

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LENE LOPEZ
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph G. Bertogli
300 Walnut St., Ste. 270
Des Moines, Iowa 50309
P: 515/244-7820
F: 515/244-9175
E: josephbertogli@yahoo.com

QUESTION PRESENTED

Whether Lopez's 28 USC Section 2255(a) Motion was timely filed under *Johnson v United States*, 135 S. Ct. 2551 (2015) as there is a split between the 8th Circuit and the 7th Circuit Court of Appeals on the question of the time allowed a defendant to file a Section 2255(a) Motion under *Johnson*.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

Lopez v United States, No. 16-cv-00371-crw (December 7, 2018)

United States v Lopez, No. 4:96-cr-0021-crw

United States Court of Appeals (8th Cir.):

Lopez v United States, No. 18-3757 (March 30, 2020) Petition for Rehearing Denied, (May 11, 2020)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Daniel Lene Lopez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINION BELOW

On March 30, 2020 the Eighth Circuit Court of Appeals entered its opinion affirming the district court's Order dismissing Lopez's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 USC Section 2255 as untimely. The opinion of the Court of Appeals is unpublished.

On April 13, 2020 the Petitioner filed a Petition for En Banc Hearing with the United States Court of Appeals for the Eighth Circuit which was denied on May 11, 2020.

JURISDICTION

The Court of Appeals entered judgment on March 30, 2020 and an Order denying Petitioner's Petition for En Banc Hearing on May 11, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in a land or naval forces, or in the Militia wherein actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, and will be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Lopez pleaded guilty to Conspiring to Distribute Methamphetamine, Amphetamine, and Marijuana; Possessing Methamphetamine and Amphetamines; and Using and Carrying a Firearm During and in Relation to a Drug-Trafficking Crime. On April 30, 1997 he was sentenced to 360 months in prison, which was based, in part, on his designation as a career offender under U.S.S.G. § 4B1.1.

On June 24, 2016, Lopez filed a Motion to Vacate, Set Aside, or Correct

Sentence pursuant to 28 U.S.C. § 2255(a) asserting that his sentence was unconstitutional in light of the United States Supreme Court decision in *Johnson v United States*, 135 S. Ct. 2551 (2015).

On July 6, 2017 the Court granted Lopez's request to stay full briefing and disposition until January 3, 2017.

On March 15, 2017 the Court entered an Order requiring Lopez to show cause why his petition for relief under *Johnson* should not be dismissed in lieu of the United States Supreme Court decision in *Beckles v United States*, 137 S. Ct. 886 (2017), decided on March 6, 2017. Lopez timely filed his reply to the Court's Show Cause Order and the government offered its Resistance to Lopez's Motion to Vacate, Set Aside, or Correct Sentence.

On December 7, 2018 the Court entered an Order denying Lopez's § 2255 Motion as untimely under *Russo v United States*, 902 F 3d 880 (8th Cir. 2018). In that same order the Court found that Lopez made a substantial showing of the denial of a constitutional right for any of his claims and granted a certificate of appealability on the issue of whether or not he may not mount a void for vagueness attack on his sentence under *Beckles* because he was sentenced pre-*Booker*.

The three-judge panel determined that Lopez's argument was foreclosed by

that Court's recent decision in *Russo v United States*, 902 F 3d 888 (8th Cir. 2018) where the court held that a right under the Due Process Clause to be sentenced without reference to the residual clause of USSG Section 4B1.2(a)(2) under the mandatory guidelines is not dictated by *Johnson*. *Id.* at 882-883. (Panel Opinion p. 2,3). The panel went on to state that Lopez was free to argue that *Russo* was wrongly decided in a Petition for Rehearing En Banc.

On April 13, 2020 Petitioner filed a Petition for En Banc Hearing as suggested by the panel which was denied on May 11, 2020.

REASONS FOR GRANTING THE WRIT

- I.) A SPLIT BETWEEN THE CIRCUITS EXISTS AS TO WHEN A DEFENDANT TIMELY FILES A MOTION UNDER 28 USC SECTION 2255 BASED UPON HIS CLAIM THAT JOHNSON INVALIDATED THE CAREER OFFENDER PROVISION UNDER THE MANDATORY GUIDELINES.

A. Lopez's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 Was Timely.

A federal inmate may file a motion under 28 U.S.C. § 2255 for release “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, ...” 28 U.S.C. § 2255(a).

28 U.S.C. § 2255(f) provides:

“...(f) A 1-year period of limitation shall apply to a motion under this §. The limitation period shall run from the latest of –

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

(2) the date on which the impediment to making a motion created by the government action in violation of the constitutional laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(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 may retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claim presented could have been discovered through the exercise of due diligence...”

It is undisputed that Lopez filed his Section 2255 Motion within one year of *Johnson v United States*, 135 S. Ct. 2551 (2015). (Panel Opinion p. 2).

In *Johnson* the Supreme Court invalidated the residual clause of the on-Career Criminal Act as unconstitutionally vague. 135 S Ct. at 2556-57, 2563. The court made *Johnson* retroactive to cases on collateral review in *Welch v United States*, 136 S Ct. 1257, 1265, 1268 (2016). In *Beckles v United States*, 137 S. Ct. 886, 892, 895 (2017), the Court held that the parallel residual clause in the career offender provisions of the advisory guidelines was not unconstitutionally vague. In a concurring opinion, Justice Sotomayor said it should be considered an open question whether the career offender residual clause and the mandatory guidelines was susceptible to a vagueness challenge under *Johnson*. *Id.* at 903 n. 4 (Sotomayor, J., concurring in the judgment). It is undisputed that Lopez was sentenced before the Sentencing Guidelines were made advisory in *United States v Booker*, 543 US 220, 246 (2005). In his Section 2255 Petition Lopez argued that he was entitled to relief because *Johnson* effectively invalidated the career offender provision under which he was sentenced, and therefore his Motion to Correct his sentence was timely filed under 28 USC Section 2255(f)(3).

The three-judge panel determined that Lopez's argument was foreclosed by

8th Circuit's recent decision in *Russo v United States*, 902 F 3d 888 (8th Cir. 2018) where the court held that a right under the Due Process Clause to be sentenced without reference to the residual clause of USSG Section 4B1.2(a)(2) under the mandatory guidelines is not dictated by *Johnson*. *Id.* at 882-883. (Panel Opinion p. 2,3). The panel went on to state that Lopez was free to argue that *Russo* was wrongly decided in a Petition for Rehearing En Banc, which he did.

In *Russo v United States*, 902 F 3d 880 (8th Cir. 2018), the 8th Circuit reasoned that the United States Supreme Court opinion in *Johnson v United States*, 135 S. Ct. 2551 (2015), which declared the residual clause of the Armed Career Criminal Act (ACCA) unconstitutionally vague, did not announce a new rule that the mandatory guidelines were susceptible to vagueness challenges, so as to enable a defendant to raise a vagueness challenge, within the 1-year limitation period after the *Johnson* decision, to the residual clause in the pre-*Booker* mandatory guidelines through a motion to vacate a sentence upon Russo's conviction for various drug and firearm offenses. *Russo* at 883. The *Russo* court concluded that *Johnson* did not address the sentencing guidelines and did not address possible distinctions between the provision that establishes statutory penalty and a mandatory guideline provision that affected sentences within a

statutory range, subject to authorized departures. *Id at 883*.

Conversely the *Russo* court recognized that, “[i] t is reasonably debatable whether *Johnson*’s holding regarding the ACCA extends to the former mandatory guidelines.” *Id at 883*. The *Russo* court concluded that because the Supreme Court did not specifically recognize the right asserted by Russo, he could not benefit from the limitations period in 28 U.S.C. § 2255(f)(3) and affirmed the district court’s decision to dismiss Russo’s § 2255 Motion as untimely. *Id at 883*.

A split between the 8th Circuit and the 7th Circuit Court of Appeals exists on the question of what the correct limitation period is for a prisoner raising a vagueness challenge to the residual clause in the mandatory guidelines. The 8th Circuit relies upon its opinion in *Russo v United States*, 902 F 3d 880 (8th Cir. 2018) which claims that the Supreme Court in *Johnson*, which declared the residual clause of the Armed Career Criminal Act (ACCA) unconstitutionally vague, did not announce a new rule that the mandatory guidelines were susceptible to vagueness challenges, so as to enable a defendant to raise a vagueness challenge, within the one-year limitation period after the *Johnson* decision, to the residual clause in the pre-*Booker* mandatory guidelines. *Russo at 883*. The 8th Circuit concluded that *Johnson* did not address the sentencing guidelines and did

not address possible distinctions between the provision that enables statutory penalty and a mandatory guideline provision that effected sentences within the statutory range, subject to authorized departures. *Id at 883.*

Lopez asserts that the dismissal of his motion under U.S.C. § 2255 as untimely is incorrect and points this Court to the more reasoned decisions of the 7th Circuit in *Cross v United States*, 892 F 3d 288 (7th Cir. 2018) and *D’Antoni v United States*, 916 F 3d 658 (7th Cir. 2019). In *Cross* the 7th Circuit concluded that *Johnson* restarts the limitations period for a prisoner raising a vagueness challenge to the residual clause in the mandatory guidelines and that the contrary view which views the term “asserted” out of the statute and “improperly reads a merits analysis limitations.” *Cross at 293-294.*

The 7th Circuit in *Cross* correctly reasoned:

“...The government argues that *Johnson* recognized the invalidity of the residual clause only vis-à-vis the ACCA. *Cross* and *Davis*, unlike *Johnson*, were sentenced under the residual clause of the guidelines. The government concludes, therefore, that § 2255(f)(3) cannot help them, unless and until the Supreme Court explicitly extends the logic of *Johnson* to the pre-*Booker* mandatory guidelines. The Fourth and Sixth Circuits have both accepted this view. *Raybon v. United States*, 867 F.3d 625, 629–31 (6th Cir. 2017); *United States v. Brown*, 868 F.3d 297, 301–04 (4th Cir. 2017). The First Circuit has rejected it. *Moore v. United States*, 871 F.3d 72, 80–84 (1st Cir. 2017).

3 The government’s approach suffers from a fundamental flaw. It improperly reads a merits analysis into the limitations period.

§ 2255(f)(3) runs from “the *294 date on which the right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3)(emphasis added). It does not say that the movant must ultimately prove that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading “asserted” out of the statute. See *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’ ” (quoting *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955))).

Here, *Cross* and *Davis* claim the right to be resentenced on the ground that the vague (yet mandatory) residual clause unconstitutionally fixed their terms of imprisonment. The right not to be sentenced under a rule of law using this vague language was recognized in *Johnson*, 135 S.Ct. at 2556–57 (“The prohibition of vagueness in criminal statutes ... appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.... [T]he indeterminacy of the ... residual clause ... denies due process of law.”); see also *Beckles*, 137 S.Ct. at 892 (“In *Johnson*, we applied the vagueness rule to a statute fixing permissible sentences. The ACCA’s residual clause ... fixed—in an impermissibly vague way—a higher range of sentences for certain defendants.”).

We are satisfied that the requirements of § 2255(f)(3) are met. Under *Johnson*, a person has a right not to have his sentence dictated by the unconstitutionally vague language of the mandatory residual clause. *Davis* and *Cross* assert precisely that right. They complied with the limitations period of § 2255(f)(3) by filing their motions within one year of *Johnson*. See also *Vitrano v. United States*, 721 F.3d 802, 807–08 (7th Cir. 2013) (holding that the Supreme Court recognized the general right not to be subject to an enhanced sentence based on an understanding of the term “violent felony” that conflicted with *Begay v. United States*, 553 U.S. 137, 148, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), and thus holding motion under § 2255 untimely when it was filed more than a year after *Begay* was decided)....”

