INDEX TO THE APPENDIX

United States Court of Appeals
For the First Circuit

Nos. 16-2366
16-2486

JAMES C. KARAHALIOS, JR.,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: April 5, 2019

Petitioner appeals from the district court's denial of a 28 U.S.C. § 2255 motion featuring a challenge to one or more 18 U.S.C. § 924(c) convictions under Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), and related precedent. The court entered an order to show cause citing recent precedent from this court holding that various federal offenses, including potentially the offense(s) anchoring petitioner's § 924(c) conviction(s), categorically satisfy the force clause at § 924(c)(3)(A), rendering any challenge to the residual clause at § 924(c)(3)(B) irrelevant. Petitioner was directed to show cause why relief should not be denied in this case in light of the precedent cited. Petitioner has responded to that order to show cause, and we have considered carefully any arguments sufficiently developed in that response and any supplemental or amended response. We conclude, after review of those arguments and relevant portions of the record, that the district court's denial of § 2255 relief was not erroneous. See Parsley v. United States, 604 F.3d 667, 671 (1st Cir. 2010) (standard of review). To the extent petitioner requests denial of relief without prejudice in case the Supreme Court eventually deems the § 924(c)(3)(B) residual clause unconstitutionally vague, such a ruling would not be appropriate in light of the force-clause basis of this ruling.

Accordingly, any previously imposed stay is lifted, and any pending motion for appointment of counsel is denied. To the extent petitioner has filed an application for expanded

COA to encompass a claim that the Johnson II claim goes to jurisdiction and/or actual innocence, that request is denied as moot in light of the conclusion that the Johnson II claim fails on the merits. The judgment of the district court is affirmed. Any remaining pending motions are denied as moot.

By the Court:

Maria R. Hamilton, Clerk

cc:
Judith H. Mizner
James C. Karahalios Jr.
Seth R. Aframe
Bjorn R. Lange

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Derek Kucinski

v. Civil No. 16-cv-201-PB

United States of America

Anthony M. Shea

v. Civil No. 16-cv-235-PB

United States of America

Anthony Sawyer

v. Civil No. 16-cv-250-PB

United States of America

James C. Karahalios, Jr.

v. Civil No. 16-cv-254-PB

United States of America

Gerard Boulanger

v. Civil No. 16-cv-266-PB

United States of America

Arthur Durham

v. Civil No. 16-cv-274-PB

United States of America

Matthew Karahalios

v. Civil No. 16-cv-286-PB

United States of America

Opinion No. 2016 DNH 163

MEMORANDUM AND ORDER

Derek Kucinski and six other prisoners have filed 28 U.S.C. § 2255 motions challenging their convictions under 18 U.S.C. § 924(c) for using a firearm during and in relation to a "crime of violence."[1] A "crime of violence," as used in § 924(c), is a felony offense that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "force clause"), or "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" (the "residual clause"). 18 U.S.C. §

[1] Two other prisoners, Patrick Chasse, 15-cv-473-PB, and Sean King, 16-cv-283-PB, have also filed § 2255 motions challenging their convictions under § 924(c). I address Chasse's motion in a separate order because it is not barred by the statute of limitations. King has filed a second or successive motion with the First Circuit which has not yet been granted. I therefore do not address King's motion.

924(c)(3). The prisoners challenge their convictions by claiming that § 924(c)'s residual clause is unconstitutionally vague.

In this Memorandum and Order I address the government's contention that the prisoners' § 924(c) claims are barred by the statute of limitations that governs § 2255 motions.

I. BACKGROUND

Section 2255 motions are subject to a one-year statute of limitations. 28 U.S.C. § 2255(f). In most cases, the limitations period begins to run for § 2255 motions when a prisoner's conviction becomes final. § 2255(f)(1). If, however, a prisoner bases his motion on a new right that was announced by the Supreme Court after his conviction became final, the limitations period begins when "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." § 2255(f)(3).

The prisoners argue that their § 924(c) claims are timely under § 2255(f)(3) because their claims are based on a new right that the Supreme Court initially recognized in Johnson v. United States, 135 S.Ct. 2551, 2563 (2015), less than a year before

they filed their § 2255 motions. Johnson held that a similar residual clause used in defining a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(2)(B)(ii), is unconstitutionally vague. Id. The Court later determined in Welch v. United States, 136 S.Ct. 1257, 1268 (2016), that Johnson announced a new rule that applies retroactively to cases on collateral review. The prisoners argue that the reasoning that led the Court to invalidate the ACCA's residual clause in Johnson requires the same result when applied to their § 924(c) claims. See Doc. No. 14 at 10-14.[2] Thus, they contend that their § 2255 motions are timely under § 2255(f)(3) because they filed their motions within a year of the date that the Court announced the right initially recognized in Johnson.

In response, the government asserts that the new right announced in Johnson does not extend to § 924(c)'s residual clause. See Doc. No. 9 at 5 (arguing that "the Supreme Court's holding in Johnson does not address whether the residual clause of § 924(c) is void for vagueness"). Instead, the government argues that the right asserted by the prisoners falls outside

[2] Unless otherwise specified, docket citations refer to Case No. 16-cv-201-PB, that of petitioner Derek Kucinski. The parties have filed identical briefs in all the cases listed in the caption.

the scope of the new right announced in Johnson and, therefore, applying that right to a § 924(c) claim would itself require the recognition of a new right.

II. ANALYSIS

Neither the Supreme Court nor the First Circuit has explained how a court should determine when the Supreme Court has recognized a new right for purposes of § 2255(f)(3). I fill that gap by applying the analytical framework the Supreme Court uses to determine whether a judicial decision announces a new rule that can be applied retroactively to cases on collateral review.

The Supreme Court announced its current scheme for resolving retroactivity questions in a plurality opinion in Teague v. Lane, 489 U.S. 288 (1989). Teague's reasoning was later adopted by a majority of the Court and the Court refined its reasoning in several subsequent decisions. See, e.g., Sawyer v. Smith, 497 U.S. 227, 234 (1990); Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997); Chaidez v. United States, 133 S.Ct. 1103, 1107 (2013). Under Teague, a case announces a new rule for retroactivity purposes if "the result was not dictated by precedent existing at the time the defendant's conviction became final." Chaidez, 133 S.Ct. at

1107 (emphasis in original). And, as later cases explain, a "holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." Id. (quoting Lambrix, 520 U.S. at 527-28) (internal quotations omitted).

Other courts have concluded, and I agree, that Teague's analytic framework also applies in determining whether a new right has been recognized for purposes of § 2255(f)(3). See Headbird v. United States, 813 F.3d 1092, 1095 (8th Cir. Feb. 19, 2016); United States v. Taylor, No. 1:06-CR-430, 2016 WL 4718948, at *2-*9 (E.D. Va. Sept. 8, 2016); Smith v. United States, 13-cv-924-J-34PDB, 2016 WL 3194980, at *4 (M.D. Fl. June 9, 2016). Congress enacted § 2255(f)(3) in 1996, several years after Teague, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Taylor, 2016 WL 4718948, at *4. Thus, "[t]here can be no doubt that Congress was aware of the Teague framework when it enacted the AEDPA." Id. Indeed, several of AEDPA's provisions include language that directly tracks Teague. Id. at *4, n.10 (citing 28 U.S.C. § 2255(h)(2) and 28 U.S.C. § 2254(e)(2)(A)(i)). In particular, § 2255(f)(3) itself references the Teague framework by specifying that the recognition of a new right by the Supreme Court will not restart the statute of limitations unless the right has also been made "retroactively applicable to cases on collateral review." See

id. Thus, the text of both AEDPA as a whole, and § 2255(f)(3) in particular, strongly suggest that Congress intended courts to use Teague to determine whether the Supreme Court has recognized a new right for statute of limitations purposes.[3]

One might nevertheless argue that the Teague framework should not apply to the statute of limitations inquiry because Teague is used to determine whether a new "rule" has been recognized for retroactivity purposes, whereas § 2255(f)(3) and other sections of AEDPA refer to the announcement of a new "right" for statute of limitations purposes.[4] Compare 28 U.S.C. § 2255(f)(3), with Teague, 489 U.S. at 301, and 28 U.S.C. §§ 2254(e)(2)(A)(i), 2255(h)(2). I decline to follow this path.

---

[3] Although the parties do not offer any detailed analysis of this issue, the government agrees that Teague should be used to determine when a new right has been recognized pursuant to § 2255(f)(3). See Doc. No. 9 at 9. Indeed, Teague and its progeny provide the only existing analytic framework for deciding such issues. Cf. Headbird, 813 F.3d at 1095 (explaining that "it seems unlikely that Congress meant to trigger the development of a new body of law that distinguishes rights that are 'newly recognized' from rights that are recognized in [a] 'new rule' under established retroactivity jurisprudence").

[4] Neither side argues that the terms "right" and "rule" should be construed differently in this context. In fact, the parties used the terms interchangeably both in their briefs and at oral argument. See, e.g., Doc. Nos. 9 at 9 and 14 at 10. I nevertheless address the subject because it has been considered by other courts. See, e.g., Taylor, 2016 WL 4718948, at *3-*9.

If Congress had intended something other than the Teague framework to be used to determine when a new right has been recognized for statute of limitations purposes, a § 2255 claimant would be unable to benefit from § 2255(f)(3) when the Supreme Court announces a retroactive new rule unless the Court also determines that the new rule is based on a new right. Absent this additional determination, § 2255(f)(3) would be unavailable to collateral review claimants, and only claimants whose petitions are timely under § 2255(f)(1) could benefit from the new rule.

Welch can be used to illustrate the problem that results if a "right" is treated differently from "rule" in this context. See Taylor, 2016 WL 4718948 at *6-*7 (using their example). If we were to assume that Johnson announced a new rule for collateral review purposes but not a new right for statute of limitations purposes, the petitioner in Welch could not benefit from the Court's determination in his case that the new right announced in Johnson also applies on collateral review. This is because the petitioner could not rely on § 2255(f)(3), as the Supreme Court did not base its new rule on a new right, and the petitioner could not rely on § 2255(f)(1) because he waited more than a year after his conviction became final to file his petition. Id. (noting that the petitioner in Welch waited more

than a year after his conviction became final to file his § 2255 motion).

I cannot explain why Congress might have intended that a "rule" for retroactivity purposes should be treated differently from a "right" for statute of limitations purposes. New rules apply retroactively on collateral review only if they are either "substantive" rules or "watershed rules of civil procedure." Welch, 136 S.Ct. at 1264. Substantive rules include rules that "narrow the scope of a criminal statute by interpreting its terms" or that "place particular conduct or persons covered by the statute beyond the State's power to punish." Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). Watershed rules of criminal procedure "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." Welch, 136 S.Ct. at 1264 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990). When such rules are made retroactive to cases on collateral review, no good reason justifies the use of a statute of limitations to bar a collateral review claimant from obtaining relief on the basis of the new rule if the claimant has asserted his claim promptly after the new rule is announced. Accordingly, stronger textual support than the use of the term "right" rather than "rule" in § 2255(f)(3) is required to justify an interpretation of

§ 2255(f)(3) that would require such a result.[5]

Because both sides agree that Johnson announced a new retroactive rule, the question here is whether that new rule also encompasses the prisoners' contention that § 924(c)'s residual clause is unconstitutionally vague. Applying the Teague framework, I answer that question by asking whether all reasonable jurists would agree that the Court's reasoning in Johnson also dictates the conclusion that § 924(c)'s residual clause is unconstitutionally vague. Absent such agreement, the prisoners' claimed right must itself be treated as a new right that must await recognition by the Supreme Court before the statute of limitations can be restarted by § 2255(f)(3).

I am not persuaded that Johnson necessarily encompasses the prisoners' § 924(c) claims. Although strong arguments can be

---

[5] Sound policy reasons also support the use of the Teague framework to determine when a new right has been recognized for purposes of § 2255(f)(3). Although the prisoners here would benefit from a ruling that Johnson's new rule also encompasses their § 924(c) claims, other prisoners with similar claims would be barred from obtaining § 2255 relief unless they filed their claims within a year of either the date that their convictions became final or the date that Johnson was decided. Limiting the scope of newly announced rules to applications that reasonable jurists can agree on protects defendants who fail to act immediately to assert a novel application of a new rule because the statute of limitations with respect to such claims will not begin to run until they are clearly recognized by the Supreme Court.

made that the reasoning the Court used in Johnson to invalidate ACCA's residual clause requires the same result when applied to § 924(c), several courts, including at least three circuit courts and one district court, have concluded otherwise. See, e.g., United States v. Hill, No. 14-3872-CR, 2016 WL 4120667, at *8-*11 (2d Cir. Aug. 3, 2016); United States v. Prickett, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (per curium); United States v. Taylor, 814 F.3d 340, 378 (6th Cir. 2016); United States v. Moreno-Aguilar, 2016 WL 4089563, at *9 (D. Md. Aug. 2, 2016); see also United States v. Gonzalez-Longoria, No. 15-40041, 2016 WL 4169127, at *1 (5th Cir. Aug. 5, 2016) (en banc)(concluding that identical language in 18 U.S.C. § 16(b) is not unconstitutionally vague in light of Johnson). Now is not the time to determine whether these courts are correct. Instead, it is sufficient to resolve the statute of limitations issue to conclude, as I do, that a substantial number of capable jurists have reasonably determined after careful analysis that Johnson does not require the invalidation of § 924(c)'s residual clause. Because reasonable jurists can and do disagree on this issue, the prisoners must await a determination by the Supreme Court before they may proceed with their § 2255 motions.

III. CONCLUSION

For the reasons set forth in this Memorandum and Order, the prisoners listed in the case caption are not currently entitled to invoke § 2255(f)(3) in support of their challenges to § 924(c)'s residual clause. Because all of the prisoners filed their § 2255 motions more than a year after their convictions became final, their motions are currently barred by § 2255(f).

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

September 15, 2016

cc: Counsel of record in all cases

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

James C. Karahalios, Jr.

v. Civil No. 16-cv-254-PB

United States of America

O R D E R

The Rules Governing Section 2255 Proceedings require the court to rule on the issuance of a certificate of appealability when it issues a final order. The court will issue the certificate "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The issues addressed in this matter have not been resolved by the First Circuit. Reasonable jurists could find debatable whether Johnson v. United States, 135 S. Ct. 2251 (2015), recognized a new right that applies retroactively to cases on collateral review, and extends to petitioners challenging their 18 U.S.C. § 924(c) convictions, such that Karahalios's petition is timely under § 2255(f)(3). I grant Karahalios a certificate of appealability on this issue.

SO ORDERED.

/s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

September 15, 2016
cc: Bjorn Lange, Esq.
Seth Aframe, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

James C. Karahalios, Jr.

v.

Civil No. 16-cv-254-PB

United States of America

JUDGMENT

In accordance with the Orders by Judge Paul Barbadoro dated September 15, 2016, judgment is hereby entered.

By the Court,

Daniel J. Lynch
Clerk of Court

Date: September 16, 2016

cc: Bjorn R. Lange Esq.
Seth Aframe, Esq.

United States Court of Appeals
For the First Circuit

No. 16-1330

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM C. DAY,

Defendant, Appellant.

Before

Torruella, Thompson, and Barron,
Circuit Judges.

JUDGMENT

Entered: August 25, 2017

Defendant appellant William C. Day ("Day") was charged with one count of pharmacy robbery, in violation of 18 U.S.C. § 2118(a). In November 2015, Day pleaded guilty and, after determining that Day was a career offender pursuant to U.S.S.G. § 4B1.1, the district court imposed a variant sentence of fifty-one months' imprisonment followed by three years of supervised release. On appeal, Day argues that: 1) a robbery by intimidation is not a crime of violence under U.S.S.G. § 4B1.2(a)(1) (the force clause); and 2) that U.S.S.G. § 4B1.2(a)(2) (the residual clause) of the career offender guideline is void because it is unconstitutionally vague in light of the U.S. Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Therefore, Day argues, the district court incorrectly found him to be a career offender.

After he filed his appellate brief, the U.S. Supreme Court decided Beckles v. United States, which held that Johnson does not apply to U.S.S.G. § 4B1.2(a)(2) of the advisory Guidelines (the residual clause) because the advisory Guidelines, unlike the Armed Career Criminal Act, are not

subject to vagueness challenges under the Due Process Clause. 137 S. Ct. 886, 892 (2017). Soon thereafter, this Court decided United States v. Ellison, which involved a challenge to the designation of the federal bank robbery statute, 18 U.S.C. § 2113, as a "crime of violence" under the career offender guideline. No. 16-1460, 2017 WL 3276797 (1st Cir. Aug. 2, 2017). In Ellison, we held that we need not decide how the residual clause of the career offender guideline applies post-Beckles as the federal bank robbery statute qualifies as a crime of violence under the guideline's force clause, U.S.S.G. § 4B1.2(a)(1). Ellison, 2017 WL 3276797, at *3.

While Day challenges the application of U.S.S.G. § 4B1.2 to a different offense than that challenged in Ellison, the language in the two statutes defining the offenses is nearly identical.[1] Day's appeal raises the exact same arguments as to § 2118(a)'s designation as a "crime of violence" under the career offender guideline that we considered in Ellison. Given our decision in Ellison, we find that the offense for which Day was convicted qualifies as a "crime of violence" under the career offender guideline's force clause. For this reason, the district court did not err in applying the career offender guideline. Accordingly, we affirm Day's sentence.

Affirmed.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Jeffrey W. Langholtz
William C. Day
Renee M. Bunker
Jonathan R. Chapman
Julia M. Lipez

---

[1] The bank robbery statute provides, in relevant part, that, "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money . . . belonging to . . . any bank, . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a).

The pharmacy robbery statute provides, in relevant part, that, "[w]hoever takes or attempts to take from the person or presence of another by force or violence or by intimidation any material or compound containing . . . a controlled substance belonging to or in the care . . . of a person registered with the Drug Enforcement Administration . . . shall . . . be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 2118(a).