

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

10
11 UNITED STATES OF AMERICA,
12 Plaintiff-Respondent,
13 v.
14 JESUS GUADALUPE GASPAR-
15 SAMANO (1),
16 Defendant-Petitioner.

Case Nos.: 10-cr-3510-BTM-1
16-cv-1539-BTM

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

[ECF NOS. 243, 285, 295]

17
18 Jesus Guadalupe Gaspar-Samano ("Defendant") has filed a motion to
19 vacate, set aside, or reduce his sentence pursuant to 28 U.S.C. § 2255, Johnson
20 v. United States, 135 S. Ct. 2551 (2015), and Welch v. United States, 136 S. Ct.
21 1257 (2016). (ECF No. 243.) The Court recently stayed consideration of
22 Defendant's motion pending the Supreme Court's resolution of Sessions v.
23 Dimaya, No. 15-1498, cert. granted sub nom. Lynch v. Dimaya, 137 S. Ct. 31
24 (Sept. 29, 2016). (ECF No. 279.) Defendant has moved for reconsideration of the
25 stay. (ECF Nos. 285, 295.) For the reasons discussed below, the Court grants
26 Defendant's motion for reconsideration, lifts the stay, and denies Defendant's
27 § 2255 motion.

28 //

1 **I. BACKGROUND**

2 On February 17, 2011, Defendant pled guilty pursuant to a plea agreement
3 to one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C.
4 § 1951(a) (Count 1), and one count of possession of a firearm in furtherance of a
5 crime of violence, in violation of 18 U.S.C. § 924(c) (Count 2). (ECF No. 70.) The
6 “crime of violence” that served as the predicate for Defendant’s conviction on
7 Count 2 was his conviction on Count 1 for conspiracy to commit Hobbs Act robbery.
8 On August 5, 2011, the Court sentenced Defendant to a term of 37 months on
9 Count 1 and 60 months on Count 2, run consecutively for a total term of
10 imprisonment of 97 months. (ECF Nos. 169, 170.)

11 On June 26, 2015, the Supreme Court decided Johnson, in which it held that
12 the residual clause definition of “violent felony” in the Armed Career Criminal Act
13 (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague. On October
14 19, 2015, the Ninth Circuit decided Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015),
15 holding that the reasoning of Johnson applied to the residual clause definition of
16 “crime of violence” in 18 U.S.C. § 16(b) so as to render it void for vagueness.

17 On June 17, 2016, Defendant filed the instant § 2255 motion. He moves to
18 vacate his conviction under § 924(c), arguing that the reasoning of Johnson and
19 Dimaya apply to the residual clause definition of “crime of violence” in
20 § 924(c)(3)(B) and lead to the conclusion that the latter statute is likewise
21 unconstitutionally vague. He simultaneously applied for leave from the Ninth
22 Circuit to proceed with this motion because it appeared to be a successive § 2255
23 petition. The parties agreed the case should be stayed until the Ninth Circuit ruled
24 on Defendant’s application (see ECF Nos. 248, 257), and the Court thus entered
25 a stay (ECF No. 266).

26 On September 29, 2016, the Ninth Circuit issued an order denying
27 Defendant’s application for permission to file a successive § 2255 petition as
28 unnecessary because his first petition was dismissed without prejudice. (ECF No.

1 269.) The Court subsequently lifted the stay and set a briefing schedule on the
2 § 2255 motion. (ECF No. 271.)

3 On September 29, 2016, the Supreme Court granted certiorari in Dimaya.
4 Dimaya, No. 15-1498, 137 S. Ct. 31 (Sept. 29, 2016).

5 On November 4, 2016, the government filed a response brief in which it
6 moved to stay Defendant's motion pending resolution of Dimaya as well as United
7 States v. Begay, in which the Ninth Circuit is anticipated to address the
8 constitutionality of § 924(c)(3)(B) in light of Johnson. (ECF No. 246.) On November
9 9, 2016, Defendant filed a reply brief in which he opposed a stay. (ECF No. 276.)

10 On March 29, 2017, the Ninth Circuit entered an order deferring submission
11 of Begay pending the Supreme Court's resolution of Dimaya. See Order (Doc. No.
12 87), United States v. Begay, No. 14-10080 (9th Cir. Mar. 29, 2017). On June 9,
13 2017, this Court entered an order staying consideration of Defendant's § 2255
14 motion pending the outcome of Dimaya, noting that the Supreme Court was
15 expected to issue its decision no later than June 2017, such that the ensuing stay
16 was anticipated to be brief.

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

20 On June 29, 2017, Defendant filed a motion for reconsideration of the Court's
21 stay order in light of the development in Dimaya. On June 30, 2017, the Court
22 issued an order in which it advised the parties it was considering vacating the stay
23 and ruling on the merits of Defendant's § 2255 motion, and permitted the parties
24 to file supplemental briefing by July 10, 2017.

25 //

26 //

27 //

28 //

1 **II. DISCUSSION**

2 28 U.S.C. § 2255 provides, in pertinent part, that a prisoner in custody
3 “claiming the right to be released upon the ground that the sentence was imposed
4 in violation of the Constitution or laws of the United States ... may move the court
5 which imposed the sentenced to vacate, set aside or correct the sentence.” 28
6 U.S.C. § 2255.

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

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

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

16 18 U.S.C. § 924(c)(3). Courts generally refer to subsection (A) of § 924(c)(3) as
17 the “force clause,” and subsection (B) as the “residual clause.”

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

26 The government responded by seeking a stay of Defendant’s motion
27 pending the Supreme Court’s resolution of Dimaya, and the Ninth Circuit’s
28 resolution of Begay. The government also argues that Defendant’s motion is

1 procedurally barred because his plea agreement included a provision waiving his
2 right to collateral attack, and because he defaulted on his claim for failure to raise
3 it on direct appeal.¹ As to the merits, the government maintains that the reasoning
4 of Johnson does not apply to § 924(c)(3)(B), and that even if the Court does find §
5 924(c)(3)(B) unconstitutionally vague, conspiracy to commit Hobbs Act robbery
6 remains a crime of violence under the force clause, § 924(c)(3)(A).

7 A. Reconsideration Of Stay Order

8 The Court first addresses Defendant's motion for reconsideration of the
9 Court's June 9, 2017 order staying this case pending the Supreme Court's
10 issuance of a decision in Dimaya. Defendant contends that now that it is clear no
11 decision will be forthcoming in Dimaya until the Supreme Court's next term ending
12 in June 2018, the Court should lift the stay because he will be prejudiced by the
13 additional, unanticipated delay.²

14 The Court agrees and will lift the stay. As discussed below, post-Johnson,
15 the courts have been divided with regard to the constitutionality of § 924(c)(3)(B).
16 Since the language of the residual clause at issue in Dimaya is virtually identical
17 to the text of § 924(c)(3)(B), the Court anticipated a decision from the Supreme
18 Court in Dimaya would effectively control the outcome of Defendant's motion.
19 Indeed, in Begay, in which the Ninth Circuit is considering the constitutionality of
20 § 924(c)(3)(B), the Ninth Circuit has deferred its decision pending resolution of
21 //

24 ¹ On August 10, 2016, in response to the government's argument that similar § 2255 motions filed by
25 his co-defendants violated the provision of the plea agreement in which they waived the right to
26 collateral attack, Defendant filed a motion for declaratory and injunctive relief seeking a determination
27 whether he was in breach of the plea agreement. (ECF No. 258.) He withdrew the motion after the
28 government changed its position. (ECF Nos. 264, 265.)

² After the Court issued its stay order on June 9, 2017, on June 14, 2017, Defendant filed a
supplemental brief indicating he did not oppose a stay through the end of June 2017. (ECF No. 282.)
It was not until June 29, 2017, that Defendant sought reconsideration of the stay on the ground that
because his anticipated release date is September 2, 2017, a continued stay is prejudicial.

1 Dimaya. See Order, Begay, No. 14-10080 (9th Cir. Mar. 29, 2017).

2 Although it would be helpful to know the result of Dimaya before ruling on
3 this case, in considering the wisdom of a stay based on judicial economy, district
4 courts faced with habeas petitions must consider the potential prejudice of a stay
5 to the defendant. Yong v. I.N.S., 208 F.3d 1116, 1117-19 (9th Cir. 2000). When
6 the Court stayed this case pending the outcome of Dimaya, it believed the
7 Supreme Court's decision would be issued in a matter of weeks, no later than June
8 2017. While the Ninth Circuit's decision in Begay will almost certainly resolve the
9 issue presented here, as of the date of this order, Begay remains stayed, and it
10 appears it will not be decided until after Dimaya. The unanticipated delay in
11 resolution of Dimaya is a development that warrants reconsideration of the stay.
12 The Court finds that any benefit that might be conferred by waiting for a decision
13 in Dimaya or Begay is outweighed by the prejudice to Defendant of further delay.

14 Accordingly, the Court grants Defendant's motion for reconsideration and
15 lifts the stay.

16 B. Merits of Defendant's § 2255 Motion

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

25 Since Johnson was decided, dozens of courts have been presented with
26 vagueness challenges to the constitutionality of § 924(c)(3)(B). The courts are
27 divided with regard to the resolution of this issue. On the one hand, the Second,
28 Fifth, Sixth, Eighth, and Eleventh Circuits have upheld § 924(c)(3)(B) against post-

1 Johnson void-for-vagueness challenges. See United States v. Hill, 832 F.3d 135,
2 145 (2d Cir. 2016); United States v. Davis, --- Fed. Appx. ----, 2017 WL 436037, at
3 *2 (5th Cir. 2017) (unpublished); United States v. Taylor, 814 F.3d 340, 375-79
4 (6th Cir. 2016); United States v. Prickett, 839 F.3d 697, 699–700 (8th Cir. 2016);
5 Ovalles v. United States, --- F.3d ----, 2017 WL 2829371, at *4-8 (11th Cir. 2017).
6 The Seventh Circuit, on the other hand, has held § 924(c)(3)(B) unconstitutionally
7 vague under the reasoning of Johnson. See United States v. Cardena, 842 F.3d
8 959, (7th Cir. 2016). District courts in other circuits, including the Ninth Circuit, are
9 split. Compare, e.g., United States v. Bell, 158 F. Supp. 3d 906, 921-24 (N.D. Cal.
10 2016) (residual clause of § 924(c)(3)(B) unconstitutional in light of Johnson and
11 Dimaya); United States v. Baires-Reyes, 191 F. Supp. 3d 1046, 1051-53 (N.D. Cal.
12 2016) (same); United States v. Smith, 215 F. Supp. 3d 1026, 1035-36 (D. Nev.
13 2016) (same); United States v. Herr, No. 16-cr-10038-IT, 2016 U.S. Dist. LEXIS
14 144201, at *4-11 (D. Mass. Oct. 18, 2016) (same); United States v. Edmundson,
15 153 F. Supp. 3d 857, 861-64 (D. Md. 2015) (same); with United States v. Lott, No.
16 95cr0072 WQH, 16cv1575 WQH, 2017 WL 553467, at *3 (S.D. Cal. Feb. 9, 2017)
17 (residual clause of § 924(c)(3)(B) remains constitutional after Johnson); United
18 States v. Tsarnaev, 157 F. Supp. 3d 57, 71-74 (D. Mass. 2016) (same); United
19 States v. Green, No. 15-cr-00526, 2016 WL 277982, at *3-5 (D. Md. Jan. 22, 2016)
20 (same).

21 The courts that have considered the issue in this District have rejected post-
22 Johnson challenges to the constitutionality of § 924(c)(3)(B). Lott, No. 95cr0072
23 WQH, 16cv1575 WQH, 2017 WL 553467, at *3; United States v. Sehorn,
24 95cr0072-2 WQH, 2017 WL 1336872 (S.D. Cal. Feb. 17, 2017); United States v.
25 Nelson, 95cr0072-4 WQH, 2017 WL 1346638 (S.D. Cal. Feb. 17, 2017);
26 Hernandez v. United States, No. 10-CR-3173-H-3, 2016 WL 7250676, at *3–4
27 (S.D. Cal. Nov. 7, 2016); Averhart v. United States, No. 11-cr-1861 DMS, 2016
28 U.S. Dist. LEXIS 184031 (Nov. 21, 2016); Mondragon-Hernandez v. United States,

1 NO. 10-CR-3173-H-1; 16-CV-1537-H, 2017 U.S. Dist. LEXIS 41720 (S.D. Cal.
2 Mar. 22, 2017).

3 The Court finds the reasoning of courts that have rejected challenges to the
4 constitutionality of § 924(c)(3)(B) persuasive. See, e.g., Taylor, 814 F.3d at 375-
5 79; Lott, 2017 WL 553467 at *3. These courts have reasoned as follows. Johnson
6 analyzed the residual clause of the ACCA, which provides that a “violent felony” is
7 a felony that “(ii) is burglary, arson, or extortion, involves use of explosives, or
8 otherwise involves conduct that presents a serious potential risk of physical injury
9 to another.” 18 U.S.C. § 924(e)(2)(B) (residual clause underlined). The Supreme
10 Court reasoned that the ACCA’s residual clause was unconstitutionally vague
11 because (1) it created uncertainty with regard to how judges should estimate the
12 “serious potential risk of physical injury” posed by a crime, and as to the quantum
13 of potential risk that qualified as “serious,” (2) the list of dissimilar enumerated
14 offenses that preceded the residual clause only added to the uncertainty over its
15 interpretation, and (3) experience had proven the clause to be unworkably vague,
16 as courts had struggled to apply it in practice. Johnson, 135 S. Ct. at 2556-60.

17 Courts that have rejected challenges to § 924(c)(3)(B) based on the
18 reasoning of Johnson have found that material differences between the residual
19 clause of § 924(e)(2)(B)(ii) and § 924(c)(3)(B) undermine the force of the Supreme
20 Court’s reasoning with regard to the latter statute. First, unlike the ACCA,
21 § 924(c)(3)(B) requires courts to determine whether a crime “involves a substantial
22 risk that physical force” may be used by the offender, which is a less attenuated
23 determination than whether a crime will create a “serious potential risk of physical
24 injury to another.” See Taylor, 814 F.3d at 376-77. Second, unlike the ACCA, the
25 residual clause of § 924(c)(3)(B) is not preceded by a list of dissimilar crimes, a
26 textual difference that makes the ACCA’s residual clause the harder of the two to
27 interpret. See id. at 377. Third, unlike the history of interpretation of the ACCA
28 residual clause, courts have not experienced “repeated attempts and repeated

1 failures to craft a principled and objective standard” out of § 924(c)(3)(B). See id.
2 at 377-78 (quoting Johnson, 135 S. Ct. at 2558).

3 Courts that have reached the opposite conclusion regarding the
4 constitutionality of § 924(c)(3)(B) have relied heavily on Dimaya. See, e.g., Bell,
5 158 F. Supp. 3d at 921-24; United States v. Lattanaphom, 159 F. Supp. 3d 1157,
6 1162-64 (E.D. Cal. 2016). In Dimaya, the Ninth Circuit reasoned that 18 U.S.C. §
7 16(b)³ suffered from the same constitutional infirmities as the ACCA’s residual
8 clause, because use of the categorical approach to determine which offenses are
9 “crimes of violence” within the meaning of § 16(b) requires the same judicial
10 hypothecating, and involves similar double indeterminacy with regard to the
11 amount of risk required, so as to render the reasoning of Johnson equally
12 applicable to § 16(b). Dimaya, 803 F.3d at 1116-17. Courts that have followed
13 Dimaya’s holding with regard to the constitutionality of § 924(c)(3)(B) have
14 reasoned that since § 16(b) is materially identical to § 924(c)(3)(B), Dimaya’s
15 reasoning should apply equally to § 924(c)(3)(B), and the same result should
16 pertain to the latter statute. See Lattanaphom, 159 F. Supp. 3d at 1164 (“The
17 Dimaya court extended Johnson to a statute with identical language as that in the
18 § 924(c) residual clause and cannot be distinguished.”). However, other courts,
19 including from within the Ninth Circuit, have rejected the notion that Dimaya is
20 controlling with regard to the fate of § 924(c)(3)(B). See, e.g., Lott, 2017 WL
21 553467 at *4. Such courts have noted that the Dimaya court explicitly limited its
22 holding and stated its decision did “not reach the constitutionality of applications of
23 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast doubt on the
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 constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence.” Dimaya,
2 803 F.3d at 1120 n.17; Lott, 2017 WL 553467 at *4 (“*Dimaya* does not control the
3 issue of the constitutionality of § 924(c)(3)(B).”). The Court agrees with the latter
4 line of reasoning that by virtue of this so-called “cabining” footnote, the analysis of
5 Dimaya is not controlling with regard to the constitutionality of § 924(c)(3)(B).⁴

6 The Court finds the reasoning of the courts that have rejected post-Johnson
7 due process challenges to § 924(c)(3)(B) persuasive, and therefore concludes, as
8 they did, that § 924(c)(3)(B) is not unconstitutionally vague. Because Defendant’s
9 conviction for conspiracy to commit Hobbs Act robbery remains a crime of violence
10 under § 924(c)(3)(B), his motion to vacate his conviction for violating § 924(c) is
11 denied. Also, since the Court denies Defendant’s motion on this ground, the Court
12 need not, and does not, address the government’s argument that conspiracy to
13 commit Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A),
14 or its contention that Defendant’s motion is procedurally barred. Finally, since
15 Defendant’s motion is being denied, the Court finds there is no conflict in counsel’s
16 representation of Defendant at this stage of the proceedings, although this issue
17 would merit further consideration going forward if Defendant’s motion had been
18 granted.

19 //

20 //

21 //

22 //

23 //

24 _____

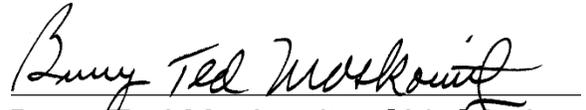
25
26 ⁴ That the Ninth Circuit, in United States v. Hernandez-Lara, 817 F.3d 651 (9th Cir. 2016), relied on Dimaya to
27 hold an 8-level sentencing enhancement under U.S.S.G. § 2L1.2(b)(1)(C) unconstitutional to the extent it
28 incorporated § 16(b) does not suggest that the Ninth Circuit regards Dimaya 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 **III. CONCLUSION AND ORDER**

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

6 IT IS SO ORDERED.

7 Dated: July 24, 2017

8 
9 Barry Ted Moskowitz, Chief Judge
10 United States District Court
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28