IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 30, 2018
Lyle W. Cayce
Clerk

No. 16-20815

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEELAND DURALLE WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before ELROD, GRAVES, and HO, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge:

Before the court is Defendant Keeland Duralle Williams's motion for reconsideration of the denial of his application for a certificate of appealability (COA). We **GRANT** the motion, withdraw the prior order of March 9, 2018, and substitute the following:

In 2014, Defendant Keeland Duralle Williams, who proceeds before this court *pro se*, was convicted of aiding and abetting bank robbery, in violation of 18 U.S.C. §§ 2113(a) & (d) (Count One), and aiding and abetting the carrying and brandishing of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Two). The district court sentenced him to seventy months of imprisonment on Count One and a consecutive eighty-four-month term of

imprisonment on Count Two. Williams did not appeal, but he later filed a 28 U.S.C. § 2255 motion, which the district court dismissed as time-barred. He seeks a COA in this court, arguing that (1) reasonable jurists would debate whether the district court erred in determining that his § 2255 motion was time-barred because *Welch v. United States*, 578 U.S. —, 136 S. Ct. 1257 (2016), made *Johnson v. United States*, 576 U.S. —, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii), retroactive to cases on collateral review; (2) his § 2255 motion was timely filed under § 2255(f)(3) within one year of *Johnson*; and (3) in light of *Johnson*, the residual clause of 18 U.S.C. § 924(c)(3)(B), the statute under which he was sentenced, was unconstitutionally vague.

Federal habeas proceedings are subject to the rules prescribed by the Anti-terrorism and Effective Death Penalty Act (AEDPA). *Matamoros v. Stephens*, 783 F.3d 212, 215 (5th Cir. 2015); *see* 28 U.S.C. § 2254. Under AEDPA, a federal habeas petitioner may appeal a district court's dismissal of his § 2255 motion only if the district court or the court of appeals first issues a certificate of appealability. 28 U.S.C. §§ 2253(c)(1)(B) & 2253(c)(2); *Buck v. Davis*, 580 U.S. —, —, 137 S. Ct. 759, 773 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). When a district court has denied relief on procedural grounds, "the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

In the initial review of Williams's application, this court posited that Williams could not make the required showing because "*Johnson* and *Welch* addressed 18 U.S.C. § 924(e)(2)(B)(ii) rather than the residual clause of . . . § 924(c)(3)(B)," and "[t]his court has declined to extend the holding in *Johnson*

to invalidate the residual clause of § 924(c)(3)(B)." As support for this position, we cited two cases—*United States v. Jones*, 854 F.3d 737, 740 (5th Cir.), *cert. denied*, 583 U.S. —, 138 S. Ct. 242 (2017), and *United States v. Chapman*, 851 F.3d 363, 374–75 & n.7 (5th Cir. 2017)—in which we had ruled that the argument that § 924(c)(3)(B) is unconstitutionally vague under *Johnson* was foreclosed by our en banc decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675–77 (5th Cir. 2016) (en banc) (holding that the definition of "crime of violence" found in 18 U.S.C. § 16(b), which is identical to the definition found in § 924(c)(3)(B), "remains constitutional in the aftermath of *Johnson*"), *vacated*, 585 U.S. — (June 18, 2018).

But three months ago, in *Sessions v. Dimaya*, 584 U.S. —, 138 S. Ct. 1204 (2018), the Supreme Court held that § 16(b)'s definition of "crime of violence," as used in the Immigration and Nationality Act, is unconstitutionally vague, abrogating (and later affirmatively vacating) *Gonzalez-Longoria*. *See id.* at 1213–16, 1223 & 1212 n.2.; *see also Gonzalez-Longoria*, 585 U.S. at — (vacating the judgment and remanding the case "for further consideration in light of" *Dimaya*).[1] Respecting the Court's ruling, which vitiated the sole ground upon which we had ruled that Williams was not entitled to a COA, we requested briefing from the parties on the effect, if any, of *Dimaya*'s holding on Williams's application.

Section 2255(f)(3), which governs the timeliness of Williams's § 2255 motion, provides that a motion must be filed within one year from the latest of "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." 28 U.S.C. § 2255(f)(3); *see also*

[1] There will be no further consideration of *Gonzalez-Longoria* by this court, however. The Defendant has been released from prison and declined to mount any further challenge on remand. *United States v. Gonzalez-Longoria*, — F.3d —, —, 2018 WL 3421806 (5th Cir. July 13, 2018) (en banc).

generally Dodd v. United States, 545 U.S. 353 (2005). The Supreme Court held in *Johnson* that § 924(e)(2)(B)(ii) is unconstitutionally vague—which commenced the one-year clock for defendants sentenced under that statute—and held in *Dimaya* that § 16(b) is unconstitutionally vague—which commenced the one-year clock for defendants sentenced under that statute—but it has made no predicate holding vis-à-vis § 924(c)(3)(B). Though the Court has instructed the courts of appeals to ***reconsider*** § 924(c)(3)(B) cases in light of *Dimaya*, *see, e.g.*, *United States v. Jackson*, 584 U.S. —, 138 S. Ct. 1983 (2018); *United States v. Jenkins*, 584 U.S. —, 138 S. Ct. 1980 (2018), that instruction does not amount to a determination that the provision is unconstitutional. There is no "newly recognized" right for Williams to assert here.

Section 924(c)(3)(B) remains valid. An assumption that the statute will eventually be invalidated at some indeterminate point cannot overcome the timeliness requirement of § 2255(f)(3). For Williams's motion to even be considered, the statute must actually have first been invalidated. The one-year clock on § 924(c)(3)(B) has not yet started. So in that sense, his motion ***is*** untimely, but because it was filed too early, not too late. *Cf. United States v. Santistevan*, — F. App'x —, —, 2018 WL 1779331, at *3 (10th Cir. Apr. 13, 2018) ("[A]n initial § 2255 motion invoking *Johnson* [is] not timely under § 2255(f)(3) when the underlying statute of conviction [is] § 924(c), not the ACCA.").

If § 924(c)(3)(B) is ultimately held to be unconstitutional, that finding may open the door to future collateral challenges to sentences rendered under that statute. But that has not yet come to pass, so we cannot consider such a challenge at this time. We conclude that jurists of reason would ***not*** find it debatable that the district court was correct in its procedural ruling. *See Gonzalez*, 565 U.S. at 140–41.

The application for a certificate of appealability is **DENIED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20815

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KEELAND DURALLE WILLIAMS,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

Before ELROD, GRAVES, and HO, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not

disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James E. Graves, Jr.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CIVIL ACTION NO. H-16-1922
v.	§	(CRIMINAL NUMBER H-13-575-05)
	§	
KEELAND DURALLE WILLIAMS	§	

FINAL JUDGMENT

In accordance with the court's Memorandum Opinion and Order of today granting the United States' Motion to Dismiss, this action is **DISMISSED with prejudice.**

For the reasons stated in the Memorandum Opinion and Order and because defendant Williams has not made a substantial showing of the denial of a constitutional right, Williams is **DENIED** a certificate of appealability.

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas, on this 13th day of October, 2016.

SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO. H-13-575-01&05
v.	§	
	§	CIVIL ACTION NO. H-16-1898
ALEXANDER S. SELLERS and	§	CIVIL ACTION NO. H-16-1922
KEELAND DURALLE WILLIAMS	§	

MEMORANDUM OPINION AND ORDER

Codefendants, Alexander S. Sellers and Keeland Duralle Williams, have filed motions under 28 U.S.C. § 2255 to vacate, set aside, or correct their sentences. (Docket Entry No. 236 and No. 238)[1] Pending before the court is the United States' Motion to Dismiss § 2255 Motions (Docket Entry No. 271).

On November 25, 2013, Sellers and Williams (along with other codefendants) were charged in a Superseding Indictment with three counts: Count One alleged aiding and abetting aggravated bank robbery, in violation of 18 U.S.C. §§ 2113(a), (d), & 2; Count Two alleged aiding and abetting the carrying and brandishing of a firearm during and in relation to a crime of violence (bank robbery), in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) & 2; and Count Three alleged conspiracy to carry or brandish a firearm

[1]Docket Entry citations are to relevant docket entries in Crim. No. 4:13-575.

during and in relation to a crime of violence (bank robbery), in violation of 18 U.S.C. § 924(o). (Docket Entry No. 55) Sellers and Williams pleaded guilty to Counts One and Two pursuant to written Plea Agreements (Docket Entry No. 96 (Sellers) and No. 104 (Williams)). On August 28, 2014, the court sentenced Sellers to 110 months in prison (26 months on the bank robbery charge and a consecutive term of 84 months on the § 924(c) charge) (Docket Entry No. 163); and sentenced Williams to 154 months in custody (70 months on the bank robbery charge and a consecutive term of 84 months on the § 924(c) charge) (Docket Entry No. 159). Both defendants received five-year terms of supervision. Neither defendant appealed. (§ 2255 Motions, Docket Entry No. 236, p. 1 and No. 238, p. 2)

Sellers filed an undated motion under 28 U.S.C. § 2255 to vacate his conviction and sentence, which the District Clerk docketed on June 27, 2016. (Docket Entry No. 236) Williams signed a similar motion on June 21, 2016, which the district court docketed on June 27, 2016. (Docket Entry No. 238) Both Sellers and Williams challenge their convictions under 18 U.S.C. § 924(c), asserting that after Johnson v. United States, 135 S. Ct. 2551 (2015), the convictions are unconstitutional.

A motion filed under 28 U.S.C. § 2255 is subject to a one-year statute of limitations, which ordinarily begins running on the date the judgment of conviction became final. 28 U.S.C. § 2255(f)(1). Because Sellers and Williams did not file notices of appeal, their

convictions became final fourteen days after entry of the judgments of conviction on September 2, 2014. Fed. R. App. P. 4(b)(1)(A)(ii). Accordingly, the statute of limitations on Sellers' and Williams' § 2255 motions expired on September 16, 2015. Because Sellers and Williams did not file the present § 2255 motions within that one-year limitations period, their motions are untimely and subject to dismissal.[2]

Sellers and Williams argue that their § 2255 motions are timely under 28 U.S.C. § 2255(f)(3) because they filed the motions within one year of Johnson. See Document Entry No. 236, p. 10 and No. 238, p. 11. Section 2255(f)(3) provides that the one-year limitations period shall run from the latest of -- "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; . . ."

In Johnson the Supreme Court held that the residual clause definition of "violent felony" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague.[3] 135 S. Ct. at 2563. In Welch v. United States, 136 S. Ct.

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[2]Neither Sellers nor Williams argues that the statute of limitation should be equitably tolled.

[3]The ACCA imposes a mandatory minimum sentence of fifteen years in prison on defendants (1) who are convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. § 922(g)(1), and (2) who have at least three prior convictions for a violent felony, a serious drug offense, or both. 18 U.S.C. § 924(e)(1).

1257, 1268 (2016), the Court held that Johnson applies retroactively to cases on collateral review. Because neither Sellers nor Williams was convicted for unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g), the ACCA is not at issue in this case. Instead, Sellers and Williams challenge their convictions under 18 U.S.C. § 924(c) for aiding and abetting the carrying and brandishing of a firearm during and in relation to a crime of violence.

Section 924(c) proscribes the use or carrying or brandishing of a firearm during or in relation to a drug trafficking crime or a crime of violence, or the possession of a firearm in furtherance of a drug trafficking crime or a crime of violence. 18 U.S.C. § 924(c)(1)(A). The definition of "crime of violence" in § 924(c)(3) includes a residual clause that is different from the residual clause definition of violent felony held unconstitutional in Johnson. Compare 18 U.S.C. § 924(c)(3)(B) with 18 U.S.C. § 924(e)(2)(B)(ii). Sellers and Williams argue that their § 924(c) convictions are no longer valid because under Johnson the residual clause definition of "crime of violence" in § 924(c)(3)(B) is unconstitutional. In United States v. Gonzalez-Longoria, ___ F.3d ___, 2016 WL 4169217 (5th Cir. Aug. 5, 2016) (en banc), the Fifth Circuit held that 18 U.S.C. § 16(b), which contains the same definition of "crime of violence" as § 924(c)(3)(B), is not unconstitutionally vague. Sellers' and Williams' arguments therefore have no merit, and their § 2255 motions are not timely.

Because the § 2255 motions filed by Sellers and Williams are time-barred, the United States' Motion to Dismiss § 2255 Motions (Docket Entry No. 271) is **GRANTED**, and Sellers' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Docket Entry No. 236) and Williams' Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Docket Entry No. 238) are **DENIED**.

SIGNED at Houston, Texas, on this 13th day of October, 2016.

SIM LAKE
UNITED STATES DISTRICT JUDGE