

APPENDIX 1

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

LG:fw

UNITED STATES DISTRICT COURT
Southern District of MississippiUNITED STATES OF AMERICA
V.
RICHARD BEN

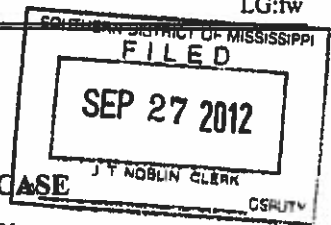
JUDGMENT IN A CRIMINAL CASE

Case Number: 4:12cr11HTW-LRA-001

USM Number: 16658-043

Omodare B. Jupiter, 200 S. Lamar Street, 200-N, Jackson, MS 39201

Defendant's Attorney:



THE DEFENDANT:

☒ pleaded guilty to count(s) 3☐ pleaded nolo contendere to count(s)
which was accepted by the court.☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|------------------------------|---|---------------|-------|
| 18 U.S.C. § 924(c)(1)(A)(ii) | Use of a Firearm During Violent Crime-Robbery | 09/09/11 | 3 |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 1, 2, 4, 5 and 6 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

September 19, 2012

Date of Imposition of Judgment

Signature of Judge

The Honorable Henry T. Wingate

U.S. District Court Judge

Name and Title of Judge

Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 6

DEFENDANT: RICHARD BEN
CASE NUMBER: 4:12cr11HTW-LRA-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

eighty-four (84) months

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ by ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment—Page 3 of 6

DEFENDANT: RICHARD BEN
CASE NUMBER: 4:12cr11HTW-LRA-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : 5 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the Probation Officer in a manner and frequency directed by the Court or the Probation Officer.
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C — Supervised Release

Judgment—Page 4 of 6

DEFENDANT: RICHARD BEN
CASE NUMBER: 4:12cr11HTW-LRA-001

SPECIAL CONDITIONS OF SUPERVISION

- A. The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the supervising U.S. Probation Officer.
- B. The defendant shall participate in a program of testing and/or treatment for alcohol/drug abuse as directed by the probation office. If enrolled in an alcohol/drug treatment program, the defendant shall abstain from consuming alcoholic beverages during treatment and shall continue abstaining for the remaining period of supervision. The defendant shall contribute to the cost of treatment in accordance with the probation office Copayment Policy.
- C. The defendant is to provide any financial information, business or personal, to the U. S. Probation Office upon request, and is prohibited from incurring any new credit without prior approval from the supervising U. S. Probation Officer

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary PenaltiesJudgment — Page 5 of 6DEFENDANT: RICHARD BEN
CASE NUMBER: 4:12cr11HTW-LRA-001**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------|--------------------|
| TOTALS | \$100.00 | \$1,000.00 | \$300.00 |

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|--|--------------------|----------------------------|-------------------------------|
| Victim, S. N. (Will be provided under separate cover) | | \$300.00 | |

| | | | | |
|---------------|----|-------------|----|---------------|
| TOTALS | \$ | <u>0.00</u> | \$ | <u>300.00</u> |
|---------------|----|-------------|----|---------------|

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICHARD BEN
CASE NUMBER: 4:12cr11HTW-LRA-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- * Restitution is payable during the period of incarceration. Any balance remaining upon release from imprisonment shall be paid in 6 monthly installments of \$50, beginning 60 days after release from imprisonment.
- * Fine is payable during the period of incarceration. Any balance remaining upon release from imprisonment shall be paid in 20 monthly installments of \$50, beginning the month after the restitution is paid in full.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the U.S. District Clerk of Court, P. O. Box 23552, Jackson, MS 39225-3552.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

RICHARD BEN

PETITIONER

vs.

**CIVIL ACTION No.: 4:16-CV-1-HTW and
CRIMINAL ACTION No.: 4:12-CR-11-HTW-LRA-1**

UNITED STATES OF AMERICA

RESPONDENT

ORDER

BEFORE THIS COURT is the Motion to Dismiss filed by the United States of America (hereinafter referred to as “United States”) [Docket no. 26] and the Motion to Vacate filed by petitioner Richard Ben [Docket no. 22]. By its motion, the government asks this court to dismiss the Motion to Vacate filed by the Petitioner, Richard Ben (hereinafter referred to as “Ben”) [Docket no. 22]. This court, however, is persuaded that Ben has not waived his right to challenge his sentence under Title 28 U.S.C. § 2255¹. Relative to the merits of Ben’s claims in his Motion to Vacate, this court finds that it is not well-taken. The court sets out below its reasoning on these matters.

I. PROCEDURAL HISTORY

On May 9, 2012, the United States charged Ben by indictment for various state and federal criminal violations: house burglary in violation of MISS. CODE ANN. § 97-17-23²; robbery in

¹ (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C.A. § 2255 (West)

² (1) Every person who shall be convicted of breaking and entering the dwelling house or inner door of such dwelling house of another, whether armed with a deadly weapon or not, and whether there shall be at the time some human being in such dwelling house or not, with intent to commit some crime therein, shall be punished by commitment to the custody of the Department of Corrections for not less than three (3) years nor more than twenty-five (25) years.

(2) Every person who shall be convicted of violating subsection (1) under circumstances likely to terrorize any person who is actually occupying the house at the time of the criminal invasion of the premises shall be punished by

violation of Title 18 U.S.C. § 2111³; using a firearm during a crime of violence in violation of Title 18 U.S.C. § 924(c)(1)⁴; possession of a firearm by a person using or addicted to drugs in violation of Title 18 U.S.C. § 922 (g)(3)⁵; possession of a firearm by a person previously convicted of domestic assault in violation of Title 18 U.S.C. § 922(g)(9)⁶; and business burglary in violation of MISS. CODE ANN. § 97-17-33⁷. Ben, a Native American Choctaw, was charged under both state

imprisonment in the custody of the Department of Corrections for not less than ten (10) years nor more than twenty-five (25) years.

Miss. Code. Ann. § 97-17-23 (West)

³ “Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.” 18 U.S.C.A. § 2111 (West)

⁴ (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C.A. § 924 (West)

⁵ (g) It shall be unlawful for any person—[...]

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));[...]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.A. § 922 (West)

⁶ (g) It shall be unlawful for any person—[...]

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,[...]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.A. § 922 (West)

⁷ (1) Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, water vessel, commercial or pleasure craft, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven (7) years.

(2) Any person who shall be convicted of breaking and entering a church, synagogue, temple or other established place of worship with intent to commit some crime therein shall be punished by imprisonment in the penitentiary not more than fourteen (14) years.

Miss. Code. Ann. § 97-17-33 (West)

and federal statutes because his crimes occurred on an Indian reservation, which is under the purview of Title 18 U.S.C. § 1153⁸.

On July 10, 2012, Ben entered a plea agreement with the United States where he expressly waived “the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255....” [Docket no. 13, P. 4, ¶ 7(b)]. Ben pled, with the advice of counsel, to count 3 of the indictment, that is, that he had used a firearm during a crime of violence in violation of Title 18 U.S.C. § 924(c)(1). The underlying crime of violence was robbery as outlawed by Title 18 U.S.C. § 2111.

On September 19, 2012, this court, after considering the guidelines and the statutory minimum and maximums, sentenced Ben to eighty-four (84) months’ imprisonment, the statutory minimum for the crime to which he had pled guilty. [Docket no. 20]. The court then dismissed counts 1, 2, 4, 5, and 6 on the motion of the United States and pursuant to the plea agreement between the parties. [Docket no. 16].

Ben filed his instant motion to vacate under 28 U.S.C. § 2255 on June 23, 2016. [Docket no. 22]. Ben’s motion to vacate alleges that the newly-decided case of *Johnson v. United States*, 135 S.Ct. 2551 (2015) grants him relief from his sentence because, according to Ben, the crime of

⁸ (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense

18 U.S.C.A. § 1153 (West)

robbery no longer qualifies as a crime of violence under Title 18 U.S.C. § 924(c). Ben also alleges that *United States v. Welch*, 136 S.Ct. 1257 (2016) allows the retroactive application of *Johnson*.

This court, after *Welch* was announced, ordered the United States to respond to Ben's Motion to Vacate. [Docket no. 25]. The United States filed its Motion to Dismiss on April 26, 2017, alleging that Ben expressly had waived his right to challenge his sentence under Title 28 U.S.C. § 2255. [Docket no. 26].

Ben filed his response in opposition to the government's motion to dismiss on April 27, 2017. [Docket no. 27]. He predicates his response on his reading of the jurisprudence of the Ninth Circuit Court of Appeals case of *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) and the Sixth Circuit's holding in *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016).

II. DISCUSSION

A. Motion to Dismiss [Docket no. 26]

It is well-settled law in the Fifth Circuit that a "voluntary, unconditional guilty plea waives all nonjurisdictional defects in the proceedings against the defendant." *United States v. Hoctel*, 154 F.3d 506, 507 (5th Cir. 1998)(Citing *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *United States v. Andrade*, 83 F.3d 729, 731 (5th Cir.1996)). As this court stated above, with the advice of counsel⁹, Ben knowingly, intelligently and expressly waived his right to challenge his sentence under 28 U.S.C. § 2255.

7. Waivers. Defendant, knowing and understanding all of the matters aforesaid, including the maximum possible penalty that could be imposed, and being advised of Defendant's rights to remain silent, to trial by jury, to subpoena witnesses on Defendant's own behalf, to confront the witnesses against Defendant, and to appeal the conviction and sentence, in exchange for the U.S. Attorney entering into this plea agreement and accompanying plea supplement, hereby expressly waives the following rights: [...]

b. the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought

⁹ Ben was represented by Omodare Jupiter, Esq. at his change of plea hearing and his sentencing hearing.

under Title 28, United States Code, Section 2255, and any type of proceeding claiming double jeopardy or excessive penalty as a result of any forfeiture ordered or to be ordered in this case, [...]

[Docket no. 13, P. 4, ¶ 7]. The plea agreement was signed by Assistant United States Attorney Patrick Lemon for the United States; Omodare Jupiter, as attorney for Ben; and Richard Ben in his own capacity. [Docket no. 13, P. 6].

The Fifth Circuit has recognized two exceptions to the waiver rule of *Hoctel*: ineffective assistance of counsel if the claimed ineffective assistance directly affected the validity of that waiver or the plea itself; or where the sentence imposed exceeded the statutory maximum penalty. See *United States v. Hollins*, 97 Fed. App'x 477 (5th Cir. 2004). In his motion to vacate, Ben has alleged neither an ineffective assistance of counsel nor that his sentence exceeded the statutory maximum.

According to Ben, *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), which is based on a substantially similar set of facts, is the authority for the proposition that he has not waived this issue. Torres, though, pled to a violation of Title 18 U.S.C. § 924(e), the provision that the United States Supreme Court already found unconstitutionally vague in *Johnson*. Further, Torres specifically “preserv[ed] the right to appeal a determination that [he] qualifies as an Armed Career Criminal.” *Torres* at 1124.

In either event, of the circuits outside of the 9th Circuit which have addressed *Torres*, one District Court in the Western District of New York has followed *Torres*¹⁰ and one District Court in the Eastern District of Michigan declined to follow *Torres*¹¹. This court, regardless, is not

¹⁰ *Williams v. United States*, 2016 WL 4917017 (W.D.N.Y. September 15, 2016)(finding that the defendant had been sentenced under the ACCA’s residual clause that *Johnson* found unconstitutionally vague and, therefore, the sentence imposed by the court was illegal).

¹¹ *United States v. Wall*, 230 F.Supp. 3d 771 (E.D. Mich. January 18, 2017)(finding that defendants in the Sixth Circuit can validly waive an challenge to improperly calculated guidelines and the court’s imposition of a sentence based on improperly calculated guidelines does not render the sentence illegal).

persuaded that *Torres* is precedential for the Fifth Circuit and, therefore, this court declines to follow *Torres* also.

Ben also argues that *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016) provides this court with the authority to find that he had not waived his right to challenge his sentence under *Johnson*. This court is not bound by the Sixth Circuit precedent cited by Ben where the Fifth Circuit Court of Appeals offers guidance. *United States v. Wright*, 681 Fed. App'x. 418 (5th Cir. 2017) comes to mind. In *Wright*, the Fifth Circuit held:

“Waiver occurs when a party intentionally abandons a right that is known.” *United States v. Troxler*, 390 Fed.Appx. 363, 367 (5th Cir. 2010) (citing *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006)). Where, as here, a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time. *Id.*; see also, e.g., *Smith v. Blackburn*, 632 F.2d 1194, 1195 (5th Cir. 1980).

United States v. Wright, 681 F. App'x 418, 420 (5th Cir. 2017).

This court is persuaded that this Fifth Circuit jurisprudence speaks to waiver and holds that a defendant does not waive an unknown right at the time of his plea agreement. To find that Ben could not later challenge an allegedly unconstitutional action based on law, made retroactive after his own sentencing would not comport with the fairness standards of the United States Constitution, nor would it comport with Due Process. Ben pled guilty on July 10, 2012. The United States Supreme Court announced its opinion in *Johnson* in 2015 and made *Johnson* retroactive in *Welch* in 2016. This court finds, then, that Ben did not waive a right that did not exist until four (4) years after his conviction and sentence. This court, therefore, holds that Ben did not waive a known right.

B. Motion to Vacate [Docket no. 22]

By his Motion to Vacate [Docket no. 22], Ben asks this court to apply the standards announced by the United States Supreme Court in *Johnson* and *Welch* to his conviction under Title

18 U.S.C. § 924(c)(1). The *Johnson* court held that the residual clause of the Armed Career Criminal Act¹² was unconstitutionally vague. According to Ben, the language of the statute under which he was convicted, Title 18 U.S.C. 924(c), is substantially similar to the residual clause that the *Johnson* court found unconstitutional.

The United States has not responded to the arguments of Ben.

The Fifth Circuit nevertheless already has addressed an issue exactly like the one before this court in its opinion in *United States v. Garcia*, 857 F.3d 708 (5th Cir. 2017). In *Garcia*, the defendant was convicted for possession, brandishing, or discharging a firearm during a crime of violence. The underlying crime of violence was a Hobbs Act robbery¹³. Like Ben, *Garcia* argued that a Hobbs Act robbery no longer qualifies as a “crime of violence”. The Fifth Circuit held:

In *Johnson v. United States*, the Supreme Court held that a somewhat similar provision, the residual clause of 18 U.S.C. § 924(e), was unconstitutionally vague. — U.S. —, 135 S.Ct. 2551, 2555–60, 192 L.Ed.2d 569 (2015). However, our Court subsequently held that 18 U.S.C. § 16(b), which contains wording almost identical to that of § 924(c)(3)(B), is not unconstitutionally vague. *United States v. Gonzalez–Longoria*, 831 F.3d 670, 674–77 (5th Cir. 2016) (en banc), petition for cert. filed (U.S. Sept. 29, 2016) (No. 16–6259). To preserve this issue for further review, *Garcia* argues that *Gonzalez–Longoria* was wrongly decided. But because *Garcia* concedes that *Gonzalez–Longoria* is controlling, we affirm his conviction under § 924(c).

¹² The Act defines “violent felony” as follows:

any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.

Johnson v. United States, 135 S. Ct. 2551, 2555–56, 192 L. Ed. 2d 569 (2015)(Quoting 18 U.S.C. § 924(e)(2)(B)(Emphasis added which reflects the text of the residual clause).

¹³ A Hobbs Act Robbery is:

- (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C.A. § 1951 (West)

United States v. Garcia, 857 F.3d 708, 711 (5th Cir. 2017).

This court finds that the Fifth Circuit has already precluded the relief that Ben seeks. His motion to vacate is premised on the same grounds the Fifth Circuit already rejected.

III. CERTIFICATE OF APPEALABILITY

A final order adverse to the petitioner having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by this federal court or a proceeding pursuant to 28 U.S.C. § 2255, the court, considering the record in the case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts, hereby finds that:

A Certificate of Appealability should not issue. The petitioner has failed to make a substantial showing of the denial of a constitutional right.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that the Motion to Dismiss [Docket no. 26] filed by the United States is hereby **DENIED**.

IT IS FURTHER ORDERED that the Motion to Vacate [Docket no. 22] filed by Ben is hereby **DENIED**.

IT IS FURTHER ORDERED that the United States District Court Clerk for the Southern District of Mississippi is hereby ordered to close the related civil action in this matter, 4:16-CV-1-HTW.

IT IS FINALLY ORDERED that a Certificate of Appealability shall not issue.

SO ORDERED AND ADJUDGED this the 18th day of May, 2018.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60378

D.C. Docket No. 4:16-CV-1

United States Court of Appeals
Fifth Circuit

FILED
November 6, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RICHARD BEN,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-60378

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Lyle W. Cayce
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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RICHARD BEN,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 4:16-CV-1

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:*

Richard Ben pled guilty to violating 18 U.S.C. § 924(c)(1) for using a firearm during a crime of violence. Ben argues his conviction should be vacated because the predicate crime of robbery, 18 U.S.C. § 2111, is no longer “a crime of violence” under § 924(c)(1). In *United States v. Brewer*, we held that robbery by intimidation under 18 U.S.C. § 2113(a) is “a crime of violence.” 848 F.3d 711, 716 (5th Cir. 2017). The definitions of robbery under both § 2113(a) and §

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 18-60378

2111 are the same. Ben's counsel conceded that *Brewer* controls in this case during oral argument. Ben cannot prevail because *Brewer* forecloses the argument that robbery under § 2111 is not a predicate "crime of violence."

For the reasons described, we AFFIRM the district court's judgment.