

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 18 2019

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

CHARLES BENTON BAGWELL,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 18-35675
18-35676

D.C. Nos. 1:16-cv-00264-BLW
1:05-cr-00174-BLW-1
1:16-cv-00265-BLW
1:05-cr-00132-BLW-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted July 15, 2017**

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

In these consolidated appeals, Charles Benton Bagwell appeals from the district court's judgments denying his 28 U.S.C. § 2255 motions. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2)*.

In both appeals, Bagwell contends that his conviction for armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3). This argument is foreclosed. *See United States v. Watson*, 881 F.3d 782, 784 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018) (federal armed bank robbery by force and violence or by intimidation is categorically a crime of violence under the force clause of section 924(c)(3)). Moreover, contrary to Bagwell’s contention, *Watson* is not “clearly irreconcilable” with *Stokeling v. United States*, 139 S. Ct. 544 (2019). *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

In light of this disposition, we do not reach the parties’ remaining arguments.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHARLES BENTON BAGWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-cv-00264-BLW
1:05-cr-00174-BLW

MEMORANDUM DECISION AND
ORDER

INTRODUCTION

Pending before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Civ. Dkt. 2, Crim. Dkt. 23). For the reasons described below, the Court will deny the motion.

BACKGROUND

Petitioner Charles Benton Bagwell pleaded guilty on August 29, 2005 to six counts in two cases. *See Plea Agreement*, Crim. Dkt. 4; *Minute Entry for Arraignment*, Crim. Dkt. 9. In this case, which was transferred from the Central District of California, Petitioner pleaded guilty to two counts of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d); brandishing a firearm during and in relation to a crime of violence, in violation of Title 18 U.S.C. § 924(c); and discharging a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). *See id.* In Case No. 1:05-cr-00132-BLW, Petitioner pleaded guilty to bank robbery conspiracy, in violation of 18 U.S.C. § 371 and

§§ 2113(a) and (d), and armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d).

See id. Petitioner was convicted on all six counts, and sentenced on January 27, 2006 to a term of imprisonment of forty years, with the sentence for both cases to run concurrently.

Judgment, Crim. Dkt. 18. Petitioner argues that in light of *Johnson v. United States*, 135 S.Ct. 2251 (2015) (“*Johnson II*”), his convictions under 18 U.S.C. § 924(c) are illegal and unconstitutional. *Petitioner’s Br.* at 4, Civ. Dkt 2, Crim. Dkt. 23.

ANALYSIS

Under 18 U.S.C. § 924(c), a defendant is subject to “a mandatory consecutive term of imprisonment for using or carrying a firearm during and in relation to a crime of violence.” *United States v. Watson*, 881 F.3d 782, 784 (9th Cir. 2018). A “crime of violence” is defined as a felony that:

- (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). Section (A) is satisfied if the predicate crime of conviction has as an element the use of “‘violent’ physical force - ‘that is force capable of causing physical pain or injury.’” *Watson*, 881 F.3d at 784 ((quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) (“*Johnson I*”) and finding the standard applied therein to 18 U.S.C. § 924(e)(2)(B)(i) “applies equally to the similarly worded force clause of § 923(c)(3)(A).”)).

In *Watson*, the Ninth Circuit held that the force required to prove armed bank robbery in violation of 18 U.S.C. § 2113 meets the *Johnson I* standard for “violent force” and thus qualifies as a “crime of violence” under 18 U.S.C. § 924(c)(3)(A). *Id.* Thus, Petitioner’s conviction in this case on two counts of armed bank robbery constitute predicate “crimes of violence” under the “force clause” of § 924(c)(3)(A). *See Watson*, 881 F.3d at 784, 786. Although Petitioner argues that the residual clause in § 924(c)(3)(B) is unconstitutional under the reasoning of *Johnson II*, he concedes that § 924(c)(3)(A) remains good law. Because Petitioner’s argument that his predicate convictions for armed bank robbery do not qualify as “crimes of violence” under § 924(c)(3)(A) is foreclosed by *Watson*, Petitioner’s motion fails on the merits, and the Court does not need to reach the issues raised by *Johnson II*. Accordingly,

ORDER

IT IS ORDERED:

1. Plaintiff’s Motion to Vacate, Set Aside, Or Correct Sentence Under 28 U.S.C. § 2255 (Civ. Dkt. 2, Crim. Dkt. 23) is **DENIED**. The Court shall issue a separate judgment as required by Rule 58(a).
2. This case is **DISMISSED**.



DATED: May 23, 2018

B. Lynn Winmill
Chief U.S. District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CHARLES BENTON BAGWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:16-cv-00265-BLW
1:05-cr-00132-BLW

MEMORANDUM DECISION AND
ORDER

INTRODUCTION

Pending before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Civ. Dkt. 2, Crim. Dkt. 26) and the Government's Motion to Dismiss (Civ. Dkt 7). For the reasons described below, the Court will grant the Government's motion, and deny Petitioner's motion in part, and grant it in part.

BACKGROUND

Petitioner Charles Benton Bagwell pleaded guilty on August 29, 2005 to six counts in two cases. *See Plea Agreement*, Crim. Dkt. 9; *Minute Entry for Change of Plea Hearing*, Crim. Dkt. 13. In Case No. 1:05-cr-00132, which is the subject of this petition, Petitioner pleaded guilty to bank robbery conspiracy, in violation of 18 U.S.C. § 371 and §§ 2113(a) and (d), and armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). *See id.* In Case No. 1:05-cr-00174-BLW, which was transferred from the Central District of California, Petitioner pleaded guilty to two counts of armed bank robbery in violation

of 18 U.S.C. §§ 2113(a) and (d); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); and discharging a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). *See id.* Petitioner was convicted on all six counts and sentenced on January 27, 2006 to a term of imprisonment of forty years, with the sentence for both cases to run concurrently. *Judgment*, Dkt. 22.

Petitioner argues that in light of *Johnson v. United States*, 135 S.Ct. 2251 (2015) (“*Johnson II*”), his convictions in Case No. 1:05-cr-00174-BLW under 18 U.S.C. § 924(c) are illegal and unconstitutional, and that his sentence in Case No. 1:05-cr-00132-BLW was based, in part, on those illegal convictions. *Petitioner’s Response* at 3, Civ. Dkt 9. Petitioner further argues, and the Government concurs, that his forty-year sentence in this case exceeds the maximum sentence authorized by statute, and must be corrected.

ANALYSIS

In the Memorandum Decision and Order issued concurrently herewith in Case Nos. 1:16-cv-00264-BLW and 1:05-cr-00174-BLW, the Court denied Petitioner’s motion under § 2255 to vacate his convictions under 18 U.S.C. § 924(c). Thus, to the extent that the instant § 2255 motion rests on a claim that his sentence was unconstitutional based on his convictions under § 924(c), the motion fails, and is due to be dismissed.

Petitioner argues separately, however, and the Government agrees, that he was erroneously sentenced above the statutory maximum of thirty years for the two counts for which he was convicted in Case No. 1:05-cr-00132-BLW. Pursuant to Rule 36, the Court will issue an amended judgment in this case, correcting the error. The Court notes that

Petitioner's sentence in Case No. 1:05-cr-00174-BLW remains unchanged, and that his corrected sentence will continue to run concurrently with his sentence in that case.

Accordingly,

ORDER

IT IS ORDERED:

1. The Government's Motion to Dismiss (Civ. Dkt. 7) is **GRANTED**
2. Petitioner's Amended Motion to Vacate/Set Aside/Correct Sentence pursuant to 28 U.S.C. § 2255 (Civ. Dkt. 2; Crim. Dkt. 26) is **GRANTED** in part and **DENIED** part as follows: In accordance with the agreement of the parties, Petitioner's sentence in Case No. 1:05-cr-00132-BLW shall be corrected pursuant to Rule 36 to comply with the statutory maximum sentence of thirty years, to run concurrently with his sentence in Case No. 1:05-cr-00174-BLW. In all other respects, the petition is denied.
3. Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Court shall issue an amended judgment in Case Nos. 1:05-cr-00132-BLW and 1:05-cr-00174-BLW which on page 2 shall now read as follows:

"The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Total term of 40 years. **30** years in Case#1:05-CR-00132-S-BLW to run concurrent with Case #1:05-cr-00174-S-BLW, 40 years in Case#1:05-CR-00174-S-BLW to

run concurrent with Case # 1:05-CR-00132-S-BLW.” (amendment denoted in **bold**).

4. The Court shall issue a separate judgment in this case as required by Rule 58(a).
5. This case is **DISMISSED**.



DATED: May 23, 2018

A handwritten signature in black ink that reads "B. Lynn Winmill".

B. Lynn Winmill
Chief U.S. District Court Judge