IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15598-C

GREGORY EUGENE ALLEN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Gregory Allen, a federal prisoner serving a 262-month sentence for possession with intent to distribute cocaine base, moves for a certificate of appealability ("COA"), in order to appeal the district court's dismissal of his counseled 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence as untimely. In his § 2255 motion, he raised one claim, pursuant to *Johnson v. United States*, 135 S. Ct. 2251 (2015), arguing that he was sentenced under the then-mandatory Sentencing Guidelines as a career offender, based in part on the residual clause of U.S.S.G. § 4B1.2.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court rejects a constitutional claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable

whether: (1) the district court was correct in its procedural ruling, and (2) the § 2255 motion stated a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2255 motion to vacate. 28 U.S.C. § 2255(f). The one-year period of limitations begins to run from the latest of four possible events:

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

Id.

Allen cannot make the requisite COA showing in this case because the district court correctly found his motion to be untimely. The district court entered its final judgment on April 27, 2001. Because Allen did not file a direct appeal, his conviction became final 14 days later. *See* Fed. R. App. P. 4(b)(1)(A); *Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000). Allen did not file his § 2255 motion in the district court until June 23, 2016, and, therefore, it was untimely under § 2255(f)(1) by over 14 years, absent the application of another provision of § 2255(f) or equitable tolling. Allen did not argue that equitable tolling applied or that he was actually innocent of his conviction.

Allen did argue that his § 2255 motion was timely under § 2255(f)(3), due to *Johnson*,

but the district court did not err in concluding that his reliance on *Johnson* was misplaced. The Supreme Court has held that an advisory guideline cannot be unconstitutionally vague, and, therefore, the residual clause of the career-offender guideline is not subject to a vagueness challenge under *Johnson*. *See Beckles v. United States*, 137 S. Ct. 886, 890, 895 (2017). Further, any argument that such vagueness challenges can be raised against mandatory Sentencing Guidelines, which applied when Allen was sentenced in 2001, is foreclosed by binding Circuit precedent. *See In re Griffin*, 823 F.3d 1350, 1354 (11th Cir. 2016) (holding that the logic in *United States v. Matchett*, 802 F.3d 1185 (11th Cir. 2015), also governed when the Sentencing Guidelines were mandatory); *see also In re Sapp*, 827 F.3d 1334, 1336 (11th Cir. 2016) (noting that this Court is bound by the holding of *Griffin*). Thus, Allen cannot rely on *Johnson* to extend the time period to timely file his § 2255. *See* 28 U.S.C. § 2255(f)(3).

Accordingly, Allen's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 19, 2017

Elizabeth Warren
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 16-15598-C
Case Style: Gregory Allen v. USA
District Court Docket No: 8:16-cv-01735-RAL-AAS
Secondary Case Number: 8:00-cr-00378-RAL-AAS-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Walter Pollard, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GREGORY EUGENE ALLEN,

Plaintiff,

v. CASE NO. 8:16-cv-1735-T-26AAS

UNITED STATES OF AMERICA,

Defendant.
_____/

O R D E R

Plaintiff, proceeding through court appointed counsel, has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255, in which he contends that the decision in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the residual clause of the Armed Career Criminal Act (the ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague, and which has been held to be retroactive on collateral review by the decision in Welch v. United States, 578 U. S. ___, 136 S. Ct. 1257, ___ L. Ed. 2d ___ (2016), should be applied to him.[1] The problem with his contention is that he was classified as a career offender for sentencing purposes under the United States Sentencing Guidelines, specifically § 4B1.1, and not under the ACCA.

[1] Without the retroactive application of Johnson in Welch, Plaintiff's motion would be clearly time-barred under the provisions of 28 U.S.C. 21 2255(f). As the record in his underlying criminal case reflects, he was sentenced on April 27, 2001, and he did not appeal. See case number 8:00-cr-378, docket 29. In this case, counsel filed Plaintiff's motion on June 23, 2016.

The Eleventh Circuit Court of Appeals recently determined in United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) that even in light of Johnson, the career offender guideline was not unconstitutionally vague. Consequently, the Plaintiff's argument lacks merit. Additionally, the fact that the Plaintiff was sentenced when the guidelines were mandatory does not entitle him to relief. See In re: Marvin Griffin, ___ F.3d ___, 2016 WL 3002293, at *4 (11th Cir. May 25, 2016) (stating that "the logic and principles established in Matchett also govern our panel as to Griffin's sentence when the Guidelines were mandatory" and concluding that "[t]he Guidelines - whether mandatory or advisory - cannot be unconstitutionally vague because they do not establish the illegality of any conduct and are designed to assist and limit the discretion of the sentencing judge.").

ACCORDINGLY, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion to Vacate (1) is **denied**. The clerk is directed to enter judgment for the Defendant and to **CLOSE** this case. The Court defers determining whether a certificate of appealability should issue pending an appropriate application from Plaintiff's counsel.

DONE AND ORDERED at Tampa, Florida, on June 24, 2016.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record