

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:01CR00014
)	
v.)	OPINION AND ORDER
)	
JAMES McCLOUD,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Kathleen Carnell, Special Assistant United States Attorney, Abingdon, Virginia, for United States; James McCloud, Pro Se Defendant.

James McCloud, a federal inmate proceeding pro se, filed this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2012), alleging that his sentence under the Armed Career Criminal Act (“ACCA”), codified as 18 U.S.C.A. § 924(e) (West 2000), is invalid in light of *Begay v. United States*, 553 U.S. 137 (2008), which narrowed the definition of predicate violent felony offenses for ACCA purposes. The United States moves to dismiss the § 2255 motion as untimely filed under § 2255(f), and McCloud has responded. After review of the parties’ submissions, I find it appropriate to stay disposition of McCloud’s § 2255 motion, pending a forthcoming decision by the Supreme Court on the issue of equitable tolling.

McCloud appears to admit that his § 2255 motion is untimely under § 2255(f).¹ He argues, however, that he is entitled to equitable tolling of the limitations period because he is actually innocent of the criminal offense to which he pleaded guilty and of his ACCA sentence. Specifically, McCloud asserts that after *Begay*, a prior conviction for assault and battery under Virginia law does not qualify as a misdemeanor crime of domestic violence and cannot support his conviction under 18 U.S.C.A. § 922(g)(9) (West 2000) for possession of a firearm after being convicted of a misdemeanor crime of domestic violence. *See United States v. White*, 606 F.3d 144, 153-54 (4th Cir. 2010) (holding that simple assault and battery in Virginia are not offenses involving physical force because they include acts of mere offensive touching). McCloud also contends that in light of *Begay*, his prior convictions for possession of an unregistered machine gun and a sawed-off shotgun no longer qualify as “violent felonies” as required to support his ACCA sentence. *See United States v. Haste*, 292 F. App’x 249 (4th Cir. 2008)

¹ A defendant must file his § 2255 motion within one year after his conviction became final or when his claim first became available because the government removes some impediment, the Supreme Court recognized a new, retroactively applicable right, or the defendant, acting with due diligence, discovers new, necessary facts. *See* § 2255(f)(1)-(4). McCloud does not demonstrate that his § 2255 is timely under any of the subsections of § 2255(f). Because McCloud did not appeal the October 11, 2001, judgment, his conviction became final on October 23, 2001, when his opportunity to appeal expired. *See* Fed. R. App. P. 4(b)(1)(A) (former version giving 10 business days to note appeal). The *Begay* decision upon which McCloud’s claims rely was issued in April of 2008. McCloud did not sign and date his § 2255 motion until February 14, 2012, more than a year after his conviction became final and after *Begay*.

(unpublished) (holding that, in light of *Begay*, possession of sawed-off shotgun did not constitute a “violent felony” under ACCA).

It is well established that the statutory limitation period under § 2255(f) may be tolled for equitable reasons. *See, e.g., United States v. Prescott*, 221 F.3d 686 (4th Cir. 2000) (applying equitable tolling to § 2255 motion). Considerably less defined is the question of whether an actual innocence exception to the limitation period exists. McCloud does not cite any binding authority from the Fourth Circuit or the Supreme Court holding that a claim of “actual innocence” of one’s criminal offense can equitably toll the limitations period for a § 2255 motion otherwise time-barred by application of § 2255(f), and I find no such authority. *See Crawford v. Johnson*, No. 7:11CV00158, 2011 WL 3420840, at *3 (W.D. Va. Aug. 4, 2011) (Conrad, J.) (noting lack of binding authority). The Supreme Court recently granted a petition for a writ of certiorari on the issue, however. *See Perkins v. McQuiggin*, 670 F.3d 665 (6th Cir.), *cert. granted*, 133 S. Ct. 527 (2012). The United States Court of Appeals for the Sixth Circuit held in *Perkins* that a credible claim of actual innocence warrants equitable tolling of a statute of limitations for federal habeas actions even if the petitioner makes no showing of reasonable diligence. 670 F.3d at 676.

The United States has not yet responded to McCloud’s assertions of actual innocence as grounds for equitable tolling, and I do not find additional briefing

warranted at this time. Based on the state of the record, it is **ORDERED** that disposition of McCloud's § 2255 motion and the United States' Motion to Dismiss are STAYED, pending the Supreme Court's ruling in the *McQuiggin* case.

ENTER: December 18, 2012

/s/ James P. Jones
United States District Judge