IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

FREDERICK D. DARRINGTON, JR.,	)	
	)	
Movant,	)	
	)	
v.	)	No. 4:20-CV-00490-DGK
	)	(Crim. No. 4:07-CR-00193-DGK-2)
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING § 2255 MOTION AND MOTION TO STAY

This habeas case arises out of Movant Frederick D. Darrington Jr.'s guilty plea and 300-month sentence for two counts of carjacking, in violation of 18 U.S.C. § 2119, and one count of using and carrying a firearm during a crime of violence, namely, carjacking, in violation of 18 U.S.C. § 924(c).

Pending before the Court are Movant's motion to vacate his judgment pursuant to 28 U.S.C. § 2255 (Doc. 2) and his motion to stay (Crim. Doc. 189).[1] Movant claims his § 924(c) conviction must be vacated since carjacking should not be considered a crime of violence, and that this Court should stay its decision on the motion to vacate pending the outcome of a petition of certiorari before the United States Supreme Court making this same argument. Because the Eighth Circuit has recently rejected Movant's argument, the motions are DENIED, and the Court declines to issue a certificate of appealability.

Pursuant to § 924(c)(1)(A)(ii), a defendant is subject to a higher mandatory minimum sentence if he brandishes a firearm while committing a "crime of violence," which is defined as a felony that:

[1] In what appears to be an oversight, Movant filed his motion to stay in his underlying criminal case rather than in his civil case.

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(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

Id. § 924(c)(3). Subsection A is known as the force clause; subsection B is the residual clause.

Movant asserts that carjacking "categorically fails to qualify as a 'crime of violence' under either clause" following the Supreme Court's holding in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019) (Doc. 2 at 1). *Davis*, however, only held unconstitutional the residual clause of § 924(c)(3)(B); it did not address the constitutionality of the force clause. *Id*. at 2324. To the contrary, courts that have addressed the issue, including the Eighth Circuit, have held that carjacking continues to be a crime of violence under the force clause post-*Davis*. *See Taylor v. United States*, 773 F. App'x 346, 347 (8th Cir. 2019) ("Notwithstanding the holding in *Davis*, we deny [Movant's] request for relief under § 2255 because his carjacking conviction qualifies as a crime of violence under the force clause of § 924(c)(3)(A)."), *cert. denied*, 140 S. Ct. 516 (2019); *see also Harper v. United States*, 792 Fed.App'x 385, 389 (6th Cir. 2019), *cert. denied*, — S.Ct. —, No. 19-7780, 2020 WL 3492692 (June 29, 2020); *United States v. Burke*, 943 F.3d 1236, 1238–39 (9th Cir. 2019); *Wilkes v. United States*, 791 Fed.App'x. 883, 884 (11th Cir. 2020).

In fact, in *Taylor*, the movant made the exact same argument as Movant in this case: that carjacking—which requires proof that a defendant took or attempted to take a motor vehicle "by force and violence or by intimidation"—does not satisfy the force clause because the element of "intimidation" does not necessarily imply a threatened use of force. *Id*. The Eighth Circuit explicitly rejected the argument, holding that intimidation necessarily requires a threatened use of force causing bodily harm, and, thus, satisfies the force clause of § 924(c)(3)(A). *Id*. (citing *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019) *cert. denied*, 140 S. Ct. 490 (2019)); *see also*

United States v. Ross, No. 18-2800, 2020 WL 4590124, at *6 (8th Cir. Aug. 11, 2020) (holding carjacking "necessarily involves at least the threatened use of force").

Movant disagrees with the Eighth Circuit's analysis and claims that this Court should either abandon precedent or stay the case because "the Supreme Court may be on the verge of reviewing" this legal issue in the pending petition for a writ of certiorari in *United States v. Rogers*, No, 19-07320, 2020 WL 429423 (Jan. 14, 2020) (requesting the grant of certiorari to review whether a crime committed by intimidation may constitute a crime of violence under § 924(c)) (Doc. 2 at 6). But the grant or denial of a petition for certiorari—much less a pending petition—does not overturn existing circuit precedent. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1404 n.56 (2020) (noting that denial of a petition for certiorari has no legal significance). And, contrary to Movant's argument, this Court is required to follow existing circuit precedent. *United States v. Olness*, 9 F.3d 716, 717 (8th Cir. 1993) ("Only the court en banc may overrule an earlier decision and adopt a differing rule of law.").

Accordingly, Movant's motions are DENIED. Because no reasonable jurist would grant the motion to vacate, the Court denies Movant a certificate of appealability. *See Tennard v. Dretke*, 542 U.S. 274, 276 (2004); 28 U.S.C. §§ 2255, 2253(c)(2).

IT IS SO ORDERED.

Date: August 20, 2020

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2831

Frederick D. Darrington, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cv-00490-DGK)

JUDGMENT

Before SHEPHERD, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The appellant's motion for stay is denied.

December 15, 2020

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

/s/ Michael E. Gans

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