

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY L. DOUGLAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

APPENDIX

ELIZABETH B. FORD
Federal Community Defender
JENNIFER NILES COFFIN
Assistant Federal Defender
Counsel of Record
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, Tennessee 37929
(865) 637-7979

No. 19-5079

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY L. DOUGLAS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
Aug 05, 2019
DEBORAH S. HUNT, Clerk

O R D E R

Timothy L. Douglas, a federal prisoner represented by counsel, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Douglas moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

In 2001, Douglas pleaded guilty to armed bank robbery, in violation of 18 U.S.C. § 2113(d), and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The district court determined that Douglas was a career offender under § 4B1.1 of the Sentencing Guidelines based on his prior convictions in Tennessee for escape and possession of cocaine for resale and sentenced him to a total term of 224 months of imprisonment. This court affirmed, finding, as is relevant here, that escape was a predicate "crime of violence" under the career-offender guideline because it "posed a serious potential risk of physical injury." *See United States v. Douglas*, 80 F. App'x 450, 450-51 (6th Cir. 2003).

In June 2016, Douglas filed a motion to vacate under § 2255, arguing that he was entitled to relief from his career-offender sentence because his two escape convictions were no longer

No. 19-5079

- 2 -

predicate “crimes of violence” in view of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* invalidated the residual-clause definition of “violent felony” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), pursuant to which a defendant was subject to a fifteen-year mandatory minimum sentence if he had three or more prior convictions for an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” In *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Supreme Court made *Johnson* retroactively applicable to cases on collateral review.

Under § 2255(f)(3), a federal prisoner must file his motion to vacate within one year of “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.” After Douglas filed his motion to vacate, the Supreme Court decided in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that *Johnson* did not apply to the identically worded residual-clause definition of “crime of violence” in § 4B1.2(a)(2) of the advisory Sentencing Guidelines. Douglas argued, however, that *Beckles* did not apply to his case because he was sentenced when the Sentencing Guidelines were mandatory. Therefore, Douglas argued, *Johnson* applies to his case, and his motion was timely under § 2255(f)(3) because he filed it within one year of the date that *Johnson* was decided.

But in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018), this court concluded that the Supreme Court left open the question whether *Johnson* applies to the mandatory Sentencing Guidelines, *see id.* at 630. Since the applicability of *Johnson* to the mandatory Sentencing Guidelines is still unresolved, this court held that *Johnson* did not establish a newly recognized right that applies retroactively to cases on collateral review for a prisoner who was sentenced as a career offender under the mandatory residual-clause definition of “crime of violence.” *See id.* at 630-31. Thus, a federal prisoner seeking relief from a mandatory career-offender sentence cannot use *Johnson* as the starting point to measure the one-year § 2255(f)(3)

No. 19-5079

- 3 -

limitations period. *See Chambers v. United States*, 763 F. App'x 514, 516 (6th Cir. 2019) (citing *Raybon*), *reh'g en banc denied*, No. 18-3298 (6th Cir. June 26, 2019) (order).

The district court concluded that Douglas's motion to vacate was untimely because he filed it more than one year after his convictions became final. *See* 28 U.S.C. § 2255(f)(1). And citing *Raybon*, the district court held that § 2255(f)(3) did not apply to Douglas's motion. Since no other provision of § 2255(f) applied to Douglas's case, the district court ruled that his motion to vacate was untimely and dismissed it. The district court denied Douglas a COA.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a district court denies a claim on procedural grounds, the court may issue a COA only if the applicant shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Douglas's convictions became final in 2004, and he filed his motion to vacate in 2016. Consequently, reasonable jurists would not debate the district court's conclusion that Douglas's motion was untimely under § 2255(f)(1) because he filed it more than one year after "the date on which the judgment of conviction [became] final." And *Raybon* establishes that § 2255(f)(3) does not apply to Douglas's motion. Douglas argues that *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which held that the similarly worded definition of "crime of violence" in 18 U.S.C. § 16(b) is unconstitutionally vague, *see id.* at 1210, "fatally undermined" *Raybon*. But *Raybon* remains the controlling precedent in this circuit on the applicability of *Johnson* to petitioners sentenced under the mandatory Sentencing Guidelines. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017) ("One panel of this court may not overrule the decision of another panel."), *cert denied*,

No. 19-5079

- 4 -

____S. Ct.____, No. 17-7496, 2019 WL 2493932 (U.S. June 17, 2019); *Chambers*, 763 F. App'x at 518 (“*Raybon* is binding.”). Douglas does not claim that his motion was timely under any other provision of § 2255(f). Thus, reasonable jurists would not debate the district court’s conclusion that Douglas’s motion to vacate was barred by the statute of limitations.

Accordingly, the court **DENIES** Douglas’s COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TIMOTHY L. DOUGLAS,)
)
)
Petitioner,)
)
)
v.) Nos. 1:01-cr-146-CLC-CHS-1
) 1:16-cv-191-CLC
UNITED STATES OF AMERICA,)
)
)
Respondent.)

MEMORANDUM OPINION

Presently before the Court is a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [Doc. 43] filed by Timothy L. Douglas (“Petitioner”) seeking to challenge his classification as a career offender under the United States Sentencing Guidelines (“USSG”) in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the following reasons, Petitioner’s § 2255 motion [Doc. 43] will be **DENIED** and this action will be **DISMISSED WITH PREJUDICE**. Petitioner’s motion to defer ruling pending resolution of *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) *cert denied* 138 S. Ct. 2661 (2018) [Doc. 58] will be **DENIED as moot**.

I. PROCEDURAL BACKGROUND

On November 8, 2001, Petitioner pled guilty to bank robbery, in violation of 18 U.S.C. § 2113(d), and to brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) [Doc. 18]. A presentence investigation report (“PSIR”) identified at least two prior convictions of either a “crime of violence” or a “controlled substance offense” that qualified Petitioner as a career offender under § 4B1.1(a) of the United States Sentencing Guidelines (“USSG”): one conviction for possession of cocaine for resale and two convictions for escape

[PSIR ¶¶ 26, 42, 46, 47]. On September 20, 2002, Petitioner was sentenced as a career offender to a total term of imprisonment of 224 months [Docs. 29, 34]. Petitioner's conviction and sentence were affirmed by the Sixth Circuit Court of Appeals on November 5, 2003 [Doc. 38].

On June 7, 2016, Petitioner filed a § 2255 motion [Doc. 43] challenging his career offender classification and sentence under *Johnson*, in which the Supreme Court determined that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is unconstitutionally vague in violation of the Due Process Clause. 135 S. Ct. at 2563. Petitioner argues that the residual clause of § 4B1.2(a) of the USSG, identically worded to the ACCA's residual clause, likewise is void for vagueness in light of *Johnson*, and that his convictions for escape therefore no longer qualify as predicate offenses under the career offender guideline.

While Petitioner's motion was pending, the Supreme Court decided *Beckles v. United States*, 137 S. Ct. 886 (2017), which held that the USSG, which now are advisory, *see United States v. Booker*, 543 U.S. 220, 245 (2005), "are not subject to a vagueness challenge under the Due Process clause" and that, as a result, the residual clause of the *advisory* USSG "is not void for vagueness." *Beckles*, 137 S. Ct. at 892. Left open by *Beckles*, however, was the issue of whether defendants sentenced to terms of imprisonment pre-*Booker*, when the USSG were binding on the federal courts, may mount vagueness challenges to their sentences. *Id.* at 903 n. 4 (J. Sotomayor, concurring).

In light of *Beckles*, Petitioner submitted a supplemental brief arguing that *Beckles* exempts only sentences under the advisory USSG from vagueness challenges, not sentences, such as his, imposed under the pre-*Booker* mandatory USSG [Doc. 48]. As a result, Petitioner maintains that the residual clause of the *mandatory* USSG is void for vagueness under *Johnson* [*Id.*] The government responded by arguing that *Johnson* invalidated only the residual clause of the ACCA

and that the Supreme Court has never made that reasoning applicable to the pre-*Booker* guidelines nor made that holding retroactive to mandatory guidelines cases on collateral review [Doc. 51].

Following a reply from Petitioner reiterating his position that *Johnson* applies to the mandatory USSG and should be applied retroactively, [Doc. 54], the government filed a supplemental response, [Doc. 57], asserting that Petitioner's § 2255 motion should be dismissed as untimely in light of *Raybon*, *supra*, in which the Sixth Circuit held that *Johnson* did not provide a new triggering date from which to measure the one-year limitations period for filing a § 2255 motion under § 2255(f).

II. ANALYSIS

Section 2255(f) places a one-year period of limitation on all petitions for collateral relief under § 2255 which runs from the latest of: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).

In this case, the Sixth Circuit Court of Appeals affirmed Petitioner's conviction and sentence on direct review on November 5, 2003, and Petitioner's conviction became final when the time for filing a petition for writ of certiorari to the United States Supreme Court expired ninety days later on February 3, 2004. *See Clay v. United States*, 537 U.S. 522, 532 (2003); *Sanchez-Castellano v. United States*, 358 F.3d 424, 426–27 (6th Cir. 2004). Petitioner's § 2255 motion

was not filed until June 7, 2016, nearly twelve years later. Thus, his motion is untimely unless he satisfies one of the exceptions set forth in § 2255(f).

Petitioner contends that his motion is timely under § 2255(f)(3) because it is based on *Johnson*, which triggered a renewed one-year limitation period by recognizing a new right that applies retroactively.¹ It is settled that challenges to ACCA sentences based on *Johnson* satisfy the third sub-category of § 2255(f), *i.e.*, the assertion of a newly recognized right made retroactively applicable to cases on collateral review. *Welch*, 136 S. Ct. at 1268 (*Johnson* constitutes a new substantive rule of constitutional law made retroactively applicable on collateral review); *In Re Watkins*, 810 F.3d at 381–85. However, *Johnson* dealt only with the residual clause of the ACCA, not with the residual clause of the USSG. *Walker v. United States*, 710 F. App'x 696, 697 (6th Cir. 2018). Thus, Petitioner's motion is untimely unless *Johnson* recognized a new right that also applies to defendants sentenced under the pre-*Booker* mandatory USSG.

This issue was decided in *Raybon*, which held that whether *Johnson* applies to the mandatory guidelines is an “open question” and therefore is not a “‘right’ that ‘has been newly recognized by the Supreme Court’ let alone one that was ‘made retroactively applicable to cases on collateral review.’” 867 F.3d at 630 (quoting § 2255(f)(3)).² As a result, because Petitioner's

¹ The one-year limitation period for filing a motion to vacate based on a right newly recognized by the Supreme Court runs from the date on which the Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactively applicable. *Dodd v. United States*, 545 U.S. 353, 357 (2005). Accordingly, *Johnson* triggered a renewed one-year period of limitation for challenges to ACCA sentences beginning on the date of that decision, June 26, 2015, and running until June 26, 2016. Petitioner's motion was filed on June 7, 2016, within that one-year period.

² On December 6, 2017, the Sixth Circuit denied rehearing en banc in *Raybon* and the Supreme Court denied a petition for writ of certiorari on June 18, 2018. 138 S. Ct. 2661 (2018). The Supreme Court to date has not recognized that individuals have a constitutional right not to be sentenced as career offenders under the residual clause of the pre-*Booker* mandatory USSG.

motion fails to satisfy the requirements of § 2255(f)(3), and his motion does not satisfy any of the other subsections of § 2255(f), it is untimely and must be denied.³ *See Walker*, 710 F. App'x at 697; *Chubb v. United States*, 707 F. App'x. 388, 390 (6th Cir. 2018).

III. CONCLUSION

For the reasons set forth herein, the Court finds that Petitioner's § 2255 motion is untimely. Accordingly, Petitioner's § 2255 motion [Doc. 43] will be **DENIED**, and this action will be **DISMISSED WITH PREJUDICE**. Petitioner's motion to defer ruling pending resolution of *Raybon* [Doc. 58] will be **DENIED as moot**.

AN ORDER WILL ENTER.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

³ The Supreme Court has held that the one-year limitation period set forth in § 2255(f) is not jurisdictional, *Day v. McDonough*, 547 U.S. 198, 205 (2006), and thus may be subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). The Court finds no basis for equitable tolling here.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TIMOTHY L. DOUGLAS,)
)
Petitioner,)
)
v.) Nos. 1:01-cr-146-CLC-CHS-1
) 1:16-cv-191-CLC
UNITED STATES OF AMERICA,)
)
Respondent.)

JUDGMENT ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it hereby is **ORDERED** and **ADJUDGED** that Petitioner's § 2255 motion [Doc. 43] is **DENIED** and this action is **DISMISSED WITH PREJUDICE**. Petitioner's motion to defer ruling pending *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) *cert denied* 138 S. Ct. 2661 (2018) [Doc. 58] is **DENIED as moot**.

Should Petitioner give timely notice of an appeal from this Order, such notice will be treated as an application for a certificate of appealability, which is hereby **DENIED** since he has failed to make a substantial showing of the denial of a constitutional right or to present a question of some substance about which reasonable jurists could differ. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Additionally, the Court has reviewed this case pursuant to Rule 24 of the Federal Rules of Appellate Procedure and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by Petitioner for leave to proceed *in forma pauperis* on appeal is **DENIED**. *See* Fed. R. App. P. 24.

The Clerk of Court is **DIRECTED** to **CLOSE** the civil case associated with Petitioner's § 2255 motion at No. 1:16-cv-191.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

s/ John L. Medearis
CLERK OF COURT