APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Devon Mitchell, Movant/Defendant, vs. United States of America, Respondent/Plaintiff.	No. CV 16-4592-PHX-DGC (MHB) (CR 05-00886-2-PHX-DGC) **REPORT AND RECOMMENDATION**

TO THE HONORABLE DAVID G. CAMPBELL, UNITED STATES DISTRICT JUDGE:

Movant was convicted after a jury trial of one count of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), three counts of unarmed bank robbery, in violation of 18 U.S.C. § 2113(a), and one count of possessing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(I). (CRDocs.[1] 41, 226.) On July 16, 2008, Movant was sentenced to a total of 222 months in prison, consisting of concurrent terms of 162 months on the bank robbery counts, followed by 60 months on the 924(c) count. (CRDoc. 278.) Movant appealed his judgment and sentence, and on October 2, 2009, the Ninth Circuit Court of Appeals affirmed. (CRDoc. 325-1.) The mandate issued on December 1, 2009. (CRDoc. 325.)

[1]Docket entries reference in the underlying criminal case, CR 05-0886, will be referred to as "CRDoc."

On March 28, 2011, Movant filed a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. (CRDoc. 327; 11-cv-00580[2], Doc. 1.) On April 1, 2011, Movant filed a motion for permission to amend. (11-cv-00580, Doc. 4.) On April 5, 2011, the Court denied Movant's first 2255 motion with leave to amend, and denied his motion for permission to amend as moot. (11-cv-00580, Doc. 5.) Movant filed an amended 2255 motion to vacate, set aside, or correct sentence on May 17, 2011. (11-cv-00580, Doc. 6.) In his amended 2255 motion, Movant raised the claims of (1) constructive amendment of the indictment, (2) the government's failure to prove each essential element of the offenses charged in Counts 2, 3, 5, and 6, (3) insufficient evidence to sustain the charge in Count 4, (4) prejudice resulting from the trial court's failure to give an alibi instruction, (5) abuse of discretion by the trial court in failing to respond promptly to jury notes requesting clarification of legal issues, and (6) ineffective assistance of counsel. On May 17, 2012, the trial court denied and dismissed Movant's amended 2255 motion. (Id. at 18, 29.) Movant did not appeal the denial.

Thereafter, Movant filed a request with the Ninth Circuit Court of Appeals to file a successive 2255 motion, which was denied on May 29, 2014. (11-cv-00580, Doc. 25.) On June 26, 2016, Movant, through counsel, filed a successive 2255 motion, asserting that his conviction pursuant to 924(c) is now illegal pursuant to the intervening United States Supreme Court case, Johnson v. United States, __U.S. __; 135 S.Ct. 2551(2015). (Doc. 13 at 2-14.) The Ninth Circuit granted Movant's application to file this successive 2255 motion, and deemed the date of his 2255 motion filing as June 27, 2016. (Doc. 13-1.) Thereafter, Movant filed a First Amended 2255 motion. (Doc. 21.)

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[2]That 2255 proceeding was assigned civil case number 11-cv-00580.

On May 8, 2017, this Court granted Respondent's motion for a stay of the proceedings pending the United State Supreme Court decision in Lynch v. Dimaya, __ U.S.__; 137 S. Ct. 31 (2018). Thereafter, on July 31, 2017, Respondent filed its Limited Answer[3], asserting therein that Movant's 2255 motion was untimely, and his claim pursuant to Johnson is procedurally defaulted without excuse. (Doc. 28.) The Court granted Movant's several unopposed motions for extensions to file his Reply, as the Supreme Court had decided Dimaya, but the Ninth Circuit was yet due to decide United States v. Begay. (Docs. 30, 32, 34, 36, 38.) On June 26, 2018, Movant filed his Reply. (Doc. 45.) On September 19, 2018, Respondent filed a Notice of Supplemental Authority. (Doc. 48.)

