

APPENDIX "A"
Eleventh Circuit Opinion

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13880-B

TODD MICHAEL VINCENT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Todd Michael Vincent is a federal prisoner serving a total sentence of 130 months' imprisonment after pleading guilty in 2015 to bank robbery, in violation of 18 U.S.C. § 2113(a) & (d), and brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his Fed. R. Civ. P. 60(b) motion, in which he argued that his underlying 28 U.S.C. § 2255 motion to vacate, which was filed in 2016, was timely. Specifically, he argued that, in light of the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018), the district court erred in determining that his claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015), was inapplicable to his conviction and sentence.

This Court has held that "a [COA] is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding." *Gonzalez v. Sec'y for Dep't*

of *Corrs.*, 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

The appeal of a Rule 60(b) motion is limited to a determination of whether the district court abused its discretion in denying the motion, and shall not extend to the validity of the underlying judgment *per se*. *Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996). A Rule 60(b) motion permissibly may assert that a federal court's previous habeas ruling that precluded a merits determination (*i.e.*, a procedural ruling such as failure to exhaust, a procedural bar, or a statute-of-limitations bar) was in error. *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005).

Here, reasonable jurists would not debate the denial of Vincent's Rule 60(b) motion. This Court already determined that, even if § 924(c)(3)(B)'s residual clause was invalidated, Vincent's conviction under § 924(c) would remain valid because his bank-robbery conviction qualifies as a crime of violence under § 924(c)(3)(A). *See In re Hines*, 824 F.3d 1334, 1336-37 (11th Cir. 2016). Accordingly, because Vincent failed to make the requisite showing, his motion for a COA is DENIED and his motion for IFP status is DENIED AS MOOT. *See Slack*, 529 U.S. at 484.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"
District Court Opinion

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TODD MICHAEL VINCENT,

Plaintiff,

v.

CASE NO. 8:16-cv-1721-T-26TGW

UNITED STATES OF AMERICA,

Defendant.

ORDER

UPON DUE AND CAREFUL CONSIDERATION of Plaintiff's submissions, together with the procedural history of this case, it is ORDERED AND ADJUDGED that Plaintiff's Motion to Vacate (Dkt. 18) is denied. See United States v. Wiles, 723 F. App'x 968 (11th Cir. 2018) (unpublished); United States v. Washington, 2018 WL 2128993 (M.D. Fla. 2018).

DONE AND ORDERED at Tampa, Florida, on August 3, 2018.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:

Counsel of Record
Plaintiff, *pro se*

APPENDIX "C"
Eleventh Circuit Order Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13880-B

TODD MICHAEL VINCENT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: WILSON and NEWSOM, Circuit Judges.

BY THE COURT:

Todd Michael Vincent has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's August 20, 2019, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis* in his appeal from the order denying his Fed. R. Civ. P. 60(b) motion for relief from the judgment denying his underlying 28 U.S.C. § 2255 motion to vacate his sentence. Upon review, Vincent's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX "D"
Supreme Court Order Granting Extension of Time

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

January 17, 2020

Mr. Todd Michael Vincent
Prisoner ID 61591018
FCI, P.O. Box 1031
Coleman, FL 33521-1031

Re: Todd Michael Vincent
v. United States
Application No. 19A794

Dear Mr. Vincent:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 17, 2020, extended the time to and including April 12, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Jacob A. Levitan
Case Analyst

APPENDIX "E"
Judgment and Commitment

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 8:14-cr-436-T-26TGW
USM NUMBER: 61591-018

vs.

TODD MICHAEL VINCENT

Defendant's Attorney: Adam Nate, AFPD

THE DEFENDANT:

X pleaded guilty to Count(s) FOUR and FIVE of the Indictment.

| <u>TITLE & SECTION</u> | <u>NATURE OF OFFENSE</u> | <u>OFFENSE ENDED</u> | <u>COUNT</u> |
|-----------------------------|--|----------------------|--------------|
| 18 U.S.C. §2113(a) and (d) | Bank Robbery with Assault | September 11, 2014 | FOUR |
| 18 U.S.C. §924(c)(1)(A)(ii) | Brandishing a Firearm in Relation to a Crime of Violence | September 11, 2014 | FIVE |

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X Count(s) ONE, TWO, THREE, and SIX are dismissed on the motion of the United States.

IT IS FURTHER 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 any material change in economic circumstances.

Date of Imposition of Sentence: May 22, 2015


SUSAN C. BUCKLEW
UNITED STATES DISTRICT JUDGE

DATE: May 22, 2015

APPENDIX "F"
Filed 28 U.S.C. § 2255

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

| | | |
|---|--|--|
| United States District Court | District | Middle District of Florida, Tampa Division |
| Name (<i>under which you were convicted</i>): Todd Michael Vincent | Docket or Case No.: | |
| Place of Confinement: Coleman Low FCI | Prisoner No.: 02/18/2024 | |
| UNITED STATES OF AMERICA | Movant (<i>include name under which convicted</i>) | |
| V. TODD MICHAEL VINCENT | | |

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
U.S. District Court, Middle District of Florida, Tampa Division

(b) Criminal docket or case number (if you know): 8:14-cr-436-T-26TGW

2. (a) Date of the judgment of conviction (if you know): 5/22/2015

(b) Date of sentencing: 5/22/2015

3. Length of sentence: 130 months

4. Nature of crime (all counts):

1. Bank Robbery with Assault (Count 4)
2. Brandishing a Firearm in Relation to a Crime of Violence (Count 5)

5. (a) What was your plea? (Check one)

(1) Not guilty

(2) Guilty

(3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

8. Did you appeal from the judgment of conviction? Yes No

APPENDIX "G"
District Court Denial of § 2255

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

TODD MICHAEL VINCENT,

Plaintiff,

v.

CASE NO. 8:16-cv-1721-T-26TGW

UNITED STATES OF AMERICA,

Defendant.

ORDER

Plaintiff, proceeding through appointed counsel, has filed a Motion to Vacate pursuant to 28 U.S.C. § 2255. The Court has undertaken a prompt examination of the motion as required by Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts. After doing so, the Court concludes that it plainly appears from the motion, as well as the record of the Plaintiff's prior criminal proceedings,¹ that he is not entitled to relief and that the motion must be dismissed. In view of that conclusion, the Court needs no response from the Defendant or to conduct an evidentiary hearing.

¹ See case number 8:14-cr-436.

A federal grand jury returned a six-count indictment against the Plaintiff.² The Plaintiff eventually pleaded guilty to counts four and five of the indictment pursuant to a written plea agreement with the Defendant.³ In count four, he pleaded guilty to committing bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). In count five, he pleaded guilty to brandishing a firearm in relation to a crime of violence, that is, the bank robbery charged in count 4 in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The Court later sentenced him to a term of imprisonment of 46 months as to count four and a consecutive term of imprisonment of 84 months as to count five, to be followed by a term of supervised release of 36 months.⁴ Plaintiff did not appeal.

Plaintiff now seeks collateral relief under the auspices of § 2255 with respect to his consecutive term of imprisonment imposed in count five, claiming that because his consecutive sentence as to that count was based on the residual clause of § 924(c)(3)(B), and because that clause is unconstitutionally vague, he has been denied due process.

Plaintiff's claim for relief rests on the decision in Johnson v. United States, 576 U.S. ___, 135 S.Ct. 1551, 192 L.Ed.2d 569 (2015), in which the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague, a decision that was made retroactive on collateral review by the

² See id., docket 1.

³ See id., dockets 18 and 23.

⁴ See id., docket 45.

Supreme Court in Welch v. United States, 578 U.S. ___, 136 S.Ct. 1257, ___ L.Ed.2d ___ (2016).⁵

After careful consideration, the Court concludes that Johnson affords the Plaintiff no collateral relief with regard to the consecutive sentence imposed in count five. A panel of the Eleventh Circuit Court of Appeals recently undertook an examination in a direct appeal of whether Johnson invalidated § 924(c)(3)(B). See United States v. Fox, 2016 WL 3033067 (11th Cir. May 27, 2016) (unpublished). Although the opinion was not published and the issue was subject to plain error review, the Court finds its reasoning very persuasive. The Court in Fox, after an extensive analysis, first determined that “it is not clear or obvious that *Samuel Johnson* invalidated § 924(c)(3)(B).” 2016 WL 3033067, at *2. The Court then, after acknowledging that the Eleventh Circuit has yet to determine whether § 2113(a) is a crime of violence under § 924(c)(3)(A), nevertheless determined, after an extensive analysis of its own cases by analogy with regard to crimes of violence and three other circuit cases which concluded that § 2113(a) constitutes a crime of violence under § 924(c)(3)(A),⁶ held that “because Fox has not cited to, and an

⁵ Without the retroactive application of Johnson in Welch, Plaintiff’s motion would be clearly time-barred under the provisions of § 2255(f)(1). As the record in Plaintiff’s underlying criminal case reflects, he was sentenced on May 22, 2015, and he did not appeal. In this case, his counsel filed the motion on June 23, 2016.

⁶ See e.g., United States v. Lockley, 632 F.3d 1238, 1244-45 (11th Cir. 2011); United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998); United States v. Adkins, 937 F.2d 947, 950, n.2 (4th Cir. 1991).

independent review has not uncovered any precedent holding that bank robbery under § 2113(a) is *not* a qualifying offense under § 924(c)(3)(A), he cannot show plain error.” 2016 WL 3033067 at *3 (emphasis in original) (footnote omitted).

Underscoring this lack of authority holding that bank robbery is not a crime of violence under § 924(c)(3)(A) is the recent decision in Clark v. United States, 2016 WL 845271 (E.D. Wis. March 4, 2016). In rejecting as futile Clark’s attempt to amend his § 2255 motion to include a Johnson-based argument that he was entitled to relief because his bank robberies did not constitute crimes of violence under § 924(c), the Court concluded that “even if the Court were to reach the merits of Clark’s newly-asserted ground for relief, it would reject his position. Every decision the Court has found to have considered the issue has concluded that bank robbery and similar crimes constitute crimes of violence under the range of statutes that Johnson’s reasoning might affect.” 2016 WL 845271, at *25 (numerous citations omitted).

More to the point is the Eleventh Circuit’s recent order denying an application to file a second or successive motion to vacate in In re: Charles Hines, ___ F.3d ___, 2016 WL 3189822 (11th Cir. June 8, 2016). In that case, the Court held that even if the definition of a crime of violence as defined in § 924(c)(3)(B) was unconstitutionally vague in light of Johnson, the applicant’s conviction for bank robbery still would support an enhancement under § 924(c)(3)(A). 2016 WL 3189822, at 2-3.

ACCORDINGLY, for the reasons expressed, it is **ORDERED AND ADJUDGED** that the Plaintiff's Motion to Vacate (Dkt. 1) is **dismissed**. The clerk is directed to enter judgment in favor of the Defendant and to **CLOSE** this case. The Court defers determining whether a certificate of appealability should issue pending an appropriate application from Plaintiff's counsel.

DONE AND ORDERED at Tampa, Florida, on June 24, 2016.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TODD MICHAEL VINCENT,

Plaintiff,

v.

CASE NO. 8:16-cv-1721-T-26TGW

UNITED STATES OF AMERICA,

Defendant.

ORDER

UPON DUE AND CAREFUL CONSIDERATION of the procedural history of this case, as well as the Plaintiff's underlying criminal case, it is **ORDERED AND ADJUDGED** that the Plaintiff's Application for Certificate of Appealability (Dkt. 7) is **denied** because the Plaintiff has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). For some reason, Plaintiff's counsel failed to alert the Court to the case of In re Sams, ___ F.3d ___, 2016 WL 3997213 (11th Cir. July 26, 2016). In that case, the Eleventh Circuit, after analyzing and relying on its own prior precedent in In re Hines, 824 F.3d 1334 (11th Cir. 2016) and United States v. Moore, 43 F.3d 56 (11th Cir. 1994), as well as the decisions from three other circuit courts of appeal - United States v. McNeal, 818 F.3d 141 (4th Cir. 2016), United States v. Wright, 215 F.3d 1020 (9th Cir. 2000), and Royal v. Tombone, 141 F.3d

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596 (5th Cir. 1998) - unequivocally held "that a bank robbery conviction under [18 U.S.C.] § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the [18 U.S.C.] § 924)(c)(3)(A) use-of-force clause." 2016 WL 3997213, at 4.

DONE AND ORDERED at Tampa, Florida, on August 29, 2016.

s/Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record

APPENDIX "H"
Motion to Vacate under Fed. R. Civ. P. 60

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Todd Michael Vincent,

petitioner,

v.

Case No.: 8:16-cv-1721-T-26-TGW
(8:14-cr-436-T-26-TGW)

United States of America,

respondent.

**MOTION TO VACATE JUNE 24, 2016 ORDER DENYING § 2255 PETITION
UNDER RULE 60(b)(4) and 60(b)(6)**

In 2016, Todd Michael Vincent, sought to vacate this court's criminal judgment against him. A criminal judgment based on a violation of 18 U.S.C. § 924(c). **Todd Michael Vincent v. United States**, Case No. 8:16-cv-1721-T-26-TGW (M.D. Fla. 2016). Ultimately, this court dismissed that § 2255 on the merits. **Id.**

In the light of the Supreme Court's recent decision in **Sessions v. Dimaya**, 138 S.Ct. 1204 (April 2018) (invalidating an identically worded portion of 18 U.S.C. § 16(b)), this court's finding that the § 2255 motion is meritless was erroneous. Succinctly, if Mr. Vincent proves his § 924(c) claim, then Mr. Vincent is actually innocent. Thus, his § 2255 was timely and meritorious.

