NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC JOHNSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 18-2413

Eric Johnson

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Arkansas - El Dorado

Submitted: June 25, 2019
Filed: August 1, 2019
[Unpublished]

Before SMITH, Chief Judge, BENTON and STRAS, Circuit Judges.

PER CURIAM.

Eric Devon Johnson pled guilty in 2013 to aiding and abetting armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d) and 2, and the brandishing of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. He was sentenced to 135 months' imprisonment. He moved to

vacate his § 924(c) conviction under 28 U.S.C. § 2255, invoking *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court[1] found his challenge foreclosed by *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) (per curiam) (concluding "*Johnson* does not render § 924(c)(3)(B) unconstitutionally vague"). The district court granted a certificate of appealability whether § 924(c)(3)(B) is unconstitutional. This court held the case in abeyance pending the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Having jurisdiction under 28 U.S.C. § 1291 and 2253, this court affirms.

The issue is whether aiding and abetting armed bank robbery is a "crime of violence" under § 924(c). Section 924(c)(3) defines "crime of violence" as a felony offense that meets either the force clause of subsection (A) or the residual clause of subsection (B). In *Davis*, the Supreme Court invalidated the residual clause. *Davis*, 139 S. Ct. at 2336. Despite *Davis*'s holding, Johnson is not entitled to relief.

The force clause encompasses felonies that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Aiding and abetting armed bank robbery qualifies under this clause. Johnson's arguments to the contrary are foreclosed by precedent. Bank robbery by intimidation requires the threatened use of violent force. *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019) (holding bank robbery under § 2113(a) qualifies as crime of violence under § 924(c)(3)(A), even when committed by intimidation). Because bank robbery qualifies under the force clause, so does aiding and abetting armed bank robbery. *See Kidd v. United States*, 2019 WL 2864451, at *2 (8th Cir. July 3, 2019) (per curiam) (aider and abettor is treated same

[1]The Honorable Harry F. Barnes, United States District Judge for the Western District of Arkansas, adopting in part the report and recommendation of the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas.

as principal when determining whether offense qualifies as crime of violence under § 924(c)(3)(A)), *citing* 18 U.S.C. § 2. Johnson is not entitled to § 2255 relief.

* * * * * * *

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

ERIC JOHNSON PETITIONER

v. CASE NO. 1:12-CR-10010-2
CASE NO. 1:16-CV-01052

UNITED STATES OF AMERICA RESPONDENT

ORDER

Before the Court is a Report and Recommendation entered by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas, on September 14, 2017. ECF No. 183. Petitioner has filed objections. ECF No. 185. The Court finds this matter ripe for consideration.

BACKGROUND

On December 13, 2013, a Judgment was entered against Petitioner, sentencing him to a total of 135 months' imprisonment with credit for time served in federal custody. ECF No. 141. Petitioner did not file a direct appeal. Petitioner filed the instant Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 on June 9, 2016. ECF No. 166. Petitioner subsequently filed a brief in support of his motion. ECF No. 167.

In these documents Petitioner argues, in relevant part, that 18 U.S.C. § 924(c)(3)(B) is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). (ECF No. 166). On August 29, 2016, the Government filed a response, arguing that Petitioner is not entitled to section

2255 relief. ECF No. 175. On September 14, 2017, Judge Bryant issued the present Report and Recommendation. ECF No. 183. Petitioner filed objections on September 28, 2017. ECF No. 185.

DISCUSSION

In the present Report and Recommendation, Judge Bryant recommends that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 166) be denied and dismissed with prejudice. Judge Bryant found that "the United States Court of Appeals for the Eighth Circuit directly addressed this issue and ruled that the holding in *Johnson* did not invalidate the language of 18 U.S.C. § 924(c)." ECF No. 183, p. 2 (citing *United States v. Prickett*, 839 F.3d. 697 (8th Cir. 2016)). Likewise, Judge Bryant further recommends that any request for a Certificate of Appealability should be denied. Petitioner makes two arguments in his objections. The Court will address each in turn.

I. Denial of Petitioner's Motion

In his objections, Petitioner concedes that the Court is bound by the Eighth Circuit's ruling in *Prickett*, but argues that *Prickett* "was incorrectly decided and that § 924(c)(3)(B) is void for vagueness." ECF No. 185, p. 3. Accordingly, he states that "he objects to the R&R's recommendation that his motion be denied in order to preserve his argument for possible appeal to the United States Supreme Court." ECF No. 185, p. 3. Upon consideration, the Court finds that Judge Bryant was correct in his finding that *Prickett* forecloses Petitioner's argument that § 924(c)(3)(B) is void for vagueness. *Prickett*, 839 F.3d. at 700 ("We therefore conclude that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague."). Accordingly, upon *de novo* review, the Court finds that Judge Bryant's Report and Recommendation should be adopted as to this issue and Petitioner's motion should denied and dismissed with prejudice.

II. Certificate of Appealability

Petitioner also objects to Judge Bryant's recommendation that no Certificate of Appealability be issued, arguing "that he has made a substantial showing of the denial of a constitutional right, as [a] split among the circuits clearly demonstrates that the issue of the constitutionality of § 924(c)(3)(B) is debatable among reasonable jurists." ECF No. 185, p. 4.

