Appendix

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANDREW CHAPNICK, Defendant-Appellant.	No. 19-56257 D.C. Nos. 2:16-cv-04185-SVW 2:16-cv-04278-SVW 2:02-cr-00144-SVW-1 2:02-cr-00145-SVW-1 Central District of California, Los Angeles ORDER

Before: BYBEE and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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); *United States v. Blackstone*, 903 F.3d 1020, 1022-23 (9th Cir. 2018), *cert. denied,* 139 S. Ct. 2762 (2019); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:16-CV-04185-SVW/2:16-cv-4278-SVW 2:02-cr-00144-SVW	Date	10/29/2019
Title	*Andrew Chapnick v. United States of America*		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE [1]

I. Background

On June 12, 2004, Petitioner Andrew Chapnick was convicted of one count of conspiracy to commit bank robbery in violation of 18 U.S.C. §§ 371, 2113(a) and one count of bank robbery in violation of 18 U.S.C. § 2113(a). Dkt. 1 at 1; Dkt. 12 at 1. Petitioner was also convicted of two counts of bank robbery in violation of 18 U.S.C. § 2113(a), three counts of armed bank robbery in violation of 18 U.S.C. §2113(a), (d), and carrying and brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). *Id.* Petitioner was sentenced to a total term of 272 months of imprisonment. Dkt. 12 at 1. Prior to defendant's sentencing hearing, the Probation Office determined that defendant was a career offender under U.S.S.G. § 4B1.1. *Id.*

On June 13, 2016, Petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Dkt. 1. The Government filed an opposition to the motion on November 3, 2016. Dkt. 12.

II. Legal Standard

A federal prisoner making a collateral attack against the validity of his conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence pursuant to § 2255, filed in

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the court which imposed the sentence. *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344-45 (1974); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a "substantial and injurious effect or influence" on the guilty plea or the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) ("We hold now that *Brecht's* harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254."). Relief is warranted only where a petitioner has shown "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346; *see also United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

A motion filed under § 2255 must be filed within a year of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

III. Analysis

A. Section 924(c)

In *Johnson v. United States*, 135 S. Ct. 2551, 2554 (2015), the Supreme Court held that the

"residual" clause of the Armed Career Criminal Act ("ACCA") was void for vagueness. 18 U.S.C.A. § 924(e)(2)(B). Petitioner argues that the holding in *Johnson* renders the similarly worded residual clause contained in § 924(c)(3)(B) unconstitutionally vague and, thus, that his second predicate offense for unarmed bank robbery and instant conviction for armed bank robbery cannot qualify as "crimes of violence" under that clause. Dkt. 1 at 14-24, 27-29. Indeed, in *United States v. Davis*, 139 S. Ct. 2319 (2019), the Supreme Court recently determined that the residual clause in § 924(c)(3)(B) is unconstitutionally vague on similar logic to that applied in *Johnson*. *Id.* at 2336. Petitioner then argues that unarmed bank robbery and armed bank robbery in violation of §§ 2113 (a), (d) are not "crimes of violence" under the "force" clause of § 924(c)(3)(A). Dkt. 1, at 14-22. Thus, Petitioner contends that he was unconstitutionally convicted of crimes of violence.

At the time Petitioner filed this motion, the question of whether unarmed bank robbery and armed bank robbery as defined in § 2113 qualified as crimes of violence under either the force clause or residual clause of § 924(c) was an unsettled question in this circuit. However, this question has since been definitively resolved. In *United States v. Watson*, the Ninth Circuit held that both unarmed bank robbery and federal armed bank robbery remain crimes of violence within the meaning of § 924(c) under the force clause. 881 F.3d 782, 785-86 (9th Cir. 2018) (holding that "bank robbery qualifies as a crime of violence because . . . [it] requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard," and that "[b]ecause bank robbery . . . is a crime of violence, so too is armed bank robbery") (internal citation and quotation marks omitted). This holding is binding on this Court and thus precludes Petitioner's § 924(c) arguments. *See United States v. Rodgers*, 2018 WL 3031817, at *2 (C.D. Cal. June 18, 2018).

B. Career Offender Status

Petitioner also argues that, in light of *Johnson*, Petitioner was unconstitutionally classified as a career offender for sentencing purposes. Dkt. 1, at 4-8. This argument is based on the observation that the career offender sentencing guideline, U.S.S.G. § 4B1.2, contains a residual clause with the same wording as § 924(c)'s residual clause, and on the argument that California burglary pursuant to Cal. Penal Code § 459[1] and California robbery pursuant to Cal. Penal Code § 211 are not crimes of violence

[1] The Supreme Court has held that California *burglary* is no longer a crime of violence under the enumerated clause of the career offender guideline. *See Descamps v. United States*, 133 S. Ct. 2276 (2013).

within the meaning of U.S.S.G. § 4B1.2(a)(1)-(2). Because Chapnick filed this motion almost exactly twelve years after his conviction and only asserts arguments that recent caselaw has rendered his sentence "illegal", Dkt. 1., at 30, his motion is time-barred on this issue under 28 U.S.C. § 2255(f) unless he can show that retroactive applicability on collateral review is appropriate under § 2255(f)(3).

In *Beckles v. United States*, 137 S. Ct. 886, 895 (2017), the Supreme Court held that the federal advisory Sentencing Guidelines are not subject to vagueness challenges under the Due Process Clause. However, *Beckles* did not directly address whether *Johnson* applies to a sentence like Petitioner's, which was imposed under the mandatory Sentencing Guidelines. Dkt. 1, at 3. This could conceivably be a basis on which to distinguish *Beckles*.

However, in *United States v. Blackstone*, 903 F.3d 1020, 1026 (9th Cir. 2018), the Ninth Circuit recognized that the Supreme Court has "repeatedly admonished [courts] not to advance on [their] own in determining what rights have been recognized by the Supreme Court under AEDPA." *Blackstone* noted that the Supreme Court has not yet considered *Johnson*'s application to the mandatory Sentencing Guidelines or the residual clause of § 924(c). Thus, the court held that *Johnson* did not announce a new rule that is applicable to the mandatory Sentencing Guidelines or § 924(c)'s residual clause. *Id.* at 1028. The court concluded: "The Supreme Court may hold in the future that *Johnson* extends to sentences imposed when the Sentencing Guidelines were mandatory or pursuant to 18 U.S.C. § 924(c), but until then Blackstone's motion is untimely." *Id.* at 1029.

The Supreme Court's decision in *United States v. Davis* expressly declaring 18 U.S.C. § 924(c) unconstitutionally vague does not alter this analysis because it did not expressly announce a new rule that is applicable to the mandatory Sentencing Guideline at U.S.S.G. § 4B1.2(a). Indeed, in dissent Justice Kavanaugh expressly highlights this fact, asking "who knows whether the ruling will be retroactive?" *Davis,* 139 S. Ct. at 2354. Nowhere in the majority opinion does Justice Gorsuch indicate in any way that the Supreme Court has extended either *Johnson* or *Davis* to sentences imposed when the Sentencing Guidelines were mandatory. *See generally Davis*, 139 S. Ct. 2319.

However, Petitioner's prior conviction for California *robbery* continues to stand as a predicate offense for career offender purposes. *See United States v. Bankston*, 901 F.3d 1100, 1107 (9th Cir. 2018).

This Court follows *Blackstone* in holding that "*Johnson* cannot serve to extend the limitations period under 28 U.S.C. § 2255(f)(3) and that [Petitioner's] motion is untimely." *United States v. Saenz*, 2018 WL 5785325, at *3 (S.D. Cal. Nov. 5, 2018); *see also Lackey v. United States*, 2018 WL 2011032, at *3 (S.D. Cal. Apr. 30, 2018) (collecting cases showing that "[n]early all the courts in the Ninth Circuit addressing the issue have determined that extending the reasoning of *Johnson* to the sentencing enhancements of the pre-*Booker* Guidelines is a new rule not recognized by the Supreme Court in *Johnson*"). Absent an express indication from the Supreme Court that 28 U.S.C. 2255(f)(3) should apply retroactively to sentences imposed under the mandatory Sentencing Guidelines, this Court cannot consider Petitioner's arguments on these grounds.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant" in § 2255 cases. Under 28 U.S.C. § 2253(c), a federal prisoner must seek and obtain a certificate of appealability to appeal the district court's denial of relief under 28 U.S.C. § 2255. 28 U.S.C. § 2253(c)(1). A district judge may issue a certificate of appealability. *See* Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1269–70 (9th Cir. 1997) (holding that "district courts possess the authority to issue certificates of appealability in § 2255"). A "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy the showing required by Section 2253(c)(2), the petitioner must show that reasonable jurists could debate whether the petition should have been resolved differently or that the issues presented are "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

Based on its review of the record, this Court finds no issues are debatable among reasonable jurists and no questions are adequate to deserve encouragement to proceed further. Therefore, Petitioner is not entitled to a certificate of appealability.

V. Conclusion

For these reasons, the Court DENIES Petitioner's motion to vacate, set aside, or correct his

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Title	*Andrew Chapnick v. United States of America*		

sentence pursuant to 28 U.S.C. § 2255. Petitioner is not entitled to a certificate of appealability.

IT IS SO ORDERED.

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