UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SHONDOR JANELL ARCENEAUX, Defendant-Appellant.	No. 19-16011 D.C. Nos. 2:11-cv-02781-MCE-EFB 2:03-cr-00371-MCE-EFB-6 Eastern District of California, Sacramento ORDER

Before: IKUTA and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the [section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES OF AMERICA, Respondent, vs. SHONDOR JANELL ARCENEAUX, Movant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
2018 U.S. Dist. LEXIS 164660
No. 2:03-cr-0371-MCE-EFB P2
September 25, 2018, Decided
September 25, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Post-conviction relief denied at, Certificate of appealability denied United States v. **Arceneaux**, 2019 U.S. Dist. LEXIS 65179 (E.D. Cal., Apr. 15, 2019)

Editorial Information: Prior History

United States v. **Arceneaux**, 2014 U.S. Dist. LEXIS 19216 (E.D. Cal., Feb. 13, 2014)

Counsel **{2018 U.S. Dist. LEXIS 1}**Shondor Janell **Arceneaux**, Defendant, Pro se, Memphis, TN.

For Shondor Janell **Arceneaux**, Defendant: Barry Morris, LEAD ATTORNEY, Attorney At Law, Walnut Creek, CA.

For Shawn Micheal Conley, Defendant: Clarence Emmett Mahle, LEAD ATTORNEY, Law Offices of C. Emmett Mahle, Sacramento, CA.

For USA, Plaintiff: Michele M. Beckwith, GOVT, LEAD ATTORNEY, Jason Hitt, United States Attorney's Office, Sacramento, CA.

Judges: EDMUND F. BRENNAN, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: EDMUND F. BRENNAN

Opinion

FINDINGS AND RECOMMENDATIONS

Movant Shondor **Arceneaux** is a federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.1 **Arceneaux** challenges his conviction and sentence on three counts of bank robbery, in violation of 18 U.S.C. § 2113, and three counts of using a firearm in connection with those robberies, in violation of 18 U.S.C. § 924(c)(1). He initially sought post-conviction relief on the grounds that: (1) the government violated his Sixth Amendment right to notice and his Fifth Amendment right to due process when it failed to notify him in the indictment that he faced mandatory consecutive sentences of 25 years in prison on the firearm counts; (2) the trial court lacked jurisdiction to sentence him; (3) his trial and appellate counsel**{2018 U.S. Dist. LEXIS 2}** rendered ineffective assistance; and (4) the government violated his right to due process in failing to advise him that Dakina Sudduth would be a witness at his trial. Then, in a second amended § 2255 motion, **Arceneaux** added a claim that three of his convictions should be set aside because armed bank robbery pursuant to 18 U.S.C. § 2113(a), (d) is no longer a crime of violence within the meaning of 18 U.S.C. § 924(c)(3) in the wake of the Supreme Court's decision in

This motion was assigned, for statistical purposes, the following civil case number: No. 2:11-cv-2781-MCE-EFB P.
2

In recent years the Supreme Court has issued two Johnson decisions which are commonly referred to as *Johnson I* and *Johnson II. Johnson I* refers to *Johnson v. United States*, 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010) wherein the court held that the term 'physical force' contained in the ACCA definition of 'violent felony' "means violent force - that is force, capable of causing physical pain or injury to another person. *Id.* at 559 U.S. at 140. Unlike its successor, *Johnson I* did not substantively address the ACCA's residual clause.
3

In *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), the Supreme Court held that the Sixth Amendment right to trial by jury requires a jury to determine facts that increase a mandatory minimum sentence. However, the *Alleyne* decision does not provide movant with a basis for relief because it is not retroactively applicable to cases on collateral review. The Ninth Circuit has concluded that *Alleyne* does not apply retroactively to cases that became final before that decision was announced. *See Hughes v. United States*, 770 F.3d 814, 818-19 (9th Cir. 2014); *In re Mazzio*, 756 F.3d 487, 491 (9th Cir. 2014). *See also Broussard v. United States*, No. 1:03-CR-05054, 2014 U.S. Dist. LEXIS 83517, 2014 WL 3530003, at *4 (E.D. Cal. July 14, 2014) (noting that district courts in the Ninth Circuit have "uniformly" concluded that the decision in *Alleyne* is not retroactive, and citing cases); *Jackson v. United States*, Nos. 5:11-CR-00231-F-1, 5:13-CV-00284-F, 2014 U.S. Dist. LEXIS 112972, 2014 WL 4060270, at *4 (E.D.N.C. Aug. 14, 2014) (motion to amend § 2255 motion to add claim based on *Alleyne* denied because *Alleyne* not retroactive to cases on collateral review).
4

BARRY MORRIS, SBN #48368
Attorney at Law
1220 Oakland Blvd. #200
Walnut Creek, CA 94596
(925) 934-1100
fax: (925) 934-1122
barrymorris@mac.com

Attorney for Defendant
SHONDOR JANELL ARCENEAUX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, No. 2:03-CR-371 MCE/EFB

Plaintiff,

v.

SHONDOR JANELL ARCENEAUX,

Defendant./

First Amended Motion Pursuant to 28 U.S.C. §2255

Table of Contents

Table of Authorities

BARRY MORRIS, SBN #48368
Attorney at Law
1220 Oakland Blvd. #200
Walnut Creek, CA 94596
(925) 934-1100
fax: (925) 934-1122
barrymorris@mac.com

Attorney for Defendant
SHONDOR JANELL ARCENEAUX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, No. 2:03-CR-371 MCE/EFB

Plaintiff,

v.

SHONDOR JANELL ARCENEAUX,

Defendant./

First Amended Motion Pursuant to 28 U.S.C. §2255

I.

The Court Should Dismiss Defendant's Convictions on Counts 4, 12, and 18 Because A Conviction under 18 U.S.C. §2113(a)(d) is Not a Crime of Violence Within the Meaning of 18 U.S.C. §924(c)(3)

A.

Introduction

In February of 2006, Mr. Arceneaux was convicted of three counts of armed bank robbery, in violation of 18 U.S.C. 2113(a)(d). In addition, because a gun was involved, Mr. Arceneaux was also convicted of three counts of using a firearm, a violation of 18 U.S.C. 924(c)(1). He was sentenced to 977 months

imprisonment, 293 months on the robbery charges and the remainder on the 924(c) counts. (See Exhibit A, Judgment) In this case, the 924(c) enhancement was truly the tail that wagged the dog.

On October 20, 2011, defendant SHONDOR JANELL ARCENEAUX filed a motion pursuant to 18 U.S.C. §2255, in *propria persona*. Subsequent to the filing of the motion, this Court appointed counsel to assist defendant in the conduct of an evidentiary hearing on one of the claims of the initial §2225 motion.

In June of 2015, the United States Supreme Court issued its opinion in *Johnson v. United States*, 135 S.Ct. 2551 (2015) (hereinafter, *Johnson II*) holding that the residual clause of 18 U.S.C. §924(c) was unconstitutionally vague. That decision was made fully retroactive by *Welch v. United States*, 136 S. Ct. 1257 (2016). On May 9, 2016, Mr. Arceneaux filed a motion, *in propria persona,* to amend the previously filed §2255 motion by adding a claim based on the decision *Johnson II* decision.

On May 19, 2016, this Court issued an order directing the Clerk to terminate the motion to amend on the grounds that defendant was represented by counsel. On that same day, counsel petitioned this Court to expand counsel's appointment to include the *Johnson* issue. On May 23, 2016, this Court issued an order so expanding the appointment of counsel.

The original motion alleged five grounds in support thereof. Rather than redrafting that motion to include the *Johnson* issue, what follows should simply be denominated as Ground Six of the original §2225 motion. Thus this First Amended Motion incorporates, by reference, the previously filed §2225 motion.

B.

18 U.S.C. §2113(a)(d) is Not a Crime of Violence for Purposes of 18 U.S.C. §924(c)(3)

1.

Section 924(c) Applies Only to Predicate Crimes Whose Elements are No Broader than the Federal Generic Definition of That Crime

At first blush, the contention that armed bank robbery is not a crime of violence may seem to be oxymoronic in concept. As Judge Watford noted in his recent concurrence in *United States v. Parnell*, 2016 U.S. App. LEXIS 6629*15-16 (9th Cir. 2016)

> "I confess I was initially inclined to affirm the sentence. The notion that robbery is not a 'violent felony,' as that term is defined in the Armed Career Criminal Act (ACCA), strikes me as counterintuitive to say the least. Holding that armed robbery doesn't qualify as a violent felony seems even more absurd. But, as the court's opinion persuasively explains, that conclusion is compelled...¶ To qualify now as a violent felony, armed robbery must have as an element the use, attempted use, or threatened use of violent physical force."

Judge Watford was compelled by clear Supreme Court precedent; armed bank robbery is not a "crime of violence" as defined by §924(c). *Johnson II, supra; Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *Shepard v. United States*, 544 U.S. 13, 24 (2005); *Taylor v. United States*, 495 U.S. 575, 600 (1990).

The reason that armed bank robbery does not come within the provisions of §924(c) is a natural consequence of the purpose and scope of that statute.

Section 924(c) was designed to impose a uniform eligibility for a sentence enhancement upon a myriad of varying state statutes, not to mention a plethora of federal statutes. Although the "Act was intended to supplement the States' law enforcement efforts against 'career' criminals," Congress did not want the application of §924(c) to depend on the vagaries of state law definitions of criminal conduct. *Taylor v. United States* 495 U.S. 575, 581 (1990).

As the high court noted in *Taylor,* the "general approach" of Congress was to "us[e] uniform, categorical definitions" to "capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law." *Taylor, supra,* 495 U.S. at 590.

Consequently, "Congress intended that the enhancement provision [§924(c)] be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction." *Id.* 495 U.S. at 588-589.

To effectuate a uniform application of §924(c) to violent crimes, no matter what they were called in the particular jurisdiction or where they were committed, the high court adopted a categorical approach in *Taylor, supra,* to determine whether a violation of a particular statute invoked the provisions of §924(c). The court noted that "[i]f the state statute is narrower than the generic view...there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Taylor, supra,* 495 U.S. at 599.

On the other hand, if the statute at issue prohibits conduct that is *de hors*

the federal generic version of that crime, "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, *even if the defendant actually committed the offense in its generic form.*" *Descamps, supra; United States v. Acosta-Chavez*, 727 F.3d 903, 907 (9th Cir. 2013). (emphasis added)

In short, faced with the choice of being all encompassing, for example, including all robberies no matter how they were defined by the various jurisdictions, versus consistency of application, Congress chose the latter. Thus §924(c) excludes crimes, federal or state, which are broader in scope than their federal generic equivalents to make sure that the application of §924(c) would be uniform and consistent, nationwide.

2.

Section 924(c) Does Not Apply to Violations of 18 U.S.C. §2113(a), Bank Robbery, Because §2113(a) is Broader than the Federal Generic Definition of Robbery, Encompassing Conduct that is Outside the Scope of the Federal Generic Definition of Robbery

Section 2113(a) provides that "[w]hoever, by force and violence, *or by intimidation*, takes, or attempts to take, from the person...any property or money...belonging to...any bank...[s]hall be fined under this title or imprisoned not more than twenty years, or both." (emphasis added.) The Ninth Circuit has explained that the federal generic version of robbery is an "aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving *immediate danger to the person.*" *United States v. Velasquez-Bosque,* 601 F.3d 955, 958 (9th Cir. 2010) (emphasis added); *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015).

Thus while the federal definition requires proof of "circumstances involving immediate danger to the person" §2113(a) requires no such proof. Section 2113(a) is broader than the generic definition because "intimidation" is more encompassing than "immediate danger to the person." "Intimidation" and "immediate danger to the person" are hardly congruent in scope; one can be intimidated without being in immediate danger.

Moreover, the "intimidation" element of §2113(a) has been broadly defined to include conduct that cannot, by any stretch of the imagination, be read to be equivalent to "immediate danger to the person." *United States v. Velasquez-Bosque, supra.* For example, a defendant's mere reference to possessing a gun, without actually displaying displaying the gun, without making any threat to use the gun, has been held to be sufficient to sustain a conviction *See United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996). Under §2113(a), "the robber's creation of even *the appearance of dangerousness* is sufficient to subject him to enhanced punishment." *United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989). (emphasis added)

Along the same lines, simply telling a teller to "[g]ive me all your money," accompanied by the presentation of a 'black pouch'" has been held sufficient to constitute "intimidation" under §2113(a). *United States v. Robinson*, 527 F.2d 1170, 1172 (6th Cir. 1975); See also *United States v. Clark*, 227 F.3d 771, 774-775 (7th Cir. 2000), ["It is important that you remain calm and place all of your twenties, fifties and hundred dollar bills on the counter and act normal for the next fifteen minutes" constituted intimidation.]; *United States v. McCarty*, 36 F.3d 1349, 1351 (5th Cir. 1994), [A note that stated: "Be calm. This is a robbery."];

United States v. Amos, 566 F.2d 899, 901 (4th Cir. 1977), [sufficient evidence of intimidation where robber, with hand in pocket, told bank manager not to sound alarm and directed tellers to hand over money]; *United States v. Johnston*, 543 F.2d 55-59 (8th Cir. 1976), [demanding money with hand in pocket sufficient to prove intimidation].

Because it encompasses conduct outside the scope of the federal generic definition, because it sweeps "more broadly than the generic crime," §2113(a) "cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps, supra; United States v. Acosta-Chavez, supra,* 727 F.3d at 907; *United States v. Dixon, supra,* 805 F.3d at 1197.

In *Dixon, supra,* the Ninth Circuit held that California Penal Code §211, robbery, did not qualify as a predicate crime for the purposes of §924 because a violation of §211 may be committed when the defendant unintentionally uses force. *Id.* 805 F.3d at 1197. "Because *Anderson*[1] shows that one can realistically violate CPC §211 in a manner that is not covered by the ACCA's definition of "violent felony," a violation of CPC §211 is not categorically a "violent felony" under the ACCA." *Dixon, supra,* 805 F.3d at 1197-1198.

3.

Defendant's Sentencing Pursuant to 18 U.S.C. §2113(d) Does Not Bring His Conviction of a Violation of §2113(a) Within the Scope of the Federal Generic Robbery Because §2113(d) is Not an Element of §2113(a), but Simply a Penalty Enhancement

For each count of §2113(a) that defendant was convicted, there was a parallel conviction of a violation of §2113(d). Section 2113(d) provides that

[1] *People v. Anderson*, 51 Cal. 4th 989, 995 (2011).

> "Whoever, *in committing, or in attempting to commit, any offense defined in subsections (a) and (b)* of this section...puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both." (emphasis added)

From the explicit wording of §2113(d), it is plain that 2112(d) is not an element of the federal bank robbery statute, §2113(a). Section 2113(d) specifically states that it applies to "*any offense defined* in subsections (a) and (b)." Thus the section itself acknowledges that the definition of the elements of bank robbery, as herein relevant, is found only in §2113(a). As the court noted in *Taylor, supra,* §2113(d) is a "sentence enhancement provision," not an element of bank robbery. "This statute provides a sentence enhancement for a defendant who is convicted..." *Id.* 495 U.S. at 577; *Abimbola v. Ashcroft*, 378 F.3d 173, 175 (2d Cir. 2004).

Section 2113(d) enhances the sentence based upon a factual determination of the means by which a violation of §2113(a) was effectuated. "Sentencing courts may 'look only to the statutory definitions'—*i.e.,* the elements—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions." *Descamps, supra,* 133 S.Ct. at 2283; *Taylor, supra,* 495 U.S. at 600.

4.

Section 924(c)(3)(B) is Unconstitutionally Vague

Section 924(c)(3)(B) provides, in pertinent part, that, "[f]or purposes of this subsection the term 'crime of violence' means an offense that is a felony and...that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the

offense." In *Johnson II*, the Supreme Court held that an almost identical residual clause of 18 U.S.C.S. § 924(e)(2)(B) was unconstitutionally vague. The statute at issue in *Johnson II* provided that a "violent felony" was ""any crime punishable by imprisonment for a term exceeding one year...that...involves conduct that presents a serious potential risk of physical injury to another." *Id., supra,* 135 S. Ct. 2555-2556.

The *Johnson II* court held that the residual clause of §924(e)(2)(B) was unconstitutionally vague because the high court was "convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." *Johnson II, supra,* 135 S.Ct. at 2556.

In *Dimaya v. Lynch,* 803 F.3d 1110, 1114 (9th Cir. 2015), the Ninth Circuit compared the language of the statute at issue in *Johnson II, supra,* with 18 U.S.C. § 16(b), which defines a crime of violence as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

The court first noted that the language in §16(b) was subject to the "same mode of analysis" as the statute at issue in *Johnson II.* "Specifically, courts considering both §16(b) and the residual clause must decide what a "'usual or ordinary violation' of the statute entails and then determine how great a risk of injury that 'ordinary case' presents." *Id.* 803 F.3d at 1115. The *Dimaya* court concluded that "a careful analysis of the two sections, the one at issue here and