The simple facts of this case are that on April 30, 1997, the district court sentenced Lopez to 360 months imprisonment based upon the court's conclusion that he was career offender under USSG Section 4B1.1(S.D. Ia. CR 4:96-cr-121). Lopez's career offender sentence was predicated on his 1985 Iowa conviction for going armed with intent, a 1989 assault with intent to do bodily injury conviction, a 1995 domestic assault causing serious injury conviction, a 1995 domestic assault with a weapon conviction, and a 1995 Iowa conviction of domestic assault causing bodily injury. (PSR 8, 11, 12, 13).

The record in this case clearly shows that the sentencing court in 1997 relied upon the residual clause of USSG Section 4B1.2(a)(2), to find Lopez's Iowa assault with intent causing injury aggravated misdemeanor conviction was crime of violence and counted as a predicate felony conviction.

Here it is undisputed that Lopez filed his § 2255 Motion within 1 year of the Supreme Court's decision in *Johnson*.

Rule 10 of the Supreme Court Rules provides as follows:

“...Review on a writ of certiorari is not a matter of right, but of judicial discretion. Petition for Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court considers: (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter, has decided an

important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure, by a lower court, as to call for an exercise of this court's supervisory power..."

It is clear that a split between the 8th Circuit and the 7th Circuit on the question of when the one year limitation for the filing of a petition under 28 USC Section 2255 exists. The 8th Circuit claims that *Johnson* did not authorize claims such as Lopez's here could be filed within one year after this court's opinion in *Johnson*. Conversely, the 7th Circuit concluded that this court's opinion in *Johnson* restarts the limitation period for a person raising a vagueness challenge to the residual clause and the mandatory guidelines and that the contrary view which views the term "asserted" out of the statute and improperly reads a merit analysis into the limitations. *Cross at 293-294*.

This court should accept Lopez's Petition for Writ of Cert and resolve the split between the 8th Circuit and the 7th Circuit that exists regarding the timeliness of Lopez's 28 USC Section 2255 Motion.

B. Under Beckles, Pre-Booker Sentences Imposed Under the Residual Clause of the Career Offender Guidelines are Subject to Challenge as Being Void for Vagueness.

Beckles was convicted of being a felon in possession of a firearm, to wit:

a sawed off shotgun. *Beckles v. United States*, 135 S. Ct. 886 (2017). He was sentenced under the 2006 edition of U.S.S.G. § 4B1.2. *Beckles* at 894. He argued that because that offense did not have as an element the intentional use of violent force, and was not specifically listed in the guideline itself, it could only qualify as a felony crime of violence under the residual clause of § 4B1.2. Because that residual clause was identical to the residual clause in the Armed Career Criminal Act (ACCA) which was declared unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Beckles reasoned that the residual clause of the sentencing guidelines was also unconstitutionally vague, and, therefore, he could not be sentenced as a career offender. *Beckles*.

The Court in *Beckles* rejected one of the fundamental premises of Beckles's argument – that provisions of the Guidelines can be the subject of a void for vagueness challenge. *Beckles* at 894. The Court distinguished the ACCA residual clause from the guideline residual clause because the ACCA was a statute that fixed a sentence, in contrast to the guidelines, which only provide guidance to the courts regarding how to exercise their sentencing discretion.

In reaching its conclusion, the *Beckles* court repeatedly stressed the advisory nature of the guideline scheme under which *Beckles* was sentenced. For example,

the Court stated that “we hold that the advisory Guidelines are not subject to vagueness challenges.” *Id at 894*. In contrasting the Guidelines to the ACCA, the Court noted that, “(u)nlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences.” *Id at 892*. The “advisory Guidelines,” the Court stated, “do not implicate the vagueness doctrine’s concern with arbitrary enforcement.” *Id at 894*. At least two more times in the opinion, the Court refers to the “advisory Guidelines.” *Id at 894, 895*.

