

App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD FOLEY,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITIONERS' APPLICATION TO EXTEND TIME TO
FILE A PETITION FOR A WRIT OF CERTIORARI

July 24, 2019

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To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner Ronald Foley respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended 30 days to and including September 11, 2019. The Court of Appeals issued its opinion in this matter on May 14, 2019. *United States v. Foley*, nos. 18-1114, 18-1115 (2d Cir.); App. A. Absent an extension of time, the petition would be due on August 12, 2019. Mr. Foley is filing this application at least ten days before that date. *See* S.Ct.R. 13.5, 30.3. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

Mr. Foley's case involves the application of this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015)—which found 18 U.S.C. § 924(e)(2)(B) to be unconstitutionally vague—to sentences enhanced under U.S. Sentencing Guideline

provisions utilizing the same language, but that were imposed before *Booker v. United States*, 543 U.S. 220 (2005), when the Sentencing Guidelines were mandatory. *See Brown v. United States*, 139 S.Ct. 14 (2018) (Sotomayor, J., dissenting from denial of certiorari). The case further involves the question of whether two Connecticut robbery provisions (Conn. Gen. Stat. §§ 53a-133, 53a-134) qualify as crimes of violence within the meaning of the career offender Guideline's force clause (U.S.S.G. § 4B1.2(a)(1)) in light of this Court's decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019).

Mr. Foley is a 72-year old Vietnam War veteran. When he was sentenced on January 9, 2003, prior Connecticut convictions for robbery enhanced Mr. Foley's sentence under the Sentencing Guidelines' career offender provisions. In Mr. Foley's case, the career offender enhancement raised his Guideline range from 130-162 months (level 27, CH VI) to 210-262 months (level 32, CH VI). In 2003, 18 U.S.C. § 3553(b) still required the District Court to impose a sentence within the career offender Guideline range. As required, the District Court's 262-month sentence was within the enhanced Guideline range.

In light of this Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Foley filed a 28 U.S.C. § 2255 motion and sought to be resentenced without application of the career offender enhancement. Like many other defendants, Mr. Foley argued that the career offender Guideline's residual clause (U.S.S.G. § 4B1.2(a)(2)) was unconstitutionally vague because it utilizes the same

language that was struck down in *Johnson*.¹ Following the decision in *Beckles v. United States*, 137 S.Ct. 886 (2017), the District Court dismissed Mr. Foley's motion as untimely under 28 U.S.C. § 2255(f)(3) on March 30, 2018. *See United States v. Foley*, 2018 WL 1626111 (D.Vt.). The District Court granted a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2).

After receiving additional briefing on the application of *Stokeling*, the Court of Appeals affirmed the District Court's decision on May 14, 2019. It reasoned that even if the § 2255 motion was timely, Mr. Foley's claim would still fail because the Connecticut robbery provisions at issue categorically qualified as crimes of violence under the career offender Guideline's force clause.

Reasons for Granting an Extension of Time

1. This case presents important and unresolved issues arising out of two recent decisions from this Court.

2. First, Mr. Foley's case presents the issue of whether the Court's decision in *Johnson* applies to sentences enhanced by the same language found to be unconstitutionally vague in *Johnson* and that were imposed under the pre-*Booker*, mandatory Sentencing Guidelines. The Court determined in *Beckles v. United States*, 137 S.Ct. 886 (2017), that *Johnson* did not apply to sentences imposed under the post-*Booker*, advisory Guidelines. Thus far, however, the Court has not resolved the question of whether its decision in *Johnson* applies to sentences imposed before *Booker*, when the Sentencing Guidelines were mandatory. This is

¹ In 2016, following the decision in *Johnson*, the Sentencing Commission eliminated the residual clause in § 4B1.2(a)(2) of the Sentencing Guidelines.

an issue that “has generated divergence among the lower courts” and that could affect “the liberty of over 1,000 people.” *Brown*, 139 S. Ct. at 14, 16.

3. Mr. Foley’s case also involves the application of this Court’s decision in *Stokeling*. That decision involved a Florida robbery provision that required that only minimal physical force be used to accomplish the robbery. The *Stokeling* Court determined that such a provision still qualified as a violent felony under the Armed Career Criminal Act so long as the minimal physical force was employed to overcome the victim’s resistance in a face-to-face encounter. 139 S.Ct. at 553. Mr. Foley’s case involves two Connecticut robbery provisions that also require that only minimal physical force be utilized, but that do not require that the minimal force be utilized to overcome a victim’s resistance in a face-to-face encounter. *Stokeling* thus suggests that the Connecticut provisions should not qualify as crimes of violence. Mr. Foley’s case thus presents an opportunity for this Court to provide further guidance on the application of *Stokeling*.

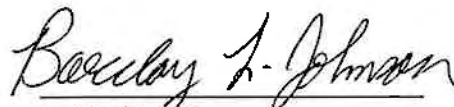
4. Given the important and unresolved questions that will be presented as part of any petition, the case is deserving of careful attention to the drafting of the petition for a writ of certiorari. As part of this process, counsel requires additional time to consult with other attorneys with relevant experience in the drafting and presentation of claims to the Court.

5. No meaningful prejudice would arise from the extension. While Mr. Foley is still incarcerated, this Court would hear oral argument and issue its opinion in the October 2019 term regardless of whether an extension of time is granted.

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended thirty days to and including September 11, 2019.

Dated: July 24, 2019

Respectfully Submitted,

A handwritten signature in cursive script, reading "Barclay T. Johnson".

BARCLAY T. JOHNSON
Assistant Federal Public Defender
Counsel of Record

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APPENDIX A—Court of Appeals Opinion (May 14, 2019)

18-1114-pr(L)
Foley v. United States

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 14th day of May, two thousand nineteen.

Present: ROSEMARY S. POOLER,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

RONALD FOLEY,

Petitioner-Appellant,

v.

18-1114-pr, 18-1115-pr

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appearing for Appellant: Barclay T. Johnson, Assistant Federal Public Defender, *for*
Michael L. Desautels, Federal Public Defender, District of
Vermont, Burlington, VT.

Appearing for Appellee: Gregory L. Waples, Assistant United States Attorney (Eugenia A.
P. Cowles, Assistant United States Attorney, *on the brief*), *for*
Christina E. Nolan, United States Attorney for the District of
Vermont, Burlington, VT.

Appeal from the United States District Court for the District of Vermont (Reiss, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Ronald Foley appeals from the March 30, 2018 opinion and order of the United States District Court for the District of Vermont (Reiss, J.) denying his petition to vacate and correct his sentence pursuant to 28 U.S.C. § 2255. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Foley's petition relied on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding the residual clause of the Armed Career Criminal Act ("ACCA") void for vagueness, and *Welch v. United States*, 136 S. Ct. 1257 (2016), which made *Johnson* retroactive to cases on collateral review. Foley argued that because the residual clause of the Guidelines in effect prior to *United States v. Booker* is unconstitutionally vague, and his prior convictions are not crimes of violence under the enumerated offenses clause or the force clause of the Guidelines, the prior finding that he was a career offender should be vacated and he should be resentenced. The district court denied his petition. *United States v. Foley*, Nos. 2:1-cr-34, 2:2-cr-40, 2018 WL 1626111 (D. Vt. March 30, 2018).

The only avenue available for Foley to timely bring his claim is 28 U.S.C. § 2255(f)(3), which provides for a one-year limitations period that runs from "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." Even assuming Foley's petition is timely, he cannot succeed on the merits following *Shabazz v. United States*, 912 F.3d 73 (2d Cir. 2019), *reh'g denied*, No. 17-167, 2019 WL 1868008 (2d Cir. April 26, 2019) (robbery conviction under Connecticut General Statute § 53a-133 involves use or threat of force capable of causing pain or injury and thus is a predicate offense under the force clause of the ACCA). While Foley was sentenced under the Guidelines, the relevant language of the Guidelines is identical to the relevant language in ACCA. *See United States v. Gray*, 535 F.3d 128, 130 (2d Cir. 2008) ("In analyzing the definition of 'crime of violence,' we have looked to cases examining the statutory definition of 'violent felony,' as found in the [ACCA], because the operative language of [the Guidelines] and the statute is identical."). Foley's convictions for first degree robbery in Connecticut therefore under *Shabazz* qualify as crimes of violence under the Guidelines, and thus even assuming his petition is timely it could not be granted.

We have considered the remainder of Foley's arguments and find them to be without merit. Accordingly, the order of the district court hereby is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe