United States Court of Appeals
For the Eighth Circuit

No. 17-3422

John Joseph Douglas

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: March 6, 2019
Filed: March 11, 2019
[Unpublished]

Before BENTON, WOLLMAN, and KELLY, Circuit Judges.

PER CURIAM.

John Douglas was found guilty of being a felon in possession of a firearm, and he was sentenced to 240 months in prison. His sentence was enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e) (felon in possession who has three prior convictions for "violent felony" shall be imprisoned not less than 15 years).

Douglas later filed a 28 U.S.C. § 2255 motion challenging his sentence as an armed career criminal. The motion was denied, based in part on the district court's[1] conclusion that Douglas's two prior Minnesota convictions for first-degree aggravated robbery qualified as "violent felon[ies]" for purposes of section 924(e). The district court then granted Douglas a certificate of appealability regarding that conclusion, and he appeals.

After careful de novo review, we conclude that Douglas's prior convictions were properly classified as "violent felon[ies]." See United States v. Libby, 880 F.3d 1011, 1013, 1016 (8th Cir. 2018) (by its terms, first-degree aggravated robbery under Minnesota law minimally requires that defendant communicate threat of violent force; as such, elements of offense categorically present "violent felony"); see also United States v. Salean, 583 F.3d 1059, 1060 n.2 (8th Cir. 2009) (for purposes of determining whether prior conviction qualified as "violent felony," it was irrelevant that prior conviction was premised on aiding-and-abetting theory of liability). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1]The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3422

John Joseph Douglas

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:15-cv-01218-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 15, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	Case No. 11-CR-0324(1) (PJS/LIB)
	Case No. 15-CV-1218 (PJS)
Plaintiff,	
v.	ORDER
JOHN JOSEPH DOUGLAS,	
Defendant.	

Andrew S. Dunne, UNITED STATES ATTORNEY'S OFFICE, for plaintiff.

Andrew S. Garvis, KOCH & GARVIS, LLC, for defendant.

A jury convicted defendant John Douglas of being a felon in possession of a firearm. ECF No. 64. At sentencing, the Court found that Douglas was a "career offender" within the meaning of § 4B1.1 of the United States Sentencing Guidelines. The Court also found that Douglas was subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because he had at least three prior convictions for "violent felon[ies]." The Court then sentenced Douglas to 240 months in prison, which represented a substantial downward variance from Douglas's Guidelines range of 360 months to life. ECF Nos. 112-13. The United States Court of Appeals for the Eighth Circuit affirmed Douglas's conviction on direct appeal. *United States v. Douglas*, 744 F.3d 1065 (8th Cir. 2014).

This matter is before the Court on Douglas's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. In his original motion, Douglas raised various claims of ineffective assistance of counsel. In later briefing, Douglas argued that, under *Johnson v. United States*, 135 S. Ct. 2551 (2015), his felon-in-possession offense no longer qualifies as a "crime of violence" under § 4B1.1 of the Guidelines and that therefore he is not a career offender.

The Court rejected all of Douglas's ineffective-assistance claims, *see* ECF No. 164, and later rejected Douglas's *Johnson* claim on the basis of *Beckles v. United States*, 137 S. Ct. 886 (2017), *see* ECF No. 167. In the meantime, Douglas requested an opportunity to brief the impact of *Mathis v. United States*, 136 S. Ct. 2243 (2016), on his designation as an armed career criminal under 18 U.S.C. § 924(e). The Court granted Douglas's request. ECF No. 167. Having received the parties' supplemental briefing, the Court rejects the remainder of Douglas's claims.

I. BACKGROUND

In Douglas's presentence investigation report ("PSR"), six of his prior offenses were found to qualify as violent felonies for purposes of the ACCA. PSR ¶ 26. Two of these prior offenses were burglaries that the government concedes no longer qualify as violent felonies. That leaves four potentially qualifying offenses: two first-degree aggravated robberies under Minn. Stat. § 609.245, subd. 1, and two second-degree

assaults under Minn. Stat. § 609.222. Douglas committed three of these four offenses—the two robberies and one of the assaults—on September 25, 1998. PSR ¶ 45. Douglas committed the other of the assaults in February 2006. *Id.* ¶ 46.

II. ANALYSIS

Douglas concedes that the February 2006 second-degree assault qualifies as a violent felony under the ACCA. He contends, however, that (1) his aggravated-robbery convictions do not qualify as violent felonies under the ACCA; (2) even if the aggravated robberies otherwise qualify as violent felonies, they cannot both be counted as ACCA predicates because they were not "committed on occasions different from one another," as required by § 924(e)(1); and (3) his conviction for the September 1998 second-degree assault is invalid because he was never actually charged with that crime. *See* ECF Nos. 170, 177.

The Court agrees with the government that the latter two arguments are procedurally barred.[1] At no time during sentencing proceedings in this Court or on direct appeal did Douglas argue either that the two aggravated robberies were not "committed on occasions different from one another" or that he was never actually

[1]It appears that these claims are also time barred, as Douglas did not raise them until well after the statute of limitations had expired. *See* 28 U.S.C. § 2255(f)(1). The government does not contend that Douglas's claims are untimely, however, and therefore the Court does not rely on that ground in denying them.

charged with the 1998 second-degree assault to which he pleaded guilty.[2] These arguments are not based on any new Supreme Court decision or other recent change in the law. *See, e.g., United States v. Hamell*, 3 F.3d 1187, 1191 (8th Cir. 1993) (examining whether offenses committed within minutes of each other counted as separate offenses under § 924(e)(1)); *Skordalos v. United States*, No. RDB-08-1049, 2009 WL 124302, at *2 (D. Md. Jan. 15, 2009) (noting argument that the defendant had not actually been convicted of a prior offense). Because Douglas could have, but did not, raise these claims at

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[2]The documents submitted by the parties demonstrate that Douglas and his two co-defendants were charged with four counts of second-degree assault arising out of the events of September 25, 1998. *See* Def. Ex. A [ECF No. 170-2]. But for some reason, Douglas pleaded guilty to—and was convicted of—a count that charged one of his co-defendants (but not Douglas) with second-degree assault. *See id.*; Def. Ex. B [ECF No. 170-1]; Gov't Exs. 1, 2 [ECF Nos. 173-1, 173-2].

The transcript of the plea hearing does not explain the discrepancy, but the structure of the plea appears to be intentional. Notably, "states are not bound by the technical rules governing federal criminal prosecutions; the crucial question in state prosecutions is whether the defendant had sufficient notice of the potential charges against him that he could prepare to contest those charges." *Blair v. Armontrout*, 916 F.2d 1310, 1329 (8th Cir. 1990). In other words, Douglas could be charged with an offense—and convicted of that offense—even if that offense was not mentioned in an indictment or other formal charging instrument. *See Williams v. Nix*, 751 F.2d 956, 961 (8th Cir. 1985) ("In the federal courts such a de facto amendment of an indictment might raise serious problems, but the Supreme Court has held that the Fourteenth Amendment does not require the states to use grand-jury indictments at all, even to prosecute serious crimes.").

sentencing or on direct appeal, they are procedurally defaulted.[3] *See Fletcher v. United States*, 858 F.3d 501, 505-06 (8th Cir. 2017).

Douglas points out that, before he was sentenced, he submitted a pro se letter to the probation office contesting his classification as an armed career criminal and stating that, after excluding his third-degree burglary conviction, he had only two other qualifying convictions. *See* ECF No. 178-1 at 6. This submission is obviously insufficient to raise the arguments that Douglas now wishes to make. Even if Douglas had submitted that letter to this Court during his sentencing proceedings—and even if the Court had been willing to entertain a pro se submission from a represented defendant (which is not the Court's practice)—Douglas's letter did not identify any reason why his aggravated-robbery and second-degree assault convictions would not qualify as predicate offenses. And even if it had, Douglas did not raise these issues on appeal. They are therefore clearly procedurally defaulted.

A defendant may overcome a procedural default by showing cause and prejudice or that he is "'actually innocent.'" *Fletcher*, 858 F.3d at 506 (citation omitted). Douglas does not attempt to argue either of these grounds for overcoming his

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[3]In addition, as the government notes, Douglas's argument that his 1998 second-degree assault conviction is invalid is an impermissible collateral attack on a prior conviction. *See Custis v. United States*, 511 U.S. 485 (1994).

default—and the Court has found on multiple occasions that Douglas is not actually innocent—and therefore these claims are rejected.

With respect to Douglas's remaining claim that his aggravated-robbery convictions do not qualify as predicate ACCA offenses: It appears that this claim is time barred. Douglas did not raise it until well after his conviction became final under 28 U.S.C. § 2255(f)(1). The only way that this claim could be timely, then, is if *Mathis*, on which Douglas purports to base the claim, recognized a new right that is "retroactively applicable to cases on collateral review . . . ."[4] *See* 28 U.S.C. § 2255(f)(3). Again, however, because the government does not raise the limitations issue nor address the retroactivity of *Mathis*, the Court does not rely on that ground. *Cf. Day v. McDonough*, 547 U.S. 198, 205 (2006) (characterizing statute-of-limitations and non-retroactivity defenses as non-jurisdictional).

In any event, Douglas's claim fails on the merits. Under the force clause of the ACCA, a violent felony includes any felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). As the Court recently found in *United States v. Early*, No. 15-CR-0106

[4]In the Court's view, Douglas's claim has nothing to do with *Mathis* and therefore would be untimely even if *Mathis* announced a new rule of law that was retroactively applicable. Moreover, the Court has found that *Mathis* did not, in fact, recognize a new rule of law. *See Montgomery v. United States*, No. 17-CV-0542 (PJS/LIB), slip op. at 7-9 (D. Minn. Oct. 17, 2017). Because Douglas's claim fails on the merits, however, the Court need not address these issues further.

(PJS/FLN), 2017 WL 4621281 (D. Minn. Oct. 13, 2017), simple robbery under Minn. Stat. § 609.24 qualifies as a violent felony under the force clause. *Id.* at *3. Because simple robbery is a lesser-included offense of first-degree aggravated robbery, the latter is necessarily also a violent felony. *See* Minn. Stat. § 609.245, subd. 1 ("Whoever, *while committing a robbery*, is armed with a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon, or inflicts bodily harm upon another, is guilty of aggravated robbery in the first degree . . . .") (emphasis added); *State v. Salim*, No. A16-0294, 2017 WL 562499, at *6 (Minn. Ct. App. Feb. 13, 2017) ("A simple robbery is necessarily included in aggravated robbery because it is impossible to commit an aggravated robbery without committing a simple robbery." (citation and quotation marks omitted)).

Douglas argues that there is no precedent for analyzing a lesser-included offense to determine if the greater offense is a violent felony under the ACCA. In examining the elements of a lesser-included offense, however, the Court is not departing from precedent; it is simply applying logic. Because a lesser-included offense is a subset of the greater offense, all of the elements of the lesser offense are also elements of the greater. *See Salim*, 2017 WL 562499, at *5-6. Adding more elements to define the greater offense does not change the fact that, because the lesser offense includes a "force" element, the greater offense *necessarily* includes a "force" element as well. The Court

therefore rejects Douglas's arguments and holds that his first-degree aggravated robbery convictions qualify as violent felonies under the ACCA.

The Court acknowledges that, in a previous case, it held that simple robbery was not a violent felony for purposes of the ACCA. *See United States v. Pettis*, No. 15-CR-0233 (PJS/FLN), 2016 WL 5107035, at *2-3 (D. Minn. Sept. 19, 2016). As the Court acknowledged in *Early*, however, the Court has since been persuaded that it erred in *Pettis*. *See Early*, 2017 WL 4621281, at *3 & n.6 (citing cases).

Under 28 U.S.C. § 2253(c), a defendant may not appeal the denial of a § 2255 motion unless he makes "a substantial showing of the denial of a constitutional right." It is at least debatable that Douglas's claim that he does not qualify for enhanced sentencing under the ACCA is of constitutional dimension. *See Whalen v. United States*, 445 U.S. 684, 690 (1980) (referring to a petitioner's "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress"). Likewise, as this Court's own struggles with the issue demonstrate, whether first-degree aggravated robbery qualifies as a violent felony under the ACCA is debatable. The Court will therefore grant a certificate of appealability on the following question only: "Is first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1, a 'violent felony' for purposes of 18 U.S.C. § 924(e)?"

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant's motion to vacate, set aside, or correct his sentence [ECF No. 137] is DENIED.

2. The Court grants defendant a certificate of appealability on the following issue only: "Is first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1, a 'violent felony' for purposes of 18 U.S.C. § 924(e)?"

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 19, 2017

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

United States of America,

Plaintiff

v.

John Joseph Douglas

Defendant.

Case No. 11-CR-00324-PJS-LIB-1
Case No. 15-CV-1218 (PJS)

JUDGMENT IN A CRIMINAL CASE

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED THAT:

1. Defendant's motion to vacate, set aside, or correct his sentence [ECF No. 137] is DENIED.
2. The Court grants defendant a certificate of appealability on the following issue only: "Is first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1, a 'violent felony' for purposes of 18 U.S.C. § 924(e)?"

Date: October 19, 2017

RICHARD D. SLETTEN, CLERK

s/M. Giorgini

By: M. Giorgini
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN JOSEPH DOUGLAS, Defendant.	Case No. 11-CR-0324(1) (PJS/LIB) Case No. 15-CV-1218 (PJS) ORDER

Andrew S. Dunne, UNITED STATES ATTORNEY'S OFFICE, for plaintiff.

Andrew S. Garvis, KOCH & GARVIS, LLC, for defendant.