Moreso, the actual innocence also overrides any procedural default, which may have impeded this court granting § 2255 relief.

In **McQuiggin v. Perkins**, 569 U.S. 383 (2013), the Supreme Court held that a showing of actual innocence equated to a miscarriage of justice,—which in turn generated an equitable exception that overrides the § 2255 statute of limitations. Moreover, the federal circuit courts recognize that a miscarriage

of justice, not only overrides statute of limitations, but also, especially, when combined with an intervening change in the law—creates an extraordinary circumstance that justifies Rule 60(b) relief. See **Satterfield v. Dist. Atty. Phil.**, et al., 872 F.3d 152 (3d Cir. 2017).

Here, Mr. Vincent's § 924(c) related due process claims, if proved, makes him actually innocent of the 18 U.S.C. § 924(c) charge. See **Duhart v. United States**, Dist. No. 16-61499-CIV-Marra, Doc. 36 (S.D. Fla. May 29, 2018) ("as a result of applying the vagueness rule the Court found Duhart actually innocent of his § 924(c) conviction"). That actual innocence overrides the § 2255 statute of limitations, and renders this court's untimeliness ruling erroneous.

Certain Intervening Changes in the Law Justify Rule 60(b) Relief

Under Rule 60(b)(6), an intervening change in the law plus actual innocence constitutes an extraordinary circumstance justifying equitable relief. Especially, when the defendant argued the correct rule of law in the original proceeding but the habeas court denied the relief by mistake. See **Reese v. Harvey**, 376 Fed. Appx. 920, 921 (11th Cir. 2010); see **Satterfield**, at 164. (vacating a district court's denial of Rule 60(b) motion and remanding for a determination of whether the intervening change in the law implicates actual innocence, thereby justifying Rule 60(b)(6) relief).

The effect of **Dimaya** is to return viability to Mr. Vincent's claim of actual innocence and to do so retroactively. This court should reopen the § 2255 proceedings and address the merits of Mr. Vincent's Johnson-related claim.

Abandonment by § 2255 Attorney

And a second basis for Rule 60(b) relief is the effective abandonment of the § 2255 by his appointed counsel. Although appointed counsel pursued, albeit ineffectively, the § 924(c)-vagueness claim. Appointed counsel ignored her client's express direction to include in the motion claims of ineffective assistance at sentencing and in relation to direct appeal. The attorney's

failure to include these claims, even after telling Mr. Vincent that she would heed his suggestions, amounts to an attorney's withdrawal or abandonment. See, e.g., **Christeson v. Roper**, 135 S.Ct. 891 (2015); **Maples v. Thomas**, 132 S.Ct. 912 (2012).

Appointed counsel's abandonment also denied Mr. Vincent the opportunity to have his § 2255 claim (that counsel failed to file a direct appeal to be heard). This court should reopen Mr. Vincent's § 2255 and be allowed to present the claims which were unadjudicated as a result of appointed counsel's abandonment.

CONCLUSION

Mr. Vincent respectfully requests this court reopen the § 2255 and address Mr. Vincent's claim that his § 924(c) conviction violates due process of law, as well as his ineffective assistance claims (mitigation at sentencing) and ineffective assistance with regards to filing a direct appeal.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted by Todd Michael Vincent on this 31st day of July 2018:

Todd Michael Vincent
Todd Michael Vincent
Reg. No. 61591-018 Unit B-3
Federal Correctional Complex Low
P.O. Box 1031
Coleman, Florida 33521-1031

APPENDIX "I"
Notice of Appeal of Denial of Rule 60

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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Todd Michael Vincent
movant.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

Case No
8:16 cv 1721 T 26TGW

versus

United States of America,
respondent.

Notice of Appeal

Todd Michael Vincent hereby files this notice of appeal. The court denied Mr. Vincent on August 3rd 2018 (Dkt 20) Therefore Mr. Vincent files this notice of appeal from that order.

Respectfully submitted on this 8th day of September 2018.

Todd Vincent
Todd Michael Vincent #61591 018
Federal Correctional Complex
P.O. Box 1031 (Low custody)
Coleman, Florida 33521 1031
Unit B-3

Certificate of Service

I hereby certify that a copy of this motion has been sent to the United States Attorney's Office at 400 North Tampa Street, Suite 3200; Tampa, Florida 33602 on the same day as filed in this court.

Submitted on this 8th day of September, 2018.

Todd M. Vincent
Todd M. Vincent