

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERROL NELSON,

Defendant.

1:10-cr-00012

**TO: Errol Nelson, *Pro se*, #02179-094
Oakdale Federal Correction Institution
P.O. Box 5000
Oakdale, LA 71463
Omodare Jupiter, Esq.**

ORDER and REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon the Order (ECF No. 150) of Chief Judge Wilma A. Lewis in Criminal No. 10-00012 referring Defendant Errol Nelson's Motion under 28 U.S.C. § 2255¹ to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 137), Defendant Errol Nelson's Motion to Correct Sentence under 28 U.S.C. § 2255 (ECF No. 133), and attorney Omodare Jupiter's Response to Court's May 12, 2017 Order to the undersigned for a report and recommendation. For the reasons that follow, the undersigned will grant Attorney Jupiter's request to withdraw the Motion to Correct Sentence, will grant Attorney Jupiter's request to withdraw as counsel, and recommends that Errol Nelson's *pro se* motion be denied.

¹ All citations to the United States Code are to the electronic version that appears in Lexis.

United States v. Nelson
1:12-cr-00010
Order and Report and Recommendation
Page 2

I. Background

Errol Nelson's criminal history began in 1983, when at nine years of age he was charged with petit larceny and trespassing and referred to the Youth Services Administration. Defendant's Sentencing Memorandum (ECF No. 107) at 2. In 1987, at the age of 13, Nelson was adjudged to be a person in need of supervision. *Id.* (citing PSR p. 6, para. 26). In 1991, at the age of 16, Nelson was adjudicated a juvenile delinquent and remanded to the custody of the Youth Rehabilitation Center for six months. *Id.* (citing PSR p. 6, para. 26). That same year, Nelson was tried as an adult for aiding and abetting a robbery and aiding and abetting a murder. He was sentenced to consecutive terms of 15 years and 10 years imprisonment on those charges. *Id.* On April 10, 2007, defendant was released from prison on parole.

On February 4, 2010, a warrant issued for Nelson's arrest for violating the conditions of his parole. That same day, police were dispatched to his residence on a report of a domestic dispute between Nelson and his girlfriend. Government's Sentencing Memorandum (ECF No. 104). An officer responding to the 9-1-1 call encountered Nelson in a parking area near the apartments where Nelson and his girlfriend lived. *United States v. Nelson*, 483 Fed. Appx. 677 at *678 (3d Cir. 2012). The officer informed Nelson that he intended to pat him down for weapons and "a struggle ensued" during which the officer "heard a hard object fall to the ground, which he subsequently identified as a chrome

United States v. Nelson
1:12-cr-00010
Order and Report and Recommendation
Page 3

handgun.” *Id.* Nelson was arrested and in March, 2010, a grand jury returned an indictment charging him with various firearms violations.²

One year later, Nelson was convicted of the firearms violations that were charged in counts one, two, and three of the indictment. The sentencing advisory, recommending that Nelson serve 63-78 months in prison, was predicated upon the determination that Nelson’s 1991 convictions for aiding and abetting second degree murder and aiding and abetting robbery constituted a ‘crime of violence’ as defined by U.S.S.G. § 4B1.2. Defendant’s Motion to Correct Sentence (ECF No. 133). Nelson was sentenced on December 2, 2011, to 78 months imprisonment on count one of the indictment to run concurrent to a term of fifteen years imprisonment on count two, and a term of five years imprisonment on count three. *See* (ECF Nos. 115 and 116) (the judgments entered in Nelson’s case).

On June 26, 2015, the Supreme Court issued its opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding that the “residual clause” in the definition of “violent felony” in the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague and therefore invalid. On April 18, 2016, the Supreme Court issued its opinion in *Welch v. United States*, 136 S. Ct. 1257 (2016), holding that *Johnson*

² Count One: Felon in Possession in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2). Count Two: Unauthorized Possession of a Firearm in violation of 14 V.I.C. Section 2253(a). Count Three: Possession of a Firearm with an Obliterated Serial Number in violation of 18 U.S.C. Sections 922(k) and 924(a)(1)(B). Count Four: Possession of a Firearm in a School Zone in violation of 18 U.S.C. Sections 922(q)(2)(A) and 924(a)(1)(B). (ECF No. 1).

United States v. Nelson
1:12-cr-00010
Order and Report and Recommendation
Page 4

applies retroactively on collateral review. The deadline for filing motions under 28 U.S.C. § 2255 based on the court's decision in *Johnson* was June 27, 2016.

On June 24, 2016, with the assistance of counsel, Nelson filed a motion under § 2255 requesting that the Court vacate his sentence and schedule a hearing "so that he can be re-sentenced in accordance with the law." (ECF No. 133). On July 11, 2016 the Court received a *pro se* motion under § 2255 making the same request. (ECF No. 137).³

II. Legal Principles

A. Section 2255

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

The Rules Governing Section 2255 Proceedings requires the district court to review a § 2255 motion and "dismiss the motion" if it "plainly appears from the motion . . . that the moving party is not entitled to relief." U.S.C. Sec. 2255 Proc R 4.

B. Pro se pleadings

Pro se pleadings are construed liberally and must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520

³ In the interest of justice and in consideration of the mailbox rule, the Court does not find Nelson's *pro se* motion at ECF No. 137 untimely.

United States v. Nelson
 1:12-cr-00010
 Order and Report and Recommendation
 Page 5

(1972). Nonetheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

III. Discussion

Following the decisions in *Johnson* and *Welch*, noted above, the Supreme Court considered the residual clause of § 4B1.2 of the advisory Sentencing Guidelines and found that this clause was not unconstitutionally vague under the Due Process Clause. *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). The Court explained that in contrast to ACCA's residual clause, which, when applicable, required sentencing courts to increase a defendant's term of imprisonment, the advisory Guidelines "do not fix the permissible range of sentences" but "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." *Id.* at 892. Thus, the court declined to extend its reasoning in *Johnson* to the advisory Guidelines, stating plainly that the "residual clause in § 4B1.2(a)(2) [] is not void for vagueness." *Id.* The Supreme Court noted that their decision was exclusive to the advisory Sentencing Guidelines—that they were making no statement as to whether *Johnson* applies to pre-*Booker* sentences that were pronounced under the mandatory Guidelines. *See Beckles*, 137 S. Ct. at 903 n. 4 (Sotomayor, J., concurring in judgment).⁴

⁴ Before *Booker*, the Sentencing Guidelines were mandatory. Since *Booker*, the Sentencing Guidelines are advisory. *See United States v. Booker*, 543 U.S. 220 (2005) (sentencing guidelines made effectively advisory by severance of statutory provisions concerning mandatory applicability).

United States v. Nelson
1:12-cr-00010
Order and Report and Recommendation
Page 6

Simply put, a prisoner sentenced under the ACCA may, in certain circumstances, be eligible for relief under *Johnson*. A prisoner sentenced after the *Booker* decision under the advisory Sentencing Guidelines is not eligible for relief under *Johnson*. The Supreme Court has made no decision as to whether prisoners sentenced before the *Booker* decision under the mandatory Sentencing Guidelines will be eligible for relief under *Johnson*.

The Supreme Court's decision in *Beckles* applies in Nelson's case, because he was sentenced in 2011 under the advisory Guidelines (post-*Booker*). For Nelson, this means that the Supreme Court's decision in *Johnson* does not provide an opportunity for the Court to revisit his sentence.

After the *Beckles* decision, this Court ordered the Office of the Federal Public Defender (OFPD) to notify the Court as to whether it would pursue the motion it filed on Nelson's behalf on June 24, 2016. (ECF No. 143). Having analyzed the Supreme Court decision and concluding that the decision in *Beckles* meant that relief pursuant to *Johnson* was not available to Nelson, the OFPD informed the Court that it could not "in good faith maintain the arguments" put forth in the June 24 motion. The OFPD also asked the court for permission to withdraw the June 24 motion "without prejudice to any pleading filed by Mr. Nelson, *pro se*, and that the court allow counsel to withdraw from further representation of Mr. Nelson." (ECF No. 148).

IV. Conclusion

Based upon the foregoing, it is hereby

United States v. Nelson
1:12-cr-00010
Order and Report and Recommendation
Page 7

ORDERED that attorney Omodare Jupiter's request to Withdraw the Motion to Correct Sentence under 28 U.S.C. § 2255, filed June 24, 2016 (ECF Nos. 133, 148) is **GRANTED**; it is further

ORDERED that attorney Omodare Jupiter's request to withdraw as counsel (ECF No. 148) is **GRANTED**; and it is

RECOMMENDED that Defendant Errol Nelson's *pro se* motion pursuant to § 2255 (ECF No. 137) be **DENIED** without an evidentiary hearing.⁵ It is further recommended that a certificate of appealability be **DENIED**.⁶

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: February 13, 2018

/s/ George W. Cannon, Jr.
GEORGE W. CANNON, JR.
MAGISTRATE JUDGE

⁵ The question of whether to order an evidentiary hearing when considering a motion to vacate a sentence under § 2255 "is committed to the sound discretion of the district court." *Government of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir.1989). A § 2255 evidentiary hearing "is unnecessary when the 'files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Padilla-Castro*, 426 F. App'x 60, 63 (3d Cir.2011) (quoting 28 U.S.C. § 2255(b)). Here, the record in this case conclusively shows that Nelson is not entitled to relief.

⁶When a district court issues a final order on a § 2255 motion, it must make a determination whether it will permit a certificate of appealability. 3d Cir. L.A.R. 22.2; Fed. R. App. P. 22(b)(1). A district court will issue a certificate of appealability only upon a finding of a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, the record fails to show a violation of Nelson's constitutional rights. Accordingly, a certificate of appealability should be denied.