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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Shawn Tyrone Percy,

9 Petitioner,

10 vs.

11 United States,

12 Respondent.

No. CV 16-02066-PHX-DGC (DMF)

ORDER

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15 Magistrate Judge Deborah M. Fine has issued a Report and Recommendation that
16 the Court stay this matter pending decision of cases by the Ninth Circuit and Supreme
17 Court (“R&R”). Doc. 13. Petitioner objects. Doc. 14. The Court concludes that this
18 matter should not be stayed.

19 **I. Background.**

20 On October 7, 1999, Petitioner Shawn Tyler Percy was found guilty by a jury of
21 second degree murder in violation of 18 U.S.C. §1111, and discharging a firearm during
22 and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii).
23 Doc. 1, ¶ 9. Petitioner was sentenced to 280 months in prison, consisting of 160 months
24 on the murder count and 120 months on the § 924(c) count. *Id.*

25 On June 26, 2016, Petitioner, through counsel, filed a Motion to Vacate, Set
26 Aside, or Correct Sentence under 28 U.S.C. § 2255. *Id.* Petitioner asserts that his
27 sentence is unconstitutional under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Id.*
28 In *Johnson*, the Supreme Court held that the residual clause in the definition of a “violent

1 felony” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (“ACCA”), is
2 unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. Petitioner argues that his
3 sentence under 18 U.S.C. § 924(c)(1)(A)(iii) is likewise unconstitutional. Doc. 1.
4 Petitioner’s sentence expiration date on the second degree murder charge alone (not
5 considering the § 924(c) sentence) was July 7, 2016. Doc. 11.

6 On September 6, 2016, Respondent sought a stay of these proceedings pending the
7 Supreme Court’s decision in *Lynch v. Dimaya*, No. 15-1498 (cert. granted Sept. 29,
8 2016), and the Ninth Circuit’s decision in *United States v. Begay*, No. 14-10080. Doc. 5.
9 Petitioner opposes the stay. Doc. 10.

10 *United States v. Begay* has been fully briefed and argued, and was submitted for
11 decision on May 26, 2016. *Begay* will address whether second degree murder is a crime
12 of violence for purposes of a § 924(c) conviction and how *Johnson* impacts the analysis –
13 questions posed by this petition. Respondent suggests that a decision could be handed
14 down “any day now.” Doc. 5 at 4.

15 The Supreme Court has granted certiorari in *Lynch v. Dimaya*, No. 15-1498. In
16 that case, the Supreme Court will decide whether the residual clause of 18 U.S.C. § 16(b),
17 which is identical to the residual clause of § 924(c)(3)(B), is unconstitutional for the same
18 reasons as the residual clause in *Johnson*. Although a decision normally would be
19 expected by June, the current vacancy on the Supreme Court, and uncertainty as to when
20 that vacancy will be filled, makes that normal expectation less certain. If the vacancy is
21 not filled, a 4-4 split could result in the issue not being resolved by June.

22 On November 4, 2016, Judge Fine issued the R&R recommending that the Court
23 grant the government’s Motion to Stay. Doc. 13. Petitioner filed an objection to the
24 R&R (Doc. 14), and the government filed a reply (Doc. 17).

25 **II. Standard of Review.**

26 A party may file specific written objections to the R&R’s proposed findings and
27 recommendations. The Court must undertake de novo review of those portions of the
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1 R&R to which specific objections are made. The Court may accept, reject, or modify, in
2 whole or in part, the findings or recommendations. Fed. R. Civ. P. 72(b); 28 U.S.C.
3 § 636(b)(1).

4 **III. Analysis.**

5 “A district court has discretionary power to stay proceedings in its own court.”
6 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v. North*
7 *American Co.*, 299 U.S. 248, 254 (1936)). The Court must weigh competing interests,
8 including “the possible damage which may result from the granting of stay, the hardship
9 or inequity which a party may suffer in being required to go forward, and the orderly
10 course of justice measured in terms of the simplifying or complicating of issues, proof,
11 and questions of law which could be expected to result from a stay.” *Id.* (quoting
12 *CMAX, Inc. v. Hall*, 300 F.2d 265 (9th Cir. 1962)). If there is even a fair possibility that
13 the stay will work damage to someone else, the party seeking the stay “must make out a
14 clear case of hardship or inequity.” *Id.* (quoting *Landis*, 299 U.S. at 255). In habeas
15 cases, “special considerations” are implicated “that place unique limits on a district
16 court’s authority to stay a case in the interests of judicial economy.” *See Yong v. INS*,
17 208 F.3d 1116, 1120 (9th Cir. 2000).

18 The government argues that staying the proceedings would promote judicial
19 efficiency and consistency. Doc. 5 at 5. Rulings in *Begay* and *Dimaya*, the government
20 contends, will answer or clarify several issues in this case that would otherwise require
21 litigation by the parties and independent findings by the Court. *Id.* at 4.

22 Petitioner agrees that *Begay* will deal with an issue in this case – whether second-
23 degree murder amounts to a crime of violence under § 924 (c)(3)(B). *See* Doc. 10 at 3.
24 But Petitioner contends that a stay is still unwarranted. Petitioner argues that the Court
25 remains bound by the Ninth Circuit’s decision in *Dimaya* unless and until the Supreme
26 Court changes the Ninth Circuit’s holding in that case, and the fact that these issues are
27 pending before appellate courts is insufficient reason to grant the requested stay. *Id.* at 3,
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1 5. “This Court has a statutory obligation to rule on [Petitioner’s] § 2255 motion without
2 undue delay – particularly where, as here, prevailing on his challenge would result in his
3 immediate release from custody.” *Id.* at 3 (citing 28 U.S.C. § 2243).

4 The Court concludes that Petitioner would face a distinct possibility of prejudice
5 from any stay. He completed the portion of his sentence for second degree murder on
6 July 7, 2016. *See* Doc. 11. Should he succeed on his § 2255 motion and have his
7 § 924(c) sentence vacated, he would be entitled to immediate release. Doc. 10 at 5.

8 On the other hand, the government has not made out “a clear case of hardship or
9 inequity.” *Lockyer*, 398 F.3d at 1109. This case likely will be pending for many months.
10 Briefing must be completed on Petitioner’s § 2255 motion, Judge Fine must prepare an
11 R&R, this Court must consider the R&R and any objections, and this Court’s decision
12 likely will be appealed. If it is true that *Begay* will be decided any day now, it may well
13 occur during the consideration by Judge Fine and can be addressed in the parties’ briefs
14 or, if necessary, in short order through supplemental briefs. *Dimaya* can also be
15 considered if it is decided during the pendency of this case, and, if it is not decided, this
16 case will not have been delayed in the meantime. Given the fact that Petitioner may be
17 released from custody as a result of this case, the Court concludes that it should not be
18 delayed for events that can be considered as the case moves forward. The government
19 does not face a clear case of hardship or inequity from proceeding in this manner.


20 The government argues that “every [*Johnson*] case in which the government has
21 separately filed a motion to stay in [the Phoenix Division of the District of Arizona], the
22 stay has ultimately been ordered or recommended.” *Id.* at 3. But the petitioners in those
23 cases failed to show that they would be prejudiced by a stay. *See, e.g., Hatch v. United*
24 *States*, No. CV-16-02041-PHX-JJT (MHB), 2016 WL 6143047 (D. Ariz. Oct. 20, 2016)
25 (“Issuance of the stay . . . will not injure Petitioner, substantially or otherwise, because
26 the portion of his sentence for which he does not seek resentencing . . . will not nearly
27 have elapsed by the time the Supreme Court has provided any necessary guidance[.]”);
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1 *Grant v. United States*, No. CV-16-2057-PHX-JAT (BSB) (D. Ariz. Sept. 21, 2016)
2 (petitioner's earliest possible release if claim is successful is not until January 2018); *see*
3 *also Cascketta v. United States*, No. CV-16-02042-PHX-JAT (JZB) (D. Ariz. Nov. 14,
4 2016) (Defendant did not object to the stay, as he was already serving a 180 month
5 sentence on counts unrelated to the motion); *Arnold v. United States*, No. CV-16-1839-
6 PHX-SMM (DKD) (D. Ariz. Nov. 3, 2016) (no discussion of prejudice to the petitioner).

7 A number of courts outside this district have denied motions to stay from the
8 government because they would prejudice the petitioners. *See, e.g., United States v.*
9 *Shumilo*, No. CV-16-4412-GW, 2016 WL 6302524 (C.D. Cal. Oct. 24, 2016) ("The
10 Court would lift the stay and move forward with these proceedings, as Petitioner has
11 clearly established prejudice from the stay."); *United States v. Carcamo*, 2016 WL
12 5897735 (N.D. Cal. Oct. 11, 2016) ("The Court is of the view that briefing should
13 proceed on schedule without any stay in light of the fact that defendant could possibly be
14 sentenced to time served if his 2255 motion is granted.").

15 **IT IS ORDERED** that the Court does not adopt the R&R (Doc. 13). This case
16 should not be stayed pending the decisions in *Begay* and *Dimaya*. This case is referred
17 back to Magistrate Judge Deborah M. Fine to set a briefing schedule on Petitioner's
18 § 2255 petition and for issuance of an R&R on Petitioner's § 2255 petition.

19 Dated this 12th day of December, 2016.

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David G. Campbell
United States District Judge