

Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 6 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LISTON DAVID, a/k/a Liston Oswanio
David, a/k/a Smiley, a/k/a Seal A,

Defendant-Appellant.

No. 17-56127

D.C. Nos. 2:17-cv-01374-TJH
2:01-cr-00254-TJH-1

Central District of California,
Los Angeles

ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The stay issued in this case on January 19, 2018, is lifted.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Beckles v. United States*, 137 S. Ct. 886, 895 (2017) (holding that “the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and that § 4B1.2(a)’s residual clause is not void for vagueness”); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), *cert. denied*, No. 18-5022, 2018 WL 3223705 (Oct. 1, 2018).

Any pending motions are denied as moot.

DENIED.

United States District Court
Central District of California
Western Division

LISTON DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 17-01374 TJH
CR 01-00254 TJH

Order

JS-6

The Court has considered Petitioner Liston David's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 or, in the alternative, request for a certificate of appealability as to his claim pursuant to 28 U.S.C. § 2253(c)(2), together with the moving and opposing papers.

Petitioner challenges his sentence under 18 U.S.C. § 924(c), which is predicated on armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d). Petitioner, further, challenges his sentence to the extent the sentence is based on U.S.S.G. § 4B1.1.

1 Section 924(c) defines “crime of violence” under § 924(c)(3)(A) [the “Force
2 Clause”] and § 924(c)(3)(B) [the “Residual Clause”]. This Court held that the Residual
3 Clause is unconstitutionally vague, and that certain convictions — convictions that,
4 under the categorical approach, *see Taylor v. United States*, 495 U.S. 575 (1990), fall
5 outside the Force Clause because the statutory elements of the conviction includes
6 conduct falling outside the Force Clause’s definition of a “crime of violence” — must
7 be vacated. *See Juan Becerra-Perez v. United States*, No. 2:16-cv-07046-TJH (C.D.
8 Cal. Feb. 15, 2017). The Force Clause defines a “crime of violence” as a felony that
9 “has as an element the use, attempted use, or threatened use of physical force against
10 the person or property of another[.]” § 924(c)(3)(A).

11 Sections 2113 (a) and (d) are crimes of violence under the Force Clause defined
12 in § 924(c)(3)(A). *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).
13 Since *Wright*, the Ninth Circuit has reaffirmed that armed bank robbery qualifies as a
14 crime of violence under the Force Clause. *United States v. Pritchard*, No. 15-50278,
15 2017 WL 2219005, at *1 (9th Cir. May 18, 2017). Subsection (a) provides for a felony
16 conviction for bank robberies and incidental crimes committed “by force and violence,
17 or by *intimidation*.” 18 U.S.C. § 2113(a) (emphasis added). The Ninth Circuit has
18 defined intimidation under § 2113 to mean “wilfully to take, or attempt to take, in such
19 a way that would put an ordinary, reasonable person in fear of bodily harm,” which
20 comports with the requirement of a “threatened use of physical force” contained in the
21 Force Clause. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990).

22 Similarly, Subsection (d) includes “putting in jeopardy the life of any person by
23 the use of a dangerous weapon or device.” 18 U.S.C. § 2113(d). As such, even the
24 most innocent conduct penalized under this section would qualify as a crime of
25 violence. *See United States v. Watson*, No. 14-00751 01 DKW, 2016 WL 866298, at
26 *7 (D. Haw. Mar. 2, 2016). Therefore, both Subsections (a) and (d) fall within the
27 definition of a crime of violence under 18 U.S.C. § 924(c)(3)(A). *Watson*, 2016 WL
28 866298, at *7. This conclusion is, further, supported by decisions in this Circuit

1 reaching the same result. *See, e.g., McFarland v. United States*, 2017 WL 810267 at
2 *4 (C.D. Cal. Mar. 1, 2017); *United States v. Salinas*, No. 1:08 CR 0338 LJO SKO,
3 2017 WL 2671059, at *7 (E.D. Cal. June 21, 2017).

4 On March 6, 2017, the Supreme Court issued its decision in *Beckles v. United*
5 *States*, 137 S. Ct. 886 (2017), holding that the advisory Sentencing Guidelines are not
6 subject to a due process vagueness challenge. 137 S. Ct. at 895. The Court held that
7 unlike the Armed Career Criminal Act, which was subject to the Court's decision in
8 *Johnson v. United States*, 135 S.Ct. 2551 (2015), the advisory Sentencing Guidelines
9 "merely guide the exercise of a court's discretion in choosing an appropriate sentence
10 within the statutory range." *Beckles*, 137 S. Ct. at 892. Indeed, on this basis, the
11 Supreme Court held that § 4B1.2(a)(2) specifically was not void for vagueness.
12 *Beckles*, 137 S. Ct. at 895. As a result, to the extent Petitioner challenges his sentence
13 under § 4B1.2(a)(2), Petitioner's motion is foreclosed by *Beckles*.

14 A district court may issue a certificate of appealability "only if the applicant has
15 made a substantial showing of the denial of a constitutional right." 28 U.S.C. §
16 2253(c)(2). Such a showing requires the petitioner to "demonstrate that the issues are
17 debatable among jurists of reason; that a court could resolve the issues [in a different
18 manner]; or that the questions are adequate to deserve encouragement to proceed
19 further." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in
20 original, emphasis omitted). Petitioner has not made a substantial showing of the denial
21 of a constitutional right under any of the above bases.

22
23 Accordingly,

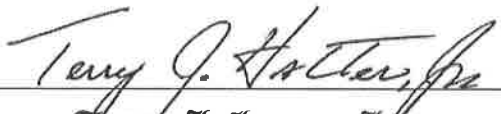
24
25 ~~It is Ordered~~ that the motion to vacate Petitioner's sentence under 18 U.S.C.
26 § 924(c) and § 4B1.2(a)(2) be, and hereby is, ~~Denied~~.

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1 **It is Further Ordered** that Petitioner's request for a certificate of appealability
2 pursuant to 28 U.S.C. § 2253(c)(2) be, and hereby is, **Denied**.

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4 Date: July 31, 2017

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6 
7 **Terry J. Hatter, Jr.**
8 **Senior United States District Judge**

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