

FILED

NOT FOR PUBLICATION

FEB 7 2019

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EULOS CEASAR KNIGHT,

Defendant-Appellant.

No. 17-35708

D.C. Nos. 3:16-cv-01244-BR
3:14-cr-00152-BR-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

Argued and Submitted November 7, 2018
Portland, Oregon

Before: FERNANDEZ and IKUTA, Circuit Judges, and SESSIONS,** District Judge.

Eulos Ceasar Knight appeals the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

Even assuming that Knight was ineligible for a sentencing enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), Knight failed to show that the potential for such an enhancement was “demonstrably made the basis for [his] sentence.” *United States v. Hill*, — F.3d —, (9th Cir. 2019) (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009)). Pre-sentencing discussions between the prosecutor and defense counsel about the potential for an ACCA enhancement, and evidence that Knight considered the potential for an ACCA enhancement in entering into his plea agreement, do not make it “abundantly clear” that the district court relied on the potential ACCA enhancement as the basis for its sentence. *Hill*, — F.3d at — (quoting *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978)). Because the district court did not impose a sentence based on misinformation of a constitutional magnitude, we reject Knight’s claim that his due process rights were violated and conclude he is not entitled to a hearing on that claim.¹

AFFIRMED.

¹ Because Knight’s motion fails on the merits, we do not reach the government’s argument that Knight’s motion is untimely. *See United States v. Hill*, — F.3d — n.1 (9th Cir. 2019).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

3:14-cr-00152-BR
(3:16-cv-01244-BR)

OPINION AND ORDER

v.

EULOS CEASAR KNIGHT,

Defendant.

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1 - OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendant Eulos Ceasar Knight's Motion (#25) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 and Plaintiff's Motion (#39) to Dismiss Defendant's Motion to Vacate, Set Aside or Correct Sentence. For the reasons that follow, the Court **DENIES** Defendant's Motion, **GRANTS** Plaintiff's Motion, and **DECLINES** to issue a certificate of appealability.

BACKGROUND

On April 7, 2009, Defendant was charged in an Indictment with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1).

On July 24, 2014, Defendant pled guilty to the charge.

On October 27, 2014, the Court held a sentencing hearing, found Defendant qualified for a sentencing enhancement pursuant to U.S.S.G. § 2K2.1 as a career offender, adopted the sentencing calculations in the Presentence Report, and sentenced Defendant to 84 months imprisonment and three years of supervised release.

On October 28, 2014, the Court entered a Judgment (#19).¹ Defendant did not appeal his conviction.

On June 23, 2016, Defendant filed a Motion (#25) to Vacate

¹ Although Plaintiff states the Judgment was entered on January 9, 2015, the docket reflects the Court entered the Judgment on October 28, 2014.

or Correct Sentence under 28 U.S.C. § 2255 in which he asserts the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), "applies to the identical residual clause in the career offender guideline, U.S.S.G. § 4B1.2, which is incorporated by reference into U.S.S.G. § 2K2.1, and renders it unconstitutionally vague."

On May 18, 2017, Defendant filed a Memorandum in Support of his Motion to Vacate.

On June 19, 2017, Plaintiff filed a Motion (#39) to Dismiss Defendant's Motion to Vacate, Set Aside or Correct Sentence on the ground that the Supreme Court concluded in *Beckles v. United States* that the holding of *Johnson* did not extend to the advisory sentencing guidelines and held "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause and that [U.S.S.G.] § 4B1.2(a)'s residual clause is not void for vagueness." 137 S. Ct. 886, 895 (2017).

The Court took Defendant's Motion to Vacate and Plaintiff's Motion to Dismiss under advisement on July 14, 2017.

DISCUSSION

As noted, Defendant asserts in his Motion that this Court should vacate or set aside his sentence because the Supreme Court's decision in *Johnson* "applies to the identical residual clause in the career offender guideline, U.S.S.G. § 4B1.2, which

is incorporated by reference into U.S.S.G. § 2K2.1, and renders it unconstitutionally vague."

The government asserts in its Response to Defendant's Motion and in its Motion to Dismiss that Defendant's claim is meritless and untimely because the Supreme Court held in *Beckles* that *Johnson* did not apply to the advisory guidelines.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), motions to vacate or to set aside sentences pursuant to § 2255 are subject to a one-year limitation period that runs from the latest of:

(1) the date on which the judgment of conviction becomes final; [or]

* * *

(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.

28 U.S.C. § 2255(f)(1), (3). Defendant does not dispute his June 23, 2016, Motion to Vacate is untimely under § 2255(f)(1) because he filed it more than one year after his sentence became final. Defendant, however, asserts his Motion to Vacate is timely under § 2255(f)(3) because of the Supreme Court's ruling in *Johnson*.

In *Johnson* the Supreme Court held the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), was unconstitutional. Later in *Welch v. United States*, 136 S. Ct.

1257 (2016), the Supreme Court held *Johnson* announced a new substantive rule, and, therefore, its holding is retroactive in cases under § 2255. Defendant, however, was not sentenced as an armed career criminal under the ACCA. Instead Defendant was sentenced as a career offender pursuant to U.S.S.G. § 4B1.2, which is incorporated by reference into § 2K2.1. Defendant asserts the holding in *Johnson* and *Welch* should be extended to the residual clause of U.S.S.G. § 4B1.2, and, therefore, under the circumstances of this case, Defendant would satisfy the requirement of § 2255(f)(3) because his Motion to Vacate was filed within one year of a "right . . . newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." As noted, however, the Supreme Court rejected this argument in *Beckles*, concluded the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, and specifically held [U.S.S.G.] § 4B1.2(a)'s residual clause is not void for vagueness." *Beckles*, 137 S. Ct. at 895. Defendant does not identify any other newly-recognized rule of constitutional law made retroactive by the Supreme Court. Thus, Defendant fails to satisfy the requirements of § 2255(f)(3), and his Motion to Vacate is, therefore, untimely. See, e.g., *United States v. Gonzales*, No. 2:03-CR-176 JCM, 2017 WL 2870093, at *2 (D. Nev. Jul. 5, 2017)(the court concluded the defendant's § 2255 motion was untimely because he did not file it

within one year of the date that his judgment of conviction became final and because the Supreme Court's decision in *Beckles* made clear *Johnson* did not constitute a newly-recognized right by the Supreme Court that was retroactively applicable to cases on collateral review of sentencing enhancements under U.S.S.G.

§ 2K2.1); *United States v. Richter*, No. CR 13-023-M-DWM, 2017 WL 2437251, at *2 (D. Mont. June 5, 2017)(same); *United States v. Singletary*, No. CR 12-00798 YGR, 2017 WL 1404326, at *2 (N.D. Cal. Apr. 18, 2017)(same).

The Court, therefore, denies Defendant's Motion to Vacate, Set Aside or Correct Sentence pursuant to § 2255 and grants Plaintiff's Motion to Dismiss. In addition, the Court finds Defendant has not made a substantial showing of the denial of a constitutional right, and, therefore, the Court declines to issue a certificate of appealability.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#25) to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255, **GRANTS** Plaintiff's Motion (#39) to Dismiss Defendant's Motion to Vacate, Set Aside or Correct Sentence, and **DECLINES** to

issue a certificate of appealability.

IT IS SO ORDERED.

DATED this 17th day of August, 2017.

Anna J. Brown

ANNA J. BROWN
United States Senior District Judge

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UNITED STATES COURT OF APPEALS

APR 18 2019

FOR THE NINTH CIRCUIT

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District of Oregon,
Portland

ORDER

Before: FERNANDEZ and IKUTA, Circuit Judges, and SESSIONS,* District Judge.

The panel has unanimously voted to deny appellant's petition for rehearing.

Judge Ikuta has voted to deny the petition for rehearing en banc, and Judge Fernandez and Judge Sessions have so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are
DENIED.

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

18 U.S.C.A. § 924

§ 924. Penalties

Effective: December 21, 2018

Currentness

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.