If the Court’s numerous references to the “advisory Guidelines” leaves any doubt that their advisory nature was the key component of the Court’s ultimate holding, the Court’s discussion of *Irizarry v. United States*, 553 U.S. 708 (2008) should dispel that doubt. *Beckles at 894*. The Court held in *Irizzary* that the provisions of Fed. R. Crim. P. 32(h), requiring the district court to provide notice to the parties before sua sponte imposing a departure from the guidelines, did not apply to sua sponte variances. *Irizzary v. United States*, 553 U.S. 708, 719–20 (2008). In *Beckles*, the Court recognized that the crucial distinction between sua sponte departures and sua sponte variances was that the “‘due process concerns that . . . require notice in a world of mandatory Guidelines no longer’ apply” in a post-*Booker* advisory scheme. *Beckles at 894*. (quoting *Irizarry*, 555 U.S. at 714).

Of course, we have not lived in “a world of mandatory Guidelines” since *Booker* was decided on January 12, 2005. *United States v. Booker*, 543 U.S. 220 (2005). Defendants sentenced before *Booker* were sentenced under a system in which the Guidelines were mandatory. Under that mandatory scheme, a sentencing court – unlike the sentencing court in *Beckles* – could not decide that a below guideline range sentence was appropriate based upon the sentencing factors in 18 U.S.C. § 3553(a), nor could the court reject the sentencing range computed under the Guidelines because it decided, as a matter of policy, that a particular guideline was fundamentally flawed or not based upon empirical research.

In *Booker*, the Supreme Court held that there was no substantial difference between the federal sentencing guidelines and the mandatory state guideline system held to violate the Sixth Amendment in *Blakely v. Washington*, 542 U.S. 296 (2004), and found that the Guidelines, as applied, violated the Sixth Amendment. *Booker*, 543 U.S. at 233. The Court specifically found that 18 U.S.C § 3553(b)(1), which made the Guidelines mandatory, also made them unconstitutional. *Id.* As a remedy, the Court excised the mandatory language from the statute, and “ma[de] the Guidelines effectively advisory.” *Id.* at 245. The Court stated, “the Guidelines as written, however, are not advisory; they are

mandatory and binding on all judges.” *Id. at 233*. The Court acknowledged that “we have consistently held that the Guidelines have the force and effect of laws.” *Id. at 234*.

The majority in *Beckles* did not specifically address the question of whether defendants sentenced prior to *Booker* could mount a void for vagueness challenge to sentences imposed under the Guidelines. In her concurrence, however, Justice Sotomayor pointed out that this is still an open question, stating: “The Court’s adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] – that is, during the period in which the Guidelines *did* ‘fix the permissible range of sentences’ - may mount vagueness attacks on their sentences.” *Beckles at 905*. (citations omitted).

The due process concerns that actuated the Court’s decision in *Johnson* apply with equal force to the mandatory guidelines that controlled the petitioner’s sentence. The *Beckles* court found that the advisory guidelines did not raise the same due process notice concerns as the Armed Career Criminal Act statute “because even if a person behaves so as to avoid an enhanced sentence under the career offender guideline, the sentencing court retains discretion to impose the

enhanced sentence.” *Beckles at 894*, citing *Pepper v. United States*, 562 U.S. 476, 501 (2011). No discretion existed under the mandatory guidelines that dictated the Petitioner’s sentence imposed on April 30, 1997. (S.D. Iowa CR 4:96-cr-121).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

Respectfully submitted

/s/ Joseph G. Bertogli
JOSEPH G. BERTOGLI
ICIS No. AT0000797
300 Walnut, Suite 270
Des Moines, Iowa 50309
Telephone: 515/244-7820
Facsimile: 515/244-9125
ATTORNEY FOR PETITIONER