

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

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| <b>UNITED STATES OF AMERICA</b> | ) |                              |
|                                 | ) |                              |
|                                 | ) | Case No. 1:00CR00087-003     |
|                                 | ) |                              |
| v.                              | ) | <b>OPINION AND ORDER</b>     |
|                                 | ) |                              |
| <b>MARK EDWARDS, SR.,</b>       | ) | By: James P. Jones           |
|                                 | ) | United States District Judge |
| Defendant.                      | ) |                              |

*Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia, for United States; Brian J. Beck, Assistant Federal Public Defender, Abingdon, Virginia, for Defendant.*

Mark Edwards, Sr., a federal inmate, has filed a motion under 28 U.S.C. § 2255, contending that his sentences under 18 U.S.C. § 1952(a)(3)(B) and 18 U.S.C. § 924(c) are invalid based upon the Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), because the definitions of “crime of violence” in both statutes are unconstitutionally vague. For the reasons that follow, I will deny the motion.<sup>1</sup>

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<sup>1</sup> The Supreme Court recently granted certiorari to the decision of the Ninth Circuit in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), which held that the definition of “crime of violence” in 18 U.S.C. § 16(b), a definition also applicable to 18 U.S.C. § 1952(a)(3)(B), was unconstitutionally vague. *Lynch v. Dimaya*, No. 15-1498, 2016 WL 3232911 (U.S. Sept. 29, 2016). The parties have not requested the court to reserve ruling in the present case until the Supreme Court has heard and decided *Dimaya*, and I have determined not to do so.

## I.

After pleading not guilty to a multi-defendant and multi-count Indictment, Edwards was convicted by a jury in this court on April 12, 2001, of traveling in interstate commerce to commit a crime of violence, in violation of 18 U.S.C. § 1952 (“Travel Act”) (Count Seven); possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Nine); and being an unlawful user of a controlled substance in possession of a firearm and after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1), (3) (Count Fourteen). By Judgment entered July 17, 2001, Edwards was sentenced to a total of 264 months imprisonment, consisting of 60 months on the Travel Act conviction, 84 months on the § 924(c) conviction, and 120 months on the unlawful firearm possession conviction. All of the terms were ordered to run consecutive.<sup>2</sup> Edwards unsuccessfully appealed. *United States v. Edwards*, 38 F. App’x 134 (4th Cir. 2002) (unpublished). His sentence was reduced by this court in 2008 and again in 2015 under 18 U.S.C. § 3582(c)(2), based upon retroactive amendments to the Sentencing Guidelines. His current sentence is 204 months, consisting of 60 months on Count Seven, 84 months on Count Nine, and 60 months on Count Fourteen, all to run consecutively.

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<sup>2</sup> Count Nine required a mandatory consecutive sentence, in light of the fact that the jury found that Edwards had brandished a firearm. (Verdict, ECF No. 90.) *See* 18 U.S.C. § 924(c)(1)(A)(ii).

On March 4, 2003, Edwards filed a pro se § 2255 motion, which was denied. *Edwards v. United States*, No. 7:03CV00146 (W.D. Va. Nov. 21, 2004). On June 8, 2016, the United States Court of Appeals for the Fourth Circuit granted authorization pursuant to 28 U.S.C. § 2255(h) for Edwards to file a second or successive § 2255 motion. *In re: Mark Edwards, Sr.*, No. 16-828 (4th Cir. June 8, 2016). On that same day, Edwards, represented by the Federal Public Defender for this district, filed the present § 2255 motion. On September 16, 2016, the United States filed a motion to dismiss, along with a motion seeking leave to file an amended or supplement response. Amended motions to dismiss were thereafter filed by the United States and oral argument was heard by the court on October 5, 2016.

The issues have now been fully submitted by the parties and are ripe for decision.

## II.

Edwards contends that the Supreme Court’s decision in *Johnson*, involving the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), applies equally to the statutory definitions of “crime of violence” of the Travel Act and § 924(c), thus invalidating his sentences under Counts Seven and Ten. Prior to *Johnson*, the term “violent felony” was defined in the ACCA as

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

(i) has as 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). The first clause is referred to as the “force clause.” The first portion of the second clause is known as the “enumerated crime clause.” The second portion of that clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”) is called the “residual clause” and was found to be unconstitutionally vague in *Johnson*. The force and enumerated crime clauses were untouched by *Johnson*.

The Travel Act, in pertinent part, provides that whoever travels in interstate commerce with the intent to “commit any crime of violence to further any unlawful activity” and thereafter performs or attempts to perform such an act, shall be punished. 18 U.S.C. § 1952(a). In Chapter 1 of Title 18 of the United States Code, the term “crime of violence” is defined as

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, 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. § 16. In connection with a § 924(c) offense, “crime of violence” is defined as an offense that is a felony and

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

(B) that 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).

Edwards contends that since both of the above definitions contain a residual clause similar to that of the ACCA, it is appropriate based upon *Johnson* to vacate his convictions. In response, the government argues that the right claimed by Edwards has not been made retroactive by *Johnson* and thus his current motion is barred by the one-year statute of limitations that accrued from the date Edwards’ convictions became final, as provided by 28 U.S.C. § 2255(f)(1). Moreover, on the merits of Edwards’ claim, the government asserts that the limited holding of the Supreme Court in *Johnson* does not reach § 16(b) and § 924(c).

The parties agree that lower federal courts have reached different results on these issues. Neither the Supreme Court nor the Fourth Circuit have definitively ruled in a way binding upon this court. Upon careful consideration of the authorities cited by the parties, I find that the government’s arguments are more persuasive. *See, e.g., United States v. Jimenez-Segura*, No. 1:07-CR-146, 2016

WL 4718949, at \*9 (E.D. Va. Sept. 8, 2016) (holding that invalidity of residual clause of § 924(c) was not a rule announced in *Johnson* and thus § 2255 motion must be dismissed as untimely), *appeal docketed*, No. 16-7277 (4th Cir. Sept. 21, 2016); *United States v. Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127, at \*1 (5th Cir. Aug. 5, 2016) (en banc) (holding that § 16(b) is not unconstitutionally vague); *United States v. Hill*, No. 14-3872-cr, 2016 WL 4120667, at \*8 (2d Cir. Aug. 3, 2016) (holding that § 924(c) “risk of force” (residual) clause is not void for vagueness). Accordingly, I deny the defendant’s motion, finding that it is successive and untimely and alternatively, his convictions based on § 16(b) and § 924(c) are not invalid.<sup>3</sup>

### III.

For the reasons stated, the United States’ motion to dismiss, as amended (ECF Nos. 246, 248, 266) is GRANTED and the defendant’s Motion to Vacate Convictions Under 28 U.S.C. § 2255 (ECF No. 226) is DENIED.

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). The prospective appellant must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 336–38

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<sup>3</sup> I make no ruling on the government’s contention that the defendant’s claims have been procedurally defaulted.

(2003); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). After reviewing the case in light of the applicable standard, I find that a certificate of appealability is GRANTED as to all claims presented in the defendant’s § 2255 motion.

It is so **ORDERED**.

ENTER: October 11, 2016

/s/ James P. Jones  
United States District Judge