

Pet. App. 1a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CR-196-FL-3
NO. 5:16-CV-480-FL

TAHJI ANTONIO ELEY,)
)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 143), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 226), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On October 4, 2010, petitioner pleaded guilty, without a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one); substantive Hobbs Act robbery, attempted Hobbs Act robbery, and aiding and abetting same, in violation of 18 U.S.C. §§ 1951 and 2 (count two); using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three); and possession of a firearm by a person previously convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (count five). On

January 19, 2011, the court sentenced petitioner to concurrent terms of 160 months' imprisonment on each of counts one and two, a consecutive term of 84 months' imprisonment on count three, and a concurrent term of 120 months' imprisonment on count five, producing an aggregate custodial sentence of 244 months' imprisonment. Defendant appealed his judgment of conviction. On November 29, 2011, the United States Court of Appeals for the Fourth Circuit issued unpublished opinion which vacated petitioner's conviction on count five, affirmed his remaining convictions, and remanded for resentencing. On January 31, 2012, the court dismissed count five and resentenced defendant as follows: concurrent terms of 37 months' imprisonment on each of counts one and two, and a consecutive sentence of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 121 months' imprisonment.

On June 23, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On August 2, 2016, respondent moved to stay the § 2255 proceedings pending the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 22, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis,

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932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on January 31, 2020, arguing petitioner’s motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner’s predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)’s force clause. See id. at 265-66 (holding “Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)”). Accordingly, petitioner’s § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to

¹ Although count two alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Superseding Indictment (DE 33) at 2-3).

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proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 226), and DENIES petitioner's motion to vacate (DE 143). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.



LOUISE W. FLANAGAN
United States District Judge

Pet. App. 6a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

TAHJI ANTONIO ELEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:10-CR-196-FL-3
Civil Case Number: 5:16-CV-480-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the respondent's motion to dismiss.

IT IS ORDERED AND ADJUDGED in accordance with the court's order entered this date, that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on October 27, 2020, with service on:

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Federal Public Defender
150 Fayetteville St., Suite 450
Raleigh, NC 27611-5967

Asia J. Prince (via CM/ECF Notice of Electronic Filing)
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

October 27, 2020

PETER A. MOORE, JR., CLERK

by 
Deputy Clerk

Pet. App. 7a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:11-CR-279-FL-4
NO. 5:16-CV-795-FL

MICHAEL EMANUEL PRYOR,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 326), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 357), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On February 16, 2012, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three). On December 6, 2012, the court sentenced petitioner to 13 months' imprisonment on count one and a consecutive term of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 97 months.

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On September 12, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On October 18, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit’s resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court’s decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 25, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner’s motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit’s decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on February 3, 2020, arguing petitioner’s motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion

and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of using a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of five years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

¹ The superseding indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count two, which was dismissed at sentencing. (Superseding Indictment (DE 70) at 3-4; Judgment (DE 235)). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count two alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Superseding Indictment (DE 70) at 3-4).

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CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 326), and DENIES petitioner's motion to vacate (DE 357). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 12a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

MICHAEL EMANUEL PRYOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:11-CR-279-FL-4
Civil Case Number: 5:16-CV-796-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the respondent's motion to dismiss.

IT IS ORDERED AND ADJUDGED in accordance with the court's order entered this date, that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on October 27, 2020, with service on:

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Federal Public Defender's Office
150 Fayetteville Street, Suite 450
Raleigh, NC 27601

Joshua B. Royster (via CM/ECF Notice of Electronic Filing)
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

October 27, 2020

PETER A. MOORE, JR., CLERK

by 
Deputy Clerk

Pet. App. 13a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:10-CR-36-FL-1
NO. 7:16-CV-135-FL

STANLEY ANDREA CLYBURN, JR.)
Petitioner,)
v.)
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 53), which challenges, *inter alia*, petitioner’s conviction and sentence for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 65), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On June 1, 2010, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one); using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three); and possession of a firearm by a person previously convicted of a felony, in violation of 18 U.S.C. § 922(g) (count six). On March 25, 2011, the court sentenced petitioner to concurrent terms of 116 months' imprisonment on counts one and six, and a consecutive term of

60 months' imprisonment on count three. On August 5, 2014, the court reduced the sentence to concurrent terms of 92 months' imprisonment on counts one and six, and a consecutive term of 48 months' imprisonment on count three, producing an aggregate custodial sentence of 140 months.

On June 8, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction and armed career criminal and career offender designations should be vacated in light of Johnson. On July 14, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on July 15, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 19, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on February 4, 2020, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of five years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery¹ in violation of 18 U.S.C. § 1951, and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms. As to petitioner's challenge to his advisory career offender enhancement, the claim is not cognizable in a habeas corpus proceeding. See United States v. Foote, 784 F.3d 931 (4th Cir. 2015); see also Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding advisory sentencing Guidelines are not subject to void-for-vagueness challenge based on Johnson and its progeny).

Petitioner also asserts that his designation as an armed career criminal under 18 U.S.C. § 924(e) should be vacated under Johnson. Respondent argues that petitioner was not sentenced as an armed career criminal, or in the alternative that his armed career criminal designation had no

¹ The indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count two, which was dismissed at sentencing. (Indictment (DE 1)). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count two alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Indictment (DE 1)).

impact on the aggregate sentence in light of the sentences on the remaining counts. Petitioner fails to address this issue in his counseled response to respondent's motion to dismiss. The court construes petitioner's failure to respond as concession that this claim is without merit or otherwise moot in light of the aggregate sentence. See Pueschel v. United States, 369 F.3d 345, 354 (4th Cir. 2004) (explaining that when party fails to respond to motion to dismiss, the district court is "entitled, as authorized, to rule on the . . . motion and dismiss [the] suit on the uncontested bases asserted" in the motion).

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 65), and DENIES petitioner's motion to vacate (DE 53). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

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SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 19a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

STANLEY ANDREA CLYBURN, JR.,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 7:10-CR-36-1FL
Civil Case No. 7:16-CV-135-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Rudy Renfer (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 20a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:09-CR-57-FL-1
NO. 7:16-CV-175-FL

BOBBY RAY LAMBERT,)
)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 126), which challenges petitioner's convictions and sentence for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent's motion to dismiss (DE 139), which was briefed fully.¹ For the reasons that follow, the court grants respondent's motion to dismiss, and denies petitioner's motion to vacate.

BACKGROUND

On October 6, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (counts five and eight), and two counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (counts six and nine). On May 12, 2010, the court sentenced petitioner to

¹ Also pending is defendant's pro se motion for compassionate release, filed August 31, 2020. The court has appointed the Federal Public Defender to represent petitioner in connection with the motion for compassionate release, and therefore holds in abeyance the pro se motion pending additional filing by counsel.

concurrent terms of six months' imprisonment on counts five and eight, a consecutive term of 84 months' imprisonment on count six, and a consecutive term of 300 months' imprisonment on count nine, producing an aggregate custodial sentence of 390 months' imprisonment.

On June 21, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) convictions and career offender designation should be vacated in light of Johnson. On August 1, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on August 2, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 22, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on February 4, 2020, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of five years’ imprisonment for the first conviction, and a consecutive term of 25 years’ imprisonment for the second conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offenses qualify as crimes of violence under subsection (c)(3)(A) (the force clause), his convictions remain valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offenses are Hobbs Act robberies in violation of 18 U.S.C. § 1951,² and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) convictions remain valid, notwithstanding Davis and Simms. As to petitioner's challenge to his advisory career offender enhancement, the claim is not cognizable in a habeas corpus proceeding. See United States v. Foote, 784 F.3d 931 (4th Cir. 2015); see also Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding advisory sentencing Guidelines are not subject to void-for-vagueness challenge based on Johnson and its progeny).

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented

² Although counts five and eight alleged defendant committed both substantive and attempted Hobbs Act robberies, the § 924(c) convictions were based solely on substantive Hobbs Act robberies. (See Indictment (DE 1)).

Pet. App. 24a

should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 139), and DENIES petitioner's motion to vacate (DE 126). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.



LOUISE W. FLANAGAN
United States District Judge

Pet. App. 25a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

BOBBY RAY LAMBERT,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 7:09-CR-57-1FL
Civil Case No. 7:16-CV-175-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Rudy Renfer (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 26a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-329-FL-3
NO. 5:16-CV-476-FL

RONNIE DONTE RAND,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 189), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 243), which was briefed fully.¹ For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On January 5, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count six). On April 10, 2009, the court sentenced petitioner to 87 months'

¹ Also pending is defendant's pro se motion for compassionate release, filed September 3, 2020. The court has appointed the Federal Public Defender to represent petitioner in connection with the motion for compassionate release, and therefore holds in abeyance the pro se motion pending supplemental filing by counsel or other pertinent motion.

imprisonment on count one, and a consecutive term of 120 months' imprisonment on count six, producing an aggregate custodial sentence of 207 months.

On June 23, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On July 28, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on August 1, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 22, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on January 28, 2020, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 19, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without

jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of discharging a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of ten years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense

qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,² and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

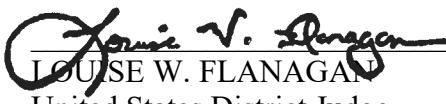
² The indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count five, which was dismissed at sentencing. (Indictment (DE 1) at 4; Judgment (DE 73) at 1). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count five alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Indictment (DE 1) at 3-4).

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CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 243) and DENIES petitioner's motion to vacate (DE 189). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 31a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RONNIE DONTE RAND,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:08-CR-329-3FL
Civil Case No. 5:16-CV-476-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Michael James (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 32a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:11-CR-38-FL-1
NO. 7:16-CV-207-FL

CHRISTOPHER DAVID FRAZIER,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 67), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 107), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On June 6, 2011, petitioner pleaded guilty, pursuant to a written plea agreement, to Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 (count two), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three). On November 14, 2011, the court sentenced petitioner to 63 months' imprisonment on count two and a consecutive term of 60 months' imprisonment on count three, producing an aggregate custodial sentence of 123 months.

On June 26, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On August 9, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit’s resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the United States Supreme Court’s decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 23, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner’s motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit’s decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on January 30, 2020, arguing petitioner’s motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion

and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of five years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

¹ Although the indictment alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Indictment (DE 1) at 3).

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 107) and DENIES petitioner's motion to vacate (DE 67). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 37a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CHRISTOPHER DAVID FRAZIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 7:11-CR-38-FL-1
Civil Case Number: 7:16-CV-207-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the respondent's motion to dismiss.

IT IS ORDERED AND ADJUDGED in accordance with the court's order entered this date, that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on October 27, 2020, with service on:

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Federal Public Defender's Office
150 Fayetteville Street, Suite 450
Raleigh, NC 27601

Asia J. Prince (via CM/ECF Notice of Electronic Filing)
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

October 27, 2020

PETER A. MOORE, JR., CLERK

by 
Deputy Clerk

Pet. App. 38a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-329-FL-1
NO. 5:16-CV-321-FL

AHMAD LEE BANKS,)
)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 180), which challenges petitioner's conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent's motion to dismiss (DE 245), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss, and denies petitioner's motion to vacate.

BACKGROUND

On January 5, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count six). On July 10, 2009, the court sentenced petitioner to 87 months' imprisonment on count one, and a consecutive term of 120 months' imprisonment on count six, producing an aggregate custodial sentence of 207 months.

On June 6, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On July 8, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit’s resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court’s decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 19, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner’s motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 15, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit’s decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on January 29, 2020, arguing petitioner’s motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion

and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of discharging a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of ten years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

¹ The indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count five, which was dismissed at sentencing. (Indictment (DE 1) at 4; Judgment (DE 90) at 1). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count five alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act robbery. (See Indictment (DE 1) at 3-4).

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CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 245) and DENIES petitioner's motion to vacate (DE 180). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 43a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AHMAD LEE BANKS,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:08-CR-329-1FL
Civil Case No. 5:16-CV-321-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Asia Prince (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 44a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:09-CR-201-FL-2
NO. 5:16-CV-487-FL

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 205), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 256), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On January 19, 2010, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count eleven). On June 10, 2010, the court sentenced petitioner to 70 months' imprisonment on count one, and a consecutive term of 84 months' imprisonment on count eleven, producing an aggregate custodial sentence of 154 months.

On June 23, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On August 3, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit’s resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on August 4, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court’s decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 22, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner’s motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit’s decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on February 3, 2020, arguing petitioner’s motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion

and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

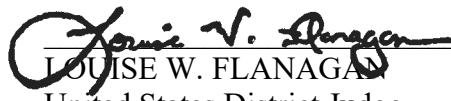
Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

¹ The indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count ten, which was dismissed at sentencing. (Indictment (DE 1) at 8; Judgment (DE 101) at 1). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count ten alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act robbery. (See Indictment (DE 1) at 7-8; Plea Agreement (DE 52) at 4-5).

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 256) and DENIES petitioner's motion to vacate (DE 205). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

JOHNNY DRAUGHN,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:09-CR-201-2FL
Civil Case No. 5:16-CV-487-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Joshua Royster (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 50a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:10-CR-196-FL-2
NO. 5:17-CV-43-FL

SHANIQUA SHONTA BURRELL,)
)
)
Petitioner,)
)
)
v.) ORDER
)
)
UNITED STATES OF AMERICA,)
)
)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 157), which challenges petitioner's conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent's motion to dismiss (DE 224), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss, and denies petitioner's motion to vacate.

BACKGROUND

On September 7, 2010, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three). On January 5, 2011, the court sentenced petitioner to 14 months' imprisonment on count one and a consecutive term of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 98 months' imprisonment.

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On January 23, 2017, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that her § 924(c) conviction should be vacated in light of Johnson. On March 6, 2017, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit’s resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on March 7, 2017. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court’s decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 25, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner’s motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit’s decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner’s claims. Respondent filed the instant motion to dismiss on January 30, 2020. On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes she is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the

court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), her conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

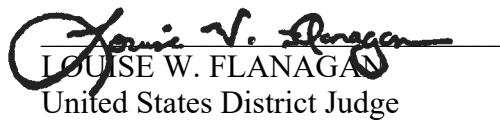
¹ The superseding indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robbery as charged in count two, which was dismissed at sentencing. (Superseding Indictment (DE 33) at 3; Judgment (DE 81) at 1). Petitioner's § 924(c) conviction, however, does not require conviction on the predicate crime of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority). Furthermore, although count two alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Superseding Indictment (DE 33) at 3; Plea Agreement (DE 50-1) at 4-5).

Pet. App. 54a

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 224), and DENIES petitioner's motion to vacate (DE 157). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 27th day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 55a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

SHANIQUA SHONTA BURRELL,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:10-CR-196-2FL
Civil Case No. 5:17-CV-43-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 27, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 27, 2020, with service on

Michael James (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 56a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:12-CR-353-BO-2
No. 5:19-CV-195-BO

MARVIN RASHAD CUMMINGS,)
Cummings,)
v.)
UNITED STATES OF AMERICA,)
Respondent.)

ORDER

This cause is before the Court on Cummings's motion for home confinement; motion to defer payments; motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255; and motion to supplement § 2255 motion. For the reasons that follow, the motions are denied

BACKGROUND

Cummings pleaded guilty in March 2013 to one count of conspiracy to interfere with commerce by threats and violence (count one), one count of interference with commerce by threats and violence and aiding and abetting (count seven), one count of possessing a firearm in furtherance of a crime of violence and aiding and abetting (count eight), and one count of bank robbery and aiding and abetting (count eleven). In May 2014, the Court sentenced him to a total term of imprisonment of 144 months, with eighty-four months on count one, eighty-four months on count seven concurrent with count one, eighty-four months on count eleven concurrent with count one, and sixty months on count eight consecutive to count one. Cummings has filed a motion for home confinement; motion to defer payments; motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255; and motion to supplement § 2255 motion. The government has filed

a motion to dismiss in response to the § 2255 motion and has responded in opposition to the other motions. The issues are ripe for disposition.

DISCUSSION

Home Confinement

Cummings asks the Court to place him on home confinement in light of the COVID-19 pandemic. The BOP has exclusive authority to determine Cummings's place of imprisonment, and the BOP's placement decisions are "not reviewable by any court." *See* 18 U.S.C. § 3621(b); *see also* 18 U.S.C. § 3624(c). Therefore, the court is without jurisdiction to order the BOP to place Cummings on home confinement. *See United States v. Caudle*, 740 F. App'x 364, 365 (4th Cir. 2018). Cummings's motion for home confinement is denied. [DE 335].

Defer Payments

A sentence which imposes an order of restitution is a final judgment subject to modification or amendment under limited circumstances. 18 U.S.C. § 3664(o). Although a restitution order may be adjusted under 18 U.S.C. § 3664(k) due to a material changes in the economic circumstances of the defendant, in order to find a material change in economic circumstances, the Court must be able to conduct "an objective comparison of a defendant's financial condition before and after a sentence is imposed." *United States v. Bratton-Bey*, 564 F. App'x 28, 30 (4th Cir. 2014) (quoting *United States v. Grant*, 235 F.3d 95, 100 (2d Cir. 2000)). Here, the Court has been provided with insufficient information on which to conduct an objective comparison of Cummings's economic circumstances. He has therefore failed to demonstrate that adjustment of the restitution judgment is appropriate. Furthermore, Cummings's request to postpone his restitution payment is a challenge to the execution of his sentence, which is construed as a petition for habeas corpus relief under 28 U.S.C. § 2241. *See United States v. Martin*, 662 F.3d 301, 306–07 (4th Cir. 2011); *United States*

v. *Gripper*, 224 F. App'x 219, 220 (4th Cir. 2007). Such a petition must be brought in the district in which the defendant is incarcerated. *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000). Cummings currently resides at FCI Oxford in the Western District of Wisconsin. Therefore, Cummings's request to postpone restitution payments is denied. [DE 330].

§ 2255

The government contends that the Court should dismiss Cummings's § 2255 motion pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. "To survive a motion to dismiss pursuant to Rule 12(b)(6), [petitioner's] '[f]actual allegations must be enough to raise a right to relief above the speculative level,' thereby 'nudg[ing] their claims across the line from conceivable to plausible.'" *Aziz v. Alcolac Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Under § 2255(b), [u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court must grant a prompt hearing to determine the issues and make findings of fact and conclusions of law with respect thereto." *United States v. Thomas*, 627 F.3d 534, 539 (4th Cir. 2010) (internal quotation and citation omitted).

In its motion to dismiss, the government argues that the § 2255 motion is without merit. This Court agrees. The predicate offense for Cummings's 18 U.S.C. § 924(c) conviction was a substantive count of Hobbs Act robbery, which is a crime of violence under Subsection A of § 924(c). The Supreme Court determined that the residual clause of Subsection B of § 924(c) is unconstitutional, but Subsection A remains valid. *United States v. Davis*, 139 S. Ct. 2319. Cummings's assertion that his Hobbs Act robbery conviction is not a crime of violence is without merit. *United States v. Mathis* 932 F.3d 242, 246 (4th Cir. 2019).

Furthermore, Cummings's claim for relief is procedurally barred, as Cummings could have raised this issue on direct appeal but failed to do so. *Bousley v. United States*, 523 U.S. 614, 621 (1998). In order to overcome procedural default, a petitioner must show either cause and actual prejudice or that he is actually innocent. *Id.* at 622; *see also United States v. Thomas*, 627 F.3d 534, 538 (4th Cir. 2010). In order to show cause for failing to raise issues on direct appeal, a petitioner must show that something that "cannot be fairly attributed to him," such as a factual or legal basis that was not reasonably available or some impediment by the government existed, prevented him from raising the issue. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Cummings has not demonstrated cause or that he is actually innocent. He cannot, therefore, overcome the procedural bar, and his § 2255 claim fails. [DE 307].

Supplement § 2255 Motion

Leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15. is within the discretion of the court to allow or deny the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). However, the right to amend is not unfettered. "The law is well settled that leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (citation omitted). A proposed amendment is futile when "it advances a claim or defense that is legally insufficient on its face." *Joyner v. Abbott Labs.*, 674 F. Supp. 185, 190 (E.D.N.C. 1987).

Here, allowing amendment would be futile. Cummings seeks to amend his § 2255 motion with a *Davis* claim. However, as previously discussed, Cummings's assertion that his Hobbs Act robbery conviction is not a crime of violence is without merit. The motion to supplement is therefore denied. [DE 330].

Pet. App. 60a

Certificate of Appealability

A certificate of appealability shall not issue absent “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that reasonable jurists would find that an assessment of the constitutional claims is debatable and that any dispositive procedural ruling dismissing such claims is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). As reasonable jurists would not find this Court’s dismissal of Cummings’s § 2255 motion debatable, a certificate of appealability is DENIED.

CONCLUSION

The government’s motion to dismiss the § 2255 motion is GRANTED. [DE 341]. Cummings’s motions, for the foregoing reasons, [DE 307, 330, 335], are DENIED.

SO ORDERED, this 6 day of October, 2020.


TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

Pet. App. 61a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MARVIN RASHAAD CUMMINGS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:12-CR-353-2BO

Civil Case Number: 5:19-CV-195-BO

Decision by Court.

This cause comes before the Court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

IT IS ORDERED AND ADJUDGED. The government's motion to dismiss the § 2255 motion is GRANTED. [DE 341]. Cummings's motions, for the foregoing reasons, [DE 307,330, 335], are DENIED. A certificate of appealability is DENIED.

This Judgment Filed and Entered on October 7, 2020 with service on:

Sherri Alspaugh (via CM/ECF)

Dennis Duffy (via CM/ECF)

October 7, 2020

Peter A. Moore, Jr.

Clerk

Raleigh, North Carolina

Pet. App. 62a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

NO. 2:13-CR-19-FL-1
NO. 2:16-CV-45-FL

RANDOLPH LEVY HYMAN, JR.)
)
)
Petitioner,)
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v.) ORDER
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)
UNITED STATES OF AMERICA,)
)
)
)
Respondent.)

This matter is before the court on petitioner's motions to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, (DE 106, 112), which challenge petitioner's conviction for brandishing a firearm in furtherance of a crime of violence in light of the Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent's motion to dismiss, (DE 125), which was fully briefed. For the reasons that follow, the court grants respondent's motion to dismiss, and denies petitioner's motions to vacate.

BACKGROUND

On June 2, 2014, petitioner pleaded guilty to attempted bank robbery and aiding and abetting same, in violation of 18 U.S.C. §§ 2331(a) and 2 (count one), and brandishing a firearm during and in relation to a crime of violence and aiding and abetting same, in violation of 18 U.S.C. §§ 924(c) and 2 (count two). The predicate crime of violence supporting petitioner's § 924(c) conviction is Hobbs Act robbery, in violation of 18 U.S.C. § 1951. On September 13, 2014, the

court sentenced petitioner to time served as to count one, and a consecutive sentence of 84 months' imprisonment on count three. Petitioner did not appeal his conviction or sentence.

On June 26, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On August 2, 2016, respondent filed motion to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on August 4, 2016. Petitioner filed corrected motion to vacate on September 21, 2016, raising substantially the same claim asserted in the first motion. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the United States Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 22, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on January 30, 2020. On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

Pet. App. 64a

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1)(A)(ii). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; United States v. Simms, 914 F.3d 229, 237 (4th Cir. 2019). The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951, and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

Pet. App. 66a

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss, (DE 125), and DENIES petitioner's motions to vacate, (DE 106, 112). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 29th day of June, 2020.



LOUISE W. FLANAGAN
United States District Judge

Pet. App. 67a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

RANDOLPH LEVY HYMAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 2:13-CR-19-FL-1
Civil Case Number: 2:16-CV-45-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the respondent's motion to dismiss.

IT IS ORDERED AND ADJUDGED in accordance with the court's order entered this date, that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on June 29, 2020, with service on:

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Federal Public Defender
150 Fayetteville St., Suite 450
Raleigh, NC 27611-5967

Michael James (via CM/ECF Notice of Electronic Filing)
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

June 29, 2020

PETER A. MOORE, JR., CLERK

/s/ M. Castania

By M. Castania, Deputy Clerk

Pet. App. 68a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:09-CR-93-FL-1
NO. 5:16-CV-335-FL

THOMAS LAMONT JONES,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 97), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 112), which was fully briefed, and petitioner’s pro se motion seeking judicial recommendation for halfway house placement (DE 115). For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motions to vacate and for judicial recommendation for halfway house placement.

BACKGROUND

On October 16, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 (count two), and using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (count three). On June 9,

2010, the court sentenced petitioner to 95 months' imprisonment on count two, and a consecutive term of 87 months' imprisonment on count three, for a total custodial sentence of 182 months.

On June 7, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction and career offender designation should be vacated in light of Johnson. On July 11, 2016, respondent filed motion to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on July 13, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the United States Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 19, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 15, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on February 4, 2020. On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

Petitioner, proceeding pro se, filed the instant motion seeking judicial recommendation for halfway house placement on September 17, 2020. Respondent did not respond to this motion.

DISCUSSION

A. Section 2255 Motion

1. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

2. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1)(A)(ii). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; United States v. Simms, 914 F.3d 229, 237 (4th Cir. 2019). The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offense qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951, and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms. As to petitioner's challenge to his advisory career offender enhancement, the claim is not cognizable in a habeas corpus proceeding. See United States v. Foote, 784 F.3d 931 (4th Cir. 2015); see also Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding advisory sentencing Guidelines are not subject to void-for-vagueness challenge based on Johnson and its progeny).

3. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S.

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473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

B. Motion for Recommendation for Halfway House Placement

Petitioner also has filed motion seeking post-judgment, judicial recommendation for halfway house placement. The court declines to make such recommendation. The court did not recommend community confinement at sentencing despite consideration of all relevant pre-sentencing conduct. And the Federal Bureau of Prisons is better positioned to evaluate whether defendant's post-sentencing conduct justifies placement in community confinement.¹ The court, however, commends defendant for his record of achievement in custody, as reflected in the instant motion. Defendant's reported performance is consistent with the court's expectations at time of sentencing.

CONCLUSION

Based on the foregoing, the respondent's motion to dismiss (DE 112) is GRANTED, and defendant's motions to vacate (DE 97) and for judicial recommendation for halfway house placement (DE 115) are DENIED. A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 19th day of October, 2020.



LOUISE W. FLANAGAN
United States District Judge

¹ Accordingly, this order should not be construed as stating the court is opposed to defendant's placement in community confinement. The court takes no position on the issue.

Pet. App. 73a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

THOMAS LAMONT JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:09-CR-93-FL-1
Civil Case Number: 5:16-CV-335-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the respondent's motion to dismiss.

IT IS ORDERED AND ADJUDGED in accordance with the court's order entered this date, that respondent's motion to dismiss is granted and this action is hereby dismissed.

This Judgment Filed and Entered on October 19, 2020, with service on:

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Federal Public Defender
150 Fayetteville St., Suite 450
Raleigh, NC 27611-5967

Rudy E. Renfer (via CM/ECF Notice of Electronic Filing)
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

October 19, 2020

PETER A. MOORE, JR., CLERK

by



Deputy Clerk

Pet. App. 74a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-328-FL-1
NO. 5:16-CV-246-FL

RAPHAEL DAVONNE POWELL,)
)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,) ORDER
)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 69), which challenges petitioner's conviction and sentence for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent's motion to dismiss (DE 73), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss and denies petitioner's motion to vacate.

BACKGROUND

On January 20, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951 (count one), and two counts of possession of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (counts five and nine). On July 15, 2009, the court sentenced petitioner to 73 months' imprisonment on count one, a consecutive term of 84 months' imprisonment on count

five, and a consecutive term of 300 months' imprisonment on count nine, producing an aggregate custodial sentence of 457 months.

On May 11, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) convictions and sentence should be vacated in light of Johnson. Petitioner also challenges his advisory Guidelines range pursuant to Molina-Martinez v. United States, 136 S. Ct. 1338 (2016). Respondent filed the instant motion to dismiss on June 17, 2016, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 7, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the United States Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 18, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motion. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 15, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Petitioner filed supplemental brief on January 23, 2020, conceding that Mathis forecloses his claims. Respondent filed supplemental brief on February 4, 2020, arguing petitioner's § 2255 motion should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction, and mandatory consecutive sentence of 25 years’ imprisonment for each subsequent conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; United States v. Simms, 914 F.3d 229, 237 (4th Cir. 2019). The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offenses qualify as crimes of violence under subsection (c)(3)(A) (the force clause), his convictions remain valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offenses are Hobbs Act robberies¹ in violation of 18 U.S.C. § 1951, and the Fourth Circuit has held that this offense is a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) convictions remain valid, notwithstanding Davis and Simms. As to petitioner's challenge to his advisory Guidelines range, the claim is not cognizable in a habeas corpus proceeding. See United States v. Foote, 784 F.3d 931 (4th Cir. 2015); see also Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding advisory sentencing Guidelines are not subject to void-for-vagueness challenge based on Johnson and its progeny).

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The

¹ The superseding indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robberies as charged in counts four and eight, which were dismissed at sentencing. (DE 21, 49). Petitioner's § 924(c) convictions, however, do not require independent convictions on the predicate crimes of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority).

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petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, petitioner's motion to vacate (DE 69) is DENIED, respondent's motion to dismiss (DE 73) is GRANTED, and a certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 21st day of October, 2020.



LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

RAPHAEL DAVONNE POWELL,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:08-CR-328-1FL
Civil Case No. 5:16-CV-246-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motions to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered October 21, 2020, that petitioner's motion to vacate is DENIED, respondent's motion to dismiss is GRANTED, and a certificate of appealability is DENIED.

This Judgment Filed and Entered on October 21, 2020, with service on

Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Rudy E. Renfer (via CM/ECF Notice of Electronic Filing)

October 21, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 80a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:09-CR-33-FL-1
NO. 7:16-CV-235-FL

JOSHUA HUNT,)
)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 196), which challenges petitioner's convictions and sentence for two counts of possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). For the reasons that follow, the court denies petitioner's motion to vacate.

BACKGROUND

On August 3, 2009, petitioner pleaded guilty, pursuant to a written plea agreement, to two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (counts 2 and 7); carjacking, in violation of 18 U.S.C. § 2119 (count 5); two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (counts 10 and 12); and possession with intent to distribute in excess of five grams of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (count 15). On November 10, 2009, the court sentenced petitioner to concurrent terms of 210 months' imprisonment on counts 2, 7, and 15, a concurrent term of 180 months' imprisonment on

count 5, a consecutive term of 120 months' imprisonment on count 10, and a consecutive term of 300 months' imprisonment on count 12, producing an aggregate custodial sentence of 630 months.

On June 27, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) convictions and career offender designation should be vacated in light of Johnson. On August 4, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 24, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Petitioner filed supplemental brief on January 23, 2020, conceding that Mathis forecloses his claims. Respondent filed supplemental brief on February 3, 2020, arguing petitioner's § 2255 motion should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that “the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of discharging a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of 10 years’ imprisonment for the first conviction, and mandatory consecutive sentence of 25 years’ imprisonment for the second conviction. 18 U.S.C. § 924(c)(1)(A)-(C). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner's predicate offenses qualify as crimes of violence under subsection (c)(3)(A) (the force clause), his convictions remain valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offenses are carjacking and Hobbs Act robbery.¹ The Fourth Circuit has held that these offenses qualify as crimes of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)"); United States v. Evans, 848 F.3d 242, 244, 247 (4th Cir. 2017). Accordingly, petitioner's § 924(c) convictions remain valid, notwithstanding Davis and Simms. As to petitioner's challenge to his advisory career offender enhancement, the claim is not cognizable in a habeas corpus proceeding. See United States v. Foote, 784 F.3d 931 (4th Cir. 2015); see also Beckles v. United States, 137 S. Ct. 886, 895 (2017) (holding advisory sentencing Guidelines are not subject to void-for-vagueness challenge based on Johnson and its progeny)).

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The

¹ The indictment charged petitioner with possessing a firearm in furtherance of substantive carjacking and Hobbs Act robbery as charged in counts 9 and 11, respectively, both of which were dismissed at sentencing. (DE 1, 103). Petitioner's § 924(c) convictions, however, do not require convictions on the predicate crimes of violence. See United States v. Carter, 300 F.3d 415, 425 (4th Cir. 2002); see also United States v. Nelson, 27 F.3d 199, 200-01 (6th Cir. 1994) (collecting authority).

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petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, petitioner's motion to vacate (DE 69) is DENIED. A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 23rd day of October, 2020.



LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

JOSHUA HUNT,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 7:09-CR-33-1FL
Civil Case No. 7:16-CV-235-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 23, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. A certificate of appealability is denied.

This Judgment Filed and Entered on October 23, 2020, with service on

Dennis Duffy (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 23, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 86a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:11-CR-38-FL-2
NO. 7:16-CV-208-FL

MARCUS GEROME HYDE,)
Petitioner,)
v.) ORDER
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the court on petitioner’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 69), which challenges petitioner’s conviction for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court’s rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). The matter also is before the court on respondent’s motion to dismiss (DE 105), which was briefed fully. For the reasons that follow, the court grants respondent’s motion to dismiss, and denies petitioner’s motion to vacate.

BACKGROUND

On July 20, 2011, petitioner pleaded guilty, without a plea agreement, to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one); Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count two); and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three). On November 14, 2011, the court sentenced petitioner to concurrent terms of 24 months' imprisonment on counts one and

two, and a consecutive term of 60 months' imprisonment on count three, producing an aggregate custodial sentence of 84 months.

On June 26, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Johnson. On August 9, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay that same day. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 23, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 16, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Respondent filed the instant motion to dismiss on January 30, 2020, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 20, 2020, petitioner responded to the motion to dismiss, conceding that Mathis establishes he is not entitled to habeas relief.

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without

jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of five years’ imprisonment for the first conviction. 18 U.S.C. § 924(c)(1)(A)(ii). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offense

qualifies as a crime of violence under subsection (c)(3)(A) (the force clause), his conviction remains valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offense is Hobbs Act robbery in violation of 18 U.S.C. § 1951,¹ and the Fourth Circuit has held that this offense qualifies as a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) conviction remains valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

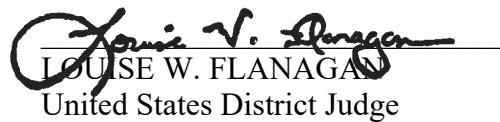
¹ Although count two alleged defendant committed both substantive and attempted Hobbs Act robbery, the § 924(c) conviction was based solely on substantive Hobbs Act Robbery. (See Indictment (DE 1) at 3).

Pet. App. 90a

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 105) and DENIES petitioner's motion to vacate (DE 69). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 23rd day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

Pet. App. 91a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

MARCUS GEROME HYDE,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 7:11-CR-38-2FL
Civil Case No. 7:16-CV-208-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and the respondent's motion to dismiss for failure to state a claim.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 23, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss for failure to state a claim. A certificate of appealability is denied.

This Judgment Filed and Entered on October 23, 2020, with service on

Asia Prince (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 23, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

Pet. App. 92a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:08-CR-174-FL-1
NO. 5:16-CV-333-FL

KENDRICUS MARQUELL WILLIAMS,)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

This matter is before the court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 234), which challenges petitioner's conviction and sentence for possessing a firearm in furtherance of a crime of violence in light of the United States Supreme Court's rulings in Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319 (2019). For the reasons that follow, the court denies petitioner's motion.

BACKGROUND

On May 8, 2009, a jury convicted petitioner of nine counts of substantive Hobbs Act Robbery, in violation of 18 U.S.C. § 1951, nine counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), and one count of possession of a firearm by a person previously convicted of a felony offense, in violation of 18 U.S.C. § 922(g). On August 27, 2009, the court sentenced petitioner to concurrent terms of 235 months' imprisonment for the Hobbs Act robberies and unlawful possession of a firearm convictions, a consecutive term of 87 months' imprisonment for the first § 924(c) conviction, and consecutive

terms of 300 months' imprisonment on each of the remaining eight § 924(c) convictions, producing an aggregate custodial sentence of 2,719 months' imprisonment.

On June 7, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) convictions should be vacated in light of Johnson. On July 5, 2016, respondent moved to stay the § 2255 proceedings pending the United States Court of Appeals for the Fourth Circuit's resolution of United States v. Simms, 914 F.3d 229 (4th Cir. 2019). The court granted the motion to stay on July 6, 2016. The Fourth Circuit decided Simms on January 24, 2019, but stayed the mandate pending the United States Supreme Court's decision in United States v. Davis, No. 18-431. The Supreme Court decided Davis on June 24, 2019.

On July 19, 2019, the court lifted the stay and directed the parties to file supplemental briefing addressing the effect of Simms and Davis on petitioner's motion. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On January 15, 2020, the court lifted the stay and directed the parties to file supplemental briefing addressing whether the Fourth Circuit's decision in United States v. Mathis, 932 F.3d 242 (4th Cir. 2019), forecloses petitioner's claims. Petitioner filed supplemental brief on January 23, 2020, conceding that Mathis forecloses his claims. Respondent filed supplemental brief on February 3, 2020, arguing petitioner's § 2255 motion should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

DISCUSSION

A. Standard of Review

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without

jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a). “Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” Id. § 2255(b).

B. Analysis

Pursuant to 18 U.S.C. § 924(c), a person convicted of brandishing a firearm “during and in relation to any crime of violence or drug trafficking crime” is subject to a mandatory minimum punishment of seven years’ imprisonment for the first conviction, and mandatory consecutive sentence of 25 years’ imprisonment for each subsequent conviction. 18 U.S.C. § 924(c)(1). The sentence shall run consecutive to any sentence imposed for the predicate crime of violence or drug trafficking crime. Id. § 924(c)(1)(A). Section 924(c)(3) defines crime of violence 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 [the “force clause”], 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 [the “residual clause”].

Id. § 924(c)(3)(A)-(B).

Davis and Simms held that § 924(c)(3)(B) is unconstitutionally vague, thereby rendering invalid § 924(c) convictions based on the residual clause definition of crime of violence. Davis, 139 S. Ct. at 2336; Simms, 914 F.3d at 237. The Davis and Simms decisions, however, do not call into question the constitutionality of § 924(c)(3)(A). Thus, if petitioner’s predicate offenses

qualify as crimes of violence under subsection (c)(3)(A) (the force clause), his convictions remain valid. See Mathis, 932 F.3d at 263-64.

Petitioner's predicate offenses are Hobbs Act robberies in violation of 18 U.S.C. § 1951, and the Fourth Circuit has held that this offense is a crime of violence under § 924(c)'s force clause. See id. at 265-66 (holding "Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)."). Accordingly, petitioner's § 924(c) convictions remain valid, notwithstanding Davis and Simms.

C. Certificate of Appealability

Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, petitioner's motion to vacate (DE 234) is DENIED. A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 23rd day of October, 2020.


LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KENDRICUS MARQUELL WILLIAMS,
Petitioner,
v.

Judgment in a 2255 Case

UNITED STATES OF AMERICA,
Respondent.

Criminal Case No. 5:08-CR-174-1FL
Civil Case No. 5:16-CV-333-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

IT IS ORDERED AND ADJUDGED for the reasons set forth more specifically within the court's order entered on October 23, 2020, that the court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. A certificate of appealability is denied.

This Judgment Filed and Entered on October 23, 2020, with service on

Dennis Duffy (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)

October 23, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-7846

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TAHJI ANTONIO ELEY,

Defendant - Appellant.

No. 20-7850

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL EMANUEL PRYOR,

Defendant - Appellant.

No. 20-7852

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

STANLEY ANDREA CLYBURN, JR., a/k/a Drea,

Defendant - Appellant.

No. 20-7853

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BOBBY RAY LAMBERT,

Defendant - Appellant.

No. 20-7854

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONNIE DONTE RAND,

Defendant - Appellant.

No. 20-7856

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER DAVID FRAZIER,

Defendant - Appellant.

No. 20-7858

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AHMAD LEE BANKS,

Defendant - Appellant.

No. 20-7865

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHNNY DRAUGHN,

Defendant - Appellant.

No. 20-7869

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHANIQUA SHONTA BURRELL,

Defendant - Appellant.

Appeals from the United States District Courts for the Eastern District of North Carolina, at Raleigh and Wilmington. Louise W. Flanagan, District Judge. (5:10-cr-00196-FL-3; 5:16-cv-00480-FL; 5:11-cr-00279-FL-4; 5:16-cv-00796-FL; 7:10-cr-00036-FL-1; 7:16-cv-00135-FL; 7:09-cr-00057-FL-1; 7:16-cv-00175-FL; 5:08-cr-00329-FL-3; 5:16-cv-00476-FL; 7:11-cr-00038-FL-1; 5:08-cr-00329-FL-1; 5:16-cv-00321-FL; 5:09-cr-00201-FL-2; 5:16-cv-00487-FL; 5:10-cr-00196-FL-2)

Submitted: April 22, 2021

Decided: April 27, 2021

Before GREGORY, Chief Judge, AGEE, Circuit Judge, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Eric Joseph Brignac, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellants. Michael Gordon James, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Appellants seek to appeal the district court's orders denying relief on their 28 U.S.C. § 2255 motions. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). 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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the records and conclude that Appellants have not made the requisite showing. Accordingly, we deny their motions for certificates of appealability and dismiss the appeals. 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

FILED: April 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7846 (L)
(5:10-cr-00196-FL-3)
(5:16-cv-00480-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TAHJI ANTONIO ELEY

Defendant - Appellant

No. 20-7850
(5:11-cr-00279-FL-4)
(5:16-cv-00796-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL EMANUEL PRYOR

Defendant - Appellant

Pet. App. 104a

No. 20-7852
(7:10-cr-00036-FL-1)
(7:16-cv-00135-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

STANLEY ANDREA CLYBURN, JR., a/k/a Drea

Defendant - Appellant

No. 20-7853
(7:09-cr-00057-FL-1)
(7:16-cv-00175-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BOBBY RAY LAMBERT

Defendant - Appellant

No. 20-7854
(5:08-cr-00329-FL-3)

Pet. App. 105a

(5:16-cv-00476-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RONNIE DONTE RAND

Defendant - Appellant

No. 20-7856
(7:11-cr-00038-FL-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHRISTOPHER DAVID FRAZIER

Defendant - Appellant

No. 20-7858
(5:08-cr-00329-FL-1)
(5:16-cv-00321-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

Pet. App. 106a

v.

AHMAD LEE BANKS

Defendant - Appellant

No. 20-7865
(5:09-cr-00201-FL-2)
(5:16-cv-00487-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHNNY DRAUGHN

Defendant - Appellant

No. 20-7869
(5:10-cr-00196-FL-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SHANIQUA SHONTA BURRELL

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 appeals are 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

UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7560

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARVIN RASHAAD CUMMINGS, a/k/a Ray Ray,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:12-cr-00353-BO-2; 5:19-cv-00195-BO)

No. 20-6985

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RANDOLPH LEVY HYMAN, JR.,

Defendant - Appellant.

Pet. App. 109a

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Louise W. Flanagan, District Judge. (2:13-cr-00019-FL-1; 2:16-cv-00045-FL)

No. 20-7568

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

THOMAS LAMONT JONES,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:09-cr-00093-FL-1; 5:16-cv-00335-FL)

No. 20-7573

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAPHAEL DAVONNE POWELL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:08-cr-00328-FL-1; 5:16-cv-00246-FL)

No. 20-7591

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA HUNT,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Louise W. Flanagan, District Judge. (7:09-cr-00033-FL-1; 7:16-cv-00235-FL)

No. 20-7598

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS GEROME HYDE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Louise W. Flanagan, District Judge. (7:11-cr-00038-FL-2; 7:16-cv-00208-FL)

No. 20-7599

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENDRICUS MARQUELL WILLIAMS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:08-cr-00174-FL-1; 5:16-cv-00333-FL)

Submitted: July 15, 2021

Decided: July 23, 2021

Before MOTZ and KING, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Eric Joseph Brignac, Jennifer Claire Leisten, Assistant Federal Public Defenders, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellants. John Everett Harris, Michael Gordon James, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Marvin Rashaad Cummings, Randolph Levy Hyman, Jr., Thomas Lamont Jones, Raphael Davonne Powell, Joshua Hunt, Marcus Gerome Hyde, and Kendricus Marquell Williams (collectively, “Appellants”) seek to appeal the district courts’ orders denying relief on their 28 U.S.C. § 2255 motions. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). 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). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court’s assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). 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. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Appellants have not made the requisite showing, as their claims are foreclosed by this court’s decision in *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019). Accordingly, we deny Appellants’ motion for a certificate of appealability and dismiss the appeals. 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

FILED: July 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7560 (L)
(5:12-cr-00353-BO-2)
(5:19-cv-00195-BO)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARVIN RASHAAD CUMMINGS, a/k/a Ray Ray

Defendant - Appellant

No. 20-6985
(2:13-cr-00019-FL-1)
(2:16-cv-00045-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDOLPH LEVY HYMAN, JR.

Defendant - Appellant

No. 20-7568
(5:09-cr-00093-FL-1)
(5:16-cv-00335-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

THOMAS LAMONT JONES

Defendant - Appellant

No. 20-7573
(5:08-cr-00328-FL-1)
(5:16-cv-00246-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RAPHAEL DAVONNE POWELL

Defendant - Appellant

No. 20-7591
(7:09-cr-00033-FL-1)

Pet. App. 115a

(7:16-cv-00235-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSHUA HUNT

Defendant - Appellant

No. 20-7598
(7:11-cr-00038-FL-2)
(7:16-cv-00208-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARCUS GEROME HYDE

Defendant - Appellant

No. 20-7599
(5:08-cr-00174-FL-1)
(5:16-cv-00333-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KENDRICUS MARQUELL WILLIAMS

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 these appeals are 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