CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX A: Third Superseding Indictment R. 109, pp 1-20

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20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

D-1 BERNARD THOMAS EDMOND,
D-2 PHILLIP HARPER,
D-3 JUSTIN BOWMAN,
D-4 FRANK HARPER,
D-5 DARRELL DEVIN YOUNG,
D-6 OMAR JOHNSON,

Defendants.

_____/

CRIMINAL NO. 11-20188

HONORABLE GEORGE CARAM STEEH

VIOLATIONS: 18 U.S.C. § 2
18 U.S.C. § 371
18 U.S.C. § 511
18 U.S.C. § 924(c)
18 U.S.C. § 1512(a)(2)
18 U.S.C. § 2119(1)
18 U.S.C. § 2119(2)
18 U.S.C. § 2312
18 U.S.C. § 2321
18 U.S.C. § 2322

THIRD SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(18 U.S.C. § 371– Conspiracy to Violate United States Law)

D-1 BERNARD THOMAS EDMOND
D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER
D-5 DARRELL DEVIN YOUNG
D-6 OMAR JOHNSON

THE CONSPIRACY AND ITS OBJECTS

(1) From about January, 2009, and continuing until about March 2012, in the Eastern District of Michigan, Southern Division, defendants BERNARD THOMAS EDMOND, PHILLIP HARPER, JUSTIN BOWMAN, FRANK HARPER, DARRELL DEVIN YOUNG,

and OMAR JOHNSON knowingly and wilfully conspired and agreed with each other and with others both known and unknown to the Grand Jury to commit the following offenses against the United States: carjacking, in violation of Title 18, United States Code, Sections 2119(1) and 2119(2); operating a chop shop in violation of Title 18, United States Code, Section 2322; interstate transportation of stolen vehicles in violation of Title 18, United States Code, Section 2312; and altering vehicle identification numbers in violation of Title 18, United States Code, Section 511.

MANNER AND MEANS OF THE CONSPIRACY

(2) It was a part of the conspiracy that defendants BERNARD THOMAS EDMOND and OMAR JOHNSON would buy stolen motor vehicles from defendants PHILLIP HARPER, FRANK HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG, and others.

(3) It was further a part of the conspiracy that defendant BERNARD THOMAS EDMOND would alter the vehicle identification number of stolen motor vehicles in order to conceal that they had been stolen, and would do this at a business building in the vicinity of Lyndon and Livernois; and at a home on Coyle Street, a home on Winthrop, a home on Rosemont, and a home on Parkview, all in the City of Detroit, among other locations.

(4) It was further a part of the conspiracy that defendant BERNARD THOMAS EDMOND would create false paperwork to make it appear that various persons and companies were the legitimate owners of the stolen motor vehicles, and would pay persons to submit this paperwork to the Michigan Secretary of State in order to obtain State of Michigan titles for the stolen vehicles using the altered vehicle identification numbers.

(5) It was further a part of the conspiracy that after fraudulently obtaining State of Michigan titles defendant BERNARD THOMAS EDMOND would sell and otherwise transfer stolen vehicles in various locations, including other states and other countries.

(6) It was further a part of the conspiracy that defendant BERNARD THOMAS EDMOND created a market for the theft of high-end and sport utility vehicles, and communicated to defendants PHILLIP HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG, and others that he was willing to pay for stolen vehicles of this type.

(7) It was further a part of the conspiracy that defendants PHILLIP HARPER, FRANK HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG, and others would steal vehicles for the purpose of selling them to defendant BERNARD THOMAS EDMOND and to defendant OMAR JOHNSON acting on behalf of BERNARD THOMAS EDMOND, among others.

(8) It was further a part of the conspiracy that in order to obtain the types of vehicles sought by defendant BERNARD THOMAS EDMOND, defendants PHILLIP HARPER, FRANK HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG, and others would often steal vehicles from the persons who owned them. In order to accomplish this, one or more of the defendants would often use a minivan to transport themselves and/or their co-conspirators to a location where they were likely to locate high-end and sport utility vehicles. Defendants' target locations included restaurants, casinos, and other businesses with valet services.

(9) It was further part of the conspiracy that defendants PHILLIP HARPER, FRANK HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG, and others would carry and brandish a firearm during and in furtherance of the vehicle thefts to force, threaten and intimidate

their victims into relinquishing control of the vehicles. Defendants also used physical force when necessary in order to execute their carjacking plan.

(10) It was further part of the conspiracy that defendants PHILLIP HARPER, JUSTIN BOWMAN, DARRELL DEVIN YOUNG and others would sell or attempt to sell the vehicles they had carjacked and otherwise stolen to defendant BERNARD THOMAS EDMOND and to OMAR JOHNSON on behalf of BERNARD THOMAS EDMOND, among others.

OVERT ACTS

Defendants and other coconspirators committed the following acts along with other acts to further the conspiracy and accomplish its objectives:

(A) On about January 30, 2009, defendant BERNARD THOMAS EDMOND paid a person about $50 to apply to the Michigan Secretary of State for a State of Michigan title for a stolen 2008 GMC Yukon using an altered vehicle identification number.

(B) On about December 22, 2009, defendant BERNARD THOMAS EDMOND paid a person about $50 to submit an application for vehicle title to the Michigan Secretary of State for a stolen 2009 Ford pickup truck.

(C) In about the spring of 2010 defendant BERNARD THOMAS EDMOND solicited another person to steal a Mercury Marauder.

(D) On about June 24, 2010, defendant BERNARD THOMAS EDMOND stored a 2010 Dodge Challenger, which had been stolen from Ellwood City, Pennsylvania, at 15845 Winthrop in Detroit.

(E) On about October 14, 2010, defendants PHILLIP HARPER and JUSTIN BOWMAN and other persons brandished a firearm to steal a 2010 Cadillac Escalade, a 2010 GMC Yukon, a 2008 Chrysler Aspen, and 2006 Mercury Milan from the Elysium Club in

Detroit, Michigan, and then sold or transferred at least one of these vehicles to defendant BERNARD THOMAS EDMOND.

(F) On about November 17, 2010, defendant PHILIP HARPER and another person stole a 2011 Acura MDX from the vicinity of the Westin Hotel in Detroit, Michigan, and then sold or transferred this vehicle to defendant BERNARD THOMAS EDMOND.

(G) On about December 1, 2010, defendant BERNARD THOMAS EDMOND caused a stolen 2011 Acura MDX to be transported from the State of Michigan to the State of Maryland.

(H) On about December 20, 2010, defendants PHILLIP HARPER and JUSTIN BOWMAN, along with another person, stole a 2003 Hummer and a Mercedes S550 from the vicinity of Flood's Bar & Grill in Detroit, Michigan, and then sold or transferred the Mercedes S550 to defendant OMAR JOHNSON on behalf of defendant BERNARD THOMAS EDMOND.

(I) In or around late December 2010, defendants PHILLIP HARPER and JUSTIN BOWMAN, along with another person, stole a Mercedes S550 and two Jeep Cherokees from the vicinity of the Rattlesnake Club in Detroit, Michigan.

(J) On about December 30, 2010, defendant DARRELL DEVIN YOUNG, along with another person, brandished a gun to steal a Mercedes S550 from a person in the vicinity of Grandville and Joy Road in Detroit, Michigan, and then sold or transferred the Mercedes S550 to defendant BERNARD THOMAS EDMOND.

(K) On about January 1, 2011 defendants PHILLIP HARPER and JUSTIN BOWMAN, along with another person, stole a Jaguar XJ from the vicinity of Flood's Bar & Grill in Detroit, Michigan.

(L) On about January 4, 2011, defendant PHILLIP HARPER and three other persons stole three Cadillac Escalades from the vicinity of MGM Casino in Detroit, Michigan, and then

sold or transferred one or more stolen Cadillac Escalades to defendant BERNARD THOMAS EDMOND.

(M) On about January 7, 2011, defendant PHILLIP HARPER and another person stole two GMC Yukon Denalis from Henry Ford Hospital in Detroit, Michigan, and then sold or transferred one of the stolen GMC Denalis to defendant BERNARD THOMAS EDMOND.

(N) On about January 25, 2011, defendants JUSTIN BOWMAN and FRANK HARPER, and another person, brandished a firearm to steal a Mercedes S550 from a person in the vicinity of Atwater and Jos. Campau streets in Detroit, Michigan, and then sold or transferred the stolen Mercedes S550 to defendant BERNARD THOMAS EDMOND.

(O) On about January 25, 2011, defendant BERNARD THOMAS EDMOND tampered with and altered the vehicle identification number for a stolen 2007 S550 Mercedes-Benz, and then sold or transferred that vehicle to PHILLIP HARPER in exchange for other stolen vehicles.

