

In June 2016, Manners filed a § 2255 motion, arguing that his sentence under § 924(c) was invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the Supreme Court struck down the identically worded residual clause of the Armed Career Criminal Act (“ACCA”). He also argued that his assault conviction qualified as a predicate offense only under the residual clause of § 924(c) because the conviction did not have as an element the use,

attempted use, or threatened use of physical force. The government responded, arguing that Manners's § 2255 motion was untimely and that his challenge to § 924(c)'s residual clause was precluded by this court's decision in *United States v. Taylor*, 814 F.3d 340, 376-77 (6th Cir. 2016), *petition for cert. filed* (U.S. Oct. 6, 2016) (No. 16-6392). In his reply, Manners acknowledged this court's holding in *Taylor*, but he noted that the court had more recently held, in *Shuti v. Lynch*, 828 F.3d 440, 441 (6th Cir. 2016), *petition for cert. filed* (U.S. Feb. 13, 2017) (No. 16-991), that the similarly worded residual clause set forth in 18 U.S.C. § 16(b) was unconstitutionally vague. He also noted that other circuit courts of appeals have determined that the residual clause set forth in § 924(c)(3)(B) was unconstitutionally vague in light of *Johnson*.

The district court concluded that Manners's § 2255 motion was timely, but denied the motion as being without merit. The district court determined that, despite the case law from other circuits, it was bound by this court's holding that *Johnson* does not invalidate § 924(c)'s residual clause. Alternatively, the district court concluded that Manners's assault conviction qualified as a crime of violence because it was a felony with an element involving the use, attempted use, or threatened use of physical force against another person. The district court also denied Manners's motion to alter or amend the judgment, concluding that the holding in *Shuti* did not overrule the holding in *Taylor*. However, the district court granted Manners a certificate of appealability.

Manners reasserts his argument that the holding in *Johnson* invalidates § 924(c)'s residual clause, as has been determined by other circuit courts of appeals that have addressed the issue. He also reasserts his argument that this court's holding in *Shuti* supports his claim that § 924(c)'s residual clause is unconstitutional. Finally, he continues to argue that his assault conviction did not involve violence or an element of physical force because he merely fired his weapon into the ceiling of a bar to break up a brawl.

When considering a district court's denial of a § 2255 motion, we review factual findings for clear error and legal conclusions de novo. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). To obtain relief under § 2255, a prisoner "must show '(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that

was so fundamental as to render the entire proceeding invalid.” *McPhearson v. United States*, 675 F.3d 553, 558-59 (6th Cir. 2012) (quoting *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)).

The district court properly denied Manners’s § 2255 motion as being without merit. Manners continues to argue that his assault conviction is not a crime of violence under the residual clause of § 924(c)(3)(B) because the clause was rendered unconstitutional by the Supreme Court’s decision in *Johnson*. In *Johnson*, the Supreme Court held that the residual clause of the ACCA is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. Manners was not sentenced under the ACCA but argues that the residual clause of § 924(c)(3)(B) is similar enough to the residual clause found unconstitutional in *Johnson* to warrant the conclusion that the residual clause of § 924(c)(3)(B) is also unconstitutionally vague. However, we have consistently held that § 924(c)(3)(B) is not unconstitutionally vague, and is distinguishable from and considerably narrower than the ACCA’s residual clause invalidated by *Johnson*. See *Taylor*, 814 F.3d at 376-77; see also *United States v. Whitson*, 664 F. App’x 503, 507 (6th Cir. 2016); *United States v. Rafidi*, 829 F.3d, 437, 449 (6th Cir. 2016), *cert denied*, 137 S. Ct. 2147 (2017). “A published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’” *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). Manners’s reliance on *Shuti* is unavailing because we explicitly discounted the similarities between § 924(c)(3)(b) and § 16(b), and determined that the court’s holding that § 16(b) is unconstitutionally vague to be “wholly consistent” with its conclusion in *Taylor* that § 924(c)(3)(b) is not unconstitutionally vague. *Shuti*, 828 F.3d at 449.

Accordingly, we **AFFIRM** the district court’s order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERICK MANNERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 06-20465

Honorable Nancy G. Edmunds

ORDER DENYING PETITIONER'S MOTION TO VACATE CONVICTION PURSUANT TO 28 U.S.C. 2255 [2784] AND MOTION FOR APPOINTMENT OF COUNSEL [2800]

Pursuant to 28 U.S.C. § 2255(f)(3), Petitioner Erick Manners moves to vacate his conviction under 18 U.S.C. § 924(c) for using a firearm during a crime of violence. He also moves for appointment of counsel to help him present his § 2255 motion. For the reasons stated below, both of Petitioner's motions are DENIED.

I. Background

In January 2011, Petitioner pled guilty to a count of assault with a dangerous weapon in aid of racketeering ["felonious assault"], in violation of 18 U.S.C. § 1959(a)(3). (Dkt. 1719.) He also pled guilty to using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). (*Id.*) His conviction for felonious assault served as the predicate "crime of violence" for his conviction under § 924(c). (*Id.*)

On August 17, 2011, this Court sentenced Petitioner to eighteen months for the felonious assault and ten years for his conviction under § 924(c). (Dkt. 2153.) Petitioner did not file a notice of appeal.

On June 26, 2015, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). Less than one year later, Petitioner filed this 28 U.S.C. § 2255 motion to vacate his § 924(c) conviction in light of *Johnson*. (Dkt. 2784.) His motion is therefore timely under § 2255(f)(3).¹

II. Standard

To obtain relief under § 2255, Petitioner must show either that: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) it is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

III. Analysis

A. Motion to Vacate Conviction

In *Johnson*, the Court struck down the “residual clause” of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). 135 S. Ct. at 2563. Here, Petitioner challenges his conviction under a different statute, 18 U.S.C. § 924(c). Petitioner argues that *Johnson* also invalidated the residual clause in § 924(c)(3), thereby rendering his conviction unconstitutional. This Court disagrees.

In *United States v. Taylor*, the Sixth Circuit held that *Johnson* does not invalidate the residual clause in § 924(c)(3). 814 F.3d 340, 376-79 (6th Cir. 2016). While other Circuits

¹ Respondent argues that Petitioner's motion is untimely because the Supreme Court has not “applied *Johnson* to ... 18 U.S.C. § 924(c) at all, much less made it retroactive on collateral review.” (Dkt. 2802, at 3.) This Court disagrees. Timeliness under 28 U.S.C. § 2255(f)(3) depends on “the right asserted,” not on whether Petitioner's claim is meritorious. Because Petitioner asserted a right under *Johnson* within one year of the Supreme Court's holding, his motion is timely. See 28 U.S.C. § 2255(f)(3).

have disagreed with *Taylor's* reasoning (see *United States v. Vivas-Ceja*, 808 F.3d 719, 722-24 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1114-20 (9th Cir. 2015)), Sixth Circuit precedent binds this Court. Accordingly, this Court holds that *Johnson* has no effect on Petitioner's conviction under § 924(c). See also *Byrd v. United States*, 2016 WL 4009884, at *1-2 (E.D. Tenn. July 25, 2016) (noting that § 924(c)(3) "remains unaffected" by the Supreme Court's holding in *Johnson*); *United States v. Walker*, 2016 WL 762717, at *3 (E.D. Ky. Feb. 26, 2016) (holding that sentence imposed for violation of § 924(c) was not implicated by *Johnson*).

Even if *Johnson* did invalidate the residual clause in § 924(c)(3), Petitioner's motion would fail because his predicate offense, felonious assault, qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). See *Johnson*, 135 S.Ct. at 2563. Under this clause, a crime constitutes a "crime of violence" if it is a felony and "has an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Felonious assault requires "assault with a dangerous weapon or assault resulting in serious bodily injury." 18 U.S.C. § 1959(a)(3). It therefore qualifies as a "crime of violence" because it is a felony with an element involving the "use of, attempted use, or threatened use of physical force against another." 18 U.S.C. § 924(c)(3)(A); see also *United States v. Mosley*, 339 F. App'x 568, 575 (6th Cir. 2009) (holding that felonious assault constitutes a crime of violence under the similarly worded elements clause of the Armed Career Criminal Act).

Given the above, case law does not entitle Petitioner to relief, and this Court finds no other reason to vacate his conviction. Petitioner's motion to vacate his conviction is DENIED.

B. Motion for Appointment of Counsel

Because the Court is denying Plaintiff's § 2255 motion, his motion for appointment of counsel is moot and therefore DENIED.

III. CONCLUSION

For the above-stated reasons, Petitioner's motions to vacate his conviction and for appointment of counsel are DENIED.

SO ORDERED.

S/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: September 14, 2016

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 14, 2016, by electronic and/or ordinary mail.

S/Carol J. Bethel
Case Manager

ERICK MANNERS, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2017 U.S. App. LEXIS 23161
No. 17-1171
November 16, 2017, Filed

Editorial Information: Prior History

Manners v. United States, 2017 U.S. App. LEXIS 16648 (6th Cir. Mich., Aug. 22, 2017)

Counsel ERICK MANNERS (#40833039), Petitioner - Appellant, Pro se,
Greenville, IL.

For UNITED STATES OF AMERICA, Respondent - Appellee:
Shane N. Cralle, United States Attorneys Office, Eastern District of Michigan, Detroit, MI.

Judges: BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Footnotes

*

Judge Griffin recused himself from participation in this ruling.

**Additional material
from this filing is
available in the
Clerk's Office.**