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# United States Court of Appeals For the First Circuit

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No. 16-2315

AVERY BLODGETT,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

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Before

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

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## 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  
Avery Blodgett  
Seth R. Aframe

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

AVERY BLODGETT

v.

UNITED STATES OF AMERICA

\* 16-CV-267-PB  
\* October 21, 2016  
\* 12:10 p.m.

\* \* \* \* \*

TRANSCRIPT OF TELEPHONE CONFERENCE  
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Petitioner: Bjorn R. Lange, Esq.  
Federal Defender Office

For the Respondent: Seth R. Aframe, AUSA  
U.S. Attorney's Office

Court Reporter: Susan M. Bateman, LCR, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

## PROCEEDINGS

(Off the Record)

THE COURT: Okay. Let's go on the record.

I have a 2255 motion that's been filed in the Blodgett case. I've asked the defense counsel to explain to me how that motion is affected, if at all, by any of the three orders I've issued addressing Johnson problems.

Those orders are my order in Kucinski, opinion number 2016 D.N.H. 147; my second order in Kucinski addressing a number of other cases as well, in opinion number 2016 D.N.H. 163; and my opinion in Chasse, which is opinion number 2016 D.N.H. 164.

Having reviewed the defendant's response and having briefly discussed the matter with counsel in this telephone conference before we went on the record, it's my understanding that Mr. Blodgett's argument is a Johnson argument, that Mr. Blodgett is arguing that his 924(c) conviction can't stand in light of Johnson because Johnson invalidates the residual clause, and that therefore he's entitled to 2255 relief.

My understanding is that the circumstances of his case are such that he did not bring his Johnson argument within a year of his conviction becoming final and therefore his 2255 motion would not be timely unless it qualifies under 2255(f)(3), and also that he did not raise this argument in

1 his case before me, or on appeal, and that therefore his  
2 argument would be procedurally defaulted and he would be  
3 required to demonstrate cause and prejudice.

4 I addressed both the statute of limitations  
5 argument and the procedural default argument in the cases  
6 that I identified, and I concluded that in Kucinski, opinion  
7 number 2016 D.N.H. 163, that a person in the position of Mr.  
8 Blodgett would not be able to proceed with his Johnson claim  
9 because the claim would be barred by 2255(f)(3).

10 I also concluded in Chasse, opinion number 2016  
11 D.N.H. 164, that the defendant in that case, Chasse, could  
12 not establish cause and prejudice because one of his  
13 convictions in that case was for a federal bank robbery and  
14 federal bank robbery qualified as a crime of violence under  
15 the elements clause for 924(c). Therefore, even if the  
16 residual clause is unconstitutionally vague, his 924(c)  
17 conviction would be warranted in any event under the elements  
18 clause of 924(c), and therefore Mr. Chasse would not be  
19 entitled to relief.

20 The same circumstances obtain here because Mr.  
21 Blodgett's qualifying conviction is for federal bank robbery.  
22 And for the same reasons that I concluded that a federal bank  
23 robbery would be a crime of violence under the elements  
24 clause it is also a crime of violence here under the elements  
25 clause, and therefore, accordingly, Mr. Blodgett would not be

1 in a position to demonstrate prejudice and as a result he  
2 couldn't overcome the cause of prejudice requirement and his  
3 claim would be procedurally defaulted.

4 The conclusion that I'm drawing from all of this is  
5 that I must deny Mr. Blodgett's 2255 motions for the same  
6 reasons that I denied the 2255 motion brought by Mr. Chasse,  
7 because his claim would be procedurally defaulted, and for  
8 the reasons that I denied the 2255 motion in Kucinski,  
9 because the claim is barred by the applicable statute of  
10 limitations.

11 Blodgett's claim is indistinguishable from the  
12 claims at issue in those cases, the same result is required,  
13 and therefore what I'm proposing to do is to deny the claims  
14 orally on the record today for the reasons set forth in my  
15 decisions in Kucinski and Chasse.

16 In both of those cases I granted certificates of  
17 appealability for reasons that I outlined in those orders.  
18 It seems, therefore, appropriate that I should grant a  
19 certificate of appealability here for the same reasons,  
20 entitling Mr. Blodgett to join the defendants in the Kucinski  
21 case in claiming that my ruling on the Section 2255 statute  
22 of limitations is erroneous and my ruling in Chasse that also  
23 applies here, that the claim is procedurally defaulted is  
24 erroneous.

25 So I'm proposing to deny the 2255 motion here for

1 the reasons set forth in Kucinski and Chasse and to grant the  
2 certificates of appealability with respect to the two issues  
3 that I've identified for the reasons that I granted the  
4 certificates of appealability in those cases.

5 That would mean that the defendant would be  
6 immediately free to seek review in the Court of Appeals.

7 It seems sensible, and I would expect the  
8 government to move to consolidate Mr. Blodgett's appeal with  
9 the appeals that have already been taken in those cases so  
10 that we don't unduly burden the Court of Appeals, allowing  
11 the decisions on those cases to resolve all of them.

12 Does anyone disagree with the proposal that I've  
13 outlined here or the proposed ruling that I'm suggesting I  
14 should make here?

15 MR. LANGE: No, your Honor.

16 MR. AFRAME: The government agrees.

17 THE COURT: Okay.

18 And of course Mr. Blodgett's objections are all  
19 preserved. He's simply agreeing that I cannot, consistent  
20 with my rulings in Chasse and Kucinski, do anything other  
21 than to deny his motion.

22 His arguments that my prior rulings are incorrect  
23 are of course preserved for purposes of appeal.

24 So for the reasons I've explained, I deny the 2255  
25 motion and grant certificates of appealability specifically

1 authorizing Mr. Blodgett to proceed with his arguments both  
2 that my ruling on the statute of limitations is incorrect and  
3 my ruling that his claim is procedurally defaulted is  
4 incorrect.

5 Is there anything else that I need to do today?

6 MR. AFRAME: No.

7 MR. LANGE: No.

8 THE COURT: Okay. Thank you very much.

9 MR. AFRAME: Thank you.

10 MR. LANGE: Thank you.

11 (Conclusion of hearing at 12:17 p.m.)

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Avery Blodgett

v.

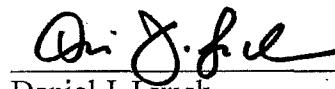
Civil No. 16-cv-267-PB

United States of America

**JUDGMENT**

In accordance with the oral order by Judge Paul Barbadoro issued on October 21, 2016, denying the petitioner's Amended Motion to Vacate Conviction, judgment is hereby entered.

By the Court,

  
\_\_\_\_\_  
Daniel J. Lynch  
Clerk of Court

Date: October 21, 2016

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

# United States Court of Appeals For the First Circuit

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No. 16-1745

AVERY BLODGETT,

Petitioner,

v.

UNITED STATES,

Respondent.

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Before

Lynch, Thompson and Kayatta,  
Circuit Judges.

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## JUDGMENT

Entered: June 21, 2016

Citing Johnson v. United States, 135 S. Ct. 2551 (2015), petitioner has filed an application for leave to file a second or successive § 2255 motion. There is no indication, however, that petitioner has yet had a first § 2255 motion adjudicated. Consequently, petitioner does not need authorization from this court to proceed in the district court with his § 2255 motion.

The clerk of court will transfer petitioner's motion for permission to file a second or successive § 2255 motion to the United States District Court for the District of New Hampshire for filing as a § 2255 motion. The motion shall be deemed filed in the district court on June 13, 2016, the date it was filed in the court of appeals.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Honorable Paul J. Barbadoro, Daniel Lynch, Clerk, United States District Court for the District of New Hampshire, Avery Blodgett, Seth R. Aframe