IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

STEVEN L. McCOY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 16-cv-0631-MJR**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER ON *JOHNSON*-BASED PETITION
TO VACATE/CORRECT SENTENCE UNDER 28 U.S.C. 2255

REAGAN, Chief Judge:

A. Introduction

In Case No. 07-cr-30012-MJR ("the underlying case"), Steven McCoy was indicted on a charge of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841. In June 2007, McCoy pled guilty to the charges before the undersigned District Judge. His written plea agreement and stipulation of facts are Docs. 37 and 38 in the underlying case. In October 2007, the undersigned sentenced McCoy to 200 months in prison, running consecutively to two sentences McCoy received in state court and was then serving. Judgment was entered October 5, 2007. No direct appeal was filed.

On June 13, 2016, McCoy filed in this Court a pro se petition to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which was opened as the above-captioned civil case. The petition is based on ***Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551 (2015),** which found unconstitutional one provision of the Armed Career Criminal Act,

18 U.S.C. 924(e)(2)(B)(ii), and ***Welch v. United States,* -- U.S. --, 136 S. Ct. 1257 (2016),** which held ***Johnson*** retroactively applicable to cases on collateral review.

On threshold review under Rule 4 of the Rules Governing Section 2255 Proceedings, the undersigned did not summarily dismiss the petition. The Court ordered briefing but noted one potential obstacle to relief – the petition might be barred by a waiver provision contained in the plea agreement. The threshold review Order also noted that McCoy was not sentenced under the statute struck down in ***Johnson*.** He was sentenced under the career offender provision of the United States Sentencing Guidelines (§ 4B1.1(a)), and at that point in time it was unclear whether the holding of ***Johnson*** extends to the Guidelines.

Pursuant to Administrative Order 176, the Court appointed the Federal Public Defender's Office for the Southern District of Illinois to assist McCoy in presenting any valid ***Johnson***-based argument. Assistant Federal Public Defender Daniel G. Cronin entered his appearance on McCoy's behalf, and briefs were filed as follows: Mr. Cronin's August 30, 2016 brief on behalf of Petitioner McCoy (Doc. 4), and the United States' October 24, 2016 response (Doc. 9). Petitioner McCoy was given the opportunity to file a pro se reply brief by December 1, 2016 but elected to not do so. The matter is fully ripe. For the reasons stated below, the Court denies the petition.

B. <u>Evidentiary Hearing</u>

Under Rule 8(a) of the Rules Governing Section 2255 Proceedings, this Court must determine whether an evidentiary hearing is warranted. Not every petition warrants a hearing. ***Boulb v. United States*, 818 F.3d 334, 339 (7th Cir. 2016).** ***See also***

***Martin v. United States*, 789 F.3d 703, 706 (7th Cir. 2015) ("It is well-established that a district court need not grant an evidentiary hearing in all § 2255 cases," such as where the record conclusively shows the prisoner is not entitled to relief.); *Kafo v. United States*, 467 F.3d 1063, 1067 (7th Cir. 2006) (to justify a hearing, petition must be accompanied by a detailed affidavit which shows that the petitioner has actual proof of the allegations going beyond mere unsupported assertions).** The record before this Court conclusively reveals that McCoy is not entitled to relief, so no hearing is needed.

C. Timeliness of Petition

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year period of limitations for prisoners to file petitions seeking to modify or vacate their sentences under 28 U.S.C. 2255. Usually the period runs from the date on which the judgment of conviction became final. **28 U.S.C. 2255(f); *Clay v. United States*, 537 U.S. 522, 524 (2003).**

> The one-year limitation period is triggered by the latest of four 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.

