APPENDIX

A-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11161-J

MARIO BACHILLER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Mario Bachiller, moves for a certificate of appealability ("COA") in order to appeal the partial denial of his 28 U.S.C. § 2255 motion to vacate his sentence. 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). Because Bachiller's has not made a substantial showing of the denial of a constitutional right his motion for a COA is DENIED.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-23880-CIV-ZLOCH
(06-20592-CR-WJZ)

MARIO BACHILLER,

Movant,

vs. **ORDER**

UNITED STATES OF AMERICA,

Respondent.
_______________________________/

THIS MATTER is before the Court upon the Report Of Magistrate Judge (DE 26) filed herein by United States Magistrate Judge Patrick A. White and Movant's Amended Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. § 2255 (DE 18). The Court has conducted a de novo review of the entire record herein and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Movant's Objections To Report Of Magistrate Judge (DE 27) be and the same are hereby **OVERRULED**;

2. The Report Of Magistrate Judge (DE 26) filed herein by United States Magistrate Judge Patrick A. White be and the same is hereby approved, adopted, and ratified by the Court;

3. Movant's Amended Motion To Vacate, Correct, Or Set Aside Sentence Pursuant To 28 U.S.C. § 2255 (DE 18) be and the same is hereby **DENIED**; and

4. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this ___31st___ day of January, 2018.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

The Honorable Patrick A. White
United States Magistrate Judge

All Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CIV-23880-ZLOCH
(06-CR-20592-ZLOCH)
MAGISTRATE JUDGE P.A. WHITE

MARIO BACHILLER, :

Movant, :

v. : REPORT OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA, :

Respondent. :

Introduction

This matter is before this Court on the movant's motion to vacate pursuant to 28 U.S.C. §2255, attacking his conviction and sentence entered in Case No. 06-CR-20592-ZLOCH.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the order from the Eleventh Circuit Court of Appeals granting Movant leave to file this second § 2255 motion (CV-DE#9), Movant's counseled memorandum of law in support of his claim (CV-DE#18), the government's response (CV-DE#22), Movant's reply (CV-DE#23), the government's notice of supplemental authority (CV-DE#24), Movant's reply thereto (CV-DE#25), and all pertinent portions of the underlying criminal file.

Claim

The only claim that the Eleventh Circuit has authorized Movant to bring in this second § 2255 proceeding is that his § 924(c) conviction is no longer lawful after the Supreme Court's decision in Johnson v. United States, 135 S.Ct. 2551 (2015).

Procedural History

Movant was convicted of conspiracy to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 846, attempt to possess with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 846, conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), attempt to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), using and carrying a firearm during and in relation to a crime of violence or a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), and being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 924(g)(1). [See CR-DE#18, 204, 205].

A PSI was prepared in anticipation of sentencing. Movant's base offense level was predicated upon his § 846 convictions, which was 36. (PSI, ¶32). However, Movant was considered to be a Career Offender under the Federal Sentencing Guidelines, because he was at least 18 years old at the time of the instant offense, the instant offenses were felony controlled substance offense and crimes of violence, and he had at least two prior felony convictions for a crime of violence or a controlled substance offense. (Id. at ¶38). His offense level was thus enhanced to 37. (Id.). Movant was also considered to be an Armed Career Criminal, because he was subject to an enhanced sentence pursuant to § 924(e) of the ACCA. (Id.). However, because the offense level from Movant's Career Offender designation was higher, Movant's offense level remained at 37. (Id.).

As the prior convictions qualifying Movant for the Career Offender enhancement under the Guidelines and the ACCA enhancement, the PSI listed Florida convictions for: 1) battery on a law enforcement officer and sale or delivery of cocaine in docket number F97-33477A; 2) unlawful sale or delivery of cocaine in docket number F98-22428B; 3) aggravated assault with a deadly

weapon in docket number F01-028615; and, 4) cocaine trafficking in docket number F02-33936. (Id. at ¶38). Movant also had a subtotal of 13 criminal history points, resulting in a criminal history category of VI. (PSI, ¶65). In addition, the Guidelines provided that a Career Offender's criminal history category in every case shall be VI, and that the greater criminal history category shall apply. (Id. at ¶65).[1] Based on a total offense level of 37 and a criminal history category of VI, Movant's guideline sentencing range was 360 months to life. (Id. at ¶110).

