APPENDIX

B

ALEX JOE HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case Nos. CR-08-48-F
	)	CIV-16-604-F
ALEX JOE HERNANDEZ,	)	
	)	
Defendant.	)	

ORDER

Before the court is defendant, Alex Joe Hernandez's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. *See*, doc. nos. 54 and 55. Plaintiff, United States of America, has responded to the motion and defendant has replied. Upon due consideration of the motion, the court makes its determination.

I.

On February 20, 2008, defendant was charged in a one-count indictment with possession of a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). Defendant entered a plea of guilty to the charge on April 8, 2008. Plaintiff notified defendant that it would seek an imposition of sentence under the enhanced penalty provisions of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). The enhanced penalty was based on a state conviction for attempted robbery with a dangerous weapon; a state conviction for burglary in the second degree and two state convictions for deadly conduct. Defendant objected to the use of the two convictions for deadly conduct to support the enhanced penalty. The court disagreed and sentenced defendant to 180 months imprisonment. Judgment was entered on August 22, 2008. Defendant's conviction and sentence were affirmed by the Tenth

Circuit on June 16, 2009. Defendant filed a petition for writ of certiorari, which was denied by the Supreme Court on March 2, 2010.

II.

Defendant seeks to vacate his sentence under § 2255 based upon the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). Defendant argues that Johnson, which struck the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) as unconstitutionally vague, applies retroactively on collateral review and because his prior convictions do not qualify as violent felonies under the elements and enumerated offenses clauses of § 924(e)(2)(B)(i) and (ii), his sentence must be vacated.

Plaintiff agrees with defendant that Johnson applies retroactively to ACCA cases on collateral review.[1] However, it argues that defendant is not entitled to § 2255 relief because three of defendant's prior convictions qualify as violent felonies under either the elements clause or the enumerated offenses clause. With respect to the burglary in the second degree conviction, plaintiff asserts that the conviction qualifies as a violent felony under the enumerated offenses clause. Plaintiff acknowledges that the applicable Oklahoma burglary statute, 21 O.S. § 1435, includes alternatives, *i.e.* "automobile," that do not satisfy the requirements for generic burglary, but asserts that the Tenth Circuit has held that the statute is nevertheless divisible. Plaintiff asserts that the Oklahoma courts have also recognized that the alternatives listed in the statute are elements, not means. Plaintiff therefore contends that the modified categorical approach applies and under that approach, defendant's prior conviction for burglary in the second degree qualifies as a violent felony under the enumerated offenses clause.

[1] The Supreme Court made Johnson's holding retroactive to cases on collateral review in Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

As to defendant's attempted robbery with a dangerous weapon conviction, plaintiff contends that it qualifies as a violent felony under the elements clause and the enumerated offenses clause. Plaintiff asserts that a conviction under 21 O.S. § 801 for aggravated robbery requires that all elements in 21 O.S. § 791, defining robbery, be established. Plaintiff acknowledges that the "force or fear" alternatives in the definition of robbery are "means" rather than "elements" and as such, both must qualify under either the elements clause or the enumerated offenses clause. Plaintiff contends that the "force" means qualifies under the elements clause and the "fear" means, with respect to the destruction of property (incorporated through 21 O.S. § 794) qualifies under the enumerated offenses clause as it corresponds to the generic crime of extortion.

With respect to the deadly conduct convictions, plaintiff contends that one of those convictions, *i.e.*, 235th Judicial District, Court of Cooke County, Texas, Case No. 96-052, qualifies as a violent felony under the elements clause. Plaintiff asserts that the residual clause, which was found to be unconstitutional under Johnson, was not referenced by this court in sentencing or by the Tenth Circuit on direct appeal as a ground for the enhanced penalty based upon this conviction. According to plaintiff, the Tenth Circuit found the Texas deadly conduct statute to be divisible and applying the modified categorical approach found defendant's conviction to fall under the elements clause. Plaintiff contends that defendant cannot re-litigate this issue based upon Johnson, and therefore, defendant's conviction for deadly conduct (Case No. 96-052) was an appropriate basis for the sentence enhancement under the ACCA.

In reply, defendant contends that his second degree burglary offense does not qualify under the enumerated offenses clause in light of the Supreme Court's rulings in Taylor v. United States, 495 U.S. 575 (1990), Descamps v. United States, 133 S.Ct. 2276 (2013) and Mathis v. United States, 136 S. Ct. 2243 (2016). He also argues that

it does not qualify under the enumerated offenses clause because his information was amended to show that he may have entered a motor home, not a building, and consequently, his offense does not fall within the generic definition of burglary. As to the attempted robbery offense, defendant asserts that plaintiff cannot take robbery and re-define it as the enumerated offense of extortion. Defendant maintains that the elements clause is the only viable clause for his robbery offense and that clause does not apply because it requires the use of physical force against a person. Finally, defendant argues that even though the Tenth Circuit found his deadly conduct conviction to fall under the elements clause, the applications and definitions have evolved since that decision and the conviction must be reviewed under the present day standards. Defendant contends that the Texas deadly conduct statute proscribes conduct broader than that which would satisfy the elements clause as it prohibits discharging a firearm in the direction of an individual. Defendant argues that discharging a firearm in the direction of another does not establish the use or threatened use of physical force against another.

III.

The ACCA provides enhanced punishment for persons with three previous convictions for a "violent felony." 18 U.S.C. § 924(e). After Johnson, a "violent felony" under the ACCA includes any crime punishable by imprisonment for more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another," *see* 18 U.S.C. § 924(e)(2)(B)(i) [the elements clause], or is "burglary, arson, or extortion, or involves use of explosives," *see*, 18 U.S.C. § 924(e)(2)(B)(ii) [the enumerated offenses clause].

The criminal statute in effect at the time of defendant committed his offense of second degree burglary provided:

> Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin-operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

21 O.S. § 1435.

As stated above, plaintiff argues that defendant's conviction falls within the enumerated offenses clause of 18 U.S.C. § 924(e)(2)(B)(ii), *i.e.* burglary. The Tenth Circuit recently determined in an unpublished decision, United States v. Taylor, Case No. 16-1223, ___ Fed. Appx. ___, 2016 WL 7093905, at *3 (10th Cir. Dec. 6, 2016) (unpublished decision cited as persuasive pursuant to 10th Cir. R. 32.1(A), that a conviction under § 1435 cannot give rise to an enhanced sentence under the ACCA in light of the Supreme Court's decision in Mathis v. United States. However, it also determined that Mathis did not announce a new rule. Therefore, it held that the defendant's § 2255 motion, which was filed nearly fifteen years after the judgment in his criminal case became final, was time-barred under 28 U.S.C. § 2255(f).

Here, at the time of sentencing, the court did not utilize defendant's prior conviction for second degree burglary based upon the residual clause. Because Johnson did not affect sentencing enhancements based upon the enumerated offenses clause, Johnson cannot afford defendant relief with respect to the use of the second degree burglary conviction to enhance his sentence. Defendant relies upon the Supreme Court's rulings in Mathis and Descamps to attack the court's use of second degree burglary conviction. However, as stated in Taylor, defendant cannot rely upon Mathis to support his motion because it did not announce a new rule. Taylor, 2016 WL 7093905, at *4. The Tenth Circuit has reached the same conclusion as to the

ruling in Descamps. United States v. Hopson, 589 Fed. Appx. 417, 418 (10th Cir. 2015) (unpublished decision cited as persuasive pursuant to 10th Cir. R. 32.1(A)). Therefore, defendant cannot challenge the court's use of the second degree burglary conviction in enhancing his sentence under § 2255 as such challenge is time-barred under 28 U.S.C. § 2255(f).

IV.

The next conviction defendant challenges is the deadly conduct conviction. However, the Tenth Circuit on direct appeal specifically determined that defendant's conviction was a violent felony because it had as an element the use, attempted use, or threatened use of physical force against the person of another. United States v. Hernandez, 568 F.3d 827, 830 (10th Cir. 2009). Because the Tenth Circuit concluded that defendant's conviction fell under the elements clause, the court again concludes that defendant cannot challenge this conviction under Johnson. Such a challenge would be barred by the one-year time limitation set forth in 28 U.S.C. § 2255(f). Since Johnson does not call into question the elements clause, *see*, Johnson, 135 S.Ct. at 2563, the court finds the Tenth Circuit's previous ruling stands and defendant is not entitled to relief under § 2255 based upon the deadly conduct conviction.

V.

The final conviction defendant challenges under Johnson is his prior conviction for attempted robbery with a dangerous weapon. At the time of the offense, the applicable statute, 21 O.S. § 801, provided:

> Any person or persons who, with the use of any firearms or any other dangerous weapons, . . . attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night, shall be guilty of a felony . . . .

21 O.S. § 801. Convictions under § 801 additionally require that the essential elements of robbery, defined by 21 O.S. § 791, be satisfied. *See*, Cannon v. State, 107 P.2d 809, 810 (Okla. Cr. 1940) (The "general statute defining robbery is the statute upon which all robbery cases are based. [Section 801] under which the information in this case was filed is what is known as a statute of classification, and not definition. It does not supercede the statute defining robbery, but it only increases the punishment.") Robbery is defined under § 791 as "a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." 21 O.S. § 791. As plaintiff acknowledges in its briefing both "force or fear," which are designated as "means" must qualify under either the elements clause or the enumerated offenses clause in order for a conviction under § 801 to qualify as a ACCA predicate.

Under Oklahoma law, "force" for robbery must be "actual, personal violence," however, "the degree of force used is immaterial." Cannon, 107 P.2d at 810. The Supreme Court has held that "physical force" for purposes of the elements clause means "violent force–that is, force capable of causing physical pain or injury to another person." Johnson, 559 U.S. at 140. While a conviction of simple robbery by means of force may not qualify under the elements clause[2] because it need not necessarily involve the use of "physical force" as defined by the Supreme Court, the court concludes that a conviction under § 801 (force coupled with the use of a dangerous weapon)[3] satisfies the requirement that the conviction contain as "an

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[2] *See*, Woods v. State, 569 P.2d 1004, 1106 (Okla. 1977) (it is robbery under 21 O.S. § 791 if force, no matter how slight, is used to obtain property); *but see*, United States v. Cherry, 641 Fed. Appx. 829, 831 (10th Cir. Feb. 22, 2016) (robbery by force and fear pursuant to 21 O.S. § 791 is a violent felony under the ACCA).

[3] Use of a dangerous weapon is an element of the crimes for robbery with a dangerous weapon and for attempted robbery with a dangerous weapon. *See*, OUJI-CR 4-144 and OUJI-CR

element the use, the attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). *See*, United States v. Redrick, 841 F.3d 478, 484 (D.C. Cir. 2016) (analyzing Maryland armed robbery statute); *see also*, United States v. Taylor, ___ F.3d ___, 2016 WL 7187303, at *7 (10th Cir. Dec. 12, 2016) ("the use of a 'dangerous weapon' during an assault or battery always 'constitutes a sufficient threat of force to satisfy the elements clause'") (quoting United States v. Mitchell, ___ Fed. Appx.___, 2016 WL 3569764, at *5).

Under Oklahoma law, "fear" for robbery is defined as "fear of an unlawful injury, immediate or future, to the person or property of the person robbed or of any relative of his, or member of his family" or "fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed." 21 O.S. § 794. The court concludes that a robbery with the use of a dangerous weapon by means of fear of unlawful injury to the person would qualify as having as an element the threatened use of physical force against a person. However, the court concludes that a robbery with a dangerous weapon by means of fear of unlawful injury to property would not qualify under the elements clause because it does not involve the threatened use of physical force against the "person of another." 18 U.S.C. § 924(e)(2)(B)(i). Nevertheless, even if the latter crime would not qualify under the elements clause, the court concludes that it would qualify under the enumerated offenses clause because it falls within the generic crime of extortion. *See*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 409 (2003) (recognizing the generic definition of extortion is "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats"). Thus, the crime of robbery with a dangerous weapon remains a violent felony. *See*, United States v. Castilla, 811

4-145.

F.3d 342, 347 (10th Cir. 2015) ("a violation of [California Penal Code] section 211 achieved through threats to a person meets the generic robbery definition, while a violation of section 211 based on a threat to property corresponds to generic extortion."); *see also*, United States v. Moore, 149 F.Supp.3d 177, 181-183 (D.D.C. 2016) (robbery with dangerous weapon under Maryland law to the extent it can be committed through threats to property qualifies as generic extortion under the sentencing guidelines).

In the case at bar, defendant was convicted of attempted robbery with a dangerous weapon rather than robbery with a dangerous weapon. Nonetheless, the essential elements of the crime include force or fear and the use of a dangerous weapon. *See*, OUJI-CR 4-145. The only difference between attempted robbery and robbery relates to the element of taking. *Id*. Because force or fear and the use of a dangerous weapon must be shown to be convicted of the crime of attempted robbery with a dangerous weapon, the court concludes that it is a violent felony for purposes of the ACCA. Therefore, the court concludes that defendant's attempted robbery with use of a dangerous weapon conviction can be used for purposes of the enhanced penalty under the ACCA. Based upon the foregoing, the court concludes that defendant has three prior convictions which qualify as violent felonies and his sentence under the ACCA was appropriate.

VI.

The court file and records conclusively show that defendant is not entitled to relief under 28 U.S.C. § 2255. An evidentiary hearing would be futile and none is required. *See*, Sanders v. U.S., 373 U.S. 1, 21 (1963) (sentencing court has discretion to ascertain whether claim is substantial before granting a full evidentiary hearing in a § 2255 matter).

VII.

The district court is required to issue or deny a certificate of appealability when it enters a final order adverse to the applicant in § 2255 proceedings. Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts.

A certificate of appealability may issue only if defendant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Defendant can satisfy that standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

After considering the record in this case, the court concludes that defendant has failed to make the required showing. The court therefore concludes that a certificate of appealability should be denied.

VIII.

Based upon the foregoing, defendant, Alex Joe Hernandez's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (doc. no. 54), filed June 3, 2016, is **DENIED**. Judgment shall issue forthwith. A certificate of appealability is **DENIED**.

DATED December 20, 2016.

S P Friot

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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