No.

In the

Supreme Court of the United States

OCTOBER TERM, 2019

MARIO RONRICO SMITH
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Robin M. Wolpert*
*Counsel of Record
Demetria Dyer
SAPIENTIA LAW GROUP, PLLC
120 South Sixth Street, Suite 100
Minneapolis, MN 55402
Telephone: (612) 756-7100
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court declared unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) ("ACCA").

The question presented is:

1. Whether the sentencing package doctrine, rather than the concurrent sentence doctrine, must be applied on post-conviction review of a meritorious challenge to an unconstitutional ACCA-enhanced sentence in a multi-count conviction, requiring vacation, *de novo* resentencing, and application of the current Guidelines?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

UNITED STATES SENTENCING GUIDELINES

RULES

No.

In the

Supreme Court of the United States

OCTOBER TERM, 2019

MARIO RONRICO SMITH
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Mario Ronrico Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's published opinion affirming denial of Mr. Smith's 28 U.S.C. § 2255 motion to vacate sentence is reported at 930

F.3d 978 (8th Cir. 2019), and included in the Appendix at A-1. The Eighth Circuit's unreported order granting Mr. Smith a certificate of appealability is included in the Appendix at A-2.

The District Court's unpublished order denying Mr. Smith's motion for reconsideration is included in the Appendix at A-3. The District Court's unpublished order denying Mr. Smith's § 2255 motion and denying resentencing is included in the Appendix at A-4. The District Court's sentence and judgment are included in the Appendix at A-5.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming the district court's denial of Mr. Smith's 28 U.S.C. § 2255 motion was entered on July 18, 2019. This petition is timely filed within 90 days of entry of the judgment below, pursuant to Supreme Court Rule 13.1.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Section 924(e)(2)(B) of Title 18 states, in pertinent part:

18 U.S.C. § 924(e)(2)

> (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

18 U.S.C. § 924(e)(2)(B).

The United States Sentencing Guidelines state, in pertinent part:

§ 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level*
(1)	Life	37
(2)	25 years or more	34
(3)	20 years or more, but less than 25 years	32
(4)	15 years or more, but less than 20 years	29
(5)	10 years or more, but less than 15 years	24
(6)	5 years or more, but less than 10 years	17
(7)	More than 1 year, but less than 5 years	12

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.1.

§ 4B1.2. Definitions of Terms Used in Section 4B1.1 (Pre-2016 Amendment)

(a) The term "crime of violence" means 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, or

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

U.S.S.G. § 4B1.2.

§4B1.2. Definitions of Terms Used in Section 4B1.1 (Amended 2016)

(a) The term "crime of violence" means 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, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2.

INTRODUCTION

This case presents an important issue that arises in countless post-conviction cases across the country involving a successful challenge to some, but not all, counts of conviction or sentences in a multi-count conviction. The courts of appeal are divided about when, and under what conditions, the sentencing package or the concurrent sentence doctrine applies. Some have concluded that the sentencing package doctrine applies when certain counts are grouped together for purposes of calculating the sentence and are interdependent. The Eighth Circuit Court of Appeals has applied more stringent standards, requiring a showing that the invalid sentenced caused or drove the sentence on another count.

Petitioner Mario Ronrico Smith urges the Court to grant certiorari and address whether the sentencing package doctrine, rather than the concurrent sentence doctrine, must be applied on post-conviction review of a meritorious challenge to an unconstitutional ACCA-enhanced sentence in a multi-count conviction, requiring vacation, *de novo* resentencing, and application of the current Guidelines. Not only is this issue one of importance in the aftermath of *Johnson v. United States*, 135

S. Ct. 2551 (2015), but this case gives the Court a needed opportunity to clarify proper application of the concurrent sentence doctrine in light of the liberty interests of offenders and interests in judicial economy.

STATEMENT OF THE CASE

1. In 2013, a jury convicted Mr. Smith of possession with intent to distribute cocaine, in violation of 21 § U.S.C. 841(a)(1) and 841(b)(1)(B) (Count 1), using and carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 2), and felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 922(a)(2) (Count 3).

2. The Presentence Investigation Report ("PSR") concluded that Mr. Smith's criminal history contained three prior convictions that qualified as a "violent felony" or a "serious drug offense" under 18 U.S.C. §§ 924(e)(1) and 924(2)(B)—specifically, a 1997 Wisconsin felony conviction of fleeing and eluding police in a motor vehicle, a 1998 Minnesota felony conviction of fleeing police in a motor vehicle, and a serious drug offense. Mr. Smith's prior drug offense is not at issue in this petition.

3. In calculating Mr. Smith's sentence, the PSR grouped Counts 1 and 3 together and treated Count 3 as a specific offense characteristic applicable to Count 1. U.S.S.G. § 3D1.2(c). The base offense level for Count 1 was 28. The total offense level on Count 3 for armed career criminal was 34. U.S.S.G. § 4B1.4, § 4B1.1(c), and § 2K2.4(c). For Count 1, Mr. Smith's career offender enhancement brought the total offense level to 37. U.S.S.G. § 4B1.1. With an adjusted offense level of 37, and a criminal history category of VI, the resulting guideline range was 360 months to life. Mr. Smith's five-year mandatory minimum sentence for Count 2 under 18 U.S.C. § 924(c) resulted in an advisory Guidelines range of 420 months to life.

4. At the sentencing hearing on July 30, 2014, Mr. Smith maintained that he was not a career offender or an armed career offender and urged the court to apply *United States v. Tyler*, 580 F.3d 722 (8th Cir. 2009), rather than *Sykes v. United States*, 131 S. Ct. 2267 (2001). In *Sykes*, this Court concluded that vehicle fleeing was a crime of violence for purposes of the ACCA and noted that its holding was "at least in tension, if not in conflict, with" *Tyler*. 131 S. Ct. at 2272. Without the armed career offender enhancement, the statutory penalty for Count 3

would have been 10 years. Absent the ACCA and career offender designations, Mr. Smith's total offense level would have been 30, with criminal history category IV, resulting in a Guidelines range of 135-168 months, plus 60 months for Count 2. Defense counsel requested a sentence of 15 years.

5. The district court ultimately varied downward from the advisory Guidelines range of 420 months to life and imposed concurrent 220-month sentences on Counts 1 and 3 and a consecutive 60-month sentence on Count 2. The court stated that it "considered the defendant's criminal history and lengthy flight from authorities in fashioning this sentence." The court explained that the reasons for the sentence were based on 18 U.S.C. § 3553(a) factors and that "it would have imposed the same sentence had it sustained defendant's . . . objections" to the calculation of his sentence.

