

Pet. App. 1a

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

NO. 5:14-CR-103-FL-1
NO. 5:16-CV-570-FL

ALDRIDGE ROBINSON,)	
)	
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 42), 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 55), 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 16, 2014, petitioner pleaded guilty, pursuant to a written plea agreement, to three counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (counts one, three, and five), and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count six). On December 10, 2014, the court sentenced petitioner to concurrent terms of 78 months' imprisonment on counts one, three and five, and a consecutive term of 84 months' imprisonment on count six, producing an aggregate custodial sentence of 162 months.

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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 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 3, 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 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 February 6, 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.

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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

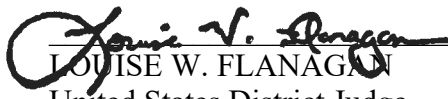
Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate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

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 55), and DENIES petitioner's motion to vacate (DE 42). 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

ALDRIDGE ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:14-CR-103-1FL
Civil Case No. 5:16-CV-570-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 Rogers (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. 7a

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

NO. 5:13-CR-238-FL-1
NO. 5:16-CV-567-FL

CHESTER LAMAR WHEELLESS,)	
)	
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 45), 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 59), 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 December 3, 2013, petitioner pleaded guilty, pursuant to a written plea agreement, to 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 two). On March 12, 2014, the court sentenced petitioner to 57 months' imprisonment on count one and a consecutive term of 84 months' imprisonment on count two, producing an aggregate custodial sentence of 141 months.

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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 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 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 February 5, 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.

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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

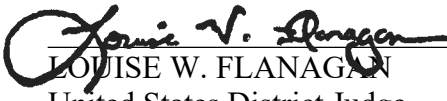
Having determined that petitioner is not entitled to relief, the court turns to whether a certificate of appealability should issue. A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate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

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 59) and DENIES petitioner's motion to vacate (DE 45). 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

CHESTER LAMAR WHEELLESS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:13-CR-238-1FL
Civil Case No. 5:16-CV-567-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 Rogers (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. 13a

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

NO. 5:08-CR-329-FL-4
NO. 5:15-CV-188-FL

JOSHUA FORREST WAGNER,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)

ORDER

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 148, 182), which challenge 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), United States v. Davis, 139 S. Ct. 2319 (2019), and Rosemond v. United States, 572 U.S. 65 (2014). The matter also is before the court on respondent's motion to dismiss (DE 151), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss and denies petitioner's motions 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 using and carrying 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 four). On July 10, 2009, the court sentenced

petitioner to 87 months' imprisonment on count one and a consecutive term of 84 months' imprisonment on count four, producing an aggregate custodial sentence of 171 months.

On May 1, 2015, petitioner filed the instant motion to vacate, set aside, or correct sentence, asserting that his § 924(c) conviction should be vacated in light of Rosemond. On June 2, 2015, respondent filed the instant motion to dismiss the Rosemond claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Petitioner filed amended motion to vacate on June 6, 2016, which amended the original motion to assert new claim challenging his § 924(c) conviction on the basis of Johnson. On June 29, 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 June 30, 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 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 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. Petitioner filed supplemental brief on January 23, 2020, conceding that he is not entitled to habeas relief. Respondent filed supplemental brief on February 3, 2020, arguing petitioner's § 2255 motions 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

The court begins with petitioner’s claim that his § 924(c) conviction should be vacated in light of Johnson and Davis. 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 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.

Petitioner also argues that his § 924(c) conviction should be vacated under Rosemond, which addresses the legal standard governing aiding and abetting liability, and the evidentiary showing required to establish same. See 572 U.S. at 72-78. The court agrees with respondent that this claim is untimely. A one-year statute of limitations applies to § 2255 motions. See 28 U.S.C. § 2255(f). The statute of limitations runs from the latest of four dates: 1) the date on which the judgment of conviction becomes final; 2) the date on which the impediment to making a motion created by governmental action in violation of the constitution or laws of the United States is

¹ The indictment charged petitioner with using and carrying a firearm in furtherance of substantive Hobbs Act robbery as charged in count three, which was dismissed at sentencing. (DE 1). Petitioner's § 924(c) conviction, however, does not require convictions 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 three 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 2-3).

removed, if the movant was prevented from making a motion by such governmental action; 3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and 4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. Id. § 2255(f)(1)-(4). And where, as here, the petitioner relies on subsections (f)(3) or (f)(4), the statute of limitations applies on a claim-by-claim basis. See Pace v. DiGuglielmo, 544 U.S. 408, 416 n.6 (2005) (discussing materially identical statute of limitations for habeas petitions under 28 U.S.C. § 2254); Zack v. Tucker, 704 F.3d 917, 925-26 (11th Cir. 2013) (en banc). Accordingly, the court may consider the timeliness of petitioner’s claim premised on Rosemond even though his Johnson and Davis claims were timely filed.

Petitioner argues his Rosemond claim is timely under subsections (f)(3) or (f)(4). Rosemond, however, was decided on March 5, 2014, and petitioner filed the instant motion to vacate on April 28, 2015, over one year later. Accordingly, the claim is untimely under subsection (f)(3).² As to subsection (f)(4), the Rosemond decision is not a new “fact” supporting petitioner’s claims. See Whiteside v. United States, 775 F.3d 180, 183-84 (4th Cir. 2014) (en banc) (holding favorable change in law is not a new “fact” for purposes of subsection (f)(4)).

Petitioner asserts the court should excuse his untimely filing based on his showing of actual innocence. “[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations.”

² Furthermore, Rosemond is not retroactively applicable on collateral review. See 28 U.S.C. § 2255(f)(3); Bey v. Hollenback, No. 5:14-HC-2016-FL, 2015 WL 859575, at *3 (E.D.N.C. Feb. 26, 2015), aff’d 616 F. App’x 125 (4th Cir. 2015).

McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). However, “tenable actual-innocence gateway pleas are rare: ‘[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’” Id. (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). Having reviewed and considered petitioner’s actual innocence claim, the court concludes he has failed to show that no reasonable juror would have voted to convict him. Finally, to the extent petitioner asserts he is entitled to equitable tolling of the statute of limitations, he fails to show that 1) “he has been pursuing his rights diligently”; and 2) some extraordinary circumstances prevented timely filing. Holland v. Florida, 560 U.S. 631, 649 (2010). Accordingly, the court grants respondent’s motion to dismiss petitioner’s habeas claims.


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 motions to vacate (DE 148, 182) are DENIED, respondent's motion to dismiss (DE 151) is GRANTED, and 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

JOSHUA FORREST WAGNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:08-CR-329-4FL
Civil Case No. 5:15-CV-188-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 and the respondent's motion to dismiss.

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 motions to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and grants respondent's motion to dismiss. A certificate of appealability is denied.

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

Dennis Duffy (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. 21a

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

NO. 5:08-CR-328-FL-2
NO. 5:16-CV-562-FL

DAVID MICHAEL WESLEY, JR.,)	
)	
Petitioner,)	
)	
v.)	ORDER
)	
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 78, 81), which challenge petitioner's convictions 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 108), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss, and denies petitioner's motions 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 brandishing 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 consecutive terms of one month imprisonment on count one, 84 months' imprisonment on count

five, and 300 months' imprisonment on count nine, producing an aggregate custodial sentence of 385 months' imprisonment.

On June 26, 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. Petitioner filed supplemental pro se motion on June 29, 2016. 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 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 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 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 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. § 1951,¹ 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) 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.


¹ The superseding indictment charged petitioner with possessing a firearm in furtherance of substantive Hobbs Act robberies as charged in counts four and eight, both of which were dismissed at sentencing. (Superseding Indictment (DE 21) at 3, 5; Judgment (DE 48) at 1). Petitioner's § 924(c) convictions, however, do not require conviction 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). Furthermore, although counts four 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 Superseding Indictment (DE 21) at 3-4, 5).

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 108), and DENIES petitioner's motions to vacate (DE 78, 81). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 26th 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

DAVID MICHAEL WESLEY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:08-CR-328-FL-2
Civil Case Number: 5:16-CV-562-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 26, 2020, with service on:

Sherri R. Alspaugh
Federal Public Defender
150 Fayetteville St., Suite 450
Raleigh, NC 27611-5967

(via CM/ECF Notice of Electronic Filing)

Michael James
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

(via CM/ECF Notice of Electronic Filing)

October 26, 2020

PETER A. MOORE, JR., CLERK

by


Deputy Clerk

Pet. App. 27a

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

NO. 5:10-CR-196-FL-4
NO. 5:17-CV-41-FL

MICHAEL JAVON SPENCER,)	
)	
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 154), 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 229), 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); 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 January 19, 2011, the court sentenced petitioner to concurrent terms of 37 months' imprisonment on each of counts one and

two, and a consecutive term of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 121 months' imprisonment.

On January 23, 2017, 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 February 10, 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 February 13, 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 February 6, 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 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).

CONCLUSION

Based on the foregoing, the court GRANTS respondent's motion to dismiss (DE 229) and DENIES petitioner's motion to vacate (DE 154). 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

MICHAEL JAVON SPENCER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:10-CR-196-FL-4
Civil Case Number: 5:17-CV-41-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
Federal Public Defender's Office
150 Fayetteville Street, Suite 450
Raleigh, NC 27601

(via CM/ECF Notice of Electronic Filing)

Joshua B. Royster
United States Attorney's Office - EDNC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601

(via CM/ECF Notice of Electronic Filing)

October 27, 2020

PETER A. MOORE, JR., CLERK

by


Deputy Clerk

Pet. App. 33a

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

NO. 5:09-CR-322-FL-2
NO. 5:16-CV-354-FL

JOSEPH OSCAR PRICE,)	
)	
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 118), 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 178), 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 3, 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); Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count two); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count three); and attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count four). On December 15, 2010, the court sentenced petitioner to concurrent terms of 124 months' imprisonment on counts one, two,

and four, and a consecutive term of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 208 months. Petitioner appealed his judgment of conviction. On November 21, 2011, the United States Court of Appeals for the Fourth Circuit granted petitioner's unopposed motion to remand for resentencing due to an error in petitioner's Guidelines range. The court held petitioner's resentencing hearing on February 2, 2012, and imposed revised sentence consisting of concurrent terms of 93 months' imprisonment on counts one, two, and four, and a consecutive term of 84 months' imprisonment on count three.

On June 9, 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 September 1, 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 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 claim. Petitioner filed supplemental brief on August 19, 2019. Respondent filed the instant motion to dismiss on September 17, 2019, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 30, 2019, petitioner responded in opposition.

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 United States v. Mathis, 932 F.3d 242, 263-64 (4th Cir. 2019).

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.

Petitioner also argues that his § 924(c) conviction is invalid where his substantive Hobbs Act robbery convictions were "grouped" with his conspiracy conviction on count one for purposes of determining his advisory Guidelines range. As noted by petitioner, if his predicate conviction for the § 924(c) conviction is conspiracy to commit Hobbs Act robbery, as opposed to substantive Hobbs Act robbery, the conviction would be invalid because conspiracy to commit Hobbs Act robbery is not a crime of violence under the force clause. See Simms, 914 F.3d at 233-34.

To the extent petitioner suggests that the grouping caused ambiguity with respect to which underlying predicate conviction supports petitioner's § 924(c) conviction, the court discerns no ambiguity. The indictment clearly alleges petitioner used and carried a firearm during and in relation to substantive Hobbs Act robbery as charged in count two of the indictment. (DE 7 at 3-4). Petitioner's plea agreement also makes clear that he pleaded guilty to using and carrying a

firearm during substantive Hobbs Act robbery. (DE 30 ¶ 3). Accordingly, the grouping of the predicate offense with another offense at sentencing does not affect the validity of petitioner's stand-alone § 924(c) conviction.¹


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 178) and DENIES petitioner's motion to vacate (DE 118). A certificate of appealability is DENIED. The clerk is directed to close the instant § 2255 proceedings.

SO ORDERED, this the 2nd day of November, 2020.



LOUISE W. FLANAGAN
United States District Judge

¹ Furthermore, the grouping procedure is used to determine petitioner's Guidelines range. See U.S.S.G. § 3D1.1. To the extent petitioner is asserting a Guidelines error, the claim is not cognizable on collateral review. See United States v. Foote, 784 F.3d 931, 942-43 (4th Cir. 2015).

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

JOSEPH OSCAR PRICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Judgment in a 2255 Action

Criminal Case No. 5:09-CR-322-2FL

Civil Case No. 5:16-CV-354-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of a Motion to Dismiss Petitioner's 28 U.S.C. § 2255 motion.

IT IS ORDERED AND ADJUDGED that the government's motion to dismiss is ALLOWED, and the § 2255 motion is DENIED. A certificate of appealability is DENIED.

This Judgment Filed and Entered on November 2, 2020, with service on:

Rudolph A. Ashton, III (via CM/ECF Notice of Electronic Filing)

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

November 2, 2020

/s/ Peter A. Moore, Jr.

Clerk of Court

Pet. App. 39a

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

NO. 5:10-CR-196-FL-1
NO. 5:16-CV-142-FL

DWIGHT SHERROD TAYLOR,)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

ORDER

This matter is before the court on the following motions by petitioner: 1) to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (DE 131); 2) objecting to stay of the § 2255 proceedings (DE 210); 3) for reduction of sentence pursuant to the First Step Act of 2018 (DE 215); 4) to remove counsel (DE 234); 5) for home confinement (DE 241); 6) to amend motion to vacate (DE 242); and 7) for compassionate release (DE 254). The matter also is before the court on respondent's motion to dismiss petitioner's § 2255 claims (DE 135), which was briefed fully. For the reasons that follow, the court grants respondent's motion to dismiss and petitioner's motion to amend the § 2255 motion, denies petitioner's motions to vacate, objecting to stay, to remove counsel, for reduction of sentence under the First Step Act, and for compassionate release, and dismisses without prejudice petitioner's motion for home confinement.

BACKGROUND

On September 8, 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 using and carrying 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 three). On March 22, 2011, the court sentenced petitioner to 113 months' imprisonment on count one and a consecutive term of 84 months' imprisonment on count three, producing an aggregate custodial sentence of 197 months.

On April 1, 2016, petitioner filed the instant motion to vacate, set aside, or correct sentence, which challenges petitioner's § 924(c) conviction and his career offender designation 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). Respondent filed the instant motion to dismiss on May 16, 2016, arguing petitioner's motion to vacate should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 1, 2017, the court entered order staying the instant § 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 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 motions. The parties then requested further stay pending resolution of United States v. Ali, No. 15-4433 (4th Cir.), which the court granted. On December 11, 2019, petitioner, proceeding pro se, filed the instant motion objecting to the stay. On January 2, 2020, petitioner filed the instant motion for reduction of sentence pursuant to the First Step Act. Respondent did not respond to the foregoing motions.

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, through counsel, filed supplemental

brief on February 24, 2020, conceding that he is not entitled to § 2255 relief. On February 20, 2020, petitioner filed the instant motion to remove counsel. On May 18, 2020, petitioner filed the instant pro se motion for compassionate release, which in substance requests an order directing the Federal Bureau of Prisons (“FBOP”) to place him on home confinement. On June 1, 2020, petitioner filed the instant pro se motion to amend his § 2255 motion, asserting challenges to his career offender designation. Finally, on September 17, 2020, petitioner filed the instant pro se motion for compassionate release, raising concerns about his risk of contracting the communicable disease known as COVID-19. Respondent did not respond to the foregoing motions.

DISCUSSION

A. Motions Objecting to Stay and to Remove Counsel

Petitioner’s motion objecting to stay is denied as moot where the court previously lifted the stay and directed the parties to file supplementary briefing on his motion to vacate. As to the motion to remove counsel, the court denies the motion as unnecessary. Petitioner’s counsel’s representation ended when she determined petitioner is not eligible for § 2255 relief under Johnson and its progeny. See Standing Order 15-SO-2. To the extent petitioner is requesting appointment of new counsel, the court denies the motion where, for the reasons set forth below, petitioner has not established a cognizable claim for post-conviction relief under § 2255 or the First Step Act.

B. Motions for Compassionate Release and Home Confinement

With limited exceptions, the court may not modify a sentence once it has been imposed. 18 U.S.C. § 3582(c). One exception is the doctrine of compassionate release, which permits the court to reduce a sentence in extraordinary and compelling circumstances. As amended by the

First Step Act, 18 U.S.C. § 3582(c)(1)(A) now permits a defendant to file motion for compassionate release in the sentencing court “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.” See First Step Act § 603, 132 Stat. at 5239.

The court may reduce petitioner’s term of imprisonment if, after consideration of the factors set forth in 18 U.S.C. § 3553(a), it finds that “extraordinary and compelling reasons warrant such a reduction” and that “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A)(i).¹ The Sentencing Commission promulgated U.S.S.G. § 1B1.13 as the policy statement applicable to compassionate release motions filed by the FBOP. Section 1B1.13 is substantially similar to § 3582(c)(1)(A), but adds that before granting compassionate release the court must determine “the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g).” See U.S.S.G. § 1B1.13(1)(B)(2).

Petitioner’s instant motion does not establish grounds for compassionate release under U.S.S.G. § 1B1.13, or otherwise demonstrate that extraordinary and compelling reasons justify release. As an initial matter, petitioner fails to establish that he has any underlying medical conditions that places him at risk of severe complications if he contracts COVID-19. Furthermore, there are no active inmate infections at petitioner’s correctional institution. See Fed. Bureau of Prisons, COVID-19 Coronavirus (Oct. 23, 2020), www.bop.gov/coronavirus. “[T]he

¹ The statute also permits compassionate release for certain elderly offenders who no longer pose a danger to the safety of others or the community. 18 U.S.C. § 3582(c)(1)(A)(ii). This provision is not applicable to petitioner.

mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release.” United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020). The court also finds that the factors under 18 U.S.C. § 3553(a) do not support a sentence reduction in light of petitioner’s violent offense conduct and extensive criminal history.² Accordingly, petitioner’s motion for compassionate release is denied.

Petitioner also moves for an order directing the FBOP to transfer him to home confinement under the CARES Act. In relevant part, the CARES Act provides that “if the Attorney General finds that emergency conditions will materially affect the functioning of the [FBOP], the Director of the [FBOP] may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of [18 U.S.C. § 3624(c)] as the Director determines appropriate.” CARES Act of 2020, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516. This provision does not authorize the court to order petitioner’s placement in home confinement. Such placement decisions are solely within the discretion of the FBOP, and the court therefore lacks jurisdiction to grant such relief. See 18 U.S.C. §§ 3621(b), 3624(c); United States v. Caudle, 740 F. App’x 364, 365 (4th Cir. 2018). Accordingly, the court dismisses without prejudice petitioner’s motion for home confinement.

C. First Step Act Motion

Petitioner also seeks a sentence reduction pursuant to § 404 of the First Step Act of 2018. Section 404 of the First Step Act made retroactive changes to the statutory penalties for cocaine

² Defendant notes that he has taken numerous educational and vocational courses while incarcerated. While the court commends defendant for his record of achievement in custody, his post-sentencing conduct does not justify release in these circumstances.

base offenses. See Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222; United States v. Wirsing, 943 F.3d 175, 180 (4th Cir. 2019). Where petitioner was not convicted of an offense involving distribution of cocaine base, he is ineligible for a sentence reduction under § 404. See United States v. Gravatt, 953 F.3d 258, 263-64 (4th Cir. 2020) (explaining prior conviction for distributing powder cocaine is “plainly not a covered offense” under § 404(c) of the First Step Act). Accordingly, petitioner’s First Step Act motion is denied.

D. Section 2255 Motion and Motion to Amend

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

The court begins with petitioner’s motion to amend his § 2255 motion. Hearing no objection from respondent, the court grants the motion. See Fed. R. Civ. P. 15(a)(2). Accordingly, the court will address below the habeas claims presented in the original motion and the motion to amend.

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 robbery³ 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

³ 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. (DE 33). 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 52) ¶ 3).

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, 932, 942 (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). For this same reason, petitioner’s claim in the motion to amend that his career offender designation should be vacated under United States v. Eason, 953 F.3d 1184 (11th Cir. 2020) is without merit. Eason involved a direct appeal challenging the defendant’s career offender designation. Here, petitioner is attempting to challenge his advisory career offender designation under § 2255. As explained above, such a claim is not cognizable in this § 2255 proceeding. Foote, 784 F.3d at 932, 942; see also Lester v. Flournoy, 909 F.3d 708, 715 (4th Cir. 2018).

E. Certificate of Appealability


Having determined that petitioner is not entitled to relief on his § 2255 claims, 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 rules as follows:

- 1) Petitioner's motion to amend (DE 242) the § 2255 motion to vacate is GRANTED;
- 2) Petitioner's motion to vacate (DE 131), as amended, is DENIED, and a certificate of appealability as to same also is DENIED;
- 3) Respondent's motion to dismiss (DE 135) is GRANTED;
- 4) Petitioner's motions objecting to stay (DE 210), for reduction of sentence pursuant to the First Step Act (DE 215), to remove counsel (DE 234), and for compassionate release (DE 254) are DENIED;
- 5) Petitioner's motion for home confinement (DE 241) is DISMISSED WITHOUT PREJUDICE; and
- 6) 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

DWIGHT SHERROD TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Judgment in a 2255 Case

Criminal Case No. 5:10-CR-196-1FL
Civil Case No. 5:16-CV-142-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.

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. A certificate of appealability is denied.

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

Dennis Duffy (via CM/ECF Notice of Electronic Filing)
Sherri R. Alspaugh (via CM/ECF Notice of Electronic Filing)
Dwight Sherrod Taylor (via U.S. Mail at #53953-056, Butner Medium I - F.C.I., P.O. Box
1000, Butner, NC 27509)

October 27, 2020

Peter A. Moore, Jr., Clerk

/s/ Susan Tripp

By: Susan Tripp, Deputy Clerk

UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7860

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ALDRIDGE ROBINSON,

Defendant - Appellant.

No. 20-7861

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHESTER LAMAR WHEELLESS,

Defendant - Appellant.

No. 20-7862

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSHUA FORREST WAGNER,

Defendant - Appellant.

No. 20-7867

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID MICHAEL WESLEY, JR.,

Defendant - Appellant.

No. 20-7871

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL JAVON SPENCER,

Defendant - Appellant.

No. 20-7892

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH OSCAR PRICE,

Defendant - Appellant.

No. 21-6004

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DWIGHT SHERROD TAYLOR,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:14-cr-00103-FL-1; 5:16-cv-00570-FL; 5:13-cr-00238-FL-1; 5:16-cv-00567-FL; 5:08-cr-00329-FL-4; 5:15-cv-00188-FL; 5:08-cr-00328-FL-2; 5:16-cv-00562-FL; 5:10-cr-00196-FL-4; 5:17-cv-00041-FL; 5:09-cr-00322-FL-2; 5:16-cv-00354-FL; 5:10-cr-00196-FL-1; 5:16-cv-00142-FL)

Submitted: May 25, 2021

Decided: May 27, 2021

Before DIAZ and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed in part and affirmed in part by unpublished per curiam opinion.

Eric Joseph Brignac, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellants. David A. Bragdon,

Pet. App. 52a

Assistant United States Attorney, Jennifer P. May-Parker, Assistant United States Attorney, 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:

In these consolidated appeals, Appellants Aldridge Robinson, Chester Lamar Wheelless, Joshua Forrest Wagner, David Michael Wesley, Jr., Michael Javon Spencer, Joseph Oscar Price, and Dwight Sherrod Taylor seek to appeal the district court's orders denying relief on their 28 U.S.C. § 2255 motions challenging their convictions under 18 U.S.C. § 924(c) in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). 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 the Appellants have not made the requisite showing. Accordingly, we deny their motions for a certificate of appealability and dismiss the appeals.

In No. 21-6004, Taylor also appeals the denial of his motions for reduction of sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, and for compassionate release or release to home confinement, as well as the

denial of his motion for reconsideration. We have reviewed the record and the district court's opinion with respect to these issues and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *United States v. Taylor*, No. 5:10-cr-196-FL-1 (E.D.N.C. Oct. 27, 2020 & Dec. 29, 2020). 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 IN PART,
AFFIRMED IN PART*

FILED: May 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7860 (L)
(5:14-cr-00103-FL-1)
(5:16-cv-00570-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ALDRIDGE ROBINSON

Defendant - Appellant

No. 20-7861
(5:13-cr-00238-FL-1)
(5:16-cv-00567-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHESTER LAMAR WHEELLESS

Defendant – Appellant

No. 20-7862
(5:08-cr-00329-FL-4)
(5:15-cv-00188-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSHUA FORREST WAGNER

Defendant - Appellant

No. 20-7867
(5:08-cr-00328-FL-2)
(5:16-cv-00562-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DAVID MICHAEL WESLEY, JR.

Defendant – Appellant

No. 20-7871
(5:10-cr-00196-FL-4)
(5:17-cv-00041-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL JAVON SPENCER

Defendant - Appellant

No. 20-7892
(5:09-cr-00322-FL-2)
(5:16-cv-00354-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSEPH OSCAR PRICE

Defendant – Appellant

No. 21-6004
(5:10-cr-00196-FL-1)
(5:16-cv-00142-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DWIGHT SHERROD TAYLOR

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, certificates of appealability are denied in Case Nos. 20-7860, 20-7861, 20-7862, 20-7867, 20-7871, and 20-7892, and the appeals are dismissed.

In Case No. 21-6004, a certificate of appealability is denied and the appeal is dismissed in part. The judgment of the district court is affirmed in part.

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