No.

In The Supreme Court Of The United States

Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Hall and Mati Sefo,

Petitioners,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petitioners' Joint Appendix

Appendix A

United States v. Fierro,
848 F. App'x 337 (9th Cir. May 21, 2021) (unpublished),
Memorandum affirming denial of motion to vacate

848 Fed.Appx. 337 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Brian FIERRO, Defendant-Appellant.

No. 20-16058
|
Submitted May 18, 2021 *
|
FILED May 21, 2021

Appeal from the United States District Court for the District of Nevada, Kent J. Dawson, District Judge, Presiding, D.C. Nos. 2:12-cv-02062-KJD 2:09-cr-00240-KJD-PAL-1

Attorneys and Law Firms

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Lauren Torre, Assistant Federal Public Defender, Federal Public Defender's Office Las Vegas, Las Vegas, NV, for Defendant-Appellant

Before: CANBY, FRIEDLAND, and VANDYKE, Circuit Judges.

MEMORANDUM **

Federal prisoner Brian Fierro appeals from the district court's judgment denying his motion to vacate under 28 U.S.C. § 2255. We have jurisdiction under 28 U.S.C. § 2253. We review de novo the district court's denial of a motion to vacate under § 2255, *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), and we affirm.

Appellant argues that Hobbs Act robbery under 18 U.S.C. § 1951 does not constitute a crime of violence under the elements clause of 18 U.S.C. § 924(c). This contention is foreclosed. *See United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020) (reaffirming that Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)). Fierro asserts that *Dominguez* was wrongly decided, but as a three-judge panel, we are bound by the decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (three-judge panel is bound by circuit precedent unless that precedent is "clearly irreconcilable" with intervening higher authority).

We treat Fierro's arguments regarding the district court's denial of his motion to amend the § 2255 motion to plead claims under *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), as a motion to expand the certificate of appealability. So treated, the motion is denied because Fierro 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 ***338** constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See* 28 U.S.C. § 2253(c)(2); 9th Cir. R. 22-1(e); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999); *see also Gonzalez v. Thaler*, 565 U.S. 134, 140-41, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012); *Tate v. United States*, 982 F.3d 1226, 1227-28 (9th Cir. 2020) (holding that *Rehaif* did not announce a new rule of constitutional law); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (stating that the district court must make an independent determination of whether § 2255(h) is satisfied).

AFFIRMED.

All Citations

848 Fed.Appx. 337 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix B

United States v. Fierro,
No. 20-16058 (9th Cir. Mar. 5, 2021), (unpublished),
Order denying initial hearing en banc

FILED

MAR 5 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRIAN FIERRO, Defendant-Appellant.	No. 20-16058 D.C. Nos. 2:12-cv-02062-KJD 2:09-cr-00240-KJD-PAL-1 District of Nevada, Las Vegas ORDER

No judge has requested a vote to hear this case initially en banc within the time allowed by GO 5.2(a). The petition for initial hearing en banc (Docket Entry No. 6) is therefore denied.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Paul Keller
Deputy Clerk
Ninth Circuit Rule 27-7

Appendix C

United States v. Fierro,
No. 2:09-cr-0240-KJD-PAL, 2020 WL
1531162 (D. Nev. Mar. 31, 2020) (unpublished),
Order denying motion to vacate and granting COA

2020 WL 1531162
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Respondent,
v.
Brian FIERRO, Petitioner.

Case No. 2:09-cr-0240-KJD-PAL
|
2:17-cv-0742-KJD
|
Signed 03/31/2020

Attorneys and Law Firms

Brian Fierro, Sheridan, OR, pro se.

ORDER

Kent J. Dawson, United States District Judge

***1** Presently before the Court is Petitioner Brian Fierro's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#124/139). The Government filed responses in opposition and supplements (#126/141) to which Petitioner replied (#133/142). Also, before the Court is Petitioner's Motion for Leave to File First Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137). Respondent filed a response in opposition (#139) to which Petitioner replied (#142).

I. Background

Fierro was found guilty after a jury trial on four counts of a superseding indictment. After appeal, the court entered Second Amended Judgment (#94) on: (1) Count One -- Interference with commerce by robbery (Hobbs Act Robbery); and (3) Count Two -- discharging a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference with commerce by robbery charged in Count One of the superseding indictment; and (3) Count Three – felon in possession of a firearm. The court sentenced Fierro to one hundred and twenty (120) months imprisonment on Count One and Three each, to run concurrently. It sentenced Fierro to one hundred and twenty (120) months imprisonment on Count Two to be served consecutively to Counts One and Three, followed by five years of supervised release. In the instant motion, Fierro moves to vacate his § 924(c) conviction and sentence pursuant to Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319, 2336 (2019), and requests that the court vacate his conviction.

II. Motion to Amend

Petitioner has also filed a motion for leave to amend his petition wishing to assert claims for relief under Rehaif v. United States, 139 S. Ct. 2191 (2019). The Rehaif claims would address his felon in possession of a firearm conviction, not otherwise at issue in the current § 2255. The present motion is a second or third successive petition and was filed after receiving permission (#123) from the Ninth Circuit Court of Appeals to address claims found to be retroactive in cases on collateral review. The Order (#123) from the Ninth Circuit did not grant permission to raise other claims. Further, Rehaif has not been found to apply retroactively to cases on collateral review. See, e.g., In re Palacios, 931 F.3d 1314, 1315 (11th Cir. 2019) (Rehaif "did not announce a new rule of constitutional law") (internal quotations omitted). At best, the Rehaif claim is premature. Accordingly, the Court denies Petitioner's leave to amend.

III. Analysis

A federal prisoner may move to "vacate, set aside or correct" his sentence if it "was imposed in violation of the Constitution." 28 U.S.C. § 2255(a). When a petitioner seeks relief pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of limitations for seeking habeas relief runs from "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and that he is entitled to relief.

***2** In Johnson, the United States Supreme Court held that the residual clause in the definition of a "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) ("ACCA"), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines "violent felony" as any crime punishable by imprisonment for a term exceeding one year, that: (i) has as an element the use, attempted use, or threatened

use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. § 924(e)(2)(B). Subsection (ii) above is known as the ACCA's "residual clause." Johnson, 135 S. Ct. at 2555-56. The Supreme Court held that "increasing a defendant's sentence under the clause denies due process of law." Id. at 2557.

Fierro was not, however, sentenced pursuant to ACCA. Rather, he was convicted of violating 18 U.S.C. § 924(c) for discharging a firearm during and in relation to a crime of violence. Section 924(c)(3) provides:

> the term "crime of violence" means an offense that is a felony and–
>
> (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.

As with the ACCA, subsection (A) is referred to as the force or elements clause while subsection (B) is referenced as the residual clause. Fierro argues that Johnson is equally applicable to § 924(c) cases and that his instant motion is timely as it was filed within one year of Johnson. Additionally, the Supreme Court has subsequently applied the principles first outlined in Johnson to the residual clause of § 924(c), holding "that § 924(c)(3)(B) is unconstitutionally vague." Davis, 139 S. Ct. at 2336. Accordingly, the Court will now consider the motion as timely given the Supreme Court's decision in Davis, extending the principles of Johnson to § 924(c), and will treat the motion as if filed seeking relief pursuant to Davis. Further, Defendant received permission from the Court of Appeals to file this second or successive § 2255 motion (#123).

A. Hobbs Act Robbery

Fierro asserts that his conviction is not subject to the provisions of § 924(c)(3) because the crime (Hobbs Act Robbery) underlying his 924(c) conviction does not constitute a "crime of violence." He argues that his § 924(c) conviction and sentence is unconstitutional under Davis because a Hobbs Act Robbery cannot constitute a crime of violence without relying on the unconstitutional residual clause. The court disagrees.

Fierro argues that a Hobbs Act Robbery cannot categorically fall under the force or elements clause of § 924(c)(3)(A) because a Hobbs Act Robbery can be committed by any amount of force necessary to accomplish the taking, it does not necessarily require the use of violent force. Prior to the Supreme Court's holding in Davis, the Ninth Circuit held that Hobbs Act "[r]obbery indisputably qualifies as a crime of violence" under § 924(c). United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was confronted with essentially the same argument that Fierro raises here, that "because Hobbs Act Robbery may also be accomplished by putting someone in 'fear of injury,' 18 U.S.C. § 1951(b), it does not necessarily involve 'the use, attempted use, or threatened use of physical force,' 18 U.S.C. § 924(c)(3)(A)." United States v. Howard, 650 Fed App'x. 466, 468 (9th Cir. 2016). The Ninth Circuit held that Hobbs Act Robbery nonetheless qualified as a crime of violence under the force clause:

> ***3** [Petitioner's] arguments are unpersuasive and are foreclosed by United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we held that the analogous federal bank robbery statute, which may be violated by "force and violence, or by intimidation," 18 U.S.C. § 2113(a) (emphasis added), qualifies as a crime of violence under U.S.S.G. § 4B1.2, which uses the nearly identical definition of "crime of violence" as § 924(c). Selfa, 918 F.2d at 751. We explained that "intimidation" means willfully "to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm," which satisfies the requirement of a "threatened use of physical force" under § 4B1.2. Id. (quoting United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)). Because bank robbery by "intimidation"—which is defined as instilling fear of injury—qualifies as a crime of violence, Hobbs Act robbery by means of "fear of injury" also qualifies as [a] crime of violence.

Id.

The Court holds that a Hobbs Act Robbery constitutes a crime of violence under § 924(c)(3)'s force clause. Under the elements set forth in the language of § 1951, Fierro's underlying felony offense (Hobbs Act Robbery) is a "crime of violence" because the offense has, "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A); see also United States v. Jay, 705 F. App'x 587 (9th Cir. 2017) (*unpublished*) (finding Hobbs Act Robbery a crime of violence). Davis is inapplicable here because Fierro's conviction and sentence do not rest on the residual clause of § 924(c). The Court sees no reason to depart from the well-reasoned cases of nine other circuit courts of appeals that have found Hobbs Act Robbery to be a crime of violence after Johnson. See United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018); United States v. Hill, 890 F.3d 51, 60 (2d Cir. 2018); United States v. Mathis, 932 F.3d 242, 265-67 (4th Cir. 2019); United States v. Buck, 847 F.3d 267, 274–75 (5th Cir. 2017); United States v. Gooch, 850 F.3d 285, 292 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States v. Fierro, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Melgar-Cabrera, 892 F.3d 1053, 1064-6 (10th Cir. 2018); In re Pollard, 931 F.3d 1318 (11th Cir. 2019).

As the Supreme Court found in Stokeling v. United States, 139 S. Ct. 544, 553 (2019), "Robbery ... has always been within the category of violent, active crimes" that merit enhanced penalties under statutes like 924(c). As stated by the Supreme Court "Congress made clear that the 'force' required for common-law robbery would be sufficient to justify an enhanced sentence." Id. at 551. Like the statute in Florida, Hobbs Act Robbery is "defined as common-law robbery." United States v. Melgar-Cabrera, 892 F.3d 1053, 1064. Section 924(c) includes crimes that involve "physical force." 18 U.S.C. § 924(c)(3)(A). Stokeling forecloses Petitioner's argument that the "force" required for Hobbs Act Robbery does not meet the standard set by 18 U.S.C. § 924(c)(3)(A).

Defendant argues that Hobbs Act Robbery fails to constitute a crime of violence under the elements clause because it does not categorically require the use of intentional force against the person or property of another, but instead, can be committed by causing fear of future injury to property, tangible or intangible. However, "[a] defendant cannot put a reasonable person in fear" of injury to their person or property without "threatening to use force." United States v. Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017). "[Robbery] by intimidation thus requires at least an implicit threat to use the type of violent physical force necessary" to satisfy the requirements of the elements clause. Id.; see also Estell v. United States, 924 F.3d 1291,1293 (8th Cir. 2019) (bank robbery by intimidation requires threatened use of force causing bodily harm). Like the court in Mathis, this Court sees no reason to discern any basis in the text of elements clause for creating a distinction between threats of injury to tangible and intangible property for the purposes of defining a crime of violence. 932 F.3d at 266. Therefore, Hobbs Act Robbery constitutes a crime of violence under the elements clause of Section 924(c).

IV. Certificate of Appealability

***4** To appeal this order, Fierro must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1 (a). To obtain that certificate, he "must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quotation omitted). This standard is "lenient." Hayward v. Marshall, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

Given contrary holdings in other district courts in the Ninth Circuit, the Court cannot deny that other reasonable jurists would find it debatable that the Court's determination that Hobbs Act Robbery is a crime of violence pursuant to the force clause of § 924(c) is wrong. See United States v. Chea, No. 4:98-cr-40003-CW, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019); United States v. Dominguez, No. 14-10268 (9th Cir. argued Dec. 10, 2019). Accordingly, the court grants Defendant a certificate of appealability.

