UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

MARIO FLORES,

Defendant.

12-Cr-874 (SHS)
15-Cv-7410 (SHS)

OPINION & ORDER

SIDNEY H. STEIN, U.S. District Judge.

Mario Flores, currently incarcerated at Federal Correctional Institution, Allenwood, moves to vacate his sentence pursuant to 28 U.S.C. § 2255 in light of the U.S. Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Flores's sentence was based, in part, on language in the United States Sentencing Guidelines that is identical to the language in the Armed Career Criminal Act ("ACCA") that was invalidated as unconstitutionally vague by *Johnson*. Because the Supreme Court held in *Beckles v. United States*, 137 S. Ct. 886 (2017), that, unlike ACCA, the Sentencing Guidelines are not subject to vagueness challenges, defendant's motion is denied.

I. BACKGROUND

On February 1, 2013, Mario Flores pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At Flores's sentencing five months later, the Court calculated Flores's base offense level after factoring in his two prior felony convictions for "crime[s] of violence" pursuant to U.S.S.G. § 2K2.1(a) (2012). One of these prior convictions – a conviction for burglary in the third degree in violation of N.Y. Penal Law § 140.20 – qualified as a "crime of violence" pursuant to the "residual clause" of section 4B1.2(a)(2) of the Sentencing Guidelines, which defines a "crime of violence" as including any burglary offense that "involves conduct that presents a serious potential risk of physical injury to another."

Flores argued at sentencing that a violation of N.Y. Penal Law § 140.20 was not a "crime of violence" and that the residual clause of U.S.S.G. § 4B1.2(a)(2) was unconstitutionally vague (No. 12-cr-874, ECF No. 16 at 10-15), but the Court rejected those arguments. The Court applied the residual clause of U.S.S.G. § 4B1.2(a)(2) and relied on *United States v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008) and *United States v. Boyd*, 398 F. App'x 649, 652 (2d Cir. 2010) to determine that burglary in the third degree in New York was indeed a "crime of violence" within the meaning of the Guidelines. (*See* No. 12-cr-874, ECF No. 19, Sentencing Tr. 4:20-7:1.)

Accordingly, the Court concluded that Flores's offense level was 24 – four levels higher than it would have been had he only had one prior conviction for a "crime of violence." *Compare* U.S.S.G. § 2K2.1(a)(2) *with* U.S.S.G. § 2K2.1(a)(4)(A). Although Flores's Guidelines range was 84 to 105 months, the Court varied downward pursuant to 18 U.S.C. § 3553(a) based on Flores's "cognitive deficit" and imposed a below-Guidelines sentence of 60 months imprisonment and 3 years supervised release. (No. 12-cr-874, ECF No. 19, Sentencing Tr. at 17:16–25.) Judgment was entered on August 1, 2013. (No. 12-cr-874, ECF No. 17.)

Flores filed a timely appeal from the resulting judgment, arguing that his burglary conviction was not a "crime of violence." On June 17, 2014, the Second Circuit rejected his argument and affirmed the Court's judgment. *United States v. Flores*, 569 F. App'x 33 (2d Cir. 2014). Flores then filed a petition for certiorari, which was denied by the Supreme Court on January 12, 2015. *Flores v. United States*, 135 S. Ct. 999 (2015). Flores's motion for rehearing before the Supreme Court was similarly denied on March 2, 2015. *Flores v. United States*, 135 S. Ct. 1526 (2015).

On September 18, 2015, Flores filed a timely 28 U.S.C. § 2255 motion to vacate his sentence on the ground that the residual clause of U.S.S.G. § 4B1.2(a) is unconstitutionally vague and that his conviction for burglary in the third degree could not have been a "crime of violence." This time, Flores relied on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the

residual clause of ACCA was unconstitutionally vague; *Johnson* did not deal with the residual clause of U.S.S.G. § 4B1.2(a).

II. DISCUSSION

In *Johnson*, the Supreme Court held that the residual clause of ACCA, which defined a "violent felony" as any crime that "involves conduct that presents a serious potential risk of physical injury to another," violated the Fifth Amendment's Due Process Clause. 135 S. Ct. at 2563; *see also* 18 U.S.C. § 924(e)(2)(B). The residual clause in section 4B1.2(a)(2) of the 2012 Sentencing Guidelines defined "crime of violence" using identical language.[1]

While Flores's section 2255 motion was pending before this Court, the Supreme Court issued an opinion that directly addressed the question of whether *Johnson*'s holding applies to challenges to the identically worded residual clause of U.S.S.G. § 4B.2(a)(2). In *Beckles v. United States*, 137 S. Ct. 886, 894-95 (2017), the Supreme Court held that, because the advisory Sentencing Guidelines "merely guide the district courts' discretion," they "do not implicate the twin concerns underlying vagueness doctrine – providing notice and preventing arbitrary enforcement" – and are therefore "not subject to a vagueness challenge under the Due Process Clause." Accordingly, Flores's offense level was not determined on the basis of an unconstitutionally vague residual clause.

Although the government had conceded in this action, prior to the *Beckles* decision being issued, that U.S.S.G. § 4B1.2(a)(2) was void for vagueness (No. 12-cr-874, ECF No. 25 at 2), that concession will not be enforced by this Court because it squarely conflicts with a definitive determination of the Supreme Court. *See United States v. Thompson*,

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[1] The U.S. Sentencing Commission has since removed the residual clause from the definition of "crime of violence" in the Sentencing Guidelines, effective August 1, 2016. *See* U.S. Sentencing Comm'n, Amendments to the Sentencing Guidelines 1-2 (Jan. 21, 2016).

___ F.3d ___ , No. 13-1822, 2017 WL 1076336, at *2 & n.5 (1st Cir. Mar. 22, 2017) (per curiam) ("ignor[ing] the government's concession [on the applicability of *Johnson* to the Sentencing Guidelines] and follow[ing] the Supreme Court's clear precedent [in *Beckles*]" (internal quotation marks, alterations, and citation omitted)); *see also United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996) (a court is not bound by the parties' concessions).

In light of the Supreme Court's unambiguous resolution of the only issue raised by this 18 U.S.C. § 2255 motion, Flores's petition to vacate his sentence is DENIED.[2]

Because this motion makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(2). In addition, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *Cf. Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

Dated: New York, New York
April 4, 2017

SO ORDERED:

Sidney H. Stein, U.S.D.J.

[2] Because the Court finds that *Beckles* forecloses a finding that U.S.S.G. § 4B1.2(a)(2) is unconstitutionally vague, the Court does not address the remaining arguments raised in the government's brief in opposition to Flores's motion.