

IN THE
SUPREME COURT OF THE UNITED STATES

Dameion Higley v. United States of America

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX B

Order Denying 28 U.S.C. § 2255 Motion, February 23, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Criminal Case No. 06-cr-00205-WYD
Civil Case No. 16-cv-01528-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAMEION HIGLEY,

Defendant/Movant.

ORDER DENYING 28 U.S.C. § 2255 MOTION

I. INTRODUCTION

THIS MATTER is before the Court on Movant Dameion Higley's 28 U.S.C. § 2255 Motion to Vacate Sentence filed June 20, 2016. Mr. Higley seeks to vacate his conviction under 18 U.S.C. § 924(c) on the basis that it violates the Fifth Amendment's Due Process Clause, relying on *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). The government initially filed a motion to dismiss on July 22, 2016, which I denied by Order of November 9, 2016 (ECF No. 35). I found in that Order that the issues raised in the motion to dismiss were intertwined with the merits and should be decided after substantive briefing on the § 2255 motion.

Thereafter, the government filed a response to Mr. Higley's § 2255 motion on November 22, 2016, and submitted supplemental authority on December 8, 2016. Mr. Higley filed a reply on December 9, 2016. Thus, Mr. Higley's § 2255 motion is fully briefed.

II. BACKGROUND

Mr. Higley was convicted of two counts: armed bank robbery and aiding and abetting, a violation of 18 U.S.C. §§ 2113(a) and 2 (count 1), and brandishing a firearm during the commission of violence and aiding and abetting, a violation of 18 U.S.C. § 924(c) (count 2). Mr. Higley asserts that the predicate crime of violence was aiding and abetting a violation of the federal armed bank robbery statute. Mr. Higley was sentenced to 176 months imprisonment—92 months as to count 1 and 84 months as to count 2, to be served consecutively. (ECF No. 26.)

The statute of conviction defines “crime of violence” as a felony that—

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) . . . or 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.

18 U.S.C. § 924(c)(3). Mr. Higley asserts that aiding and abetting federal bank robbery does not qualify under § 924(c)(3)(A), the so-called elements or physical force clause, as a crime of violence. He argues, therefore, that he was convicted under § 924(c)(3)(B), the so-called residual clause, and that *Johnson* renders this residual clause unconstitutional. *Johnson* invalidated the residual clause of the Armed Career Criminal Act [“ACCA”] on the basis that it was unconstitutionally vague. Mr. Higley argues that although § 924(c)’s residual clause is not identical to the ACCA’s, it suffers from the same defects as the residual clause of the ACCA found in *Johnson*. On April 18, 2016, the Supreme Court held that *Johnson* announced a new “substantive rule that

has retroactive effect in cases on collateral review.” *Welch v. United States*, ___ U.S. ___, 136 Ct. 1257, 1268 (2016).

The government argues that Mr. Higley’s § 2255 motion is untimely because it was not filed within one year after his conviction became final. It also asserts that his motion is not timely under § 2255(f)(3) based on the *Johnson* decision, because *Johnson* did not involve or recognize the right asserted by Higley related to the invalidity of 18 U.S.C. § 924(c)’s residual clause. Further, it is argued that § 924(c)(3)(B) is not unconstitutionally vague as applied to Mr. Higley, and that even if *Johnson* could be construed to void § 924(c)’s residual clause, armed bank robbery remains a crime of violence under § 924(c)(3)(A).

III. ANALYSIS

A. Timeliness

I first agree with the government that Mr. Higley’s motion is untimely under 28 U.S.C. § 2255(f). A § 2255 motion ordinarily must be filed within one year after the judgment becomes final. 28 U.S.C. § 2255(f)(1). Here, judgment was entered on May 25, 2007. (ECF No. 26.) Mr. Higley did not file a direct appeal, and his conviction became final “upon the expiration of the time in which to take a direct criminal appeal”, which occurred ten days later. *United States v. Prows*, 448 F.3d1223, 1227-28 (10th Cir. 2006). The government asserts that Mr. Higley’s § 2255 motion, filed in June 2016, is eight years too late.

Mr. Higley asserts in response that his motion is timely under 28 U.S.C. § 2255(f)(3). That statute states that “[a] 1-year period of limitation shall apply to a motion under this

section”, running “from the latest of-- . . . 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.* Here, Mr. Higley asserts that his conviction under § 924(c) must be vacated because the residual clause in § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson*. Mr. Higley is thus asserting that the Supreme Court’s decision in *Johnson* is “new”, and the decision is retroactive under *Welch*. Since Mr. Higley filed his claim during the 1-year period after *Johnson* was decided, he asserts that his motion is timely. I reject this argument, as I find that the right asserted here—the unconstitutionality of § 924(c)(3)(B)—has not been recognized by the Supreme Court in *Johnson* or otherwise.

