

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD LUMPKIN

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

Richard Allen Lumpkin vs. United States of America, Case No. 3:16-cv-01473
(U.S. District Court, Middle District of Tennessee, September 3, 2019)
(Memorandum and Order Dismissing § 2255)

Richard Allen Lumpkin vs. United States of America, Case No. 19-6097
(6th Circuit Court of Appeals, December 23, 2019)
(Order denying Application for a Certificate of Appealability)

s/ Michael C. Holley

Michael C. Holley (BPR #021885)
Assistant Federal Public Defender
Office of the Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203-3805
(615) 736-5047

No. 19-6097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 23, 2019
DEBORAH S. HUNT, Clerk

RICHARD ALLEN LUMPKIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Richard Allen Lumpkin, a federal prisoner represented by counsel, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. We construe Lumpkin's notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2).

Lumpkin pleaded guilty to two counts of possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1). In April 1996, the district court sentenced Lumpkin as a career offender under the then-mandatory sentencing guidelines to 405 months of imprisonment. This court affirmed the district court's judgment. *United States v. Lumpkin*, 159 F.3d 983 (6th Cir. 1998). Lumpkin subsequently filed a § 2255 motion, which the district court denied. Lumpkin appealed, and this court denied him a certificate of appealability.

In 2015, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), holding that the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), which defines "violent felony" to include a felony that "involves conduct that presents a serious potential risk of physical injury to another," is unconstitutionally vague. Lumpkin then moved this court for an order authorizing the district court to consider a second or

No. 19-6097

- 2 -

successive § 2255 motion, asserting that *Johnson* applied to the career-offender guideline's residual clause defining "crime of violence." See USSG § 4B1.2(1)(ii) (1995). This court granted Lumpkin's motion and transferred his case to the district court to be held in abeyance pending the Supreme Court's decision in *Beckles v. United States*, 136 S. Ct. 2510 (2016) (mem.). Thereafter, the Supreme Court held in *Beckles v. United States*, 137 S. Ct. 886, 892 (2017), that *Johnson* did not apply to the career-offender guideline's residual clause because the advisory sentencing guidelines "are not subject to a vagueness challenge under the Due Process Clause." The *Beckles* decision left "open the question whether defendants sentenced to terms of imprisonment" under the mandatory sentencing guidelines "may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring).

After the *Beckles* decision, Lumpkin filed a supplemental brief asking the district court to postpone ruling on his § 2255 motion until resolution of the rehearing petition in *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017). In *Raybon*, this court concluded that the defendant's § 2255 motion was untimely, holding that, because *Johnson*'s application to the mandatory sentencing guidelines "is an open question, it 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 28 U.S.C. § 2255(f)(3)). Lumpkin acknowledged that *Raybon* precluded relief. Following this court's denial of rehearing en banc in *Raybon*, the district court denied Lumpkin's § 2255 motion as time-barred and denied a certificate of appealability. This appeal followed.

Lumpkin must obtain a certificate of appealability to appeal the denial of his § 2255 motion. See 28 U.S.C. § 2253(c)(1)(B). To obtain a certificate of appealability, Lumpkin must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied his § 2255 motion as time-barred, Lumpkin must demonstrate "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

No. 19-6097

- 3 -

Reasonable jurists would not debate the district court's denial of Lumpkin's § 2255 motion as time-barred. A one-year limitations period applies to motions under § 2255. *See* 28 U.S.C. § 2255(f). The one-year period runs "from the latest of" four possible events, two of which are relevant to Lumpkin's § 2255 motion:

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

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review

28 U.S.C. § 2255(f)(1), (3). Lumpkin's judgment of conviction became final twenty years ago. And, as this court concluded in *Raybon*, the Supreme Court has not recognized the right Lumpkin asserts. 867 F.3d at 630-31 (holding that "the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague" and that the defendant's "untimely motion cannot be saved under § 2255(f)(3) because he 'is asking for the recognition of a new right by this court—that individuals have a Constitutional right not to be sentenced as career offenders under the residual clause of the mandatory Sentencing Guidelines'" (citation omitted)). Lumpkin's § 2255 motion is thus barred by the one-year limitations period.

For these reasons, we **DENY** a certificate of appealability.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

RICHARD ALLEN LUMPKIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

)
)
)
)
)
)
)
)
)
)
)

**Case No. 3:16-cv-01473
Judge Aleta A. Trauger**

MEMORANDUM & ORDER

Before the court is Richard Lumpkin's Motion to Vacate, Set Aside, or Correct Sentence in Accordance with 28 U.S.C. § 2255. (Doc. No. 1.) Lumpkin seeks to vacate and reduce the sentence entered upon his criminal conviction in *United States v. Lumpkin*, No. 3:95-cr-00065 (M.D. Tenn. Apr. 12, 1996) (Morton, J.), under *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the so-called "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). As set forth herein, the court finds that *Johnson* does not apply to Lumpkin's claim and that the motion must be denied as time-barred.

I. Procedural Background

Lumpkin was sentenced in April 1996 to a prison term of 405 months following his guilty plea to two counts of possession with intent to distribute methamphetamine, in violation of 18 U.S.C. § 841(a)(1). The Sixth Circuit affirmed. *United States v. Lumpkin*, 159 F.3d 983 (6th Cir. 1998). Lumpkin's initial motion under § 2255 was denied, *Lumpkin v. United States*, No. 3:00-cv-00048 (M.D. Tenn. Jan. 10, 2001) (Campbell, J.), and the Sixth Circuit denied a certificate of appealability, *Lumpkin v. United States*, No. 01-5229 (6th Cir. Dec. 27, 2001).

On June 20, 2016, Lumpkin filed his present Motion to Vacate, arguing that his

sentencing range was calculated based on his classification as a career offender under the United States Sentencing Guidelines, under a clause of the guidelines identical to the statutory provision held to be unconstitutionally vague in *Johnson*.¹ Consideration of the Motion was stayed pending the Sixth Circuit's review of Lumpkin's application to file a second or successive petition. (Doc. No. 6.) After the appellate court granted that application on October 4, 2016 (*see* Doc. No. 7), Lumpkin filed a Supplemental Brief (Doc. No. 10), asking the court to postpone ruling on his motion until the "potential rehearing process" had been completed for *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017). He expressly acknowledges therein that *Raybon* precludes the relief sought and that, unless the Sixth Circuit reversed course *en banc*, his motion must be deemed time-barred. (*See* Doc. No. 10, at 7.)

In its Response, the United States argues that the movant has not asserted a right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, 28 U.S.C. § 2255(f)(3), and, therefore, that his motion is time-barred. (Doc. No. 12 (citing *Raybon*, 867 F.3d at 629–30).) Lumpkin thereafter filed a *pro se* Reply (Doc. No. 13).

II. Standard of Review

28 U.S.C. § 2255 provides a statutory mechanism for a post-conviction challenge to the imposition of a federal sentence. In order to obtain relief under § 2255, a movant "must

¹ The Presentence Report ("PSR") does not expressly identify what prior convictions the Probation Office included for purposes of characterizing Lumpkin as a career offender. It simply lists his prior convictions and then, under "Criminal History Computation," states that, although the "total of the criminal history points is 9, which establishes a criminal history category of IV, . . . the defendant is a career offender since the instant offense is a controlled substance offense and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." (PSR at 10–11.) Because he was a career offender, his criminal history category was automatically VI. (*Id.* at 11 (citing U.S.S.G. § 4B1.1).) As Lumpkin noted in the present Motion, "[a]lthough the [PSR] does not so state, it appears that his offense level on his drug count was higher than the career offender range, but that his criminal history category was increased from a IV to a VI by application of the career offender guideline," which increased his sentencing range. (Doc. No. 1, at 2.) In its Response, the United States does not contest the implication that the career offender guideline only applied based on prior burglary convictions that would no longer qualify as crimes of violence except under the residual clause of the career offender guideline, § 4B1.2(1)(ii) (1994).

demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict.'" *Humphress v. United States*, 398 F.3d 855, 858 (6th Cir. 2005) (quoting *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003)).

A motion under § 2255 is subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). The one-year period runs from "the latest of" four possible events, only two of which are relevant here:

- (1) the date on which the judgment of conviction becomes final; [or]
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review

Id. § 2255(f)(1), (3). Because his conviction became final more than twenty years ago, the current motion is clearly time-barred if subsection (1) is the latest relevant event. Lumpkin claims that he is entitled to relief under subsection (3), because *Johnson* articulated a newly recognized right made retroactive on collateral review.

III. Analysis

In *Johnson*, the Supreme Court held that the subsection of the ACCA that included within the scope of the definition of "violent felony" any crime that "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii)—the so-called "residual clause"—was unconstitutionally vague and, therefore, that "an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2555–56. That holding was made retroactive to cases on collateral review by the Supreme Court's decision in *Welch v. United States*, 136 S. Ct. 1257 (2016).

Lumpkin was not sentenced under the ACCA. He nonetheless argues that his sentencing guideline range calculation—and therefore his sentence—was defective, because the definitional

language in the “career offender” guideline, U.S.S.G. § 4B1.2(1)(ii) (1994), encompassing “any offense” that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” is nearly identical to the ACCA’s residual clause found unconstitutional in *Johnson*. Indeed, the Sixth Circuit held on May 13, 2016 that the *Johnson* rationale applied with equal force to the residual clause in U.S.S.G. § 4B1.2, compelling the conclusion that the residual clause of § 4B1.2 is also unconstitutionally vague. *United States v. Pawlak*, 822 F.3d 902, 907 (6th Cir. 2016). *Pawlak*, however, was subsequently abrogated by the Supreme Court’s decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), in which the Supreme Court held that the *advisory* sentencing guidelines are not subject to the vagueness challenge identified in *Johnson*, because, unlike the ACCA, “the advisory Guidelines do not fix the permissible range of sentences.” *Beckles*, 137 S. Ct. at 892.

Pawlak, consequently, no longer advances Lumpkin’s position, but *Beckles* does not answer the question posed in this case either, because the decision was premised on the *advisory* nature of the Sentencing Guidelines. The Supreme Court did not declare that the Guidelines are advisory until 2005, in *United States v. Booker*, 543 U.S. 220, 245 (2005).² At the time Lumpkin was sentenced in 1996, the sentencing guidelines were mandatory, that is, “binding on district courts.” *Beckles*, 137 S. Ct. at 894. The *Beckles* Court made clear that its decision declared “only that the *advisory* Sentencing Guidelines . . . are not subject to a challenge under the void-for-vagueness doctrine.” *Id.* at 895 (emphasis added). *Beckles* left “open the question whether defendants sentenced to terms of imprisonment before [*Booker*]*—that is, during the period in*

² In *Pawlak*, the Sixth Circuit did not address the question of whether there was a distinction between the advisory (post-*Booker*) and mandatory (pre-*Booker*) guidelines or even mention the date of Pawlak’s sentencing, but the case was heard on direct appeal rather than collateral review. Other documents available on Westlaw confirm that Pawlak was sentenced in 2015, well after *Booker*. See *United States v. Pawlak*, No. 4:14-CR-305, 2015 WL 13173231 (Feb. 2, 2015) (Order adopting Report and Recommendation that the defendant’s plea of guilty be accepted).

which the Guidelines did fix the permissible range of sentences, may mount vagueness attacks on their sentences.” *Id.* at 903 (Sotomayor, J., concurring).

Thus, as the United States argues (*see* Doc. No. 12, at 5), *Beckles* itself made it clear that the Supreme Court has not yet recognized the right that Lumpkin is asserting, because it did not address the question of whether application of the career offender guideline’s residual clause at a time when the guidelines were deemed binding on the district courts is unconstitutional. Moreover, the Sixth Circuit has already answered the statute-of-limitations question raised here and held, under factually similar circumstances, that *Johnson* does not afford relief. *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), *reh’g en banc denied* (Dec. 6, 2017), *cert. denied*, 138 S. Ct. 2661 (2018). In *Raybon*, the court stated:

Beckles decided that *Johnson 2015* does not apply to the advisory sentencing guidelines. And whether it applies to the mandatory guidelines, which contain identical language as the ACCA provision at issue in *Johnson 2015*, is an open question. . . .

Because it is an open question, it 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.” *See* § 2255(f)(3).

Raybon, 867 F.3d at 629, 630. The Sixth Circuit determined that *Johnson*’s holding “was limited to the ACCA and did not extend to other legal authorities such as the Sentencing Guidelines” and, therefore, that *Johnson* did not “establish[] the same right” that Raybon sought to assert. *Raybon*, 867 F.3d. at 630 (citations omitted). It held that, “[b]ecause the Supreme Court has not decided whether the residual clause of the mandatory Sentencing Guidelines is unconstitutionally vague—and did not do so in *Johnson* . . . —Petitioner’s motion is untimely under § 2255(f)(3).” *Id.* (citation and quotation marks omitted).

Raybon is binding on this court and compels the conclusion that Lumpkin’s motion is likewise time-barred. The right he seeks to assert has never been established by the Supreme

Court. Section 2255(f)(3) does not apply, and the motion is barred by § 2255(f)(1).

IV. Conclusion and Order

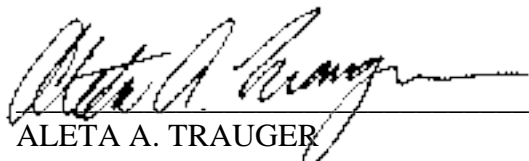
The Motion to Vacate is **DENIED** as time-barred.

Rule 22 of the Federal Rules of Appellate Procedure provides that an appeal of the denial of a § 2255 motion may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. Rule 11 of the Rules Governing § 2255 Proceedings requires that a district court issue or deny a COA when it enters a final order. Because the court finds that the applicant has not made a “substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), the court hereby **DENIES** a COA. The movant may, however, seek a COA directly from the Sixth Circuit Court of Appeals. Fed. R. App. P. 22(b)(1).

In addition, the Clerk is **DIRECTED** to terminate the movant’s Motion to Expedite Hearing on Motion to Modify Sentence (Doc. No. 14) and to refile it in the movant’s criminal case, Case No. 3:95-cr-00065, as it pertains to the Motion to Modify Sentence Pursuant to 18 U.S.C. § 3582(c)(2) filed in that case.

This is the final Order in this case. The Clerk shall enter judgment. Fed. R. Civ. P. 58.

It is so **ORDERED**.


Aleta A. TRAUGER
United States District Judge