6. Although Mr. Smith preserved his sentencing issues, his attorney did not raise them on direct appeal. The Eighth Circuit affirmed Mr. Smith's convictions on June 19, 2015. *United States v. Smith*, 789 F.3d 923 (8th Cir. 2015).

7. Exactly one week later, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the residual clause of the ACCA is void for vagueness under the Fifth Amendment.

8. On January 21, 2016, the Sentencing Commission proposed amendments to § 4B1.2(a)(2) to strike the residual clause, with an effective date of August 1, 2016. U.S.S.G. App. C., Amend. 798 (Reason for Amendment) (Aug. 1, 2016).

9. On June 6, 2016, Mr. Smith timely moved, *pro se*, to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Mr. Smith asked for vacation of his sentence and *de novo* resentencing. His court-appointed federal defender submitted a memorandum arguing that this Court's holding in *Johnson* that the ACCA's residual clause was void for vagueness was retroactively applicable to Mr. Smith under *Johnson* and *Welch v. United States*, 136 S. Ct. 1257 (2016). Defense counsel further argued that because the residual clause of the Guidelines was identical to that of the ACCA, it too was void for vagueness. Finally, counsel argued that Mr. Smith could be eligible for further reductions as set forth in Guideline Amendment 782.

10. The district court granted the Government's motion for a stay pending this Court's decision in *Beckles v. United States*. On March 6, 2017, this Court held that the advisory Guidelines cannot be subject to a constitutional void for vagueness challenge under the Fifth Amendment's due process clause. *Beckles v. United States*, 137 S. Ct. 886, 895 (2017).

11. Following *Beckles*, Mr. Smith proceeded *pro se* and reiterated his request for a *de novo* resentencing based on the Government's concession that his ACCA offender status was no longer valid. Mr. Smith argued that the sentencing package doctrine should apply because his ACCA and career offender sentences were imposed concurrently and were bundled together into a total sentencing package for his multi-count convictions. Mr. Smith asked the court to vacate his unlawful ACCA sentence based on *Johnson* and recalculate his sentence.

12. On July 19, 2017, almost one year after the effective date of the amendments to the Guidelines striking the residual clause, the district court denied Mr. Smith's motion to vacate his sentence and denied a certificate of appealability, relying on the concurrent sentence doctrine. The court reasoned that Mr. Smith would not receive a lower sentence if he was resentenced because his sentence on Count 1 was the

same as his sentence for Count 3. The court explained that in sentencing Mr. Smith to 220 months, the court granted him a 200-month downward variance. Accordingly, the district court concluded, if Mr. Smith were resentenced on Counts 1 and 2, he would not receive the relief requested.

13. On August 14, 2017, the district court denied Mr. Smith's motion for reconsideration.

14. Mr. Smith filed a *pro se* post-conviction appeal on September 26, 2017. On April 24, 2018, the Eighth Circuit issued an order appointing appellate counsel and granting a certificate of appealability, designating two questions:

(a) Whether the district court erred in relying on the concurrent-sentence doctrine to deny relief on Smith's meritorious claim that his ACCA sentence was unconstitutional pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), without examining (1) whether the sentencing package doctrine required the entire sentence to be vacated, (2) whether Smith would face any prejudicial collateral consequences, or (3) whether the concurrent sentence doctrine is appropriate

when the government conceded the claim was meritorious; and

(b) Whether the district court erred in concluding that appellate counsel was not ineffective for failing to inform this court that Smith's sentence was affected by *Johnson*.

15. Mr. Smith argued to the Eighth Circuit that the entire sentence should be vacated because Counts 1 and 3 were a package of interdependent sentences—they were grouped together for purposes of calculating his sentence, the court considered and described them a single sentence, and the court exercised its discretion and varied downward in an equal amount for both Counts 1 and 3. Mr. Smith further argued that failure to resentence him was prejudicial because resentencing would be *de novo* and the law-of-the-case doctrine would not apply. *See Pepper v. United States*, 562 U.S. 476, 507-08 (2011). The district court would apply the current Guidelines, rather than the 2013 Guidelines, because the version of the Guidelines in effect at the time of resentencing applies absent an *ex post facto* violation. *Peugh v. United States*, 133 S. Ct. 2072, 2083-85 (2013); U.S.S.G. § 1B1.11 cmt. 8. Application of the current Guidelines would have a significant effect on

Mr. Smith's sentence because the Guidelines were amended following *Johnson* and the current Guidelines no longer contain the career offender residual clause. In addition, the base level of his drug conviction would be reduced from 28 to 26 based on Guidelines Amendment 782.

16. On July 18, 2019, a divided Eighth Circuit affirmed the denial of relief under § 2255 based on the concurrent sentence doctrine. *Smith v. United States*, 930 F.3d 978 (8th Cir. 2019). The majority explained that under this doctrine, a court may decline to review the validity of a concurrent conviction or sentence when a ruling in the defendant's favor would not reduce the time he is required to serve or otherwise prejudice him in any way. 930 F.3d at 980. The majority reasoned that reducing Mr. Smith's ACCA sentence on Count 3 would not affect his total sentence because the concurrent 220-month sentence on Count 1 and consecutive 60-month sentence on Count 2 are still valid. *Id.* The majority rejected Mr. Smith's arguments that the concurrent sentences on Counts 1 and 3 were interdependent. *Id.* at 981. The majority declared that Count 1 drove the sentence on Count 3, and Count 3 had no impact on the sentence for Count 1. *Id.* The majority concluded that the district court did not abuse its discretion in not ordering a complete resentencing

because the district court would have imposed the same sentence on resentencing and stated that the concurrent 220-month sentences on Counts 1 and 3 were based on the Section 3553(a) factors. *Id.*

17. The dissenting Circuit Judge observed that the majority "leaves in place a sentence that all agree is unlawful." 930 F.3d at 982. Judge Kelly observed that "the statutory maximum sentence on Smith's ACCA count is 120 months' imprisonment, yet Smith received a sentence of 220 months." *Id.* Judge Kelly went on to explain that "the district court could invoke the concurrent sentence doctrine to deny the petition only if a ruling in Smith's favor 'would not reduce the time he is required to serve or otherwise prejudice him in any way.'" *Id.* (quoting *Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019) (cleaned up)). But, Judge Kelly noted, "it is possible that a ruling in Smith's favor would reduce the time he is required to serve" because the current version of the Guidelines would apply upon resentencing, and under the current Guidelines, Smith would not qualify for a career offender enhancement on Count 1, yielding a Guidelines range significantly lower than the range applicable in his original sentencing. 930 F.3d at 982. Indeed, Judge Kelly pointed out, "Smith received a 140-month downward

variance at his original sentencing; to reimpose the same term of imprisonment upon resentencing would likely require the district court to vary upwards, a variance that might prove difficult to justify." *Id.* at 982-83.

REASONS FOR GRANTING THE WRIT

I. The circuits are divided on when the sentencing package doctrine applies to an unlawful sentence in a multi-count conviction.

28 U.S.C. § 2255 provides that when a federal court finds that a judgment was rendered without jurisdiction or is legally infirm, "the court *shall* vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255 (emphasis added). In practice, however, federal courts have exercised discretion in responding to an invalid conviction or sentence in a multi-count conviction based on two competing doctrines—the sentencing package doctrine and the concurrent sentence doctrine.

The sentencing package doctrine applies in cases involving multi-count indictments and a successful attack by a defendant on some, but not all, of the counts of conviction or sentences. In such instances, the

court may vacate the entire sentence on all counts so that it can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a). *Greenlaw v. United States*, 554 U.S. 237, 253-54 (2008). Alternatively, a federal court may follow the concurrent sentence doctrine, which "allows courts to decline to review the validity of a concurrent conviction or sentence when a ruling in the defendant's favor 'would not reduce the time he is required to serve' or otherwise 'prejudice him in any way.'" *Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019), quoting *United States v. Olunloyo*, 10 F.3d 578, 581-82 (8th Cir. 1993).

The concurrent sentence doctrine is a disfavored vehicle of judicial economy. The propriety of the doctrine was called into question by this Court in *Benton v. Maryland*, 395 U.S. 784 (1969). In *Benton*, the Court clarified that there was no jurisdictional bar to consideration of all counts under concurrent sentences and declined to address the doctrine's continued validity. *Id.* at 791-2. The Court warned that unreviewed counts could have significant collateral consequences, such as increasing an appellant's future sentencing under a habitual offender statute,

adversely affecting his chances for parole, or being used to impeach his testimony at a future trial. *Id.*

Since *Benton*, this Court has rarely mentioned, let alone addressed, the role of the concurrent sentence doctrine or the sentencing package doctrine in federal sentencing. *See Dean v. United States*, 137 S.Ct. 1170, 1176 (2017) (observing that the Government's practice in multi-count indictment cases, where there is a successful attack on some counts of conviction, is to argue that the appellate court should vacate the entire sentence so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence, citing *Greenlaw*, 554 U.S. at 253-54, and *United States v. Smith*, 756 F.3d 1179, 1188-89 & n.5 (10th Cir. 2014) (collecting cases)); *Ray v. United States*, 107 S.Ct. 2093 (1987) (holding that presence of $50 assessment precluded application of concurrent sentence doctrine); *Mariscal v. United States*, 448 U.S. 405 (1981) (vacating judgment affirming convictions and remanding for reconsideration of the application of the concurrent sentence doctrine to a conviction conceded by the United States to be erroneous); *Pinkus v. United States*, 436 U.S. 293 (1978) (remanding the decision of the Ninth Circuit, which had relied

on the concurrent sentence doctrine, on the grounds that the defendant had at least a pecuniary interest in securing review of all counts of his conviction).

In *Pepper*, this Court recognized that "[a] criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent." 562 US. at 507-08, quoting *United States v. Stinson,* 97 F.3d 466, 469 (11th Cir. 1996) (*per curiam*). This Court further recognized that a district court's "original sentencing intent may be undermined by altering one portion of the calculus," *Id.*, quoting *United States v. White,* 406 F.3d 827, 832 (7th Cir. 2005). This Court has not, however, articulated when and under what conditions application of the sentencing package doctrine is appropriate.

In evaluating the prejudicial collateral consequences of an unlawful conviction or sentence, the circuit courts are divided regarding the test for invoking the sentencing package doctrine. Some circuits have recognized that counts in a multicount indictment are interdependent if they are grouped together pursuant to the Guidelines, requiring application of the sentencing package doctrine. *See, e.g., In re Davis*, 829 F.3d 1297 (11th Cir. 2016) (granting a Section 2255 successive

application where the judge sentenced the movant based on a single sentencing guideline range for his ACCA violation combined with other offenses, so the sentencing decision was "no doubt informed by [defendant's] ACCA designation, which means that [he] may have suffered 'adverse collateral consequences' if his ACCA sentence turns out to be unlawful."); *United States v. Miller*, 594 F.3d 172, 181-82 (3d Cir. 2010) (("[C]ounts that were grouped together pursuant to the Sentencing Guidelines at the original sentencing are interdependent."); *United States v. Bass*, 104 Fed. Appx. 997, 999-1000 (5th Cir. 2004) (applying the sentencing package doctrine where counts were grouped under the sentencing Guidelines); *United States v. Rozier*, 485 Fed. Appx. 352, 356 (11th Cir. 2012) (holding that counts were interdependent where they were grouped together); *United States v. Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014) ("the notion is that, especially in the Guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence."). *See also United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir. 1987) (where the sentences on individual counts are interdependent, they form a single sentencing package); *United States v.*

Pimienta-Redondo, 874 F.2d 9, 14 (1st Cir. 1989) (recognizing that a package takes into account "a breadth of information" to ensure that "the punishment 'will suit not merely the offense but the individual defendant'") (quoting *United States v. Wasman*, 468 U.S. 559, 564 (1984)).

By contrast, in Mr. Smith's case, the Eighth Circuit rejected the notion that the grouping of counts for purposes of calculating a single Guidelines range or "interdependence" was sufficient to require application of the sentencing package doctrine. Instead, the court required the defendant to demonstrate that a ruling in his favor would reduce the time he is required to serve or otherwise prejudice him. *Eason v. United States*, 912 F.3d 1122, 1123-24 (8th Cir. 2019). In Mr. Smith's case, the Eighth Circuit examined whether the unlawful ACCA sentence in Count 3, which was grouped with Count 1, caused any impact on Count 1. Absent such causation, the court concluded that mere grouping for purposes of calculating the Guidelines sentence was insufficient to justify application of the sentencing package doctrine, vacation, and *de novo* resentencing. In both *Smith* and *Eason*, the Eighth Circuit suggested that the test for invoking the sentencing package doctrine is heightened

when the validity of a concurrent sentence, as opposed to a concurrent conviction, is challenged. *Eason*, 912 F.3d at 1123; *Smith*, 930 F.3d at 981. Further, the Eighth Circuit concluded that because the sentencing court relied on the Section 3553(a) factors in fashioning the concurrent sentence, independent of the Guidelines range, and stated that "it would have imposed the same sentence had it sustained defendant's . . . objections," reliance on the concurrent sentence doctrine was justified because the sentence would remain the same even if resentenced.

