

No.

In The Supreme Court Of The United States

Joseph Griego and Jason Romero,

Petitioners,

v.

United States of America,

Respondent.

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

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Appendix A

United States v. Griego,

No. 22-15041, 2022 WL 2693699 (9th Cir. May 24, 2022) (unpublished),
Order Denying Certificate of Appealability

2022 WL 2693699

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Joseph GRIEGO, Defendant-Appellant.

No. 22-15041

|

FILED May 24, 2022

D.C. Nos. 2:20-cv-01103-GMN, 2:15-cr-00260-GMN-CWH-1, District of Nevada, Las Vegas

Attorneys and Law Firms

Elizabeth Olson White, Esquire, Assistant U.S., USRE - Office of the US Attorney, Reno, NV, for Plaintiff-Appellee.

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

Before: RAWLINSON and NGUYEN, Circuit Judges.

ORDER

***1** The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

All Citations

Not Reported in Fed. Rptr., 2022 WL 2693699

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Appendix B

United States v. Griego,

No. 2:15-cr-00260-GMN-CWH, Dkt. No. 68 (D. Nev. Nov. 10, 2021)
(unpublished), Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH GRIEGO,

Defendant.

JUDGMENT

Case Number: 2:15-cr-00260-GMN-CWH-⁺

(Related case: 2:20-cv-01103-GMN)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

pursuant to the Court's Order Denying the Motion to vacate under 28 U.S.C. 2255, this matter is closed. Judgment for the United States. A Certificate of Appealability is Denied.

11/10/2021

Date

DEBRA K. KEMPI

Clerk



/s/ D. Reich-Smith

Deputy Clerk

Appendix C

United States v. Griego,

No. 2:15-cr-00260-GMN-CWH, 2021 WL 5237235 (D. Nev. Nov. 9, 2021)
(unpublished), Order Denying Motion to Vacate and Certificate of
Appealability

2021 WL 5237235

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Respondent/Plaintiff,

v.

Joseph GRIEGO, Petitioner/Defendant.

Case No.: 2:15-cr-00260-GMN-CWH-1

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Signed 11/09/2021

An offense that is a felony and (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Attorneys and Law Firms

Brandon Jaroch, US Attorney's Office, Las Vegas, NV, for Respondent/Plaintiff.

ORDER

Gloria M. Navarro, District Judge

*1 Pending before the Court is Petitioner Joseph Griego's ("Petitioner's") Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, (ECF No. 63). The Government filed a Response, (ECF No. 65), and Petitioner filed a Reply, (ECF No. 66). For the reasons discussed below, the Court **DENIES** Petitioner's Motion.

I. BACKGROUND

On May 17, 2016, Petitioner pleaded guilty to Counts 1 and 2 of the Indictment: one count of Interference with Commerce by Robbery (Hobbs Act Robbery) in violation of 18 U.S.C. § 1951(a); and one count of Discharging a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). (See Mins. Proceedings, ECF No. 41); (J., ECF No. 55). The Court sentenced Petitioner to 26 months custody as to Count 1 and 120 months custody as to Count 2, for a total of 146 months custody, to be followed by 5 years supervised release. (Am. J., ECF No. 56).

In June 2019, the Supreme Court issued its decision in *United States v. Davis*, which considered the constitutionality of 18 U.S.C. § 924(c). 139 S. Ct. 2319 (2019). Section 924(c) generally prohibits the use or carrying of a firearm in relation to a "crime of violence," and it imposes mandatory minimum sentences that must run consecutive to any other sentence. The statute defines a "crime of violence" as:

18 U.S.C. § 924(c)(3). "Courts generally refer to the '(A)' clause of section 924(c)(3) as the 'force clause' and to the '(B)' clause of section 924(c)(3) as the 'residual clause.'" *United States v. Bell*, 158 F. Supp. 3d 906, 910 (N.D. Cal. Jan. 28, 2016). In *Davis*, the Supreme Court struck down the residual clause as unconstitutionally vague. 139 S. Ct. at 2335–36 (2019).

On June 17, 2020, Petitioner filed the present Motion, challenging the validity of his conviction for Discharging a Firearm During a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) in light of *Davis*. (See generally Mot. Vacate, ECF No. 63).

II. LEGAL STANDARD

Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the sentencing Court to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255(a). Such a motion may be brought on the following grounds: "(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack." *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010). "[A] district court may deny a Section 2255 motion without an evidentiary hearing only if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989).

III. DISCUSSION

A. Davis Claim

*2 Petitioner claims that his conviction for Discharging a Firearm During a Crime of Violence should be vacated because, in light of *Davis*, he did not commit a crime of violence. (Mot. Vacate 1:18–26). Petitioner explains that the underlying crime of violence for his § 924(c) conviction is Hobbs Act Robbery, which only qualified as a crime of violence under the now unconstitutional residual clause. (*Id.* 2:20–3:2). Petitioner argues that Hobbs Act Robbery does not qualify as a crime of violence under § 924(c)'s remaining force clause, and thus, he did not commit the crime of violence necessary to be convicted under § 924(c). (*Id.* 3:3–20, 7:18–14:9).

However, the Ninth Circuit has unequivocally held that Hobbs Act Robbery constitutes a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s force clause. *United States v. Dominguez*, 954 F.3d 1251, 1255, 1262 (9th Cir. 2020) (“Hobbs Act Robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A) ... because it's a felony that ‘has an element the use, attempted use, or threatened use of physical force against the person or property of another.’ ”); *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993) (“Robbery indisputably qualifies as a crime of violence.”).¹ Since Hobbs Act Robbery is a crime of violence, Petitioner's § 924(c) conviction for Discharging a Firearm During a Crime of Violence is proper. Accordingly, the Court denies Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255.

B. Certificate of Appealability

To proceed with an appeal of this Order, the Court must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950–51 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001). This means that Petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). He bears the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 483–84.

The Court has considered the issues raised by Petitioner with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that the issues do not meet that standard. The Court therefore denies Petitioner a certificate of appealability.

IV. CONCLUSION

IT IS HEREBY ORDERED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, (ECF No. 63), is **DENIED**.

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

All Citations

Slip Copy, 2021 WL 5237235

Footnotes

- 1 A petition for certiorari has been filed in *Dominguez*. However, the appeal only challenges the Ninth Circuit holding that *attempted* Hobbs Act Robbery is a crime of violence, not that *completed* Hobbs Act Robbery is a crime of violence. *See Dominguez v. United States*, 954 F.3d 1251 (9th Cir. 2020), *petition for cert filed*, (No. 20-1000). Because the present case concerns a completed Hobbs Act Robbery, any final disposition of *Dominguez* will not affect this Order. (See Indictment, ECF No. 1) (charging Defendant with Hobbs Act Robbery, not attempted Hobbs Act Robbery).

Appendix D

United States v. Romero,

No. 21-17128, Dkt. No. 7 (9th Cir. May 24, 2022) (unpublished), Order
Denying Certificate of Appealability

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 24 2022

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON MATTHEW ROMERO,

Defendant-Appellant.

No. 21-17128

D.C. Nos. 2:16-cv-01416-GMN

2:13-cr-00339-GMN-PAL-1

District of Nevada,
Las Vegas

ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

Appendix E

United States v. Romero,

No. 2:13-cr-00339-GMN-PAL, Dkt. No. 78 (D. Nev. Nov. 1, 2021)
(unpublished), Judgment

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA

Plaintiff,

v.

JASON MATTHEW ROMERO,

Defendant.

JUDGMENT

Case Number: 2:13-cr-00339-GMN-PAL-1

(Related case: 2:16-cv-01416-GMN)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

pursuant to the Court's Order Denying the Motion to vacate under 28 U.S.C. 2255, this matter is closed. Judgment for the United States. A Certificate of Appealability shall not issue.

11/1/2021

Date

DEBRA K. KEMPI

Clerk



/s/ D. Reich-Smith

Deputy Clerk

Appendix F

United States v. Romero,

No. 2:13-cr-00339-GMN-PAL, 2021 WL 5056070 (D. Nev. Nov. 1, 2021)
(unpublished), Order Denying Motion to Vacate and Certificate of
Appealability

2021 WL 5056070

Only the Westlaw citation is currently available.

United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff/Respondent,

v.

Jason Matthew ROMERO, Defendant/Petitioner.

Case No.: 2:13-cr-00339-GMN-PAL-1

|

Signed 11/01/2021

Attorneys and Law Firms

Phillip N. Smith, Jr., U.S. Attorneys Office, Las Vegas, NV,
for Plaintiff/Respondent.

ORDER

Gloria M. Navarro, District Judge

*1 Pending before the Court is Petitioner Jason Romero's ("Petitioner's") First Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("First 2255 Motion"), (ECF No. 38).¹

Also pending before the Court is Petitioner's Abridged Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("Abridged 2255 Motion"), (ECF No. 45).²

Also pending before the Court is Petitioner's Second Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("Second 2255 Motion"), (ECF No. 46). The Government filed a Response, (ECF No. 48), to which Petitioner filed a Reply, (ECF No. 49).³

For the reasons discussed below, the Court **DENIES** Petitioner's First 2255 Motion, Abridged 2255 Motion, and Second 2255 Motion.

I. BACKGROUND

On June 30, 2014, Petitioner pleaded guilty to Counts One, Three, Five, and Seven of the Indictment: Interference with Commerce by Robbery, in violation of 18 U.S.C. § 1951; and Count 8 of the Indictment: Carrying and Use of a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(A). (See Plea Agreement, ECF No.

30); (see also Mins. Proceedings, ECF No. 29). The Court sentenced Petitioner to 60-months custody as to Counts 1, 3, 5, and 7, per count, to run concurrent to each other, and 84-months custody as to Count 8, to run consecutive to all other counts. (See J., ECF No. 37); (see also Mins. Proceedings, ECF No. 35).

On June 26, 2015, the United States Supreme Court held that the residual clause in the definition of a "violent felony" under the Armed Career Criminal Act ("ACCA") violates due process. See *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551 (2015). Petitioner subsequently filed the First 2255 Motion, asserting that he is entitled to resentencing in light of *Johnson* and further that counsel rendered ineffective assistance of counsel. (See First 2255 Mot., ECF No. 28). Petitioner then filed a Notice of Voluntary Dismissal of his non-*Johnson* claims. (Notice of Voluntary Dismissal, ECF No. 44). In addition, Petitioner filed his Abridged 2255 Motion and his Second 2255 Motion. (Amended 2255 Mot., ECF No. 45); (Second 2255 Mot., ECF No. 46).

In April 2020, the Ninth Circuit in *United States v. Dominguez* held that a completed Hobbs Act robbery, in violation of 18 U.S.C. § 1951, is a crime of violence under the "force clause" of Section 924(c)(3).⁴ *Dominguez*, 954 F.3d 1251 (9th Cir. 2020). In light of the new Ninth Circuit decision, the Court requested additional briefing, addressing any new applicable Ninth Circuit rulings. (See Min. Order, ECF No. 74). Petitioner filed a Supplement to his Second Motion to Vacate, (ECF No. 75), and the Government filed a Response, (ECF No. 76).

II. LEGAL STANDARD

*2 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the sentencing Court to vacate, set aside, or correct his sentence. 28 U.S.C. § 2255(a). Such a motion may be brought on the following grounds: "(1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack." *Id.*; see *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010). "[A] district court may deny a Section 2255 motion without an evidentiary hearing only if the movant's allegations, viewed against the record, either do not state a claim for relief or are so palpably incredible or patently frivolous as to warrant summary dismissal." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989).

III. DISCUSSION

In his Motion, Petitioner asserts that he is entitled to relief in light of the Supreme Court's decision in *Johnson*. (See generally Second 2255 Mot., ECF No. 46). Petitioner further requests the Court grant him a certificate of appealability if the Court declines to find his Section 924(c) conviction and sentence unconstitutional. (See Suppl. to Second 2255 Mot., ECF No. 75). The Court addresses each argument in turn.

A. Motion to Vacate under Section 2255

Defendant challenges the constitutionality of his underlying conviction under 18 U.S.C. § 924(c), arguing that his conviction is void because his underlying charge, a Hobbs Act robbery, no longer qualifies as a “crime of violence” under *Johnson*. (Second 2255 Mot. 3:2–8). The Ninth Circuit, however, has since held that a completed Hobbs Act robbery constitutes a “crime of violence” under 18 U.S.C. § 924(c). *Dominguez*, 954 F.3d at 1251. Though Dominguez ultimately filed a Petition for Writ of Certiorari, Dominguez solely appealed the Ninth Circuit's decision that an attempted Hobbs Act robbery qualifies as a crime of violence. (Seventh Joint Status Report 2:5–8, ECF No. 73); see also *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), petition for cert. filed, 80 U.S.L.W. 3463 (U.S. Jan. 21, 2021) (No. 20-1000). Therefore, the Ninth Circuit's decision regarding a completed Hobbs Act robbery remains authoritative.

