United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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September 11, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-40136 USA v. James Brown
USDC No. 4:16-CV-406

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

Mr. James Anthony Brown
Mr. Ernest Gonzalez
Mr. David O'Toole, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-40136

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES ANTHONY BROWN, also known as J.B.,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

James Anthony Brown, federal prisoner # 19659-078, was convicted of conspiracy to possess with intent to distribute cocaine. He seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion and leave to proceed in forma pauperis (IFP).

In his request for a COA, Brown challenges the career offender enhancement under U.S.S.G. § 4B1.1, asserting that his prior Texas convictions for possession with intent to deliver cocaine no longer qualify as controlled substance offenses in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), and *United States v. Tanksley*, 848 F.3d 347 (5th Cir.), *supplemented*, 854 F.3d 284 (5th Cir. 2017). He also argues that his trial counsel was ineffective for failing to challenge the career offender enhancement.

To obtain a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, the prisoner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that the issues he presents are "adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Brown has not made the requisite showing. *See Miller-El*, 537 U.S. at 327; *Slack*, 529 U.S. at 484. In addition, he has abandoned his *Johnson v. United States*, 135 S. Ct. 2551 (2015), claim by failing to brief it in his COA motion. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999). Accordingly, the motions for a COA and for leave to proceed IFP are DENIED.

/s/Jennifer Walker Elrod
JENNIFER WALKER ELROD
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JAMES ANTHONY BROWN, #19659-078	§	
	§	
VS.	§	CIVIL ACTION NO. 4:16cv406
	§	CRIMINAL NO. 4:12CR00019-008
UNITED STATES OF AMERICA	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Movant James Anthony Brown, an inmate confined at F.M.C. Ft. Worth, brings this Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255. The motion was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Background

Brown filed the present motion on June 16, 2016. He states that he is seeking relief based on *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551(2015). He filed a supplemental § 2255 motion (Dkt. #6) in anticipation of a favorable decision by the Supreme Court in *Beckles*. *See Beckles v. United States*, 580 U.S. ___, 137 S. Ct. 886 (2017). In a second supplemental § 2255 motion (Dkt. #9), he argues that he is entitled to relief based on *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016).

Brown is in custody pursuant to a conviction for the offense of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846 and 841(b)(1)(A). On May 3, 2013, after a plea of guilty, he was sentenced to a term of 262 months of imprisonment. The judgment was entered on May 9, 2013. Brown did not appeal the conviction.

Brown is challenging the sentence imposed in this case. In the Presentence Investigation Report, the probation officer determined that Brown's base offense level was 32 under United States Sentencing Guidelines Manual § 2D1.1(c)(4). PSR ¶ 15. Because Brown had two prior felony convictions for crimes of violence or controlled substance offenses, the Presentence Investigation Report applied the career offender guideline, U.S.S.G. § 4B1.1. PSR ¶ 21. This yielded an offense level of 37. PSR ¶ 21. With a three-level adjustment for acceptance of responsibility under § 3E1.1, PSR ¶¶ 22-23, Brown's total offense level was 34. PSR ¶ 24.

Brown's extensive criminal history placed him in category V. PSR ¶ 32. However, because Brown qualified as a career offender, his criminal history category was VI under U.S.S.G. §4B1.1(b). PSR ¶ 33. With an offense level of 34 and a criminal history category of VI, the advisory guideline range was 262 to 327 months of imprisonment. PSR ¶ 59. On May3, 2013, Brown was sentenced to 262 months of imprisonment.

The original § 2255 motion was filed on June 16, 2016. Brown filed two supplemental motions adding additional claims (Dkt. ##6, 9). The Government filed a response (Dkt. #5).

Discussion and Analysis

The decision in *Johnson* was based on an analysis of the Armed Career Criminal Act ("ACCA"). The Supreme Court discussed the operation of the ACCA as follows:

> Federal law forbids certain people - such as convicted felons, persons committed to mental institutions, and drug users - to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' of imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1).

Johnson, 135 S. Ct. at 2555. The Court held that the "residual clause" of § 924(e)(2)(B)(ii) was unconstitutionally vague. *Id.* at 2563. The Supreme Court subsequently held that *Johnson* applies

retroactively to cases on collateral review. *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1260-68 (2016).

In the present case, Brown was not convicted of the offense of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He was not convicted as an armed career criminal under the ACCA. *Johnson* could not possibly affect his sentence. Brown is not entitled to relief based on *Johnson*.

Brown argues in his first supplemental § 2255 motion that the reasoning in *Johnson* should be extended to the sentencing guidelines. The Supreme Court, however, provided the following analysis in declining to extend the reasoning in *Johnson* to the sentencing guidelines:

> At the time of petitioner's sentencing, the advisory Sentencing Guidelines included a residual clause defining a "crime of violence" as an offense that "involves conduct that presents a serious potential risk of physical injury to another." United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2006) (U.S.S.G.). This Court held in *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), that the identically worded residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B), was unconstitutionally vague. Petitioner contends that the Guidelines' residual clause is also void for vagueness. Because we hold that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.

Beckles, 137 S. Ct. at 890. The Fifth Circuit has thus routinely cited *Beckles* in rejecting constitutional vagueness challenges to the sentencing guidelines. *United States v. Osorio*, 734 F. App'x 922, 924 (5th Cir. 2018); *United States v. Gonzales*, 714 F. App'x 367, 370 (5th Cir. 2017); *United States v. Rodriguez-Lopez*, 697 F. App'x 304, 305 (5th Cir. 2017). In light of the Supreme Court's decision in *Beckles* declining to extend *Johnson* to the sentencing guidelines, Brown's first supplemental § 2255 motion lacks merit.

