

Appendix

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY W. GARDNER,

Defendant-Appellant.

No. 17-56160

D.C. Nos. 2:16-cv-03376-TJH
2:04-cr-00425-GHK-3

Central District of California,
Los Angeles

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on January 19, 2018 (Docket Entry No. 3), is lifted.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Beckles v. United States*, 137 S. Ct. 886 (2017); *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020); *United States v. Blackstone*, 903 F.3d 1020, 1027-28 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2762 (2019).

Any pending motions are denied as moot.

DENIED.

United States District Court
Central District of California
Western Division

ANTHONY GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CV 16-03376 TJH
CR 04-00425 GHK

Order

JS-6

The Court has considered Petitioner Anthony Gardner's amended motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 or, in the alternative, request for a certificate of appealability as to his claim pursuant to 28 U.S.C. § 2253(c)(2), together with the moving and opposing papers.

Petitioner challenges his sentence under 18 U.S.C. § 924(c), which is predicated on interference with commerce by robbery, in violation of 18 U.S.C. § 1951(a) ["Hobbs Act robbery"]. Petitioner, further, challenges his sentence to the extent the sentence is based on U.S.S.G. § 4B1.1.

Section 924(c) defines "crime of violence" under § 924(c)(3)(A) [the "Force Clause"] and § 924(c)(3)(B) [the "Residual Clause"]. This Court held that the Residual

1 Clause is unconstitutionally vague, and that certain convictions — convictions that,
2 under the categorical approach, *see Taylor v. United States*, 495 U.S. 575 (1990), fall
3 outside the Force Clause because the statutory elements of the conviction includes
4 conduct falling outside the Force Clause’s definition of a “crime of violence” — must
5 be vacated. *See Juan Becerra-Perez v. United States*, No. 2:16-cv-07046-TJH (C.D.
6 Cal. Feb. 15, 2017). The Force Clause defines a “crime of violence” as a felony that
7 “has as an element the use, attempted use, or threatened use of physical force against
8 the person or property of another[.]” § 924(c)(3)(A).

9 The Hobbs Act robbery is a crime of violence under the Force Clause, as defined
10 in 18 U.S.C. § 924(c)(3)(A). Under Subsection (b)(1), Hobbs Act robbery punishes,
11 *inter alia*, the “fear of injury.” 18 U.S.C.A. §1951(b)(1). As this Court has
12 previously, and persuasively, held, the “fear of injury” prong of Hobbs Act robbery
13 categorically falls under the Force Clause because a Hobbs Act conviction under that
14 prong satisfies both the force and intent requirements of § 924(c)(3)(A). *United States*
15 *v. Bailey*, No. 14-328, 2016 WL 3381218, at *4–5 (C.D. Cal. June 8, 2016). Thus,
16 even in view of the most innocent statutory element, Hobbs Act robberies constitute
17 crimes of violence under the Force Clause.

18 On March 6, 2017, the Supreme Court issued its decision in *Beckles v. United*
19 *States*, 137 S. Ct. 886 (2017), holding that the advisory Sentencing Guidelines are not
20 subject to a due process vagueness challenge. 137 S. Ct. at 895. The Court held that
21 unlike the Armed Career Criminal Act, which was subject to the Court’s decision in
22 *Johnson v. United States*, 135 S.Ct. 2551 (2015), the advisory Guidelines “merely
23 guide the exercise of a court’s discretion in choosing an appropriate sentence within the
24 statutory range.” *Beckles*, 137 S. Ct. at 892. Indeed, on this basis, the Supreme Court
25 held that § 4B1.2(a)(2) specifically was not void for vagueness. *Beckles*, 137 S. Ct. at
26 895. As a result, to the extent Petitioner challenges his sentence under § 4B1.2(a)(2),
27 Petitioner’s motion is foreclosed by *Beckles*.

28 A district court may issue a certificate of appealability “only if the applicant has

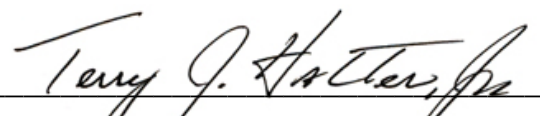
1 made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
2 2253(c)(2). Such a showing requires the petitioner to “demonstrate that the issues are
3 debatable among jurists of reason; that a court could resolve the issues [in a different
4 manner]; or that the questions are adequate to deserve encouragement to proceed
5 further.” *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (alterations in
6 original, emphasis omitted). Petitioner has not made a substantial showing of the denial
7 of a constitutional right under any of the above bases.

8
9 Accordingly,

10
11 **It is Ordered** that the motion to vacate Petitioner’s sentence under 18 U.S.C.
12 § 924(c) and § 4B1.2(a)(2) be, and hereby is, **Denied**.

13
14 **It is Further Ordered** that Petitioner’s request for a certificate of appealability
15 pursuant to 28 U.S.C. § 2253(c)(2) be, and hereby is, **Denied**.

16
17 Date: July 31, 2017

18
19 
20 **Terry J. Hatter, Jr.**
Senior United States District Judge

21 CC: BOP
22
23
24
25
26
27
28