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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Carlos Torres,

10 Petitioner,

11 v.

12 United States of America,

13 Respondent.

14 No. CV-16-00406-TUC-JGZ  
CR-05-672-TUC-JGZ

**ORDER**

15 On June 24, 2016, Movant Carlos Torres filed a Motion to Vacate, Set Aside, or  
16 Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. 1.) The Government filed its  
17 Response on February 1, 2017. (Doc. 10.) Movant filed a reply on February 7, 2017.  
18 (Doc. 14.) In the pending Motion, Movant joins the many incarcerated federal  
19 defendants who are challenging their sentences by applying for retroactive application of  
20 *Johnson v. United States*, 135 S. Ct. 2551 (2015) (“*Johnson II*”). Whether *Johnson II*  
21 applies to convictions under § 924(c)(3)(B) – the statutory provision under which Movant  
22 was convicted – is currently awaiting decision by the Ninth Circuit in *United States v.*  
23 *Begay*, No. 14-10080 (9<sup>th</sup> Cir.) and an analogous issue is currently awaiting decision by  
24 the United States Supreme Court in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016). This Court  
25 has reviewed the record, the submissions of the parties, the supporting exhibits, and the  
26 related cases pending before the United States Supreme Court and the Ninth Circuit, and  
27 for the reasons set forth below, will deny the Motion without prejudice.

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## BACKGROUND

On October 18, 2006, Movant entered into a plea agreement whereby he pled guilty to four counts of interference with commerce by robbery in violation of 18 U.S.C. § 1951(a) and (b)(1), and one count of brandishing a firearm during a crime of violence, *i.e.* robbery under 18 U.S.C. § 1951(a) and (b)(1), in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (CR-05-672-TUC-JGZ, Doc. 167.) The plea agreement provided a sentencing range of 180 to 360 months and included a waiver of Movant's right to collaterally attack his sentence. (*Id.*) The Court accepted Movant's guilty plea on November 1, 2006. (CR-05-672-TUC-JGZ, Doc. 183.)

On March 20, 2007, the Court sentenced Movant to a term of imprisonment of 168 months on each of the four robbery counts, with the sentences to run concurrently. (CR-05-672-TUC-JGZ, Docs. 210, 314.) The Court also sentenced Movant to a term of 120 months' imprisonment on the § 924(c) violation, with that sentence to run consecutively to the sentences imposed on the robbery counts. (*Id.*) The Court's sentence exceeded the mandatory seven-year minimum sentence required under § 924(c)(1)(A)(ii) by three years.

The Ninth Circuit Court of Appeals dismissed the Movant's appeal of his conviction and sentence. *United States v. Torres*, 309 Fed. App'x 94 (9th Cir. 2009). Movant's projected release date is February 25, 2027. (Doc. 1.)

## DISCUSSION

## 1. Standard of Review

28 U.S.C. § 2255 states:

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.

Thus, in order to prevail on his Motion, Movant must demonstrate that his sentence was

1 imposed in violation of the United States Constitution or federal law. Rule 4(b) of the  
 2 Rules Governing Section 2255 Proceedings for the United States District Courts  
 3 provides, in relevant part, that “[i]f it plainly appears from the motion, any attached  
 4 exhibits, and the record of prior proceedings that the moving party is not entitled to relief,  
 5 the judge must dismiss the motion and direct the clerk to notify the moving party.”

6       Generally, motions pursuant to § 2255 must be brought within one year of the date  
 7 the conviction becomes final. 28 U.S.C. § 2255(f)(1). However, a § 2255 motion may  
 8 also be filed within one year of “the date on which the right asserted was initially  
 9 recognized by the Supreme Court, if that right has been newly recognized by the  
 10 Supreme Court and made retroactively applicable to cases on collateral review.” 28  
 11 U.S.C. § 2255(f)(3).

12       **2. Analysis**

13       Because Movant’s Motion was filed more than one year after his 2007 conviction,  
 14 it is untimely under § 2255(f)(1). Movant contends that his Motion is timely because the  
 15 right asserted in his claim -- that his conviction and sentence under § 924(c)(1)(A)(ii)  
 16 violate due process in light of *Johnson II* – was recognized by the Supreme Court and  
 17 made retroactively applicable to cases on collateral review in *Welch v. United States*, 136  
 18 S.Ct. 1257 (2016).<sup>1</sup> The Court concludes that *Johnson II* has not yet newly recognized a  
 19 right applicable to Movant on collateral review and consequently, that the statute of  
 20 limitations should be calculated pursuant to § 2255(f)(1).