A jury convicted defendant John Douglas of being a felon in possession of a firearm. ECF No. 64. Douglas filed a motion for a new trial, which the Court denied after an evidentiary hearing. ECF No. 105. The Court then sentenced Douglas under the Armed Career Criminal Act (18 U.S.C. § 924(e)) to 240 months in prison and 5 years of supervised release. ECF No. 112. The United States Court of Appeals for the Eighth Circuit affirmed Douglas's conviction on direct appeal. *United States v. Douglas*, 744 F.3d 1065 (8th Cir. 2014).

This matter is before the Court on Douglas's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Court appointed counsel to assist

Douglas and held an evidentiary hearing on Douglas's claims.[1] For the reasons that follow, the Court denies relief on all of Douglas's claims save for his claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015). As to that claim, the Court will defer ruling until the Supreme Court decides whether and how *Johnson* applies to the career-offender guideline—a decision that should come before the end of the present Term. *See Beckles v. United States*, 136 S. Ct. 2510 (2016).

I. BACKGROUND

Douglas attended a graduation party on the afternoon of May 30, 2011.[2] Also attending the party were, among others, Raina Hoiland,[3] Rachel Ryberg, Anthony Petric, Mark Dorstad, and Dorstad's young son. Later that evening, Douglas, Hoiland, Ryberg, Petric, and the Dorstads drove to a wooded lot owned by Douglas's aunt and uncle, Paul and Mary Easter. The group sat around a bonfire, drinking beer. Douglas asked the others if they would like to see his "toy." He went off into the woods, returned with a sawed-off shotgun wrapped in a plastic bag, took the gun out of the

[1]The Court also granted Douglas's request for a change of counsel before the evidentiary hearing. ECF Nos. 149, 150.

[2]The record is somewhat inconsistent concerning whether the date was May 29 or May 30. The discrepancy makes no difference.

[3]By the time of trial, Hoiland had married and her surname was Compton.

bag, and shot the gun multiple times. Douglas then helped Hoiland shoot the gun a few times and returned the gun to its hiding place in the woods.

A neighbor heard the gunshots and called the police, who arrived on the Easter property about five minutes after the last shot was fired. On seeing the police approach, Hoiland and Ryberg hid behind a car because they were not of legal drinking age. After the officers arrived, Douglas was agitated and hostile, repeatedly demanding that the officers get off of the property and even calling his aunt to try to enlist her help in getting the police to leave. Several of those present denied that anyone had fired a gun, but Hoiland and Ryberg eventually told the officers that Douglas had done so. The officers searched the property, found the shotgun, and arrested Douglas on a probation violation. The Court denied Douglas's motion to suppress the gun.

The focus of the trial was the testimony of three eyewitnesses—Hoiland, Ryberg, and Petric—all of whom told the jury that Douglas had retrieved and fired the shotgun.[4] Douglas's defense attorney, Frederick Goetz, worked hard to discredit their testimony. Goetz was able to elicit evidence that the shotgun actually belonged to Dorstad; that Dorstad was in the habit of keeping the gun in his car and calling it his "little buddy"; and that Dorstad liked to show off the gun. Goetz also elicited evidence that Dorstad had asked Petric to lie to the police. Specifically, Petric testified that, at Dorstad's

[4]Neither Douglas nor the Dorstads testified.

request, he had falsely told police that it was Douglas who had sawed off the shotgun. Petric also admitted that he had persisted in this lie until, shortly before trial, Dorstad admitted that he (not Douglas) had sawed off the gun.

In addition to eliciting this evidence, Goetz highlighted inconsistencies in the eyewitnesses' statements, and Goetz forcefully argued that, comparatively speaking, Douglas was the outsider in the group and thus an easy scapegoat. Goetz pointed out that both Dorstad and Petric had a lot to lose if they were convicted of a gun charge. Dorstad was entangled in child-custody proceedings, and Petric admitted that he could lose his job. Finally, Goetz cross-examined the government's expert on gunshot residue, emphasizing the lack of forensic evidence that Douglas had fired the gun. Goetz got the expert to admit that particles found on Douglas's hands were consistent with shooting off fireworks, which Douglas had done earlier in the evening.

The jury convicted Douglas. A few months later, Douglas moved for a new trial on the basis of newly discovered evidence—specifically, an affidavit from Petric in which he recanted his trial testimony and claimed that only he, and not Douglas, had fired the gun. Two other trial witnesses—Dorstad's sister and niece—also offered affidavits stating that, after the trial, Dorstad admitted to them that he had hidden the gun on the Easter property and that it was Petric who had been shooting it on the night

in question. (By contrast, Hoiland and Ryberg submitted affidavits affirming that their trial testimony had been true.)

After conducting an evidentiary hearing, the Court denied Douglas's new-trial motion. The Court identified numerous reasons why Petric's recantation was not credible and likely the result of pressure from Douglas's family and friends. The Court later sentenced Douglas to 240 months in prison, a substantial downward variance from the 360-months-to-life sentence recommended by the United States Sentencing Guidelines. After an unsuccessful appeal that focused on the denial of Douglas's suppression motion, Douglas filed this motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence.

II. ANALYSIS

A. Standard of Review

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Id.* at 687-88, 694.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In reviewing ineffective-assistance claims, a court must be careful to avoid second-guessing counsel's strategic decisions. "Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* at 689. "We look at counsel's challenged conduct at the time of his representation of the defendant and we avoid making judgments based on hindsight." *Ragland v. United States*, 756 F.3d 597, 600 (8th Cir. 2014) (citation and quotations omitted). "The defendant bears the burden to overcome the strong presumption that counsel's performance was reasonable." *Thomas v. United States*, 737 F.3d 1202, 1207 (8th Cir. 2013).

B. Douglas's Claims

1. Rejected Guilty Plea

Douglas first contends that, if Goetz had properly explained the concept of constructive possession to him, Douglas would have accepted the government's plea offer and thus received a lower sentence.

The sole issue at trial was whether Douglas possessed the shotgun, and the focus of the parties was the credibility of the three witnesses (Hoiland, Ryberg, and Petric)

who testified that Douglas *actually* possessed the shotgun. But during the prosecutor's closing argument, he very briefly mentioned the concept of *constructive* possession. Specifically, the prosecutor suggested—almost as an aside—that, even if the jury did not find that Douglas touched the weapon, the jury could still convict him if he knew that the shotgun was on the Easter property and asserted control over that property by asking the officers to leave. Douglas claims that Goetz never explained this concept of constructive possession to him—and, in particular, that Goetz never told him that he could be convicted merely because he knew of the shotgun and attempted to assert control over the property. Had he known this, Douglas says, he would have pleaded guilty.

Douglas and Goetz offered conflicting testimony at the evidentiary hearing on Douglas's § 2255 motion. Douglas testified that Goetz never spoke to him about the concept of constructive possession and that he had never heard of the concept until the prosecutor mentioned it during closing arguments. By contrast, Goetz testified that he had dozens of discussions with Douglas, and that in many of those discussions he explained the concept of constructive possession (although he may not have used—or always used—the precise term "constructive possession"). Specifically, Goetz testified that he explained to Douglas on multiple occasions that the government did not have to

prove that Douglas actually touched the shotgun, but only that Douglas exercised dominion and control over it.

The Court credits Goetz's testimony that he explained the concept of constructive possession to Douglas. The Court is very familiar with Goetz, who has an active federal practice and who is a highly regarded member of the criminal-defense bar. Goetz is smart, careful, thorough, and devoted to his clients, and Goetz has acted honestly and ethically in all of his many dealings with this Court. Moreover, Goetz's demeanor while testifying was calm, precise, measured, and not at all defensive or evasive. Finally, Goetz's testimony at the hearing was entirely consistent with the documentary evidence. The Court therefore finds that Goetz was telling the truth and that he did, in fact, explain to Douglas that he could be convicted of possessing the shotgun—even if he never touched it—as long as he exercised dominion and control over the weapon.

In testifying to the contrary, Douglas was likely lying. This Court found the trial testimony of Hoiland, Ryberg, and Petric to be credible—and Petric's attempted recantation of his trial testimony to be incredible—and thus this Court necessarily disbelieves Douglas's claim that he never discharged the shotgun. Moreover, Douglas and his supporters have been desperate to get his conviction or sentence vacated; as noted, the Court strongly suspects that they pressured Petric into his clumsy attempt to recant his trial testimony.

It is possible, however, that Douglas simply did not pay much attention when Goetz described the concept of constructive possession. Again, the focus of all of those involved in the trial—defendant, attorneys, jurors, and judge—was on the credibility of the three witnesses whose testimony put the shotgun in Douglas's hands. As the Court explains below, no one could have anticipated that the prosecutor would introduce the concept of constructive possession during his closing argument. It is thus possible that Douglas did not focus on constructive possession until he heard the government suggest in its closing argument that he could be found guilty even if he never touched the shotgun as long as he knew that the gun was stored on the Easter property and asserted control over that property by demanding that the officers leave. Hearing the concept put so starkly in a closing argument may have made more of an impression on Douglas than hearing the concept described more abstractly in the course of numerous pretrial conversations with his attorney.