The issuance of a Certificate of Appealability is only appropriate in a section 2255 proceeding when a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has stated that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his objections, Petitioner cites a Seventh Circuit opinion as well as numerous district court opinions which find that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson*. Petitioner also cites opinions from the Third, Sixth, Seventh, Ninth, and Tenth Circuits that find 18 U.S.C. § 16(b)—a statute with almost identical language to 18 U.S.C. § 924(c)(3)(B)—void for vagueness in light of *Johnson*. The Court further recognizes that after Petitioner filed his objections, the Supreme Court issued its opinion in *Sessions v. Dimaya*, affirming the Ninth Circuit's holding that 18 U.S.C. § 16(b), as incorporated in the Immigration and Nationality Act, is unconstitutionally vague. 138 S. Ct. 1204 (2018). Taking all of this into account, the Court is satisfied that Petitioner has demonstrated that reasonable jurists would find that the question of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague to be debatable. Therefore, the Court finds that a Certificate of Appealability shall issue.

CONCLUSION

For the foregoing reasons, the Court hereby **ADOPTS IN PART** Judge Bryant's Report and Recommendation (ECF No. 183) insofar as it recommends a finding that Petitioner's motion should be denied on the merits. Therefore, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 166) is hereby **DENIED** and **DISMISSED WITH PREJUDICE**. However, the Court finds that a Certificate of Appealability should be and hereby is **GRANTED** on the issue of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of recent Supreme Court precedent.

IT IS SO ORDERED, this 30th day of April, 2018.

/s/ Harry F. Barnes
Harry F. Barnes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

UNITED STATES OF AMERICA RESPONDENT

v. No. 1:12-cr-10010
No. 1:16-cv-01052

ERIC JOHNSON MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 filed by Eric Johnson ("Johnson"). ECF No. 166. The Motion was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case. The United States of America (hereinafter referred to as the "Government") has responded to the Motion. ECF No. 175. The Court has considered the entire record, and this matter is ready for decision. For the reasons stated below, the Court recommends the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 166) be **DENIED**.

1. Background:

On August 22, 2012, Johnson was named in a three-count Second Superseding Indictment filed in the Western District of Arkansas charging Johnson as follows: Count One, Conspiracy to Commit Armed Bank Robbery in violation of 18 U.S.C. § 371; Count Two, Aiding and Abetting Armed Bank Robbery, in violation of 18 U.S.C. §§ 2113(a) and (d) and 2; and Count Three, Aiding and Abetting the Brandishing of Firearm during the Commission of a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A).

On March 3, 2013, Johnson appeared before the Honorable Harry F. Barnes for a change of

plea hearing in which he pled guilty to Count Two of the Second Superseding Indictment charging him with Aiding and Abetting Armed Bank Robbery in violation of 18 U.S.C. §§ 213(a) and (d) and to Count Three charging him with Aiding and Abetting the Brandishing of a Firearm during the Commission of a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2.

The United States Probation Office issued Johnson's Final Presentence Report ("PSR") and Addendum on October 3, 2013. ECF No. 122. On December 11, 2013, Johnson was sentenced to a total of 135 months imprisonment, consisting of 51 months on Count 2 and 84 months on Count 3 to be served consecutively, five years of supervised release on each count to run concurrently, and restitution in the amount of $53,402.61. ECF No. 141. Johnson did not appeal his sentence.

On June 9, 2016, Johnson filed the instant Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody based on the *Johnson* decision. ECF No. 166. Johnson's appointed counsel filed a brief in support on June 20, 2016. ECF No. 167. The Government responded to this Motion on August 29, 2016. ECF No. 175.

2. Discussion:

The only issue Johnson has raised with this § 2255 Motion is whether the Supreme Court's holding in *Johnson v. United States,* 135 S. Ct. 2551 (2015), which invalidated the residual clause of the Armed Career Criminal Act ("ACCA") because it was unconstitutionally vague, applies to 18 U.S.C. § 924(c) and invalidates its "crime of violence" provision. Upon review, the Court finds the reasoning in *Johnson* does not apply to invalidate this provision of 18 U.S.C. § 924(c).

On October 5, 2016, the United States Court of Appeals for the Eighth Circuit directly addressed this issue and ruled that the holding in *Johnson* did not invalidate the language of 18 U.S.C. § 924(c). *United States v. Prickett,* 839 F.3d. 697 (8th Cir. 2016). *Prickett* was decided after

the initial briefing in this case and neither Johnson nor the Government addressed its holding.[1] The Eighth Circuit in *Prickett* held : "We therefore conclude that *Johnson* does not render § 924(c)(3)(B) [defining "crime of violence" from 18 U.S.C. § 924(c)(1)(A)] unconstitutionally vague." *Id.* at 700. Consistent with that holding, the Court recommends Johnson's Motion (ECF No. 166) be **DENIED.**

3. Evidentiary Hearing:

Based on the record in this case, I also conclude an evidentiary hearing is not required in this matter. Johnson is clearly not entitled to the relief he seeks.[2] Further, I find Johnson has not made a substantial showing of the denial of a constitutional right, and any request for a certificate of appealability should be denied as well.

4. Recommendation:

Accordingly, based on the foregoing, it is recommended the instant motion be **DENIED** and dismissed with prejudice. Pursuant to 28 U.S.C. § 1915(a), I recommend the finding that an appeal from dismissal would not be taken in good faith.

The Parties have fourteen (14) days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The Parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court.

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[1] I note the Federal Defender in the Western District of Arkansas, who represents Johnson here, also represented the movant in *Prickett*.

[2] *See Buster v. United States*, 447 F.3d 1130, 1132 (8th Cir.2006) (holding that a § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact).

DATED this **14th day of September 2017.**

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE