Appendix

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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.

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

The Court has considered Petitioner's motion for reconsideration, Petitioner'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.

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

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

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

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

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

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

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

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

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

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

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

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

Accordingly,

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

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

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

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

Date: January 24, 2018

Terry J. Hatter, 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

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

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

Accordingly,

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

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

Date: July 31, 2017

Terry J. Hatter, Jr.
Senior United States District Judge

CC:BOP