21       In *Johnson II*, the Supreme Court held unconstitutional the definition of “violent  
 22 felony” found in the residual clause of 18 U.S.C. § 924(e)(2)(B), which mandates more  
 23 severe punishment if a defendant has three or more previous convictions for a “violent  
 24 felony,” a term defined to include any felony that “involves conduct that presents a  
 25 serious potential risk of physical injury to another.” 135 S. Ct. at 2555, 2563. Movant  
 26 was convicted and sentenced pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), which mandates

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27       <sup>1</sup> In *Welch v. United States*, 136 S.Ct. 1257 (2016), the Supreme Court held that its  
 28 decision in *Johnson II* regarding the vagueness of the residual clause in § 924(e)(2)(B)  
 announced a substantive rule that applied retroactively on collateral review.

1 more severe punishment if a defendant brandishes a firearm “during and in relation to any  
 2 crime of violence.” The term “crime of violence” is defined in 18 U.S.C. § 924(c)(3) as  
 3 “an offense that is a felony and--(A) has as an element the use, attempted use, or  
 4 threatened use of physical force against the person or property of another, or (B) that by  
 5 its nature, involves a substantial risk that physical force against the person or property of  
 6 another may be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3).

7 Movant argues that “violent felony” as the term is defined under § 924(e)(2)(B) is  
 8 “materially indistinguishable” from the definition of “crime of violence” under §  
 9 924(c)(3)(B), and therefore *Johnson II* applies to his conviction.<sup>2</sup> However, the *Johnson*  
 10 *II* Court specifically limited its ruling to the residual clause of § 924(e)(2)(B); the Court  
 11 explained that its ruling “does not call into question application of the Act to the four  
 12 enumerated offenses, or the remainder of the Act's definition of a violent felony.” 135 S.  
 13 Ct. at 2563. Whether *Johnson II* recognizes a new right to be retroactively applied to  
 14 sentences imposed pursuant to provisions other than § 924(e)(2)(B) has yet to be decided  
 15 by the United States Supreme Court. The question of the applicability of *Johnson II* to §  
 16 924(c)(3)(B) is pending before the Ninth Circuit in *United States v. Begay*, No. 14-10080  
 17 (9<sup>th</sup> Cir.) (argued and submitted May 26, 2016). Moreover, while the Ninth Circuit has  
 18 applied *Johnson II* to convictions under 8 U.S.C. § 1101(a)(43)(F), which includes  
 19 language similar to the § 924(e)(2)(B) language held to be unconstitutional in *Johnson II*,  
 20 the Ninth Circuit specifically limited the scope of that decision to convictions under 8

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22 <sup>2</sup> Movant's Motion makes a threshold assumption that Movant was sentenced  
 23 pursuant to § 924(c)(3)(B). The government challenges this threshold assumption.  
 24 Pursuant to his plea agreement, the “crime of violence” on which Movant's sentence was  
 25 based was “robbery of a place of business.” (CR-05-672-TUC-JGZ, Doc. 167, pg. 2.) The interrelated robbery counts to which Movant pled were violations of the Hobbs Act,  
 26 18 U.S.C. § 1951(a) and (b)(1). (CR-05-672-TUC-JGZ, Docs. 141, 167.) The government argues that Hobbs Act robbery constitutes a crime of violence pursuant to §  
 27 924(c)(3)(A), not § 924(c)(3)(B). Section 924(c)(3)(A)'s definition of “crime of  
 28 violence” -- a felony that “has as an element the use, attempted use or threatened use of physical force against the person or property of another” – is not facially similar to the residual clause of 18 U.S.C. § 924(e)(2)(B) held to be unconstitutional in *Johnson II*. The Court need not resolve the issue of whether Movant was sentenced pursuant to § 924(c)(3)(A) or (B), because even if the Court credits Movant's assumption that he was sentenced pursuant to § 924(c)(3)(B), the Court concludes that Movant is not entitled to retroactive application of *Johnson II*.

