

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit

Torres v. United States, 16-17652 A-1

Order Dismissing Motion to Vacate

Torres v. United States, 8:16-cv-1508-T-24TGW A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17652-G

MIGUEL ANTONIO TORRES,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Miguel Torres is a federal prisoner serving a total sentence of 384 months' imprisonment after pleading guilty in 2011 to 2 counts of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) and (2) (Counts Three and Five). The underlying predicate offenses for the § 924(c) counts were Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count Two), and carjacking, in violation of 18 U.S.C. § 2119 and 2 (Count Four). This Court affirmed his sentences on direct appeal in an unpublished opinion. *United States v. Torres*, 491 F. App'x 148 (11th Cir. 2012).

On June 10, 2016, Torres filed a *pro se* 28 U.S.C. § 2255 motion to vacate sentence, arguing that his 924(c) conviction predicated on Hobbs Act robbery should be vacated because it was not a crime of violence. The district court subsequently appointed counsel to represent Torres, and his counsel filed an amended § 2255 motion, arguing that both of Torres's § 924(c) convictions should be vacated in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He acknowledged that *Johnson* held that the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague, and that he was not sentenced under the ACCA, but he maintained that the holding in *Johnson* extended to § 924(c) because it contains a residual clause similar to that of the ACCA.

The government moved to dismiss the § 2255 motion as untimely. Specifically, the government maintained that his motion was untimely under § 2255(f)(1) because it was filed well outside the one-year statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Further, the government maintained that his § 2255 motion was untimely under § 2255(f)(3) because the "new rule of law" announced in *Johnson* was ACCA-specific, and extending it to other similarly worded statutes would result in the creation of a new rule that the Supreme Court had not recognized.

Following Torres's response and the government's reply, the district court concluded that Torres's § 2255 motion was untimely because, at that time, neither the Supreme Court nor this Court had addressed whether the ruling in *Johnson* extended to § 924(c), and, therefore, § 2255(f)(3) was not available to render his motion timely. Furthermore, the district court explained that, even if the ruling in *Johnson* extended to § 924(c), Torres would not be entitled to relief because under this Court's precedent Hobbs Act robbery and carjacking otherwise qualify as crimes of violence under § 924(c)(3)(A)'s use-of-force clause. Accordingly, the district court granted the government's motion to dismiss, dismissed the § 2255 motion as untimely, and denied a certificate of appealability ("COA"). Torres, proceeding *in forma pauperis*, now seeks a COA from this Court.

Specifically, in his counseled motion for a COA before this Court, Torres argues that § 924(c)(3)(B)'s residual clause is unconstitutionally vague, post-*Johnson*, because § 924(c)(3)(B)'s residual clause is materially indistinguishable from the ACCA's now-invalidated residual clause. He maintains that the new rule announced in *Johnson* applies to any statute that involves applying a risk-based standard under a categorical approach. He also notes that several other courts have reached the conclusion that both § 924(c)(3)(B)'s residual clause and the identically worded clause in 18 U.S.C. § 16(b), are

unconstitutionally vague, post-*Johnson*. Thus, he contends that reasonable jurists could debate whether *Johnson* applies to § 924(c)(3)(B)'s residual clause.

Furthermore, he maintains that reasonable jurists could debate whether Hobbs Act robbery otherwise qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause, based on the categorical framework set forth in *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013), because it can be accomplished by mere intimidation and without the use of violent physical force. He acknowledges that, in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), this Court held that Hobbs Act robbery clearly qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause. However, he argues that *Saint Fleur*, although published, has no precedential value and is not binding, as it arose in the procedurally unique context of adjudicating applications for leave to file a second or successive § 2255 motion in a small window of time and was based on a *pro se* filing without the benefit of counsel or consideration of any of the arguments raised here. In support of his contention that published orders in the successive-application context have no precedential value, Torres points out that this Court has stated in published orders granting applications to file a second or successive § 2255 motion that its rulings are not binding, citing, *e.g.*, *In re Rogers*, 825 F.3d 1335, 1338 (11th Cir. 2016) (granting a successive application and stating that “nothing we pronounce in orders on applications to file successive § 2255

motions binds the district court”); *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016) (granting Gomez’s successive application and stating that “[i]t is the job of the district court to decide every aspect of Gomez’s motion fresh, or in the legal vernacular, de novo” (quotation omitted)). Finally, he notes that Judge Martin has indicated in an unpublished order issued in the successive-application context that *Saint Fleur* may have been wrongly decided, citing *In re Garcia*, No. 16-14320, Order at 13-16 (11th Cir. July 27, 2016) (Martin, J., concurring).

Additionally, Torres argues that carjacking cannot qualify as a crime of violence under § 924(c)(3)(A)’s use-of-force clause because it can be committed by mere intimidation without the use of physical force. He acknowledges that this Court held in *In re Smith*, 829 F.3d 1276, 1280-81 (11th Cir. 2016), that carjacking qualifies as a crime of violence under § 924(c)(3)(A)’s use-of-force clause, but he reiterates his argument that published orders issued in the successive-application context have no precedential value. He also notes that one member of the *Smith* panel dissented, which he contends establishes that reasonable jurists could debate whether carjacking qualifies as a crime of violence.

In order 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). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable (1) whether the petition states a valid claim

of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If the petitioner fails to satisfy either prong of this two-part test, this Court should deny a COA. *Id.* Further, “no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law.” *Hamilton v. Sec’y, Fla. Dep’t of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (quotation omitted), *cert. denied*, 136 S. Ct. 1661 (2016). “[T]his Court reviews *de novo* the dismissal of a § 2255 [motion] for untimeliness.” *Boyd v. United States*, 754 F.3d 1298, 1301 (11th Cir. 2014).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a one-year statute of limitations for filing a § 2255 motion to vacate. 28 U.S.C. § 2255(f). The one-year period of limitations begins to run from the latest of four possible events:

- (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.

28 U.S.C. § 2255(f). A conviction ordinarily becomes final when the Supreme Court denies *certiorari* or when the 90-day period for filing a petition for *certiorari* expires. *Close v. United States*, 336 F.3d 1283, 1284-85 (11th Cir. 2003).

Specifically, the ACCA defines the term “violent felony” as any crime punishable by a term of imprisonment 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.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). The Supreme Court in *Johnson* held that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2557-58, 2563. Thereafter, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264-65, 1268 (2016).

Distinct from the ACCA, § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence or a drug-trafficking crime. 18 U.S.C. § 924(c)(1). For the purposes of § 924(c), “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.

Id. § 924(c)(3)(A), (B). Notably, at the time the district court dismissed Torres’s § 2255 motion as untimely, this Court had yet to address the issue of whether the holding in *Johnson* extended to the language of § 924(c)(3)(B). *See In re Pinder*, 824 F.3d 977, 978-79 (11th Cir. 2016) (noting that “the law [was] unsettled” on whether the rule announced in *Johnson* applies to the “very similar” language of § 924(c)(3)(B) defining a crime of violence as one that involves “substantial risk” of physical force”). However, this Court recently held that “*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B).” *Ovalles v. United States*, No. 17-10172, manuscript op. at 20 (11th Cir. June 30, 2017). This Court clarified that § 924(c)(3)(B) was more appropriately called a “risk of force” clause than a “residual clause,” and noted that other circuits were split on whether *Johnson* affected § 924(c)(3)(B)’s risk-of-force clause. *Id.* at 12-22. Nevertheless, this Court concluded that § 924(c)(3)(B)’s risk-of-force clause was “narrower” and

“easier to construe” than the ACCA’s residual clause, noting that there are textual and functional differences between the two clauses that make them “materially different.” *Id.* at 17-20. Consequently, this Court determined that § 924(c)(3)(B) was still valid, post-*Johnson*. *Id.* at 22.

In this case, this Court affirmed Torres’s convictions and sentences on October 4, 2012. *See Torres*, 491 F. App’x at 148. Therefore, his judgment became final on January 2, 2013, when the 90-day window for filing a petition for writ of *certiorari* in the Supreme Court expired. Therefore, Torres had until January 2, 2014, to file a timely § 2255 motion to vacate sentence under § 2255(f)(1). He did not file the instant § 2255 motion until June 10, 2016, well outside the limitations period, as calculated under § 2255(f)(1). However, Torres asserted that his § 2255 motion was timely under § 2255(f)(3) because it was premised on the new rule of constitutional law recognized in *Johnson*.

In analyzing whether his motion was timely under § 2255(f)(3), the district court determined that Torres’s motion was untimely because he was convicted under § 924(c), not the ACCA, and *Johnson* only implicated the ACCA’s residual clause. Notably, at that time, neither this Court nor the Supreme Court had addressed whether the ruling in *Johnson* extended to § 924(c)(3)(B). However, since then, this Court has expressly held that “*Johnson* does not apply to, or invalidate, the ‘risk-of-force clause’ in § 924(c)(3)(B).” *Ovalles*, No. 17-10172,

manuscript op. at 20. Therefore, because *Johnson* does not extend to § 924(c)(3)(B), Torres cannot rely on § 2255(f)(3) to render his § 2255 motion timely. Accordingly, reasonable jurists would not debate the dismissal of Torres's § 2255 motion as untimely.

Furthermore, even, assuming, *arguendo*, that his § 2255 motion was timely, his claim that *Johnson* invalidated § 924(c)(3)(B)'s risk-of-force clause is foreclosed by this Circuit's binding precedent. *See id.* Moreover, as discussed further below, even if his claim was not foreclosed by *Ovalles*, Torres would not be entitled to relief on the merits of his claim, as both of his predicate offenses qualify as crimes of violence under § 924(c)(3)(A)'s use-of-force clause.

Specifically, this Court has held that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *Saint Fleur*, 824 F.3d at 1340-41. Likewise, this Court has held that carjacking was a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *Smith*, 829 F.3d at 1280-81. Thus, reasonable jurists would not debate the district court's conclusion that, under this Court's precedent in *Saint Fleur* and *Smith*, Torres was not entitled to relief on the merits. Although Torres argues that this Court's decisions in *Saint Fleur* and *Smith* are not binding because they were made in the unique context of an application to file a second or successive § 2255 motion, and, therefore, are of no

precedential value outside of the successive-application context, his argument is unpersuasive for several reasons.

While this Court has stated when granting applications to file second or successive § 2255 motions that “[n]othing about our ruling here binds the District Court,” this statement must be considered in the entirety of its context. When considered in context, it is clear that this statement has been used to merely emphasize that this Court’s determination that an applicant has made a *prima facie* showing that he meets the statutory criteria of § 2255(h) is not binding on the district court, and that the district court must determine for itself whether the applicant has satisfied the criteria of § 2255(h), before even reaching the merits of the applicant’s claims. *See Jordan v. Sec’y, Dep’t of Corrs.*, 485 F.3d 1351, 1357 (11th Cir. 2007) (emphasizing that, once the prisoner files his authorized § 2255 motion in the district court, “the district court not only can, but must, determine for itself whether [the § 2255(h)] requirements are met”). Thus, contrary to Torres’s argument, when considered in context, it is clear that this language does not mean that this Court’s legal determinations made in panel decisions published in the context of applications to file second or successive § 2255 motions, such as whether a particular crime categorically qualifies as a crime of violence under a given statute, is mere *dicta* and non-binding on the district court.

Moreover, in *In re Lambrix*, 776 F.3d 789, 793-94 (11th Cir. 2015), this Court rejected the argument that prior orders published in the context of applications to file a second or successive federal habeas petition were not binding precedent in this Circuit. Applying the prior-panel-precedent rule, this Court stated that “a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.” *Id.* at 794 (quotation omitted). This Court further clarified that the “prior-panel-precedent rule applies with equal force as to prior panel decisions published in the context of applications to file second or successive petitions. In other words, published three-judge orders issued under § 2244(b) are binding precedent in our circuit.” *Id.* In reaching this conclusion, this Court noted that it “repeatedly ha[s] treated published decisions involving applications for permission to file a second or successive petition as binding precedent.” *Id.* Although *Lambrix* was a published order in the context of an application to file a second or successive 28 U.S.C. § 2254 federal habeas corpus petition, there is nothing to suggest that this Court’s holding was limited to the successive-application context.

Furthermore, Torres’s contention that no precedential weight attaches to this Court’s statements in published decisions in the successive-application context regarding whether a particular crime qualifies as a crime of violence is incorrect

for several reasons. First, the characterization of an offense as a crime of violence or not is essential to the decision's holding granting or denying the application. Second, a contrary conclusion would produce anomalous results where identical predicate offenses could qualify for some federal prisoners, but not others, based solely on the vehicle used to present the claim. Thus, *Saint Fleur* and *Smith* are binding precedents in this Circuit until they are overruled by this Court sitting *en banc* or by a decision of the United States Supreme Court. *See United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010) (explaining that "only the Supreme Court or this [C]ourt sitting *en banc* can judicially overrule a prior panel decision" (quotation omitted)).

Accordingly, in light of the above, Torres cannot make a substantial showing of the denial of a constitutional right his motion for a COA is DENIED. *See* 28 U.S.C. § 2253(c)(2); *Hamilton*, 793 F.3d at 1266 (explaining that "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law").


UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 25, 2017

Elizabeth Warren
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 16-17652-G
Case Style: Miguel Torres v. USA
District Court Docket No: 8:16-cv-01508-SCB-TGW
Secondary Case Number: 8:11-cr-00309-SCB-TGW-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bryon Robinson, G/bjk
Phone #: (404) 335-6185

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

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

MICHAEL ANTONIO TORRES

Petitioner,

v.

CASE NO. 8:16-cv-1508-T-24TGW

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

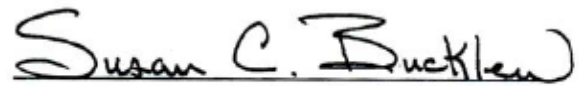
Petitioner Joshua Michael Wilkes, represented by counsel, filed an Application for Certificate of Appealability. (Doc. 23). Upon consideration of Petitioner's Motion to Vacate pursuant to 28 U.S.C. § 2255 as well as Petitioner's underlying criminal case, Petitioner's Application is denied because Petitioner has not made a showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2).

Petitioner seeks to extend the holding in Johnson v. United States, 135 S. Ct. 2551 (2015), to 18 U.S.C. § 924(c) on collateral review. Johnson affords Petitioner no collateral relief with regard to his § 924(c) conviction because Johnson did not address the statute under which Petitioner was convicted. The Supreme Court has never held that any part of § 924(c) is unconstitutionally vague. Nor has the Eleventh Circuit Court of Appeals extended Johnson's vagueness determination to § 924(c). However, even if

reasonable jurists could find it debatable under Slack v. McDaniel, 529 U.S. 473, 478 (2000), as to whether Johnson extends to the residual clause under 18 U.S.C. § 924(c), Petitioner's convictions for a Hobbs Act robbery and carjacking qualify as crimes of violence under § 924(c)'s use-of force clause. See In re Fleur, 824 F.3d 1337, 1341 (11th Cir. 2016) (holding Hobbs Act robbery offense met use-of-force clause of statutory definition of crime of violence); In re Smith 829 F.3d 1276 (11th Cir. 2016)(concluding that carjacking in violation of § 2119 satisfies § 924(c)'s force clause).

ACCORDINGLY, for the reasons expressed, Petitioner's Application for Certificate of Appealability is denied.

DONE AND ORDERED at Tampa, Florida, on February 3, 2017.


SUSAN C. BUCKLEW
United States District Judge

Copies to: Counsel of Record