No. 18-6018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERNARD ROOSEVELT SHAW,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Bernard Shaw, a pro se federal prisoner, appeals a district court judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. Shaw has filed an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis on appeal.

Shaw pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); carjacking, in violation of 18 U.S.C. § 2119; and using or carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The district court sentenced him to a total term of 189 months in prison, and this court affirmed. *United States v. Shaw*, 459 F. App'x 551, 552 (6th Cir. 2012).

In December 2016, Shaw filed this § 2255 motion, arguing that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), which invalidated the residual clause of the Armed Career Criminal Act, *see* 18 U.S.C. § 924(e)(2)(B)(ii), also invalidated the similarly worded clause in § 924(c)(3)(B), rendering his § 924(c) conviction improper. Shaw later supplemented his motion based on *Sessions v. Dimaya*, 138 S. Ct. 1204,

1216 (2018), which held that the residual clause in 18 U.S.C. § 16(b)—which is identical to the residual clause in § 924(c)(3)(B)—is unconstitutionally vague.

The district court denied Shaw's motion, reasoning that his *Johnson* claim was time-barred, and, alternatively, was meritless because this court held in *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 1975 (2018), that *Johnson* did not invalidate § 924(c)'s residual clause. Additionally, the district court rejected Shaw's *Dimaya* claim based on *Shuti v. Lynch*, 828 F.3d 440, 449-51 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 1977 (2018), which distinguished *Taylor* while holding that 18 U.S.C. § 16(b)'s residual clause was unconstitutionally vague. Further, the district court declined to grant a COA.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the denial of a § 2255 motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the denial is based on "procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Reasonable jurists would not debate the district court's conclusion that Shaw's *Johnson* claim is time-barred. Under § 2255(f)(3), Shaw had one year from "the date on which the right asserted [under *Johnson*] was initially recognized by the Supreme Court" to file his § 2255 motion. Because *Johnson* was decided on June 26, 2015, Shaw's claim, first asserted in December 2016, is time-barred. Although Shaw argues that § 2255(f)(3)'s limitations period commenced on April 18, 2016, when the Supreme Court decided in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), that *Johnson* applies retroactively, the Supreme Court has held that the limitations period starts from the date on which a right is initially recognized, not the date on which a right is made retroactive. *See Dodd v. United States*, 545 U.S. 353, 357 (2005).

Next, reasonable jurists would not debate the district court's rejection of Shaw's *Dimaya* claim. Even if *Dimaya* has cast doubt on whether *Taylor* was correctly decided, *see United States v. Richardson*, 906 F.3d 417, 425 (6th Cir. 2018), Shaw's carjacking conviction is a predicate crime of violence without resort to § 924(c)(3)(B)'s residual clause because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" under § 924(c)(3)(A). *See Dobbins v. United States*, No. 17-5015, 2017 WL 6853012, at *1 (6th Cir. June 6, 2017). And at least four circuits have concluded that carjacking is a predicate offense under § 924(c)(3)(A). *See United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (per curiam), *cert. denied*, 138 S. Ct. 1602 (2018); *United States v. Jones*, 854 F.3d 737, 740-41 (5th Cir.), *cert. denied*, 138 S. Ct. 242 (2017); *United States v. Evans*, 848 F.3d 242, 247 (4th Cir.), *cert. denied*, 137 S. Ct. 2253 (2017); *Ovalles v. United States*, 905 F.3d 1300, 1303-04 (11th Cir. 2018).

Accordingly, this court **DENIES** Shaw's COA application and **DENIES** as moot his motion to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BERNARD SHAW, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	No. 2:16-cv-02994-SHL-egb

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY AND CERTIFYING THAT AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH

Before the Court are Bernard Shaw's pro se Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (ECF No. 1), filed December 21, 2016 and his pro se Motion to Supplement his § 2255 Motion (ECF No. 9), filed May 8, 2018. Mr. Shaw challenges his sentence under the Supreme Court rulings in both Johnson v. United States, 135 S. Ct. 2551 (2015), and Sessions v. Dimaya, 138 S. Ct. 1204 (2018), arguing that he was impermissibly sentenced for a "crime of violence" under 18 U.S.C. § 924(c). (ECF Nos. 1 at 4, 9 at 2.) Because his arguments are meritless, the Motions are **DENIED**.

I. BACKGROUND

Mr. Shaw's challenge to the definition of a "crime of violence" emanates from case law developments related to the Armed Career Criminal Act ("ACCA"). Under the ACCA, a mandatory minimum fifteen-year sentence applies where a criminal defendant is convicted of unlawful possession of a weapon and has previously been convicted of three or more violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). "Violent felonies" once included those falling under what had been called the "residual clause" of the ACCA, which stated that a prior

offense qualified as violent if it "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The definitions of a "crime of violence" under 18 U.S.C. §§ 924(c) and 16(b) contain similar language. See 18 U.S.C. § 924(c)(3)(B) ("[T]he term 'crime of violence' means an 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."); see also 18 U.S.C. § 16(b) ("The term "crime of violence" means 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.).

On January 26, 2011, Mr. Shaw was sentenced to 189 months incarceration after he pleaded guilty to being a felon in possession of a firearm, carjacking and using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). United States v. Shaw, Case No. 2:09-cr-20499, ECF No. 38 at 1–2 (W.D. Tenn. Jan. 26, 2011). Mr. Shaw's sentence was not enhanced under the ACCA. (Id.)

In 2015, the Supreme Court held in Johnson, 135 S. Ct. at 2563, that the "residual clause" of the ACCA was unconstitutionally vague and could no longer be used to qualify a prior felony as a "violent" one under the ACCA.[1] In 2016, Mr. Shaw filed the instant § 2255 motion, arguing the Court's decision in Johnson should similarly apply to 18 U.S.C. § 924(c) and invalidate his sentence. (Mot., ECF No. 1-1 at 3–5.)

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[1] Less than one year later, the Court held in Welch v. United States, 136 S. Ct. 1257 (2016), that the Johnson rule is substantive and that it applies retroactively in cases on collateral review. Id. at 1268.

In 2018, the Supreme Court held in Dimaya, 138 S. Ct. at 1223, that, in light of the Johnson decision, 18 U.S.C. § 16(b) is unconstitutionally vague.[2] In 2018, Mr. Shaw filed a supplemental motion, arguing that the Court's decision in Dimaya should also apply to 18 U.S.C. § 924(c) and invalidate his sentence. (Mot., ECF No. 9 at 2.)

II. ANALYSIS

Mr. Shaw first argues that the ruling in Johnson calls into question what constitutes a "crime of violence" under 18 U.S.C. § 924(c), and that he is entitled to resentencing. (ECF No. 1-1 at 3–5.) This argument is moot, as this Motion is time-barred. Under 28 U.S.C. § 2255(f),

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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[2] 18 U.S.C. § 16(b) was previously used to define a "crime of violence" for determination of whether an alien was convicted of an "aggravated felony" under the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1101(a)(43)(F) ("The term 'aggravated felony' means . . . a crime of violence (as defined in [18 U.S.C. § 16(b)] . . .) for which the term of imprisonment [is] at least one year.").

28 U.S.C. § 2255. A timely Johnson claim must have been filed on or before June 27, 2016.[3] Because Mr. Shaw's motion was not filed until December 21, 2016, his claim for relief under Johnson is time-barred.

Mr. Shaw's argument is also without merit. The Sixth Circuit has held that the Johnson ruling does not render 18 U.S.C. § 924(c) unconstitutionally vague "[b]ecause § 924(c)(3)(B) is considerably narrower than the statute invalidated by the Court in Johnson, and because much of Johnson's analysis does not apply to § 924(c)(3)(B)." United States v. Taylor, 814 F.3d 340, 375–76 (6th Cir. 2016). Therefore, under Johnson, Mr. Shaw is not entitled to relief.

Mr. Shaw further argues that, under Dimaya, he is entitled to resentencing. (Mot., ECF No. 9 at 2.) He is incorrect. While 18 U.S.C. § 16(b) defines a "crime of violence" identically to 18 U.S.C. § 924(c), the Sixth Circuit found that the two were distinct in Shuti v. Lynch, 828 F.3d 440, 449 (6th Cir. 2016).[4] Therefore, the Dimaya ruling does not apply to 18 U.S.C. § 924(c). Mr. Shaw is not entitled to relief, and his motion is **DENIED**.

III. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if

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[3] Johnson was decided on June 26, 2015.

[4] The Shuti court held that 18 U.S.C. § 16(b) is unconstitutionally vague, but also stated that "we find Taylor wholly consistent with our conclusion. There, we held that 18 U.S.C. § 924(c)'s definition of crime of violence was not unconstitutionally vague. That conclusion, we think, makes perfect sense because the statute at issue in Taylor is a criminal offense and 'creation of risk is an element of the crime.' See Johnson, 135 S. Ct. at 2557. As the Johnson Court determined, no doubt should be cast upon laws that apply a qualitative risk standard to 'real-world facts or statutory elements.' See id. at 2557, 2561 (emphasis added). Unlike the ACCA and INA, which require a categorical approach to stale predicate convictions, 18 U.S.C. § 924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding. This makes all the difference." (citation omitted)).

the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate. 28 U.S.C. § 2253(c)(1)(B); see also Fed. R. App. P. 22(b)(1).

A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotation marks omitted). A COA does not require a showing that the appeal will succeed. Id. at 337. However, courts should not issue a COA as a matter of course. Id.

There can be no question that the issues raised in Movant's § 2255 Motion are meritless for the reasons previously stated. Because any appeal by Movant on the issues raised does not deserve attention, the Court **DENIES** a certificate of appealability.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. §§ 1915(a)–(b), does not apply to appeals of orders denying § 2255 motions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal in forma pauperis in a § 2255 case, and thereby avoid the appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, the prisoner must obtain pauper status pursuant to Federal Rule of Appellate Procedure 24(a). Kincade, 117 F.3d at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, the prisoner must file his motion to proceed in forma pauperis in the appellate court. See Fed. R. App. P. 24(a)(4)–(5).

In this case, for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore **CERTIFIED**, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter would not be taken in good faith. Leave to appeal in forma pauperis is **DENIED**.[5]

IT IS SO ORDERED, this 6th day of August, 2018.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

[5] If Movant files a notice of appeal, he must also pay the full $505 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the Sixth Circuit Court of Appeals within thirty days.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BERNARD SHAW, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	No. 2:16-cv-02994-SHL-egb

JUDGMENT

JUDGMENT BY COURT. This action having come before the Court on the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (ECF No. 1),

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, in accordance with the Order Denying Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody and Certifying That an Appeal Would Not Be Taken in Good Faith (ECF No. 11), entered August 7, 2018, judgment is entered and the matter is hereby **DISMISSED WITH PREJUDICE**.

APPROVED:

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

August 6, 2018
Date

If both the district court and the court of appeals deny a certificate of appealability, then the appeal is over. 28 U.S.C. § 2253(c). If either court certifies any issue for appeal, then the clerk's office will issue a briefing schedule.

Sincerely yours,

s/Leon T. Korotko
Case Manager
Direct Dial No. 513-564-7014

cc: Ms. Naya Bedini

Enclosure

No. 18-6018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 04, 2019
DEBORAH S. HUNT, Clerk

BERNARD ROOSEVELT SHAW,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: DAUGHTREY, GRIFFIN, and STRANCH, Circuit Judges.

Bernard Roosevelt Shaw petitions for rehearing en banc of this court's order entered on December 28, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk