

("PSR") of the United States Probation Officer without objection of the parties.¹ The PSR stated that Martinez was a career offender under the advisory Sentencing Guidelines. See U.S.S.G. § 4B1.1. In addition, it calculated Martinez as having a total offense level of 34 and a criminal history category of VI. This resulted in a Guidelines' sentencing range of 262 to 327 months.

Judge Dalzell accepted the plea agreement of the parties under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Pursuant to the Rule 11(c)(1)(C) plea agreement, Judge Dalzell sentenced Martinez to the parties' agreed upon sentence of the statutory mandatory minimum sentence of 120 months' imprisonment, five years of supervised release, and a \$200 special assessment.²

In the instant petition, Martinez contends that he is entitled to relief from his sentence under Johnson v. United States, 135 S. Ct. 2551 (2015).³ In Johnson, the Supreme Court

1. The case was reassigned from Judge Dalzell to Judge Legrome D. Davis on May 5, 2016. Following the retirement of Judge Davis, the action was reassigned on October 11, 2017 to the undersigned.

2. This 120-month sentence was 142 months below the bottom of the advisory Sentencing Guideline range of 262 to 327 months.

3. On June 28, 2010 Martinez filed his first pro se motion pursuant to 28 U.S.C. § 2255. The court subsequently denied this motion on November 16, 2010 and no certificate of appealability was issued. On November 15, 2013 Martinez filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c). This motion was denied on November 20, 2013.

held that an enhanced sentence predicated on what is known as the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924, was invalid because the residual clause was void for vagueness under the Due Process Clause of the Fifth Amendment. See Johnson, 135 S. Ct. at 2563. This clause stated that a prior conviction was a violent felony if it "otherwise involves conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court determined that the "indeterminacy of the wide-ranging inquiry required by the residual clause [of ACCA] both denies fair notice to defendants and invites arbitrary enforcement by judges." Johnson, 135 S. Ct. at 2557. The holding of Johnson was applied retroactively in Welch v. United States, 136 S. Ct. 1257, 1265, 1268 (2015).

This case does not involve ACCA. Nonetheless, Martinez asserts that Johnson likewise invalidates the residual clause of the "crime of violence" definition in § 4B1.2(a) of the career offender provision contained in § 4B.1(a) of the then-advisory Sentencing Guidelines. Section 4B1.2(a) defined "a crime of violence" as an offense under federal or state law, punishable by imprisonment for a term exceeding one year that:

- (1) has an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(emphasis added).⁴ Even assuming that the residual career offender provision of the Guidelines played any role in his sentencing, his argument is without merit.

In Beckles v. United States, 137 S. Ct. 886, 894, the Supreme Court laid this issue to rest. While the relevant language of § 4B1.2(a) mirrors the language of ACCA, the Court held that the holding of Johnson was not applicable to the advisory Sentencing Guidelines. Specifically, the Court ruled that the residual clause of § 4B1.2(a) of the then-advisory Sentencing Guidelines was not unconstitutionally vague under the Due Process Clause. Id. at 890. In writing for the majority, Justice Thomas explained that ACCA's residual clause, where applicable, required sentencing courts to increase a defendant's term of imprisonment from a statutory maximum of ten years to a minimum of fifteen years. Id. at 892. In contrast, the advisory Guidelines "do not fix the permissible range of sentences" but "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the

4. The residual clause was removed from the career offender provision of the Guidelines prospectively effective August 1, 2016. U.S.S.G. Supp. App. C, Amend. 798.

statutory range.” Id. Thus Johnson had no impact on Martinez’s sentencing.

Accordingly, the motion of Martinez to vacate, set aside, or correct his sentence will be denied.