(P) On about January 29, 2011, defendant BERNARD THOMAS EDMOND caused a person to sign an application for vehicle title for a stolen 2009 Ford Fusion, which application was submitted to the Michigan Secretary of State.

(Q) On about January 31, 2011, defendants PHILLIP HARPER, FRANK HARPER, and JUSTIN BOWMAN, along with another person, brandished a gun to steal a Chevrolet Camaro, an Infiniti, and a Cadillac CTS from a person on Jos. Campau Street in Detroit, Michigan.

(R) On about February 22, 2011, defendants PHILLIP HARPER, FRANK HARPER, JUSTIN BOWMAN, and another person brandished a gun to steal a Chevrolet Tahoe, Cadillac

Escalade, and Cadillac CTS from a person in the vicinity of Opus One restaurant in Detroit, Michigan.

(S) On about March 12, 2011, defendant PHILLIP HARPER and another person brandished a gun to steal or attempt to steal a Porsche Panamera from a person in the vicinity of Greektown Casino in Detroit, Michigan, with the intent of selling the vehicle to defendant BERNARD THOMAS EDMOND.

(T) On about March 20, 2011, defendants PHILLIP HARPER, JUSTIN BOWMAN, and DERRELL YOUNG brandished a gun to steal a Lexus 460 from a person at the vicinity of Club Vain on Woodward in Detroit, Michigan.

(U) On about October 4, 2011, defendant BERNARD THOMAS EDMOND paid a person about $100 to travel from Michigan to Ohio to assist with the sale in Ohio of a 2011 Cadillac CTS which had been stolen in the State of Michigan.

(V) On about October 4, 2011, defendant BERNARD THOMAS EDMOND caused a 2011 Cadillac CTS, which had been stolen in the State of Michigan, to travel from the State of Michigan to the State of Ohio.

(W) On about December 7, 2011, defendant BERNARD THOMAS EDMOND caused a stolen 2008 GMC Yukon Denali to be delivered to Laurel Park Place in Livonia, Michigan.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

(18 U.S.C. §§ 2119(1) & 2 – Carjacking & Causing Carjacking)

D-1 BERNARD THOMAS EDMOND
D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN

On about October 14, 2010, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND induced and caused defendants PHILLIP HARPER and JUSTIN BOWMAN to take motor vehicles from the person and presence of Mizanur Rahman with the intent to cause serious bodily harm and death, specifically, a 2010 Cadillac Escalade, a 2010 GMC Yukon, a 2008 Chrysler Aspen, and 2006 Mercury Milan, each of which had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2.

COUNT THREE

(18 U.S.C. §§ 924(c) & 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-1 BERNARD THOMAS EDMOND
D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN

On about October 14, 2010, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND induced and caused defendants PHILLIP HARPER and JUSTIN BOWMAN to intentionally use and carry a firearm during and in relation to the commission of a crime of violence for which PHILLIP HARPER, JUSTIN BOWMAN, and BERNARD THOMAS EDMOND may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Two of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT FOUR

(18 U.S.C. §§ 2119(1) & 2 – Carjacking & Causing Carjacking)

D-1 BERNARD THOMAS EDMOND
D-5 DARRELL DEVIN YOUNG

On about December 30, 2010, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced defendant DARRELL DEVIN YOUNG to take a motor vehicle from the person and presence of Annetta Powell with the intent to cause serious bodily harm and death, specifically, a 2009 Mercedes S550 that had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, causing serious bodily injury as a result of such actions, in violation of Title 18, United States Code, Sections 2119(2) and 2.

COUNT FIVE

(18 U.S.C. §§ 924(c) & 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-1 BERNARD THOMAS EDMOND
D-5 DARRELL DEVIN YOUNG

On about December 30, 2010, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced defendant DARRELL DEVIN YOUNG to intentionally use and carry a firearm during and in relation to the commission of a crime of violence for which DARRELL DEVIN YOUNG and BERNARD THOMAS EDMOND may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Four of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT SIX

(18 U.S.C. §§ 2119(1) & 2 – Carjacking & Causing Carjacking)

D-1 BERNARD THOMAS EDMOND
D-3 JUSTIN BOWMAN

On about January 25, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced JUSTIN BOWMAN, FRANK HARPER, and others to take a motor vehicle from the person and presence of Errol Service with the intent to cause serious bodily harm and death, specifically, a 2007 S550 Mercedes-Benz that had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2.

COUNT SEVEN

(18 U.S.C. §§ 924(c)& 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-1 BERNARD THOMAS EDMOND
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER

On about January 25, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced defendants JUSTIN BOWMAN and FRANK HARPER and another person to intentionally use and carry a firearm during and in relation to the commission of a crime of violence for which JUSTIN BOWMAN, FRANK HARPER, and BERNARD THOMAS EDMOND may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Six of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT EIGHT

(18 U.S.C. §§ 2119(1) & 2 – Carjacking & Causing Carjacking)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER

On about January 31, 2011, in the Eastern District of Michigan, Southern Division, defendants PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER, with the intent to cause serious bodily harm and death, took motor vehicles from the person and presence of Ricky Boyd, specifically, a 2010 Chevrolet Camaro and a 2011 Infiniti QX56, both of which had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2.

COUNT NINE

(18 U.S.C. §§ 924(c)& 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER

On about January 31, 2011, in the Eastern District of Michigan, Southern Division, defendants PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER intentionally used and carried a firearm during and in relation to the commission of a crime of violence for which PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Eight of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT TEN

(18 U.S.C. §§ 2119(1) & 2 – Carjacking & Causing Carjacking)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER

On about February 22, 2011, in the Eastern District of Michigan, Southern Division, defendants PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER took motor vehicles from the person and presence of Ahmed Asad Hussain with the intent to cause serious bodily harm and death, specifically, a 2009 Cadillac Escalade Hybrid and 2010 Chevrolet Tahoe, each of which had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2.

COUNT ELEVEN

(18 U.S.C. §§ 924(c)& 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-4 FRANK HARPER

On about February 22, 2011, in the Eastern District of Michigan, Southern Division, defendants, PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER intentionally used and carried a firearm during and in relation to the commission of a crime of violence for which PHILLIP HARPER, JUSTIN BOWMAN, and FRANK HARPER may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Ten of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT TWELVE

(18 U.S.C. §§ 2119(1) & 2 – Attempted Carjacking & Causing Attempted Carjacking)

D-1 BERNARD THOMAS EDMOND
D-2 PHILLIP HARPER

On about March 12, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced defendant PHILLIP HARPER to attempt to take a motor vehicle from the person and presence of Shah Jahangir Ali with the intent to cause serious bodily harm and death, specifically, a 2011 Porsche Panamera that had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, in violation of Title 18, United States Code, Sections 2119(1) and 2.

COUNT THIRTEEN

(18 U.S.C. §§ 924(c)& 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-1 BERNARD THOMAS EDMOND
D-2 PHILLIP HARPER

On about March 12, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND caused and induced defendant PHILLIP HARPER to intentionally use and carry a firearm during and in relation to the commission of a crime of violence for which PHILLIP HARPER and BERNARD THOMAS EDMOND may be prosecuted in a court of the United States, that is, attempted carjacking as alleged in Count Twelve of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT FOURTEEN

(18 U.S.C. §§ 2119(2) & 2 – Carjacking & Causing Carjacking)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-5 DARRELL DEVIN YOUNG

On about March 20, 2011, in the Eastern District of Michigan, Southern Division, defendants PHILLIP HARPER, JUSTIN BOWMAN, and DARRELL DEVIN YOUNG took a motor vehicle from the person and presence of Hamzh Jamal-Abdel-Rahim Mehyar and Hussein Bazzi with the intent to cause serious bodily harm and death, specifically, a 2010 Lexus 460 that had been transported, shipped and received in interstate commerce, and did so by force and violence and intimidation, causing serious bodily injury as a result of such actions, in violation of Title 18, United States Code, Sections 2119(2) and 2.