1 U.S.C. § 1101(a)(43)(F). *See Dimaya v. Lynch*, 803 F.3d 1110, 1120 n.17 (9th Cir.  
 2 2015), *cert. granted*, 137 S. Ct. 31, 195 L. Ed. 2d 902 (2016) (specifying that its  
 3 “decision does not reach the constitutionality of applications ... outside of 8 U.S.C. §  
 4 1101(a)(43)(F)”). The Ninth Circuit’s decision in *Dimaya* is now pending review by the  
 5 United States Supreme Court.

6 In light of the current state of the law, this Court cannot conclude that the United  
 7 States Supreme Court has recognized a new right, *ie.* application of *Johnson II* to  
 8 convictions under § 924(c)(3)(B), as required to obtain relief under 28 U.S.C. §  
 9 2255(f)(3). To the contrary, it appears that the United States Supreme Court is positioned  
 10 to address this issue in future decisions. If and when the United States Supreme Court  
 11 specifically holds that *Johnson II* applies retroactively on collateral review to convictions  
 12 under § 924(c)(3)(B), Movant may have legal grounds for a petition pursuant to § 2255.  
 13 The pending Motion, however, is premature. *See Dodd v. United States*, 545 U.S. 353,  
 14 357 (2005) (holding that statute of limitations in 28 U.S.C. § 2255(f)(3) is measured from  
 15 “the date on which the right asserted was initially recognized by the Supreme Court” and  
 16 that the Court “must presume that [the] legislature says in a statute what it means and  
 17 means in a statute what it says there.”)

18 **3. Certificate of Appealability**

19 The district court may issue a certificate of appealability “only if the applicant has  
 20 made a substantial showing of the denial of a constitutional right.” 28 U.S.C.  
 21 § 2253(c)(2). “[A] substantial showing of the denial of a constitutional right . . . includes  
 22 showing that reasonable jurists could debate whether . . . the petition should have been  
 23 resolved in a different manner or that the issues presented were ‘adequate to deserve  
 24 encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)  
 25 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). *See also Turner v. Calderon*,  
 26 281 F.3d 851, 865 (9th Cir. 2002). “When the district court denies a habeas petition on  
 27 procedural grounds without reaching the prisoner’s underlying constitutional claim, a  
 28 [certificate of appealability] should issue when the prisoner shows, at least, that jurists of

1 reason would find it debatable whether the petition states a valid claim of the denial of a  
2 constitutional right and that jurists of reason would find it debatable whether the district  
3 court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

4 As previously stated, cases involving the application of *Johnson II* are pending  
5 before the Ninth Circuit and the United States Supreme Court. Reasonable jurists could  
6 debate whether Movant’s petition should be resolved in a different manner. Accordingly,  
7 the Court will issue a certificate of appealability so that Movant may pursue an appeal of  
8 this Order.

9 **CONCLUSION**

10 **IT IS ORDERED** that:

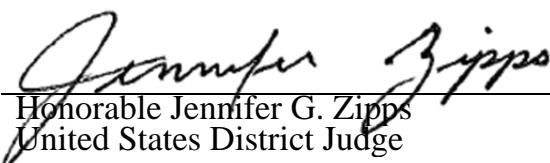
11 1. The Motions under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence  
12 (Doc. 307 in CR-05-672-TUC-JGZ and Doc. 1 in CV-16-406-TUC-JGZ) are  
13 **DENIED WITHOUT PREJUDICE**;

14 2. The civil action opened in connection with this Motion, CV 16-406-TUC-JGZ, is  
15 **DISMISSED WITHOUT PREJUDICE**.

16 3. The Court hereby issues a certificate of appealability on the issue of whether  
17 Movant’s conviction and sentence under § 924(c)(1)(A)(ii) violates due process in  
18 light of *Johnson II*. Movant has made “a substantial showing of the denial of a  
19 constitutional right,” 28 U.S.C. § 2253(c)(2), and reasonable jurists could find this  
20 Court’s ruling debatable.

21 Dated this 23rd day of March, 2017.

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Honorable Jennifer G. Zipts  
United States District Judge