APPENDIX A

FILED: August 26, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6038
(2:10-cr-00200-RBS-DEM-1)
(2:16-cv-00311-RBS)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKY LEE TYNDALL

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6038

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKY LEE TYNDALL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, Senior District Judge. (2:10-cr-00200-RBS-DEM-1; 2:16-cv-00311-RBS)

Submitted: August 20, 2019 Decided: August 26, 2019

Before GREGORY, Chief, Judge, WILKINSON, Circuit Judge, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Ricky Lee Tyndall, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ricky Lee Tyndall seeks to appeal the district court's orders dismissing his 28 U.S.C. § 2255 (2012) motion and denying reconsideration. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012).

When the district court denies relief on the merits, a movant satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the movant must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Tyndall has not made the required showing. In his § 2255 motion, Tyndall claimed his 18 U.S.C. § 924(c) (2012) convictions should be vacated under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The predicate offenses for his convictions were Hobbs Act robberies committed on September 29, 2010 and October 1, 2010. In light of *United States v. Mathis*, No. 16-4633, __ F.3d __, 2019 WL 3437626, at *16 (4th Cir. July 31, 2019) (holding that "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"), we conclude that his § 2255 motion fails to state a debatable claim of the denial of a constitutional right.

Accordingly, we deny Tyndall's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

RICKY LEE TYNDALL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION
2016 U.S. Dist. LEXIS 138179
CIVIL NO. 2:16cv311,[ORIGINAL CRIMINAL NO. 2:10cr200-1]
October 4, 2016, Decided
October 4, 2016, Filed

Editorial Information: Subsequent History

Reconsideration denied by, Motion granted by Tyndall v. United States, 2016 U.S. Dist. LEXIS 186730 (E.D. Va., Dec. 8, 2016)

Editorial Information: Prior History

United States v. Tyndall, 495 Fed. Appx. 316, 2012 U.S. App. LEXIS 21228 (4th Cir. Va., Oct. 12, 2012)

Counsel {2016 U.S. Dist. LEXIS 1}Ricky Lee Tyndall, Petitioner, Pro se.
Judges: REBECCA BEACH SMITH, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: REBECCA BEACH SMITH

Opinion

MEMORANDUM DISMISSAL ORDER

This matter comes before the court on the Petitioner's "Motion to Vacate Conviction Under 28 U.S.C. § 2255" ("§ 2255 Motion"), filed by counsel on June 15, 2016. ECF No. 191.

On June 29, 2016, the court ordered the government to file responsive pleadings to the Petitioner's § 2255 Motion within sixty (60) days of the entry date of that order. ECF No. 195. On August 29, 2016, the United States filed a "Motion to Dismiss § 2255 Petition" ("Motion to Dismiss"), which asserted that the Petitioner's § 2255 Motion is untimely under 28 U.S.C. § 2255(f), and that his claim under Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), lacks merit. ECF No. 204. On September 9, 2016, the Petitioner, by counsel, filed the "Petitioner's Response to Government's Motion to Dismiss" ("Response"), which includes a request to hold this proceeding in abeyance. ECF No. 205.

For the reasons below, the Petitioner's Response, requesting a stay of this proceeding, is **DENIED**; the government's Motion to Dismiss is **GRANTED**; and the Petitioner's § 2255 Motion is **DISMISSED**.

I. PROCEDURAL HISTORY

On March 8, 2011, the Petitioner pled guilty to Counts Two, Three, and Five of the thirteen-count Superseding Indictment. Count Two{2016 U.S. Dist. LEXIS 2} charged him with Interference with Commerce by Means of Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; and Counts Three and

Five charged him with Use of a Short-barreled Shotgun During a Crime of Violence, in violation of 18 U.S.C. §§ 924 (c)(1)(A), (B)(i) and 2. ECF No. 26. On June 14, 2011, the court sentenced the Petitioner to a total term of four hundred twenty-six (426) months imprisonment. ECF No. 87. The Petitioner appealed, and the Court of Appeals for the Fourth Circuit affirmed the convictions and sentence on October 12, 2012. ECF Nos. 120, 121. The Petitioner did not file a petition for a writ of certiorari from the United States Supreme Court.

The Petitioner has previously filed four habeas corpus petitions pursuant to 28 U.S.C. § 2255, ECF Nos. 125, 137, 165, 186, and one motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, ECF No. 176, all of which the court has denied. See ECF Nos. 126, 148, 166, 180, 188. On June 15, 2016, the Fourth Circuit issued an Order granting authorization to the Petitioner to file the instant § 2255 Motion. ECF No. 190.

