

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

UNITED STATES OF AMERICA)	
)	
)	Case No. 1:11CR00026-005
)	
v.)	OPINION AND ORDER
)	
CHRIS BERRY,)	By: James P. Jones
)	United States District Judge
)	
Defendant.)	

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for United States; Brian J. Beck, Assistant Federal Public Defender, Abingdon, Virginia, for Defendant.

The defendant, a federal inmate sentenced by this court in 2012, has filed a motion under 28 U.S.C. § 2255, seeking to vacate his sentence based upon the Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the Residual Clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii). The United States, while agreeing that the *Johnson* decision applies retroactively,¹ contends that the applicable statute of limitations still bars Berry’s motion because he had other non Residual Clause predicate convictions supporting the ACCA determination.

¹ The Fourth Circuit has yet to decide whether *Johnson* applies retroactively on collateral review, and has scheduled argument in a case that raises that issue, *In re Hubbard*, No. 15-276, but the Justice Department has determined that it does apply retroactively.

Berry pleaded guilty to two firearms offenses in 2011. His presentence investigation report referenced three prior state convictions for serious drug offenses and two prior convictions for grand larceny and thus determined him to be an Armed Career Criminal. The government moved that Berry be sentenced below the 15-year statutory mandatory minimum required by the ACCA, based upon his substantial assistance in the prosecution of another. *See* 18 U.S.C. § 3553(e). The motion was granted and Berry was sentenced by the court on August 8, 2012, to a total of 60 months of imprisonment. There was no appeal.

In his present motion, Berry asserts that the two grand larceny convictions are now invalid ACCA predicates under *Johnson* because they were only countable under the Residual Clause. But he also seeks to attack use as predicates of two of the serious drug offenses on the ground that they have the same offense date and there is no proper indication in the record that they occurred on “occasions different from one another.” 18 U.S.C. § 924(e)(1).

The United States contends that even assuming that *Johnson* extends the bar of the one-year statute of limitations, 28 U.S.C. § 2255(f), the court should not permit the defendant to reopen issues unrelated to the invalidation of the Residual Clause, such as the application of Berry’s prior serious drug convictions. It thus argues that § 2255(f)(3) extends the limitations period from the date “on which the right asserted was initially recognized by the Supreme Court” and that the right

asserted in *Johnson* involved the Residual Clause and had nothing to do with the validity of the serious drug offense predicates.

While the government may be right, I believe the prudent course is to allow it to fully brief the issue and its other defenses, as well as provide the court with the transcript of the defendant's sentencing. Accordingly, I will reserve ruling on the United States' Motion to Dismiss. The United States is granted leave to submit a further brief and materials, provided such is filed within 30 days of the date of this Order. The defendant may respond within 14 days after service and the United States may file a reply within 7 days after service of the response.

It is so **ORDERED**.

ENTER: December 16, 2015

/s/ James P. Jones
United States District Judge