

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES

v.

SHAWN ALEXANDER,

Defendant.

Criminal Action No. 98-209

Civil Action No. 16-2272

MEMORANDUM OPINION

Rufe, J.

September 4, 2018

Defendant Shawn Alexander, who was sentenced in 1998 as a career offender under Section 4B1.2(a)(2) of the then-mandatory United States Sentencing Guidelines, filed this motion to correct sentence under 28 U.S.C. § 2255 based on the Supreme Court’s decision in *Johnson v. United States*.¹ In light of the Third Circuit Court of Appeals’ recent decision in *United States v. Green*,² Defendant’s motion will be dismissed as untimely.

I. BACKGROUND

On October 15, 1998, Defendant was sentenced to 210 months’ imprisonment after pleading guilty to Hobbs Act Robbery in violation of 18 U.S.C. § 1951. Defendant received a career offender enhancement pursuant to U.S.S.G. §§ 4B1.1 and 4B1.2 based on a finding that his Hobbs Act conviction was a “crime of violence” and that he had two prior convictions for “crime[s] of violence” in violation of 18 Pa. C.S. § 3701(a) (Robbery) and 18 Pa. C.S. § 903 (Conspiracy to Commit Robbery). As a result, he was assigned a total offense level of 30 and a

¹ 135 S. Ct. 2552 (2015).

² 898 F.3d 315, 320 (3d Cir. 2018).

criminal history category of VI, resulting in a guideline range of 168-210 months, which was binding on the sentencing court.³

On June 26, 2015, the Supreme Court held in *Johnson*, that the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) (“ACCA”), is void for vagueness.⁴ On May 3, 2016, Defendant filed a motion asserting that his sentence was unconstitutional because the residual clause of the definition of “crime of violence” in U.S.S.G. § 4B1.2, under which he was sentenced, is identical to the residual clause of the ACCA, and is therefore void for vagueness pursuant to *Johnson*.⁵ The Government opposes the motion, asserting among other arguments that it is untimely.

II. LEGAL STANDARD

A motion filed under 28 U.S.C. § 2255 is subject to a one-year limitations period that runs from:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or 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 made retroactively applicable to cases on collateral review; or

³ Before the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines had “the force and effect of laws” and were “mandatory and binding on all judges.” *Green*, 898 F.3d at 320 (quoting *Booker*, 543 U.S. at 233-34).

⁴ The Supreme Court held in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), that the rule announced in *Johnson* is substantive and retroactive to cases on collateral review.

⁵ This matter was stayed pursuant to Chief Judge Petrese B. Tucker’s administrative stay of all *Johnson*-based § 2255 motions. The stay was lifted upon motion of Defendant’s counsel.

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.⁶

III. ANALYSIS

Here, Defendant's motion is not timely under any provision of § 2255(f). Defendant's motion was filed 18 years after his judgment of conviction, and he has not asserted any governmental action that prevented him from making the motion or any newly discovered facts. Rather, Defendant contends, pursuant to § 2255(f)(3), that his motion asserts a constitutional right newly recognized by the Supreme Court in *Johnson*.

The Third Circuit has rejected Defendant's argument. In *Green*, the Third Circuit held that "*Johnson*'s holding as to the residual clause in the ACCA created a right only as to the ACCA" and "says nothing about a parallel right to not be sentenced under Sentencing Guidelines, whether advisory or mandatory."⁷ Thus, the Court of Appeals held that *Johnson* did not restart the one-year clock under § 2255(f)(3) for any claims challenging the vagueness of U.S.S.G. § 4B1.2, regardless of whether the Sentencing Guidelines were mandatory or advisory at the time of the defendant's sentence.⁸ In light of *Green*, Defendant's Motion is untimely pursuant to § 2255(f).

IV. CONCLUSION

For the reasons discussed, Defendant's Motion is untimely and must be dismissed. In light of the clear and binding precedent on this issue, a hearing is not warranted, and no certificate of appealability will issue. An order follows.

⁶ 28 U.S.C. § 2255(f); *Green*, 898 F.3d at 318.

⁷ *Green*, 898 F.3d at 321 (citing *Beckles v. United States*, 137 S. Ct. 886, 892 (2017)).

⁸ Whether, on the merits, the mandatory Sentencing Guidelines can be subject to vagueness challenges remains an open question. *Id.* at 323. In *Beckles*, the Supreme Court held only that "the *advisory* Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." 137 S. Ct. at 896 (emphasis added).

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES

v.

SHAWN ALEXANDER,

Defendant.

Criminal Action No. 98-209

Civil Action No. 16-2272

ORDER

AND NOW, this 4th day of September 2018, upon consideration of Defendant's Motion to Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 49), and the opposition, reply, and supplemental letters thereto, it is hereby **ORDERED** that the Motion (Doc. No. 49) is **DISMISSED** as untimely. No certificate of appealability shall issue.

Defendant's criminal case shall remain **CLOSED**, and the Clerk of Court is directed to **CLOSE** the civil action opened for this matter.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.