COUNT FIFTEEN

(18 U.S.C. §§ 924(c)& 2 – Using and Carrying a Firearm During and in Relation to a Crime of Violence)

D-2 PHILLIP HARPER
D-3 JUSTIN BOWMAN
D-5 DARRELL DEVIN YOUNG

On about March 20, 2011, in the Eastern District of Michigan, Southern Division, defendants PHILLIP HARPER, JUSTIN BOWMAN, and DARRELL DEVIN YOUNG intentionally used and carried a firearm during and in relation to the commission of a crime of violence for which PHILLIP HARPER, JUSTIN BOWMAN, and DARRELL DEVIN YOUNG may be prosecuted in a court of the United States, that is, carjacking as alleged in Count Fourteen of this Indictment, all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT SIXTEEN

(18 U.S.C. §§ 2312 & 2 – Causing Interstate Transportation of Stolen Motor Vehicle)

D-1 BERNARD THOMAS EDMOND

Between about November 17, 2010 and December 1, 2010, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND unlawfully transported and caused to be transported from the State of Michigan to the State of Maryland a stolen motor vehicle, that is, a 2011 Acura MDX with vehicle identification number 2HNYD2H6XBH506794, knowing the same to be stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

COUNT SEVENTEEN

(18 U.S.C. § 511 – Falsification and Removal of Motor Vehicle Identification Numbers)

D-1 BERNARD THOMAS EDMOND

On about January 25, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND knowingly and unlawfully tampered with and altered the vehicle identification number for a motor vehicle, specifically, a 2007 S550 Mercedes-Benz with true vehicle identification number WDDNG86X97A093177 which defendant altered to WDDNG86X57A095282, in violation of Title 18, United States Code, Section 511.

COUNT EIGHTEEN

(18 U.S.C. § 2321 – Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers)

D-1 BERNARD THOMAS EDMOND

On about January 25, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND knowingly bought, received, possessed, and obtained control of, with intent to sell and otherwise dispose of, a motor vehicle, specifically, a 2007 S550 Mercedes-Benz with vehicle identification number WDDNG86X97A093177, knowing that the vehicle identification number of said vehicle had been unlawfully tampered with and altered, in violation of Title 18, United States Code, Section 2321.

COUNT NINETEEN

(18 U.S.C. §§ 2312 & 2 – Causing Interstate Transportation of Stolen Motor Vehicle)

D-1 BERNARD THOMAS EDMOND

On about October 4, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND unlawfully transported and caused to be transported from the State of Michigan to the State of Ohio a stolen motor vehicle, that is, a 2011 CTS with true vehicle identification number 1G6DG8EYXB0136510, knowing the same to be stolen, in violation of Title 18, United States Code, Sections 2312 and 2.

COUNT TWENTY

(18 U.S.C. § 2321 – Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers)

D-1 BERNARD THOMAS EDMOND

On about October 4, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND knowingly possessed, with intent to sell and otherwise dispose of, a motor vehicle, specifically, a 2011 Cadillac CTS with altered vehicle identification number 1G6DL8ED8B0161222, knowing that the vehicle identification number of said vehicle had been unlawfully tampered with and altered, in violation of Title 18, United States Code, Section 2321.

COUNT TWENTY-ONE

(18 U.S.C. § 2321 – Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers)

D-1 BERNARD THOMAS EDMOND

On about December 7, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND knowingly possessed, with intent to sell and otherwise dispose of, a motor vehicle, specifically, a 2008 GMC Yukon Denali with an altered vehicle identification number, knowing that the vehicle identification number of said vehicle had been unlawfully tampered with and altered, in violation of Title 18, United States Code, Section 2321.

COUNT TWENTY-TWO

(18 U.S.C. § 2322(a)(1) and (b) – Operating a Chop Shop)

D-1 BERNARD THOMAS EDMOND

From about January 1, 2009, through about December 31, 2011, in the Eastern District of Michigan, Southern Division, defendant BERNARD THOMAS EDMOND knowingly owned, operated, maintained, and controlled chop shops and conducted operations in chop shops at a building in the vicinity of Lyndon and Livernois; at 18717 Coyle, at 19303 Rosemont, at 440 Parkview, and at 15845 Winthrop, all in Detroit, Michigan, where one or more persons engaged in receiving, concealing, and storing passenger motor vehicles which had been unlawfully obtained in order to alter, counterfeit, deface, destroy, disguise, falsify, forge, obliterate, and remove the identities, including the vehicle identification numbers or derivatives thereof, of such vehicles and to distribute, sell, and dispose of such vehicles in interstate or foreign commerce, in violation of Title 18, United States Code, Section 2322(a)(1) and (b).

COUNT TWENTY-THREE

(18 U.S.C. §§ 1512(a)(2)(C) & 2 – Tampering With a Witness by Physical Force or Threat)

D-2 PHILLIP HARPER

Between about the Summer of 2011 and the Spring of 2012, in the Eastern District of Michigan, Southern Division, defendant PHILLIP HARPER used and attempted to use the threat of physical force against Shah Jahangir Ali by sending another person or persons to Shah Jahangir Ali's place of employment to threaten Shah Jahangir Ali with the intent to hinder, delay, and prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission of the federal offense of carjacking, in violation of Title 18, United States Code, Sections 1512(a)(2)(C) and 2.

FORFEITURE ALLEGATIONS

Pursuant to Fed.R.Cr.P. 32.2(a), the Government hereby provides notice to Defendants of its intention to seek forfeiture of all proceeds, direct or indirect, or property traceable thereto, all property that facilitated the commission of the violations alleged, or property traceable thereto, and all property involved in, or property traceable thereto, of the crimes set forth in this Indictment.

THIS IS A TRUE BILL.

s/ Grand Jury Foreperson
GRAND JURY FOREPERSON

BARBARA L. McQUADE
United States Attorney

s/ John N. O'Brien II
JOHN N. O'BRIEN II
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s/ Jerome F. Gorgon Jr.
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Dated: July 9, 2013

United States District Court Eastern District of Michigan	**Criminal Case Cover Sheet**	**Case Number** 11-20188

NOTE: It is the responsibility of the Assistant U.S. Attorney signing this form to complete it accurately in all respects.

Reassignment/Recusal Information This matter was opened in the USAO prior to August 15, 2008 [ ]

Companion Case Information	**Companion Case Number:**
This may be a companion case based upon **LCrR 57.10 (b)(4)[1]:**	**Judge Assigned:**
☐ **Yes** ☐ **No**	**AUSA's Initials:**

Case Title: USA v. BERNARD THOMAS EDMOND ET AL.

County where offense occurred :

Check One: ☒ **Felony** ☐ **Misdemeanor** ☐ **Petty**

____Indictment/____Information --- **no** prior complaint.
____Indictment/____Information --- based upon prior complaint [**Case number:**]
✓ Indictment/____Information --- based upon **LCrR 57.10 (d)** ***[Complete Superseding section below]***

2013 JUL 9 A 11:38
FILED
U.S. DIST. COURT CLERK
EAST. DIST. MICHIGAN
DETROIT

Superseding Case Information

Superseding to Case No: 11-20188 **Judge:** GEORGE CARAM STEEH

☐ Original case was terminated; no additional charges or defendants.
☐ Corrects errors; no additional charges or defendants.
☐ Involves, for plea purposes, different charges or adds counts.
☒ Embraces same subject matter but adds the additional defendants or charges below:

Defendant name	**Charges**	**Prior Complaint (if applicable)**
Bernard Thomas Edmond	18 U.S.C. §§ 511, 2312, 18 U.S.C. §§ 2321, 2322 18 U.S.C. § 1512(a)(2)	
Frank Harper		

Please take notice that the below listed Assistant United States Attorney is the attorney of record for the above captioned case.

July 9, 2013
Date

JEROME F. GORGON JR.
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Attorney Bar #:

[1] Companion cases are matters in which it appears that (1) substantially similar evidence will be offered at trial, (2) the same or related parties are present, and the cases arise out of the same transaction or occurrence. Cases may be companion cases even though one of them may have already been terminated.

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX B: Judgment R. 210, PgID 3720-3727

SANFORD A. SCHULMAN
Attorney for Petitioner
BERNARD EDMOND
Guardian Building
500 Griswold Street, Suite 2340
Detroit, MI 48226
(313) 963-4740

United States District Court
Eastern District of Michigan

United States of America
V.
BERNARD THOMAS EDMOND

JUDGMENT IN A CRIMINAL CASE

Case Number: 11CR20188-5
USM Number: 09837-039

Sanford A. Schulman
Defendant's Attorney

THE DEFENDANT:

■ Was found guilty on count(s) **1, 2, 3, 4, 5, 6, 7, 12, 17, 18, 19, 20, 21 and 22 of the Third Superseding Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
See page 2 for details.			

The defendant is sentenced as provided in pages **2 through 8** of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984

■ The defendant has been found not guilty on count(s) **Count 13 of the Third Superseding Indictment**

■ Count(s) **1 of the Second Superseding Indictment** is dismissed on the motion of the United States after a plea of not guilty.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 27, 2014
Date of Imposition of Judgment

s/George Caram Steeh
United States Senior Judge

October 28, 2014
Date Signed

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 371	Conspiracy to Violate United States Law	March 2012	1S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	10/14/10	2S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	10/14/10	3S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	12/30/10	4S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	12/30/10	5S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	1/25/11	6S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	1/25/11	7S
18 USC §§ 2119(1) and 2	Attempted Carjacking and Causing Attempted Carjacking	3/12/11	12S
18 USC § 511	Falsification and Removal of Motor Vehicle Identification Numbers	1/25/11	17S
18 USC § 2321	Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers	1/25/11	18S
18 USC §§ 2312 and 2	Causing Interstate Transportation of Stolen Motor Vehicles	10/4/11	19S
18 USC § 2321	Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers	10/4/11	20S
18 USC § 2321	Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers	12/7/11	21S
18 USC §§ 2322(a)(1) and (b)	Operating a Chop Shop	12/31/11	22S

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

See next page for imprisonment terms.

The court makes the following recommendations to the Bureau of Prisons: **that defendant be designated to F.C.I., Milan, Michigan if possible.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

EFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

ADDITIONAL IMPRISONMENT TERMS

Counts 1s and 17s: 60 months on each count to be served concurrent with Counts 2s, 3s, 4s, 5s, 6s, 7s, 12s and 18s through 22s. Counts 2s, 6s, 12s and 22s: 180 months on each count to be served concurrently with one another and to all other counts. Count 4s: 240 months to be served concurrently to all other counts. Counts 18s through 22s: 120 months, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 6s, 7s, 12s and 17s through 22s. Count 7s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 5s, 6s, 12s and 17s through 22s.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years on Counts 1-3s, 12s and 17s through 22s, all to be served concurrent with one another.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. Revocation of supervised release is mandatory for possession of a controlled substance.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report ot the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SPECIAL CONDITIONS OF SUPERVISION

■ The defendant shall make monthly payments on any remaining balance of the:**restitution, special assessment** at a rate and schedule recommended by the Probation Department and approved by the Court.

■ The defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer.

■ The defendant shall provide the probation officer access to any requested financial information.

■ The defendant shall participate in a program approved by the Probation Department for substance abuse which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol. ■ If necessary.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS:	$ 1,400.00	$ 0.00	$ 0.00

The determination of restitution is deferred until for 90 days. An *Amended Judgment in a Criminal Case* will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS:	$ 0.00	$ 0.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:
[A] Lump sum payment of **$1,400.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, while in custody, the defendant shall participate in the Inmate Financial Responsibility Program. The Court is aware of the requirements of the program and approves of the payment schedule of this program and hereby orders the defendant's compliance. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX C: Amended Judgment, R. 311 PgID 4680-4687

SANFORD A. SCHULMAN
Attorney for Petitioner
BERNARD EDMOND
Guardian Building
500 Griswold Street, Suite 2340
Detroit, MI 48226
(313) 963-4740

United States District Court
Eastern District of Michigan

AMENDED

United States of America
V.
BERNARD THOMAS EDMOND

JUDGMENT IN A CRIMINAL CASE

Case Number: 11CR20188-5
USM Number: 09837-039

Sanford A. Schulman
Defendant's Attorney

Original Judgment: 10/27/14; Reason for Amendment: Resentencing in light of Dean v USA, Supreme Court case

■ Was found guilty on count(s) **1, 2, 3, 4, 5, 6, 7, 12, 17, 18, 19, 20, 21 and 22 of the Third Superseding Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count

See page 2 for details.

The defendant is sentenced as provided in pages **2 through 8** of this judgment. This sentence is imposed pursuant to the Sentencing Reform Act of 1984

■ The defendant has been found not guilty on count(s) **Count 13 of the Third Superseding Indictment**

■ Count(s) **1 of the Second Superseding Indictment** is dismissed on the motion of the United States after a plea of not guilty.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 2, 2018
Date of Imposition of Judgment

s/George Caram Steeh
United States Senior Judge

May 9, 2018
Date Signed

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 371	Conspiracy to Violate United States Law	March 2012	1S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	10/14/10	2S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	10/14/10	3S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	12/30/10	4S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	12/30/10	5S
18 USC §§ 2119(1) and 2	Carjacking and Causing Carjacking	1/25/11	6S
18 USC §§ 924(c) and 2	Using and Carrying a Firearm During and in Relation to a Crime of Violence	1/25/11	7S
18 USC §§ 2119(1) and 2	Attempted Carjacking and Causing Attempted Carjacking	3/12/11	12S
18 USC § 511	Falsification and Removal of Motor Vehicle Identification Numbers	1/25/11	17S
18 USC § 2321	Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers	1/25/11	18S
18 USC §§ 2312 and 2	Causing Interstate Transportation of Stolen Motor Vehicles	10/4/11	19S
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18 USC § 2321	Trafficking in Motor Vehicles With Falsified, Altered or Removed Identification Numbers	12/7/11	21S
18 USC §§ 2322(a)(1) and (b)	Operating a Chop Shop	12/31/11	22S

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

See next page for imprisonment terms.

The court makes the following recommendations to the Bureau of Prisons: **that defendant be designated to F.C.I., Milan, Michigan if possible.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

_____
Deputy United States Marshal

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

ADDITIONAL IMPRISONMENT TERMS

Counts 1s and 17s: *1 day* on each count to be served concurrent with Counts 2s, 3s, 4s, 5s, 6s, 7s, 12s and 18s through 22s. Counts 2s, 6s, 12s and 22s: *1 day* on each count to be served concurrently with one another and to all other counts. Count 4s: *1 day* to be served concurrently to all other counts. Counts 18s through 22s: *1 day*, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 6s, 7s, 12s and 17s through 22s. Count 7s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 5s, 6s, 12s and 17s through 22s.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years on Counts 1-3s, 12s and 17s through 22s, all to be served concurrent with one another.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

If the defendant is convicted of a felony offense, DNA collection is required by Public Law 108-405.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. Revocation of supervised release is mandatory for possession of a controlled substance.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report ot the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

14) the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. Revocation of supervised release is mandatory for possession of a firearm.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SPECIAL CONDITIONS OF SUPERVISION

■ The defendant shall make monthly payments on any remaining balance of the:**restitution**, **special assessment** at a rate and schedule recommended by the Probation Department and approved by the Court.

■ The defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer.

■ The defendant shall provide the probation officer access to any requested financial information.

■ The defendant shall participate in a program approved by the Probation Department for substance abuse which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol. ■ If necessary.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS:	$ 1,400.00	$ 0.00	$ 0.00

The determination of restitution is deferred until for 90 days. An *Amended Judgment in a Criminal Case* will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS:	$ 0.00	$ 0.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BERNARD THOMAS EDMOND
CASE NUMBER: 11CR20188-5

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:
[A] Lump sum payment of **$1,400.00** due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, while in custody, the defendant shall participate in the Inmate Financial Responsibility Program. The Court is aware of the requirements of the program and approves of the payment schedule of this program and hereby orders the defendant's compliance. All criminal monetary penalty payments are to be made to the Clerk of the Court, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX D: Motion to Vacate Sentencer 28 U.S.C. 2255 R. 317 PgID 4733-4762

SANFORD A. SCHULMAN
Attorney for Petitioner
BERNARD EDMOND
Guardian Building
500 Griswold Street, Suite 2340
Detroit, MI 48226
(313) 963-4740

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name *(under which you were convicted)*: Bernard Thomas Edmond	Docket or Case No.: 11-cr-20188
Place of Confinement:	Prisoner No.: 09837-039
UNITED STATES OF AMERICA	Movant *(include name under which convicted)* v. Bernard Thomas Edmond

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
United States District Court
Eastern District of Michigan
Southern Divison
(b) Criminal docket or case number (if you know): 11-CR-20188

2. (a) Date of the judgment of conviction (if you know):
(b) Date of sentencing: October 27, 2014

3. Length of sentence: 75 years

4. Nature of crime (all counts): ① the mandatory Consecutive 55 years (660 months) on counts 3, 5, and 7 (three 924(c) counts) ② 60 months concurrent on count 1 (Conspiracy) and count 17 (Falsification of Numbers) ③ 180 month Concurrent on counts 2, 6, and 12 (Three Carjackings) ④ 240 months concurrent on count 4 (carjacking) and ⑤ 120 months concurrent on counts 18, 19, 20, 21 and 22 (Motor vehicles)

5. (a) What was your plea? (Check one)
(1) Not guilty ☑ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☑ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

AO 243 (Rev. 09/17)

8. Did you appeal from the judgment of conviction? Yes ☑ No ☐

9. If you did appeal, answer the following:
(a) Name of court: United States Court of Appeals for the Sixth Circuit
(b) Docket or case number (if you know): 14-2426
(c) Result: Judgement Affirmed
(d) Date of result (if you know): Argued January 28, 2016 Decided March 3 2016
(e) Citation to the case (if you know):
(f) Grounds raised: Grand Jury challange, Handwriting expert, Jury Challenge Pinkerton theory, advanced knowledge Rosemond, Double Jeopardy Challenge. Challenge the Sentence in light of mandatory 924(c) Convictions.

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☑ No ☐
If "Yes," answer the following:
(1) Docket or case number (if you know): 16-5441
(2) Result: Certioraci was granted
(3) Date of result (if you know): April 17th 2017
(4) Citation to the case (if you know): remanded to Sixth Circuit in light of Dean v. U.S.
(5) Grounds raised: challenge the Sentence in light of the mandatory 924(c) Convictions.

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?
Yes ☐ No ☑

11. If your answer to Question 10 was "Yes," give the following information:
(a) (1) Name of court:
(2) Docket or case number (if you know):
(3) Date of filing (if you know):

AO 243 (Rev. 09/17)

(4) Nature of the proceeding: _____

(5) Grounds raised:

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

_____

AO 243 (Rev. 09/17)

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: 924(C)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Violates my right to Due process

Please see attached

Please see attached

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

the issue was still pending in the higher courts.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☑

AO 243 (Rev. 09/17)

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☑

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☑

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: Ineffective Assistace of Counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Please see attached

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

You cant raise Ineffective Assistance of Counsel on Direct Appeal

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

AO 243 (Rev. 09/17)

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

AO 243 (Rev. 09/17)

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:
William Ford

(b) At the arraignment and plea:
William Ford

(c) At the trial:
Sanford A. Schulman 500 Griswold St. Suite 2340 Det. Mich. 48226

(d) At sentencing:
Sanford A. Schulman 500 Griswold St. Suite 2340 Det. Mich. 48226

(e) On appeal:
Sanford A Schulman 500 Griswold Suite 2340 Det Mich 48226

(f) In any post-conviction proceeding:
Sanford A. Schulman 500 Griswold Suite 2340 Det. Mich 48226

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became 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 removed, if the movant was prevented from making such 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

AO 243 (Rev. 09/17)

Therefore, movant asks that the Court grant the following relief:

Please See attached

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on August 14 2018 (month, date, year).

Executed (signed) on August 14 2018 (date)

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

Print Save As... Add Attachment Reset

TRULINCS 09837039 - EDMOND, BERNARD THOMAS - Unit: MIL-D-A

FROM: 09837039
TO:
SUBJECT: 2255
DATE: 08/16/2018 07:05:39 PM

...

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

United States of America,
Plaintiff,

v.

Criminal No. 11-cr-20188
Hon. George C. Steeh.

Bernard Edmonds,
Defendant.
_____/

ATTACHMENT
BERNARD EDMOND
PRO SE 2255 MOTION

NOW COMES, Defendant/Movant Bernard Edmond, hereinafter Mr. Edmond acting pro se, respectfully files this motion under 28 U.S.C. 2255 motion to vacate, set aside, or correct his sentence.

Mr. Edmond raises 4 constitutional claims in his 2255 motion. The primary claims are Count (3) 924(c), Count (5) 924(c), and Count (7) 924(c). Mr. Edmond also alleges that he was provided with ineffective assistance of counsel by his trial attorney Sanford A. Schulman. The applicable law with respect to each issue and the supporting facts will be briefly discussed below.

BRIEF

THE RESIDUAL CLAUSE OF 18 U.S.C. 924 (c) IS UNCONSTITUTIONALLY VAGUE

Under Ground One of his motion, Mr. Edmond's submits that the residual clause contained in 18 U.S.C. 924(c) is unconstitutional in light of the reasoning contained in Sessions v. Dimaya, 138 S. Ct. 1204 (2018) and Johnson v. United States, 135 S. Ct.2551 (2015)

Dimaya held that the residual clause of 18 U.S.C. 16's definition of crime of violence, as incorporated into the Immigration and Nationality Act's definition of aggravated felony was unconstitutionally vague.

Johnson invalidated a similar definition in the residual clause of the Armed Career Criminal Act (ACCA).

The ACCA's residual clause defined a "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924 (e)(2)(B)(ii). In assessing whether a given offense qualifies, Congress required a court not to look at how the defendant "committed it on a particular occasion", or just at its statutory elements, but rather

"to picture the kind of conduct that the crime involves in the 'ordinary case.'" Johnson, 136 S. Ct. at 2557-62. Because this cannot be done with any certainty, let alone predictability, the Court concluded the residual clause is unconstitutionally vague. Id, at 2558-59. It attributed this vagueness to "two features" of the residual clause: the "grave uncertainty about how to estimate the risk" posed by a "judicially imagined 'ordinary case' of crime" in the first place coupled with the difficulty of "apply(ing) an imprecise 'serious potential risk" standard" to such a "judge-imagined abstraction." Id. at 2557-58. Section 924(c) defines a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense". The identical language appears in 18 U.S.C. 16 (b), which was struck down and declared unconstitutionally vague in Dimaya.

Defendant, Mr. Edmond, is mindful that there appears to be a split in the circuits on the application of Dimaya to 924(c)'s residual clause. Prior to Dimaya, the Sixth Circuit distinguished 924 (c) from 16(b) in the context of vagueness challenges. United States v. Taylor, 814 F.3d 340, 375-379 (6th Cir. 2016) and Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016). On May 14, 2018, the Supreme court denied petitions for writs of certiorari in Taylor and Shuti.

It is of import to note that the explanation in Shuti for why invalidating 16(b) does not require invalidating the residual clause in 924(c) is simply wrong and had been reached prior to the Supreme Court's decision in Dimaya.

The Sixth Circuit has issued opinions rejecting Johnson Dimaya vagueness challenges to several common 924(c) offenses: United States v. Gooch, 850 F.3d 285 (6th Cir 2017), Hobbs Act Robbery; United States v. Dial, 694 Fed. Appx. 368 (6th Cir. 2017) cert. den 138 S. Ct 647 (2018). Notably, in Frank Harper v. United States, No. 18-1202, the Sixth Circuit issued an Order granting a Certificate of Appealability, regarding the term "crime of violence" since Dimaya, and cited the Tenth Circuit's opinion United States v. Sala, which held that Dimaya compelled the conclusion that 924(c)'s residual clause is unconstitutionally vague. __F.3d___ (2018 WL 2074547 at (10th Cir. May 4, 2018) ("Dayama's reasoning for invalidating 16 (b) applies equally to 924(c)(3)(B)."). "There is ostensibly a circuit split on the issue of 924(c)(3)(B)'s constitutionality...(b)ut Dimaya has since abrogated the reasoning of those cases.". [Note: as this Honorable Court is aware the above noted Harper case is the codefendant of Mr. Edmond in the instance cause].

The Seventh Circuit in United States v, Vivas-Ceja, 808 F.3d 719, 721-23, (7th Cir. 2018), reasoned that because Congress had also required the same hopelessly vague "ordinary case" analysis for 16(b), it suffered from the same two "features" that doomed the ACAA' residual clause.

D.C. Circuit - 924 (c)

On August 3, 2018, the (D.C. Cir) in U.S.v. Eshetu, (No. 15-2020) decided per curium that 924 (c)(3)(B) is void for vagueness, and that Dimaya required the Court to [abjure] it's earlier analysis to the contrary.

In U.S. V Esheto, a Jury convicted defendants Pablo Lovo ("Lovo") and Joel Sorto ("Sorto")... of 18 U.S.C. Sec. 1951, and using, carrying or possessing a firearm during a crime of violence, 18 U.S.C. Sec. 924(c). Lovo and Sorto appealed their convictions. See, U.S. v. Esheto, 863 F.3d 946 (D.C. Cir. 2017). In the main, the court rejected their claims, Id. at 951-58 & n 9. As relevant here, in Mr. Edmond's Claim, the Esheto Court rejected their claim that the "residual clause" of the statutory crime-of-violence definition that affects them set forth in 18 U.S.C. Sec. 924 (c)(3)(B) is unconstitutionally vague." Id. at 952; See Id at 952-56. After that decision was issued, the United States Supreme Court held that 18 U.S.C. 16(b) the "residual clause" of 16's Crime-of-violence definition is unconstitutionally vague. See Sessions v. Dimaya, 138 S. Ct. 1204, 1210, (2018). With the Support of the Federal Public Defender as amicus curiae, Lovo and Sorto sought rehearing. They argued that Dimaya dictates vacator of their section 924(c) convictions. The D.C. Court agreed. The Esheto Court further held; "in short, section 924(c)(3)(B) is void for vagueness. Dimaya required this court to abjure our earlier analysis to the contrary. Accordingly, the court granted rehearing for the limited purpose of vacating Lovo's and Sorto's section 924 (c) convictions in light of Dimaya."

It is also of importance to note that on June 15, 2018, the Supreme Court in Enix v. United States__S.Ct.___(2018), (No. 17-6340), issued a judgment , that Granted a pention for a writ of certiorari, and remanded for consideration on the issue of whether the residual clause of U.S.v Dimaya. 924(c)(3)(B) is unconstitutionally vague in light if Sessions v. Dimaya.

CONCLUSION

Defendant, Mr. Edmond, submits that the reasoning and analysis in Dimaya and Johnson compels the conclusion that the residual clause regarding the definition of a crime of violence contained in 18 U.S.C. 924(c) is unconstitutionally vague. The recent direct remand in Enix supports this conclusion and will inevitably lead to the Supreme Court issuing an opinion on the 924(c)'s constitutionality and resolve and restore the vestige of any lingering split among the Circuits.

INEFFECTIVE ASSISTANCE OF COUNSEL

A primary issue Mr. Edmond has raised in his 2255 motion is that he was denied his right to the effective assistance of counsel by his trial attorney Sanford A. Schulman. Schulman by his [own] admission provided Mr. Edmond with ineffective assistance of counsel by NOT raising the issue that lead Agent Southard had presented false and perjured testimony to the grand jury, even though Mr. Edmond specifically asked that this issue be raised timely. (see, U.S. v. Edmond, Case No. 11-cr-20188. Dkt. # 303 at Pg. 7).

THE APPLICABLE LEGAL FRAMEWORK

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it

affects his ability to assert any other rights he may have." U.S. v. Chronic, 466 U.S. 468, 653 (1984).

The constitutional right to assistance of counsel, by definition carries with it the right to "effective assistance of counsel" Man v. Richardson, 397 U.S. 759, n 14 (1970).

RELIEF REQUESTED

WHEREFORE, Defendant/Movant Benard Edmond, prays this Honorable Court enter an opinion and judgment declaring the residual clause defining a crime of violence unconstitutionally vague and dismiss Count's (3); Count (5); and Count (7) in the instance cause. Due to the fact Mr. Edmond is un-familar with federal case law and the complexity of this case, he respectfully request that he be appointed counsel pursaunt to the Criminal Justice Act (CJA), and that appointed counsel the opportunity to amend his claims and suppelement his submission.

Respectfully submitted,

/s/ Benard Edmond

Benard Edmond 09837-039
Federal Detention Center (Milan)
P.O. Box 1000
Milan, MI. 48160

Dated August 14, 2018.

TRULINCS 09837039 - EDMOND, BERNARD THOMAS - Unit: MIL-D-A

FROM: 09837039
TO:
SUBJECT: Certificate of Service
DATE: 08/13/2018 07:34:30 PM

.....

CERTIFICATE OF SERVICE

I, hereby certify that on this 14th, day of August, 2018, I have caused a copy of the foregoing 2255 Motion to be served on all Counsel of record by placing in the prisoner's legal mail at the Federal Detention Center (Milan) located at Milan, Michigan.

/s/ Bernard Edmond

Bernard Edmond 09837-039
Federal Detention Center (Milan)
P.O. Box 1000
Milan, MI. 48160

Dated: August 14, 2018.

No. 18-1202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK HARPER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

FILED
Jun 18, 2018
DEBORAH S. HUNT, Clerk

ORDER

Frank Harper, a federal prisoner proceeding through counsel, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Harper has filed an application for a certificate of appealability ("COA") and a motion to appoint appellate counsel.

A jury convicted Harper, along with two co-defendants, of several charges arising from a carjacking conspiracy. Specifically, Harper was convicted of conspiracy (count 1), three counts of carjacking (counts 6, 8, and 10), and three counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (counts 7, 9, and 11). The court sentenced Harper to concurrent terms of imprisonment of 60 months on count 1 and 97 months for each carjacking count and to consecutive sentences of 60 months on count 7, 300 months on count 9, and 300 months on count 11, resulting in a total term of imprisonment of 757 months or approximately 63 years. This court affirmed Harper's convictions and sentences. *United States v. Edmond*, 815 F.3d 1032 (6th Cir. 2016). The United States Supreme Court denied Harper's petition for a writ of certiorari. *Harper v. United States*, 137 S. Ct. 619 (2017) (mem.).

In June 2016, Harper filed a pro se § 2255 motion. The district court appointed counsel, who filed an amended § 2255 motion raising the following claims: (1) pursuant to *Johnson v.*

United States, 135 S. Ct. 2551 (2015), carjacking is not a crime of violence and therefore cannot serve as a predicate felony for Harper's § 924(c) convictions; (2) Harper is entitled to resentencing under the Supreme Court's decision in *Dean v. United States*, 137 S. Ct. 1170 (2017), and appellate counsel was ineffective for failing to raise this claim on direct appeal; (3) appellate counsel was ineffective for failing to challenge the denial of Harper's motion for a separate trial under *Bruton v. United States*, 391 U.S. 123 (1968); (4) trial and appellate counsel were ineffective for failing to challenge certain jury instructions; and (5) trial and appellate counsel were ineffective for failing to raise a sentencing claim under *Alleyne v. United States*, 570 U.S. 99 (2013). The district court denied the motion and denied Harper's request for a COA.

Harper now seeks a COA from this court on all of the grounds raised in his § 2255 motion. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In order to be entitled to a COA, the movant must show that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The attorney representing Harper on his COA application has moved to be appointed to represent him on appeal under the Criminal Justice Act.

I. Carjacking as a "Crime of Violence" under 18 U.S.C. § 924(c)(3)

Harper argued that his § 924(c) convictions should be vacated in light of the Supreme Court's ruling in *Johnson* because carjacking can no longer be considered a "crime of violence." In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act's definition of "violent felony" was unconstitutionally vague. 135 S. Ct. at 2556, 2562-63. As Harper acknowledged, he was not sentenced under the Armed Career Criminal Act, but rather he was convicted under § 924(c)(1)(A), for using or carrying a firearm during and in relation to a crime of violence. Importantly, however, a "crime of violence" for purposes of this subsection is defined by § 924(c)(3), which includes a clause that is similar to § 924(e)'s residual clause.

This court has held that *Johnson* did not invalidate § 924(c)(3)'s residual clause. *United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016). Harper, however, argues that reasonable jurists could debate the district court's ruling that *Taylor* controls given the Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which was pending at the time Harper filed his COA application and concerns whether the "crime of violence" definition in the Immigration and Nationality Act, 18 U.S.C. § 16(b), is unconstitutionally vague in light of *Johnson*. The Court recently ruled in that case and held that § 16(b)'s residual clause is void. *Dimaya*, 138 S. Ct. at 1210. Section 16(b)'s residual clause closely mirrors § 924(c)(3)'s residual clause. *Compare* 18 U.S.C. § 16(b) ("The term 'crime of violence' means . . . any other offense that is a felony and 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."), *with* 18 U.S.C. § 924(c)(3)(B) ("[T]he term 'crime of violence' means an offense that is a felony and . . . 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."). Thus, reasonable jurists could debate whether the Supreme Court's decision in *Dimaya* casts doubt on this court's decision in *Taylor*. *See United States v. Salas*, 889 F.3d 681, 685-86 (10th Cir. 2018). Because the district court denied Harper's *Johnson* claim on the grounds that *Taylor* controlled, a reasonable jurist could debate the denial of relief on this claim; thus, a COA is warranted on this claim.[1]

II. Ineffective Assistance of Appellate Counsel for Failure to Seek Resentencing Based on the Trial Court's Failure to Take into Consideration the Mandatory Minimum Sentences Imposed for the 18 U.S.C. § 924(c) Convictions When Determining the Sentences for the Predicate Convictions

Harper next argued that the district court erred by refusing to consider the mandatory sentences imposed under § 924(c) when determining the sentences to be imposed for the predicate carjacking convictions and that his appellate attorney was ineffective for failing to raise

[1] Because the district court denied Harper's *Johnson* claim solely on the basis of *Taylor*, it did not consider whether Harper was sentenced under the elements clause in § 924(c)(3)(A) or the residual clause in § 924(c)(3)(B). This as yet unadjudicated issue is best considered by the merits panel after full briefing by the parties.

2018 WL 2074547
Only the Westlaw citation is currently available.
United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Clifford Raymond SALAS, Defendant–Appellant.

No. 16-2170
|
May 4, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the District of New Mexico, No. 2:12-CR-03183-RB-3, of conspiracy to commit arson, of aiding and abetting commission of arson, of being felon in possession of explosive device, and of using destructive device in furtherance of crime of violence, and he appealed.

Holdings: The Court of Appeals, Kelly, Circuit Judge, held that:

[1] as matter of first impression, residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, was unconstitutionally vague, and

[2] district court's error in relying on unconstitutional residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, in order to find that arson that defendant committed by fire bombing tattoo parlor with Molotov cocktail was "crime of violence" that supported his conviction for using destructive device in furtherance of crime of violence, was clear or obvious.

Remanded with instructions to vacate.

West Headnotes (12)

[1] **Criminal Law**

Issue raised for first time on appeal would be reviewed only for plain error.

Cases that cite this headnote

[2] **Criminal Law**

Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects fairness, integrity, or public reputation of judicial proceedings.

Cases that cite this headnote

[3] **Criminal Law**

Plain error rule is applied less rigidly when reviewing a potential constitutional error.

Cases that cite this headnote

[4] **Weapons**

Residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, was unconstitutionally vague in violation of defendant's due process rights. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(c)(3).

Cases that cite this headnote

[5] **Criminal Law**

Law can be unconstitutionally vague even if it is criminal statute that requires a determination of guilt beyond a reasonable doubt.

Cases that cite this headnote

[6] **Weapons**

Whether the crime allegedly furthered by defendant's use of destructive device was a

"crime of violence," as required to support defendant's conviction of using a destructive device in furtherance of crime of violence, is question of law, which court must attempt to answer using "categorical" approach, without inquiring into specific conduct of defendant. 18 U.S.C.A. § 924(c)(1).

Cases that cite this headnote

[7] Criminal Law

Error is plain, as required to be correctable on "plain error" review, if it is clear or obvious at time of appeal.

Cases that cite this headnote

[8] Criminal Law

Error is clear or obvious at time of appeal, as required to be redressable on "plain error" review, when it is contrary to well-settled law.

Cases that cite this headnote

[9] Criminal Law

In general, in order for unpreserved error to be clear or obvious as being "contrary to well-settled law," either the Supreme Court or the Circuit Court of Appeals must have addressed the issue; however, absence of such precedent will not prevent finding of "plain error" if district court's interpretation was clearly erroneous.

Cases that cite this headnote

[10] Criminal Law

In absence of Supreme Court or circuit precedent directly addressing a particular issue, a circuit split on issue weighs against a finding of "plain error."

Cases that cite this headnote

[11] Criminal Law

Disagreement among the circuits will not prevent a finding of plain error, if the law is well settled in the Tenth Circuit itself.

Cases that cite this headnote

[12] Criminal Law

District court's error in relying on unconstitutional residual clause in definition of "crime of violence," for purpose of statute prohibiting use of destructive device in furtherance of crime of violence, in order to find that arson that defendant committed by fire bombing tattoo parlor with Molotov cocktail was "crime of violence" that supported his conviction for using destructive device in furtherance of crime of violence, was clear or obvious under Tenth Circuit precedent that existed at time of appeal, and warranted relief on "plain error" review, given that there was Tenth Circuit case law holding identical language unconstitutionally vague in definition of "crime of violence" in another criminal statute. 18 U.S.C.A. §§ 844(i), 924(c)(1, 3).

Cases that cite this headnote

Appeal from the United States District Court for the District of New Mexico, (D.C. No. 2:12-CR-03183-RB-3)

Attorneys and Law Firms

Howard Pincus, Assistant Federal Public Defender (and Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant–Appellant.

Aaron Jordan, Assistant United States Attorney (and James D. Tierney, Acting United States Attorney, with him on the brief), Las Cruces, New Mexico, for Plaintiff–Appellee.

Before HOLMES, KELLY, and BACHARACH, Circuit Judges.

Opinion

KELLY, Circuit Judge.

*1 Defendant–Appellant Clifford Raymond Salas was found guilty of various arson-related offenses, and he now appeals from his conviction and sentence under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we remand to the district court with instructions to vacate Mr. Salas's § 924(c)(1) conviction and resentence him because § 924(c)(3)(B), the provision defining a "crime of violence" for the purposes of his conviction, is unconstitutionally vague.

Background

After using a Molotov cocktail to firebomb a tattoo parlor, Mr. Salas was convicted under 18 U.S.C. § 844(n) for conspiracy to commit arson (count 1), 18 U.S.C. §§ 2 and 844(i) for aiding and abetting the commission of arson (count 2), and 18 U.S.C. § 842(i) for being a felon in possession of an explosive (count 4). 1 R. 5–7, 82–83. He was also convicted under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence (count 3)—the "destructive device" being a Molotov cocktail, [1] and the "crime of violence" being arson. Id. For his offenses, Mr. Salas was sentenced to a total of 35 years' imprisonment: 5 years for counts 1, 2, and 4 and, pursuant to § 924(c)(1)(B)(ii)'s mandatory minimum sentence, 30 years for count 3. Id. at 84; 5 R. 13–14. He was also sentenced to 3 years' supervised release. 1 R. 85.

Section 924(c)(3) defines the term "crime of violence" as either a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Both parties agree that the first definition, known as the "elements clause," does not apply here because § 844(i) arson does not require, as an element, the use of force against the property "of another"; for example, § 844(i) may apply to a person who destroys his or her own property. See 18 U.S.C. § 844(i) (2012) (prohibiting damaging or destroying "any building, vehicle, or other real or personal property" used or affecting interstate or foreign commerce (emphasis added)); see also Torres v. Lynch, — U.S. —, 136 S.Ct. 1619, 1629–30, 194 L.Ed.2d 737 (2016) (noting that a similar "crime of violence" provision would not apply to definitions of arson that include the destruction of one's own property). Consequently, Mr. Salas could have been convicted only under the second definition, known as § 924(c)(3)'s "residual clause."

At trial, Mr. Salas did not argue that § 844(i) arson does not satisfy § 924(c)(3)'s crime-of-violence definition, and he did not object when the district court determined that arson is a crime of violence and instructed the jury to that effect. On appeal, Mr. Salas argues that § 924(c)(3)'s residual clause is unconstitutionally vague.

Discussion

*2 [1] [2] [3] Because Mr. Salas raises this issue for the first time on appeal, we review for plain error. See United States v. Avery, 295 F.3d 1158, 1181–82 (10th Cir. 2002). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Price, 265 F.3d 1097, 1107 (10th Cir. 2001). "However, we apply this rule less rigidly when reviewing a potential constitutional error." United States v. James, 257 F.3d 1173, 1182 (10th Cir. 2001); accord United States v. Benford, 875 F.3d 1007, 1016 (10th Cir. 2017). The government concedes that if Mr. Salas can prove the first two elements, the third and fourth would be satisfied, too. Aplee. Br. at 12 n.11. The issues, then, are whether there was error—that is, whether § 924(c)(3)(B) is unconstitutionally vague—and, if so, whether that error was plain.

A. Section 924(c)(3)(B) Is Unconstitutionally Vague

[4] In Sessions v. Dimaya, — U.S. —, 138 S.Ct. 1204, — L.Ed.2d — (2018), the Supreme Court held that 18 U.S.C. § 16(b)'s definition of a "crime of violence" is unconstitutionally vague in light of its reasoning in Johnson v. United States, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which invalidated the similarly worded residual definition of a "violent felony" in the Armed Career Criminal Act (ACCA). 138 S.Ct. at 1210; see also Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (ruling that § 16(b) "must be

deemed unconstitutionally vague in light of Johnson"). The Dimaya Court explained that the same two features rendered the clauses unconstitutionally vague: they " 'require[ ] a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." Dimaya, 138 S.Ct. at 1216 (quoting Johnson, 135 S.Ct. at 2557). The Court also rejected several reasons for distinguishing § 16(b) from the ACCA, namely that § 16(b) requires a risk that force be used in the course of committing the offense, focuses on the use of physical force rather than physical injury, does not contain a confusing list of enumerated crimes, and does not share the ACCA's history of interpretive failures. Id. at 1218–24.

Mr. Salas argues that § 924(c)(3)(B)'s definition of a "crime of violence," which is identical to § 16(b)'s,[2] is likewise unconstitutionally vague. Indeed, we have previously noted the similarity between the two provisions and consequently held that "cases interpreting [§ 16(b)] inform our analysis" when interpreting § 924(c)(3)(B). United States v. Serafin, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009). Other circuits interpret § 16(b) and § 924(c)(3)(B) similarly, as well. See In re Hubbard, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."). In fact, the Seventh Circuit has faced the same scenario that we face now: it ruled that § 16(b) was unconstitutionally vague in United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015), and then addressed the constitutionality of § 924(c)(3)(B) in United States v. Cardena, 842 F.3d 959 (7th Cir. 2016). In Cardena, the Seventh Circuit ruled that § 924(c)(3)'s residual clause was "the same residual clause contained in [§ 16(b)]" and accordingly held that "§ 924(c)(3)(B) is also unconstitutionally vague." Cardena, 842 F.3d at 996.