On November 5, 2018, Movant filed an unopposed Motion to Stay Proceedings, pending the possible rehearing of United States v. Blackstone, 2018 WL 4344096 (9th Cir. 2018), and a decision in United States v. Begay, No. 14-10080. (Doc. 49.) This Court granted the stay. The Ninth Circuit issued its decision in Begay, 934 F.3d 1033 (9th Cir. 2016) (finding that the defendant's conviction for second-degree murder in Indian country did not qualify as a categorical crime of violence). Thereafter, Respondent filed an Amended Response, and Movant filed a Reply to the Amended Response. (Docs. 57, 58.)

ISSUES

Movant asserted, initially, in his 2255 motion that the Supreme Court's decision in Johnson rendered his bank robbery conviction pursuant to § 2113(a) no longer a crime of violence, and thus rendering his conviction for possession of a firearm during a crime of violence unlawful. In Respondent's initial answer, Respondent argued that Movant's 2255 motion was untimely because, although it was filed within one year of the Supreme Court's decision in Johnson, the decision did not invalidate the residual clause of § 924(c). Respondent also claimed that Movant's Johnson claim is procedurally defaulted without excuse, as Movant did not raise the issue on appeal. In his initial Reply, Movant asserted that the Johnson decision has been made retroactive to cases final on direct review, and, because

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[3]As permitted by the Court, Respondent limited its Answer to affirmative def

his 2255 motion was filed within a year of that decision, the motion was timely filed. Movant also asserted that his failure to raise the issue on appeal is excused, as any attempt to raise the issue would have been futile, given the current Supreme Court precedent.

During the time this case was stayed for the second time, Respondent filed a notice of supplemental authority to support Respondent's argument that Movant's 2255 motion was untimely filed. See, Blackstone, 903 F.3d 1020, 1026-28 (9th Cir. 2018) (agreeing with other circuit courts that Johnson did not recognize a new right relating to 924(c)'s residual clause as a new right applicable on collateral review). After the stay was lifted, Respondent filed its Amended Response to Movant's amended 2255 motion. Respondent reiterated its initial timeliness and procedural default arguments, but additionally addressed two Ninth Circuit decisions that had been rendered subsequent to its initial answer. See, United States v. Gutierrez, 876 F.3d 1254 (9th Cir. 2017); United States v. Watson, 881 F.3d 782 (9th Cir. 2018) (per curiam), cert. denied, 139 S.Ct. 203 (2018) (both affirming that federal bank robbery is a crime of violence under the elements clause of § 924(c)).

In his Reply to Respondent's Amended Response, Movant reiterates his assertion that his failure to raise the issue on appeal is excused because of the "absence of the decision in Johnson 2015 during [his] prior appellate and collateral proceedings." (Doc. 58 at 5.) He also claims actual innocence as an excuse for procedural default. And, Movant posits that the Watson and Gutierrez decisions are distinguishable and "cannot be reconciled with [] Johnson 2010, or other Ninth Circuit precedent." (Id. at 8.)

ANALYSIS

Habeas relief under 28 U.S.C. § 2255 is only available to a person in custody in violation of the Constitution or laws of the United States. Under § 2255, "a district court may grant a hearing to determine the validity of a petition brought under that section, [u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief." United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994). "The standard essentially is whether the movant has made specific factual allegations that, if true, state a claim on which relief could be granted." United States v. Withers, 638 F.3d 1055, 1062 (9th

Cir. 2011). A district court may dismiss a § 2255 motion based on a facial review of the record "only if the allegations in the motion, when viewed against the record, do not give rise to a claim for relief or are palpably incredible or patently frivolous." Id. at 1062-63. Because this Court finds that Movant's 2255 motion does not give rise to a claim for relief, for the reasons set forth herein, this Court will recommend that Movant's 2255 motion be denied and dismissed with prejudice.

The Ninth Circuit, in Gutierrez, affirmed prior precedent, holding that "bank robbery by intimidation . . . requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [I] standard." 876 F.3d at 1257. Shortly thereafter, the Ninth Circuit decided Watson, in which the Court held that armed bank robbery is a crime of violence under the elements clause of § 924(c). 881 F.3d at 786 ("Because bank robbery 'by force and violence, or by intimidation' is a crime of violence, so too is armed bank robbery."). In a subsequent unpublished opinion, United States v. Swanson, the Ninth Circuit made clear the argument that bank robbery is not a crime of violence under the elements clause of United States Sentencing Guidelines § 4B1.2, is "foreclosed" by Watson, 744 Fed. App'x 527 (9th Cir. 2018).

