

# 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.**

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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,

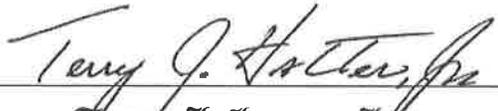
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25 **It is Ordered** that the motion to vacate Petitioner's sentence under 18 U.S.C.  
26 § 924(c) and § 4B1.2(a)(2) be, and hereby is, **Denied**.

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

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