Brown argues in his second supplemental § 2255 motion that he is entitled to relief based on *Mathis* and *Hinkle*. In *Mathis*, the Supreme Court issued a decision extending the reasoning in *Johnson* to Iowa's burglary law. The Court found that "[b]ecause the elements of Iowa's burglary law are

broader than those of generic burglary, [his] convictions under that law cannot give rise to an ACCA sentence." *Mathis*, 136 S. Ct. at 2257. Then, on August 11, 2016, the Fifth Circuit applied *Mathis* to a Texas statute prohibiting delivery of a controlled substance and determined that the crime was not a "controlled substance offense" as defined in the career offender guidelines, U.S.S.G. § 4B1.2. *Hinkle*, 832 F.3d at 572-77.

It should be noted, however, that the Fifth Circuit has distinguished direct appeals from § 2255 motions. The Fifth Circuit has held that the technical application of the sentencing guidelines does not raise an issue of constitutional dimension for purposes of § 2255 proceedings. *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). The Fifth Circuit has specifically found that *Mathis* did not set forth a new rule of constitutional law that was made retroactive to cases on collateral review. *In re Lott*, 838 F.3d 522, 523 (5th Cir. 2016); *see also United States v. Ramirez*, 740 F. App'x 68 (5th Cir. 2018) (same); *United States v. Samarripa*, 697 F. App'x 374, 375 (5th Cir. 2017) (same). This Court, in turn, has denied collateral relief based on *Mathis* and *Hinkle*. *Rosales v. Warden, USP Beaumont*, No. 1:18-CV-81, 2019 WL 77350 (E.D. Tex. Jan. 2, 2019); *Porch v. Warden, USP Beaumont*, No. 1:18-CV-122, 2018 WL 5304728 (E.D. Tex. Oct. 24, 2018); *Helm v. Warden, FCI Beaumont Low*, No 1:17-cv-143, 2018 WL 2986705 (E.D. Tex. June 14, 2018). As such, relief is unavailable under § 2255 based on *Mathis* and *Hinkle*. Brown's second supplemental § 2255 motion lacks merit. In conclusion, the present motion lacks merit and should be **DENIED**.

Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a § 2255 proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Brown has not yet filed a notice of appeal, the court may address whether he would be

entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because "the district court that denies a [movant] relief is in the best position to determine whether the [movant] has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). When a district court denies a motion on procedural grounds without reaching the movant's underlying constitutional claim, a certificate of appealability should issue when the movant shows, at least, that jurists of reason would find it debatable whether the motion 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. *Id.*

In this case, reasonable jurists could not debate the denial of Brown's § 2255 motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El*, 537 U.S. at 327 (citing *Slack*, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court find that Brown is not entitled to a certificate of appealability as to the claims raised.

Recommendation

It is recommended that the Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 be denied and the case be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 9th day of January, 2019.

KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

JAMES ANTHONY BROWN, #19659-078	§	
	§	
versus	§	CIVIL ACTION NO. 4:16-CV-406
	§	CRIMINAL ACTION NO. 4:12-CR-19(08)
UNITED STATES OF AMERICA	§	

ORDER OF DISMISSAL

The above-entitled and numbered civil action was referred to United States Magistrate Judge Kimberly C. Priest Johnson, who issued a Report and Recommendation concluding that Movant's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 should be denied. Movant has filed objections.

Movant is challenging his sentence. More specifically, he is challenging his classification as a career offender under the United States Sentencing Guidelines. In support of the claim, he cites *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016), and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016).

Johnson and its progeny concern whether a defendant may be sentenced under the Armed Career Criminal Act. The United States Supreme Court provided the following analysis in declining to extend *Johnson* to the sentencing guidelines:

> At the time of petitioner's sentencing, the advisory Sentencing Guidelines included a residual clause defining a "crime of violence" as an offense that "involves conduct that presents a serious potential risk of physical injury to another." United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2006) (U.S.S.G.). This Court held in *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), that the identically worded residual clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B), was unconstitutionally vague. Petitioner contends that the Guidelines' residual clause is also void for vagueness. Because we hold that the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause, we reject petitioner's argument.

Beckles v. United States, 580 U.S. ___, 137 S. Ct. 886, 890 (2017). In light of *Beckles*, Movant's challenge to his classification as a career offender under the sentencing guidelines lacks merit. He has not shown that he is entitled to relief with respect to his sentence.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Movant to the Report, the Court concludes that the findings and conclusions of the Magistrate Judge are correct and the objections of Movant are without merit.

It is accordingly **ORDERED** that the Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 is **DENIED**, and the case is **DISMISSED** with prejudice. A certificate of appealability is **DENIED**. All motions by either party not previously ruled upon are **DENIED**.

SIGNED at Beaumont, Texas, this 4th day of February, 2019.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT **EASTERN DISTRICT OF TEXAS**

JAMES ANTHONY BROWN, #19659-078	§	
	§	
versus	§	CIVIL ACTION NO. 4:16-CV-406
	§	CRIMINAL ACTION NO. 4:12-CR-19(08)
UNITED STATES OF AMERICA	§	

FINAL JUDGMENT

The Court having considered Movant's case and rendered its decision by opinion issued this same date, it is **ORDERED** that the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (#1) pursuant to 28 U.S.C. § 2255 is **DISMISSED** with prejudice.

SIGNED at Beaumont, Texas, this 4th day of February, 2019.

Marcia A. Crone

MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.