

APPENDIX 1a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

BARTO EDWARD USRY, JR.

PETITIONER

vs.

CRIMINAL ACTION No.: 3:94-CR-123-HTW-1
CIVIL ACTION No.: 3:16-CV-499-HTW

UNITED STATES OF AMERICA

RESPONDENT

ORDER

BEFORE THIS COURT is the petitioner's Motion to Vacate under Title 28 U.S.C. § 2255 [Docket no. 44]. Petitioner, by his motion, asks this court to set aside his sentence due to the United States Supreme Court's opinions in *Johnson v. United States*, 135 S.Ct. 2551 (2015) and *United States v. Welch*, 136 S.Ct. 1257 (2016).

Petitioner filed the instant motion, arguing that § 4B1.4 is unconstitutionally vague in light of the United States Supreme Court's holding in *Johnson v. United States*, 135 S.Ct. 2551 (2015). This court stayed consideration of the motion pending a decision by the Supreme Court in *Beckles v. United States*, 580 S. Ct. 886 (Mar. 6, 2017). The Supreme Court issued its memorandum opinion on March 6, 2017, holding that the "Advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)'s residual clause is not void for vagueness." *Id* at 895. This court is persuaded that the same reasoning applies to the case at bar and § 4B1.4 (the Armed Career Criminal enhancement of the Advisory Sentencing Guidelines) is not void for vagueness and, therefore, cannot provide petitioner relief.

Accordingly, this court holds that the United States Supreme Court's decision in *Beckles* forecloses the relief sought by the Petitioner and therefore the Petition should be denied.

IT IS THEREFORE ORDERED that the petitioner's Motion to Vacate under Title 28 U.S.C. § 2255 [Docket no. 44] is hereby **DENIED**.

IT IS FURTHER ORDERED that the instant petition is hereby DISMISSED.

IT IS FINALLY ORDERED that the related civil case 3:16-cv-499-HTW is hereby DISMISSED.

SO ORDERED AND ADJUDGED this the 13th day of April, 2019.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE

APPENDIX 1b

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

vs.

CRIMINAL ACTION No.: 3:94-CR-123-1-HTW

BARTO USRY

CERTIFICATE OF APPEALABILITY - DENIED

A final order adverse to the applicant having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by this court, this Court, considering the record in the case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, hereby finds that a Certificate of Appealability should not issue. The applicant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED this the 1st day of July, 2019.

**s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE**

APPENDIX 2

United States Court of Appeals for the Fifth Circuit



No. 19-60241

A True Copy
Certified order issued Aug 28, 2020

Tyler W. Cuyce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BARTO EDWARD USRY, JR.,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:16-CV-499
USDC No. 3:94-CR-123-1

ORDER:

Barto Edward Usry, Jr., federal prisoner # 04020-043, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion challenging the 295-month prison sentence and the five-year supervised release term on his jury trial conviction for possessing a firearm after having been adjudicated a felon. *See* 18 U.S.C. § 922(g). For a COA to issue, Usry must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Because dismissal was on the merits, he will meet this standard if he shows "that jurists of reason could disagree with

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the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Usry seeks a COA to pursue his claims that, in light of *Johnson v. United States*, 576 U.S. 591 (2015), it was unconstitutional to enhance his sentence under the Armed Career Criminal Act and under United States Sentencing Guideline § 4B1.4(b)(3)(A). Because Usry does not show that a reasonable jurist could think that he deserves encouragement to proceed further with his claim, a COA is DENIED. *See Buck*, 137 S. Ct. at 773.



STUART KYLE DUNCAN
United States Circuit Judge