On September 28, 2007, Movant appeared for sentencing, at which time the district court adopted the PSI without change, imposed the mandatory minimum sentence pursuant to the ACCA, and sentenced Movant to imprisonment. (CR-DE#290, Court's Statement of Reasons). Movant unsuccessfully appealed his convictions and sentences. (See CR-DE#343). Thereafter, in April of 2010, Movant filed an initial § 2255 motion which was assigned civil case number 10-21030-Zloch, and subsequently denied. [See CR-DE#349; see also Docket in Case No. 10-Civ-21030-Zloch].

On **June 9, 2016**, this Court received Movant's motion, seeking relief in light of the Supreme Court's decision in Johnson.[2] That motion was referred to the undersigned, who determined that Movant's motion was in legal effect a second § 2255 motion, and thus directed the Clerk to take Movant's motion for relief under Johnson and open a new civil case, filed pursuant to § 2255. (CR-DE#392).

The matter was subsequently transferred to the Eleventh Circuit Court of Appeals, for Movant to attempt to seek leave to

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[1]The Guidelines similarly provide that an Armed Career Criminal's criminal history category shall also be VI.

[2]A pro se prisoner's motion to vacate sentence or petition for writ of habeas corpus is deemed to be filed on the date that it was signed, executed, and delivered to prison officials, for purposes of AEDPA's one-year limitations period. Adams v. United States, 173 F.3d 1339 (11th Cir. 1999).

file a second § 2255 motion. (CV-DE#4, 7). On November 16, 2016, the Eleventh Circuit granted Movant leave to file a second § 2255 motion on the sole issue of whether his § 924(c) conviction might be unlawful in light of Johnson. (CV-DE#9, p.7). The undersigned then appointed counsel and ordered briefing.

Statute of Limitations

Pursuant to 28 U.S.C. §2255(f), as amended April 24, 1996, a one-year period of limitations applies to a motion to vacate by a prisoner in custody under sentence of a court established by an Act of Congress. The limitations period runs from the latest of:

> (1) the date on which the judgment 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 is prevented from filing by such governmental action;
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> (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 could have been discovered through the exercise of due diligence.

Here, the government asserts that Movant's motion is untimely, but not because it was not filed within one year of the Supreme Court's decision in Johnson. Rather, the government's position is that, because Movant is allegedly not entitled to substantive relief under Johnson, the statute of limitations in this case runs

pursuant to § 2255(f)(1) from the earlier date of when his judgment of conviction became final. The Court finds this argument unpersuasive. See Swokla v. Paramo, No. C 14-2635 WHA, 2015 WL 3562574, at *2 (N.D. Cal. June 8, 2015)(limitations period runs from the date that the Supreme Court recognized the "right asserted," and does not turn on whether the claim ultimately fails on the merits). Rather, the Court concludes that, because Movant is raising a claim under Johnson, the statute of limitations for this claim runs pursuant to § 2255(f)(3) from the date of Johnson. See Dodd v. United States, 545 U.S. 353 (2005). Johnson was of course decided on June 25, 2015, and so Movant had until June 26, 2016 to file a timely Johnson claim.[3] Here, as set forth above, Movant filed the his motion to vacate on June 9, 2016, prior to expiration of the limitations period, and this Court then transferred it to the Eleventh Circuit. Therefore, Movant's challenge to his § 924(c) conviction and sentence on the basis of Johnson is timely.[4]

Procedural Bar

The government argues that Movant's claim is procedurally barred. Specifically, the government argues that Movant failed to raise his Johnson claim either at trial or on direct appeal, and that Movant cannot satisfy either the cause-and-prejudice or the actual innocence exceptions to the procedural default rule.

