NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK ESTELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

APPENDIX

Derrick ESTELL, Petitioner - Appellant,

v.

UNITED STATES of America, Respondent - Appellee.

No. 18-2550

United States Court of Appeals, Eighth Circuit.

Submitted: April 17, 2019

Filed: June 4, 2019

Background: After affirmance of defendant's sentence for two counts of using or brandishing a firearm in furtherance of a crime of violence, 622 Fed.Appx. 599, defendant filed motion to vacate sentence, alleging that he was not properly convicted because the predicate crimes of bank robbery and carjacking were not crimes of violence. The United States District Court for the Western District of Arkansas, Susan O. Hickey, J., 2018 WL 2347090, adopted in part the report and recommendation of Barry A. Bryant, United States Magistrate Judge, 2016 WL 11259036, and denied the motion. Defendant appealed.

Holding: The Court of Appeals, Colloton, Circuit Judge, held that federal offenses of bank robbery and carjacking categorically require the use or threatened use of force and therefore qualify as crimes of violence under the force clause of the definition of crime of violence, as predicate for conviction for using or brandishing a firearm in furtherance of a crime of violence.

Affirmed.

1. Weapons ⇐194(2)

The federal offenses of bank robbery and carjacking categorically require the use or threatened use of force and therefore qualify as crimes of violence under the force clause of the definition of crime of violence, as predicate for conviction for using or brandishing a firearm in furtherance of a crime of violence. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a), 2119.

2. Weapons ⇐194(2)

Even though bank robbery by intimidation, under federal law, does not require a specific intent to intimidate, it still constitutes a threat of physical force, so that bank robbery by intimidation qualifies as a crime of violence under the force clause of the definition of crime of violence, as predicate for conviction for using or brandishing a firearm in furtherance of a crime of violence; a threat, as commonly defined, speaks to what the statement conveys, not to the mental state of the author. 18 U.S.C.A. §§ 924(c)(3)(A), 2113(a).

3. Weapons ⇐194(2)

Carjacking by intimidation, under federal law, constitutes a threat of physical force, so that carjacking by intimidation qualifies as a crime of violence under the force clause of the definition of crime of violence, as predicate for conviction for using or brandishing a firearm in furtherance of a crime of violence. 18 U.S.C.A. §§ 924(c)(3)(A), 2119.

Appeal from United States District Court for the Western District of Arkansas - Hot Springs

Counsel who represented the appellant and appeared on the brief was Christopher Aaron Holt, AFPD, of Fayetteville, AR.

Counsel who represented the appellee and appeared on the brief was David A. Harris, AUSA, of Fort Smith, AR.

Before COLLOTON, GRUENDER, and ERICKSON, Circuit Judges.

COLLOTON, Circuit Judge.

Derrick Estell pleaded guilty in 2014 to two counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). In one instance, Estell brandished a gun during a bank robbery; the other involved use of a gun during a carjacking. The district court[1] sentenced Estell to 384 months' imprisonment.

Estell later moved to vacate his convictions under 28 U.S.C. § 2255, arguing that they were unconstitutional in light of *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015). His theory is that neither bank robbery nor carjacking is a "crime of violence" under § 924(c)(3)(B), because the definition of "crime of violence" in that subsection is unconstitutionally vague, so he was not properly convicted of using a firearm during a crime of violence.

The definition of "crime of violence" in § 924(c)(3) includes both a "force clause" and a "residual clause." The "residual clause" encompasses a felony offense "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." 18 U.S.C. § 924(c)(3)(B). *Johnson* held that a different residual clause in § 924(e)(2)(B) was unconstitutionally vague, and Estell's post-conviction motion urged that the logic of *Johnson* compelled the same conclusion under § 924(c)(3)(B). He also asserted that the bank robbery and carjacking offenses did not qualify as crimes of violence under the force clause of § 924(c)(3)(A), so the alleged unconstitutionality of the residual clause made his convictions invalid.

The district court denied Estell's motion based on *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (per curiam), which held that *Johnson* did not render the residual clause of § 924(c)(3)(B) unconstitutionally vague. *Id.* at 700. The district court granted a certificate of appealability, and Estell argues on appeal that *Prickett* is both wrong and superseded by intervening authority. He relies on *Johnson* and *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), which held that another residual clause, found in 18 U.S.C. § 16, was unconstitutionally vague. The Supreme Court is now considering the residual clause of § 924(c)(3)(B) in *United States v. Davis*, No. 18-431 (argued Apr. 17, 2019).

[1] The government responds that even if the residual clause of § 924(c)(3)(B) is unconstitutionally vague, Estell's bank robbery and carjacking qualify as crimes of violence under the force clause of § 924(c)(3)(A). An offense qualifies as a "crime of violence" under that clause if it is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Bank robbery and carjacking both have as an element the use or threatened use of physical force, because each offense must be committed either "by force and violence" or "by intimidation," which means the threat of force. *Id.* §§ 2113(a), 2119; *United States v. Wright*, 957 F.2d 520, 521 (8th Cir. 1992). We have thus said in prior decisions that each of Estell's underlying offenses is a "crime of violence" under § 924(c)(3)(A). *See Allen v. United States*, 836 F.3d 894, 894 (8th Cir. 2016) (bank robbery); *United States v. Mathijssen*, 406 F.3d 496, 500 (8th Cir. 2005) (carjacking);

1. The Honorable Susan O. Hickey, now Chief Judge, United States District Court for the Western District of Arkansas.

United States v. Jones, 34 F.3d 596, 601-02 (8th Cir. 1994) (carjacking).

Estell argues nonetheless that his offenses do not categorically require the use or threatened use of force because the "intimidation" element in the bank robbery statute may be met through a defendant's reckless or negligent conduct. He also contends that bank robbery does not require "violent physical force," because intimidation occurs when a person "reasonably could infer a threat of bodily harm from the defendant's acts," and "it is possible to cause bodily injury without employing violent physical force." He asserts that the intimidation element in the carjacking statute likewise disqualifies that offense as a categorical crime of violence.

[2, 3] Estell's arguments are foreclosed by the reasoning of *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017). There, we explained that even though bank robbery by intimidation does not require a specific intent to intimidate, *see United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003), it still constitutes a threat of physical force because " 'threat,' as commonly defined, 'speak[s] to what the statement conveys—not to the mental state of the author.' " *Harper*, 869 F.3d at 626 (quoting *Elonis v. United States*, —— U.S. ——, 135 S. Ct. 2001, 2008, 192 L.Ed.2d 1 (2015)). Thus, if the government establishes that a defendant committed bank robbery by intimidation, it follows that the defendant threatened a use of force causing bodily harm. *See Yockel*, 320 F.3d at 824. And "[a] threat of bodily harm requires a threat to use violent force because 'it is impossible to cause bodily injury without using force capable of producing that result.' " *Harper*, 869 F.3d at 626 (quoting *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017)). The same goes for carjacking by intimidation. We therefore conclude that Estell's underlying offenses of bank robbery and carjacking qualify as crimes of violence under § 924(c)(3)(A). His convictions and sentences under § 924(c)(1)(A) for using a firearm during and in relation to those crimes are not unconstitutional.

The judgment of the district court is affirmed.

Denys HONCHAROV, aka Denys Vitalyevich Honcharov, Petitioner,

v.

William P. BARR, Attorney General, Respondent.

No. 15-71554

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 16, 2019 San Francisco, California

Filed May 29, 2019

Background: Alien, a Ukrainian national, petitioned for review of the affirmance, by the Board of Immigration Appeals (BIA), of the denial of his request for asylum, withholding of removal, and protection under the Convention Against Torture (CAT).

Holding: The Court of Appeals held that Board of Immigration Appeals (BIA) did not err in declining to consider argument raised for first time on appeal.

Petition denied.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

DERRICK ESTELL PETITIONER

v. CASE NO. 6:13-CR-60051
CASE NO. 6:16-CV-06057

UNITED STATES OF AMERICA RESPONDENT

ORDER

Before the Court is a Report and Recommendation entered by the Honorable Barry A. Bryant, United States Magistrate Judge for the Western District of Arkansas concerning Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. ECF No. 57. Petitioner has filed objections. ECF No. 58. The Court finds this matter ripe for consideration.

In his Report and Recommendation, Judge Bryant recommends that Petitioner's motion be denied and dismissed with prejudice and that the Court find that an appeal from dismissal would not be taken in good faith. Specifically, Judge Bryant found that Petitioner's arguments were foreclosed by the Eighth Circuit's decision in *United States v. Prickett*, 839 F.3d. 697 (8th Cir. 2016), which found that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), did not render 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague. In his objections, Petitioner objects to Judge Bryant's findings and recommendations, but concedes that the Court is bound by *Pickett*. Petitioner, however, argues that the Court should issue a Certificate of Appealability as to the issue of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

The issuance of a Certificate of Appealability is only appropriate in a section 2255 proceeding when a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has stated that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The 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).

The Court has recently noted, in light of recent precedent, that reasonable jurists would find that the question of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague is debatable. *See United States of America v. Johnson*, 1:12-CR-10010-2, ECF No. 187, p. 3 (W.D. Ark. April 30, 2018). At the time of issuing the instant Report and Recommendation, Judge Bryant did not have the benefit of the precedent cited in this Court's recent ruling. Accordingly, the Court finds that a Certificate of Appealability shall issue.

For the foregoing reasons, the Court hereby **ADOPTS IN PART** Judge Bryant's Report and Recommendation (ECF No. 57) insofar as it recommends a finding that Petitioner's motion should be denied on the merits. Therefore, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 52) is hereby **DENIED** and **DISMISSED WITH PREJUDICE**. However, the Court finds that a Certificate of Appealability should be and hereby is **GRANTED** on the issue of whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

IT IS SO ORDERED, this 23rd day of May, 2018.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

UNITED STATES OF AMERICA RESPONDENT

v. No. 6:13-cr-60051
No. 6:16-cv-06057

DERRICK ESTELL MOVANT

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 filed by Derrick Estell ("Estell"). ECF No. 52.

The Motion was referred for findings of fact, conclusions of law, and recommendations for the disposition of the case. The United States of America (hereinafter referred to as the "Government") has responded to the Motion. ECF No. 56. The Court has considered the entire record, and this matter is ready for decision. For the reasons stated below, the Court recommends the Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF No. 52) be **DENIED**.

1. Background:

On October 30, 2013, Estell was named in five-count Superseding Indictment filed in the United States District Court for the Western District of Arkansas. ECF No. 5. Count 1 alleged the following: "On or about March 1, 2013, in the Western District of Arkansas, Hot Springs Division, the defendant, **DERRICK ESTELL**, by force, violence and intimidation did take from the person or presence of another, U.S. currency, belonging to and in the care, custody, control, management and possession of Hot Springs Bank & Trust, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18 U.S.C. § 2113(a)."

Count 2 alleged as follows: "On or about March 1, 2013, in the Western District of Arkansas, Hot Springs Division, the defendant, **DERRICK ESTELL**, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, bank robbery, as charged in Count One of this Superseding Indictment, did knowingly use, carry and possess in furtherance of said crime of violence, a firearm, which was brandished, in violation of Title 18 U.S.C. § 924(c)(1)(A)(ii)."

Count 3 alleged as follows: "On or about March 7, 2013, in the Western District of Arkansas, Hot Springs Division, the defendant, **DERRICK ESTELL**, did take from the person of another a motor vehicle that had traveled in interstate commerce, namely a 2004 GMC Sierra, by force, violence and intimidation, with the intent to cause death and serious bodily harm, in violation of Title 18 U.S.C. § 2119(1)."

Count 4 alleged as follows: "On or about March 7, 2013, in the Western District of Arkansas, Hot Springs Division, the defendant, **DERRICK ESTELL** having been previously convicted of a crime punishable by imprisonment exceeding one year, knowingly possessed any one or more of the following firearms: 1. Charter Arms, .38 caliber revolver, serial number 301322 2. Taurus, .45 caliber pistol, serial number NCX59197 3. Arminus, .22 caliber revolver, serial number 792742 4. Colt, .25 caliber pistol, serial number 0032743 which had been shipped and transported in interstate commerce, in violation of Title 18 U.S.C. §§ 922(g)(1) and 924(a)(2)."

Count 5 alleged as follows: "On or about March 7, 2013, in the Western District of Arkansas, Hot Springs Division, the defendant, **DERRICK ESTELL**, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, carjacking, as charged in Count Three of this Superseding Indictment, did knowingly use, carry and possess in furtherance of said crime of violence, a firearm, which was brandished, in violation of Title 18

U.S.C. § 924(c)(1)(A)(ii)."

On November 22, 2013, Estell appeared for an arraignment before the Honorable U.S. Magistrate Judge Barry A. Bryant. ECF No. 13. At this arraignment, Estell appeared with Federal Public Defender Bruce Eddy. *Id.* Estell entered a plea of not guilty to all Counts of the Superseding Indictment. *Id.* Subsequently, the Honorable U.S. District Judge Susan O. Hickey set a jury trial in Estell's case for December 23, 2013 in El Dorado, Arkansas. *Id.* Estell's trial was subsequently continued until December 18, 2014. ECF No. 27.

On December 1, 2014, Estell appeared with counsel and entered a guilty plea as to Counts 2 and 5 of the Superseding Indictment. ECF No. 28. On the same day, Estell and the Government submitted a Plea Agreement to the Court. ECF No. 29. As a part of this Plea Agreement, Estell agreed to plead guilty to Counts 2 and 5 of the Superseding Indictment. *Id.* Specifically, Estell agreed as follows:

> 1. The defendant, **DERRICK ESTELL**, hereby agrees to plead guilty to Count Two of the Superseding Indictment charging the defendant with violation of Title 18 U.S.C. § 924(c)(1)(A) (Using, Carrying or Possessing a Firearm in Furtherance of a Crime of Violence, that is Bank Robbery); and Count Five of the Superseding Indictment charging the defendant with violation of 18 U.S.C. §924(c)(1)(A) (Using, Carrying or Possessing a Firearm in Furtherance of a Crime of Violence, that is Carjacking). . . .

ECF No. 29 ¶ 1.

On March 19, 2015, Estell appeared before Judge Hickey for sentencing. ECF No. 37. At sentencing, Judge Hickey sentenced Estell to 84 months on Count 2 and 300 months on Count 5 to run consecutive for a total of 384 months in the Bureau of Prisons with credit for time served in federal custody. He was also sentenced to five (5) years of Supervised Release on each count to run concurrent. Restitution in the amount of $12,478.00 was ordered. *Id.* A judgment adopting this sentence was entered on March 23, 2015. ECF No. 39. Estell appealed his sentence, and the

sentence was affirmed. ECF No. 51.

2. Instant Motion:

On June 13, 2016, Estell, through court-appointed counsel, filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. ECF No. 52. In this Motion, Estell raises one issue: whether the sentence entered against him pursuant to 18 U.S.C. § 924(c)(1)(A) should be vacated because the language in 18 U.S.C. § 924(c)(1)(A) is void for vagueness under *Johnson v. United States,* 135 S. Ct. 2551 (2015). *Id.* The Government responded to this Motion on August 15, 2016. ECF No. 56. This matter is now ready for decision.

3. Discussion:

The issue before the Court is whether the Supreme Court's holding in *Johnson v. United States,* 135 S. Ct. 2551 (2015), which invalidated the residual clause of the Armed Career Criminal Act ("ACCA") because it was unconstitutionally vague, applies to 18 U.S.C. § 924(c) and invalidates its "crime of violence" provision. Upon review, the Court finds the reasoning in *Johnson* does not apply to invalidate this provision of 18 U.S.C. § 924(c).

On October 5, 2016, the United States Court of Appeals for the Eighth Circuit directly addressed this issue and ruled that the holding in *Johnson* did not invalidate the language of 18 U.S.C. § 924(c). *United States v. Prickett,* 2016 WL 5799691, at *3 (8th Cir. Oct. 5, 2016). As the Eighth Circuit held: "We therefore conclude that *Johnson* does not render § 924(c)(3)(B) [defining "crime of violence" from 18 U.S.C. § 924(c)(1)(A)] unconstitutionally vague." *Id.*[1] Consistent with that holding, the Court recommends Estell's Motion (ECF No. 52) be **DENIED.**

[1]The Eighth Circuit noted it was joining the Second Circuit, *see United States v. Hill*, No. 14–3872–CR, ____ F.3d ____, 2016 WL 4120667, at *7–12 (2d Cir. Aug. 3, 2016), and Sixth Circuit, *see United States v. Taylor*, 814 F.3d 340, 375–76 (6th Cir. 2016), in reaching this conclusion.

4. Evidentiary Hearing:

Based on the record in this case, I also conclude an evidentiary hearing is not required in this matter. Estell is clearly not entitled to the relief he seeks.[2] Further, I find Estell has not made a substantial showing of the denial of a constitutional right, and any request for a certificate of appealability should be denied as well.

5. Recommendation:

Accordingly, based on the foregoing, it is recommended the instant motion be **DENIED** and dismissed with prejudice. Pursuant to 28 U.S.C. § 1915(a), I recommend the finding that an appeal from dismissal would not be taken in good faith.

The Parties have fourteen (14) days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The Parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court.

DATED this **8th day of November 2016.**

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE

[2] *See Buster v. United States*, 447 F.3d 1130, 1132 (8th Cir.2006) (holding that a § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact).