

APPENDIX 1

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

SCOTT MEECE

PETITIONER

vs.

**CRIMINAL ACTION NO. 3:07-CR-50-HTW-LRA
CIVIL ACTION NO.: 3:16-CV-513-HTW-1**

UNITED STATES OF AMERICA

RESPONDENT

ORDER

BEFORE THIS COURT is petitioner's Motion to Vacate, Set Aside, or Correct his Sentence under Title 28 U.S.C. § 2255¹ [**Docket no. 26**] and the government's Motion to Dismiss [**Docket no. 36**].

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.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) 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 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.

I. FACTUAL AND PROCEDURAL HISTORY

On March 27, 2007, a white male dressed in a business suit and tie – later identified as Scott Meece (hereinafter referred to as “Meece”) – entered the Trustmark National Bank location in Wesson, Mississippi. Upon his entry to the bank, Meece introduced himself as “Scott” and asked to open a new account. A bank employee told Meece that the customer service representative (hereinafter referred to as “CSR”) who opened new accounts was not present and that Meece would have to return later in the day, which he did.

When he returned, Meece met with the CSR and asked to open a new business checking account along with renting a safe deposit box. Meece then asked if he could see the safe deposit boxes, located in the bank’s vault. While inside the vault, Meece then told the CSR to open the second door of the vault – that door sealed the area of the vault containing the bank’s currency. The CSR hesitated and Meece showed the CSR a small black handgun and said, “If anybody starts pushing any buttons, I will start shooting.” The CSR told Meece that she did not possess the key to open the second door and that she would have to obtain the key from the head teller who held it.

Meece and the CSR then went to the head teller’s desk, obtained the key, and went back to the vault, along with the head teller, who, under threat, opened the vault’s second door. Meece

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain--

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

entered the vault and removed U.S. currency. After he took all the currency in the vault, Meece left the bank, and he entered a navy blue, 4-door Volvo without a license plate and drove away. The CSR watched Meece get into the vehicle and leave.

On April 18, 2007, an anonymous caller made a telephone call to the Louisiana State Police that a person matching Meece's description lived in Slidell, Louisiana. Based on that tip, Louisiana State Police placed that home under surveillance and found a blue Volvo matching the description of the vehicle that Meece had used to leave the bank. The next day – April 18, 2007 – the police observed Meece exiting the home and entering the maroon Nissan. This automobile had no tag. The Louisiana State Police thereafter stopped Meece for driving without a tag. When he was stopped, Meece immediately stated, "I bet you think I'm the one who robbed those banks in Mississippi. I've been stopped and checked before." The police requested and obtained from Meece a consent search of the vehicle Meece was driving. Louisiana State Police officers found a small black semi-automatic handgun. The officers then took Meece, who went voluntarily, back to the trooper post.

On the same date, April 19, 2007, Meece was arrested and United States Magistrate Judge Linda A. Anderson issued an arrest warrant for Meece.

On October 30, 2007, Meece, with advice of counsel, pled guilty to armed bank robbery by force or violence in violation of Title 18 U.S.C. § 2113² and brandishing a firearm during a crime of violence in violation of Title 18 U.S.C. §924(c)(1)³.

This court sentenced the defendant on February 20, 2008 to thirty-seven (37) months imprisonment to be followed by a five (5) year term of supervised release on count one (1) – that count which charged Meece with bank robbery. Under count two (2), this court sentenced Meece to a seven (7) year term of imprisonment to run consecutively to count one (1) and to be followed by a five (5) year term of supervised release to be served concurrently with count one (1).

On June 27, 2016, Meece filed the instant Motion to Vacate, Set Aside, or Correct his Sentence under Title 28 U.S.C. § 2255 [**Docket no. 26**]. This court then ordered the government to respond to Meece's motion. [Docket no. 32]. The government filed the instant Motion to Dismiss [**Docket no. 36**] in response.

² (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny-- Shall be fined under this title or imprisoned not more than twenty years, or both. [...]

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 USCS § 2113

³ (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—[...]

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; [...]

18 USCS § 924

II. DISCUSSION

a. Motion to Vacate [Docket no. 26]

Meece, by his motion, asks this court to set aside or vacate his conviction and sentence for brandishing a firearm during a crime of violence in violation of Title 18 U.S.C. § 924(c)(1) because, according to him, the crimes of bank robbery under Title 18 U.S.C. § 2113(a) and (d) no longer qualify as crimes of violence.

Fifth Circuit precedent says otherwise.

The term “crime of violence” is defined by statute:

The term “crime of violence” means--

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, [...]

18 U.S.C.A. § 16 (West). “Crime of violence” is also defined in Title 18 U.S.C. § 924(c)(3) as:

(3) 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.

18 U.S.C.A. § 924 (West)

This court must then determine whether such term – that is a “crime of violence” – includes a federal bank robbery in violation of 18 U.S.C. § 2113. The Fifth Circuit Court of Appeals has already addressed this question, albeit in another context.

In *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017) the Court found that federal bank robbery, under Title 18 U.S.C. § 2113(a) qualifies as a crime of violence for purposes of U.S.S.G. § 4B1.2⁴. The language of U.S.S.G. § 4B1.2 is the exact same language as that of the statutory

⁴ (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

definition of Title 18 U.S.C. § 16 and of Title 18 U.S.C. § 924(c)(3). The *Brewer* court held that “an express threat to use force may not be required for a conviction of robbery by intimidation, an implicit threat to use force is required.” *Id* at 715.

Meece has argued that a robbery by poisoning does not constitute a crime of violence for purposes of Title 18 U.S.C. § 924. The Fifth Circuit Court of Appeals, however, has already addressed a similar argument in *Brewer*. In its written opinion, the *Brewer* court reviewed *United States v. Higdon*, 832 F.2d 312 (5th Cir. 1987). The *Brewer* court then held that:

The kind of “intimidation” that suffices to put a victim in fear of bodily injury during the course of a bank robbery, and which would in turn allow a defendant to complete such a robbery, is the very sort of threat of immediate, destructive, and violent force required to satisfy the “crime of violence” definition.

Brewer at 715.

This court then concludes that Meece committed federal bank robbery and that said robbery falls squarely within the definition of a crime of violence as found in Title 18 U.S.C. § 924. Accordingly, this court will not vacate Meece’s conviction for brandishing a firearm during a crime of violence and Meece’s Motion to Vacate, Set Aside, or Correct his Sentence under Title 28 U.S.C. § 2255 must be denied.

b. Motion to Dismiss [Docket no. 36]

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

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

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 counsel, Meece knowingly, intelligently and expressly waived his right to challenge his sentence under 28 U.S.C. § 2255.

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

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 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. 17, P. 4, ¶ 12, *SEALED*]. The plea agreement was signed by Assistant United States Attorney Erin O'Leary Chalk for the United States; Richard Earl Smith, Jr., as attorney for Meece; and Scott Meece in his own capacity. [Docket no. 17, P. 6, *SEALED*].

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, Meece has alleged neither an ineffective assistance of counsel nor that his sentence exceeded the statutory maximum.

According to Meece, *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* and one District Court in the Eastern District of Michigan declined to follow *Torres*. This court, regardless, is not persuaded that *Torres* is precedential for the Fifth Circuit and, therefore, this court declines to follow *Torres* also.

Meece 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 Meece 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 Meece 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. Meece pled guilty on October 30, 2007. 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 Meece did not waive a right that did not

exist until almost ten (10) years after his conviction and sentence. This court, therefore, holds that Meece did not waive a known right. Accordingly, the motion to dismiss filed by the United States of America must be denied.

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 Meece's Motion to Vacate, Set Aside, or Correct his Sentence under Title 28 U.S.C. § 2255 [**Docket no. 26**] is hereby **DENIED**.

IT IS FURTHER ORDERED that the government's Motion to Dismiss [**Docket no. 36**] is hereby **DENIED**.

IT IS FURTHER ORDERED that the companion civil case (**3:16-CV-513-HTW-1**) is hereby **DISMISSED**.

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

SO ORDERED AND ADJUDGED this the 5th day of September, 2019.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-60681



A True Copy
Certified order issued Jul 01, 2020

Tyler W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Plaintiff-Appellee

UNITED STATES OF AMERICA,

v.

SCOTT MEECE,

Defendant-Appellant

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

ORDER:

Scott Meece, former federal prisoner # 09247-043, pleaded guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and brandishing of a firearm during a crime of violence (the bank robbery) in violation of 18 U.S.C. § 924(c)(1). Meece seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, correct, or set aside his sentence. Meece argues that the district court erred in rejecting a challenge to the constitutionality of his § 924(c) conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019). His release from incarceration does not render Meece's appeal moot. See *United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006).

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so "by

demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Meece has not made the required showing. *See id.* Accordingly, his motion for a COA is DENIED.

s/Edith Brown Clement

EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE