

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-20197

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GABRIEL CABELLO,

Defendant-Appellant

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

O R D E R:

Gabriel Cabello, federal prisoner # 71704-279, pleaded guilty to four counts of aggravated bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and to one count of brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The district court sentenced Cabello to an aggregate sentence of 300 months of imprisonment.

Cabello seeks a certificate of appealability (COA) to appeal the dismissal of his motion under 28 U.S.C. § 2255 as untimely. He also asks that his appeal be held in abeyance pending the Supreme Court's decision in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016).

According to Cabello, his § 2255 motion is timely under § 2255(f)(3) because it was filed within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). He relies on *Johnson* to argue that

his conviction under § 924(c) should be vacated because the definition of “crime of violence” in § 924(c)(3)(B) is unconstitutionally vague. He acknowledges, however, that his argument is foreclosed by this court’s decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675-77 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259).

To obtain a COA, Cabello must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). When, as in this case, a district court has dismissed a § 2255 motion on procedural grounds, this court should issue a COA “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

Cabello has not made the requisite showing. *See Slack*, 529 U.S. at 484. Accordingly, his motion for a COA is DENIED. His motion to stay his appeal is also DENIED.



Certified as a true copy and issued
as the mandate on Feb 01, 2018

Attest:

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

A handwritten signature in cursive script that reads "Edward C. Prado".

EDWARD C. PRADO
UNITED STATES CIRCUIT JUDGE

APPENDIX B

ENTERED

February 16, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA

VS.

GABRIEL CABELLO

§
§
§
§
§
§
§

CRIMINAL ACTION NO. H-11-615

CIVIL ACTION NO. H-16-1651

ORDER DISMISSING § 2255 CLAIM WITHOUT PREJUDICE

The defendant, Gabriel Cabello, pleaded guilty in 2011 to two counts of aggravated bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), and to one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). (Case H-11-cr-160) The court imposed a 25-year sentence, which included a mandatory consecutive 84 months on the § 924(c) firearm charge. Cabello did not appeal.

In June 2016, Cabello filed this motion to vacate under 28 U.S.C. § 2255. (Docket Entry No. 27). Cabello argues that his firearm conviction under 18 U.S.C. § 924(c) cannot stand, based on *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). *Johnson* held that the residual clause definition of “crime of violence” in 18 U.S.C. § 924(e) was unconstitutionally vague. The government has moved to dismiss Cabello’s § 2255 motion, arguing that he filed it too late, he waived his right to file a § 2255 motion in his plea agreement, and his motion lacks merit. (Docket Entry No. 55).

Cabello’s motion under 28 U.S.C. § 2255 is not timely. The judgment was entered on January 11, 2012 and became final on January 25, 2012, when the period for seeking review of the final conviction expired. *Clay v. United States*, 537 U.S. 522, 123 S. Ct. 1072, 1078-79 (2003);

United States v. Gamble, 208 F.3d 536, 536-37 (5th Cir. 2000) (*per curiam*). The one-year period for filing a § 2255 motion began on that date. 28 U.S.C. § 2255(f)(1). Cabello's one-year period to file a timely § 2255 motion ended on January 25, 2013, over three years before he filed this motion in June 2016.

Cabello argues that his § 2255 motion is timely under 28 U.S.C. § 2255(f)(3). That statute provides that the one-year period to file a timely § 2255 motion begins to run from "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." *Id.* The Supreme Court issued *Johnson* on June 26, 2016. That decision was made retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016).

The issue is whether *Johnson* has the effect Cabello asserts in this case. *Johnson* dealt with the Armed Career Criminal Act, 18 U.S.C. § 924(e), which provides that a person who possesses a gun in violation of 18 U.S.C. § 922(g) after three prior convictions for either a "violent felony" or a "serious drug offense" faces higher mandatory minimum and maximum sentences than would otherwise apply. 18 U.S.C. § 924(e). The Act defines the term "violent felony" to mean "any crime punishable by imprisonment for a term exceeding one year" that meets one of the following definitions: (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) "is burglary, arson, or extortion, [or] involves use of explosives"; or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* (emphasis added). The third clause, known as the "residual clause," is the portion the Court in *Johnson* held was unconstitutionally vague. 135 S. Ct. at 2563. The Court stated that its holding "d[id] not call into question . . . the remainder of the Act's definition of a violent felony." *Id.* In

Welch, the Supreme Court held that *Johnson's* invalidation of the residual clause in the Armed Career Criminal Act is “a substantive decision and so has retroactive effect . . . in cases on collateral review.” 136 S. Ct. at 1265.

Cabello was not convicted or sentenced under 18 U.S.C. § 922(g). Cabello’s argument is not that *Johnson* directly invalidates his sentence, but rather that *Johnson's* reasoning extends to invalidate the statute under which he was convicted, 18 U.S.C. § 925(c), as unconstitutionally vague.

The en banc Fifth Circuit has found that the residual clause definition of crime of violence in 18 U.S.C. § 16(b), which is virtually identical to the residual clause in § 924(c), is not unconstitutionally vague. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 672 (5th Cir. 2016) (en banc). The en banc court also held “that *Johnson* does not provide a basis for authorizing a successive § 2255 motion challenging a conviction under § 924(c).” *In re Lott*, 838 F.3d 522 (5th Cir. 2016) (citing *In re Fields*, 826 F.3d 785, 786-87 (5th Cir. 2016)). Based on *Gonzalez-Longoria*, *Johnson* provides no basis for authorizing an untimely § 2255 motion challenging a § 924(c) conviction.

The Supreme Court will consider whether *Johnson* extends to similarly worded provisions in *Beckles v. United States*, 136 S. Ct. 2510 (2016) (whether *Johnson* applies to the residual clause in U.S.S.G. § 4B1.2), and *Lynch v. Dimaya*, 137 S. Ct. 31 (2016) (whether *Johnson* extends to § 16(b)). Neither case has been decided at this time. Until they are, this court must follow the Fifth Circuit caselaw.

This § 2255 motion is dismissed, without prejudice. It is both untimely, and under Fifth Circuit precedent, lacks merit. Depending on the Supreme Court decisions in *Beckles* and *Dimaya*, Cabello may be able to reassert a basis for § 2255 relief. This court does not decide whether the

government's alternative basis for dismissal, based on Cabello's waiver of the right to file appellate or collateral challenges to his conviction and sentence, separately bars this § 2255 motion.

SIGNED on February 15, 2017, at Houston, Texas.

A handwritten signature in black ink, appearing to read 'Lee H. Rosenthal', written over a horizontal line.

Lee H. Rosenthal
Chief United States District Judge