II. DISCUSSION

A. The Petitioner's Abeyance Request

The Petitioner requests that the § 2255 proceeding be held in abeyance pending a decision from the United States Court of Appeals for the Fourth Circuit as to whether Interference with Commerce by Robbery**{2016 U.S. Dist. LEXIS 3}** ("Hobbs Act robbery"), in violation of 18 U.S.C. §§ 1951(a) and 2, is a crime of violence under 18 U.S.C. § 924(c)(3). Resp. at 1. A decision from the Fourth Circuit will not result in the relief the Petitioner seeks, even should the Fourth Circuit determine that Hobbs Act robbery is not a crime of violence: Only the Supreme Court can determine whether the residual clause in § 924(c)(3) is unconstitutionally vague, see 28 U.S.C. § 2255(f)(3); Dodd v. United States, 545 U.S. 353, 357, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005), and only the Supreme Court can determine whether this new rule of constitutional law is retroactively applicable on collateral review, see 28 U.S.C. § 2244(b)(2)(A); Tyler v. Cain, 533 U.S. 656, 662, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001).1 Accordingly, the court finds no reason to stay the proceeding in anticipation of a decision from the Fourth Circuit on the issue of whether Hobbs Act robbery is classified as a crime of violence, and the request to hold this proceeding in abeyance is **DENIED**.

B. The Petitioner's § 2255 Motion and the Government's Motion to Dismiss

The instant § 2255 Motion is untimely. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996), imposes a one-year statute of limitations on § 2255 motions. Section 2255, as amended by AEDPA, provides in relevant part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date**{2016 U.S. Dist. LEXIS 4}** on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which 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; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.28 U.S.C. § 2255(f). The Petitioner's judgment became final on January 10, 2013. See Clay v. United States, 537 U.S. 522, 532, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003) ("[F]or federal criminal defendants who do not file a petition for

certiorari with [the Supreme] Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires."); Sup. Ct. R. 13 (requiring a petition for a writ of certiorari to be filed within ninety days after the entry of judgment). Therefore, the one-year period to file a § 2255 motion expired on January 10, 2014, making the § 2255 Motion untimely under 28 U.S.C. § 2255(f)(1).

The Petitioner asserts that the instant § 2255 Motion is nonetheless{2016 U.S. Dist. LEXIS 5} timely pursuant to 28 U.S.C. § 2255(f)(3), based on Welch v. United States, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016), which made the new right recognized in Johnson applicable on collateral review. Welch, 136 S. Ct. at 1265. In Johnson, the Supreme Court struck down the residual clause of the Armed Career Criminal Act of 1984 ("ACCA"), in 18 U.S.C. § 924(e)(2)(B)(ii), because it was unconstitutionally vague. Johnson, 135 S. Ct. at 2563.

Here, the Petitioner was not sentenced under the ACCA. Instead, he challenges his conviction on Counts Three and Five, for Use of a Short-barreled Shotgun During a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(A), (B))(i) and 2, which in turn use the definition for a "crime of violence" in § 924(c)(3). Section 924(c)(3) provides the following:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and-
>
> (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.Id. Subsection (A) is the "force clause," and (B) is the "residual clause."

The Petitioner's conviction and sentence do not implicate the ACCA and its residual clause in § 924(e)(2)(B)(ii), and Johnson is inapplicable for two additional reasons. First, the court declines{2016 U.S. Dist. LEXIS 6} to extend Johnson to hold that the definition of "crime of violence" in § 924(c)(3) is unconstitutionally vague,2 particularly since the Supreme Court has not addressed this issue.3 Second, the predicate crime of violence for the Petitioner's § 924(c) (1) conviction was Hobbs Act robbery. This court has consistently found that Hobbs Act robbery is a "crime of violence" under the force clause of § 924(c)(3)(A). E.g., Brown v. United States, 163 F. Supp. 3d 315, 316 (E.D. Va. 2016), appeal docketed, No. 16-6618 (4th Cir. Apr. 29, 2016); United States v. McDaniels, 147 F. Supp. 3d 427, 433-35 (E.D. Va. 2015); United States v. Standberry, 139 F. Supp. 3d 734, 740 (E.D. Va. 2015). Indeed, multiple courts have reached the conclusion that Hobbs Act robbery can serve as a crime of violence as defined by§ 924(c)(3)(A). Standberry, 139 F. Supp. 3d at 740 (citing cases). The Petitioner has not presented any arguments warranting departure from this case law, and the court reaffirms the finding here.

Because Johnson does not extend to the "crime of violence" definition in § 924(c)(3), and because the Petitioner's predicate crime of Hobbs Act robbery falls under that definition's force clause, the § 2255 Motion does not state a claim under Johnson, and it is untimely under § 2255(f)(3) for this reason.

Accordingly, there is no basis for considering the instant § 2255 Motion timely filed. As stated above, the Petitioner filed this § 2255 Motion more than one year after the judgment became final, so the § 2255 Motion is untimely under 28 U.S.C. § 2255(f)(1). The Petitioner alleges no unlawful governmental action that prevented him from filing the § 2255 Motion, and the court finds none, so 28 U.S.C. § 2255(f)(2) is inapposite. As discussed herein, the § 2255 Motion is not timely pursuant to 28 U.S.C. § 2255(f)(3). Finally, the Petitioner provides no evidence of newly discovered facts that

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

RICKY LEE TYNDALL,

Petitioner,

v.

CIVIL NO. 2:16cv311
[ORIGINAL CRIMINAL NO. 2:10cr200-1]

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter comes before the court on the Petitioner's Motion to Proceed Pro Se, filed by the Petitioner on November 1, 2016.[1] ECF No. 213. The Petitioner seeks to proceed pro se on a Motion to Alter or Amend Judgment. ECF No. 214.

The Court of Appeals for the Fourth Circuit appointed the Federal Public Defender ("FPD") as counsel for the Petitioner for the limited purpose of filing a motion under 28 U.S.C. § 2255 that raised a claim based on the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). See ECF No. 189 (Fourth Circuit order appointing counsel in Case No. 16-9041); ECF No. 190 (Fourth Circuit order granting authorization to file a § 2255 motion under Johnson in Case

[1] The court accepts the Petitioner's motion as effectively filed on the date the Petitioner certifies he placed it in the prison's internal mailing system, which is November 1, 2016. See Houston v. Lack, 487 U.S. 266 (1988) (articulating the prison mailbox rule).

No. 16-9041). The Petitioner, through counsel, filed his § 2255 motion on June 15, 2016. ECF No. 191. After additional briefing by the Petitioner and the United States, the court issued a Memorandum Dismissal Order on October 4, 2016, which denied the Petitioner's request for a stay of the § 2255 proceeding, granted the government's motion to dismiss the Petitioner's § 2255 motion, and dismissed the Petitioner's § 2255 motion as time-barred. ECF No. 211. The court denied a certificate of appealability. Id. at 8.

The Petitioner's appointed counsel did not seek a certificate of appealability from the Fourth Circuit, or file a notice of appeal or a motion to reconsider, as allowed under Rule 11 of the Rules Governing § 2255 Proceedings ("§ 2255 Rules"), and the time to do so has now expired. See § 2255 Rule 11; Fed. R. App. P. 4(a)(1)(B). As such, the FPD's representation has concluded and the FPD is no longer counsel in this case. Accordingly, the Petitioner's Motion to Proceed Pro Se is **GRANTED**.

Turning to the Petitioner's Motion to Alter and Amend Judgment, it was timely filed by the Petitioner on November 1, 2016,[2] pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59(e) Motion"). ECF No. 214. However, "reconsideration of a judgment after its entry is an

[2] See supra note 1.

extraordinary remedy which should be used sparingly." Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998) (citation omitted). The Fourth Circuit has recognized only "three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Id. Thus, "Rule 59(e) motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." Id. Moreover, when arguing clear error, "mere disagreement [with a court's ruling] does not support a Rule 59(e) motion." United States v. Owens, No. 3:05cr264, 2016 WL 5019163, at *1 (E.D. Va. Sept. 16, 2016) (alterations in original) (quoting Hutchinson v. Staton, 994 F.2d 1076, 1082 (4th Cir. 1993)).

Here, the Petitioner's Rule 59(e) Motion fails, as he has not directed the court to any authority that demonstrates an intervening change in controlling law since the Memorandum Dismissal Order of October 4, 2016, any new evidence, or a clear error of law in the Memorandum Dismissal Order of October 4, 2016. The arguments raised by the Petitioner in support for his Rule 59(e) Motion either repeat those arguments

already made by his counsel in his § 2255 motion or raise no new matters of merit or substance. Accordingly, the Petitioner's Rule 59(e) Motion is **DENIED**.

The Petitioner is **ADVISED** that he may appeal from this Order by filing, within sixty (60) days of entry of this Order, a written notice of appeal with the Clerk of the United States District Court, 600 Granby Street, Norfolk, Virginia, 23510. For the reasons stated herein and in the Memorandum Dismissal Order of October 4, 2016, the court declines to issue a certificate of appealability.

The Clerk is **DIRECTED** to forward a copy of this Order to the Petitioner, to the Federal Public Defender at Norfolk, and to the United States Attorney at Norfolk.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge

REBECCA BEACH SMITH
CHIEF JUDGE

December 8, 2016