

18-1803-pr
Nunez v. United States

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2019
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7 (Argued: August 29, 2019

Decided: March 30, 2020)

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9 Docket No. 18-1803-pr
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13 MIGUEL NUNEZ,

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15 *Petitioner-Appellant,*
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17 v.
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19 UNITED STATES OF AMERICA,

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21 *Respondent-Appellee.*
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25 Before: POOLER, PARKER, and RAGGI, *Circuit Judges.*
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27 Petitioner Miguel Nunez appeals from a judgment of the United States

28 District Court for the Southern District of New York (Lewis A. Kaplan, J.)

29 denying his 28 U.S.C. § 2255 motion as untimely. The district court held that

30 Nunez could not show that his motion was timely pursuant to 28 U.S.C. §

2255(f)(3) because the Supreme Court's decision in *Johnson v. United States*, 135 S.
Ct. 2551 (2015), did not recognize a retroactive right not to be sentenced based
upon the residual clause in the Career Offender Guideline of the pre-*Booker*
Sentencing Guidelines. We hold that the district court properly concluded that
Johnson did not give rise to the right Nunez asserts and, therefore, correctly
denied his Section 2255 motion as untimely.

Affirmed.

Judge Pooler and Judge Raggi each concur in separate opinions.

EDWARD S. ZAS, Federal Defenders of New York, Inc.,
Appeals Bureau, New York, NY, *for Petitioner-Appellant*
Miguel Nunez.

NATHAN REHN, Assistant United States Attorney
(Anna M. Skotko, Assistant United States Attorney, *on*
the brief), *for* Geoffrey S. Berman, United States Attorney
for the Southern District of New York, New York, NY,
for Respondent-Appellee.

1 POOLER, *Circuit Judge*:

2 Petitioner Miguel Nunez appeals from the May 24, 2018 judgment of the
3 United States District Court for the Southern District of New York (Lewis A.
4 Kaplan, J.) denying as untimely Nunez's 28 U.S.C. § 2255 motion challenging his
5 February 7, 2000 sentence for substantive and conspiratorial Hobbs Act robbery.
6 *See* 18 U.S.C. § 1951(a). Nunez is currently serving 360 months' imprisonment for
7 these crimes, a significant upward departure from the 151-to-188 month
8 Guidelines range calculated by the district court under the presumptively
9 binding pre-*Booker* Sentencing Guidelines. *See United States v. Booker*, 543 U.S. 220
10 (2005). That Guidelines range was dictated by the Career Offender Guideline, *see*
11 U.S.S.G. § 4B1.1, which the district court applied upon finding that Nunez's
12 present, and two prior, convictions were all for "crime[s] of violence," as defined
13 in the Guideline's residual clause, *id.* § 4B1.2. Nunez argues that this residual
14 clause is unconstitutionally vague, and thus, his sentencing violates due process.
15 In support, Nunez relies on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which
16 struck down an identically worded provision of the Armed Career Criminal Act
17 as unconstitutionally vague. The issue presented to us on appeal is whether the
18 right Nunez asserts was recognized in *Johnson*, rendering his motion timely

1 pursuant to 28 U.S.C. § 2255(f)(3), or whether the right he asserts has yet to be
2 recognized, rendering his motion untimely. We hold that *Johnson* did not itself
3 render the residual clause of the pre-*Booker* Career Offender Guideline
4 unconstitutionally vague and, thus, did not recognize the right Nunez asserts.
5 We therefore affirm the district court's denial of Nunez's Section 2255 motion as
6 untimely.

7 BACKGROUND

8 I. Nunez's Conviction

9 On October 5, 1999, Miguel Nunez pled guilty to Hobbs Act robbery and
10 conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a).
11 Nunez and two co-conspirators had broken into the apartment of a male and
12 female couple who ran a florist business and stole between \$12,000 and \$14,000
13 in cash, along with other personal items of value. During the course of the
14 robbery, Nunez and one of his co-conspirators tied both victims up with rope
15 and raped the female proprietor of the florist business.

16 At the time of Nunez's sentencing, a defendant was considered a career
17 offender under the Sentencing Guidelines if,

1 (1) the defendant was at least eighteen years old at the time the
2 defendant committed the instant offense of conviction, (2) the instant
3 offense of conviction is a felony that is either a crime of violence or a
4 controlled substance offense, and (3) the defendant has at least two
5 prior felony convictions of either a crime of violence or a controlled
6 substance offense.

7
8 U.S.S.G. § 4B1.1 (1998). Nunez stipulated that he was eighteen years old at the
9 time of his Hobbs Act offenses, he had two prior felony convictions for New
10 York first-degree robbery, and Hobbs Act robbery was a crime of violence.

