

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7128, US v. Tracy Allen
4:05-cr-00340-TLW-1, 4:16-cv-01506-TLW

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons.
(www.supremecourt.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED

COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

Appendix A

PETITION FOR REHEARING AND PETITION FOR REHEARING EN

BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

Appendix A

FILED: October 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7128
(4:05-cr-00340-TLW-1)
(4:16-cv-01506-TLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TRACY JARVIS ALLEN

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7128

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRACY JARVIS ALLEN,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Terry L. Wooten, Senior District Judge. (4:05-cr-00340-TLW-1; 4:16-cv-01506-TLW)

Submitted: October 17, 2019

Decided: October 22, 2019

Before MOTZ and QUATTLEBAUM, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Tracy Jarvis Allen, Appellant Pro Se. Justin William Holloway, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Florence, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Tracy Jarvis Allen seeks to appeal the district court's order denying relief on his authorized, successive 28 U.S.C. § 2255 (2012) motion in which Allen raised a *Johnson** challenge to his armed career criminal designation. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Allen has not made the requisite showing. Accordingly, we deny Allen's motion for a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Appendix A

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Tracy Jarvis Allen,

PETITIONER

v.

United States of America,

RESPONDENT

Crim. No. 4:05-cr-00340-TLW-1
C/A No. 4:16-cv-01506-TLW

Order

This matter comes before the Court for consideration of the petition to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 filed by Petitioner Tracy Jarvis Allen. For the reasons stated below, the petition is denied.

I. Factual and Procedural History

Petitioner was charged with and convicted at trial of being a felon in possession of a firearm, and the Court sentenced him to 288 months incarceration. ECF No. 40.

At sentencing, Petitioner was classified as an armed career criminal under the Armed Career Criminal Act (ACCA), which imposes a mandatory minimum fifteen-year sentence on a felon who possesses a firearm and who has three or more prior convictions for committing certain drug crimes or “violent felon[ies].” 18 U.S.C. § 924(e)(1).¹ His Presentence Investigation Report (PSR) classified the following

¹ If he had not been classified as an armed career criminal, he would have faced a statutory maximum of ten years incarceration on Count 3. 18 U.S.C. §§ 922(g)(1), 924(a)(2).

convictions as ACCA predicate convictions:

- (1) Armed Robbery (PSR ¶ 28 – Docket No. 96-JU-16-163);
- (2) Armed Robbery (PSR ¶ 28 – Docket No. 96-JU-16-164);
- (3) Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN) (PSR ¶ 30);
- (4) Threaten the Life, Person, or Family of Public Employee (PSR ¶ 31);
- (5) Failure to Stop for a Blue Light (FSBL) (PSR ¶ 32).

After judgment was entered, he filed a direct appeal, but the Fourth Circuit summarily affirmed. *United States v. Allen*, No. 05-4829 (4th Cir. Jan. 30, 2006).

Petitioner filed a prior § 2255 petition, which the Court denied on the merits. ECF Nos. 53, 67. He filed a direct appeal, but the Fourth Circuit declined to issue a certificate of appealability and dismissed the appeal. *United States v. Allen*, 315 F. App'x 485 (4th Cir. 2009).

On March 14, 2016, Petitioner filed in the Fourth Circuit a motion pursuant to 28 U.S.C. § 2244 requesting permission to file a successive § 2255 petition. No. 16-245 (4th Cir.), ECF No. 2. The Fourth Circuit granted that motion on May 10, 2016, No. 16-245 (4th Cir), ECF No. 13, and his § 2255 petition was filed in this Court that day, ECF No. 105.

In Petitioner's § 2255 petition, he challenges each of his predicate convictions, asserting that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and other cases, none of these convictions remain ACCA predicate offenses. Thus, he argues that he no longer has the requisite number of ACCA predicate convictions and is therefore entitled to a resentencing without the ACCA enhancement. The

Government filed a motion to dismiss, asserting that the two armed robberies, CDVHAN, and threatening a public official convictions still qualify as predicates and that he remains an armed career criminal.² ECF No. 119. He filed a response in opposition to the Government's motion. ECF No. 122.

This matter is now ripe for decision.³

II. 28 U.S.C. § 2255

Section 2255 provides that a prisoner in custody under sentence of a federal court may file a petition in the court that imposed the sentence to vacate, set aside, or correct the sentence. A petitioner is entitled to relief under § 2255 if he proves by a preponderance of the evidence one of the following: (1) that the sentence was imposed in violation of the Constitution or laws of the United States; (2) that the court was without jurisdiction to impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; or (4) that the sentence is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958) (per curiam).

In deciding a § 2255 petition, a court need not hold a hearing if “the motion

² The Government does not dispute that his FSBL conviction is no longer an ACCA predicate offense in light of *Johnson*.

³ An assistant federal public defender entered an appearance and made various filings on Petitioner's behalf, ECF Nos. 106, 108, 116, but Petitioner made it quite clear that he did not want the assistance, ECF Nos. 118, 123, so at his request, the Court has only considered his own filings. However, the Court notes that the outcome of this petition would be the same either way.

and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b). The Court has thoroughly reviewed the motions, files, and records in this case, liberally construing Petitioner’s filings, and finds that no hearing is necessary.

III. Discussion

Fourth Circuit precedent forecloses Petitioner’s argument that he no longer has the requisite convictions to be an armed career criminal.

In *United States v. Doctor*, the Fourth Circuit concluded that a South Carolina conviction for strong arm robbery is a violent felony for ACCA purposes. 842 F.3d 306, 312 (4th Cir. 2016). Three months later, the Fourth Circuit concluded that, because strong arm robbery is a lesser-included offense of armed robbery, armed robbery is also an ACCA violent felony. *United States v. Weston*, 681 F. App’x 235, 237 (4th Cir. 2017). Thus, his two armed robbery convictions remain ACCA predicate offenses.

In *United States v. Drummond*, the Fourth Circuit recently concluded that CDVHAN and its lesser-included offense of CDV are violent felonies for ACCA purposes. ___ F.3d ___, 2019 WL 2363155, at *10 (4th Cir. June 5, 2019).

Thus, regardless of whether Petitioner’s conviction for threatening a public official remains an ACCA predicate conviction,⁴ the Court concludes that he still has

⁴ While it is not necessary for the Court to decide that question to resolve this petition, the Court notes that at least one judge in this district has held that threatening a public official in violation of S.C. Code Ann. § 16-3-1040 is an ACCA violent felony. That is so because “the statute requires, at a minimum, a threat to take the life of or

at least three predicate convictions—two armed robberies and one CDVHAN—and is therefore not entitled to habeas relief.

IV. Conclusion

For the reasons stated, the Government's Motion to Dismiss, ECF No. 119, is **GRANTED** and Petitioner's petition for relief pursuant to § 2255, ECF No. 105, is **DENIED**. This action is hereby **DISMISSED**.

The Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2255 Proceedings. In order for the Court to issue a certificate of appealability, Rule 11 requires that Petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2), which in turn requires that he “has made a substantial showing of the denial of a constitutional right.” The Court concludes that he has not made such a showing, and it is therefore not appropriate to issue a certificate of appealability as to the issues raised in this petition. Petitioner is advised that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

to inflict bodily harm upon a public official or public employee,” and “one cannot threaten to take the life of another human being without threatening the use of physical force capable of causing physical pain or injury to another.” *Febrez v. United States*, No. 4:08-cr-01165-RBH-1, 2017 WL 4764810, at *3 (D.S.C. Oct. 20, 2017).