To the extent that Douglas may contend that Goetz was ineffective because he did not predict and explain the specific theory of constructive possession raised by the government in its closing argument, the Court rejects that contention. The government's constructive-possession argument was, to put it mildly, a stretch. It is true that, when a weapon is found in a defendant's own home, the "normal inference of dominion" permits a jury to find that the defendant possessed it. *See United States v.*

White, 816 F.3d 976, 986 (8th Cir. 2016) (citation and quotations omitted). But the "normal inference of dominion" did not fit any reasonable view of the evidence in this case. Unlike the defendant in *White*, Douglas did not own the property on which the gun was found. His defense consisted of evidence that Dorstad owned the gun and that Petric and Hoiland fired it. To accept the government's theory of constructive possession, then, the jury would have to believe that Douglas had both the power and intent to exercise dominion and control over the gun even though (1) the large wooded lot on which the gun was hidden belonged to someone else; (2) the gun belonged to someone else; and (3) Douglas never touched the gun. *See* ECF No. 63 at 7 (jury instruction defining "constructive possession").

This is an extremely broad view of the concept of constructive possession. People are not ordinarily considered to have dominion and control over the personal property of anyone who comes onto their property. In this case, however, the government was stretching the concept even further, arguing that Douglas had dominion and control over the personal property of anyone who came onto *someone else's* property. If the government's theory were correct, it would mean that a person who asks the police (or anyone else) to leave *any* piece of property is in constructive possession of *everything* on that property of which he was aware—wallets, purses, jewelry, clothing, cars—regardless of who owns those the items. On this theory,

Douglas would have constructively possessed the *officers'* weapons (as well as their squad cars and badges).

This is not an accurate view of the law, nor is it a remotely reasonable inference for a jury to draw. To prove constructive possession, the government had to prove that Douglas had the power and intent to exercise dominion and control over the *firearm*; it was not enough to prove that Douglas (unsuccessfully) attempted to exercise dominion and control over the *land* owned by the Easters. *Cf. Henderson v. United States*, 135 S. Ct. 1780 (2015) (permitting a felon to nominate a person to whom a confiscated gun should be given did not amount to constructive possession by the felon). The fact that Goetz did not predict that the government would attempt to use the concept of constructive possession in such an unexpected manner does not render his assistance ineffective. *See Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities").

Douglas also raises several other alleged errors in connection with his decision to reject the government's plea offer. He contends that Goetz failed to explain that chemical particles found on his hands were consistent with firing the gun, and he contends that Goetz erroneously told him that the DNA of two other individuals had been found on the gun.

The Court credits Goetz's testimony, however, that he thoroughly discussed the results of the gunshot-residue test with Douglas. In particular, the Court credits Goetz's testimony that he explained to Douglas that the results were inconclusive and that any elements on his hands could be residue from fireworks.

Similarly, the Court credits Goetz's testimony that he never told Douglas that anyone else's DNA had been found on the gun and instead told Douglas that the lab was unable to develop *any* DNA profile from the samples taken from the gun. Goetz's testimony is corroborated by the fact that Goetz gave Douglas a copy of the two-page lab report, which plainly states that "[n]o DNA profiles were obtained from" the samples collected from the gun. Goetz Aff. Ex. 1 at 1. Douglas points to a letter that he later sent to Goetz asking for DNA testing of Petric and Dorstad. *See* Goetz Aff. Ex. 2 at 1. Douglas contends that he would not have sent such a letter unless Goetz had told him that DNA had been found on the gun. But the letter can just as easily be read as a request to keep looking for DNA on the gun—a request that would be consistent with Goetz's testimony that Douglas knew that no DNA had yet been found.

Finally, Douglas claimed that, although Goetz orally told him about a plea offer under which Douglas's potential sentence would be capped at 10 years, Douglas never saw a proposed plea agreement that was attached to an affidavit that Goetz submitted in response to Douglas's § 2255 motion. *See* Goetz Aff. Ex. 4. The Court, however,

credits Goetz's testimony that he transmitted the proposed written agreement to Douglas. Goetz's testimony is corroborated—and Douglas's testimony is contradicted—by a cover letter addressed to Douglas that indicates that Goetz mailed the written plea agreement to him. *See* Goetz Aff. Ex. 6.

Setting that aside, the proposed written plea agreement that Douglas suggests he would have accepted (had he known of it) contemplates that Douglas could be subject to a 15-year mandatory-minimum sentence under the Armed Career Criminal Act. *See* Goetz Aff. Ex. 4 at 2-3. If Douglas is to be believed, however, he rejected a plea offer that would have capped his sentence at 10 years. If Douglas was not willing to accept a 10-year *maximum* sentence, he surely would not have accepted the possibility of a 15-year *minimum* sentence.[5] Consequently, even if Goetz had failed to convey the written plea agreement to his client, Douglas cannot show prejudice. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) (defendant must show that, but for the ineffective advice of counsel, there is a reasonable probability that he would have accepted the plea).

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[5]Douglas testified that he would have accepted the written plea agreement if he had understood the concept of constructive possession. As discussed above, however, Goetz adequately explained the concept of constructive possession to Douglas and could not reasonably have been expected to predict the government's specific argument regarding constructive possession—an argument that was both legally and factually unsound.

2. Failure to Call Expert Witness

At trial, the government presented the testimony of Allison Murtha, an expert on gunshot residue. As Murtha explained, discharging a gun creates a plume of vapor that contains particles of lead, antimony, and barium. As a result of heat from the discharge and the density of the plume, some of these particles fuse together into two- and three-component particles. When all three elements fuse, the resulting three-component particles are known as "gunshot residue," and the presence of such residue conclusively establishes that a gun was fired. By contrast, although two-component particles are consistent with a gunshot, they may have other origins, and thus the presence of two-component particles does not establish that a gun was fired.

Murtha analyzed samples taken from Douglas's hands shortly after he was arrested. The collection paperwork indicated that Douglas was not allowed to wash his hands or otherwise have access to water before the samples were collected. Murtha found no gunshot residue and only three two-component particles consisting of lead and antimony. At trial, Murtha essentially testified that the particulate evidence was inconclusive; it neither proved nor disproved that Douglas had fired a gun. She also testified that particles are easily removed through such ordinary activity as putting one's hands in one's pockets or running one's hands through one's hair, and that wind, rain, and other factors can also reduce or eliminate gunshot residue.

On cross-examination by Goetz, Murtha agreed that the two-component particles found on Douglas's hands were consistent with shooting off fireworks, which Douglas had done earlier that evening. Murtha also admitted that the one-component particles found on Douglas's hands included iron and copper, which are *in*consistent with a gunshot. In his closing argument, Goetz pointed to the lack of gunshot residue on Douglas's hands and argued that, given the number of times that the gun was fired, the short length of time between the last shot and the arrival of police, and the lack of any other factor (such as rain or wind) that would have removed the gunshot residue from Douglas's hands, Douglas could not possibly have fired the gun. Goetz also highlighted the fact that the police had failed to obtain or test samples from Douglas's clothing or from anyone else at the scene.

Douglas's chief complaint about Goetz's handling of the gunshot-residue evidence is that Goetz did not call an expert witness of his own, but instead relied on his cross-examination of Murtha. At the evidentiary hearing on his § 2255 motion, Douglas presented testimony from Christopher Robinson, another gunshot-residue expert. Robinson testified that, contrary to Murtha's claim, the *absence* of gunshot residue on Douglas's hands *did* prove that Douglas had not fired the gun. According to Robinson, the type of shotgun at issue—and the fact that it was sawed off—made it inevitable that gunshot residue would get all over the shooter. Robinson also testified

that standard protocol would have been to take samples from everyone at the scene, and he faulted the police for failing to do so. Douglas argues that Goetz should have called Robinson or another expert witness to present such testimony at trial.

As noted, in evaluating claims of ineffective assistance of counsel, a court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. It is easy, in hindsight, to say that Goetz should have presented expert testimony similar to Robinson's. "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). It may be reasonable for an attorney to decide to rely on cross-examination to expose weaknesses in a government expert's testimony. *Id.* Likewise, it may be reasonable for an attorney to decide to avoid the risk of exposing a defense expert to cross-examination by the government. *See Holder v. United States*, 721 F.3d 979, 990-91 (8th Cir. 2013).

Applying these principles, Goetz's decision not to call an expert witness was within the wide range of reasonable professional assistance. Goetz testified that he considered calling an expert but, in light of the weakness of the government's expert evidence, he decided instead to focus on attacking the credibility of Hoiland, Ryberg, and Petric. Goetz was correct in assessing the expert evidence as weak; indeed, Goetz

made good use of those weaknesses during closing argument, and he was even able to make a credible argument that the testimony of the government's expert was more consistent with Douglas's innocence than with his guilt.

Moreover, Robinson's testimony had its own problems. Robinson testified that ample amounts of DNA should have been found on the gun if it had been fired in the manner described at trial, yet no DNA was found. As there was no dispute that *someone* had fired the gun multiple times, Robinson's testimony that a great deal of DNA should have been found on the gun would have given the government an opportunity to impeach his testimony. Robinson suggested that the lack of DNA may have been the result of incompetence in collecting samples, but Robinson admittedly knew nothing about how the samples were collected. A jury might well have concluded that Robinson was simply not credible—or that the incompetence that explained the failure to find DNA on the gun also explained the failure to find gunshot residue on Douglas's hands. It was reasonable for Goetz to decide, as a matter of strategy, to avoid a battle of the experts and instead emphasize the weakness of the government's expert testimony, which he did with skill and vigor. *Holder*, 721 F.3d at 990-91 (finding attorney's decision not to present expert testimony was reasonable in light of potential problems with a defense expert); *see also Richter*, 562 U.S. at 111 ("it is

difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy").

Douglas also contends that Goetz was ineffective because he failed to offer evidence that there is gunshot residue in the soil on the Easter property as well as in any soil where iron-ore mining takes place. But Goetz had no reason to prove an alternative source of gunshot residue for the simple reason that *none was found* on Douglas's hands. To the extent that Douglas may be referring to the two-component particles that were found on his hands, Goetz *did* offer a plausible alternative explanation for those particles: the fact that Douglas had shot off fireworks earlier in the evening. Given the weakness of the government's forensic evidence, Goetz's decision not to offer additional alternative theories was reasonable.

3. Failure to Appeal Denial of New Trial

Douglas next argues that Goetz was ineffective because he refused to appeal the denial of Douglas's motion for a new trial, despite Douglas's request that he do so.

As discussed above, a few months after trial, Douglas moved for a new trial on the basis of Petric's recantation. The Court denied the motion after an evidentiary hearing. In denying the motion, the Court identified numerous reasons why Petric's new testimony was not credible, including Petric's demeanor while testifying at the evidentiary hearing. *See* ECF No. 105 at 4-9.

Because "effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or non-frivolous issue on appeal." *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998). In this case, Goetz acted wisely in focusing on the Fourth Amendment issue and forgoing a challenge to the denial of the new-trial motion. The constitutionality of the search that produced the shotgun was a difficult issue, *see* ECF No. 44 at 1 (describing the issue as "close"), and this Court's decision not to suppress the evidence was reviewed de novo, *see Douglas*, 744 F.3d at 1068 (reviewing legality of search de novo). By contrast, this Court's denial of the motion for a new trial would have been reviewed for a "clear" abuse of discretion. *See United States v. Papajohn*, 212 F.3d 1112, 1117-18 (8th Cir. 2000), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Moreover, the Court's denial of the new-trial motion was based in part on credibility determinations, and a trial judge's credibility determinations are "virtually unassailable on appeal." *See United States v. Garcia*, 646 F.3d 1061, 1072 (8th Cir. 2011) (citation and quotations omitted).

Given these hurdles, there was virtually no chance that the Eighth Circuit would have reversed this Court's denial of Douglas's motion for a new trial. By raising the issue on appeal, Goetz would only have given the government an excuse to dwell on the many absurdities of Petric's recantation and the likelihood that Douglas's family

members or friends put him up to it. Goetz's decision to focus on his vastly stronger arguments under the Fourth Amendment—which, incidentally, might have resulted in an acquittal, as opposed to merely a new trial at which Petric would have been impeached to devastating effect—was eminently reasonable.

4. Reasonable Expectation of Privacy and Constructive Possession

Douglas next argues that Goetz was ineffective because he did not argue to the jury that Douglas could not have constructively possessed the firearm because, in ruling on Douglas's suppression motion, the Court found that he lacked a reasonable expectation of privacy in the plastic bag in which the gun was found.

There are several problems with this argument:

First, whether Douglas's expectation of privacy in the bag was objectively reasonable is a legal question that is separate and distinct from the factual question of whether Douglas had the intent and the ability to exert dominion and control over the shotgun. The Court would therefore not have allowed Goetz to make any argument to the jury on the basis of the Court's legal conclusions regarding Douglas's reasonable expectation of privacy in the plastic bag. In other words, Douglas is faulting Goetz for failing to make an argument that the Court would not have allowed him to make.

Second, Goetz *did* argue to the jury that the government's constructive-possession theory was a misstatement of the law and made no sense under the facts of

the case. Goetz's argument was entirely proper, and it was the most that Goetz could or should have done on the subject.

Finally, as discussed above, the Court agrees with Goetz that the trial focused almost entirely on the issue of actual, not constructive, possession. The Court doubts very much that the jury gave even two seconds' thought to the government's constructive-possession argument. Goetz was wise not to make the argument appear to be more of a threat than it was.

In short, Goetz was not ineffective, nor was Douglas prejudiced by any alleged ineffectiveness.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant John Douglas's motion to vacate, set aside, or correct his sentence [ECF No. 137] is DENIED with respect to all claims save for his claim under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

2. The Court will defer ruling on Douglas's *Johnson* claim until after the United States Supreme Court issues its decision in *Beckles v. United States*, No. 15-8544, *cert. granted*, 136 S. Ct. 2510 (2016).

Dated: December 22, 2016

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge