding that advisory sentencing guidelines, such as USSG §4B1.2(a)(2), cannot be unconstitutionally vague); *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (*en banc*) (explaining that, although it appears to be broad, § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing" (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979))); *Never Misses a Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005) (holding that "the 'new rule' announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings"); *United States v. Wivell*, 893 F.2d 156, 159-60 (8th Cir. 1990) (holding that sentencing guidelines are "not susceptible to" constitutional vagueness challenges). Having done so, I conclude that, despite being sentenced pre-*Booker*, each

petitioners' motion is time-barred because it does not assert a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

Therefore, each petitioners' motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied. As for a certificate of appealability, each of the petitioners has not made the requisite showing. *See* 28 U.S.C. § 2253(c)(2). Accordingly, a certificate of appealability under 28 U.S.C. § 2253 will not issue to any petitioner.

IT IS SO ORDERED.

DATED this 4th day of October, 2017.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

United States Court of Appeals
For the Eighth Circuit

No. 17-3609

Kirk Lurton Grummitt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No. 17-3622

Jeremy Phelps

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No. 17-3625

Kurt Alan Campbell

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No. 17-3628

Edward Lee Williams

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeals from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: January 17, 2019
Filed: February 8, 2019
[Unpublished]

Before GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

PER CURIAM.

Kirk Lurton Grummitt, Jeremy Phelps, Kurt Alan Campbell, and Edward Lee Williams (collectively, defendants) argue that they were sentenced as career offenders based on the residual clause of § 4B1.2(a)(2) of the U.S. Sentencing Guidelines (Guidelines) when the Guidelines were mandatory. In 2015, the Supreme Court decided Johnson v. United States, 135 S. Ct. 2551 (2015), which established the new rule that the residual clause of the Armed Career Criminal Act was unconstitutionally vague. Thereafter, the defendants moved to vacate, set aside, or correct their sentences under 28 U.S.C. § 2255, each arguing that Johnson applied to the almost-identical language of § 4B1.2(a)(2). The district court[1] concluded that Johnson did not apply, rendering the motions untimely.

We review *de novo* the denial of a § 2255 motion as untimely. Russo v. United States, 902 F.3d 880, 882 (8th Cir. 2018), *petition for cert. filed*, (U.S. Jan. 17, 2019) (No. 18-7538). "[T]he timeliness of [a movant's] claim depends on whether he is asserting the right initially recognized in Johnson or whether he is asserting a different right that would require the creation of a second new rule." Id. at 883. "[I]f the result sought is 'susceptible to debate among reasonable minds,' then the movant seeks declaration of a [second] new rule," and his motion is untimely. Id. (quoting Butler v. McKellar, 494 U.S. 407, 415 (1990)).

The defendants' argument is foreclosed by our decision in Russo, in which the movant argued that his mandatory sentence based on the residual clause of § 4B1.2(a)(2) was unconstitutional in light of Johnson. Id. at 882. In upholding the dismissal of the § 2255 motion, we explained that the Supreme Court had recently rejected a vagueness challenge to the advisory Guidelines in Beckles v. United States, 137 S. Ct. 886 (2017), but that "Beckles 'leaves open the question' whether the

[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, presided over the motions of Grummitt and Phelps. The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, presided over the motions of Campbell and Williams.

mandatory guidelines are susceptible to vagueness challenges" wherein the answer is reasonably debatable. Russo, 902 F.3d at 883 (quoting Beckles, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment)). We thus determined that Russo's § 2255 motion was untimely because he was attempting to assert a right not initially recognized in Johnson. Id. at 883. For those same reasons, we affirm the district court's conclusion that the defendants' motions were untimely filed. See Mora-Higuera v. United States, No. 17-3638, slip op. at 3 (8th Cir. 2019) (citing Russo, 902 F.3d at 882-83).

The judgments are affirmed.

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
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February 08, 2019

Mr. James F. Whalen
FEDERAL PUBLIC DEFENDER'S OFFICE
Southern District of Iowa
340 Capital Square
400 Locust Street
Des Moines, IA 50309-0000

RE: 17-3609 Kirk Grummitt v. United States
17-3622 Jeremy Phelps v. United States
17-3625 Kurt Campbell v. United States
17-3628 Edward Williams v. United States

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

YML

Enclosure(s)

cc: Mr. Kurt Alan Campbell
Mr. Matthew Jeremy Cole
Mr. Kevin Craig Fletcher
Mr. Kirk Lurton Grummitt
Mr. Jeremy Phelps

Mr. Rob Phelps
Mr. Patrick J. Reinert
Mr. Mark Tremmel
Mr. Shawn Wehde
Mr. Edward Lee Williams

District Court/Agency Case Number(s): 1:16-cv-00072-LRR
1:16-cv-00080-LRR
5:16-cv-04037-MWB
1:16-cv-00087-MWB

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3609

Kirk Lurton Grummitt

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No: 17-3622

Jeremy Phelps

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

No: 17-3625

Kurt Alan Campbell

Petitioner - Appellant

v.

United States of America

Respondent – Appellee

No: 17-3628

Edward Lee Williams

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:16-cv-00072-LRR)
(1:16-cv-00080-LRR)
(5:16-cv-04037-MWB)
(1:16-cv-00087-MWB)

JUDGMENT

Before GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

These appeals from the United States District Court were submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgments of the district court in these causes are affirmed in accordance with the opinion of this Court.

February 08, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans