

Appendices

Order Denying Motion to Vacate

Burke v. United States, 8:16-cv-1641-T-17MAP A

First Opinion of the Eleventh Circuit Court of Appeals

Burke v. United States, 2018 WL 6040141 (Nov. 19, 2018) B

Second Opinion of the Eleventh Circuit Court of Appeals

Burke v. United States, 746 F. App'x 951 (11th Cir. 2018) C

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KENNETH H. BURKE, JR.,

v.

Case No. 8:16-cv-1641-T-17MAP
8:11-cr-181-T-17MAP

UNITED STATES OF AMERICA.

O R D E R

This cause is before the Court *sua sponte*.

In his present successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct an illegal sentence, Burke contends that the decision in *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act (the ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional, and which has been held to be retroactive on collateral review by the decision in *Welch v. U.S.*, 136 S.Ct. 1257 (2016), should be applied to him with regard to his 18 U.S.C. § 924(c) enhanced sentence.

This Court has entered orders directing the parties to respond to Burke's 28 U.S.C. § 2255 motion to vacate, set aside or correct an illegal sentence. (Docs. cv-3, 7, 8). In doing so, the Court relied on the Eleventh Circuit's order partially granting Burke's application to file a successive petition only on ground two of his application.¹ Ground two of the application relied on 18 U.S.C. section 924(c)(e)(B)'s residual clause being vague and unconstitutional, thereby violating due

¹ The Eleventh Circuit granted Burke's application to file a successive motion to vacate on one of Burke's claims. However, the Eleventh Circuit found that Burke had not made a *prima facie* showing that the Supreme Court's decision in *Johnson* affects his ACCA sentence, because the district court found that his predicate federal convictions for three bank robberies qualified as violent felonies under the elements clause, as well as the residual clause.

The Eleventh Circuit found that Burke made a *prima facie* showing that he may be entitled to relief under the rule announced in *Johnson* as to his conviction and sentence under § 924(c).

process.

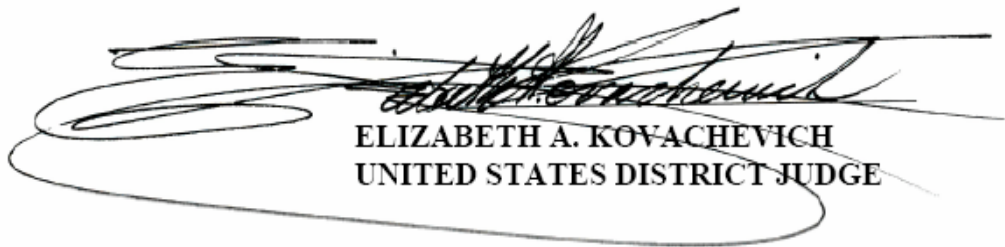
The Eleventh Circuit's threshold determination that an applicant has made a *prima facie* showing that he has met the statutory criteria of § 2255(h), thus warranting authorization to file a second or successive motion, does not conclusively resolve that issue. *Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007). Once a prisoner files his authorized § 2255 motion in the district court, "the district not only can, but must, determine for itself whether those requirements are met." *Id.* The district court does not owe deference to a court of appeal's *prima facie* finding that the requirements have been met for filing a successive motion to vacate.

Based on the prevailing case law, this Court has now determined that Burke's motion to vacate must be denied because *Johnson* does not find that the residual clause of 18 U.S.C. § 924(c)(e)(B) is unconstitutional

Accordingly, the Court orders:

1. That Burke's 28 U.S.C. § 2255 motion to vacate (Doc. cv-1; cr-145) is denied. The Clerk is directed to close this case.
2. To the extent necessary, COA and IFP on appeal denied.
3. The parties are not required to respond.

ORDERED at Tampa, Florida, on July 28, 2016.



ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Counsel of Record
Kenneth Burke, Jr.

APPENDIX B



KeyCite Red Flag - Severe Negative Treatment

Opinion Vacated and Superseded by [Burke v. United States](#), 11th Cir.(Fla.),
November 27, 2018

2018 WL 6040141

Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

Kenneth H. BURKE, Jr., Petitioner-Appellant,
v.

UNITED STATES of America, Respondent-Appellee.

No. 16-16198

|
Non-Argument Calendar

|
(November 19, 2018)

Attorneys and Law Firms

[Conrad Benjamin Kahn](#), [Rosemary Cakmis](#), [Donna Lee Elm](#),
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Tampa, FL, [Arthur Lee Bentley, III](#), [Bradley Arant Boult](#)
[Cummings, LLP](#), 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-01641-EAK-
MAP; 8:11-cr-00181-EAK-MAP-1

Before [MARTIN](#), [JORDAN](#), and [ROSENBAUM](#), Circuit
Judges.

Opinion

PER CURIAM:

*1 Kenneth Burke appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence. After careful consideration, we reverse and remand for further consideration in light of this Court's recent *en banc* decision in [Ovalles v. United States](#), 905 F.3d 1231 (11th Cir. 2018) (*en banc*).

I.

On December 2, 2011, a jury convicted Burke of conspiracy and attempt to unlawfully affect commerce by robbery, in violation of 18 U.S.C. § 1951; knowingly carrying a firearm “during and in relation to a crime of violence,” in violation of 18 U.S.C. § 924(c); and possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court sentenced Burke to 335 months in prison, including 120 months for the § 924(c) charge. This court affirmed his convictions on direct appeal. [United States v. Burke](#), 521 F. App'x 720 (11th Cir. 2013) (*per curiam*) (unpublished).

A little over three years later, the Supreme Court decided [Johnson v. United States](#), which held that the Armed Career Criminal Act's (“ACCA”) residual clause was void for vagueness. 576 U.S. —, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015). In response, Burke filed an application with this Court seeking authorization to file a second or successive § 2255 motion based (in part) on the argument that [Johnson](#) rendered his § 924(c) conviction invalid. This Court granted Burke's application on the [Johnson](#) issue. Burke then asked the district court to vacate his sentence under § 2255, arguing that his conviction under § 924(c) had to be vacated in light of [Johnson](#). The district court rejected Burke's efforts, holding that he did not satisfy the procedural requirements for filing a second or successive motion because [Johnson](#) did not find § 924(c) unconstitutional.

Burke timely filed a notice of appeal. On February 22, 2017, this Court granted him a certificate of appealability on two issues: (1) whether the district court erred when it found Burke did not meet the requirements to file a second or successive 28 U.S.C. § 2255 motion; and (2) whether the Supreme Court's decision in [Johnson](#) rendered Burke's 18 U.S.C. § 924(c) conviction unconstitutional.

II.

“We review de novo the district court's dismissal of a 28 U.S.C. § 2255 motion as second or successive.” [Gooden v. United States](#), 627 F.3d 846, 847 n.2 (11th Cir. 2010) (quotation marks omitted).

III.

28 U.S.C. § 2244(b)(4) requires a district court to dismiss “any claim presented in a second or successive application

that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements” for an exception. One such exception is a claim that “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Id.* § 2244(b)(2)(A).

Burke argues the district court erred in finding that his claim did not rely on a new, retroactively applicable rule of constitutional law as established by the Supreme Court. Because the district court denied Burke's § 2255 petition without the benefit of our opinion in *Ovalles*, 905 F.3d 1231, we reverse and remand for reconsideration in light of *Ovalles*. On remand, the district court should also determine, if necessary, whether Burke's conviction survives our *Ovalles* decision.

*2 Section 924(c) provides enhanced punishments for a person convicted of carrying a firearm “during and in relation to a crime of violence.” 18 U.S.C. § 924(c)(1)(A). A crime of violence is defined in part as any felony “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)(B). This is also referred to as § 924(c)'s residual clause, and its language shares substantial similarities with the ACCA residual clause, which the Supreme Court struck down as unconstitutionally vague in *Johnson*. See 135 S.Ct. at 2557–58.

Johnson held the ACCA residual clause was unconstitutionally void for vagueness. *Id.* at 2557. Courts were required to use what is known as the categorical approach to determine whether a particular crime qualified as a crime of violence within the meaning of the residual clause. *Id.* at 2557–58. This approach required courts to “assess[] whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.” *Id.* at 2557 (quotation marks omitted). This was an abstract inquiry, and one the Supreme Court concluded led to two problems: first, there was “no reliable way” to define the “ordinary” way of committing a crime; and second, the clause left “uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2557–58. The Court therefore held that “imposing an increased sentence under [ACCA's residual clause] violates the Constitution's guarantee of due process.” *Id.* at 2563.

Until recently, this Court used the same categorical approach to decide whether a particular offense counts as a crime of violence under § 924(c)(3)(B). See *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013) (O'Connor, J.), overruled by *Ovalles*, 905 F.3d 1231. However, *Ovalles*, which is a “successor” to *Johnson*, abandoned the categorical approach for purposes of deciding whether an offense counts as a crime of violence under § 924(c)(3)(B). 905 F.3d 1231, 1233–1235. In an effort to avoid the constitutional problems identified in *Johnson*, this Court adopted instead what we called a “conduct-based” approach to § 924(c)(3)(B). *Id.* at 1233–1235. Rather than imagine an ordinary case in the abstract, *Ovalles* now requires us to ask whether a defendant's actual conduct “by its nature[] involve[s] a substantial risk” of physical force. 18 U.S.C. § 924(c)(3)(B); *Ovalles*, 905 F.3d at 1253–54. Because this is a factual determination that increases punishment, *Ovalles* recognized that juries, not judges, must decide whether a defendant's conduct involved such a substantial risk. See 905 F.3d at 1249–51. Importantly for this case, *Ovalles* recognized that the use of the categorical approach under § 924(c)(3)(B) implicates the same vagueness problems at issue in *Johnson*. *Id.* at 1233.

It seems likely that the conspiracy to commit robbery and attempted robbery charges were categorically treated as crimes of violence here. The jury was instructed they could find Burke guilty of the § 924(c) charge only if they found beyond a reasonable doubt that Burke “committed either or both of the crimes of violence charged in Counts One or Two.” Counts One and Two charged conspiracy to commit robbery and attempted robbery. This instruction appears to have told the jury that the crimes charged were crimes of violence, rather than ask the jury to decide whether Burke's conduct made those counts crimes of violence. If the jury was instructed that conspiracy to commit robbery and attempted robbery were to be treated as crimes of violence under § 924(c)(3)(B), Burke may well have stated a *Johnson* claim. As a result, he may be entitled under *Ovalles* to have a jury decide whether his offenses posed a substantial risk that force would be used. We leave it to the district court to reconsider its decision to deny Burke's § 2255 petition and to decide in the first instance what relief, if any, Burke is entitled to in light of *Ovalles*.

*3 REVERSED AND REMANDED.

All Citations

Not Reported in Fed. Rptr., 2018 WL 6040141

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APPENDIX C

746 Fed.Appx. 951

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.

Kenneth H. BURKE, Jr., Petitioner-Appellant,
v.

UNITED STATES of America, Respondent-Appellee.

No. 16-16198

|
Non-Argument Calendar

|
(November 27, 2018)

Synopsis

Background: Following denial of his motion to suppress, defendant was convicted in the United States District Court for the Middle District of Florida, [No. 8:11-CR-181-T-17MAP, 2011 WL 5985611](#), of conspiracy and attempt to unlawfully affect commerce by robbery, discharging a firearm during and in relation to crime of violence, and possessing, in and affecting interstate commerce, ammunition as a convicted felon. Defendant appealed. The Court of Appeals, [521 Fed.Appx. 720](#), affirmed. Defendant moved to vacate his conviction and sentence. The District Court, Nos. 8:16-cv-01641-EAK-MAP, 8:11-cr-00181-EAK-MAP-1, denied motion. Defendant appealed. The Court of Appeals, [2018 WL 6040141](#), reversed and remanded.

[Holding:] The Court of Appeals, sua sponte, held that *Johnson v. United States* could not support vagueness-based challenge to residual clause of statute prohibiting carrying a firearm during and in relation to a crime of violence.

Vacated Court of Appeals opinion and affirmed district court's judgment.

[Rosenbaum](#), Circuit Judge, filed concurring opinion.

West Headnotes (1)

[1] Constitutional Law

 [Weapons and explosives](#)

Weapons

 [Violation of other rights or provisions](#)

Johnson v. United States, which held that residual clause of definition of “crime of violence” in Armed Career Criminal Act was unconstitutionally vague, did not supply any rule of constitutional law, new or old, retroactive or nonretroactive, previously unavailable or otherwise that could support vagueness-based challenge to residual clause of statute prohibiting carrying a firearm during and in relation to a crime of violence. [18 U.S.C.A. § 924\(c\)](#).

[Cases that cite this headnote](#)

West Codenotes

Recognized as Unconstitutional

[18 U.S.C.A. § 924\(e\)\(2\)\(B\)\(ii\)](#)

Attorneys and Law Firms

[Conrad Benjamin Kahn](#), [Rosemary Cakmis](#), [Donna Lee Elm](#), Federal Public Defender's Office, Orlando, FL, for Petitioner-Appellant

[Roberta Josephina Bodnar](#), U.S. Attorney's Office - FLM, Ocala, FL, [Karin Bethany Hoppmann](#), [Jillian M. Jewell](#), [Francis D. Murray](#), [Taylor G. Stout](#), U.S. Attorney's Office, Tampa, FL, [Arthur Lee Bentley, III](#), [Bradley Arant Boult Cummings, LLP](#), 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-01641-EAK-MAP, 8:11-cr-00181-EAK-MAP-1

Before [MARTIN](#), [JORDAN](#), and [ROSENBAUM](#), Circuit Judges.

Opinion

PER CURIAM:

*952 We sua sponte vacate our earlier opinion in this case and affirm the district court's judgment denying Kenneth Burke's motion to vacate his conviction and sentence under 28 U.S.C. § 2255.

Burke says the Supreme Court's decision in Johnson v. United States, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), invalidated his conviction for carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Section 924(c) defines a crime of violence in part as any felony "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)(B). Johnson held similar language in 18 U.S.C. § 924(e)(2)(B)(ii) unconstitutionally vague. 135 S.Ct. at 2557. This Court recently ruled in In re Garrett, 908 F.3d 686 (11th Cir. 2018), that neither Johnson nor Sessions v. Dimaya, — U.S. —, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018), invalidate § 924(c). Garrett thus forecloses Burke's argument. For this reason, we AFFIRM.

ROSENBAUM, Circuit Judge, concurring:

I concur in the panel's order affirming the district court's denial of Kenneth Burke's 28 U.S.C. § 2255 petition. One of Burke's companion offenses for his conviction under 18 U.S.C. § 924(c) was attempted Hobbs Act robbery. We have held that attempted Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)(3)(A)'s elements clause, without consideration of § 924(c)(3)(B)'s risk-of-force clause. United States v. St. Hubert, No. 16-10874, 909 F.3d 335, 2018 WL 5993528 (Nov. 15, 2018). Therefore, we are bound by that holding, and Johnson v. United States, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), cannot affect Burke's conviction. As a result, the district court did not err in denying Burke's § 2255 petition. I would not opine further on Burke's Johnson claim, as it is unnecessary to resolve this appeal.

All Citations

746 Fed.Appx. 951

APPENDIX D

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

February 19, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 16-16198-AA
Case Style: Kenneth Burke, Jr. v. USA
District Court Docket No: 8:16-cv-01641-EAK-MAP
Secondary Case Number: 8:11-cr-00181-EAK-MAP-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: T. L. Searcy, AA/lt
Phone #: (404) 335-6180

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16198-AA

KENNETH H. BURKE, JR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

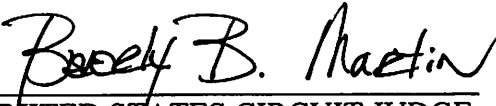
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42