

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
8

9 UNITED STATES OF AMERICA,
10 Plaintiff-Respondent,
11 v.
12 ARTURO MOLINA-VILLANUEVA
13 (2),
14 Defendant-Petitioner.

Case Nos.: 10-cr-3510-BTM-2
16-cv-1345-BTM

**ORDER GRANTING MOTION
FOR RECONSIDERATION,
LIFTING STAY AND DENYING
DEFENDANT’S § 2255 MOTION**

[ECF NOS. 227, 287, 290, 294]

15
16 Arturo Molina-Villanueva (“Defendant”) has filed a motion to vacate, set
17 aside, or reduce his sentence pursuant to 28 U.S.C. § 2255, Johnson v. United
18 States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct. 1257
19 (2016). (ECF No. 227.) The Court recently stayed consideration of Defendant’s
20 motion pending the Supreme Court’s resolution of Sessions v. Dimaya, No. 15-
21 1498, cert. granted sub nom. Lynch v. Dimaya, 137 S. Ct. 31 (Sept. 29, 2016).
22 (ECF No. 280.) Defendant has moved for reconsideration of the stay. (ECF Nos.
23 287, 290, 294.) For the reasons discussed below, the Court grants Defendant’s
24 motion for reconsideration, lifts the stay, and denies Defendant’s § 2255 motion.

25 **I. BACKGROUND**

26 On February 17, 2011, Defendant pled guilty pursuant to a plea agreement
27 to one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C.
28 § 1951(a) (Count 1), and one count of possession of a firearm in furtherance of a

1 crime of violence, in violation of 18 U.S.C. § 924(c) (Count 2). (ECF No. 72.) The
2 “crime of violence” that served as the predicate for Defendant’s conviction on
3 Count 2 was his conviction on Count 1 for conspiracy to commit Hobbs Act robbery.
4 On October 28, 2011, the Court sentenced Defendant to a term of 37 months on
5 Count 1 and 60 months on Count 2, run consecutively for a total term of
6 imprisonment of 97 months. (ECF Nos. 192, 193.)

7 On June 26, 2015, the Supreme Court decided Johnson, in which it held that
8 the residual clause definition of “violent felony” in the Armed Career Criminal Act
9 (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. On October
10 19, 2015, the Ninth Circuit decided Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015),
11 holding that the reasoning of Johnson applied to the residual clause definition of
12 “crime of violence” in 18 U.S.C. § 16(b) so as to render it void for vagueness.

13 On June 2, 2016, Defendant filed the instant § 2255 motion. He moves to
14 vacate his conviction under § 924(c), arguing that the reasoning of Johnson and
15 Dimaya apply to the residual clause definition of “crime of violence” in
16 § 924(c)(3)(B) and lead to the conclusion that the latter statute is likewise
17 unconstitutionally vague. On July 17, 2016, the government filed a response brief
18 in which it moved to stay Defendant’s motion pending the outcome of United States
19 v. Begay, in which the Ninth Circuit is anticipated to address the constitutionality
20 of § 924(c)(3)(B) in light of Johnson. (ECF No. 246.) On July 22, 2016, Defendant
21 filed a reply brief in which he opposed a stay.

22 On August 5, 2016, in response to the government’s contention in its
23 opposition brief that by filing his § 2255 motion, Defendant had breached the
24 provision of his plea agreement in which he waived his right to collateral attack,
25 Defendant filed a motion for voluntary dismissal of his petition. After the
26 government filed a brief in which it withdrew its claim of breach, Defendant filed an
27 unopposed motion to reinstate his § 2255 motion (ECF No. 268), which the Court
28 granted on October 14, 2016 (ECF No. 273).

1 On September 29, 2016, the Supreme Court granted certiorari in Dimaya.
2 Dimaya, No. 15-1498, 137 S. Ct. 31 (Sept. 29, 2016). On March 29, 2017, the
3 Ninth Circuit entered an order deferring submission of Begay pending the Supreme
4 Court’s resolution of Dimaya. See Order (Doc. No. 87), United States v. Begay,
5 No. 14-10080 (9th Cir. Mar. 29, 2017). On June 9, 2017, this Court entered an
6 order staying consideration of Defendant’s § 2255 motion pending the outcome of
7 Dimaya, noting that the Supreme Court was expected to issue its decision no later
8 than June 2017, such that the ensuing stay was anticipated to be brief.

9 On June 26, 2017, the Supreme Court restored Dimaya to the calendar for
10 reargument, meaning it will not be issuing a decision until its next term, which ends
11 in June 2018.

12 On June 29, 2017, Defendant filed a motion for reconsideration of the Court’s
13 stay order in light of the development in Dimaya. On June 30, 2017, the Court
14 issued an order in which it advised the parties it was considering vacating the stay
15 and ruling on the merits of Defendant’s § 2255 motion, and permitted the parties
16 to file supplemental briefing by July 10, 2017.

17 **II. DISCUSSION**

18 28 U.S.C. § 2255 provides, in pertinent part, that a prisoner in custody
19 “claiming the right to be released upon the ground that the sentence was imposed
20 in violation of the Constitution or laws of the United States ... may move the court
21 which imposed the sentenced to vacate, set aside or correct the sentence.” 28
22 U.S.C. § 2255.

23 Defendant moves to vacate his conviction and sentence on Count 2 for
24 violating § 924(c), which criminalizes possession of a firearm in furtherance of a
25 crime of violence. For purposes of § 924(c), “crime of violence” is defined as
26 an offense that is a felony and—

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

1 (B) that by its nature, involves a substantial risk that physical force against
2 the person or property of another may be used in the course of
3 committing the offense.

4 18 U.S.C. § 924(c)(3). Courts generally refer to subsection (A) of § 924(c)(3) as
5 the “force clause,” and subsection (B) as the “residual clause.”

6 Here, the predicate “crime of violence” supporting Defendant’s conviction
7 and sentence under § 924(c) was his conviction on Count 1 for conspiracy to
8 commit Hobbs Act robbery. Defendant argues that conspiracy to commit Hobbs
9 Act robbery qualifies as a “crime of violence,” if at all, only under the residual
10 clause, § 924(c)(3)(B). He contends that § 924(c)(3)(B) is unconstitutionally vague
11 in light of the Johnson decision’s invalidation of the residual clause definition of
12 “violent felony” in the ACCA, and that his conviction on Count 2 must therefore be
13 vacated.

14 The government responded by seeking a stay of Defendant’s motion
15 pending the Ninth Circuit’s issuance of a decision in Begay. The government also
16 argues that Defendant’s motion is procedurally barred because he defaulted on
17 his claim for failure to raise it on direct appeal.¹ As to the merits, the government
18 maintains that the reasoning of Johnson does not apply to § 924(c)(3)(B), and that
19 even if the Court does find § 924(c)(3)(B) unconstitutionally vague, conspiracy to
20 commit Hobbs Act robbery remains a crime of violence under the force clause, §
21 924(c)(3)(A).

22 A. Reconsideration Of Stay Order

23 The Court first addresses Defendant’s motion for reconsideration of the
24 Court’s June 9, 2017 order staying this case pending the Supreme Court’s
25 issuance of a decision in Dimaya. Defendant contends that now that it is clear no
26

27
28 ¹ On August 29, 2016, the government filed a brief in which it indicated it was withdrawing its claim
that Defendant had breached his plea agreement by filing his § 2255 motion. (ECF No. 264.)

1 decision will be forthcoming in Dimaya until the Supreme Court's next term ending
2 in June 2018, the Court should lift the stay because he will be prejudiced by the
3 additional, unanticipated delay.²

4 The Court agrees and will lift the stay. As discussed below, post-Johnson,
5 the courts have been divided with regard to the constitutionality of § 924(c)(3)(B).
6 Since the language of the residual clause at issue in Dimaya is virtually identical
7 to the text of § 924(c)(3)(B), the Court anticipated a decision from the Supreme
8 Court in Dimaya would effectively control the outcome of Defendant's motion.
9 Indeed, in Begay, in which the Ninth Circuit is considering the constitutionality of
10 § 924(c)(3)(B), the Ninth Circuit has deferred its decision pending resolution of
11 Dimaya. See Order, Begay, No. 14-10080 (9th Cir. Mar. 29, 2017).