28 U.S.C. 2255(f).

The statute does not provide for extensions of time. However, the limitation period is procedural not jurisdictional and can be equitably tolled. ***Boulb*, 818 F.3d at 339, *citing Holland v. Florida*, 560 U.S. 631, 645, 649 (2010).**

McCoy's judgment in the underlying case was entered on October 5, 2007. His June 2016 petition obviously was not filed within one year of that judgment becoming final. But McCoy invoked ***Johnson*,** so he had had one year from the date that decision was announced (June 26, 2015) to file his petition, as § 2255(f)(3) "allows a fresh year from 'the date on which the right asserted was initially recognized by the Supreme Court, if that right has been … made retroactively applicable to cases on collateral review.'" ***Stanley v. United States*, 827 F.3d 562, 564 (7th Cir. 2016), *quoting* 28 U.S.C. 2255(f)(3)**.

McCoy filed his petition on June 13, 2016, within the fresh one-year window. The Court finds the petition timely-filed as to any ***Johnson*-based claim.** Before discussing the merits of the petition, the Court confronts the procedural impediment flagged in the threshold review order.

D. <u>Waiver Provision</u>

McCoy executed a written plea agreement in which he acknowledged that he had the right to contest his sentence under Title 18 and Title 28, plus certain appeal rights (Doc. 37, p. 10 in underlying case). The agreement then states (*id.*, emphasis supplied):

> Acknowledging all this, and in exchange for the recommendations and concessions made by the Government in this plea agreement, the **Defendant knowingly and voluntarily waives his right to contest any**

> **aspect of his conviction and sentence that could be contested under Title 18 or Title 28, or under any other provision of federal law**, except that if the sentence imposed is in excess of the Sentencing Guidelines as determined by the Court (or any applicable statutory minimum, whichever is greater), the Defendant reserves the right to appeal the reasonableness of the sentence….
>
> Defendant's waiver of his right to … bring collateral challenges shall not apply to … any subsequent change in the interpretation of the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit, which is declared retroactive by those Courts, and which renders the Defendant actually innocent of the charges covered herein….

This waiver encompasses the collateral challenge McCoy presents under 28 U.S.C. 2255. The first paragraph quoted above bars the petition, and the second paragraph does not furnish a way around that bar.

Clearly, a defendant can waive his right to collateral review as part of a plea agreement. ***See, e.g., Solano v. United States*, 812 F.3d 573, 577 (7th Cir.), *cert. denied*, -- U.S. --, 137 S. Ct. 58 (2016) ("As part of a plea agreement, a defendant may validly waive his right to challenge his conviction and sentence on direct appeal or collateral review under 28 U.S.C. § 2255.").** Such waivers are enforced unless the plea agreement was involuntary, the court relied on a constitutionally impermissible factor (like the defendant's race), the sentence exceeded the statutory maximum, or the defendant claims ineffective assistance of counsel in connection with negotiation of the plea agreement. ***Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011), *citing Jones v. United States*, 167 F.3d 1142, 1144-45 (7th Cir. 1999); *Gaylord v. United States*, 829 F.3d 500, 505 (7th Cir. 2016).** None of these exceptions applies here.

McCoy's appointed counsel, Mr. Cronin, suggests (Doc. 4, pp. 2-3) that waivers may be subject to an implicit due process-based exception, i.e., akin to the reasoning of ***Johnson***, they can be challenged on void-for-vagueness grounds. The Court is not persuaded. The waiver's wording was in no way vague or confusing. Nor can it be argued that the waiver failed to provide fair notice of the reach of the provision.

McCoy's plea agreement (in the second paragraph quoted above) did explicitly leave open one path to collateral review. As to collateral challenges, the waiver does *not* cover any subsequent change in the law by the United States Supreme Court or the United States Court of Appeals for the Seventh Circuit that has been declared retroactive by those Courts and that rendered the Defendant actually innocent of the charges. Reliance on this provision would be misplaced, because ***Johnson*** did *not* render McCoy actually innocent of the charge he pled guilty to – possession with intent to distribute approximately 13.3 grams of a mixture of substance containing cocaine base, in violation of 21 U.S.C. 841.

Nothing about the holding of ***Johnson*** altered the elements of or heightened the proof required for conviction under this statute.[1] The undersigned finds the § 2255 waiver enforceable. That waiver precludes the relief McCoy seeks.

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[1] ***Johnson*** stands in contrast to ***Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009)**, which changed the proof required for conviction under the aggravated identity theft statute. In ***Flores-Figueroa***, an element of the offense of conviction was changed by the Supreme Court's opinion, resulting in the defendant being *actually innocent* of the charge. ***Johnson*** did not render McCoy innocent of the charge he was convicted of in this Court.

E. Merits of Petition

Assuming, arguendo, that the waiver provision did not preclude McCoy from filing this collateral attack, his petition would fail on the merits, as described below.

Relief under § 2255 is limited. It is "available only in extraordinary situations," requiring an error of constitutional or jurisdictional magnitude or a fundamental defect that resulted in a complete miscarriage of justice. ***Blake v. United States*, 723 F.3d 870, 878-79 (7th Cir. 2013).** ***Accord United States v. Coleman*, 763 F.3d 706, 708 (7th Cir. 2014).** McCoy's pro se petition argues that the career offender provision of the Guidelines under which he was sentenced "is identical to the residual clause in arm [sic] career criminal 924(e)(2)" (Doc. 1, p. 5), so the career offender residual clause is constitutionally flawed like the residual clause invalidated in ***Johnson***.

Johnson declared unconstitutional part of a federal *statute* -- the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). As noted above, McCoy was not sentenced under the ACCA, he was sentenced under the § 4B1.1 of the U.S. Sentencing Guidelines. ***Johnson*** did not address the residual clause found in several provisions of the Guidelines, such as the career offender provision of § 4B1.1.

Section 4B1.1 says a defendant is a **career offender** if (1) he was at least 18 years old at the time he committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. **U.S.S.G. 4B1.1(a).**

At the time relevant to this case, § 4B1.2(a) of the Guidelines defined **crime of violence** as any offense under federal or state law punishable by imprisonment for a term exceeding one year that:

> (1) has as 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 use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

At sentencing, the Court counted as a "crime of violence" McCoy's robbery conviction under 720 ILCS 5/18-1 (Case No. 04-CF-1179, St. Clair County, Illinois), in finding McCoy to be a career offender under § 4B1.1. The ACCA residual clause found impermissibly vague in ***Johnson*** is identical to the Guidelines residual clause italicized above in § 4B1.2(a)(2). McCoy's petition is premised on the argument that the residual clause of this Guideline is just as unconstitutionally vague as the ACCA residual clause, so his Illinois robbery conviction does not constitute a crime of violence.

Whether the holding of ***Johnson*** extended to the residual clause in § 4B1.2(a)(2) was a question on which the federal Circuit Courts of Appeal were divided for months. In late August 2016, the Seventh Circuit applied the rationale of ***Johnson*** to find the residual clause of § 4B1.2(a)(2) unconstitutionally vague. ***United States v. Hurlburt*, 835 F.3d 715, 725 (7th Cir. 2016).** But just weeks ago, the United States Supreme Court upended ***Hurlburt*** **(**and resolved the circuit split) in ***Beckles v. United States*, -- U.S. --, 137 S. Ct. 886, 892 (March 6, 2017),** squarely holding that the federal Sentencing Guidelines are *not* subject to due process vagueness challenges:

> The ACCA's residual clause … required sentencing courts to increase a defendant's prison term from a statutory maximum of 10 years to a minimum of 15 years. That requirement thus fixed—in an impermissibly vague way—a higher range of sentences for certain defendants….
>
> Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process clause. The residual clause in § 4B1.2(a)(2) therefore is not void for vagueness.