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[3]June 25, 2016 fell on a weekend, so the next business day was June 26, 2016.

[4]The filing of an application for leave to file a second or successive § 2255 tolls the AEDPA's one-year limitations period, and the period remains tolled until the Circuit Court rules on the application. Orona v. United States, 826 F.3d 1196, 1199 (9th Cir. 2016); Easterwood v. Champion, 213 F.3d 1321, 1324 (10th Cir. 2000); see also In re Jackson, 826 F.3d 1343, 1349-50 (11th Cir. 2016)(leaving question open); Fierro v. Cockrell, 291 F.3d 674, 681 n.12 (5th Cir. 2002)(noting but not deciding whether pendency of second or successive application my equitably toll the limitations period).

As a general matter, a criminal defendant must assert an available challenge to a conviction or sentence on direct appeal or be barred from raising the challenge in a section 2255 proceeding; Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989). It is well-settled that a habeas petitioner can avoid the application of the procedural default rule by establishing objective cause for failing to properly raise the claim and actual prejudice resulting from the alleged constitutional violation. Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(citations omitted); Spencer v. Sec'y, Dep't of Corr., 609 F.3d 1170, 1179-80 (11th Cir. 2010). To show cause, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999). Cause for not raising a claim can be shown when a claim "is so novel that its legal basis [wa]s not reasonably available to counsel." Bousley v. United States, 523 U.S. 614, 622 (1998). To show prejudice, a petitioner must show actual prejudice resulting from the alleged constitutional violation. United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 2505, 53 L. Ed. 2d 594 (1977).

If a petitioner is unable to show cause and prejudice, yet another avenue exists for obtaining review of the merits of a procedurally defaulted claim. Under exceptional circumstances, a prisoner may obtain federal habeas review of a procedurally defaulted claim if such review is necessary to correct a fundamental miscarriage of justice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 495-96; see also Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 862, 122 L. Ed. 2d 203 (1993); Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91

L. Ed. 2d 364 (1986). The actual innocence exception is "exceedingly narrow in scope" and requires proof of actual innocence, not just legal innocence. Id. at 496; see also Bousley, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"); Sawyer v. Whitley, 505 U.S. 333, 339 (1992)("the miscarriage of justice exception is concerned with actual as compared to legal innocence").

Where the Supreme Court explicitly overrules well-settled precedent and gives retroactive application to that new rule after a litigant's direct appeal, "[b]y definition" a claim based on that new rule cannot be said to have been reasonably available to counsel at the time of the direct appeal. Reed v. Ross, 468 U.S. 1, 17 (1984) That is precisely the circumstance here. Johnson overruled precedent, announced a new rule, and the Supreme Court gave retroactive application to that new rule. However, no actual prejudice that would result from finding a procedural default here because the Eleventh Circuit has recently held that the rule of Johnson does not apply or extend to invalidate § 924(c)'s "risk-of-force" clause. See Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017). Accordingly, Movant cannot establish cause-and-prejudice overcome the procedural bar.[5]

Stay

Movant asks that this Court to hold this proceeding in abeyance, pending final disposition of Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), wherein the Eleventh Circuit recently held that the rule of Johnson does not apply or extend to invalidate § 924(c)'s "risk-of-force" clause. Movant notes that

[5]And assuming without deciding that the rule of McKay v. United States, 657 F.3d 1190 (11th Cir. 2011) does not extend to cases where, as here, a § 2255 Movant challenges the conviction itself that is arguably unconstitutional, Movant would not be able to establish actual innocence of his § 924(c) conviction for the same reason; that is, because the Eleventh Circuit has determined that Johnson does not extend to §924(c).

the Court *sua sponte* withheld the mandate, and that a motion for rehearing has been filed. Movant also argues that the Supreme Court has recently ordered re-argument in Sessions v. Dimaya, U.S. No. 15-1498, which presents the question of whether Johnson renders an identical clause contained in § 16(b) of the INA unconstitutionally vague.

The law is well settled that federal district courts have the inherent power to stay proceedings in one proceeding until a decision is rendered in another. See Landis v. North Am. Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." Id. at 254-255; see also Clinton v. Jones, 520 U.S. 681, 706, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) ("The district court has broad discretion to stay proceedings as an incident to its power to control its own docket."). Conversely, it is similarly well settled that, when a federal court possess subject matter jurisdiction over a case before it, it generally has an "unflagging obligation" to exercise its power to adjudicate the controversy. See Colo. River Water Conservation Dist., 424 U.S. 800, 817 (1976).

With regard to the Eleventh Circuit's *sua sponte* recall of the mandate in Ovalles, this would seem to be a routine ministerial act in light of the significance of the issue presented and the resulting likelihood of a motion for rehearing, which was indeed filed. More importantly, however, it seems unlikely that the Court will vacate its decision in Ovalles. More specifically, in Ovalles the Eleventh Circuit followed and expanded upon the rationale of prior rulings issued by the Second, Sixth and Eight Circuits coming to this same conclusion that Johnson did not extend to § 924(c),

and criticized the contrary ruling of the Seventh Circuit Court of Appeals as summary, which at this point is the outlier Circuit. See Id.

With regard to DiMaya, supra, the pendency of a collateral matter in the Supreme Court does not provide a basis for this Court to ignore the Eleventh Circuit's decision in Ovalles, supra, under the circumstances of this case. More specifically, the Supreme Court has already considered § 16(b) in Leocal v. Ashcroft, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), and stated that it "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S.Ct. 377. And despite the Solicitor General's suggestion in Johnson that § 16(b) was "equally susceptible to [Johnson's] central objection to the residual clause,"[6] the Court did not even mention Leocal in Johnson. But perhaps most fundamentally, the Supreme Court's decision in DiMaya will resolve questions only with regard to § 16(b). Simply put, in light of the Court's restraint in Johnson and the well-settled principle that the Court should not decide issues that are not before it, it seems unlikely that the DiMaya Court will say anything whatsoever about § 924(c). See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 n.19, 109 S. Ct. 2782, 2802, 106 L. Ed. 2d 26 (1989)("[W]e cannot properly reach out and decide matters not before us."). Moreover, Johnson and DiMaya concern themselves with prior convictions, while § 924(c) concerns itself with contemporaneous crimes.

In sum, given the ever-shifting legal landscape in this area, the Court cannot be continually waiting for speculative and tangentially-related resolutions. Unless and until the Supreme Court speaks specifically with regard to § 924(c), there will

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[6]Supplemental Brief for Respondent at 22-23, Johnson v. United States, --- U.S. ----, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (No. 13-7120).

continue be splits regarding the status of its "risk-of-force" clause, and DiMaya is likely to only add fuel to this fire. Meanwhile, Ovalles, supra, is directly on point and, while the decision may not be technically final, there is no sound reason not to follow it at this juncture. See Colorado River, 424 U.S. at 817.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where a §2255 movant's constitutional claims have been adjudicated and denied on the merits by the district court, the movant must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a §2255 movant's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the movant can demonstrate both "(1) 'that jurists of reason would find it debatable whether the [or motion] states a valid claim of denial of

a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Movant is not entitled to relief on the merits, the court considers whether Movant is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find the court's treatment of any of Movant's claims debatable and that none of the issues are adequate to deserve encouragement to proceed further. Accordingly, a certificate of appealability is not warranted. See Miller-El, 537 U.S. at 336-38; Slack, 529 U.S. at 483-84.

Conclusion

Based upon the foregoing, it is recommended that the motion to vacate be DENIED, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

SIGNED this 30th day of October, 2017.

UNITED STATES MAGISTRATE JUDGE

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