

Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 16 2019

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

BOBBY JOE FLOYD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-56136

D.C. Nos. 2:16-cv-06995-TJH
2:94-cr-00587-HLH-1

Central District of California,
Los Angeles

ORDER

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

The government's motion for summary affirmance (Docket Entry No. 30) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019). Contrary to Floyd's argument, our decision in *Blackstone* is not "clearly irreconcilable" with *United States v. Davis*, 139 S. Ct. 2319 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

AFFIRMED.

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**United States District Court
Central District of California
Western Division**

13 BOBBY JOE FLOYD,

14 Petitioner,

15 v.

16 UNITED STATES OF AMERICA,

17 Respondent.
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CV 16-06995 TJH
CR 94-00587 HLH

Order

19 The Court has considered Petitioner's motion for reconsideration, Petitioner's
20 motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, and the
21 Government's motion to dismiss, together with the moving and opposing papers.

22 On July 31, 2017, the Court issued an order [dkt # 18] denying Petitioner's §
23 2255 motion, but that order was premised upon a factual mistake regarding Petitioner's
24 date of sentencing. Accordingly, the July 31, 2017, order shall be vacated.

25 In 1979, Petitioner was convicted in the Superior Court of California for
26 attempting to violate Cal. Penal Code § 211. In 1984, Petitioner was convicted in the
27 Eastern District of California for committing unarmed bank robbery in violation of 18
28 U.S.C. § 2113(a).

1 In 1994, Petitioner was convicted in this District on one count of armed bank
2 robbery with forced accompaniment, in violation of 18 U.S.C. §§ 2113(a), (d), and (e).
3 In 1995, Petitioner was sentenced pursuant to the then-mandatory Sentencing
4 Guidelines [“Guidelines”]. At sentencing, Petitioner was deemed a career offender
5 because his prior convictions were crimes of violence under § 4B1.1 of the Guidelines.
6 Petitioner was sentenced to 360 months, which was at the low end of the career
7 offender range. In 1996, the Ninth Circuit Court of Appeals affirmed Petitioner’s
8 conviction and sentence, *United States v. Floyd*, 77 F.3d 491, *1 (9th Cir. 1996), and
9 the United States Supreme Court denied *certiorari*, *Floyd v. United States* 518 U.S.
10 1012 (1996). Notably, Petitioner did not challenge his career offender status at time
11 of sentencing or on appeal.

12 In 1998, Petitioner’s first § 2255 motion was denied. The Ninth Circuit
13 authorized Petitioner to file this successive § 2255 petition, which challenges his 1994
14 conviction and sentence based on the argument that his 1979 and 1984 convictions were
15 not crimes of violence under § 4B1.1 and § 4B1.2.

16 A § 2255 motion must be filed within one year of, *inter alia*: (1) The date the
17 conviction became final; or (2) The date the Supreme Court initially recognized a right
18 that was retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f).
19 Here, Petitioner’s conviction became final in 1996. *See Clay v. United States*, 537
20 U.S. 522, 524-525 (2003).

21 Petitioner argues that his § 2255 motion is, nevertheless, timely because his
22 motion was brought within one year of *Johnson v. United States*, 135 S. Ct. 2551
23 (2015). The Supreme Court recognized *Johnson*’s holding – that the residual clause
24 of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) [“ACCA”], was void for
25 vagueness – as a substantive rule, retroactively applicable to cases on collateral review.
26 *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). Accordingly, § 2255 motions
27 challenging sentences under the ACCA filed within one year of *Johnson* are timely.

28 *Johnson* did not address the constitutionality of the Guidelines. *See Johnson*, 135

1 S. Ct. at 2563. Accordingly, it is unclear whether *Johnson*'s retroactive rule is
2 applicable to the Guidelines. Petitioner argues that *Johnson* is applicable because the
3 Supreme Court held that the residual clause is "vague in *all* applications." *Johnson*,
4 135 S. Ct. at 2561 (emphasis added). However, Petitioner's argument runs afoul of
5 *Beckles v. United States*, 137 S. Ct. 886, 894 (2017), where the Supreme Court
6 declined to extend *Johnson*'s holding to an identically-worded residual clause in the
7 now-advisory Guidelines.

8 Although *Beckles* foreclosed a *Johnson* argument regarding the now-advisory
9 Guidelines, the Supreme Court and the Ninth Circuit have yet to address whether
10 *Johnson* applies to sentences imposed under the then-mandatory Guidelines. Indeed,
11 Justice Sotomayor's concurrence in *Beckles* recognized the possibility that *Johnson*
12 could apply to such challenges. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J.,
13 concurring). However, Petitioner failed to identify, and the Court could not find, any
14 Supreme Court precedent that recognized a retroactive right upon which Petitioner may
15 bring his challenge. See 28 U.S.C. § 2255(f). Accordingly, Petitioner's § 2255
16 motion is untimely.