12 Although it would be helpful to know the result of Dimaya before ruling on
13 this case, in considering the wisdom of a stay based on judicial economy, district
14 courts faced with habeas petitions must consider the potential prejudice of a stay
15 to the defendant. Yong v. I.N.S., 208 F.3d 1116, 1117-19 (9th Cir. 2000). When
16 the Court stayed this case pending the outcome of Dimaya, it believed the
17 Supreme Court's decision would be issued in a matter of weeks, no later than June
18 2017. While the Ninth Circuit's decision in Begay will almost certainly resolve the
19 issue presented here, as of the date of this order, Begay remains stayed, and it
20 appears it will not be decided until after Dimaya. The unanticipated delay in
21 resolution of Dimaya is a development that warrants reconsideration of the stay.
22 The Court finds that any benefit that might be conferred by waiting for a decision
23 in Dimaya or Begay is outweighed by the prejudice to Defendant of further delay.

24 Accordingly, the Court grants Defendant's motion for reconsideration and
25

26
27 ² After the Court issued its stay order on June 9, 2017, on June 14, 2017, Defendant filed a supplemental brief
28 indicating he did not oppose a stay through the end of June 2017. (ECF No. 284.) It was not until June 29, 2017,
that Defendant sought reconsideration of the stay on the ground that because his anticipated release date is
October 19, 2017, a continued stay is prejudicial.

1 lifts the stay.

2 B. Merits of Defendant's § 2255 Motion

3 In United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993), the Ninth
4 Circuit held that conspiracy to commit Hobbs Act robbery qualifies as a crime of
5 violence pursuant to the residual clause of § 924(c)(3)(B). Mendez remains good
6 law, so there is no question that Defendant's conviction on Count 1 qualifies as a
7 predicate for his § 924(c) conviction under the residual clause. Defendant argues
8 that his conviction and sentence for violating § 924(c) must be vacated because
9 the residual clause is no longer constitutional in light of the Supreme Court's
10 decision in Johnson.

11 Since Johnson was decided, dozens of courts have been presented with
12 vagueness challenges to the constitutionality of § 924(c)(3)(B). The courts are
13 divided with regard to the resolution of this issue. On the one hand, the Second,
14 Fifth, Sixth, Eighth, and Eleventh Circuits have upheld § 924(c)(3)(B) against post-
15 Johnson void-for-vagueness challenges. See United States v. Hill, 832 F.3d 135,
16 145 (2d Cir. 2016); United States v. Davis, --- Fed. Appx. ----, 2017 WL 436037, at
17 *2 (5th Cir. 2017) (unpublished); United States v. Taylor, 814 F.3d 340, 375-79
18 (6th Cir. 2016); United States v. Prickett, 839 F.3d 697, 699–700 (8th Cir. 2016);
19 Ovalles v. United States, --- F.3d ----, 2017 WL 2829371, at *4-8 (11th Cir. 2017).
20 The Seventh Circuit, on the other hand, has held § 924(c)(3)(B) unconstitutionally
21 vague under the reasoning of Johnson. See United States v. Cardena, 842 F.3d
22 959, (7th Cir. 2016). District courts in other circuits, including the Ninth Circuit, are
23 split. Compare, e.g., United States v. Bell, 158 F. Supp. 3d 906, 921-24 (N.D. Cal.
24 2016) (residual clause of § 924(c)(3)(B) unconstitutional in light of Johnson and
25 Dimaya); United States v. Baires-Reyes, 191 F. Supp. 3d 1046, 1051-53 (N.D. Cal.
26 2016) (same); United States v. Smith, 215 F. Supp. 3d 1026, 1035-36 (D. Nev.
27 2016) (same); United States v. Herr, No. 16-cr-10038-IT, 2016 U.S. Dist. LEXIS
28 144201, at *4-11 (D. Mass. Oct. 18, 2016) (same); United States v. Edmundson,

1 153 F. Supp. 3d 857, 861-64 (D. Md. 2015) (same); with United States v. Lott, No.
2 95cr0072 WQH, 16cv1575 WQH, 2017 WL 553467, at *3 (S.D. Cal. Feb. 9, 2017)
3 (residual clause of § 924(c)(3)(B) remains constitutional after Johnson); United
4 States v. Tsarnaev, 157 F. Supp. 3d 57, 71-74 (D. Mass. 2016) (same); United
5 States v. Green, No. 15-cr-00526, 2016 WL 277982, at *3-5 (D. Md. Jan. 22, 2016)
6 (same).

7 The courts that have considered the issue in this District have rejected post-
8 Johnson challenges to the constitutionality of § 924(c)(3)(B). Lott, No. 95cr0072
9 WQH, 16cv1575 WQH, 2017 WL 553467, at *3; United States v. Sehorn,
10 95cr0072-2 WQH, 2017 WL 1336872 (S.D. Cal. Feb. 17, 2017); United States v.
11 Nelson, 95cr0072-4 WQH, 2017 WL 1346638 (S.D. Cal. Feb. 17, 2017);
12 Hernandez v. United States, No. 10-CR-3173-H-3, 2016 WL 7250676, at *3–4
13 (S.D. Cal. Nov. 7, 2016); Averhart v. United States, No. 11-cr-1861 DMS, 2016
14 U.S. Dist. LEXIS 184031 (Nov. 21, 2016); Mondragon-Hernandez v. United States,
15 NO. 10-CR-3173-H-1; 16-CV-1537-H, 2017 U.S. Dist. LEXIS 41720 (S.D. Cal.
16 Mar. 22, 2017).

17 The Court finds the reasoning of courts that have rejected challenges to the
18 constitutionality of § 924(c)(3)(B) persuasive. See, e.g., Taylor, 814 F.3d at 375-
19 79; Lott, 2017 WL 553467 at *3. These courts have reasoned as follows. Johnson
20 analyzed the residual clause of the ACCA, which provides that a “violent felony” is
21 a felony that “(ii) is burglary, arson, or extortion, involves use of explosives, or
22 otherwise involves conduct that presents a serious potential risk of physical injury
23 to another.” 18 U.S.C. § 924(e)(2)(B) (residual clause underlined). The Supreme
24 Court reasoned that the ACCA’s residual clause was unconstitutionally vague
25 because (1) it created uncertainty with regard to how judges should estimate the
26 “serious potential risk of physical injury” posed by a crime, and as to the quantum
27 of potential risk that qualified as “serious,” (2) the list of dissimilar enumerated
28 offenses that preceded the residual clause only added to the uncertainty over its

1 interpretation, and (3) experience had proven the clause to be unworkably vague,
2 as courts had struggled to apply it in practice. Johnson, 135 S. Ct. at 2556-60.

3 Courts that have rejected challenges to § 924(c)(3)(B) based on the
4 reasoning of Johnson have found that material differences between the residual
5 clause of § 924(e)(2)(B)(ii) and § 924(c)(3)(B) undermine the force of the Supreme
6 Court’s reasoning with regard to the latter statute. First, unlike the ACCA,
7 § 924(c)(3)(B) requires courts to determine whether a crime “involves a substantial
8 risk that physical force” may be used by the offender, which is a less attenuated
9 determination than whether a crime will create a “serious potential risk of physical
10 injury to another.” See Taylor, 814 F.3d at 376-77. Second, unlike the ACCA, the
11 residual clause of § 924(c)(3)(B) is not preceded by a list of dissimilar crimes, a
12 textual difference that makes the ACCA’s residual clause the harder of the two to
13 interpret. See id. at 377. Third, unlike the history of interpretation of the ACCA
14 residual clause, courts have not experienced “repeated attempts and repeated
15 failures to craft a principled and objective standard” out of § 924(c)(3)(B). See id.
16 at 377-78 (quoting Johnson, 135 S. Ct. at 2558).

17 Courts that have reached the opposite conclusion regarding the
18 constitutionality of § 924(c)(3)(B) have relied heavily on Dimaya. See, e.g., Bell,
19 158 F. Supp. 3d at 921-24; United States v. Lattanaphom, 159 F. Supp. 3d 1157,
20 1162-64 (E.D. Cal. 2016). In Dimaya, the Ninth Circuit reasoned that 18 U.S.C. §
21 16(b)³ suffered from the same constitutional infirmities as the ACCA’s residual
22 clause, because use of the categorical approach to determine which offenses are
23 “crimes of violence” within the meaning of § 16(b) requires the same judicial
24

25
26 ³ 18 U.S.C. § 16 provides:

The term "crime of violence" means--

27 (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

28 (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.

1 hypothecating, and involves similar double indeterminacy with regard to the
2 amount of risk required, so as to render the reasoning of Johnson equally
3 applicable to § 16(b). Dimaya, 803 F.3d at 1116-17. Courts that have followed
4 Dimaya's holding with regard to the constitutionality of § 924(c)(3)(B) have
5 reasoned that since § 16(b) is materially identical to § 924(c)(3)(B), Dimaya's
6 reasoning should apply equally to § 924(c)(3)(B), and the same result should
7 pertain to the latter statute. See Lattanaphom, 159 F. Supp. 3d at 1164 (“The
8 Dimaya court extended Johnson to a statute with identical language as that in the
9 § 924(c) residual clause and cannot be distinguished.”). However, other courts,
10 including from within the Ninth Circuit, have rejected the notion that Dimaya is
11 controlling with regard to the fate of § 924(c)(3)(B). See, e.g., Lott, 2017 WL
12 553467 at *4. Such courts have noted that the Dimaya court explicitly limited its
13 holding and stated its decision did “not reach the constitutionality of applications of
14 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast doubt on the
15 constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence.” Dimaya,
16 803 F.3d at 1120 n.17; Lott, 2017 WL 553467 at *4 (“*Dimaya* does not control the
17 issue of the constitutionality of § 924(c)(3)(B).”). The Court agrees with the latter
18 line of reasoning that by virtue of this so-called “cabining” footnote, the analysis of
19 Dimaya is not controlling with regard to the constitutionality of § 924(c)(3)(B).⁴

20 The Court finds the reasoning of the courts that have rejected post-Johnson
21 due process challenges to § 924(c)(3)(B) persuasive, and therefore concludes, as
22 they did, that § 924(c)(3)(B) is not unconstitutionally vague. Because Defendant's
23 conviction for conspiracy to commit Hobbs Act robbery remains a crime of violence
24

25
26
27
28
⁴ That the Ninth Circuit, in United States v. Hernandez-Lara, 817 F.3d 651 (9th Cir. 2016), relied on Dimaya to hold an 8-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(C) unconstitutional to the extent it incorporated § 16(b) does not suggest that the Ninth Circuit regards Dimaya as having a reach that extends outside the context of 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16(b). The Guideline provision at issue in Hernandez-Lara defined “aggravated felony” by reference to 8 U.S.C. § 1101(a)(43)(F), which incorporates § 16(b). See 817 F.3d at 652. Thus, the constitutional issue presented in Hernandez-Lara fell squarely within the scope of Dimaya's limited holding.

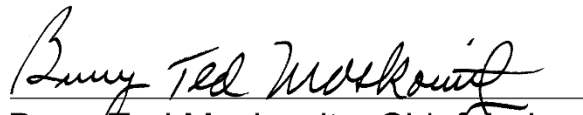
1 under § 924(c)(3)(B), his motion to vacate his conviction for violating § 924(c) is
2 denied. Also, since the Court denies Defendant's motion on this ground, the Court
3 need not, and does not, address the government's argument that conspiracy to
4 commit Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A),
5 or its contention that Defendant's motion is procedurally barred. Finally, since
6 Defendant's motion is being denied, the Court finds there is no conflict in counsel's
7 representation of Defendant at this stage of the proceedings, although this issue
8 would merit further consideration going forward if Defendant's motion had been
9 granted.

10 **III. CONCLUSION AND ORDER**

11 For the foregoing reasons, the Court GRANTS Defendant's motion for
12 reconsideration, LIFTS the stay, and DENIES Defendant's motion to vacate, set
13 aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Defendant is
14 granted a certificate of appealability.

15 IT IS SO ORDERED.

16 Dated: July 24, 2017

17 
18 Barry Ted Moskowitz, Chief Judge
19 United States District Court
20
21
22
23
24
25
26
27
28