

Appendix

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 26 2019

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

PAUL MELVIN WATSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 17-56664

D.C. Nos. 2:16-cv-09675-CBM
2:88-cr-00866-CBM-2

Central District of California,
Los Angeles

ORDER

Before: CANBY, GRABER, and McKEOWN, Circuit Judges.

Appellee's unopposed motion for leave to file motion for summary
affirmance one day late (Docket Entry No. 25) is granted.

Appellee's motion for summary affirmance (Docket Entry No. 26) is
granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating
standard); *see also United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*,
139 S. Ct. 203 (2018). *Compare* 18 U.S.C. § 924(c)(3)(A) with U.S.S.G.
§ 4B1.2(1) & cmt. n.1 (1988).

AFFIRMED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10 PAUL MELVIN WATSON,
11 Petitioner,
12 vs.
13 UNITED STATES OF AMERICA,
14 Respondent.

Case Nos.: CV 16-9675 CBM
CR 88-0866 CBM

ORDER

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16 The matter before the Court is Petitioner Paul Melvin Watson's Motion to
17 Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 ("§ 2255
18 Petition").

19 **I. FACTUAL AND PROCEDURAL BACKGROUND**

20 On January 12, 1989, Watson was convicted of five counts of armed bank
21 robbery, in violation of 18 U.S.C. § 2113(a), (d); one count of unarmed bank
22 robbery, in violation of 18 U.S.C. § 2113(a); and three counts of using or carrying
23 a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §
24 924(c)(1)(A)(i). (2:88-cr-00866-CBM, Judgment and Probation/Commitment
25 Order.) At the time of sentencing, Watson had three prior convictions for
26 unarmed bank robbery in violation of 18 U.S.C. § 2113(a). (Watson Criminal
27 Case, Presentence Report ("PSR") ¶ 93.) On October 23, 1989, this Court
28 sentenced Watson to a term of 442 months imprisonment and a five-year term of

1 supervised release.¹ (Watson Criminal Case, Judgment and
 2 Probation/Commitment Order.) Watson was sentenced as a career offender
 3 pursuant to the Federal Sentencing Guidelines (the “Guidelines”) U.S.S.G.
 4 § 4B1.1, based on his 1989 conviction for armed bank robbery, and his three prior
 5 convictions for unarmed bank robberies.

6 Watson appealed his sentence, challenging the consecutive running of his
 7 firearms sentence; the Ninth Circuit affirmed. *See United States v. Watson*, 951
 8 F.2d 365 (9th Cir. 1991). On April 3, 2000, Petitioner filed his first motion to
 9 vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255, which this
 10 Court denied. (Watson Criminal Case, Dkt. Nos. 42, 47.)

11 On June 26, 2015, in *Johnson v. United States*, the Supreme Court held that
 12 the residual clause of the Armed Career Criminal Act of 1984 (“ACCA”), 18
 13 U.S.C. § 924(e)(2)(B), used to determine a “violent felony” is unconstitutionally
 14 vague. 135 S. Ct. at 2557.

15 On June 26, 2016, Petitioner filed a § 2255 petition asserting his sentence as
 16 a career offender under § 4B1.1 of the Guidelines is unconstitutional based on
 17 *Johnson*.² (Dkt. No. 1.) The Government filed a Response to Watson’s § 2255
 18 Petition. (See Dkt. No. 9 in Civil Case No. 2:16-cv-9675.)

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22 ¹ On each of the six counts of bank robbery, Watson received a sentence of 262
 23 months, to run concurrently. Watson received a five year consecutive sentence on
 24 each of the three counts of using or carrying a firearm during and in relation to a
 25 crime of violence. 18 U.S.C. § 924(c)(1)(A)(i). Therefore, his total period of
 26 incarceration was 442 months, or thirty-six years and ten months. 18 U.S.C.
 27 § 924(c)(1)(A)(i).

28 ² Petitioner originally filed a request in the Ninth Circuit to file a second or
 successive § 2255 motion. On April 20, 2017, the Ninth Circuit granted
 Petitioner’s request and directed the Clerk to transfer the application and process it
 as a § 2255 motion filed on June 26, 2016, the date Petitioner delivered his
 application to prison authorities. (See Dkt. No. 2 in Civil Case No. 2:16-cv-9675.)

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a prisoner in federal custody may move the sentencing court to vacate, set aside, or correct his sentence if he claims the right to be released upon the ground that the sentence “was imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. § 2255(a).

III. DISCUSSION

A. Timeliness

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must file for relief within the limitation period imposed by Section 2255(f). Section 2255(f) lists events, the latest of which triggers a one-year limitation period for habeas petitions. This list includes “the date of final judgment of conviction” or “the date on which a new, and retroactive, right was recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(1)(3). Because the Court finds the Supreme Court in *Johnson* recognized a “new, and retroactive right” that applies to § 924(c) and the Guidelines retroactively, the date *Johnson* was decided triggered the one-year limitation period, and the last date to appeal would have been June 26, 2016 (*i.e.*, one year after *Johnson* was decided). Watson’s § 2255 Petition was timely filed on June 26, 2016.

B. Procedural Default

Petitioner procedurally defaulted his § 2255 Petition because he did not raise his habeas claims on direct appeal. “Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas 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) (quoting *Murray v. Carrier*, 477 U.S. 478, 485 (1986)); *see also United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003).

Cause can be demonstrated if a claim “is so novel that its legal basis [was]

1 not reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984). *Reed*
 2 held that when the Supreme Court overrules one of its precedents, and that rule “is
 3 given retroactive application, there will almost certainly have been no reasonable
 4 basis upon which an attorney previously could have” raised the same claim, and
 5 this failure to raise the claim “is sufficiently excusable to satisfy the cause
 6 requirement.” *Reed*, 468 U.S. 17. Here, *Johnson* overruled Supreme Court
 7 precedent and was given retroactive application under *Welch*. *Welch v. United*
 8 *States*, 136 S. Ct. 1257, 1268 (2016). Therefore, Petitioner demonstrates cause
 9 because his challenge to his sentence under *Johnson* is novel, and it would have
 10 been unreasonable for Petitioner to raise vagueness challenges to the Guidelines
 11 on direct review.

12 Petitioner demonstrates prejudice because application of an incorrect
 13 Guidelines range and sentencing affects a defendant’s substantial rights, even if
 14 the sentence imposed is within the correct Guidelines range. *Molina-Martinez v.*
 15 *United States*, 136 S. Ct. 1338, 1346-47 (2016); *see also United States v. Bonilla-*
 16 *Guizar*, 729 F.3d 1179, 1188 (9th Cir. 2013) (“We have held that when a
 17 sentencing judge incorrectly calculates the Guidelines range, potentially resulting
 18 in the imposition of a greater sentence, the error affects the defendant’s substantial
 19 rights and the fairness of the judicial proceedings.”).

20 Accordingly, Petitioner has shown cause and prejudice sufficient to
 21 overcome his failure to raise his claims on direct appeal.

22 **C. *Johnson* Invalidates the Residual Clause of the Mandatory Guidelines
 23 as Unconstitutionally Vague**

24 Under *Teague v. Lane*, a rule has retroactive effect in federal habeas
 25 proceedings if it is a substantive rule or a “watershed” procedural rule. 489 U.S.
 26 288, 312-13 (1989); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 728
 27 (2016), *as revised* (Jan. 27, 2016); *Reina-Rodriguez v. United States*, 655 F.3d
 28 1182, 1188 (9th Cir. 2011). The Supreme Court held in *Welch v. United States*

1 that *Johnson* introduced a new substantive rule that is retroactive on collateral
 2 review in the ACCA context. 136 S. Ct. at 1265. The Supreme Court did not
 3 consider whether *Johnson* applied retroactively in the Guidelines context. *Id.*

4 In *Reina-Rodriguez v. United States*, the Ninth Circuit held that its opinion
 5 in *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007), which limited the
 6 ACCA's definition of burglary, announced a new substantive rule. 655 F.3d 1182,
 7 1189 (9th Cir. 2011). As a result, the court found that it applied retroactively on
 8 collateral review in a case where the petitioner was challenging a Guidelines
 9 calculation, not a sentence under the ACCA. *Id.* In its retroactivity determination,
 10 the *Reina-Rodriguez* court did not distinguish between a sentence under the
 11 ACCA and one under the Guidelines; in both cases, the new rule was substantive
 12 because it "altered the conduct that substantively qualifies as burglary." *Id.* Like in
 13 *Reina-Rodriguez*, the rule announced in *Johnson* substantively changes the
 14 conduct by which federal courts may enhance the sentence of a defendant under
 15 the Guidelines and the ACCA. *See United States v. Santos*, 2016 WL 5661553, *7
 16 (C.D. Cal. Sept. 9, 2016) (Kronstadt, J.) (holding "the rule announced in *Johnson*
 17 is a substantive one that applies retroactively on collateral review to the
 18 Guidelines," reasoning the Ninth Circuit has recognized the Guidelines' residual
 19 clause is identical to the ACCA residual clause).³ Accordingly, this Court finds
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21 ³ *See also United States v. Kinman*, 2016 WL 6124456, at *5 (S.D. Cal. Oct. 20,
 22 2016) ("[C]onsistent with the Ninth Circuit's directive that retroactivity should not
 23 be applied on a piecemeal basis, the court finds that, based on *Reina-Rodriguez*
 24 and *Welch*, *Johnson* applies retroactively to the Guidelines."); *United States v.*
 25 *Jefferson*, 2016 WL 6496456, at *6 (N.D. Cal. Oct. 19, 2016) (finding *Johnson*
 26 applies retroactively to Guidelines, noting that under *Reina-Rodriguez* "a
 27 substantive change in rule does not become procedural merely because it is
 28 applied to the Guidelines rather than to the ACCA"); *United States v. Hoopes*, 195
 F. Supp. 1161, (D. Or. July 5, 2016) ("*Reina-Rodriguez* provides strong support
 for concluding that the rule [set forth in *Johnson*] is . . . substantive regardless of
 the context and thus, even in a Guidelines challenge, it is substantive and *Teague*'s
 retroactively [sic] bar does not apply.").

1 that *Johnson* applies retroactively on collateral review to the Guidelines.

2 The Guidelines provide enhanced sentences for adult offenders if the instant
 3 offense of conviction is a felony that is either a “crime of violence” or a
 4 “controlled substance offense,” and the defendant has at least two prior felony
 5 convictions of either a “crime of violence” or a “controlled substance offense.”
 6 U.S.S.G. § 4B1.1(a). At the time of Petitioner’s sentencing, the Guidelines
 7 defined a “crime of violence” as:

8 [A]ny crime punishable by imprisonment for a term exceeding one
 9 year . . . that—(1) has as an element the use, attempted use, or
 10 threatened use of physical force against the person of another; or (2)
 11 is burglary, arson, or extortion, involves use of explosives, *or*
otherwise involves conduct that presents a serious potential risk of
*physical injury to another.*⁴

12 U.S.S.G. § 4B1.2(a) (emphasis added). The Guideline’s definition of “crime of
 13 violence” prior to 2016 therefore included a residual clause with language
 14 identical to the ACCA’s residual clause which the Supreme Court found to be
 15 unconstitutionally vague in *Johnson*.

16 On March 6, 2017, the Supreme Court issued its decision in *Beckles v.*
 17 *United States*, 137 S. Ct. 886 (2017), holding that the *advisory* Sentencing
 18 Guidelines are not subject to a due process vagueness challenge like in *Johnson*.
 19 137 S. Ct. at 895. However, Petitioner was sentenced in 1989 under the then-
 20 mandatory Guidelines. *See Beckles*, 137 S. Ct. at 894 (“The Guidelines were
 21 initially binding on district courts . . . but this Court in *Booker* rendered them
 22 “effectively advisory” (citing *United States v. Booker*, 543 U.S. 220, 222 (2005)).
 23 Thus, *Beckles* does not foreclose Petitioner’s challenge to his status as a career
 24 offender under the Guidelines.

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 27 ⁴ The italicized language of the Guidelines set forth above is referred to as the
 28 residual clause of the Guidelines. The Guidelines were amended in August 2016
 to remove the residual clause under the Guidelines’ definition of “crime of
 violence.” *See* U.S.S.G. § 4B1.1.

1 The Ninth Circuit has stated that it “make[s] no distinction between ‘violent
 2 felony’ in ACCA and ‘crime of violence’ in § 4B1.2(A)(2) for purposes of
 3 interpreting the residual clauses.” *United States v. Willis*, 795 F.3d 986, 996 (9th
 4 Cir. 2015); *see also United States v. Coronado*, 603 F.3d 706, 709 (9th Cir. 2010)
 5 (noting the residual clauses of the ACCA and the Guidelines “should be
 6 interpreted similarly”); *United States v. Terrell*, 593 F.3d 1084, 1087 n.1 (noting
 7 “[t]he definition of ‘violent felony’ under the ACCA is nearly identical to the
 8 definition of ‘crime of violence’ under § 4B1.2 of the Guidelines, so we have
 9 interpreted these provision[s] in a ‘parallel manner’” and finding “the analysis [of
 10 whether prior felony convictions qualified as violent felonies under the ACCA]
 11 applies equally to § 4B1.2”) (quoting *United States v. Jennings*, 515 F.3d 980, 990
 12 n.11 (9th Cir. 2008)). Thus, consistent with these Ninth Circuit decisions, the
 13 Court finds the identically worded residual clause of § 4B1.2(a)(2) of the
 14 Guidelines to be unconstitutionally vague under *Johnson*.

15 **D. *Johnson* Invalidates the Residual Clause of 18 U.S.C. § 924(c)(3) for
 16 Firearm Enhancements**

17 This Court found Petitioner used or carried a firearm during and in relation
 18 to three armed bank robbery convictions, in violation of 18 U.S.C.
 19 § 924(c)(1)(A)(i). This statute provides 5-year sentence enhancements for any
 20 person who, “during and in relation to any crime of violence or drug trafficking
 21 crime . . . uses or carries a firearm, or who, in furtherance of any such crime,
 22 possesses a firearm.” 18 U.S.C. § 924(c)(1)(A). The statute defines “crime of
 23 violence” as a felony that: “(A) has as an element the use, attempted use, or
 24 threatened use of physical force against the person or property of another [force
 25 clause], or (B) that by its nature, involves a substantial risk that physical force
 26 against the person or property of another may be used in the course of committing
 27 the offense [residual clause].” *Id.* § 924(c)(3). The Court did not specify whether
 28 armed bank robbery constituted a “crime of violence” under the force clause or the

1 residual clause of § 924(c)(3).

2 Although the Supreme Court has not ruled on whether the residual clause of
 3 § 924(c)(3) is unconstitutionally vague, Ninth Circuit precedent supports
 4 extending *Johnson*'s holding to § 924(c)(3). In *Dimaya v. Lynch*, 803 F.3d 1110
 5 (9th Cir. 2015), the Ninth Circuit held that the residual clause in the Immigration
 6 and Nationality Act, 18 U.S.C. § 16, which contains identical language to the §
 7 924(c)(3) residual clause, "suffers from the same indeterminacy as" the ACCA's
 8 residual clause at issue in *Johnson* and, as a result, "is also void for vagueness."
 9 *Id.* at 1111, 1117 ("Section 16(b) gives judges no more guidance than does the
 10 ACCA as to what constitutes a substantial enough risk of force to satisfy the
 11 statute.") Thus, *Johnson* renders § 924(c)(3)'s residual clause unconstitutionally
 12 void for vagueness. *See United States v. Bell*, 158 F. Supp. 3d 906, 922-23 (N.D.
 13 Cal. 2016) (Orrick, J.) (after [Johnson], Section 924(c)(3)'s residual clause
 14 "cannot stand" because, like the ACCA residual clause, it requires the application
 15 of the categorical approach and "the differences in the language used in the ACCA
 16 residual clause versus the Section 924(c)(3) residual clause are not material
 17 insofar as the reasoning in *Johnson* [] is concerned").

18 Thus, the Court finds the residual clause of § 924(c)(3) to be
 19 unconstitutionally vague under *Johnson*.

20 **E. Petitioner's Sentence Was Not Imposed in Violation of the Constitution
 21 or Laws of the United States**

22 Petitioner claims that his instant armed bank robbery convictions are no
 23 longer "crimes of violence" within the meaning of § 924(c)'s firearm
 24 enhancement and § 4B1.2 of the Guidelines after the Supreme Court's decision in
 25 *Johnson*. Thus, Petitioner contends that his sentence was unconstitutionally
 26 enhanced under the residual clause of § 4B1.2 of the Guidelines and the residual
 27 clause of § 924(c)(3).

28 Petitioner's instant offenses and prior convictions were for armed bank

1 robbery pursuant to 18 U.S.C. § 2113(a), (d) and unarmed bank robbery pursuant
 2 to 18 U.S.C. § 2113(a). Armed bank robbery, and the lesser-included offense of
 3 unarmed bank robbery, qualify as crimes of violence because one of the elements
 4 of § 2113(a) is a taking “by force and violence, or by *intimidation*.” 18 U.S.C. §
 5 2113(a) (emphasis added); *United States v. Coleman*, 208 F.3d 786, 793 (9th Cir.
 6 2000) (“Armed bank robbery under 18 U.S.C. § 2113(d) is an aggravated form of
 7 unarmed bank robbery, under § 2113(a).”). The Ninth Circuit has defined
 8 intimidation under § 2113 to mean “willfully to take, or attempt to take, in such a
 9 way that would put an ordinary, reasonable person in fear of bodily harm.” *United*
 10 *States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). This comports with the
 11 requirement of a “threatened use of physical force” under the force clause of both
 12 § 924(c)(3) and U.S.S.G. § 4B1.1(a). *Selfa*, 918 F.2d at 751; *United States v.*
 13 *Steppes*, 651 F. App’x 697, 698 (9th Cir. 2016) (unpublished); *United States v.*
 14 *Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (“[R]obbery by intimidation under
 15 § 2113(a) and robbery by assault by a dangerous weapon or device under
 16 § 2113(d) have as an element the use, attempted use, or threatened use of physical
 17 force against the person or property of another and thus qualify as crimes of
 18 violence under [18 U.S.C.] § 924(c).”).

19 Petitioner was lawfully sentenced as a career offender and his sentence was
 20 lawfully enhanced under § 924(c)(3) because after *Johnson*, the instant offenses
 21 and his prior convictions remain “crimes of violence” under the applicable force
 22 clauses. U.S.S.G. § 4B1.1(a); 18 U.S.C. § 924(c)(3).

23 IV. CONCLUSION

24 Accordingly, the Court **DENIES** Petitioner’s Motion to Vacate, Set Aside,
 25 or Correct Sentence pursuant to 28 U.S.C. § 2255, and **GRANTS IN PART** the
 26 Government’s Motion to Dismiss.

27 This Court may issue a certificate of appealability “only if the applicant has
 28 made a substantial showing of the denial of a constitutional right.” 28 U.S.C.

1 § 2253(c)(2). Such a showing requires the petitioner to “demonstrate that the
2 issues are debatable among jurists of reason; that a court could resolve the issues
3 [in a different manner]; or that the questions are adequate to deserve
4 encouragement to proceed further.” *Lambright v. Stewart*, 220 F.3d 1022, 1025
5 (9th Cir. 2000) (alterations in original, emphasis omitted).

6 Although the Court’s decision here is supported by the facts of the case and
7 the existing precedent, the Court acknowledges that the legal landscape is still
8 developing in the wake of *Johnson*. Accordingly, the Court **GRANTS** a certificate
9 of appealability on the issue of whether the residual clause of § 4B1.2 of the
10 Guidelines is unconstitutionally vague under *Johnson* and whether Petitioner’s
11 convictions constitute “crimes of violence.”

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IT IS SO ORDERED.

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DATED: October 30, 2017.

Consuelo B. Marshall
CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

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