The Supreme Court held in *Johnson* that the so called “residual clause” in § 924(e)(2)(B)(ii) of the ACCA was unconstitutionally vague. 135 S. Ct. at 255. The ACCA defined a violent felony as

any crime punishable by imprisonment for a term exceeding one year . . . that –

(i) has 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) (emphasis added).¹ In contrast, the residual clause of § 924(c) states that a “crime of violence” is an offense that is a felony and “that *by its nature, involves a substantial risk that physical force against the person or property of*

¹ The residual clause in § 924(e)(2)(B)(ii) consists of the italicized language above.

another may be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3)(B) (emphasis added).

I find that there are significant differences in the language between the two clauses. Indeed, the Supreme Court and Tenth Circuit have recognized that the language of § 924(c)(3)(B) (which tracks 18 U.S.C. § 16(b)) is narrower in scope than the language in U.S.S.G. § 4B1.2 (and the identical residual clause of the ACCA). *See United States v. Serafin*, 562 F.3d 1105, 1109 (10th Cir. 2009) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 10 and n. 7 (2004)). As explained by the *Serafin* court, while the two provisions attempt “to reach similar goals—defining violent crimes for purposes of sentencing enhancements and mandatory minimum terms—each provision has important differences in statutory text and penological objectives.” *Id.* “The reckless disregard in § 16 [and by implication § 924(c)(3)(B)] relates not to the general conduct or to the possibility that harm will result from a person’s conduct, *but to the risk that the use of physical force against another might be required in committing a crime.... The substantial risk in § 16(b) relates to the use of force, not to the possible effect of a person’s conduct.*” *Id.* (quoting *Leocal*, 543 U.S. at 10 and n. 7) (emphasis in original).

Serafin further explained that the Supreme Court “noted the textual difference between § 16(b) and the Guidelines (and identical ACCA provision). . . : for an offense to qualify as a § 16(b) crime of violence, the risk of force must arise in the course of *committing* the crime and not merely as a *possible result*.” 562 F.3d at 1109 (emphasis in original.) “Crucially absent from the text of § 4B1.2 [and § 924(c)(3)(B)] is that the risk of violence must arise during the course of committing an offense.” *Id.* at 1110. The Tenth

Circuit noted that the “failure to recognize the difference” between the two provisions “would collapse the distinction between these two differently-worded definitions.” *Id.* (quotation omitted).

Other differences are that the “[r]isk of physical force against a victim’ that § 924(c)(3)(B) requires ‘is much more definite than [the] risk of physical injury to a victim’ that the ACCA residual clause required.” *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016) (quoting *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016)). And “unlike the ACCA residual clause, § 924(c)(3)(B) does not allow courts to consider ‘physical injury [that] is remote from the criminal act,’ a consideration that supported the Court’s vagueness analysis in *Johnson*.” *Id.* (quotation omitted); see also *United States v. Bowen*, Criminal Action No. 05-cr-00425-REB, 2017 WL 131794, at *4 (D. Colo. Jan. 12, 2017) (discussing differences between the ACCA residual clause and § 924(c)(3)(B)).

Given these and other differences outlined in *Prickett* and *Bowen*, I cannot accept Mr. Higley’s argument that the holding in *Johnson* invalidating the ACCA’s residual clause necessarily would apply to the narrower and different residual clause of § 924(c)(3)(B). Mr. Higley argues, however, that the Tenth Circuit’s recent decision in *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), “forecloses” the government’s argument that his motion is untimely. (Reply in Supp. of Mot. to Vacate [“Reply”], at 2-3.) *Golicov* held that § 16(b)’s definition of “crime of violence” was “not meaningfully distinguishable from the ACCA’s residual clause and that, as a result, § 16(b). . . must be deemed unconstitutionally vague in light of *Johnson*.” *Id.* at 1072.

Mr. Higley asserts that because the residual clause of § 924(c) is identical to § 16(b), it necessarily follows under a categorical approach that the residual clause of § 924(c) is unconstitutionally vague in light of *Johnson*. (Reply at 2.) He further asserts that *Golicov* recognized that *Johnson* “is not limited by its formal holding that the ACCA’s residual clause is unconstitutional but, instead, recognized a more broadly applicable right not to be subject to statutes that have two particular features: (1) an imprecise standard of risk, applied to (2) a judicially imagined ‘ordinary case’ of a crime.” (*Id.* at 3-4) (citing *Golicov*, 837 F.3d at 1072-73). Mr. Higley argues that a claim that a statute is unconstitutionally vague because it has both of those features is a “*Johnson* claim” in any reasonable sense of that concept. Here, his claim challenges § 924(c)(3)(B) on the ground that it ties an imprecise standard of risk to a judicially imagined “ordinary case” of a crime. (Reply at 4.) It is, thus, a *Johnson* claim according to Mr. Higley, and is timely as the “right” was “newly recognized by the Supreme Court” in the *Johnson* case. (*Id.*)

I reject Mr. Higley’s argument. While *Golicov* lends support to Mr. Higley’s claim that § 924(c)(3)(B) may be unconstitutional under *Johnson*, it does not support his argument that his claim is timely under 28 U.S.C. § 2255(f)(3). As Judge Blackburn recognized in the recent *Bowen* decision, “a holding by the Tenth Circuit does not *ipso facto* make § 2255(f)(3) applicable.” 2017 WL 131794, at *4. “Only a right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review triggers the application of § 2255(f)(3).” *Id.* Judge Ebel reached this same result in two recent cases. See *United States v. Hullum*, No. 11-cr-127-DME-2, 2016 WL 7178312, at *3 (D. Colo. Dec. 2, 2016) (“in deciding if the § 2255 motion is time-barred, the question is not whether

the court of appeals has recognized the right at issue, but instead whether the Supreme Court *itself* has done so. . . . So the Tenth Circuit's extension of Johnson to § 16(b) is not determinative") (emphasis in original); *United States v. Grant*, No. 11-cr-00127-DME-03, 2016 WL 7178311, at *3 (D. Colo. Dec. 2, 2016) (same).

Moreover, I agree with Judge Ebel that "[e]ven if the Tenth Circuit would hold that Johnson should be extended to § 924(c)(3)(B), which is not itself obvious even after holding § 16(b) to be unconstitutional, it is far from 'apparent to all reasonable jurists' that § 924(c)(3)(B) falls within Johnson's ambit." *Hullum*, 2016 WL 7178312, at *3 (quoting *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (under the Supreme Court's retroactivity analysis, a right is "new" if it is not *dictated* by precedent. . . . A right is "dictated by precedent only if it is "apparent to all reasonable jurists)). That is because four federal courts of appeal have expressly rejected vagueness arguments under *Johnson* as to § 924(c)(3)(B). See *Prickett*, 839 F.3d at 699 ("[B]ecause several factors distinguish the ACCA residual clause from § 924(c)(3)(B),'. . . we join the Second and Sixth Circuits in upholding § 924(c)(3)(B) against a vagueness challenge") (quotation omitted); *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016); *Taylor*, 814 F.3d at 375-76; see also *United States v. Graham*, 824 F.3d 421, 424 n. 1 (4th Cir. 2016) (en banc) (holding the vagueness argument "would not survive plain error review" in light of contrary authority).

Based on the foregoing, I find that Mr. Higley's § 2255 motion must be denied because his claim is untimely pursuant to 18 U.S.C. § 2255(f).

B. Whether Mr. Higley Committed a Crime of Violence Under § 924(c)(3)(A)

I also find that even if the motion were timely, it would still fail because Mr. Higley committed a “crime of violence” under the physical force clause in 18 U.S.C. § 924(c)(3)(A). That is, armed bank robbery contains an element involving the “use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* The Supreme Court in *Johnson* did not invalidate the similar physical force clause of § 924(e)(2)(B)(i).

Again, I find instructive Judge Ebel’s analysis of this issue in the *Hullum* and *Grant* decisions. As in those cases, Mr. Higley pleaded guilty to aiding and abetting a violation of § 2113(a) (setting forth the elements of bank robbery) and § 2113(d) (aggravation by assault or use of a deadly weapon)—“together these are known as armed bank robbery.” *Hullum*, 2016 WL 7178312, at *3. Judge Ebel noted that determining whether a crime is a “crime of violence” under § 924(c)(3)(A) generally calls for application of the categorical approach. *Id.* at *4. However, because the federal armed bank robbery statute is divisible, meaning that “there are two alternative versions of the offense”, I agree with Judge Ebel that a modified categorical approach applies here. *Id.* at *4.² Under the modified categorical approach, the court may look beyond the statute to a “limited class” of documents, including indictments and plea agreements, “for the sole purpose of understanding which elements formed the basis of an offender’s conviction.” *Id.*

² “The first version requires proof of forceful or violent taking of property from the bank, while the second alternative version involves entry into a bank with intent to commit a bank-related felony or larceny therein.” *Id.* “Because the Tenth Circuit pattern jury instructions do not charge these versions together, . . . then these alternative sets of elements are not different ‘means of committing the same offense, but alternative versions of the bank robbery statute.’” *Id.* n. 5.

Here, as in *Hullum* and *Grant*, I find that Mr. Higley was convicted under the first set of elements, requiring “proof of forceful or violent taking of property from the bank”. See *Hullum*, 2016 WL 7178312, at *4. The charges in the indictment and facts in the plea agreement do not support the alternative charge of entry into a bank with intent to commit “any larceny”, 18 U.S.C. § 2113. (ECF Nos. 1, 21.)

I further find that the armed bank robbery which Mr. Higley aided and abetted was a “crime of violence” under the physical-force clause. *Id.* Thus, the elements of armed bank robbery include that “(1) the defendant took, or attempted to take, money belonging to a bank ...; (2) by using force and violence, or intimidation”. *Id.* While Mr. Higley argues that armed bank robbery does not meet the physical force requirement because it can be accomplished merely by attempt, *i.e.*, “that armed bank robbery and attempted armed bank robbery are the same offense” (28 U.S.C. § 2255 Mot. to Vacate Sentence at 5), this is not dispositive. As Judge Ebel notes, “the physical-force clause defines ‘crime of violence’ to include ‘attempted use’ of physical force, § 924(c)(3)(A), so bank robbery is not disqualified from the ‘crime of violence’ definition on that basis.” *Hullum*, 2016 WL 7178312, at *4 (emphasis in original).

Moreover, while Mr. Higley argues that armed bank robbery does not require physical force and the statute can be violated by intimidation, Judge Ebel found these arguments without merit as well in finding that the convictions constituted a crime of violence. *Id.* at *5. Among other things, he agreed with other federal courts of appeal that found “intimidation” involves the “‘threatened use of physical force’ under the physical-force clause”. *Id.* (citing *United States v. McNeal*, 818 F.3d 141, 154 (4th Cir. 2016) and

Johnson v. United States, 779 F.3d 125, 128-29 (2d Cir. 2015)). He also rejected the argument that physical force can be accomplished without satisfying the “physical force” definition in § 924(c)(3)(A). *Id.* I adopt Judge Ebel’s reasoning in this case in finding that the predicate offense at issue here, armed robbery, is a “crime of violence” under the physical force clause in 18 U.S.C. § 924(c)(3)(A) .

Since I find that Mr. Higley committed a “crime of violence” under the physical force clause in 18 U.S.C. § 924(c)(3)(A), his § 2255 motion must also be denied on this basis.

IV. CONCLUSION

Based on the foregoing, I find that Mr. Higley’s § 2255 motion is untimely and that, alternatively, the motion must be denied because his armed robbery conviction constitutes a crime of violence under 18 U.S.C. § 924(c)(3)(A). It is therefore

ORDERED that Dameion Higley’s 28 U.S.C. § 2255 Motion to Vacate Sentence (ECF No. 29) is **DENIED**.

Dated: February 23, 2017.

BY THE COURT:

/s/ Wiley Y. Daniel
WILEY Y. DANIEL,
SENIOR UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 06-cr-00205-WYD
Civil Action No. 16-cv-01528-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAMEION HIGLEY,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying 28 U.S.C. § 2255 Motion of Senior Judge Wiley Y. Daniel entered on February 23, 2017, it is hereby

ORDERED that Jason Edward Riforgiate's 28 U.S.C. § 2255 Motion to Vacate Sentence is DENIED.

Dated at Denver, Colorado this 27th day of February, 2017.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ Robert R. Keech

Robert R. Keech
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 06-cr-00205-WYD
Civil Action No. 16-cv-01528-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAMEION HIGLEY,

Defendant.

AMENDED FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying 28 U.S.C. § 2255 Motion of Senior Judge Wiley Y. Daniel entered on February 23, 2017, it is hereby

ORDERED that Dameion Higley's 28 U.S.C. § 2255 Motion to Vacate Sentence is DENIED.

Dated at Denver, Colorado this 3rd day of March, 2017.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ Robert R. Keech

Robert R. Keech
Deputy Clerk