

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN D. WARD,

Defendant - Appellant.

No. 17-3182
(D.C. Nos. 5:16-CV-04109-DDC &
5:01-CR-40050-DDC-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HARTZ**, Circuit Judges.

John D. Ward appeals the district court's order denying as untimely his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm.

Background

In 2001, Ward was convicted of conspiracy to possess more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sentenced him as a career offender under U.S. Sentencing Guidelines Manual (USSG) § 4B1.1 (U.S. Sentencing Comm'n 2002) to 360 months' imprisonment. His conviction was affirmed on appeal. *United States v. Ward*, 60 F. App'x 716, 719 (10th Cir. 2003). The district court thereafter denied Ward's first motion to vacate his sentence under 28 U.S.C. § 2255(a).

In 2016, this court granted Ward's application for leave to file a second § 2255(a) motion so he could assert a claim for relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court held that the Armed Career Criminal Act's residual clause was unconstitutionally vague, *id.* at 2557, 2563, and in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), the Court held that *Johnson* applies retroactively to cases on collateral review. Within one year of *Johnson*, Ward filed his authorized second § 2255 motion, arguing that because he received an enhanced sentence under the mandatory guidelines' similarly worded residual clause, his sentence is unconstitutional under *Johnson*.

The district court initially granted the motion and vacated Ward's sentence, but before resentencing, the Supreme Court decided in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that *Johnson* does not impact sentences enhanced under the now advisory guidelines. *Id.* at 895. The government sought reconsideration of the order granting Ward's § 2255 motion arguing, among other things, that the motion was untimely under § 2255(f), which, as pertinent here, requires that a § 2255 motion be filed within one year from the later of "the date on which [the movant's] judgment of conviction bec[ame] final," § 2255(f)(1), and "the date on which the

right asserted was initially recognized by the Supreme Court . . . and made retroactively applicable to cases on collateral review,” § 2255(f)(3). Specifically, the government argued that Ward’s motion was untimely because he filed it more than a year after his conviction became final and § 2255(f)(3) does not apply because the Supreme Court had not held that *Johnson* applies retroactively to sentences imposed under the mandatory guidelines. The district court agreed that the Supreme Court had not recognized the right Ward sought to assert—the due process right not to be sentenced under an unconstitutionally vague sentencing provision—and denied his motion as untimely. The court granted a certificate of appealability (“COA”) on the issue of whether Ward’s claim is time-barred.

This court initially granted the government’s motion for summary affirmance pursuant to *United States v. Greer*, 881 F.3d 1241, 1248-49 (10th Cir.) (holding that *Johnson* did not create a new rule of constitutional law applicable to the mandatory guidelines and rejecting as untimely a vagueness challenge to the mandatory guidelines’ career-offender residual clause), *cert. denied*, 139 U.S. 374 (2018). *United States v. Ward*, 718 F. App’x 757 (10th Cir. 2018) (per curiam). But we later granted Ward’s petition for panel rehearing, vacated the summary affirmance order, and ordered supplemental briefing.

After supplemental briefing was completed, Ward sought a limited remand to allow the district court to consider his motion for a sentence reduction under the Fair

Sentencing Act and First Step Act.¹ The government conceded that he qualified for a reduction and, after the district court issued an order indicating it would grant a reduction if it had jurisdiction to do so, agreed that remanding the case for resentencing was appropriate. We directed a limited remand to consider Ward's motion for sentence reduction and abated the appeal to facilitate the remand. On remand, the district court resentenced Ward to 262 months' imprisonment, which is at the low end of his career offender guidelines range under the First Step Act. We must now decide whether the district court erred in dismissing Ward's § 2255 motion as untimely.²

Discussion

1. Issuance of COA

As an initial matter, we reject the government's assertion that the COA is deficient because the certified issue is a non-constitutional question of statutory construction regarding the applicability of the time bar and the COA does not specifically identify the underlying constitutional issue.

¹ The Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, increased the drug quantities necessary to trigger statutory mandatory minimum and maximum penalties for crack cocaine offenses. The First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 permits the district court to apply the Fair Sentencing Act retroactively to covered offenses committed before August 3, 2010.

² We note that Ward's resentencing does not moot his appeal because if we were to hold that the district court erred in dismissing his claim that he should not have been sentenced as a career offender, the applicable guidelines range could ultimately be further reduced, resulting in an even shorter sentence than his new sentence under the First Step Act.

To obtain a COA when the district court denies or dismisses a § 2255 motion on procedural grounds (like untimeliness), the defendant must show that jurists of reason could debate both the correctness of the procedural ruling and whether the motion stated a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). With respect to the latter requirement, courts do not “delve into the merits of the claim” at the certification stage. *Fleming v. Evans*, 481 F.3d 1249, 1259 (10th Cir. 2007). Instead, courts “simply take a quick look at the face of the [motion]” to determine whether the movant “has facially alleged the denial of a constitutional right.” *Paredes v. Atherton*, 224 F.3d 1160, 1161 (10th Cir. 2000) (per curiam) (brackets and internal quotation marks omitted). Under § 2253(c)(3), the COA must “indicate which specific issue or issues satisfy” the requirement that the applicant make “a substantial showing of the denial of a constitutional right,” § 2253(c)(2).

Here, a “quick look” at Ward’s motion reveals that he facially alleged the denial of the due process right not to be sentenced under an unconstitutionally vague sentencing provision. Accordingly, the substantial-question-of-constitutional-law requirement is satisfied and the COA is not deficient despite its failure to specify the underlying constitutional issue. *See Houchin v. Zavaras*, 107 F.3d 1465, 1469 n.2 (10th Cir. 1997) (holding that the COA from the denial of a one-issue § 2254 motion complied with the requirements of § 2253(c)(3) despite its failure to specify the constitutional issue).

2. Denial of Motion as Untimely

We review de novo the district court's dismissal of Ward's §2255 motion as untimely. *United States v. Denny*, 694 F.3d 1185, 1189 (10th Cir. 2012).

Ward argues that we are not bound by *Greer* because its reasoning has been abrogated by the Supreme Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Supreme Court invalidated the residual clause of the federal criminal code's definition of "crime of violence" in 18 U.S.C. § 16(b) as impermissibly vague. 138 S. Ct. at 1210, 1216. But *Dimaya* did not address the career-offender residual clause in the mandatory guidelines, and we recently validated *Greer*'s holding, reiterating that "*Johnson* did not create a new rule of constitutional law applicable to the mandatory Guidelines." *United States v. Pullen*, 913 F.3d 1270, 1285 (10th Cir. 2019), *petition for cert. filed* (U.S. July 15, 2019) (No. 19-5219).

Consequently, the one-year limitations period applicable to Ward's § 2255 motion cannot be based on the date *Johnson* was decided. Instead, it must be based upon "the date on which [his] judgment of conviction bec[ame] final," 28 U.S.C. § 2255(f)(1). And, because Ward filed his motion nearly fourteen years after his conviction became final, the district court correctly concluded that the motion is time barred.

Accordingly, we lift the abatement of this appeal and affirm the district court's order dismissing Ward's § 2255 motion.

Entered for the Court

Bobby R. Baldock
Circuit Judge