No.

in the

Supreme Court

of the

United States

Term,

ANTON ALEXANDER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court held that the residual clause contained in 18 U.S.C. § 924(c)(3)(b) is unconstitutionally vague. In light of *Davis*, must Alexander's 18 U.S.C. § 924(c) conviction be vacated, as it relied on, as an underlying crime of violence, bank robbery (18 U.S.C. § 2113)?

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ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Anton Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 18, 2019.

OPINION BELOW

The Sixth Circuit's opinion in this matter was unpublished, and is attached hereto in Appendix 1. The district court's order denying the 28 U.S.C. § 2255 petition was also unpublished, and is attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on June 18, 2019. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use, without just compensation..

STATEMENT OF THE CASE

On April 27, 2012, a Fifth Third bank located in Springboro Ohio was robbed. The robbers, later determined to be Petitioner Anton Alexander and co-defendant Anthony Phillips, were actually arrested before they were able to leave the bank. One of the defendants had a firearm. On October 12, 2012, Alexander pled guilty to one count of bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), as well as one count of carrying a using a firearm in relation to that robbery, in violation of 18 U.S.C. § 924(c). On May 7, 2013, the district court sentenced Alexander to 180 months incarceration, with 5 years of supervised release to follow. This consisted of a 60 month sentence on the bank robbery count, and a consecutive 120 months as to the firearms count. No appeal was taken from the judgment.

On June 21, 2016, Alexander, acting pro-se, filed a 28 U.S.C. § 2255 petition, alleging that his sentence on the 18 U.S.C. § 924(c) count was imposed illegally pursuant to the then recent decision in *Johnson v. United States*. -- U.S. ---, 135 S.Ct. 2551 (2015). On July 27, 2016, the Federal Public Defender's office entered an appearance (pursuant to a General Order appointing the Defender's office on all *Johnson* claims), and supplemented the petition, arguing that the residual clause of 18 U.S.C. § 924(c)(3)(B) suffered from the same vagueness problems as the residual clause contained the in Armed Career Criminal Act.

On March 19, 2019, the district court denied the petition, finding that the Supreme Court's ruling in *Johnson* did not apply to 18 U.S.C. § 924(c)(3)(B)'s

residual clause. The court further found that Alexander's underlying offense involved the use of force; therefore, the residual clause was not implicated in Alexander's case. (Appendix 2, p.3) The district court also denied a certificate of appealability.

Alexander then appealed this matter to the Sixth Circuit Court of Appeals, again raising the issue that 18 U.S.C. § 924(c)(3)(B)'s residual clause was void for vagueness. The Sixth Circuit denied this appeal on June 18, 2019, finding:

> No reasonable jurist could debate the district court's denial of Alexander's motion to vacate. Whether *Dimaya* applies retroactively and whether it has any bearing on § 924(c)(3)(B) remain open questions. See *Dimaya*, 138 S. Ct. at 1241 (Roberts, C.J., dissenting); *United States v. Richardson*, 906 F.3d 417, 425 (6th Cir. 2018), petition for cert. filed (U.S. Dec. 10, 2018) (No. 18-7036); see also *Johnson v. United States*, 138 S. Ct. 2676 (2018) (mem.). Nevertheless, Alexander has failed to make a prima facie showing that he was convicted under the residual clause of § 924(c)(3)(B), rather than the alternative use-of-force clause of § 924(c)(3)(A). Alexander's underlying crime of violence is attempted armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and the armed-robbery portion of § 2113(a) satisfies the use-of-force clause definition of "crime of violence." See *United States v. Henry*, 722 F. App'x 496, 500 (6th Cir.) (§ 924(c)(3)(A)'s use-of-force clause), cert. denied, 139 S. Ct. 70 (2018); *United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016).
>
> (Appendix 1, p.3)

REASONS FOR GRANTING THE WRIT

1. **Convictions for bank robbery under 18 U.S.C. § 2113(a) do not have, as an element, the requirement of the use of force; therefore, those convictions cannot be used to support a conviction under 18 U.S.C. § 924(c) for using a firearm in relation to a "crime of violence"**

Petitioner Alexander's underlying conviction for bank robbery pursuant to 18 U.S.C. § 2113(a) is not categorically a "crime of violence", so as to support a conviction under 18 U.S.C. § 924(c). Pursuant to this Court's recent decision in *United States v. Davis*, -- U.S. --, 139 S. Ct. 2319 (2019), Alexander's 18 U.S.C. § 924(c) conviction must be vacated.

In *Davis*, this Court held that the "residual clause" found in 18 U.S.C. § 924(c)(3)(b) was unconstitutionally vague. "The statute's residual clause points to those felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' [ ] . Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague." 139 S.Ct. at 2324. Having done away with the residual clause, an offense may now only be a "crime of violence" under 18 U.S.C. § 924(c) if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *United States v. Castleman*, 572 U.S. 157, 176, 134 S. Ct. 1405, 1418 (2014).

Alexander's underlying offense was for attempted bank robbery in violation of 18 U.S.C. § 2113(a) and (d). Subsection (a) states that "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association" shall be guilty of federal bank robbery. Thus, the offense allows the defendant to act with (1) force, (2) intimidation, or (3) extortion.

This offense can only be deemed a "crime of violence" through the now defunct residual clause. This is because the statute allows for different "means" of committing the offense, some of which obviously have, as an element, the use of the force, some of which do not. In *Mathis v. United States*, -- U.S.---, 136 S.Ct. 2243 (2016), the Court delineated the differences between elements and means. Elements are the "constituent parts of a crime's legal definition – the things that the prosecution must prove to sustain a conviction." 136 S.Ct. at 2248. By contrast, means are merely the "brute facts" or "circumstances" of the offense. *Id.* The Supreme Court held that under the ACCA, where a state offense uses different means to commit an element of the offense, some of which means qualify as the generic form of the offense, and some of which do not, that the offense cannot be an enumerated offense under the ACCA. *Id.* at 2250.

Here, the terms force, intimidation, and extortion are all means of committing the offense. Pursuant to *Mathis*, a reviewing court can look at (1) the plain language of the statute, (2) the caselaw, or (3) the charging document to determine whether ways of committing the crime are mean or elements. *United States v. Smith*, 921 F.3d 708, 713 (7th Cir. 2019). Here, a review of the caselaw provides that, at a minimum, force and intimidation are means. For example, the Second Circuit has found that force and intimidation are means, but extortion is a divisible element. See *United States v. Moore*, 916 F.3d 231, 238 (2d Cir. 2019). The First Circuit, by contrast, has found that force, intimidation, and extortion are all means of committing the offense. *United States v. Ellison*, 866 F.3d 32, 36 (1st Cir. 2017). Finally, the indictment in this case listed both force and intimidation as the means of committing this particular crime.

It is clear that, at a minimum, intimidation is an additional means of committing the offense. Intimidation is not an element containing force. The term intimidation is not defined in 18 U.S.C. § 924(c). Webster's dictionary defines "intimidate" as "to make timid or fearful." https://www.merriam-webster.com/dictionary/intimidate Clearly, a defendant can make a person feel intimidated without the use or threatened use of force. As such, the inclusion as a means of committing bank robbery of intimidation prevents 18 U.S.C. § 2113(a) from categorically being a crime of violence. Alexander's 18 U.S.C. § 924(c) conviction must therefore be vacated.

Davis is a new rule of constitutional law which is available to Alexander on collateral review. As this Court found in *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519 (2004):

> When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). As to convictions that are already final, however, the rule applies only in limited circumstances. New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *352 see Bousley v. United States, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish
>
> 542 U.S. at 351.

Certainly, the decision in *Davis* narrows the scope of 18 U.S.C. § 924(c)'s reach. It further places certain conduct, once thought to be criminal, beyond the United States' power to punish. Therefore, Davis should be applied to Alexander's case. Accord, *In re Hammoud*, 931 F.3d 1032,1038 (11th Cir. 2019).

Finally, at a minimum, this Court should grant, vacate, and remand so that the Sixth Circuit can pass on this matter in light of *Davis*, as the Sixth Circuit did not have this Court's guidance in *Davis* when denying Alexander relief. See *Douglas v. United States*, No. 18-7331, 2019 WL 176716, at *1 (U.S. June 28, 2019); *Watkins v. United States*, No. 18-7996, 2019 WL 653249, at *1 (U.S. June 28, 2019); *Rodriguez v. United States*, No. 18-5234, 2019 WL 2649795, at *1 (U.S. June 28, 2019); *Jefferson v. United States*, No. 18-5306, 2019 WL 2649796, at *1 (U.S. June

28, 2019); *Barrett v. United States*, No. 18-6985, 2019 WL 2649797, at *1 (U.S. June 28, 2019); *Mann v. United States*, No. 18-7166, 2019 WL 2649802, at *1 (U.S. June 28, 2019).

For all of these reasons, Alexander asks that this Court grant certiorari review, vacate his 18 U.S.C. § 924(c) conviction in light of *Davis*, and remand for further proceedings as warranted.

CONCLUSION

Alexander requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for further proceedings in the district court.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER June 18, 2019
2. DISTRICT COURT ORDER March 19, 2019

No. 19-3281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTON JEVON ALEXANDER, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	)	ORDER

Anton Jevon Alexander, a federal prisoner proceeding through counsel, appeals the district court's order denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. Alexander applies for a certificate of appealability, *see* Fed. R. App. P. 22(b)(2), and, in the alternative, requests that his case be held in abeyance pending the Supreme Court's decision in *United States v. Davis*, No. 18-431, *cert. granted*, 139 S. Ct. 782 (2019) (mem.). He also moves for leave to proceed in forma pauperis on appeal.

In 2012, Alexander pleaded guilty to attempted armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); and to discharging a firearm during the robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). In May 2013, the district court sentenced Alexander to 60 months in prison for the attempted-bank-robbery conviction and to a consecutive prison term of 120 months for the firearm conviction. Alexander did not appeal.

In August 2016, Alexander filed his § 2255 motion to vacate based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), in which the Supreme Court invalidated the residual clause definition of "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), as

unconstitutionally vague. Alexander argued that, after *Johnson*, his conviction for armed bank robbery does not constitute a "crime of violence" under the residual clause of 18 U.S.C. § 924(c)(3)(B) and therefore cannot serve as the predicate offense for his § 924(c) conviction and sentence. He later supplemented his motion to vacate with the case of *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018), in which the Supreme Court invalidated the residual clause definition of "crime of violence" contained in section 16(b) of the Immigration and Nationality Act (INA) as unconstitutionally vague. By presenting this authority, Alexander implied that because the residual clause in § 924(c)(3)(B) defining "crime of violence" is worded similarly to section 16(b) of the INA, this clause is unconstitutionally vague as well.

The district court denied the petition, deciding that *Johnson* did not apply to the residual clause in § 924(c)(3)(B), and that, in any event, Alexander's underlying offense of bank robbery involved the use of force and thus fell under the use-of-force clause—§ 924(c)(3)(A)—without implicating the residual clause of § 924(c)(3)(B). The district court determined that, as a result, Alexander's motion was untimely because he failed to file it within the one-year deadline of his 2013 judgment and had failed to assert a right that had since been recognized by the Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. § 2255(f)(1), (f)(3). The district court declined to issue a certificate of appealability, and this timely appeal followed.

Alexander must obtain a certificate of appealability to appeal the denial of his motion to vacate. *See* 28 U.S.C. § 2253(c)(1)(B). To obtain a certificate of appealability, Alexander must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Alexander "satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a district court denies a habeas petition on procedural grounds, the court may issue a certificate of appealability only if the applicant shows "that jurists of reason would find it debatable whether the petition 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

No reasonable jurist could debate the district court's denial of Alexander's motion to vacate. Whether *Dimaya* applies retroactively and whether it has any bearing on § 924(c)(3)(B) remain open questions. *See Dimaya*, 138 S. Ct. at 1241 (Roberts, C.J., dissenting); *United States v. Richardson*, 906 F.3d 417, 425 (6th Cir. 2018), *petition for cert. filed* (U.S. Dec. 10, 2018) (No. 18-7036); *see also Johnson v. United States*, 138 S. Ct. 2676 (2018) (mem.). Nevertheless, Alexander has failed to make a prima facie showing that he was convicted under the residual clause of § 924(c)(3)(B), rather than the alternative use-of-force clause of § 924(c)(3)(A). Alexander's underlying crime of violence is attempted armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), and the armed-robbery portion of § 2113(a) satisfies the use-of-force clause definition of "crime of violence." *See United States v. Henry*, 722 F. App'x 496, 500 (6th Cir.) (§ 924(c)(3)(A)'s use-of-force clause), *cert. denied*, 139 S. Ct. 70 (2018); *United States v. McBride*, 826 F.3d 293, 295-96 (6th Cir. 2016).

Accordingly, this court **DENIES** a certificate of appealability, **DENIES** the motion to proceed in forma pauperis as moot, and **DENIES** the request to hold the case in abeyance.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION CINCINNATI

ANTON JEVON ALEXANDER,

Petitioner,

vs.

USA,

Respondent.

Case 1:12-cr-00049-MRB-1

Judge Michael R Barrett

ORDER

This matter is before the Court on Defendant Petitioner's Motion to Correct Sentence under 28 U.S.C. § 2255 (Doc. 123), and the government's Motion to Dismiss § 2255 petition (Doc. 134).

I. BACKGROUND

The grand jury for the Southern District of Ohio returned a two-count superseding indictment against Anton Alexander in June 2012. (Doc. 29). Count One charged him with attempted armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d). Count Two charged him with using, carrying, and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). Alexander pled guilty to both counts in October 2012. This Court sentenced Alexander to 60 months in prison on Count One and a consecutive 120-month term on Count Two. (Doc. 77). Alexander did not appeal.

In August 2016, Alexander filed a Motion to Correct Sentence under 28 U.S.C. § 2255. (Doc. 123). By way of background, two months earlier the United States Supreme Court had deemed the "residual clause" of the Armed Career Criminal Act to

be unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Post-*Johnson*, Alexander filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that, under *Johnson*, the residual clause of 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague. (Doc. 123). Alexander's counsel then filed a supplement to that motion, in which counsel additionally argued that, in light of *Johnson* and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the sentence on Alexander's Section 2113 conviction is also invalid. (Doc. 130). Alexander argues that his sentences on both counts should be overturned, and that he should resentenced.

The government filed a motion to dismiss (Doc. 134), arguing that the following, controlling authority from the Sixth Circuit forecloses both of Alexander's arguments: (1) *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016); and (2) *United States v. McBride*, 826 F.3d 293, 295-296 (6th Cir. 2016). Alexander filed through counsel an opposition to the government's motion to dismiss. (Doc. 135).

In September 2018, Petitioner's counsel filed a notice of supplemental authority suggesting that the Sixth Circuit appeared poised to revisit *Taylor* in light of *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018). (Doc. 144) (identifying *United States v. Camp*, 903 F.3d 594, 597 (6th Cir. 2018) as the case to monitor). However, the Sixth Circuit has since denied rehearing *en banc* in *Camp*. Furthermore, on January 8, 2019, the Supreme Court denied the *Camp* petition for writ of certiorari.

II. ANALYSIS

The government persuasively argues that, under *Taylor* and *McBride*, *Johnson* has no effect on Petitioner's Section 924(c) or Section 2113 convictions.

First, *Taylor* makes clear that *Johnson* does not invalidate Section 924(c)(3)(B). 814 F.3d at 379. Despite the opportunity to revisit *Taylor* in *Camp*, both the Sixth Circuit and the Supreme Court have declined to do so. Accordingly, Alexander's Section 924(c) conviction is unaffected by *Johnson*.

Second, the Court is not persuaded by Alexander's argument that *Johnson* or any of its progeny invalidates his sentence under 18 U.S.C. §§ 2113(a) and (d), because the residual clause of Section 2113 was never implicated in the underlying criminal case. In *McBride*, the Sixth Circuit held that "[b]ank robbery by 'force and violence' plainly involves 'the use, attempted use, or threatened use of physical force.'" 826 F.3d at 295-296. Likewise, bank robbery by intimidation involves the threat to use force. *Id.* at 296. Thus, bank robbery by force, violence, or intimidation falls under the physical force clause, not the residual clause. Furthermore, the Supreme Court's holding in *Mathis* does not alter the Sixth Circuit's *McBride* analysis. *See In re McComb*, 691 F. App'x 819, 820 (6th Cir. 2016); *In re Clinton*, No. 18-5446, 2018 U.S. App. LEXIS 30079, at *4 (6th Cir. Oct. 24, 2018). Because the residual clause was never implicated in Alexander's underlying criminal case, Alexander's Section 2113 conviction is also unaffected by *Johnson*.

Ultimately, the "right" Petitioner asserts has neither been recognized by the Supreme Court nor made retroactive to cases on collateral review. As such, 18 U.S.C. § 2255(f)(3) is inapplicable, rendering Alexander's § 2255 motion untimely, as it was filed in excess of one year from his 2013 judgment.

III. CONCLUSION

Therefore, consistent with the above, the Motion to Vacate (Doc. 123) is **DENIED**, and the government's Motion to Dismiss (Doc. 134) is **GRANTED**. Because reasonable jurists would not disagree with the Court's conclusion, and Petitioner has not made a showing of a substantial denial of a constitutional right, he is denied a certificate of appealability. As any appeal would be objectively frivolous, Petitioner shall not be granted leave to appeal *in forma pauperis*. Case No. 1:16-CV-00669 is **CLOSED AND TERMINATED** from the active docket of this Court.

IT IS SO ORDERED.

s/*Michael R. Barrett*
HON. MICHAEL R BARRETT
UNITED STATES DISTRICT JUDGE