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| Present: The Honorable | CHRISTINA A. SNYDER | |
| Catherine Jeang | Not Present | N/A |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |
| Attorneys Present for Plaintiffs: | | Attorneys Present for Defendants: |
| Not Present | | Not Present |

Proceedings: (IN CHAMBERS) - ANTONIO BLACKSTONE'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On August 19, 1999, after a jury trial before Judge Lourdes G. Baird, Antonio Blackstone was convicted of: (1) conspiracy to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951; (2) committing a Hobbs Act robbery, in violation of § 1951; and (3) using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Dkt. 1 (“Mot.”) at 1; United States v. Gaines et al, 2:99-cr-00257 (C.D. Cal. Aug. 19, 1999), dkt. 231. On May 8, 2000, the court also found Blackstone to be a Career Offender, because he had two prior convictions for crimes of violence: second-degree robbery in violation of California Penal Code § 211 and voluntary manslaughter in violation of California Penal Code § 192(a). Mot. at 2. As a result of these prior convictions, Blackstone’s offense level was increased from 21 to 32 pursuant to U.S.S.G. § 4B1.2, the Career Offender Sentencing Guidelines. Id. Furthermore, because all Career Offenders are automatically placed in criminal history category IV, Blackstone’s Career Offender finding increased his criminal history category from IV to VI. Id. Consequently, the Career Offender designation raised Blackstone’s mandatory guideline range from 70–87 months to 210–240 months.¹ Id. As a result, the court sentenced Blackstone to 230 months for each of the Hobbs Act violations to be served concurrently and a mandatory consecutive sentence of 60 months for using a firearm to commit a crime of violence: a total of 290 months in prison. Mot., Ex. A. In the years following

¹ Although these Guidelines are now advisory, at the time of Blackstone’s sentencing they were mandatory. See Reply at 7–8.

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his conviction, Blackstone appealed his conviction, filed petitions pursuant to 18 U.S.C. §§ 2255 and 2241, and received permission to file a second § 2255 motion. Mot. at 2–3.

On June 2, 2016, Blackstone filed the instant motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Mot. On September 6, 2016, the government filed its opposition. Dkt. 12 (“Opp’n”). On October 5, 2016, Blackstone filed his reply. Dkt. 17 (“Reply”).

II. LEGAL STANDARD

A prisoner may move the court to vacate, set aside or correct his sentence if he can show “that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]” 28 U.S.C. § 2255(a).

III. DISCUSSION

In the instant § 2255 motion, Blackstone first argues that, in the wake of Johnson v. United States, 135 S. Ct. 2551 (2015), a Hobbs Act robbery is no longer a crime of violence under § 924(c) and, therefore, his 60-month sentence for using a firearm in commission of a crime of violence is unconstitutional. Second, Blackstone contends that his convictions for second-degree robbery, voluntary manslaughter, and Hobbs Act robbery are no longer crimes of violence for the purposes of § 4B1.2 and, therefore, the Career Offender sentence enhancement he received for committing a total of three crimes of violence is unconstitutional. In turn, the government argues that Blackstone is not entitled to § 2255 relief because: (1) Blackstone’s claims are procedurally defaulted; (2) Blackstone’s motion is time-barred; and (3) Blackstone’s motion fails on the merits because (a) the Hobbs Act robbery remains a crime of violence under § 924(c) and (b) Blackstone’s convictions for second-degree robbery, voluntary manslaughter, and the Hobbs Act robbery all remain convictions for crimes of violence under § 4.B1.2.

A. Johnson v. United States

The Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), provides sentence enhancements for a defendant who uses firearms in the commission of a crime that is the

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defendant's third conviction for a violent felony. See generally 18 U.S.C. § 924(e). The ACCA defines the term "violent felony" as a crime that either:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first part of the definition is commonly known as the "elements clause" and the second part is known as the "residual clause." Cf. United States v. Bell, 153 F. Supp. 3d 906, 910 (N.D. Cal. 2016).

On June 26, 2015, in Johnson v. United States, the Supreme Court held that the ACCA's residual clause is unconstitutionally vague and therefore void. 135 S.Ct. 2551. On October 19, 2015, in Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), the Ninth Circuit extended Johnson to a materially identical residual clause in 18 U.S.C. § 16, which defined a "crime of violence" for the purposes of identifying offenses that merit deportation of non-citizen defendants under the Immigration and Nationality Act. On April 18, 2016, in Welch v. United States, 136 S.Ct. 1257 (2016), the Supreme Court held that Johnson announced a new substantive rule of constitutional law that applies retroactively on collateral review to ACCA-enhanced sentences. Id. at 1264–68.

B. Procedural Default

The government argues that Blackstone's claims are procedurally defaulted because he failed to raise them on appeal. Opp'n at 8–11. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised [] only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." Bousley v. United States, 523 U.S. 614, 622 (1998) (quotation marks and citations omitted).

Cause exists when a claim is "novel." See Reed v. Ross, 468 U.S. 1, 15 (1984). A claim could be novel where a Supreme Court decision: (1) "explicitly overrule[s] one of th[e] Court's precedents"; (2) "may overturn a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court

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authority has expressly approved”; or (3) “disapprove[s] a practice that th[e] Court arguably has sanctioned in prior cases.” Id. at 17 (quotation marks omitted). As the Supreme Court itself recognized, Johnson expressly overruled Supreme Court precedent. See Johnson, 135 S.Ct. at 2563 (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in James [v. United States, 550 U.S. 192 (2007)] and Sykes [v. United States, 564 U.S. 1 (2011)] are overruled.”). Thus, Blackstone’s claim is “novel” and he has established cause for failing to raise this argument on appeal.

To show prejudice, Blackstone must “demonstrate[e] not merely that the errors . . . [in the proceedings] created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire [proceedings] with error of constitutional dimensions.”” United States v. Braswell, 501 F.3d 1147, 150 (9th Cir. 2007) (quotation marks omitted). Thus, a petitioner must show that there is a “reasonable probability” that, without the error, the result of the proceedings would have been different. Strickler v. Greene, 527 U.S. 263, 289 (1999). Blackstone argues that he was prejudiced because his § 924(c) conviction added 60 months to his sentence. Reply at 7. The Court agrees. If the court mistakenly treated a Hobbs Act robbery as a crime of violence, there is a reasonable probability that, but for the error, Blackstone’s sentence would have been different. Blackstone also contends that he suffered prejudice because his classification as a Career Offender enhanced his sentencing range. See Reply at 7–8. Applying an incorrect Sentencing Guidelines range affects a defendant’s substantial rights, even if the sentence imposed is within the correct range. Molina-Martinez v. United States, 136 S. Ct. 1338, 1346–47 (2016); see also United States v. Bonilla-Guizar, 729 F.3d 1179, 1188 (9th Cir. 2013) (“We have held that when a sentencing judge incorrectly calculates the Guidelines range, potentially resulting in the imposition of a greater sentence, the error affects the defendant’s substantial rights and the fairness of the judicial proceedings.”). The Court thus finds that Blackstone has established prejudice.

Additionally, courts have concluded that § 2255 motions based on a Johnson claim are not procedurally defaulted because such claims were not “reasonably available” prior to Johnson. See United States v. Garcia, -- F.Supp.3d --, No. 13-cr-00601-JST, 2016 WL 4364438, *3 (N.D. Cal. Aug. 16, 2016); Alvarado v. United States, No. 16-cv-4411-GW, 2016 WL 6302517, *3 (C.D. Cal. Oct. 14, 2016); United States v. Kinman, No. 16-cv-1360-JM, 2016 WL 6124456, *4 (S.D. Cal. Oct. 20, 2016), appeal docketed No. 16-

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56568 (9th Cir. Oct. 21, 2015). The Court concludes that Blackstone has overcome his failure to raise his instant arguments on appeal and may file the instant motion.²

C. Timeliness of Blackstone’s Section 2255 Motion

The government asserts that Blackstone’s § 2255 motion is untimely. Opp’n at 11–12. The limitations period for filing a § 2255 motion runs “from the latest of (1) the date on which the judgment of conviction becomes final . . . [or] (3) 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). The government argues that Blackstone did not bring his motion within one year of October 1, 2001, when his conviction became final, and that “the right recognized in Johnson has not been made retroactively applicable to either § 924(c) or Career Offender Guideline cases on collateral review.” See Opp’n at 12. To determine whether Blackstone’s motion is timely, the Court must first determine whether Johnson, which applies retroactively to the ACCA, also applies to § 924(c) and § 4B1.2.

Section 924(c) authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a “crime of violence.” 18 U.S.C. § 924(c)(1). The statute defines “crime of violence” as “an offense that is a felony” and:

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. § 924(c)(3)(A)–(B). As with clauses in the ACCA, courts generally refer to § 924(c)(3)(A) as the “elements clause” and to § 924(c)(3)(B) as the “residual clause.” See Bell, 153 F. Supp. 3d at 910.

While the Ninth Circuit has not specifically resolved whether Johnson invalidated the residual clause in § 924(c), in Dimaya, the Ninth Circuit held that the residual clause

² Because Blackstone has overcome procedural default by showing cause and prejudice, the Court need not address Blackstone’s actual innocence argument.

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in 18 U.S.C. § 16 was unconstitutionally vague in the wake of Johnson. See Dimaya, 803 F.3d at 1120. The Ninth Circuit found that § 16’s residual clause—though not identically worded to the ACCA—was void for vagueness because both clauses required courts to “1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial.” Id. (quotation marks omitted).

The residual clause in § 924(c) is identical to the residual clause in § 16. See 18 U.S.C. § 924(c)(3)(B); 18 U.S.C. § 16(b). Therefore, as other courts have recognized, Dimaya requires this Court to conclude that § 924(c)’s residual clause is also unconstitutionally vague post-Johnson. See Bell, 158 F. Supp. 3d at 922 (after Johnson, § 924(c)’s residual clause “cannot stand” because, like the ACCA residual clause, it requires the application of the categorical approach and “the differences in the language used in the ACCA residual clause versus the § 924(c)(3) residual clause are not material insofar as the reasoning in Johnson is concerned”); United States v. Lattanaphom, 159 F. Supp. 3d 1157, 1164 (E.D. Cal. 2016) (same); United States v. Baires-Reyes, -- F. Supp. 3d --, No. 15-cr-00122-EMC-2, 2016 WL 3163049, *5 (N.D. Cal. June 7, 2016) (same); United States v. Shumilo, No. 16-cv-4412-GW, 2016 WL 6302524, *7 (C.D. Cal. Oct. 24, 2016) (“[T]he Court would find that [Johnson] applies to the residual clause in § 924(c), thereby invalidating it.”); United States v. Bustos, No. 08-cr-297-LJO-3, 2016 WL 6821853, * 5 (E.D. Cal. Nov. 17, 2016) (“[T]he Court finds it cannot escape the conclusion that the § 924(c)(3) residual clause is unconstitutionally vague and therefore cannot be the basis for enhancing a [§ 924(c)] sentence.”).

Section 4B1.2, which governs sentence enhancements for Career Offenders, defines a “crime of violence” as an offense that:

- (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. 5845(a) or explosive material as defined in 18 U.S.C. 841(c).

U.S.S.G. § 4B1.2(a)(1)–(2). This definition of “crime of violence” also consists of an elements clause and a residual clause.

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The government argues that Johnson does not apply retroactively to the Guidelines because Johnson is a substantive rule in the context of the ACCA, but a procedural rule—and therefore non-retroactive—in the context of the Guidelines.³ Opp'n at 17–25. However, courts in the Ninth Circuit have concluded that Johnson applies retroactively to the Guidelines. See, e.g., Garcia, 2016 WL 4364438, at *6; United States v. Dean, No. 13-cr-00137-SI, 2016 WL 1060229, *16 (D. Or. Mar. 5, 2016); Kinman, 2016 WL 6124456, at *5; United States v. Santos, No. LA16-cv-3973-JAK, 2016 WL 5661553, *6–*7 (C.D. Cal. Sept. 9, 2016); Jefferson, 2016 WL 6496456, at *5; United States v. Kennedy, No. 12-cr-414-LJO-SKO-1, 2016 WL 6520524, *4–*5 (E.D. Cal. Nov. 3, 2016); Alvarado, 2016 WL 6302517, at *3; United States v. McGary, No. 14-cr-0013-CW, 2016 WL 4126451, at *5–*6 (N.D. Cal. Aug. 3, 2016); United States v. Stamps, No. 13-cr-238-CW, 2016 WL 3747286, at *1 (N.D. Cal. June 29, 2016); United States v. Benard, No. 16-cv-02692-SI, 2016 WL 5393939, *6 (N.D. Cal. Sept. 27, 2016). These courts relied on Reina-Rodriguez v. United States, 655 F.3d 1182 (9th Cir. 2011), in which the Ninth Circuit held that its earlier decision—concluding that a state burglary law was not categorical burglary for purposes of the ACCA—applied retroactively to the Guidelines. Id. at 1189. In so holding, the Ninth Circuit did not distinguish between applying a substantive rule in the statutory and Guidelines contexts and declined to apply retroactivity “on a piecemeal basis.” See United States v. Sanchez-Cervantes, 282 F.3d 664, 671 (9th Cir. 2002), (“A new rule should be retroactive as to all cases or as to none to avoid inconsistencies and unnecessary litigation.”).

The Court is persuaded by the reasoning of other courts in this Circuit and concludes that Johnson applies retroactively on collateral review to the Guidelines. Because Johnson applies retroactively to § 924(c) and § 4B1.2, Blackstone’s motion is timely because it was filed within one year of the Supreme Court’s decision in Johnson.

³ “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes . . . Procedural rules, by contrast, regulate only the manner of determining the defendant’s culpability.” Welch, 136 S.Ct. at 1264–65 (quotation marks and citations omitted).

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D. Blackstone’s 60-Month Sentence is Not Unconstitutional Because a Hobbs Act Robbery is a Crime of Violence under Section 924(c)

Blackstone argues that his conviction for using a firearm to commit a crime of violence is unconstitutional and entitles him to § 2255 relief because his Hobbs Act robbery cannot qualify as a crime of violence under § 924(c). Mot. at 5–12.⁴ This Court has considered precisely this question and, after thorough analysis, concluded that a Hobbs Act robbery remains a crime of violence after Johnson. See United States v. Dorsey, No. 14-cr-328-CAS, 2016 WL 3381218 at *4–*6. (C.D. Cal. June 8, 2016). The Court’s conclusion is consistent with the majority of courts that have addressed this issue, both before and after Dorsey. See, e.g., United States v. Crawford, No. 3:15-cr-070-JD, 2016 WL 320116, *3 (N.D. Ind. Jan. 27, 2016) (denying defendant’s motion to dismiss indictment charging him with § 924(c) offense based on a Hobbs Act robbery); United States v. Pena, No. 15-cr-551-AJN, 2016 WL 690746, *8 (S.D.N.Y. Feb. 11, 2016) (same); United States v. Coleman, No. 14-cr-664, 2016 WL 1435696, *2–3 (N.D. Ill. Apr. 12, 2016) (same); United States v. Williams, 179 F. Supp. 3d 141, 144–55 (D. Me. Apr. 15, 2016) (same); United States v. McCallister, No. 15-0171-ABJ, 2016 WL 3072237, *1 (D.D.C. May 31, 2016) (same); United States v. Barrows, No. 2:13-cr-00185-MMD-VCF, 2016 WL 4010023, *2–6 (D. Nev. July 25, 2016) (same); United States v. Nguyen, No. 16-cv-1231-JTM, 2016 WL 4479131, *2–3 (D. Kan. Aug. 25, 2016); United States v. Davis, No. 16-cv-02524-SI, 2016 WL 6473074, *4 (N.D. Cal. Nov. 2, 2016), appeal docketed No. 16-17047 (9th Cir. Nov. 4, 2016) (denying § 2255 motion that challenged the § 924(c) conviction based on a Hobbs Act robbery); In re Saint Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016) (denying permission to file a second or successive § 2255 motion raising a Johnson challenge to § 924(c)’s residual clause because a Hobbs Act robbery “clearly qualifies” as a crime of violence under the elements clause in § 924(c)). In addition, the Ninth Circuit has held that a Hobbs Act robbery remains a crime of violence under § 924(c)’s elements clause. United States v.

⁴ Blackstone and the government dispute whether the *conspiracy* to commit a Hobbs Act robbery is a crime of violence under § 924(c). Because Blackstone’s § 924(c) charge was based on the Hobbs Act robbery itself, rather than the *conspiracy* to commit a Hobbs Act robbery, the Court need not address those arguments.

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Howard, No. 15–10042, 650 Fed. Appx. 466, 468 (9th Cir. May 23, 2016).⁵ The Court continues to find it appropriate to join “the chorus of judges declaring that a robbery in violation of the Hobbs Act is a ‘crime of violence’ for purposes of 18 U.S.C. § 924(c).” McCallister, 2016 WL 3072237, at *1.

E. Blackstone’s Career Offender Enhancement is not Unconstitutional because Second-Degree Robbery, Voluntary Manslaughter, and Hobbs Act Robbery Are Crimes of Violence under Section 4B1.2

Blackstone argues that his Career Offender designation, which increased his sentencing range from 70–87 months to 210–240 months, is unconstitutional and entitles him to § 2255 relief because—after Johnson—robbery, voluntary manslaughter, and Hobbs Act robbery are no longer crimes of violence under § 4B1.2. Mot. at 17–31.

Blackstone asserts that, although robbery and manslaughter offenses are listed as crimes of violence in the commentary to § 4B1.2, after “the excision of the residual clause from the career offender provision, the offenses listed only in the commentary to the guideline are no longer of any effect.”⁶ Id. at 20; see § 4B1.2 app. n.1.

A Sentencing Guideline’s commentary may “interpret [a] guideline or explain how it is to be applied, suggest circumstances which . . . may warrant departure from the guidelines, or provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline.” Stinson v. United States, 508 U.S. 36, 41 (1996) (quotation marks omitted). The Guidelines’ commentary is binding, unless the commentary and the Guideline it interprets are inconsistent. Id. at 42–43.

⁵ Blackstone and the government also dispute whether a Hobbs Act robbery is a crime of violence under § 924(c)’s *residual* clause. Because the Court concludes that a Hobbs Act robbery is a crime of violence under § 924(c)’s *elements* clause, the Court need not address those arguments.

⁶ Blackstone also contends that his second-degree robbery and voluntary manslaughter are not crimes of violence under the elements clause or the residual clause of § 4B1.2. Because the Court concludes both offenses are crimes of violence because they are listed in the commentary to § 4B1.2, the Court need not address the parties’ arguments regarding § 4B1.2’s elements and residual clauses.

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After Johnson, courts in the Ninth Circuit have found that second-degree robbery in violation of § 211 remains a crime of violence under § 4B1.2. See, e.g., Alvarado, 2016 WL 6302517, at *7-*8; Kinman, 2016 WL 6124456, at *6-*10 (citing § 4B1.2, amend. 798 (Aug. 1, 2016), which indicated that “all the enumerated offenses of the Career Offender Guidelines qualified as crimes of violence, whether those offenses were listed in the text or Application Note 1[of the commentary].”). Moreover, the Ninth Circuit concluded that a second-degree robbery is a crime of violence under “§§ 4B1.2(a)(2) and 4B1.2’s Application Note 1.” Tate v. United States, -- Fed. Appx. --, No. 15-10283, 2016 WL 4191909, *2 (9th Cir. Aug. 9, 2016). Thus, the list of crimes of violence in Application Note 1 of the commentary to § 4B1.2 remains authoritative even after Johnson. Since manslaughter is also an enumerated offense in Application Note 1, the same reasoning applies to Blackstone’s conviction under § 192(a). The Court acknowledges that there is disagreement among courts on this issue.⁷ Nonetheless, the Court is persuaded by Alvarado and Kinman, and by the Ninth Circuit’s reasoning in Tate. Therefore, the Court concludes that second-degree robbery and voluntary manslaughter are crimes of violence for the purposes of § 4B1.2.

Blackstone also contends that his Career Offender sentence is unconstitutional and entitles him to § 2255 relief because a Hobbs Act robbery is not a crime of violence under § 4B1.2. Mot. at 29–30. The Court finds this argument unpersuasive. At least one court has found that a Hobbs Act robbery constitutes a crime of violence under § 4B1.2

⁷ Compare United States v. Taylor, No. 2:13-cr-0384-GEB-CKD, 2016 WL 5468381, *8 (E.D. Cal. Sept. 28, 2016) (recommendation by magistrate judge that district court deny § 2255 motion because California robbery remains a crime of violence under the Career Offender Guidelines) and United States v. Hall, 714 F.3d 1270, 1274 (11th Cir. 2013) (holding that the inclusion of an offense in Application Note 1’s enumerated list makes the offense a crime of violence under Career Offender Guidelines) with United States v. Walker, No. 12-cr-0430-CW, 2016 WL 5921257, at *6 (N.D. Cal. Oct. 5, 2016) (disregarding Tate and holding that § 211 is no longer a crime of violence under the Career Offender Guidelines after Johnson) and United States v. Soto-Rivera, 811 F.3d 53, 60 (1st Cir. 2016) (declining to rely on an Application Note’s inclusion of possession of a machine gun as crime of violence because “in the absence of the residual clause, there is nothing within § 4B1.2(a)’s text to serve as an anchor for Application Note 1’s inclusion of possession of a machine gun within the definition of crime of violence”).

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because it was committed by threatened use of physical force. See United States v. Blanketship, 2016 WL 3579077, *6 (D. Haw. June 28, 2016). On October 11, 1997, Blackstone and a coconspirator entered a K-Mart store and handed an employee a note that read, “This is no joke, there are 4 gunmen.” Opp’n at 2. Blackstone brandished a firearm, ordered the employee to walk to the store’s office, get on the floor, and remain quiet. Id. Blackstone proceeded to steal bags containing cash, checks, and charges. Id. Here, as in Blanketship, Blackstone threatened to use physical force when he handed the K-Mart employee the note about gunmen, brandished a firearm, and ordered him to get down on the floor. See Opp’n at 2. Thus, Blackstone’s Hobbs Act robbery is a crime of violence under § 4B1.2. Furthermore, after comparing provisions of similar statutes, the Ninth Circuit also concluded that a Hobbs Act robbery is a crime of violence under § 4B1.2. See Howard, 650 Fed. Appx. at 468 (relying on the assumption that a Hobbs Act robbery is a crime of violence under § 4B1.2 in order to conclude that a Hobbs Act robbery is a crime of violence under § 924(c)). As such, the Court concludes that that a Hobbs Act robbery is a crime of violence for the purposes of § 4B1.2.

Accordingly, the Court concludes that Blackstone’s Career Offender sentence enhancement, which resulted in his 230-month sentence, is not unconstitutional. Blackstone’s convictions for robbery, voluntary manslaughter, and a Hobbs Act robbery remain convictions for crimes of violence under § 4B1.2 and, as a result, require the application of a Career Offender sentence enhancement.

F. Summary

Having carefully considered the parties’ arguments, the Court **DENIES** Blackstone’s § 2255 motion to vacate, set aside, or correct his sentence.

IV. CERTIFICATE OF APPEALABILITY

Blackstone seeks a certificate of appealability “for any issue” that merits it. See Reply at 48–49. In denying Blackstone’s § 2255 motion, the Court must also address whether it should issue certificates of appealability. See Rule 11, Rules Governing § 2255 Cases (providing that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant”). A court may issue a certificate of appealability “for any issue with respect to which petitioner makes a “substantial showing of the denial of a constitutional right.” Jennings v. Woodford,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

‘O’ JS-6

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| Case No. | 2:16-cv-03872-CAS 2:99-cr-00257-CAS - 4 | Date | December 27, 2016 |
| Title | ANTONIO BLACKSTONE v. UNITED STATES OF AMERICA | | |

290 F.3d 1006, 1010 (quoting 28 U.S.C. § 2253(c)(2)). The substantial showing standard is “relatively low.” Jennings, 290 F.3d at 1010. Appeal is permitted where petitioner can “demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.” Id. (quoting Barefoot v. Estelle, 463 U.S. 880, 893(1983)) (quotation marks omitted).

Although the Court’s decision here is firmly grounded in and supported by the facts of the case and the existing precedent, the Court acknowledges that the legal landscape is still developing in the wake of Johnson. As noted above, courts disagree as to whether robbery and voluntary manslaughter constitute crimes of violence under § 4B1.2. See supra n.7. Having carefully reviewed Blackstone’s arguments, the Court **GRANTS** a certificate of appealability on the issue of whether robbery and voluntary manslaughter are crimes of violence under § 4B1.2.

V. CONCLUSION

Accordingly, the Court **DENIES** Blackstone's motion to vacate, set aside, or correct his sentence, but **GRANTS** a certificate of appealability on the issue of whether robbery and voluntary manslaughter constitute crimes of violence under § 4B1.2

IT IS SO ORDERED.

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTONIO DEAN BLACKSTONE,
AKA Lil Sule,
Defendant-Appellant.

No. 17-55023
D.C. Nos.
2:16-cv-03872-CAS
2:99-cr-00257-CAS-4

OPINION

Appeal from the United States District Court
for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted April 11, 2018
Pasadena, California

Filed September 12, 2018

Before: Mary M. Schroeder, Richard R. Clifton,
and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Clifton

SUMMARY*

28 U.S.C. § 2255

The panel affirmed the district court's denial of Antonio Dean Blackstone's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, which was imposed in 2000 under the then-mandatory Sentencing Guidelines, based in part on the court's conclusion that he had previously been convicted of crimes of violence.

Blackstone argued that his sentence must be vacated because, after *Johnson v. United States*, 135 S. Ct. 2551 (2015), the relevant Sentencing Guidelines provision, U.S.S.G. § 4B1.2, is unconstitutionally vague and, as a result, his prior California convictions are no longer treated as crimes of violence.

The panel held that Blackstone's § 2255 motion is untimely under 28 U.S.C. § 2255(f)(3), which authorizes filing within one year of "the date on which the right asserted was initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The panel held that the Supreme Court has left open the question of *Johnson*'s application to the mandatory Guidelines, and thus has not yet recognized the right Blackstone asserts. The panel wrote that if the Supreme Court extends *Johnson* to a sentence imposed at a time when the Sentencing Guidelines were mandatory, then Blackstone may be able to bring a timely § 2255 motion, but as of now, his motion is untimely.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel applied the same reasoning to Blackstone’s uncertified argument that Hobbs Act robbery is not a “crime of violence” for purposes of 18 U.S.C. § 924(c), writing that the Supreme Court has not recognized that § 924(c)’s residual clause is void for vagueness. The panel did not reach the merits. Noting that the Seventh Circuit would conclude that a § 2255 motion based on *Johnson* would be timely – a conclusion with which the panel disagrees but does not consider unreasonable – the panel granted Blackstone’s request to expand the certificate of appealability to include the § 924(c) issue, but denied the challenge as untimely.

COUNSEL

Alyssa Bell (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

L. Ashley Aull (argued); Bryan Y. Yang, Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; Sandra R. Brown, United States Attorney; United States Attorney’s Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

CLIFTON, Circuit Judge:

Antonio Dean Blackstone appeals the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, the version of habeas corpus review that applies to federal sentences. In May 2000, Blackstone was sentenced to 290 months of incarceration under the then-mandatory Sentencing Guidelines, based in part on the court's conclusion that he had previously been convicted of crimes of violence. Blackstone argues that his sentence must be vacated because, after *Johnson v. United States*, 135 S. Ct. 2551 (2015), the relevant Sentencing Guideline provision, U.S.S.G. § 4B1.2, is unconstitutionally vague and, as a result, his prior California convictions are no longer treated as crimes of violence under the federal sentencing laws.

Normally, a § 2255 motion must be filed within a year of the date the conviction became final, a period that expired years ago for Blackstone. *See* 28 U.S.C. § 2255(f)(1). The statute also authorizes filing within one year 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." *Id.* § 2255(f)(3). Blackstone argues that the Supreme Court recognized a new right in *Johnson*, a right that was made retroactively applicable in *Welch v. United States*, 136 S. Ct. 1257 (2016). We conclude, however, that the Supreme Court has not yet recognized the right asserted by Blackstone. The Supreme Court has not held that the mandatory Sentencing Guidelines are subject to this vagueness challenge. As a result, Blackstone's current

motion is not timely under the statute. In reaching that conclusion, we agree with similar rulings by three other circuit courts that have considered this issue. We deny a similar challenge by Blackstone to a conviction and sentence under 18 U.S.C. § 924(c) for use of a firearm during a crime of violence because the Supreme Court has not recognized that right, either. We affirm the denial of Blackstone's motion.

I. Background

On August 19, 1999, a jury found Antonio Dean Blackstone guilty of multiple offenses: conspiring to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951; committing Hobbs Act robbery; and using and carrying a firearm during a "crime of violence," in violation of 18 U.S.C. § 924(c). On May 8, 2000, the district court sentenced Blackstone to a total of 290 months of incarceration. That total consisted of two parts: 230 months for the two Hobbs Act convictions (specifically, two sentences each of 230 months to be served concurrently), and sixty months for the 18 U.S.C. § 924(c) conviction, to be served consecutively to the Hobbs Act sentences. When Blackstone was sentenced, the Sentencing Guidelines were mandatory, not advisory. *See United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that prior mandatory application of the Sentencing Guidelines had violated the Sixth Amendment and that the Guidelines were "effectively advisory" going forward).

In calculating the sentence, the district court concluded that Blackstone qualified as a career offender under U.S.S.G. § 4B1.1, also known as the career offender Guideline, because he had previously been convicted of two prior felony

crimes of violence: second-degree robbery, in violation of California Penal Code § 211; and voluntary manslaughter, in violation of California Penal Code § 192(a). As a result, Blackstone's Guideline range for the two Hobbs Act convictions increased from 70 to 87 months to 210 to 240 months. The district court imposed a sentence of 230 months for those counts. The firearms conviction carried a mandatory consecutive sentence of 60 months, 18 U.S.C. § 924(c)(1), bringing the total to 290 months.

Blackstone appealed his sentence, but this court affirmed. *United States v. Gaines*, 8 F. App'x 635 (9th Cir. 2001). Blackstone's petition for a writ of certiorari was denied. *Blackstone v. United States*, 534 U.S. 910 (2001). Thereafter, Blackstone filed a 28 U.S.C. § 2255 motion and a 28 U.S.C. § 2241 petition, both of which were denied and neither of which raised the issues presented in this appeal.

Within one year after the Supreme Court issued its opinion in *Johnson*, Blackstone filed an application with this court for authorization to file a second or successive motion to vacate under § 2255. That application was granted, and Blackstone filed his motion to vacate with the district court.

Blackstone's motion presented two primary arguments. For one, he argued that *Johnson* also applies to the mandatory Sentencing Guidelines, in particular to the residual clause of the definition of "crime of violence" within the career offender enhancement provision, U.S.S.G. § 4B1.2. Because his prior California convictions only qualified as crimes of violence based on the residual clause, he contended, his sentence for the Hobbs Act robbery convictions should be vacated and a new sentence imposed. In addition, he argued that the residual clause in 18 U.S.C. § 924(c) is void for

vagueness following *Johnson*, so his conviction and consecutive sentence for use of a firearm in connection with a crime of violence should be vacated.

The district court concluded that Blackstone's motion was timely because *Johnson* applied retroactively on collateral review to the Sentencing Guidelines and to the firearms statute, 18 U.S.C. § 924(c). But the district court denied Blackstone's motion on the merits. It held that, even after *Johnson*, Blackstone's prior California convictions for robbery and voluntary manslaughter are still crimes of violence under U.S.S.G. § 4B1.2. The district court granted a certificate of appealability on that issue. The district court held that Blackstone's current Hobbs Act robbery convictions are for crimes of violence under 18 U.S.C. § 924(c) and did not grant a certificate of appealability for that issue.

II. The Timeliness of the Motion

We review the denial of Blackstone's motion de novo. See *United States v. Geozos*, 870 F.3d 890, 894 (9th Cir. 2017). We will take up Blackstone's two challenges separately.

A. The Hobbs Act Robbery Sentences

In addition to disputing Blackstone's arguments on the merits, the Government continues to argue that Blackstone's § 2255 motion is untimely. It contends that the Supreme Court's decisions in *Johnson* and *Welch* have not authorized a motion by Blackstone at this point because those decisions pertained to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), and that neither addressed whether

Johnson applies to other clauses providing for enhanced sentences based on convictions for crimes of violence.

Under the statute of limitations applicable to a § 2255 motion challenging a federal conviction and sentence, 28 U.S.C. § 2255(f), a defendant has one year to file such a motion, measured from the latest of four possible dates. Two of those dates are relevant here. One is “the date on which the judgment of conviction becomes final.” *Id.* § 2255(f)(1). That was in 2001 for Blackstone, so the current motion is too late under that measure. The other is “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.” *Id.* § 2255(f)(3). In other words, a right newly recognized by the Supreme Court may open the door to filing a § 2255 motion later in time. The question presented in this case is whether *Johnson* and *Welch* have opened that door. We conclude that they have not.

1. *Johnson* and Subsequent Supreme Court Decisions

In *Johnson*, the Supreme Court held that part of the definition of “violent felony” in the ACCA is void for vagueness. 135 S. Ct. at 2557. The ACCA provided for a sentencing enhancement if a defendant had three previous convictions “for a violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e)(1). The statute defined “violent

felony” in multiple ways.¹ The problem identified in *Johnson* concerned the last portion of the definition, commonly referred to as the “residual clause”: “or otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B)(ii).

The Supreme Court held that the ACCA’s residual clause is unconstitutionally vague because it left “grave uncertainty” about both “how to estimate the risk posed by a crime” and “how much risk it takes for a crime to qualify as a violent felony.” *Johnson*, 135 S. Ct. at 2557–58; *see also id.* at 2556 (“Our cases establish that the Government violates [the Fifth Amendment] by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”). *Johnson* did not invalidate the other portions of the definition. In *Welch*, the Court held that *Johnson* could be applied retroactively to cases on collateral review. 136 S. Ct. at 1265.

¹ “Violent felony” is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

The Supreme Court has considered the application of its *Johnson* holding in other contexts. Last year it held that *Johnson* does not apply to sentences imposed under the advisory Sentencing Guidelines. *Beckles v. United States*, 137 S. Ct. 886, 890 (2017). The Court concluded that, because the Guidelines “merely guide the exercise of a court’s discretion in choosing an appropriate sentence within the statutory range,” they are not subject to vagueness challenges. *Id.* at 892.

Earlier this year, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court considered whether the reasoning of *Johnson* applies to the Immigration and Nationality Act (INA), which defines the term “crime of violence” by reference to 18 U.S.C. § 16 and in a manner similar to the ACCA. 138 S. Ct. at 1210–11. Affirming a decision by this court, *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), the Court concluded that 18 U.S.C. § 16(b) is unconstitutionally vague because it creates “more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Dimaya*, 138 S. Ct. at 1216 (internal quotation marks omitted).

2. Timeliness of Blackstone’s Motion

Blackstone argues that *Johnson* announced a new rule that is retroactive on collateral review, and that he therefore filed a timely motion.² Although they may suggest what the

² In his Reply Brief, Blackstone argues that the Government waived its timeliness argument by not raising it with the district court. The Government has consistently argued that Blackstone’s motion is time-barred. The Government’s contention that *Johnson* did not announce a new rule that applies to the instant case is an “alternative argument to support what has been [its] consistent claim from the beginning.” *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004).

answer might be, the Supreme Court's recent cases did not recognize the right needed to make Blackstone's motion timely.

Neither *Johnson* nor *Welch* mentioned the mandatory or advisory Sentencing Guidelines. When the Court did consider the application of the *Johnson* rule to the Sentencing Guidelines, it held that the rule did not apply to sentences imposed while the Guidelines were advisory. That may permit an inference that the Court might reach a different result regarding a sentence imposed while the Guidelines were mandatory, such as Blackstone's, but that inference has not been recognized by the Court. To the contrary, a concurring opinion in *Beckles* explicitly described that question as an issue that remains open. *See Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring in the judgment) ("The Court's adherence to the formalistic distinction between mandatory and advisory rules at least leaves open the question whether defendants sentenced to terms of imprisonment before [Booker] . . . may mount vagueness attacks on their sentences. That question is not presented by this case and I, like the majority, take no position on its appropriate resolution." (citations omitted)). The *Beckles* majority expressed no disagreement with that view.

"As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments." *Id.* That the Government's argument to us might have been expressed differently, based in large part on subsequent caselaw, does not alter the fact that the Government has argued throughout that Blackstone's motion is untimely. In the cases that Blackstone cites, a party failed to raise a statute of limitations defense or conceded timeliness. *See, e.g., Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[W]e decline to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense."). That is not true here.

The statute of limitations at issue here was part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996). The Supreme Court has repeatedly admonished our court not to advance on its own in determining what rights have been recognized by the Supreme Court under AEDPA. *See, e.g., Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (“We have before cautioned the lower courts—and the Ninth Circuit in particular—against framing our precedents at such a high level of generality.” (internal quotation marks omitted)); *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (“By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into ‘clearly established Federal law, as determined by the Supreme Court.’” (quoting 28 U.S.C. § 2254(d)(1))). We are regularly called upon to apply and extend Supreme Court holdings to different contexts, of course, but AEDPA expressly limits our ability to do that here.

It is not always obvious whether and how the Supreme Court will extend its holdings to different contexts. Our court had previously inferred that the logic of *Johnson* would extend to the Sentencing Guidelines and so held in *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) (per curiam), but the Supreme Court disagreed in *Beckles* and subsequently vacated our decision, 138 S. Ct. 1976 (2018) (mem.). In *Dimaya*, the Court affirmed our court’s application of *Johnson* to the residual clause in 18 U.S.C. § 16(b), but it took a lengthy discussion to reach that conclusion, and four justices disagreed. In those cases, our court was not limited by AEDPA from reaching the issue of how far to extend *Johnson*, but in this case we are. We conclude that Blackstone’s motion is not timely because the

Supreme Court has not yet recognized the right that Blackstone seeks to assert.

Three other circuits have agreed with our conclusion. The Sixth Circuit explained that *Beckles* concerned only *Johnson*'s application to the advisory Sentencing Guidelines, and that its application to the mandatory Guidelines "is an open question." *Raybon v. United States*, 867 F.3d 625, 629 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018) (mem.). "Because it is an open question, it is *not* a 'right' that 'has been newly recognized by the Supreme Court' let alone one that was 'made retroactively applicable to cases on collateral review.'" *Id.* at 630 (quoting 28 U.S.C. § 2255(f)(3)).

The Fourth Circuit took a similar approach, concluding that, "if the existence of a right remains an open question as a matter of Supreme Court precedent, then the Supreme Court has not 'recognized' that right." *United States v. Brown*, 868 F.3d 297, 301 (4th Cir. 2017), *petition for cert. filed* (U.S. June 8, 2018) (No. 17-9276).

Most recently, the Tenth Circuit opined that "it is apparent that [the movant] has not raised a true *Johnson* claim because he was not sentenced under any clause of the ACCA." *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir. 2018), *petition for cert. filed* (U.S. May 4, 2018) (No. 17-8775). The Tenth Circuit reasoned that to entertain an argument that has not been directly recognized by the Supreme Court "would undermine Congress's intent in passing AEDPA and the interests of comity and finality underlying federal habeas review." *Id.* (internal quotation marks omitted).

Only one circuit that has considered this matter has held differently. In *Cross v. United States*, the Seventh Circuit rejected the reasoning of the Fourth and Sixth Circuits (it did not consider the Tenth Circuit’s holding in *Greer*) and held instead that their approach “improperly reads a merits analysis into the limitations period.” 892 F.3d 288, 293 (7th Cir. 2018). According to the Seventh Circuit, 28 U.S.C. § 2255(f)(3) “does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized.” *Id.* at 294. *Cross* states that this is the only way to construe the statute without reading “asserted” out of it. *Id.*; *see also* 28 U.S.C. § 2255(f)(3).

We disagree with the interpretation of the Seventh Circuit. The right that a movant asserts must be “initially recognized by the Supreme Court.” *See* 28 U.S.C. § 2255(f)(3). The Seventh Circuit explained that, “[u]nder *Johnson*, a person has a right not to have his sentence *dictated* by the unconstitutionally vague language of the mandatory residual clause.” 892 F.3d at 294. But *Johnson* did not recognize a right expressed in such broad terms, and in concluding otherwise the Seventh Circuit failed to consider the intent and purpose of AEDPA. Particularly in light of the statement in Justice Sotomayor’s concurring opinion in *Beckles* that the question remains open before the Court, it is not for us to declare anything to the contrary.³

³ Blackstone argues that, in *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017), the First Circuit also held that *Johnson* announced a new rule that applies retroactively on collateral review to the mandatory career offender Guideline. The Seventh Circuit in *Cross* also cited *Moore* to that effect. *See Cross*, 892 F.3d at 293. But *Moore* considered only the certification required before a second or successive motion can be filed in district court pursuant to 28 U.S.C. § 2255(h)(2). 871 F.3d at 74. The

In sum, *Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review. If the Court extends *Johnson* to a sentence imposed at a time when the Sentencing Guidelines were mandatory, then Blackstone may be able to bring a timely motion under § 2255. As of now, however, Blackstone’s motion is untimely.

B. The Firearms Conviction Under 18 U.S.C. § 924(c)

Before the district court, Blackstone argued that he is actually innocent of his 18 U.S.C. § 924(c) conviction for using a firearm during a crime of violence because, after *Johnson*, Hobbs Act robbery is not a “crime of violence” under that statute. 18 U.S.C. § 924(c)(1)(A). That statute requires the imposition of an additional consecutive sentence on a defendant convicted of a “crime of violence” while using or carrying a firearm. “Crime of violence” is defined in two ways, the latter of which is commonly referred to as the “residual clause”: “that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the

Supreme Court has explained considering such an application does not require “the courts of appeals . . . to engage in [a] difficult legal analysis,” so it is not clear to us that the First Circuit has reached a definitive conclusion on the question. *See Tyler v. Cain*, 533 U.S. 656, 664 (2001). The fact that our court previously granted Blackstone permission to file a second or successive motion does not preclude our consideration of the issue on the merits. To the extent that *Moore* did state a conclusion by the First Circuit, we disagree for the reasons already stated.

offense.”⁴ *Id.* § 924(c)(3); *see also United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018) (per curiam), *petition for cert. filed* (U.S. June 28, 2018) (No. 18-5022). Blackstone’s sentence was increased by an additional sixty months as a result of its application. As noted above, the district court rejected Blackstone’s argument on the merits, and it did not grant a certificate of appealability on that issue.

Blackstone has raised this issue in his opening brief to this court, as permitted under our rules. *See* 9th Cir. R. 22-1(e). We treat Blackstone’s discussion of an uncertified issue as a request to expand the certificate of appealability issued by the district court. *Solis v. Garcia*, 219 F.3d 922, 926 (9th Cir. 2000). We may only consider the issue “if the applicant made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

We held above that *Johnson* did not announce a new rule that is applicable to the mandatory Sentencing Guidelines. The same reasoning applies to Blackstone’s uncertified argument that Hobbs Act robbery is not a “crime of violence” for purposes of 18 U.S.C. § 924(c). The Supreme Court has not recognized that § 924(c)’s residual clause is void for vagueness in violation of the Fifth Amendment. Blackstone’s uncertified challenge is time-barred.

⁴ “Crime of violence” is defined in 18 U.S.C. § 924(c)(3) as follows:

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

What that means for the request to expand the certificate of appealability to reach the § 924(c) issue presents an interesting quandary. The district court denied the certificate based on its evaluation of the merits of the argument, concluding that there was not a colorable argument that Hobbs Act robbery did not constitute a crime of violence. We have not reached the merits, rejecting Blackstone's application based on our conclusion that his application is untimely at this point. "Where a plain procedural bar is present . . . a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "In such a circumstance, no appeal would be warranted." *Id.* But it appears that the Seventh Circuit would conclude that an application would be timely based on *Johnson*. *See Cross*, 892 F.3d at 294.

Although we disagree, we would not describe that court's conclusion as unreasonable. Because we have not reached the merits, we are not in a position to deny the application on the basis relied upon by the district court, even though it might well be correct that there is not a question debatable among reasonable jurists as to whether Hobbs Act robbery is a crime of violence under § 924(c). To err on the side of caution, we grant Blackstone's request for a certificate of appealability on this issue, but deny that challenge as untimely.

III. Conclusion

The district court's denial of Blackstone's § 2255 motion is affirmed. The Supreme Court may hold in the future that *Johnson* extends to sentences imposed when the Sentencing

Guidelines were mandatory or pursuant to 18 U.S.C. § 924(c), but until then Blackstone's motion is untimely.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 17 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO DEAN BLACKSTONE,
AKA Lil Sule,

Defendant-Appellant.

No. 17-55023

D.C. Nos. 2:16-cv-03872-CAS
2:99-cr-00257-CAS-4
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER, CLIFTON, and M. SMITH, Circuit Judges.

The panel has unanimously voted to deny Appellant's petition for rehearing.

Judge M. Smith has voted to deny the petition for rehearing en banc, and Judge Schroeder and Judge Clifton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

FILED

FEB 21 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

ANTONIO DEAN BLACKSTONE,
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Defendant-Appellant.

No. 17-55023

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2:99-cr-00257-CAS-4
Central District of California,
Los Angeles

ORDER

Before: SCHROEDER, CLIFTON, and M. SMITH, Circuit Judges.

Appellant's Motion to Stay Mandate Pending Filing of a Petition for Writ of Certiorari in the Supreme Court (Docket Entry No. 61) is GRANTED. In the event that a petition for writ of certiorari is timely filed, "the stay shall continue until final disposition by the Supreme Court." Federal Rule of Appellate Procedure 41(d)(2)(B).