V. Conclusion

Accordingly, IT IS HEREBY ORDERED Petitioner's Motion for Leave to File First Amended Motion to Vacate, Set Aside, or Correct Conviction and Sentence under § 2255 (#137) is **DENIED**;

IT IS FURTHER ORDERED that Petitioner Brian Fierro's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#124/139) is **DENIED**;

IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0742-KJD, and close that case;

IT IS FURTHER ORDERED that Petitioner is **GRANTED** a Certificate of Appealability.

All Citations

Slip Copy, 2020 WL 1531162

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Appendix D

United States v. Sapp,
No. 21-15049 (9th Cir. June 17, 2021)
(unpublished), Order denying COA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 17 2021

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KACY SAPP, Defendant-Appellant.	No. 21-15049 D.C. Nos. 3:20-cv-00367-HDM 3:18-cr-00073-HDM-WGC-1 District of Nevada, Reno ORDER

Before: CANBY and LEE, Circuit Judges.

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).

Any pending motions are denied as moot.

DENIED.

Appendix E

United States v. Sapp,
No. 3:18-cr-00073-HDM-WGC
(D. Nev. Nov. 10, 2020) (unpublished),
Order denying motion to vacate and denying COA

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. KACY SAPP, Defendant.	Case No. 3:18-cr-00073-HDM-WGC Case No. 3:20-cv-00367-HDM ORDER

Defendant Kacy Sapp has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 35). The government has opposed (ECF No. 39), and Sapp has replied (ECF No. 40).

Sapp was charged by way of indictment with one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951 and one count of use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Pursuant to an agreement, Sapp pled guilty to the § 924(c) charge and the Hobbs Act charge was dismissed. Following entry of the judgment of conviction in this case, the U.S. Supreme Court issued a decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). Sapp argues that the holding of *Davis* invalidates his conviction and he accordingly moves for relief.

Section 924(c) prohibits the use of a firearm during and in relation to a "crime of violence." "Crime of violence" is defined as

> an offense that is a felony and--(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.

18 U.S.C. § 924(c)(3). Section 924(c)(3)(A) is known as the "elements clause" and § 924(c)(3)(B) is known as the "residual clause." In *Davis*, the Court held that the residual clause is unconstitutionally vague. 139 S. Ct. at 2336. Thus, a crime is a crime of violence only if it satisfies the elements clause.

The predicate for Sapp's § 924(c) conviction was Hobbs Act robbery. While Sapp argues that Hobbs Act robbery does not satisfy the elements clause and is therefore not a crime of violence, binding Ninth Circuit authority forecloses his argument. Post-*Davis*, the Ninth Circuit has held that Hobbs Act robbery satisfies the elements clause and therefore remains a crime of violence for the purposes of § 924(c). *United States v. Dominguez*, 954 F.3d 1251, 1258-61 (9th Cir. 2020).[1] Accordingly, because Hobbs Act robbery is a qualifying crime of violence, Sapp's § 2255 motion is without merit and must be denied.[2]

In accordance with the foregoing, IT IS THEREFORE ORDERED that Sapp's motion to vacate, set aside, or correct sentence (ECF No. 35) is DENIED.

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[1] Sapp acknowledges the decision in *Dominguez* but argues that it was wrongly decided. The court is not persuaded and rejects Sapp's arguments in this regard.

[2] Because the motion is plainly without merit, the court declines to address any of the other various arguments raised by the parties in their briefs.

IT IS FURTHER ORDERED that Sapp is DENIED a certificate of appealability, as jurists of reason would not find denial of the motion to be debatable or wrong.

The Clerk of Court shall enter final judgment accordingly.

IT IS SO ORDERED.

DATED: This 10th day of November, 2020.

Howard D McKibben

UNITED STATES DISTRICT JUDGE

Appendix F

United States v. Vucic,
2021 WL 3077590 (9th Cir. June 17, 2021)
(unpublished), Order denying COA

2021 WL 3077590
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Damir VUCIC, Defendant-Appellant.

No. 21-15095
|
FILED JUNE 17, 2021

D.C. Nos. 2:18-cv-02296-KJD, 2:15-cr-00332-KJD-NJK-1, District of Nevada, Las Vegas

Attorneys and Law Firms

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Wendi L. Overmyer, Assistant Federal Public Defender, Federal Public Defender's Office, Las Vegas, NV, for Defendant-Appellant.

Before: CANBY and LEE, Circuit Judges.

ORDER

***1** 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).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 3077590

Appendix G

United States v. Vucic,
No. 2:15-cr-00332-KJD-NJK 2020 WL
6729275 (D. Nev. Nov. 16, 2020) (unpublished),
Order denying supplemental motion to vacate
and first amended motion to vacate
and denying COA

2020 WL 6729275
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,
v.
Damir VUCIC, Defendant.

Case No. 2:15-cr-00332-KJD-NJK
|
2:18-cv-02296-KJD
|
Signed 11/16/2020

Attorneys and Law Firms

Damir Vucic, Anthony, NM, pro se.

ORDER

Kent J. Dawson, United States District Judge

***1** Presently before the Court is Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#75). Also, before the Court is Defendant's Protective Supplemental § 2255 Motion (#79) and Motion for Leave to File First Amended Motion to Vacate under § 2255 (#82). Having read and considered the motion for leave to file first amended petition, the Court finds good cause and grants the motion. The amended petition withdraws Defendant's ineffective assistance of counsel claim, ending the presumptive conflict Defendant created with the Public Defender's Office. Therefore, the Court finds that Defendant's motions (#75/78) are moot.

Finally, before the Court is Defendant's Motion for Compassionate Release under the First Step Act (#83). The Government filed a response in opposition (#87) to which Defendant replied (#88).

I. Background

In September 2015, Defendant Damir Vucic entered the M Resort and Hotel holding a firearm. As he approached the cashier's station, he pointed the handgun at a customer in line, and pushed them away. Vucic turned to the cashier and demanded money. He yelled for the cashier to give him "all of it." After the cashier filled the bag with $38,904.90, Vucic fled. As he ran, he pointed the handgun at a witness. He fled in a Ford Mustang. Law enforcement determined that the Ford Mustang was potentially involved in a "smash and grab" burglary several weeks prior to Vucic's robbery. Further, Vucic was suspected of robbing a Sam's Club of jewelry two weeks prior to the instant case.

Later, law enforcement executed a search warrant at Vucic's residence. In it, they found numerous firearms and more than $3,000 in cash. Sy Senor, Vucic's fiancée, told law enforcement that she helped Vucic take the rest of the money to her ex-husband's residence. Once at the ex-husband's residence, they found $21,860 in cash and $131,340.88 worth of jewelry. Vucic had already fled to Buffalo, New York where he was later arrested on a warrant.

A Grand Jury charged Vucic by indictment on November 24, 2015 for violations of 18 U.S.C. §§ 1951 and 924(c)(1)(A). On May 4, 2017, after the filing of a Superseding Information, he pled guilty to violations of 18 U.S.C. §§ 1951 and 924(c)(1)(A). The Court sentenced Vucic on December 13, 2017 to consecutive terms of twenty-seven (27) and sixty (60) months to be followed by three (3) years of supervised release.

Vucic is currently serving his custodial sentence at FCI Lompoc with an anticipated release date of December 4, 2021. While in custody, Vucic contracted COVID-19 on or about May 7, 2020. By the end of June, he twice tested negative for COVID-19. Since contracting COVID-19, he has been diagnosed with migraine headaches and tachycardia.

II. Section 2255 Analysis

A. Hobbs Act Robbery is a Crime of Violence

Defendant has amended his § 2255 motion to press the argument that his conviction under § 924(c)(a)(A) must be vacated because his contemporaneous conviction for Hobbs Act robbery does not qualify as a crime of violence. Not only has this Court previously rejected that argument, see, *e.g.*, United States v. Nguyen, 2:03-cr-00158-KJD, Doc. No. 260, March 31, 2020 (Ninth Circuit denying certificate of appealability at Doc. No. 271), the Ninth Circuit Court of Appeals has held that Hobbs Act robbery qualifies as a crime of violence under the elements clause. See United States v. Dominguez, 954 F.3d 1251, 1260 (9th Cir. 2020) (specifically rejecting Vucic's argument that Hobbs Act robbery is not a

crime of violence because it can be committed by placing the victim in fear of injury to intangible economic interests: "[defendant] fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest") (citing Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). Therefore, the Court denies Defendant's § 2255 motion.

B. Certificate of Appealability

***2** To appeal this order, Vucic must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1 (a). To obtain that certificate, he "must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (quotation omitted). This standard is "lenient." Hayward v. Marshall, 603 F.3d 546, 553 (9th Cir. 2010) (en banc). Given that the Ninth Circuit has directly considered and rejected the precise argument raised by Defendant and denied other petitioners a certificate of appealability, the Court cannot find that other reasonable jurists would find it debatable that the Court's determination that Hobbs Act robbery is not a crime of violence pursuant to the elements clause of § 924(c) is wrong. Accordingly, the court denies Defendant a certificate of appealability.

III. Compassionate Relief

A. Standard

18 U.S.C. § 3582(c)(1)(A) provides in relevant part:

> [T]he court, ... upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction;
>
> ...
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. [1]

U.S.S.G. § 1B1.13 provides:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—
>
> (1)(A) extraordinary and compelling reasons warrant the reduction;
>
> ...
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13.

The defendant is not entitled to be present for a hearing on a motion for compassionate release. See Fed. R. Crim. P. 43(b)(4).

B. Analysis

Vucic seeks release pursuant to § 3582(c)(1)(A) due to the COVID-19 epidemic and his underlying health conditions, which he argues put him at greater risk of contracting and suffering severe complications of COVID-19. The government opposes, arguing that Vucic has not established extraordinary and compelling reasons for his release, that Vucic remains a danger to the community, and the § 3553(a) factors do not favor early release.

1. Exhaustion

***3** Before a defendant may file a § 3582(c)(1)(A) motion, he must either (1) exhaust any administrative appeals of the warden's refusal to bring a motion or (2) wait thirty days from the warden's receipt of the request, whichever is earlier. Vucic submitted a request for compassionate release to the warden June 24, 2020. More than thirty days have elapsed from the date Vucic's request was submitted, so the motion is exhausted.

2. Extraordinary and Compelling Reasons

Section 1B1.13 sets forth specific examples of "extraordinary and compelling reasons," including in relevant part that the defendant is "suffering from a serious physical or medical condition ... that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13 app. n.(1)(A)(ii)(I). There is also a catch-all provision, which provides: "As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)." Id. app. n.(1)(D).

Vucic is 40 years old and complains of headaches, memory problems, fatigue, tachycardia, atrial arrythmia, anemia and other symptoms. These appear to be all post-COVID symptoms, health complaints that appeared after a six-week bout with COVID-19. He has no reported pre-COVID risk factors. He is presently incarcerated at FCI Lompoc. Vucic argues that his medical conditions increase his risk of severe COVID-19 complications were he to become re-infected at Lompoc which had both a severe outbreak of COVID and alleged inability on the part of prison officials to prevent the spread of the virus.

The government argues that the spread of COVID-19 at Lompoc has now been limited and, at the time this order was drafted the BOP reports zero (0) inmate infections and zero (0) staff infections.[2] See Bureau of Prisons (BOP), COVID-19 Cases (updated daily) (last accessed November 13, 2020). The government further disputes that Vucic's underlying health conditions put him at greater risk of contracting or suffering complications from COVID-19. It asserts that Vucic's migraine headaches are being treated, that the alleged anemia was tracked, tested and Vucic was cleared. Further, Vucic was given further treatment for the atrial arrythmia and it cleared.

While some of Vucic's conditions, primarily the tachycardia could potentially increase his risk of a negative COVID-19 outcome, Vucic is not a member of the highest risk age group and COVID-19 is not widespread at his institution. These low numbers suggest that the measures taken by BOP to combat coronavirus spread are working at last at Lompoc. Even more importantly, it seems that the risk of re-infection is low. The most recent science concludes that neutralizing antibodies are stably produced for at least 5-7 months after SARS-CoV-2[3] infection. See Tyler J. Ripperger *et al.*, Orthogonal SARS-CoV-2 Serological Assays Enable Surveillance of Low-Prevalence Communities and Reveal Durable Humoral Immunity, Immunity (2020), https://www.cell.com/immunity/fulltext/S1074-7613(20)30445-3. Thus, Defendant's risk is greatly diminished by his natural antibodies. Of nearly thirty million cases worldwide to date, there exist only about 10 documented and confirmed cases of re-infection. Id. at 10. Under these circumstances, the court does not find extraordinary and compelling reasons for early release.

3. 18 U.S.C. § 3553(a) Factors

***4** Further, the court may grant compassionate release only if the defendant is not a danger to any other person or to the community, as provided in 18 U.S.C. § 3142(g), United States v. Johnson, 2020 WL 2114357, at *1 (E.D. Wash. May 4, 2020) ("[T]he Court should not grant a sentence reduction if the defendant poses a risk of danger to the community, as defined in the Bail Reform Act."), and the relevant 18 U.S.C. § 3553(a) factors favor release. And in this case, the § 3553(a) factors do not support early release.

Vucic committed dangerous and violent robberies. He pointed his weapon at innocent bystanders. His fiancée, though supportive now, told the police that she did not tell them about his crimes because she was afraid of him. The fact that his release plan would put him back in her home is problematic.

The nature and circumstances of Vucic's offense were thus very serious. Further, Vucic has served about two-thirds of his sentence, which the court believes in not sufficient to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and avoid unwarranted sentencing disparities. The court is not persuaded that Vucic's rehabilitative efforts while incarcerated, his acceptance of responsibility, and his regret that he committed a crime, outweigh the significant facts of his offense and his criminal history. The § 3553(a) factors support Vucic serving the sentence that was originally imposed, without early release.

IV. Conclusion

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Leave to File First Amended Motion to Vacate under § 2255 (#82) is **GRANTED**;

IT IS FURTHER ORDERED that Defendant's Sealed Ex Parte Motion to Withdraw As Attorney and Appoint New Counsel (#78) is **DENIED as moot**;

IT IS FURTHER ORDERED that Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#75) is **DENIED as moot**;

IT IS FURTHER ORDERED that Defendant's Protective Supplemental § 2255 Motion (#79) and First Amended Motion to Vacate under § 2255 are **DENIED**;

IT IS FURTHER ORDERED that Defendant's Motion for Compassionate Release (#83) is **DENIED**;

IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Respondent and against Petitioner in the corresponding civil action, 2:18-cv-2296-KJD, and close that case;

IT IS FINALLY ORDERED that Defendant is **DENIED** a Certificate of Appealability.

All Citations

Slip Copy, 2020 WL 6729275

Footnotes

1 In addition to "extraordinary and compelling reasons," the court may grant a motion if "the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)." 18 U.S.C. § 3582(c)(1)(A)(ii). Because Vucic is not over 70 years of age and has not served more than thirty years in prison, this provision does not apply.

2 bop.gov/coronavirus/

3 SARS-CoV-2 is the causative agent of coronavirus disease 2019 (COVID-19). Ripperger, *supra* *1.

Appendix H

United States v. Hall,
No. 21-15520 (9th Cir. Aug. 16, 2021)
(unpublished), Order denying COA

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 16 2021

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

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BAILEY AARON HALL, Defendant-Appellant.	No. 21-15520 D.C. Nos. 2:20-cv-01062-JAD 2:16-cr-00321-JAD-GWF-1 District of Nevada, Las Vegas ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) ("When . . . the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition 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.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Any pending motions are denied as moot.

DENIED.

Appendix I

United States v. Hall,
No. 2:16-cr-00321-JAD-GWF, 2021 WL 230046
(D. Nev. Jan. 22, 2021) (unpublished), Order denying
motion to vacate and denying COA

2021 WL 230046
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff
v.
Bailey Aaron HALL, Defendant

Case No.: 2:16-cr-00321-JAD-GWF
|
Signed 01/22/2021

Attorneys and Law Firms

Alexandra M. Michael, United States Attorneys Office, Las Vegas, NV, for Plaintiff.

AFPD Brian Pugh, Federal Public Defender, Las Vegas, NV, for Defendant.

Order Denying Motion to Vacate § 924(c) Conviction under *U.S. v. Davis*

[ECF No. 82]

Jennifer A. Dorsey, U.S. District Judge

***1** Bailey Aaron Hall was convicted of interference with commerce by robbery under the Hobbs Act [1] and brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) after pleading guilty to a string of armed robberies of fast-food joints and a convenience store. [2] At the time of Hall's conviction, the statute offered two ways for an underlying offense to qualify as "a crime of violence," but a month later the United States Supreme Court struck down one of them as unconstitutionally vague in *United States v. Davis*. [3] Hall now moves this court to vacate his firearm conviction under *Davis*. [4] Because the Ninth Circuit has since reaffirmed that Hobbs Act robbery is a crime of violence under § 924(c)'s remaining clause, I deny Hall's motion and a certificate of appealability.

Background

In November 2017, Hall pleaded guilty to three counts of interference with commerce by robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, and a single count of brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). [5] Hall waived his right to challenge his sentence on direct appeal or on collateral attack under 18 U.S.C. § 2255, reserving only his right to appeal any upward departure from his sentencing-guideline range. [6] I sentenced Hall in May 2019 to a total of 180 months in custody (a 96-month concurrent sentence for the robbery counts, plus an 84-month consecutive sentence for the firearm count), a within-guidelines sentence. [7] Hall did not appeal, but he now moves under 28 U.S.C. § 2255 to vacate his conviction and sentence for the firearm count.

Section 924(c) of Title 18 of the U.S. Code carries heightened criminal penalties [8] for defendants who use, carry, or possess a firearm during and in relation to a "crime of violence." The statute defines "crime of violence" in two subsections. Section 924(c)(3)(A), commonly known as the "elements clause," defines a crime of violence to include a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." [9] Alternatively, § 924(c)(3)(B), known as the "residual clause," includes any felony "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." [10] Neither Hall's indictment nor his plea agreement specifies whether his underlying offense—Hobbs Act robbery—qualified as a crime of violence under the elements clause or the residual clause. [11]

***2** In June 2019, the Supreme Court held in *United States v. Davis* that the residual clause's crime-of-violence definition is unconstitutionally vague, and it remanded the case to allow the lower courts to determine "exactly what that holding mean[t]" for the *Davis* defendants' Hobbs Act robbery, Hobbs Act conspiracy, and firearms convictions and sentences. [12] Hall contends that his § 924(c) conviction must be vacated because, under *Davis*, Hobbs Act robbery no longer qualifies as a crime of violence at all. [13] The government opposes his motion, arguing that Hall's challenge is procedurally defaulted, waived, and fails on its merits because the Ninth Circuit held in *United States v. Dominguez* [14] that Hobbs Act

robbery remains a crime of violence under the elements clause of § 924(c).[15] I consider each argument in turn.[16]

Discussion

I. Hall didn't waive this collateral challenge.

The government contends that Hall waived his right to lodge this *Davis* challenge because his written plea agreement contains a waiver of the right to collaterally attack his sentence.[17] Hall responds that this § 2255 motion is properly before this court despite that waiver because "a plea waiver cannot be enforced when the sentence" is based on a provision the Supreme Court has determined is unconstitutional.[18] "A sentence is illegal if it ... violates the Constitution."[19] Because Hall argues that *Davis* invalidated his § 924(c) conviction based on unconstitutional vagueness, his plea waiver doesn't bar this motion.

II. Hall procedurally defaulted his claim for relief.

Though the waiver in Hall's written plea agreement may not be an obstacle to his motion, Hall's failure to raise this challenge on direct appeal is. A defendant who fails to raise a claim on direct review is deemed to have procedurally defaulted it and may only raise it in habeas if he can demonstrate cause and actual prejudice or actual innocence.[20] The government argues that Hall isn't entitled to relief because he didn't raise his claims in a direct appeal and has therefore procedurally defaulted his claim that his § 924(c) conviction is invalid for lack of a qualifying predicate offense.[21] It also argues that Hall can't show cause or prejudice to excuse his procedural default.[22] Hall responds that the procedural-default rule doesn't apply here because the court lacked jurisdiction to convict him because the government failed to make out a federal offense.[23] Alternatively, he argues that his default is excused because *Davis* announced a new, retroactive rule that constitutes cause and establishes his prejudice.[24]

A. Hall cannot rely on a jurisdictional defect.

Hall argues that his claim is exempt from the procedural-default rule because it ultimately challenges this court's jurisdiction. He cites *United States v. Montilla*[25] for the proposition that his claim challenges the constitutionality of applying the Hobbs Act to § 924(c) and that the indictment fails to state an offense.[26] The Ninth Circuit's holding in *United States v. Chavez-Diaz*[27] forecloses this argument. In *Chavez-Diaz*, the court explained that the jurisdictional exception "applies 'where on the face of the record the court had no power to enter the conviction or impose the sentence.' "[28] Thus, these limited challenges are predicated on scenarios "where [an] appeal, if successful, would mean that the government cannot prosecute the defendant *at all*."[29] Hall's challenge does not raise a jurisdictional defect excused from the procedural-default rule because he doesn't argue that the government lacked the power to prosecute him for these acts or that Congress lacked the power to pass either statute.[30]

B. Hall can't show cause to excuse his procedural default.

***3** Hall can't establish cause to excuse his procedural default. A defendant fails to meet his burden to show that his claim wasn't "reasonably available to counsel" when, at the time of his plea, "the Federal Reporters were replete with cases involving [similar] challenges."[31] *Davis* itself confirms that the vagueness challenge to the residual clause was heavily litigated "among the lower courts"[32] during the pendency of Hall's prosecution, and this district was no exception.[33] It is of no consequence that the argument would not have been successful at the time. As the Supreme Court reiterated in *Bousley v. United States*, "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time."[34]

C. Hall cannot establish prejudice.

Even if Hall could show cause, he cannot establish prejudice because Hobbs Act robbery remains a crime of violence in this circuit under the elements clause. *Davis* held only that § 924(c)'s residual clause is unconstitutionally vague. After *Davis*, courts have been confronted with the question of whether a Hobbs Act conviction can stand under the remaining elements clause. The Ninth Circuit answered that question with an emphatic "yes" in *United States v. Dominguez*: "In light of recent Supreme Court cases, we ... reiterate our previous holding that Hobbs Act armed robbery

is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A)."[35]

Hall argues that I shouldn't rely on *Dominguez* because it's not a final decision—the appellant in that case moved for reconsideration and may still seek certiorari.[36] But reconsideration was denied,[37] and the potential to petition for Supreme Court review does not allow me to avoid the *Dominguez* panel's holding. "[O]nce a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority."[38] Because *Dominguez* is the law of this circuit, this court is bound by it,[39] and I decline Hall's invitation to ignore it. That holding renders Hall unable to establish actual prejudice because, even if the residual clause no longer makes Hobbs Act robbery a crime of violence, the elements clause still does. Hall thus cannot establish prejudice to excuse his procedural default. And even if this claim were not defaulted, I would deny Hall's petition on its merits because his § 924(c) conviction remains valid under the elements clause and binding Ninth Circuit law.

Conclusion

IT IS THEREFORE ORDERED that Hall's motion to vacate under 28 U.S.C. § 2255 **[ECF No. 82] is DENIED**. And because reasonable jurists would not find this determination debatable, wrong, or deserving of encouragement to proceed further,[40] **a certificate of appealability is DENIED.** The Clerk of Court is **DIRECTED to enter a separate civil judgment denying Hall's § 2255 petition and denying a certificate of appealability**. The Clerk must also file this order and the civil judgment in this case and in the related civil case: 2:20-cv-01062-JAD.

All Citations

Slip Copy, 2021 WL 230046

Footnotes

1 18 U.S.C. § 1951.
2 ECF No. 77 (judgment).
3 *United States v. Davis*, 139 S. Ct. 2319, 2336–37 (2019).
4 ECF No. 82 (motion).
5 ECF No. 14 (criminal indictment); ECF No. 43 at 2 (plea agreement).
6 *Id.* at 13.
7 ECF Nos. 74; 77.
8 *See* *Davis*, 139 S. Ct. at 2324 (explaining that "[v]iolators of § 924(c) face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime of violence or drug trafficking crime," seven years for brandishing the firearm, and ten years for a discharge, plus other enhancements based on the firearm model and repeat violations).
9 18 U.S.C. § 924(c)(3)(A).
10 *Id.* at § 924(c)(3)(B).
11 *See generally* ECF Nos. 14, 43.
12 *Davis*, 139 S. Ct. at 2336.
13 ECF No. 82.
14 *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020).
15 ECF No. 84.

16 Hall argues that his habeas petition is timely because *Davis* announced a new rule that alters the range of conduct and class of persons that can be punished under § 924(c). ECF No. 82 at 4. Because the government does not dispute this point, I assume without deciding that the petition is timely, and I deny it for other reasons. I also find that this motion is suitable for disposition without a hearing because Ninth Circuit authority clearly precludes relief.

17 ECF No. 84 at 9.

18 ECF No. 82 at 5.

19 *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007).

20 *Bousley v. United States*, 523 U.S. 614, 622 (9th Cir. 1998) (citations omitted).

21 ECF No. 84 at 4.

22 *Id.*

23 ECF No. 85 at 3.

24 *Id.* at 5–7.

25 *United States v. Montilla*, 870 F.2d 549 (9th Cir. 1989).

26 ECF No. 85 at 4.

27 *United States v. Chavez-Diaz*, 949 F.3d 1202, 1208 (9th Cir. 2020).

28 *Id.* (citing *United States v. Broce*, 488 U.S. 563, 569 (1989)).

29 *Id.* (citation omitted) (emphasis in original).

30 *See id.* at 1208–09.

31 *Bousley*, 523 U.S. at 622.

32 *Davis*, 139 S. Ct. at 2325.

33 *See* ECF No. 84 at 6–7 (collecting cases).

34 *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted) (quoting *Engle v. Isacc*, 456 U.S. 107, 130 n.35 (1982)).

35 *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir., Apr. 7, 2020).

36 ECF No. 82 at 7–8.

37 *See* *United States v. Dominguez*, No. 14-10268 (petition for rehearing and for rehearing en banc denied 8/24/2020; mandate issued 9/1/2020).

38 *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000).

39 *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) ("Under our law of the circuit doctrine, a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so." (internal quotations omitted)). *See also* *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 990 (9th Cir., July 17, 2020) ("For the same reasons as those set forth in *Dominguez*, we hold Hobbs Act robbery constitutes a predicate crime of violence, and therefore affirm Luong's conviction on count 2.").

40 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Appendix J

United States v. Sefo,
No. 21-15259, 2021 WL 3629279
(9th Cir. Aug. 16, 2021) (unpublished),
Order denying COA

2021 WL 3629279
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Mati SEFO, aka Derek Atkinsson, Defendant-Appellant.

No. 21-15259
|
FILED 08/16/2021

D.C. Nos. 3:20-cv-00380-LRH, 3:16-cr-00052-LRH-WGC-1, District of Nevada, Reno

Before: M. SMITH and HURWITZ, Circuit Judges.

ORDER

***1** 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).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2021 WL 3629279

Appendix K

United States v. Sefo,
No. 3:16-cr-00052-LRH-WGC, 2020 WL 7409595
(D. Nev. Dec. 17, 2020) (unpublished),
Order denying motion to vacate and
denying COA

2020 WL 7409595
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,
v.
Mati SEFO, Petitioner/Defendant.

Case No. 3:16-cr-00052-LRH-WGC
|
Signed 12/17/2020

Attorneys and Law Firms

Aarin Kevorkian, Federal Public Defender, Las Vegas, NV, for Petitioner/Defendant.

ORDER

LARRY R. HICKS, UNITED STATES DISTRICT JUDGE

***1** Defendant Mati Sefo moves this Court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, arguing that Hobbs Act robbery is not a crime of violence in light of *United States v. Davis*, 139 S. Ct. 2319 (2019) ("*Davis*"). ECF No. 37. The Government opposed, arguing that his motion is foreclosed by Ninth Circuit precedent and because his motion is procedurally defaulted and barred by the explicit terms of his plea agreement. ECF No. 39. Accordingly, Sefo replied. ECF No. 40. For the reasons contained within this Order, the Court denies Sefo's motion and denies him a certificate of appealability.

I. BACKGROUND

On August 31, 2016, Sefo was indicted for (1) interference with commerce by robbery ("Hobbs Act Robbery"), in violation of 18 U.S.C. § 1951; and (2) use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). ECF No. 1. On March 21, 2017, Sefo pled guilty, pursuant to a written plea agreement, to Count II, in which he admitted the following facts: (1) on August 2, 2016, Sefo robbed the BB Food and Liquor Store at gun point —he pointed a black semi-automatic pistol at the store clerk and demanded money; (2) the clerk complied and Sefo took $325 cash and a pack of Newport cigarettes; (3) Reno Police officers located Sefo within eight minutes of the robbery and Sefo was apprehended after he initially fled from police; (4) when Sefo was searched, officers found a black Ruger .22 long rifle pistol, a pack of Newport cigarettes, and $325 in cash; and (5) BB Food and Liquor is involved in interstate commerce as they order some of their supplies from Core Mark, which is based in Sacramento, California. *See* ECF No. 19 at 4.

On July 10, 2017, the Court sentenced Sefo to 84-months imprisonment, to be followed by five years of supervised release. Sefo filed no direct appeal. On June 22, 2020, Sefo filed the pending section 2255 motion to vacate, set aside, or correct his sentence, in light of *Davis*. ECF No. 37. The Government opposed (ECF No. 39); accordingly, Sefo replied (ECF No. 40). The Court now rules on the pending motion.

II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be brought on the following grounds: (1) "the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "the court was without jurisdiction to impose such sentence;" (3) "the sentence was in excess of the maximum authorized by law;" or (4) the sentence "is otherwise subject to collateral attack." *Id.*; *see* *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) (citation omitted). When a petitioner seeks relief pursuant to a right newly recognized by a decision of the United States Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f). That one-year limitation period begins to run from "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* § 2255(f)(3).

III. DISCUSSION

A. Sefo's motion is not procedurally barred and he has not waived his right to collaterally attack his conviction and sentence.

***2** The Government argues that Sefo's motion must be denied because (1) he failed to raise the issue on direct appeal; and (2) his plea agreement contains a collateral-attack waiver. ECF No. 39. These arguments are unavailing. First, Sefo is not barred from collaterally attacking his sentence

because he failed to do so on direct appeal. Under § 2255(f)(3), he is entitled to challenge his sentence within one year of "the date on which the right [he] assert[s] was *initially* recognized by the Supreme Court." (emphasis added). Courts in this District have previously held that a motion challenging the constitutionality of § 924(c)'s residual clause is not procedurally barred, even when the defendant did not raise the issue on appeal. *See United States v. Bonaparte*, Case No. 2:12-cr-132-JAD-CWH-2, 2017 WL 3159984, at *2 (D. Nev. July 25, 2017) (finding that the defendant's section 2255 motion was not "barred by his collateral-attack waiver or based on its timing."); *United States v. Harrison Johnson*, No. 2:12-cr-00336-JAD-CWH, 2018 WL 3518448, at *2 (D. Nev. July 19, 2018) (same). As Sefo's motion was brought within one year of *Davis*, [1] which held that the residual clause of § 924(c) is unconstitutionally vague, the Court finds his motion is timely. [2]

Second, the Ninth Circuit has held that an appeal waiver in the plea agreement does not bar a defendant's challenge to his sentence based on an unconstitutionally vague statute. *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016) ("A waiver of appellate rights will also not apply if a defendant's sentence is 'illegal,' which includes a sentence that 'violates the constitution.' "). [3] As Sefo argues that his sentence should be vacated because it was based on the now unconstitutionally vague residual clause of § 924(c), his motion is not barred by the plea agreement.

B. While the residual clause of § 924(c) is unconstitutionally vague, Sefo's sentence is upheld under the "elements" clause of the statute.

Sefo pled guilty to Count II of the indictment, which charged him with using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A). ECF Nos. 1; 33. 18 U.S.C. § 924(c)(1)(A) provides that "any person, who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence ... be sentenced to a term of imprisonment" of not less than 7 years if the firearm is brandished. The statute further defines "crime of violence" in two ways. The first, by what is known as the "elements" or "force" clause: an offense that is a felony and "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 924(c)(3)(A). The second, by what is known as the residual clause: an offense that is a felony and "that by its nature, involves 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)(B). Sefo argues that Hobbs Act robbery is not a crime of violence by its elements, and thus, his sentence under 924(c) could only have arisen under the unconstitutionally vague residual clause. Therefore, he argues it must be vacated.

***3** The Court disagrees; it is bound by Ninth Circuit's precedent, *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) and *United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993), which held that Hobbs Act robbery is categorically a crime of violence under the elements clause. "An offense is categorically a crime of violence only if the least violent form of the offense qualifies as a crime of violence." *Dominguez*, 954 F.3d at 1259. Considering the "fear of injury" provision the least serious way to violate of the Hobbs Act robbery statute, the Ninth Circuit determined that "placing a victim in fear of bodily injury is categorically a crime of violence under the elements clause because it 'requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard.' " *Id.* at 1260 (quoting *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017)). Sefo argues that committing Hobbs Act robbery by causing fear of future injury to property (tangible or intangible) is overly broad to be a crime of violence. However, *Dominquez* directly rejected this argument: the Court concluded that it need not analyze the fear of injury to intangible economic interests because Dominquez failed "to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *Id.* The Court further adopted the Fourth Circuit's reasoning in *United States v. Mathis*, which observed that both the Hobbs Act robbery statute and § 924(c) "reference the use of force or threatened use of force against 'property' generally, without further defining the term 'property,' " and that "neither provision draws any distinction between tangible and intangible property." *Id.* at 1261 (quoting *Mathis*, 932 F.3d 242, 266 (4th Cir. 2019)). Defendant's request that this Court disregard Ninth Circuit precedent, and the precedent of

every other circuit court in the country that have also held Hobbs Act robbery is a crime of violence under the elements clause, *id.* at 1260 (collecting cases), must be rejected.

Because Sefo's conviction may be upheld under the elements clause of § 924(c), the Supreme Court's decision in *Davis* does not affect his sentence. While Sefo was not convicted of the predicate offense, he pled guilty and admitted to the elements of the Hobbs Act robbery as part of his plea agreement: (1) on August 2, 2016, Sefo robbed the BB Food and Liquor Store at gun point—he pointed a black semi-automatic pistol at the store clerk and demanded money; (2) the clerk complied and Sefo took $325 in cash and a pack of Newport cigarettes; (3) Reno Police officers located Sefo within eight minutes of the robbery and Sefo was apprehended after he initially fled from police; (4) when Sefo was searched, officers found a black Ruger .22 long rifle pistol, a pack of Newport cigarettes, and $325in cash; and (5) BB Food and Liquor is involved in interstate commerce as they order some of their supplies from Core Mark, which is based in Sacramento, California. Accordingly, Sefo's conviction and resulting 84-month sentence withstands his constitutional challenge, and his motion to vacate, set aside, or correct his sentence is therefore denied.

C. Certificate of Appealability

To proceed with an appeal of this Order, Sefo must receive a certificate of appealability from the Court. 28 U.S.C. § 2253(c)(1); FED. R. APP. P. 22; 9TH CIR. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006). For the Court to grant a certificate of appealability, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). And the petitioner bears the burden of demonstrating that the issues are debatable among reasonable jurists; that a court could resolve the issues differently; or that the issues are "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84 (citation omitted).

As discussed above, Sefo has failed to raise a meritorious challenge to his conviction and sentence under section 924(c)—Hobbs Act robbery is categorically a crime of violence pursuant to the Ninth Circuit's decision in *Dominguez.* As such, the Court finds that he has failed to demonstrate that reasonable jurists would find the Court's assessment of his claims debatable or wrong. *See Allen*, 435 F.3d at 950-951. Therefore, the Court denies Sefo a certificate of appealability.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (ECF No. 37) is **DENIED.**

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court **ENTER** a separate and final Judgment denying Sefo's § 2255 motion. *See Kingsbury v. United States*, 900 F.3d 1147, 1150 (9th Cir. 2018).

***4** IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 7409595

Footnotes

1 *Davis* was decided on June 24, 2019 and Sefo's motion was filed on June 22, 2020.

2 The Court further notes that in *United States v. Gutierrez*, 876 F.3d 1254, 1255-56 (9th Cir. 2017), the defendant did not directly appeal his sentence, but still brought a motion challenging his conviction for brandishing a firearm during a crime of violence. In that case, the Government "did not raise any procedural barriers" for the Court to consider and the Ninth Circuit proceeded directly to the merits of the case.

3 While the Government argues waiver, it concedes that *Torres* is binding Ninth Circuit precedent that this Court must follow. Nevertheless, it makes this argument to preserve the issue for further appeal. *See* ECF No. 39 at 8 n.1.