In the present case, Petitioner pleaded guilty to four counts of completed Hobbs Act robbery. (See generally Plea Agreement, ECF No. 30). The Ninth Circuit's holding in *Dominguez* thus forecloses Petitioner's argument that a completed Hobbs Act robbery is not a crime of violence. *Dominguez*, 954 F.3d at 1255 (“In light of recent Supreme Court cases, we also reiterate our previous holding that Hobbs Act armed robbery is a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).”); see also *United States v. Jones*, 848 F. App'x 288, 289 (9th Cir. 2021) (reaffirming that Hobbs Act robbery is a crime of violence under § 924(c)). Notably, Petitioner concedes that the “Ninth Circuit has not issued an applicable decision pertaining specifically to Hobbs Act robbery since *United States v. Dominguez*.” (Suppl. to 2255 Mot. 1:5–9).

Petitioner attempts to circumvent the Ninth Circuit's decision in *Dominguez* by arguing that *Dominguez* conflicts with existing Supreme Court and Ninth Circuit precedent. (*Id.* 2:7–3:23). Specifically, Petitioner argues that the Ninth Circuit

in *Dominguez* failed to consider a “realistic scenario” when analyzing whether the statute was facially overbroad, as is required under Ninth Circuit precedent in *Descamps v. United States*, 570 U.S. 254, 265 (2013), and *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007). (*Id.* 2:24–3:23). The Ninth Circuit, however, explicitly rejected this argument in *United States v. Hall*, 845 F. App'x 644, 645 n.3 (9th Cir. 2021). There, the Ninth Circuit reiterated that the “circuit's published opinions on the law are authoritative once issued and remain binding on subsequent panels of this court.” *Id.* (citing *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1121 (9th Cir. 2020) (citation omitted)). In light of the existing Ninth Circuit precedent, the Court accordingly denies Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under Section 2255.

B. Certificate of Appealability

***3** To proceed with an appeal of this Order, the Court must issue a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950–51 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551–52 (9th Cir. 2001). This means that Petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). He bears the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 483–84.

The Court has considered the issues raised by Petitioner with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that the issues do not meet that standard. Petitioner requests the Court issue a certificate of applicability if the Court denies relief. (Suppl. to 2255 Mot. 3:24–4:26). Specifically, Petitioner argues that “the Ninth Circuit has not yet resolved [Petitioner's] argument that *Dominguez* conflicts with earlier, binding Supreme Court and Ninth Circuit precedent.” (*Id.* 4:17–19). The Ninth Circuit, however, directly denied Petitioner's argument in *Hall*. 845 F. App'x at 645 n.3. Thus, the Court denies Petitioner a certificate of appealability.

IV. CONCLUSION

IT IS HEREBY ORDERED that Petitioner's First 2255 Motion, (ECF No. 38), is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Abridged 2255 Motion, (ECF No. 45), is **DENIED**.

All Citations

IT IS HEREBY ORDERED that Petitioner's Second 2255 Motion, (ECF No. 46), is **DENIED**. Slip Copy, 2021 WL 5056070

Footnotes

- 1 Petitioner later filed a Notice of Voluntary Withdrawal of his non-*Johnson* claims as raised in his First 2255 Motion. (See Notice Voluntary Dismissal, ECF No. 44). In light of his voluntary withdrawal, the Court solely considers Petitioner's *Johnson* claim in the following analysis.
- 2 Petitioner indicates, in his Abridged Motion to Vacate, that he filed the abridged motion to preserve his *Johnson* claim for further briefing. (Abridged Mot. Vacate 1:17–2:6, ECF No. 45).
- 3 Petitioner also filed a Supplemental Brief, (ECF No. 75), pursuant to the Court's Order requesting additional supplemental in light of potential new Ninth Circuit decisions. The Government filed a Response to Petitioner's Supplemental Brief, (ECF No. 76).
- 4 The Ninth Circuit also determined that an attempted Hobbs Act robbery is also a crime of violence under the “force clause.” *United States v. Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020). Dominguez filed a petition for writ of certiorari, solely appealing whether an attempted Hobbs Act robbery is a crime of violence. *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *petition for cert. filed*, 80 U.S.L.W. 3463 (U.S. Jan. 21, 2021) (No. 20-1000)

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