Movant attempts to distinguish the decisions in Guittierez and Watson by the holdings in United States v. Parnell, 818 F.3d 974 (9th Cir. 2016), United States v. Geozos, 870 F.3d 890 (2017), and United States v. Strickland, 860 F.3d 1224 (9th Cir. 2017). The decision in Parnell, however, pre-dates both Guittierez and Watson, and involves the analysis of a Massachusetts statute, not the federal bank robbery statute, and is thus not applicable. See, United States v. Dixon, 16 CV-04590-SRB, Doc. 28 (December 6, 2018), cert. of app. den., United States v. Dixon, No. 18-17344 (March 18, 2019) (appellant has not made a "substantial showing of the denial of a constitutional right."); United States of America v. Sterling, 16 CV-04602-DLR, Docs. 30, 2018 WL 4963341 (October 15, 2018), cert. of app. den., United States v. Sterling, No. 18-1790 (December 4, 2018).

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Similarly, the Ninth Circuit in Geozos analyzed a Florida robbery statute, Fla. Stat. § 812.13, in reaching its conclusion. The holding in Geozos was called into question in Ward v. United States, 936 F.3d 914, 919 (9th Cir. 2019) ("Our prior distinction between 'substantial' and 'minimal' force in the ACCA robbery context in such cases as *Molinar* and *Geozos* cannot be reconciled with the Supreme Court's clear holding in *Stokeling*."[4]) In Strickland, the Ninth Circuit analyzed an Oregon first-degree robbery statute[5] in the context of the ACCA, finding that the crime could be committed without physically violent force. That Oregon statute is substantially dissimilar to the federal bank robbery statute, and thus its holding is inapplicable here. See, Watson, 881 F.3d at 785 (the knowing use of intimidation, "necessarily entails the knowing use, attempted use, or threatened use of violent physical force."). Because the cases cited by Movant are either called into question or are not applicable, Movant's argument that the "force and violence" clause of the federal bank robbery statute does not meet the violent physical force standard set forth in Johnson also fails.

Additionally, Movant was convicted of armed bank robbery pursuant to 18 U.S.C. 2113 (a) and (d), the same statutory provisions addressed in Watson. The Court in Watson made clear that bank robbery pursuant to 2113(a) was a crime of violence, as the "least violent form" of committing the offence necessarily involves the type of violent physical force to meet the Johnson standard. 881 F.3d at 787. Thus, bank robbery by "force and violence" necessarily involves more violent physical force than bank robbery by intimidation. The Watson Court then concluded that armed bank robbery pursuant to 18 U.S.C. 2113(d) is also a crime of violence. Id. a 786.

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[4]The Supreme Court in Stokeling held that robbery under the same Florida statute analyzed in Geozos, Fla. Stat. § 812.13, was a violent felony under the ACCA's elements clause. Stokeling v. United States, __ U.S. __, 139 S.Ct. 544 (2019).

[5]"A person commits the crime of robbery in the third degree if . . . the person uses or threatens the immediate use of physical force upon another person . . ." Or. Rev. Stat. § 164.395(1).

Controlling Ninth Circuit precedent has established that bank robbery and armed bank robbery are categorically crimes of violence under the elements clause of 18 U.S.C. 924 § (c)(3), and thus Movant's claim in his 2255 motion is without merit. As this Court finds Movant's 2255 motion without merit, it declines to address Respondent's affirmative defenses of timeliness and procedural default.

CONCLUSION

Movant's claims fail on the merits, and therefore Movant's 2255 motion should be denied and dismissed with prejudice.

IT IS THEREFORE RECOMMENDED that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. §2255, (CVDoc. 21), be denied and dismissed with prejudice.

IT IS FURTHER RECOMMENDED that the Court deny a Certificate of Appealability and leave to proceed in forma pauperis on appeal because Movant has not made a substantial showing of the denial of a constitutional right.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order

or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72, Federal Rules of Civil Procedure.

DATED this 8th day of January, 2020.

Michelle H. Burns
United States Magistrate Judge