11 The Career Offender Guideline defined a crime of violence as “any offense
12 under federal or state law, punishable by imprisonment for a term exceeding one
13 year that—”

14 (1) has as an element the use, attempted use, or threatened use of physical
15 force against the person of another, or
16 (2) is burglary of a dwelling, arson, or extortion, involves the use of
17 explosives, *or otherwise involves conduct that presents a serious potential risk of*
18 *physical injury to another.”*

19
20 U.S.S.G. § 4B1.2(a) (1998) (emphasis added). The first definition is known as the
21 elements clause. The second definition is known as the enumerated offenses
22 clause. The italicized part of the second definition is known as the residual
23 clause. The district court concluded that Nunez’s Hobbs Act robbery, and two

1 prior felony convictions, were “crimes of violence” under the residual clause.

2 Thus, Nunez constituted a career offender.

3 As a career offender, Nunez’s Guidelines range was 151 to 188 months of
4 imprisonment, as opposed to 121 to 151 months. The district court departed
5 upwards from even this higher Guidelines range under provisions of the
6 Guidelines that permit doing so when a defendant has caused extreme
7 psychological injury in the victim and the conduct was extreme. Accordingly, the
8 district court sentenced Nunez to 240 months for Hobbs Act robbery and 120
9 months for Hobbs Act conspiracy, for a total of 360 months of imprisonment. On
10 appeal, this court upheld the sentence. *United States v. Nunez*, 8 F. App’x 81 (2d
11 Cir. 2001).

12 **II. Subsequent Supreme Court Decisions**

13 Some years later, the Supreme Court decided *United States v. Booker*, 543
14 U.S. 220 (2005), which held that a mandatory application of the Sentencing
15 Guidelines was unconstitutional, *see id.* at 245–46, and to avoid that result,
16 construed the Guidelines as advisory, *see id.* at 245, 259.

17 More recently, the Supreme Court decided *Johnson v. United States*, 135 S.
18 Ct. 2551 (2015). The Court in *Johnson* held that “imposing an increased sentence

1 under the residual clause of the Armed Career Criminal Act”—which contained
2 a residual clause identical to that in the crime of violence definition of the Career
3 Offender Guideline—“violate[d] the Constitution’s guarantee of due process”
4 because the clause was unconstitutionally vague. *Id.* at 2563. Using the rationale
5 in *Johnson*, the Court subsequently struck down similarly worded residual
6 clauses in the crime of violence definitions of the Immigration and Nationality
7 Act, see *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and in 18 U.S.C. § 924(c)(3)(B),
8 see *United States v. Davis*, 139 S. Ct. 2319 (2019).

9 The Supreme Court also dealt with a vagueness challenge to the residual
10 clause of the Career Offender Guideline as applied after *Booker* in *Beckles v.*
11 *United States*, 137 S. Ct. 886 (2017). In *Beckles*, the defendant argued that the
12 Guideline’s residual clause was void for vagueness, making his sentencing
13 pursuant to the clause unconstitutional. *Id.* at 890-91. The Supreme Court rejected
14 the argument, refusing to extend *Johnson*’s reasoning to the post-*Booker*
15 Guidelines. *Id.* at 891–92. The Court explained that unlike the ACCA’s residual
16 clause, which mandated certain, higher sentence ranges, “the advisory
17 Guidelines do not fix the permissible range of sentences.” *Id.* at 892. The advisory
18 Guidelines were for this reason not subject to a vagueness challenge. *Id.* In her

1 concurring opinion, Justice Sotomayor noted that “[t]he Court’s adherence to the
2 formalistic distinction between mandatory and advisory rules at least leaves
3 open the question whether defendants sentenced to terms of imprisonment
4 before our decision in *United States v. Booker* . . . may mount vagueness attacks on
5 their sentences.” *Id.* at 903 n.4 (Sotomayor, J., concurring in the judgment)
6 (internal quotation marks and citation omitted).

7 **III. Nunez’s Section 2255 Motion**

8 On June 21, 2016, eighteen years after his federal conviction, but less than
9 one year after *Johnson* was decided, Nunez filed a motion under 28 U.S.C. § 2255
10 to vacate his 30-year sentence. He argued that *Johnson* renders the residual clause
11 of the pre-*Booker* Career Offender Guideline unconstitutionally vague, so he
12 should not have been sentenced as a career offender. *See Nunez v. United States*,
13 No. 16-cv-4742, 2018 WL 2371714, at *1-2 (S.D.N.Y. May 24, 2018). The district
14 court decided the motion was untimely because “the Supreme Court has not
15 itself extended its holding in *Johnson* to the pre-*Booker* guidelines.” *Id.* at *2.
16 Nunez timely appealed.

DISCUSSION

On appeal from the denial of a Section 2255 motion, we review a district court's conclusions of law de novo. *Sapia v. United States*, 433 F.3d 212, 216 (2d Cir. 2005).

Motions under Section 2255 are subject to a one-year statute of limitations that runs from several possible dates, only one of which is relevant here: "[T]he 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." 28 U.S.C. § 2255(f)(3).

Nunez claims that his motion is timely under Section 2255(f)(3) because he filed it less than one year after the Supreme Court in *Johnson* first recognized the right he invokes. Nunez argues that his Section 2255 motion challenging a career-offender sentence imposed under the mandatory Guidelines asserts the same due process right recognized in *Johnson*. He argues that, like the ACCA's residual clause, the residual clause of the mandatory Career Offender Guideline "fixed" his sentencing range and was subject to the same concerns articulated in *Johnson*. Because the ACCA and residual clause of the Career Offender Guideline are identically worded and interpreted, Nunez claims the holding in *Johnson* applies

1 equally to the residual clause in the Guideline and, thus, compels the conclusion
2 that *Johnson* recognized the right he asserts.

3 We, however, conclude that *Johnson* did not itself render the residual
4 clause of the mandatory Career Offender Guideline vague, as required for
5 Section 2255 purposes. Our decision aligns with that of the majority of circuits to
6 have addressed the issue. *United States v. London*, 937 F.3d 502 (5th Cir. 2019);
7 *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *Russo v. United States*, 902
8 F.3d 880 (8th Cir. 2018); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018); *United*
9 *States v. Greer*, 881 F.3d 1241 (10th Cir. 2018); *United States v. Brown*, 868 F.3d 297
10 (4th Cir. 2017); *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017).

11 In coming to the same conclusion, we are mindful that the Supreme Court
12 has admonished lower courts “against framing [its] precedents at . . . a high level
13 of generality” in reviewing claims under the Antiterrorism and Effective Death
14 Penalty Act of 1996 (“AEDPA”), of which Section 2255 is a component. *See Lopez*
15 *v. Smith*, 574 U.S. 1, 4, 6 (2014) (internal quotation marks and citation omitted);
16 *Nevada v. Jackson*, 569 U.S. 505, 512 (2013). Instead, the Court has required
17 identification of precedent related to “the specific question presented by th[e]
18 case.” *Lopez*, 574 U.S. at 6.

1 *Johnson* by its own terms addresses only the ACCA. The Court articulated
2 its holding in that case specifically with regard to the ACCA: “We hold that
3 imposing an increased sentence under the residual clause of *the Armed Career*
4 *Criminal Act* violates the Constitution’s guarantee of due process.” 135 S. Ct. at
5 2563 (emphasis added). In addition, the Court cited exclusively to cases that dealt
6 with the residual clause of the ACCA. *See id.* at 2558-60 (citing *Sykes v. United*
7 *States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *James v.*
8 *United States*, 550 U.S. 192 (2007)). Furthermore, in *Welch v. United States*, 136 S.
9 Ct. 1257 (2016), which applied *Johnson* retroactively, the Court referred only to
10 the effect of its holding on the ACCA. *Id.* at 1265 (“By striking down the residual
11 clause as void for vagueness, *Johnson* changed the substantive reach of the *Armed*
12 *Career Criminal Act*” (emphasis added)). These factors strongly signal that
13 the rule established in *Johnson* was specific to the residual clause of the ACCA.

14 Our conclusion that the Court was not speaking to contexts beyond the
15 ACCA in *Johnson* is reinforced by the fact that the Court has considered
16 challenges to identical residual clauses in other statutes piecemeal. *See Session v.*
17 *Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019). Nor
18 were the applications in these cases necessarily straightforward. As the Ninth

1 Circuit observed, “[i]t is not always obvious whether and how the Supreme
2 Court will extend its holdings to different contexts,” and in *Dimaya*, “it took a
3 lengthy discussion to reach [the] conclusion, and four justices disagreed.” *United*
4 *States v. Blackstone*, 903 F.3d at 1026. These decisions further undermine Nunez’s
5 contention that *Johnson* in and of itself dictates the result of a vagueness
6 challenge to the residual clause in the pre-*Booker* Career Offender Guideline.

7 Nunez relies on *Beckles v. United States*, 137 S. Ct. 886 (2017), a case holding
8 that the post-*Booker* advisory Guidelines are *not* subject to vagueness challenges,
9 to argue that the pre-*Booker* mandatory Guidelines *are* so subject. This, however, is
10 not a conclusion reached in *Johnson*. Indeed, Justice Sotomayor’s concurrence in
11 *Beckles* explained that the question remains open. *See id.* at 903 n.4 (Sotomayor, J.,
12 concurring in the judgment) (stating that the Court “leaves open the question
13 whether defendants sentenced to terms of imprisonment before our decision in
14 *United States v. Booker*—that is, during the period in which the Guidelines *did* fix
15 the permissible range of sentences—may mount vagueness attacks on their
16 sentences” (internal quotation marks and citations omitted)). In sum, while we
17 agree that *Beckles* does not foreclose a vagueness challenge to the mandatory

1 Sentencing Guidelines, we cannot agree with Nunez that *Johnson* articulated the
2 right he seeks to assert.

3 Nunez attempts to circumvent this inevitable conclusion by arguing that
4 any discussion of how the Supreme Court defines the right in *Johnson* is not
5 relevant to the timeliness of his petition. He relies on *Dodd v. United States*, 545
6 U.S. 353 (2005) and the Seventh Circuit's decision in *Cross v. United States*, 892
7 F.3d 288 (7th Cir. 2018). We are not persuaded.

8 *Dodd* is inapplicable here. That case established that a petitioner is required
9 to bring a claim within one year after the Supreme Court announces a new rule—
10 not within one year after the Supreme Court announces the rule is retroactive.
11 545 U.S. at 358-59. In deciding so, the Supreme Court noted that the first clause in
12 Section 2255(f)(3), which states “the date on which the right asserted was initially
13 recognized by the Supreme Court,” is “the operative date.” *Id.* at 358. The second
14 clause, which states “if that right has been newly recognized by the Supreme
15 Court and made retroactively applicable to cases on collateral review,” merely
16 imposes a condition on the applicability of the subsection. *Id.* Nunez reads *Dodd*
17 as requiring us to focus on the first clause of Section 2255(f)(3) regardless of
18 whether the petitioner has framed the right asserted in a manner consistent with

1 how the Supreme Court articulated it. *Dodd* cannot, however, be stretched to
2 accommodate this interpretation. No aspect of *Dodd* supports Nunez's
3 interpretation that a defendant moving for Section 2255 relief may assert *any*
4 right suggested by the Supreme Court within the past year for his motion to
5 qualify as timely. *Dodd* simply stands for the proposition that the one-year
6 statute of limitations period begins to run following the Supreme Court's
7 recognition of a right, as opposed to the Court's retroactive application of the
8 right. Nunez's invocation of *Dodd* is unavailing.

9 Nor are we persuaded by *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018),
10 the only Circuit decision holding that a Section 2255 motion challenging the
11 residual clause of the pre-*Booker* Career Offender Guidelines is timely if filed
12 within a year of *Johnson*. *Cross*, 892 F.3d at 293-94. In coming to this conclusion,
13 the Seventh Circuit reasoned that the government's argument that *Johnson* did
14 not recognize the right asserted because the Supreme Court has not extended the
15 logic of *Johnson* to the pre-*Booker* mandatory guidelines "suffers from a
16 fundamental flaw. It improperly reads a merits analysis into the limitations
17 period." *Id.* at 293. But this conclusion "effectively reads 'recognized' out of 28
18 U.S.C. § 2255(f)(3) by not engaging in an inquiry into whether the right asserted

1 by the petitioner is the same right that was recognized by the Supreme Court.”

2 *United States v. Green*, 898 F.3d 315, 322 (3d Cir. 2018). For this reason, we decline
3 to adopt the Seventh Circuit’s reasoning in *Cross*.

4 Rather, we join the majority of our sister circuits and hold that Section
5 2255(f)(3) requires courts to consider whether the right a petitioner asserts has
6 been recognized by the Supreme Court as part and parcel of deciding whether a
7 petition is timely. As such, though Nunez filed his petition within one year after
8 *Johnson*, Nunez’s petition may only be considered timely if the right he asserts
9 was in fact recognized in *Johnson*. While Nunez asserts that the reasoning of
10 *Johnson* can apply to the pre-*Booker* Guidelines, *Johnson* did not itself hold the
11 residual clause of the pre-*Booker* Career Offender Guideline unconstitutionally
12 vague. *Johnson* cannot be read so broadly, particularly in light of Supreme Court
13 cautions against expansively construing its precedents in the AEDPA context,
14 and Justice Sotomayor’s concurring opinion in *Beckles* indicating that the
15 question raised by Nunez remains open in the Supreme Court. Because *Johnson*
16 has not recognized the right Nunez asserts, his Section 2255 motion is untimely.

CONCLUSION

We hold that *Johnson v. United States*, 135 S. Ct. 2551 (2015) did not recognize a constitutional right not to be sentenced under the residual clause of the pre-*Booker* Career Offender Guideline. The order and judgment of the district court is therefore AFFIRMED.