17 Nevertheless, a procedurally defaulted *habeas* petition may be considered if the
18 petitioner demonstrates either (1) cause and actual prejudice, or (2) actual innocence.
19 *Bousley v. United States*, 523 U.S. 614, 622 (1998). The cause prong is satisfied when
20 the petitioner raises a claim so novel that its legal basis was not reasonably available
21 to counsel at the time of sentencing or appeal. *Bousley*, 523 U.S. at 622. Here,
22 Petitioner argues that his vagueness challenge to the Guidelines is a novel claim because
23 "reasonably diligent counsel in January of 1995 would not have perceived and litigated"
24 such challenge. However, Petitioner failed to substantiate how a vagueness challenge
25 was not reasonably available to counsel, given that constitutional challenges based on
26 vagueness have been recognized by the Supreme Court long before 1995. See, e.g.
27 *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

28 Petitioner, also, argues that he is "actually innocent of the mandatory sentencing

1 enhancement he received.” The crux of Petitioner’s actual innocence argument is that
2 his predicate offenses are not crimes of violence under § 4B1.1 and § 4B1.2 based on
3 *Johnson*. However, Petitioner does not challenge the validity of his underlying
4 convictions based on actual innocence. See *Dorise v. Matevousian*, 692 Fed. Appx.
5 864, 865 (9th Cir. 2017). Rather, Petitioner is merely arguing that he was incorrectly
6 categorized as a career offender, which is not a constitutional issue. See *Dorise*, 692
7 Fed. Appx. at 864. Petitioner failed to raise in his 1996 appeal the issue of whether
8 he was properly categorized as a career offender. Non-constitutional sentencing errors
9 that were not raised on direct appeal are waived and may not be reviewed by way of
10 a § 2255 motion. *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995).

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12 Accordingly,

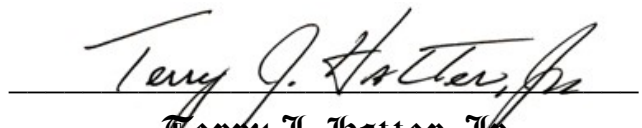
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14 **It is Ordered** that the motion for reconsideration be, and hereby is, **Granted**.

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16 **It is further Ordered** that the Court’s July 31, 2017, order [dkt # 18] be, and
17 hereby is, **Vacated**.

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19 **It is further Ordered** that Petitioner’s motion to vacate, set aside, or correct
20 his sentence under 28 U.S.C. § 2255 be, and hereby is, **Denied**.

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22 **It is further Ordered** that the Government’s motion to dismiss be, and hereby
23 is, **Denied** as moot.

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25 Date: January 24, 2018

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28 **Terry J. Haller, Jr.**
Senior United States District Judge

United States District Court
Central District of California
Western Division

BOBBY JOE FLOYD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-06995 TJH
CR 94-00587 HLH

Order

JS-6

The Court has considered Petitioner Bobby Joe Floyd's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and the Government's motion to dismiss, together with the moving and opposing papers.

Petitioner challenged his sentence, contending that *Johnson v. United States*, 135 S.Ct. 2551 (2015) applied to the identically-worded "residual clause" in the career offender definition of a "crime of violence" in U.S.S.G. § 4B1.2(a)(2).

On March 6, 2017, the Supreme Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), holding that the advisory Sentencing Guidelines are not subject to a due process vagueness challenge. 137 S. Ct. at 895. The Court held that unlike the Armed Career Criminal Act, which was subject to the Court's decision in

1 *Johnson*, the advisory Guidelines “merely guide the exercise of a court’s discretion in
2 choosing an appropriate sentence within the statutory range.” *Beckles*, 137 S. Ct. at
3 892. Indeed, on this basis, the Supreme Court held that § 4B1.2(a)(2) specifically was
4 not void for vagueness. *Beckles*, 137 S. Ct. at 895. As a result, Petitioner’s motion
5 is foreclosed by *Beckles*.

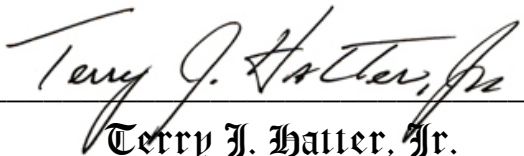
6 Petitioner argues that “because *Beckles* relied on the advisory nature of the
7 Sentencing Guidelines, and because” Petitioner’s sentencing occurred prior to
8 *Kimbrough*, 552 U.S. 85 (2007), *Gall*, 552 U.S. 38 (2007), and *Carty*, 465 F.3d 976
9 (9th Cir. 2006) “— at a time when the Supreme Court and Ninth Circuit had yet to
10 delineate the contours of a sentencing court’s ability to treat the career offender
11 Guideline as purely advisory — *Beckles* does not foreclose relief.” Petitioner is
12 incorrect. The petitioner in *Beckles*, like Petitioner in the instant case, was sentenced
13 after *United States v. Booker*, 543 U.S. 220 (2005), and prior to *Kimbrough*, *Gall*, and
14 *Carty*.

15
16 Accordingly,

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18 **It is Ordered** that the motion to vacate, set aside, or correct his sentence under
19 28 U.S.C. § 2255 be, and hereby is, **Denied**.

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21 **It is Further Ordered** that the Government’s motion to dismiss be, and
22 hereby is, **Denied** as moot.

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24 Date: July 31, 2017

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26 
27 **Terry J. Hatter, Jr.**
28 **Senior United States District Judge**
CC:BOP