

A P P E N D I X

Appendices

Opinion of the Eleventh Circuit Court of Appeals
Mitchell v. United States, 767 F. App'x 772 (11th Cir. 2019).....A

Order Dismissing Motion to Vacate
Mitchell v. United States, 8:16-cv-1677-T-26TBM.....B

A

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This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Carlos Lamar MITCHELL, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 16-15696

|
Non-Argument Calendar

|
(April 2, 2019)

Synopsis

Background: Movant convicted of brandishing firearm during and in relation to crime of violence, namely bank robbery, filed motion to vacate, arguing that bank robbery did not qualify as crime of violence. The United States District Court for the Middle District of Florida dismissed motion. Movant appealed.

[Holding:] The Court of Appeals held that bank robbery qualified as crime of violence.

Affirmed.

West Headnotes (1)

[1] Weapons

Crimes of violence

Bank robbery under federal law qualifies as a crime of violence under the elements clause of the statute criminalizing brandishing a firearm during and in relation to a crime of violence; this is because the bank robbery statute—which requires the use of force and violence or intimidation—necessarily requires the use,

attempted use, or threatened use of physical force. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

Cases that cite this headnote

West Codenotes

Limitation Recognized

18 U.S.C.A. § 924(c)(3)(B)

Attorneys and Law Firms

*773 Conrad Benjamin Kahn, Rosemary Cakmis, Donna Lee Elm, Federal Public Defender's Office, Orlando, FL, for Petitioner-Appellant

Michelle Thresher Taylor, James A. Muench, U.S. Attorney's Office, Tampa, FL, for Respondent-Appellee

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket Nos. 8:16-cv-01677-RAL-TBM, 8:10-cr-00230-RAL-TBM-1

Before TJOFAT, JORDAN, and GRANT, Circuit Judges.

Opinion

PER CURIAM:

Carlos Lamar Mitchell, a federal prisoner serving a 189-month sentence for bank robbery, 18 U.S.C. § 2113(a), and brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii), appeals the district court's dismissal of his motion to vacate his sentence based on *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Finding no error, we affirm.

In June 2015, the Supreme Court issued its opinion in *Johnson*, holding that the definition of “violent felony” in the so-called “residual clause” of the Armed Career Criminal Act was unconstitutionally vague. The following year, Mitchell filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that the definition of “crime of violence” in § 924(c)(3)(B)'s residual clause was unconstitutional under *Johnson*, and that bank robbery did not otherwise qualify as a crime of violence for purposes of § 924(c).

The district court found that *Johnson* did not invalidate Mitchell's conviction under § 924(c) and dismissed his motion to vacate. We granted Mitchell a certificate of appealability on the following issue: "Whether the district court erred in concluding that Mitchell's conviction under 18 U.S.C. § 924(c), predicated on a bank robbery conviction under 18 U.S.C. § 2113(a), was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)." In reviewing the district court's dismissal of a motion to vacate under § 2255, we review the court's legal conclusions *de novo* and its findings of fact for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014).

For purposes of § 924(c), a "crime of violence" is defined as a felony offense that either "(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." 18 U.S.C. § 924(c)(3). This Court has referred to § 924(c)(3)(A) as the "elements clause," while § 924(c)(3)(B) is referred to as the "residual clause." *774 *Ovalles v. United States*, 905 F.3d 1231, 1234 (11th Cir. 2018) (*en banc*).

In *Ovalles*, we held that § 924(c)'s residual clause is not unconstitutionally vague under *Johnson* as long as it is interpreted to require "a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." 905 F.3d at 1234. *Ovalles* forecloses Mitchell's argument on appeal. See *In re Garrett*, 908 F.3d 686, 689 (11th Cir. 2018) (holding, in the context of a second or successive § 2255 motion, that *Johnson* and its progeny do not "support a vagueness-based challenge to the residual clause of section 924(c)").

In any event, even if *Johnson* did invalidate § 924(c)(3)'s residual clause, Mitchell's conviction still would be unaffected because his predicate offense of bank robbery also qualifies as a crime of violence under the elements clause, § 924(c)(3)(A). *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (holding, in denying an application to file a second or successive § 2255 motion, that § 2113(a) bank robbery qualifies as a crime of violence under § 924(c)(3)(A)). This is because § 2113(a)—which requires the use of force and violence or intimidation—necessarily requires the use, attempted use, or threatened use of physical force. *Id.* at 1238–39; cf. *Johnson*, 135 S.Ct. at 2563 (clarifying that the invalidation of the ACCA's residual clause did not call into question either the enumerated crimes clause or the elements clause).

Mitchell contends that *Sams* does not govern in his case because orders ruling on applications to file second or successive collateral attacks have no precedential value outside that context. This argument too is foreclosed by circuit precedent. In *United States v. St. Hubert*, we held that "law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, 'unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.'" 909 F.3d 335, 346 (11th Cir. 2018) (alteration in the original) (citation omitted).

The district court correctly concluded that *Johnson* provides no basis for invalidating Mitchell's conviction under 18 U.S.C. § 924(c)(1)(A). We therefore affirm.

AFFIRMED.

All Citations

767 Fed.Appx. 772

B

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CARLOS LAMAR MITCHELL,

Plaintiff,

v.

CASE NO. 8:16-cv-1677-T-26TBM

UNITED STATES OF AMERICA,

Defendant.

_____ /

ORDER

Plaintiff, proceeding through appointed counsel, has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255. The Court has undertaken a prompt examination of the motion as required by Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts. After doing so, the Court concludes that it plainly appears from the motion, as well as the record of the Plaintiff's prior criminal proceedings,¹ that he is not entitled to relief and that the motion must be dismissed. In view of that conclusion, the Court needs no response from the Defendant or to conduct an evidentiary hearing.

¹ See case number 8:10-cr-230.

A federal grand jury returned a two-count indictment against the Plaintiff.² In count one, the grand jury alleged that he committed bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2. In count two, the grand jury alleged that he brandished a firearm in relation to the bank robbery charged in count one in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(1)(A)(ii) and 2. The Plaintiff proceeded to trial before a jury, and the jury found him guilty as to both counts, with a specific factual finding that he brandished a firearm.³ The Court later sentenced him to a term of imprisonment of 105 months as to count one and a consecutive term of imprisonment of 84 months as to count two, to be followed by a term of supervised release of 36 months.⁴ Plaintiff did not appeal.

Plaintiff now seeks collateral relief under the auspices of § 2255 with respect to his consecutive term of imprisonment imposed in count 2, claiming that because his sentence as to that count was based on the residual clause of § 924(c)(3)(B), and because that clause is unconstitutionally vague, he has been denied due process. Plaintiff's claim for relief rests on the decision in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 1551, 192 L.Ed.2d 569 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague, a

² See id., docket 1.

³ See id., docket 41.

⁴ See id., dockets 48 and 49.

decision that was made retroactive on collateral review by the Supreme Court in Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, ___ L.Ed.2d ___ (2016).⁵

After careful consideration, the Court concludes that Johnson affords the Plaintiff no collateral relief with regard to the sentence imposed in count two. A panel of the Eleventh Circuit Court of Appeals recently undertook an examination in a direct appeal of whether Johnson invalidated § 924(c)(3)(B). See United States v. Fox, 2016 WL 3033067 (11th Cir. May 27, 2016) (unpublished). Although the opinion was not published and the issue was subject to plain error review, the Court finds its reasoning very persuasive. The Court in Fox, after an extensive analysis, first determined that “it is not clear or obvious that *Samuel Johnson* invalidated § 924(c)(3)(B). 2016 WL 3033067, at * 2. The Court then, after acknowledging that the Eleventh Circuit has yet to determine whether § 2113(a) is a crime of violence under § 924(c)(3)(A), nevertheless determined, after an extensive analysis of its own cases by analogy with regard to crimes of violence and three other circuit cases which concluded that § 2113(a) constitutes a crime of violence under § 924(c)(3)(A),⁶ held that “because Fox has not cited to, and an

⁵ Without the retroactive application of Johnson in Welch, Plaintiff’s motion would be clearly time-barred under the provisions of § 2255(f)(1). As the record in Plaintiff’s underlying criminal case reflects, he was sentenced on June 3, 2011, and he did not appeal. In this case, his counsel filed the motion on June 21, 2016.

⁶ See e.g., United States v. Lockley, 632 F.3d 1238, 1244-45 (11th Cir. 2011); United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998); United States v. Adkins, 937 F.2d 947, 950, n.2 (4th Cir. 1991).

independent review has not uncovered any precedent holding that bank robbery under § 2113(a) is *not* a qualifying offense under § 924(c)(3)(A), he cannot show plain error.” 2016 WL 3033067 at *3 (emphasis in original) (footnote omitted).

Underscoring this lack of authority holding that bank robbery is not a crime of violence under § 924(c)(3)(A) is the recent decision in Clark v. United States, 2016 WL 845271 (E.D. Wis. March 4, 2016). In rejecting as futile Clark’s attempt to amend his § 2255 motion to include a Johnson-based argument that he was entitled to relief because his bank robberies did not constitute crimes of violence under § 924(c), the Court concluded that “even if the Court were to reach the merits of Clark’s newly-asserted ground for relief, it would reject his position. Every decision the Court has found to have considered the issue has concluded that bank robbery and similar crimes constitute crimes of violence under the range of statutes that Johnson’s reasoning might affect.” 2016 WL 845271, at *25 (numerous citations omitted).

More to the point is the Eleventh Circuit’s recent order denying an application to file a second or successive motion to vacate in In re: Charles Hines, ___ F.3d ___, 2016 WL 3189822 (11th Cir. June 8, 2016). In that case, the Court held that even if the definition of a crime of violence as defined in § 924(c)(3)(B) was unconstitutionally vague in light of Johnson, the applicant’s conviction for bank robbery still would support an enhancement under § 924(c)(3)(A). 2016 WL 3189822, at 2-3.

ACCORDINGLY, for the reasons expressed, it is **ORDERED AND ADJUDGED** that the Plaintiff’s Motion to Vacate (Dkt. 1) is **dismissed**. The clerk is

directed to enter judgment in favor of the Defendant and to **CLOSE** this case. The Court defers determining whether a certificate of appealability should issue pending an appropriate application from Plaintiff's counsel.

DONE AND ORDERED at Tampa, Florida, on June 24, 2016.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record