

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DESHA COOPER,

Petitioner,

v.

**Case No: 6:16-cv-1137-Orl-22KRS
(6:10-cr-308-Orl-22KRS)**

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

This case involves a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) filed by Desha Cooper. The Government filed a motion to dismiss Petitioner's § 2255 motion (Doc. 5). Petitioner filed a response in opposition to the motion to dismiss (Doc. 8), and the Government filed a reply to the response (Doc. 10).

Petitioner alleges one ground for relief, his conviction and sentence for carrying or possessing a firearm during and in relation to or in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(3) violates his right to due process. For the following reasons, the Court concludes that the motion is untimely, otherwise without merit, and must be dismissed.

I. PROCEDURAL HISTORY

Petitioner was charged by indictment with carjacking in violation of 18 U.S.C. § 2119(1) (Count One) and carrying or possessing a firearm during and in relation to or in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 924(c)(3)

(Count Two). (Criminal Case No. 6:10-cr-308-Orl-22KRS, Doc. 1).¹ Pursuant to a plea agreement, Petitioner entered a plea of guilty. (*Id.* at Doc. 18). On June 28, 2011, this Court entered Judgment, sentencing Petitioner to a 36-month term of imprisonment for Count One and to a consecutive 84-month term of imprisonment for Count Two. (*Id.* at Doc. 29). Petitioner did not appeal.

II. ANALYSIS

Pursuant to 28 U.S.C. § 2255, the time for filing a motion to vacate, set aside, or correct a sentence is restricted, as follows:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of --

- (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).

Under the time limitation set forth in § 2255(f)(1), Petitioner had one year from the date his conviction became final to file a § 2255 motion. Petitioner's Judgment was

¹Criminal Case No. 6:10-cr-308-Orl-22KRS will be referred to as "Criminal Case."

entered on June 28, 2011, and he did not file a direct appeal. Therefore, his conviction became final on July 12, 2011, when the time for filing an appeal expired. *See Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000) (a conviction which is not appealed becomes final when the time allowed for filing an appeal expires); *see also* Fed. R. App. P. 4(b); Fed. R. App. P. 26(a). Thus, Petitioner had through July 13, 2012, to timely file his § 2255 motion under § 2255(f)(1). However, the instant proceeding was not filed until June 24, 2016.

Petitioner maintains that § 2255(f)(3) is applicable based on the retroactive application of *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which held “that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.” The Supreme Court held that the newly recognized right established in *Johnson* as to the ACCA applies retroactively. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Petitioner seeks to extend *Johnson* to § 924(c)(3)(B). However, the Eleventh Circuit has held that “*Johnson* does not apply to, or invalidate, the “risk-of-force” clause in § 924(c)(3)(B).” *Ovalles v. United States*, 861 F.3d 1257, 1266 (11th Cir. 2017). Neither the Supreme Court of the United States nor the Eleventh Circuit Court of Appeals has held that *Johnson* applies to § 924(c)(3)(B). *See In re Pinder*, 824 F.3d 977, 978 (11th Cir. 2016). Consequently, the instant action is untimely.

Nevertheless, even assuming *Johnson* applied retroactively to convictions under § 924(c), a finding not made by this Court, Petitioner would not benefit from extending *Johnson*. “[A] carjacking offense under § 2119 ‘meet[s] the requirements that the force

clause in § 924(c)(3)(A) sets out for a qualifying underlying offense.” *Ovalles*, 861 F.3d at 1268 (quoting *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016)). In other words, carjacking is a crime of violence under § 924(c)(3)(A)’s use-of-force clause, regardless of application of § 924(c)(3)(B)’s risk-of- force clause. Therefore, Petitioner’s conviction and sentence for violation of §§ 924(c)(1)(A) and 924(c)(3) was premised on his conviction for carjacking, a crime of violence.

In sum, *Johnson* is not retroactive to convictions arising pursuant to § 924(c). Moreover, Petitioner’s conviction for violation of §§ 924(c)(1)(A) and 924(c)(3) is based on his conviction for carjacking. Therefore, *Johnson* would not benefit Petitioner, and Petitioner is not entitled to relief under *Johnson*.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. The Government’s Motion to Dismiss Petitioner’s 28 U.S.C. § 2255 Motion as Untimely (Doc. 5) is **GRANTED**.

2. Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED** with prejudice, and this case is **DISMISSED**.

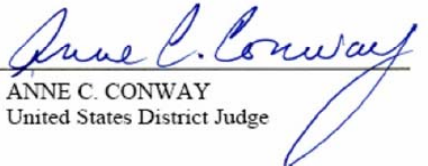
3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

4. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:10-cr-308-Orl-22KRS and to terminate the motion (Criminal Case Doc. 36) pending in that case.

5. This Court should grant an application for certificate of appealability only if the petitioner makes “a substantial showing of the denial of a constitutional right.” 28

U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on August 22, 2017.


ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record