Beckles scotches the argument that the residual clause of the career offender Guideline is unconstitutionally vague and that McCoy's Illinois robbery conviction was improperly counted as a crime of violence thereunder. The Court need not resolve the issue of whether the robbery conviction constitutes a crime of violence under the *elements* clause of § 4B1.2(a)(1). McCoy's quest for relief fails for another simple reason. Even if the Court excludes the Illinois robbery conviction from consideration, McCoy has two other qualifying predicate felony convictions.

As noted above, under the Guidelines, a defendant is a career offender if (1) he was at least 18 years old at the time he committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence *or a controlled substance offense.* **U.S.S.G. 4B1.1(a).** McCoy was 28 years old at the time he committed the offense of conviction, that offense was possession with intent to distribute cocaine base (a controlled substance offense), and he had at least two prior felony controlled substance convictions. Those convictions, both in Illinois, were for unlawful possession of

cannabis with intent to deliver (Case No. 98-CF-619) and unlawful delivery of a controlled substance (Case No. 03-CF-1415). *See* PSR, Doc. 41, ¶ 25, in underlying case; also filed as Doc. 5-1 herein.

Section 4B1.2(b) of the Guidelines defines **controlled substance offense** as an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or the possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense it. As McCoy's appointed counsel concedes, both of McCoy's Illinois narcotics convictions were punishable by more than one year in prison. And they involved delivery or intent to deliver controlled substances. Without question, they were properly counted as controlled substance offenses under § 4B1.2(b) of the Guidelines. McCoy has the requisite two prior felony convictions rendering him a career offender under § 4B1.1(a), even if the Illinois robbery conviction is completely disregarded. Therefore, if the Court could reach the merits of McCoy's petition, the undersigned would deny the requested relief.

F. Conclusion

In ***United States v. Worthen*, 842 F.3d 552, 554 (7th Cir. 2016),** the Seventh Circuit reiterated its "longstanding precedent that appeal waivers are generally enforceable," discussed the substantial benefits criminal defendants receive in exchange for such waivers, and held that the defendant had expressly waived his right to appeal his conviction and sentence, and that waiver precluded an appeal. ***Id.* at 555-56.** ***See also Hurlow v. United States*, 726 F.3d 958, 965 (7th Cir. 2013) (Waivers of right to file § 2255**

petition are generally enforceable, unless the waiver was involuntary or defense counsel was ineffective in negotiating the agreement containing the waiver). Here, the undersigned concludes that McCoy's waiver of the right to pursue a collateral challenge forecloses this collateral attack.

McCoy's plea was knowing and voluntary. He does not contend, nor would the record support the contention, that defense counsel was ineffective with respect to the plea agreement. The Court enforces the § 2255 waiver McCoy executed. That waiver bars his § 2255 petition. If the waiver could be overlooked and the Court could reach the merits of the petition, the undersigned would find that McCoy had sufficient qualifying predicates (two controlled substance offenses) to be sentenced as a career offender. The petition is hereby **DISMISSED**. Judgment shall enter in favor of Respondent United States and against Petitioner McCoy.

G. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings requires a district court entering a final order adverse to a petitioner to issue or deny a certificate of appealability. 28 U.S.C. 2253(c)(2) states that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This standard requires the petitioner to demonstrate that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the "issues presented were 'adequate to deserve encouragement to proceed further.'" ***Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003),** ***quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000).** ***See also United States v. Fleming*, 676 F.3d 621, 625 (7th Cir. 2012).**

For the reasons explained above, the Court finds McCoy's § 2255 waiver fully enforceable. And if that waiver were disregarded, the undersigned would find McCoy not entitled to § 2255 relief on the merits. Reasonable jurists would not find these conclusions debatable. Because McCoy has failed to make a substantial showing of the denial of a constitutional right, the Court **DECLINES to issue** a certificate of appealability. The Clerk's Office shall send a copy of this Order directly to Petitioner McCoy.

IT IS SO ORDERED.

DATED: April 4, 2017

s/ Michael J. Reagan
Michael J. Reagan
United States District Judge

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