The Court should grant review of this case to resolve the circuit split. Guidance and clarification are needed as to when, and under what conditions, the concurrent sentence doctrine and the sentencing package doctrine are applicable, and when an unlawful sentence in a multi-count conviction should be subject to vacation and *de novo* resentencing.

Mr. Smith's case is an appropriate vehicle for addressing the question of what counts as prejudicial collateral consequences, the impact of the Government's concession that the ACCA sentence was invalid on the applicability of the concurrent sentence doctrine, and whether a sentencing court's reliance on the Section 3553(a) factors and statement that it would impose the same sentence are sufficient to

preclude *de novo* resentencing and meaningful review on appeal. All parties agree that Mr. Smith's 220-month ACCA sentence on Count 3 was unconstitutional, exceeds the statutory maximum, and could not be reimposed following *Johnson*.

In the First, Third, Fifth, Seventh, and Eleventh Circuits, the grouping of the unlawful ACCA count with other counts for purposes of calculating the sentence would likely weigh in favor of applying the sentencing package doctrine. In *Smith*, however, the Eighth Circuit required a demonstration that the unlawful ACCA sentence negatively impacted other sentences in the multi-count conviction to trigger the sentencing package doctrine. The dissent in *Smith* recognized that if Mr. Smith's sentence were vacated and he were resentenced, the current Guidelines would apply, thereby eliminating the career offender enhancement on Count 1, among other beneficial changes to the Guidelines since his initial sentencing. Mr. Smith's case is an ideal vehicle to explain what constitutes prejudice sufficient to bar application of the concurrent sentence doctrine, as it is an important question upon that this Court should settle. S. Ct. R. 10(c).

Mr. Smith's case permits the Court to clarify the impact of the Government's concession on the use of the concurrent sentence doctrine in the context of a successful attack on a sentence in a multi-count conviction. This Court has recognized that the Government's practice in such cases is to argue that the appellate court should vacate the entire sentence so that the sentencing court may increase the sentence for any remaining counts up to the limit set by the original aggregate sentence. *See, e.g.*, *Dean*, 137 S.Ct. at 1176. This Court has also recognized that the Government typically argues that separate sentences are interrelated and interdependent, and resulting in an aggregate sentence rather than sentences that should be treated discretely. *Id.*, citing *Smith*, 756 F.3d at 1189. In this context, some circuit courts have given significant weight to Government concessions regarding the validity of sentences and convictions, declining to apply the concurrent sentence doctrine in such cases. For example, in *United States v. Evans*, 572 F.3d 455, 476-77 (5th Cir. 1978), the court declined to apply the concurrent sentence doctrine where the Government conceded that there was no basis for a conviction in a multi-count indictment, calling the Government's concession the "[m]ost significant" factor in its decision.

Similarly, in *United States v. Rosen*, 764 F.2d 763, 767 (11th Cir. 1985), the court declined to apply the concurrent sentence doctrine because the Government conceded the sentence was unlawful. By contrast, the Eighth Circuit in Mr. Smith's case did not give weight to the Government's concession that the ACCA sentence was unlawful. Indeed, the Government argued for application of the concurrent sentence doctrine. The Court should grant review to clarify the weight of any Government concession on application of the concurrent sentence doctrine.

Finally, Mr. Smith's case is an excellent vehicle for addressing the impact of any pronouncement by the sentencing court that it would reimpose the same sentence even after one sentence in a multi-count conviction is invalidated. In Mr. Smith's case, the district court stated that following the "sentencing package" doctrine would not aid him because the court would simply reimpose the same sentence. The sentencing court made such a prediction nearly a year after the effective date of the Guidelines amendment striking the residual clause. The basis for the large upward variance that would be required to accomplish this result was not identified in the record. Mr. Smith's Guidelines range for

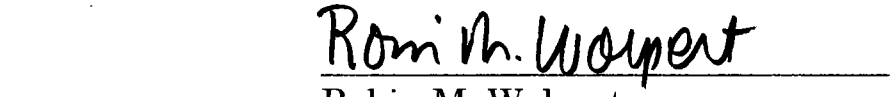
Count 1 would be 135 to 168 months, without the mandatory 60-month consecutive sentence for Count 2. Thus, absent the career offender designation, to reimpose the original 220-month sentence for Count I would require a dramatic upward variance from the Guidelines range. The district court never explained what basis it would have for such a dramatic upward departure. *See United States v. Brown*, 879 F.3d 1231, 1233 (11th Cir. 2018) (vacating imposition of statutory maximum sentence after *Johnson*, which was a significant upward variance from the corrected Guidelines range). Thus, there is no "vehicle" problem with the Court taking this case for review and resolution of the conflict in the circuits regarding what constitutes prejudice sufficient for vacation and *de novo* resentencing is an important question upon which this Court should rule. S. Ct. R. 10(c).

CONCLUSION

For the reasons set forth above, Mario Ronrico Smith respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Dated: October 16, 2019

Respectfully submitted,



Robin M. Wolpert
Demetria Dyer
SAPIENTIA LAW GROUP, PLLC
120 South 6th St., Suite 100
Minneapolis, MN 55402
(612) 756-7100
robinw@sapientialaw.com
Attorneys for Petitioner
Mario Smith

APPENDIX

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 17-3201

Mario Ronrico Smith

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: February 14, 2019
Filed: July 18, 2019

Before LOKEN, COLLOTON, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

In 2013, a jury convicted Mario Ronrico Smith of possession with intent to distribute cocaine ("Count 1"), using and carrying a firearm during a drug trafficking crime ("Count 2"), and felon in possession of a firearm ("Count 3"). At sentencing,

the district court[1] overruled Smith's objection that two prior convictions for fleeing an officer in a vehicle were not violent felonies and crimes of violence under the "residual clauses" of the Armed Career Criminal Act ("ACCA") and the career offender advisory guidelines. Therefore, the court sentenced Smith as an armed career criminal on Count 3, see 18 U.S.C. § 924(e) and USSG § 4B1.4, and as a career offender under the advisory guidelines on Counts 1 and 2, see USSG §§ 4B1.1 and 4B1.2. This resulted in a guidelines sentencing range of 420 months to life in prison. Varying downward, the court imposed concurrent 220-month sentences on Counts 1 and 3 and a consecutive 60-month sentence on Count 2. The court stated that "it would have imposed the same sentence had it sustained defendant's . . . objections" to the armed career criminal and career offender determinations. On direct appeal, Smith raised no sentencing issues; we affirmed. United States v. Smith, 789 F.3d 923 (8th Cir. 2015).

One week after we decided Smith's direct appeal, the Supreme Court issued its decision in Johnson v. United States, 135 S. Ct. 2551 (2015), holding the residual clause of the ACCA void for vagueness under the Fifth Amendment. In June 2016, Smith filed a timely *pro se* motion to vacate his sentence under 28 U.S.C. § 2255, arguing, as relevant here, that appellate counsel provided ineffective assistance when he failed to note that a Supreme Court decision was pending in Johnson; and that his sentence should be vacated because, after Johnson, his fleeing convictions no longer qualified as violent felonies under the ACCA *or* crimes of violence under the career offender guidelines. The district court appointed post-conviction counsel who filed a memorandum supporting Smith's motion.

At the government's request, the district court stayed the § 2255 proceedings until the Supreme Court decided, in Beckles v. United States, 137 S. Ct. 886 (2017),

---

[1]The Honorable David S. Doty, United States District Judge for the District of Minnesota.

that the residual clause in the advisory career offender guidelines was *not* subject to a Fifth Amendment vagueness challenge. After Beckles, the government opposed Smith's § 2255 motion, conceding that his Count 3 ACCA sentence was no longer valid under Johnson but arguing that he was not entitled to § 2255 relief because appellate counsel did not provide ineffective assistance and because Smith was not entitled to sentencing relief under the concurrent sentence doctrine.

Agreeing with the government, the district court denied Smith's § 2255 motion. Smith did not establish ineffective assistance of appellate counsel, the court concluded, because counsel's failure to anticipate Johnson's change in the law did not constitute deficient performance. Although Smith's ACCA sentence on Count 3 was no longer valid after Johnson, the concurrent sentence doctrine applied, the court concluded, because Beckles had foreclosed Smith's challenge to his concurrent career offender sentence on Count 1. Therefore, "even if the court . . . granted Smith relief on count 3, his imprisonment term would remain the same because his conviction on count 1, which is still valid, is the same as his sentence for count 3." We granted a certificate of appealability on these issues. Reviewing *de novo*, we affirm.

I. The Concurrent Sentence Doctrine Issue.

Smith's § 2255 motion argued that both his Count 1 career offender sentence and his Count 3 ACCA sentence must be vacated under Johnson. Beckles established that Johnson provides no basis for § 2255 relief from the Count 1 career offender sentence under the advisory guidelines. The district court therefore invoked the discretionary concurrent sentence doctrine to deny sentencing relief. That doctrine "allows courts to decline to review the validity of a concurrent conviction or sentence when a ruling in the defendant's favor 'would not reduce the time he is required to serve' or otherwise 'prejudice him in any way.'" Eason v. United States, 912 F.3d 1122, 1123 (8th Cir. 2019), quoting United States v. Olunloyo, 10 F.3d 578, 581-82 (8th Cir. 1993). Here, as in Eason, 912 F.3d at 1123, Smith did not challenge the

validity of his Count 3 conviction for being a felon in possession of a firearm, and reducing his ACCA sentence on Count 3 would not affect his total sentence because the concurrent 220-month sentence on Count 1 and consecutive 60-month sentence on Count 2 are still valid.

On appeal, Smith argues that he is entitled to have his entire sentence vacated because the concurrent sentences on Counts 1 and 3 are "interdependent." Smith repeatedly asserts that his sentence on Count 1 "was impacted by the unlawful ACCA enhancement" on Count 3. But repeating this assertion does not make it true. Under the Guidelines in effect when he was sentenced, Smith's total offense level on Count 1 standing alone, with the career offender enhancement, was 37; on Count 3 standing alone, with the ACCA enhancement, it was 34. Compare USSG § 4B1.1(b)(1), with USSG § 4B1.4(a)(3). The enhancements put Smith in criminal history category VI on both counts. See USSG §§ 4B1.1(b), 4B1.4(c)(2). The Count 1 enhanced offense level of 37 resulted in an advisory guidelines range of 360 months to life under § 4B1.1(c)(3); § 4B1.1(c)(2) added the mandatory consecutive 60-month sentence for Count 2, making the advisory guidelines range for Count 1 *alone* 420 months to life. Counts 1 and 3 were grouped under § 3D1.2(c), resulting in concurrent ranges of 420 months to life for each Count. Thus, Count 3 did not increase the guidelines sentence for Count 1; if anything, the opposite was true. Moreover, the typical impact of an ACCA enhancement -- its mandatory minimum fifteen-year sentence -- had no impact in this case because Smith's total sentence was far above fifteen years, before and after the district court granted a 200-month downward variance. Indeed, at sentencing, defense counsel urged the court to impose a fifteen-year sentence.

Smith further argues the district court abused its discretion in applying the concurrent sentence doctrine because, with his Count 3 sentence vacated under Johnson, he is entitled to a full resentencing under the sentencing package doctrine. At that resentencing, Smith asserts, the current career offender guidelines would apply. Therefore, because the Sentencing Commission eliminated the career offender

residual clause after Johnson, his Count 1 sentence would not be subject to the career offender enhancement. This establishes prejudice, Smith argues, so the concurrent sentence doctrine does not apply. He urges us to vacate his sentence and remand for *de novo* resentencing.

Under the sentencing package doctrine, when a defendant successfully attacks one but not all counts of conviction on appeal, we "may vacate the entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." United States v. McArthur, 850 F.3d 925, 943 (8th Cir. 2017), quoting Greenlaw v. United States, 554 U.S. 237, 253 (2008). Here, Smith's *conviction* on Count 3 was not vacated, and the district court properly held that the Count 1 sentence was not open to challenge under Beckles. At the initial sentencing, the district court emphasized that the concurrent 220-month sentences on Counts 1 and 3 were based on the § 3553(a) sentencing factors, not on the ACCA and career offender determinations. The court explicitly stated "that it would have imposed the same sentence had it sustained defendant's . . . objections." Thus, the record gives us no basis to conclude that the district court abused its discretion in not ordering a complete resentencing. See Wright v. United States, 902 F.3d 868, 872-73 (8th Cir. 2018); cf. United States v. Dace, 842 F.3d 1067, 1069-70 (8th Cir. 2016) (career offender error harmless where district court "made clear that it relied on the § 3553(a) factors -- independent of the Guidelines range").

II. The Ineffective Assistance of Appellate Counsel Issue.

Smith argues that his appellate counsel provided constitutionally ineffective assistance by failing to inform this court on direct appeal that Smith's sentence might be affected by the Supreme Court's impending decision in Johnson. The district court ruled that Smith failed to establish that appellate counsel provided ineffective assistance, relying on our prior decisions holding that "[t]he failure of counsel to

anticipate a rule of law that has yet to be articulated does not render counsel's performance professionally unreasonable." Allen v. United States, 829 F.3d 965, 967 (8th Cir. 2016) (citations omitted). We agree.

There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 689 (1984). Smith argues that appellate counsel knew or should have known that the Supreme Court had granted certiorari in Johnson and that its decision could potentially impact whether the district court erred in overruling Smith's objection to counting his fleeing convictions as violent felonies and crimes of violence. However, we have upheld the denial of appellate ineffective assistance claims in analogous circumstances. See Walker v. United States, 810 F.3d 568, 577 (8th Cir. 2016); Johnson v. Armontrout, 923 F.2d 107 (8th Cir. 1991).

For the foregoing reasons, the judgment of the district court denying Smith's motion to vacate his sentence is affirmed. We deny his Motion To Supplement the Record on Appeal.

KELLY, Circuit Judge, dissenting.

Today, the court leaves in place a sentence that all agree is unlawful; the statutory maximum sentence on Smith's ACCA count is 120 months' imprisonment, yet Smith received a sentence of 220 months. To do so, the court relies on the concurrent sentence doctrine. In my view, that doctrine is inapplicable here, so I respectfully dissent.

Because Smith's § 2255 petition was successful on the merits, the district court could invoke the concurrent sentence doctrine to deny the petition only if a ruling in Smith's favor "would not reduce the time he is required to serve or otherwise prejudice him in any way." Eason, 912 F.3d at 1123 (cleaned up). But it is possible

that a ruling in Smith's favor would reduce the time he is required to serve. "[A] district court proceeding under § 2255 may vacate the entire sentence so that the district court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." United States v. Tidwell, 827 F.3d 761, 764 (8th Cir. 2016) (cleaned up). The current version of the Guidelines would apply upon resentencing. See id. at 764 & n.3 (explaining that when resentencing a defendant under § 2255, a district court must apply "the guidelines in effect at the time of the resentencing, not at the time of the original sentencing").

Under the current Guidelines, Smith would not qualify for a career offender enhancement on Count 1, yielding a recommended Guidelines range significantly lower than the range applicable at his original sentencing.[2] Smith received a 140-month downward variance at his original sentencing; to reimpose the same term of imprisonment upon resentencing would likely require the district court to vary upwards, a variance that might prove difficult to justify.

United States v. Fletcher provides a useful illustration. Fletcher filed a meritorious § 2255 petition challenging the ACCA enhancement on one count of conviction; the district court denied the petition based on the concurrent sentence doctrine. Order at 3–4, United States v. Fletcher, No. 11-cr-193 (D. Minn. May 9, 2016), ECF No. 65. On appeal, we granted the government's motion to vacate the judgment, as the government noted that Fletcher's sentence would exceed the

---

[2]The current Guidelines omit the residual clause that originally allowed for the career offender enhancement. Based on the district court's original non-career offender calculations of a total offense level of 30 and a criminal history category of IV, I estimate a new Guidelines range (including the mandatory consecutive 60-month sentence for Count 2) of 195 to 228 months, as compared to Smith's original Guidelines range of 420 months to life. Of course, other changes to the Guidelines since Smith's original conviction could result in a different base offense level or criminal history category.

recommended Guidelines range under the current version of the Guidelines and therefore application of the concurrent sentencing doctrine was "questionable." See United States v. Fletcher, No. 16-3025 (8th Cir. 2017). On remand, the district court reduced Fletcher's overall sentence by 80 months. See Resentencing Judgment, No. 11-cr-193 (D. Minn. July 27, 2017), ECF No. 90.

As the court acknowledges, Smith's ACCA sentence is no longer valid. As a result, I would vacate it. And because it is possible for the district court to sentence Smith to a shorter term of imprisonment, I would remand the case to the district court for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3201

Mario Ronrico Smith

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:16-cv-01869-DSD)

ORDER

A certificate of appealability is granted on the following issues:

(1) Whether the district court erred in relying on the concurrent sentence doctrine to deny relief on Smith's meritorious claim that his ACCA sentence was unconstitutional pursuant to Johnson v. United States, 135 S. Ct. 2551 (2015), without examining (a) whether the sentencing package doctrine required the entire sentence to be vacated, (b) whether Smith would face any prejudicial collateral consequences, or (c) whether the concurrent sentence doctrine is appropriate when the government conceded the claim was meritorious; and

(2) Whether the district court erred in concluding that appellate counsel was not ineffective for failing to inform this court that Smith's sentence was affected by Johnson.

The request for a certificate of appealability is denied as to all other issues.

April 24, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 12-17(DSD)

United States of America,

Plaintiff,

v. **ORDER**

Mario Ronrico Smith,

Defendant.

Amber M. Brennan, United States Attorney's Office, 300 South 4th Street, Suite 600, Minneapolis, MN, counsel of plaintiff.

Mario Ronrico Smith, #10377-041, FCI Terre Haute, P.O. Box 33, Terre Haute, IN 47808, defendant pro se.

This matter is before the court upon the pro se motion[1] by defendant Mario Ronrico Smith to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Based on a review of the file, record, and proceedings herein, and for the following reasons, the court denies the motion.

BACKGROUND

On the evening of December 4, 2011, Crystal Lake Police performed a traffic stop on a speeding Dodge Charger.[2] The driver

[1] After filing his motion, Smith was appointed counsel who submitted a memorandum on his behalf. See ECF Nos. 117, 118. On March 28, 2017, the court granted counsel's motion to withdraw. See ECF No. 129.

[2] The court provides a summary of the facts as recited in United States v. Smith, 789 F.3d 923, 926-27 (8th Cir. 2015).

provided the officer with a Minnesota driver's license identifying him as Mario Ronrico Smith. The officer noticed an odor of marijuana coming from the car and called for a back up K-9 unit to assist in a search of the vehicle. As the K-9 unit approached, Smith fled from the officers. In pursuit, the officers performed a "PIT" maneuver, stopping the vehicle. Smith fled on foot and escaped into a residential neighborhood. Although the officers were not able to apprehend Smith, they retained his driver's license. On a search of the Charger, the officers found two kilograms of cocaine, $6,000 in U.S. currency, and a Glock .40 caliber hand gun with 12 live rounds of ammunition.

On January 10, 2012, a grand jury indicted Smith on three counts: (1) possession with intent to distribute cocaine; (2) using and carrying a firearm during a drug trafficking crime; and (3) felon in possession of a firearm. On May 17, 2013, Smith was arrested in Chicago, Illinois. On November 19, 2013, a jury found Smith guilty on all three counts. On July 30, 2014, the court sentenced to 280 months' imprisonment: 220 months for counts 1 and 3 to be served concurrently and 60 months for count 2 to be served consecutive to the sentence for counts 1 and 3. Smith now moves for relief pursuant to § 2255.[3]

[3] On July 28, 2016, the court stayed this action pending the Supreme Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017).

DISCUSSION

I. Ineffective Assistance of Counsel

Smith argues that he is entitled to relief because both his trial and appellate counsel were ineffective. To show that he received ineffective assistance of counsel, a movant must meet both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, a movant must show that his counsel's performance was so deficient that it was objectively unreasonable. See id. at 688. Because "[t]here are countless ways to provide effective assistance in any given case" and different attorneys "would not defend a particular client in the same way," the court reviews the performance of defense counsel with significant deference. Id. at 689. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 699. Second, a movant must demonstrate prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

A. Trial Counsel

Smith argues that his trial counsel, Ryan Garry, was ineffective because he failed to investigate and raise an available alibi defense, namely, that he was at a family gathering on the night in question and, therefore, could not have been the driver of the Dodge Charger. The decision of whether to pursue a particular

defense is a strategic choice that, when "made after a through investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011) (internal quotation marks omitted) (quoting Strickland, 466 U.S. at 690-91). But a counsel's "strategic choices resulting from lack of diligence in preparation and investigation [are] not protected by the presumption in favor of counsel." Armstrong v. Kemna, 534 F.3d 857, 864 (8th Cir. 2008) (internal quotation marks and citations omitted).

In preparing for Smith's defense, Garry hired a private investigator with almost thirty years of law enforcement experience. Garry Aff. ¶ 6. On being told by Smith that he was at a family gathering on the night of the offense, both Garry and the investigator interviewed several of Smith's family members. Id. ¶ 7. After reading the investigator's report and conducting his own interviews, Garry concluded that Smith's family members were lying and that a jury would not find them credible. Id. Smith argues that Garry did not fully investigate his alibi defense but fails to point to any specific deficiencies in Garry's investigation. Indeed, it appears that Garry interviewed all relevant witnesses; affidavits from family members, which were submitted by Smith, indicate they spoke with Garry. See ECF Nos. 120-23, 126-28. As a result, Smith fails to meet the first

Strickland prong.[4]

Even assuming that Garry's performance was deficient, Smith has not shown that, but for Garry's failure to present the alibi defense, the jury would not have convicted him. Indeed, the evidence that Smith was the driver of the Charger was strong: the driver's license provided to the officer identified the driver as Smith; the officer testified at trial that he recognized Smith from the traffic stop; officers recovered a wallet from the vehicle with credit cards and insurance cards in Smith's name and medication bottles prescribed to Smith; and Smith's DNA was recovered from a soda can in the car. See Smith, 789 F.3d at 926-27. Therefore, Smith also fails to meet the second Strickland prong.

B. Appellate Counsel

Smith also argues that appellate counsel was ineffective because he failed to appeal the court's determination that he was subject to an enhanced sentence under the Armed Career Criminal Act (ACCA), even though Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the ACCA, was pending before the Supreme Court at the time of his appeal. But Johnson was decided on June 26, 2015, and Smith's appeal was submitted on March 13, 2015. Although in retrospect, Smith may have successfully challenged his enhanced sentence, "[t]he failure

[4] Nor is Smith entitled to an evidentiary hearing. Smith's submitted affidavits and the case record as a whole "conclusively show that [he] is entitled to no relief." 28 U.S.C. § 2255(b).

to anticipate a change in the law will not generally constitute an ineffective assistance of counsel." Brunson v. Higgins, 708 F.2d 1353, 1356 (8th Cir. 1983); see also Ruff v. Armontrout, 77 F.3d 265, 268 (8th Cir. 1996) (holding counsel was not ineffective where "the theory on which Batson was based was certainly available at the time of jury selection ... Batson itself had not yet been decided"); Johnson v. Armontrout, 923 F.2d 107, 108-09 (8th Cir. 1991) (holding that failure to submit an appeal based on reasoning later adopted by the Supreme Court did not constitute ineffective assistance of counsel). As a result, Smith's appellate counsel's performance did not fall below "the deferential standard of reasonableness established in Strickland." Randolph v. Delo, 952 F.2d 243, 246 (8th Cir. 1991).

II. Johnson

A. Applicability of Johnson

Smith argues that his sentence should be corrected because it was based on the residual clause of the ACCA, 18 U.S.C. § 924(e), which the Supreme Court held to be unconstitutional in Johnson v. United States, 135 S. Ct. 2551 (2015). The government agrees that, in light of Johnson and Matthis v. United States, 136 S. Ct. 2243 (2016), the sentencing provisions of the ACCA no longer apply to Smith because his two previous convictions for fleeing police in a motor vehicle are no longer violent felonies under the ACCA. Although Smith's sentence for count 3, felon in possession of a

firearm, is not valid in light of Johnson, because Smith's sentence for count 3 is concurrent with his sentence for count 1, possession with intent to distribute cocaine, the court must still determine whether Smith is entitled to a reduced sentence.

B. Concurrent Sentence Doctrine

Under the concurrent sentence doctrine, a court, in its discretion, may decline to grant a defendant relief where the defendant was sentenced on concurrent counts and a "ruling in the defendant's favor on the conviction at issue would not reduce the time he ... is required to serve under the sentence for the valid conviction(s)." United States v. Smith, 601 F.2d 972, 973 (8th Cir. 1979). Here, even if the court to granted Smith relief on count 3, his imprisonment term would remain the same because his conviction on count 1, which is still valid, is the same as his sentence for count 3. Indeed, at the time of sentencing, the court determined that the guidelines' sentence for count 1 was 420 months to life imprisonment. In sentencing Smith to 220 months, the court granted him a 200-month downward variance. Therefore, if re-sentenced on counts 1 and 2, Smith would not receive a lower sentence. The court, therefore, declines to grant Smith the relief requested.

III. Beckles

Lastly, Smith argues that, in light of Johnson, he is no longer a career offender under Sentencing Guidelines § 4B1.1. When

Smith filed his motion, courts were divided as to Johnson's impact on the residual clause in the Guidelines. See United States v. Matchett, 802 F.3d 1185, 1193-96 (11th Cir. 2015) (holding that the Guidelines were not subject to vagueness challenges); United States v. Madrid, 805 F.3d 1204, 1210-11 (10th Cir. 2015) (holding that Guidelines § 4B1.2(a)(2) is unconstitutionally vague). In Beckles, however, the Supreme Court held that the Guidelines were not subject to vagueness challenges. Beckles, 137 S. Ct. at 892. Therefore, the Guidelines under which Smith was sentenced are not unconstitutionally vague under Johnson.

IV. Certificate of Appealability

To warrant a certificate of appealability, a defendant must make a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). A "substantial showing" requires a petitioner to establish that "reasonable jurists" would find the court's assessment of the constitutional claims "debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). The court is firmly convinced that Smith is not entitled to relief and reasonable jurists could not differ on the result. As a result, a certificate of appealability is not warranted.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to vacate his sentence [ECF No. 113] is denied; and

2. Pursuant to 28 U.S.C. § 2253, the court denies a certificate of appealability.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: July 14, 2017

s/ David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 12-17(DSD)

United States of America,

Plaintiff,

v. **ORDER**

Mario Ronrico Smith,

Defendant.

Amber M. Brennan, United States Attorney's Office, 300 South 4th Street, Suite 600, Minneapolis, MN, counsel of plaintiff.

Mario Ronrico Smith, #10377-041, FCI-Greenville, P.O. Box 5000, Greenville, IL 62246, defendant pro se.

This matter is before the court upon pro se defendant Mario Ronrico Smith's motion to reconsider. Smith urges the court to reconsider its July 14, 2017, order denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Motions to reconsider require the "court's prior permission," which will be granted only upon a showing of "compelling circumstances." D. Minn. LR 7.1(j). Smith has not received such permission from the court, and this alone warrants denial of his motion to reconsider.

Even if the court were to construe Smith's motion as a request for permission to file a motion to reconsider, it would be denied. A motion to reconsider should not be employed to relitigate old issues but rather to "afford an opportunity for relief in

extraordinary circumstances." Dale & Selby Superette & Deli v. U.S. Dep't of Agric., 838 F. Supp. 1346, 1348 (D. Minn. 1993). Here, Smith raises arguments that the court previously addressed in its order; therefore, reconsideration is not warranted.

Accordingly, **IT IS HEREBY ORDERED** that the motion to reconsider [ECF No. 144] is denied.

Dated: August 21, 2017

s/David S. Doty
David S. Doty, Judge
United States District Court

United States District Court

District of Minnesota

UNITED STATES OF AMERICA
v.

Mario Ronrico Smith

JUDGMENT IN A CRIMINAL CASE
Case Number: **12-17(DSD/JSM)**
USM Number: **10377-041**
Social Security Number: **5739**
Date of Birth: **1978**

Mark K. McCulloch & Kyle A. O'Dwyer
Defendant's Attorney

THE DEFENDANT:

[] pleaded guilty to count(s): .
[] pleaded nolo contendere to counts(s) which was accepted by the court .
[x] was found guilty on counts **1, 2, 3 of the Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC 841(a)(1) and (b)(1)(B)	Possession with intent to distribute approximately 2 kilograms of a mixture or substance containing a detectable amount of cocaine	12/4/2011	1
18 USC 924(c)(1)(A)	Using and carrying a firearm during a drug trafficking crime	12/4/2011	2
18 USC 922(g)(1) and 924(a)(2)	Felon in possession of a firearm	12/4/2011	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Special Assessment in the amount of $300.00 due immediately.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

July 30, 2014
Date of Imposition of Judgment

s/David S. Doty
Signature of Judge

DAVID S. DOTY, Senior United States District Judge
Name & Title of Judge

July 30, 2014
Date

DEFENDANT: MARIO RONRICO SMITH
CASE NUMBER: 12-17(DSD/JSM)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **280 months. This sentence consists of 220 months total for Counts 1 and 3, and 60 months for Count 2 to be served consecutively**.

[x] The court makes the following recommendations to the Bureau of Prisons:

Incarceration in or as close as possible to the state of Minnesota.
Defendant be permitted to enroll in all available vocational and educational training programs and all available rehabilitation counseling.

[x] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district.
[] at on .
[] as notified by the United States Marshal.

[] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[] before on .
[] as notified by the United States Marshal.
[] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: MARIO RONRICO SMITH
CASE NUMBER: 12-17(DSD/JSM)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **8 years. This term consists of 8 years for Count 1 and 5 years for Counts 2 and 3, to be served concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MARIO RONRICO SMITH
CASE NUMBER: 12-17(DSD/JSM)

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not associate with any member, prospect, or associate member of the Black P Stone gang, or any other gang unless granted permission to do so by the probation officer. Defendant shall not wear or possess any article of clothing, colors, including by not limited to hats, insignia, emblems, jewelry or paraphernalia which may signify affiliation with or membership in the Black P Stones gang or any other gang.

b Defendant shall submit his person, residence, office, vehicle or an area under his control to a search conducted by a U.S. Probation Officer or supervised designee, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a supervision violation. Defendant shall warn any other residents or third parties that the premises and areas under his control may be subject to searches pursuant to this condition.

c If not employed at a regular lawful occupation, as deemed appropriate by the probation officer, the defendant may be required to perform up to 20 hours of community service per week until employed. The defendant may also participate in training, counseling, daily job search, or other employment-related activities, as directed by the probation officer.

DEFENDANT: MARIO RONRICO SMITH
CASE NUMBER: 12-17(DSD/JSM)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$300.00	-0-	-0-

[] The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	**Total Loss	Restitution Ordered	Priority or Percentage
TOTALS:	$0.00	$0.00	0.00%
Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.			

[] Restitution amount ordered pursuant to plea agreement **$**.

[] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] the interest requirement is waived for the [] fine [] restitution.

[] the interest requirement for the: [] fine [] restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: MARIO RONRICO SMITH
CASE NUMBER: 12-17(DSD/JSM)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [] Lump sum payment of **$** due immediately, balance due

[] not later than , or
[] in accordance [] C, [] D, [] E, or [] F below; or

B [] Payment to begin immediately (may be combined with [] C, [] D, or [] F below); or

C [] Payment in equal (e.g., weekly, monthly, quarterly) installments of **$** over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [] Payment in equal (e.g., weekly, monthly, quarterly) installments of **$** over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the release from imprisonment to a term of supervision; or

E [] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[] Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[] The defendant shall pay the cost of prosecution.

[] The defendant shall pay the following court cost(s):

[x] The defendant shall forfeit the defendant's interest in the following property to the United States:

A Glock .40 caliber pistol, serial number RTS043 and ammunition seized by law enforcement.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7)penalties, and (8) costs, including costs of prosecution and court costs.