*3 In support of § 924(c)(3)(B)'s constitutionality, the government "submits that § 924(c)(3)(B) is distinguishable from the ACCA's residual clause for the same reasons it argued that § 16(b) was distinguishable." Aplee. Br. at 7. That is, § 924(c)(3)(B) requires the risk that force be used in the course of committing the offense, which the ACCA does not; § 924(c)(3)(B) focuses on the use of physical force rather than physical injury; § 924(c)(3)(B) does not contain the confusing list of enumerated crimes that the ACCA does; and, unlike the ACCA, § 924(c)(3)(B) does not have a history of interpretive failures. Dimaya, however, explicitly rejected all of these arguments. 138 S.Ct. at 1218–24.

The only way the government distinguishes § 924(c)(3)(B) from § 16(b) is by noting that, pursuant to § 924(c)(1)(A), the former requires a sufficient nexus to a firearm, which narrows the class of offenses that could qualify as crimes of violence. See Ovalles v. United States, 861 F.3d 1257, 1265–66 (11th Cir. 2017) ("The required 'nexus' between the § 924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable."). But this firearm requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that § 924(c)(3)(B) possesses the same two features that rendered the ACCA's residual clause and § 16(b) unconstitutionally vague: "an ordinary-case requirement and an ill-defined risk threshold," Dimaya, 138 S.Ct. at 1207. Requiring a sufficient nexus to a firearm does not remedy those two flaws.

Other circuits have upheld § 924(c)(3)(B)'s constitutionality, but they were not faced, as we are here, with binding authority holding § 16(b) unconstitutional. See United States v. Garcia, 857 F.3d 708, 711 (5th Cir. 2017); United States v. Eshetu, 863 F.3d 946, 955 (D.C. Cir. 2017); Ovalles, 861 F.3d at 1265 (11th Cir.); United States v. Prickett, 839 F.3d 697, 699 (8th Cir. 2016); United States v. Hill, 832 F.3d 135, 150 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 379 (6th Cir. 2016). For the most part, the grounds for their decisions apply equally to § 16(b) and mirror the distinctions between the ACCA's residual clause and § 16(b) that were rejected in Dimaya.

Notably, only the Sixth Circuit has held that § 924(c)(3)(B) is constitutional while § 16(b) is not. See Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016) (ruling that § 16(b) is unconstitutionally vague); Taylor, 814 F.3d at 375–76 (rejecting a void-for-vagueness challenge to § 924(c)(3)(B)). The Sixth Circuit stated that the provisions differed because, in contrast to § 16(b), "§ 924(c) is a criminal offense and 'creation of risk is an element of the crime,' " which "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." Shuti, 828 F.3d at 449 (quoting Johnson, 135 S.Ct. at

2557). It further noted that courts evaluate this risk based on the defendant's actual conduct. Id.

[5] [6] This is a distinction without a difference, though, and is incorrect to the extent it suggests that whether an offense is a crime of violence depends on the defendant's specific conduct. As an initial matter, a law can be unconstitutionally vague even if it is a criminal offense that requires a determination of guilt beyond a reasonable doubt. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (invalidating a vagrancy ordinance). Additionally, "[w]hether a crime fits the § 924(c) definition of a 'crime of violence' is a question of law," United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014), and we employ the categorical approach to § 924(c)(3)(B), meaning we determine whether an offense is a crime of violence "without inquiring into the specific conduct of this particular offender," Serafin, 562 F.3d at 1107–08 (quoting United States v. West, 550 F.3d 952, 957 (10th Cir. 2008)). Consequently, § 924(c)(3)(B), like § 16(b), "requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." Dimaya, 138 S.Ct. at 1207 (quoting James v. United States, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), overruled on other grounds by Johnson, 135 S.Ct. 2551). Regardless of whether a jury must find the defendant guilty of § 924(c) beyond a reasonable doubt, then, this "ordinary-case requirement and an ill-defined risk threshold" combines "in the same constitutionally problematic way" as § 16(b) and "necessarily 'devolv[es] into guesswork and intuition,' invit[es] arbitrary enforcement, and fail[s] to provide fair notice." Id. at 1207, 1223 (quoting Johnson, 135 S.Ct. at 2559).

*4 Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combine to produce "more unpredictability and arbitrariness than the Due Process Clause tolerates," Id. at 1223 (quoting Johnson, 135 S.Ct. at 2558), and Dimaya's reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague.

B. Mr. Salas's Conviction Constitutes Plain Error

[7] [8] [9] [10] [11] [12] Even though Mr. Salas's conviction and sentence under 18 U.S.C. § 924(c)(1) was erroneous because § 924(c)(3)(B) is unconstitutionally vague, we can grant him relief only if the error was "plain" because Mr. Salas did not raise that argument at the district court level. See United States v. Ruiz–Gea, 340 F.3d 1181, 1187 (10th Cir. 2003). An error is plain if it is "clear or obvious at the time of the appeal." United States v. Gonzalez–Huerta, 403 F.3d 727, 732 (10th Cir. 2005); see also Henderson v. United States, 568 U.S. 266, 276, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013) ("[A]n appellate court must apply the law in effect at the time it renders its decision." (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 281, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969))). In turn, "[a]n error is clear and obvious when it is contrary to well-settled law." United States v. Whitney, 229 F.3d 1296, 1309 (10th Cir. 2000). "In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue. The absence of such precedent will not, however, prevent a finding of plain error if the district court's interpretation was 'clearly erroneous.' " Ruiz–Gea, 340 F.3d at 1187 (citation omitted). In the absence of Supreme Court or circuit precedent directly addressing a particular issue, "a circuit split on that issue weighs against a finding of plain error." United States v. Wolfname, 835 F.3d 1214, 1221 (10th Cir. 2016). But disagreement among the circuits will not prevent a finding of plain error if the law is well settled in the Tenth Circuit itself. See id. at 1221–22.

We have found plain error where a holding was "implicit" in a previous case but have declined to find plain error where a previous case addressed the relevant issue merely in dicta. Compare id. at 1218, with Whitney, 229 F.3d at 1309. Here, although neither the Supreme Court nor this circuit has explicitly addressed the constitutionality of § 924(c)(3)(B), both have directly ruled on the constitutionality of identical language in § 16(b). See Dimaya, 138 S.Ct. at 1210; Golicov, 837 F.3d at 1072. The identical wording of § 16(b) and § 924(c)(3)(B) means that the provisions contain the same two features of the ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." Dimaya, 138 S.Ct. at 1223 (alteration in original) (quoting Johnson, 135 S.Ct. at 2557). Accordingly, Dimaya compels the conclusion that § 924(c)(3)(B) is unconstitutional, too.

There is ostensibly a circuit split on the issue of § 924(c)(3)(B)'s constitutionality, which ordinarily weighs against a finding of plain error. See Wolfname, 835 F.3d at 1221. But Dimaya has since abrogated the reasoning of those cases. Moreover, we do not view a circuit split as persuasive evidence that an error was not plain if the other

circuits were "writing on a clean slate," while we have relevant precedent to consider. Id. at 1221 n.3.

*5 The government makes two additional points for why error, if found, would not be plain. The first is that this circuit has repeatedly upheld § 924(c) convictions that were based on § 844(i) predicates. All of those cases, though, were pre-Dimaya (and pre-Johnson, for that matter), and none of them addressed a void-for-vagueness challenge. The second additional point is that the Eleventh Circuit found no plain error regarding a challenge to § 924(c)(3)(B)'s constitutionality in United States v. Langston, 662 Fed.Appx. 787, 794 (11th Cir. 2016), cert. denied, — U.S. —, 137 S.Ct. 1583, 197 L.Ed.2d 712 (2017). When that case was decided, however, neither the Supreme Court nor the Eleventh Circuit had ruled that § 16(b) was unconstitutionally vague, which distinguishes Langston from the current appeal.

In sum, the reasons why § 16(b) is unconstitutionally vague apply equally to § 924(c)(3)(B). Because they are identically worded, we interpret § 16(b) and § 924(c)(3)(B) similarly and apply caselaw interpreting the former to the latter. Serafin, 562 F.3d at 1108 & n.4. Additionally, we apply the plain error rule "less rigidly when reviewing a potential constitutional error." James, 257 F.3d at 1182. As a result, Mr. Salas's conviction under § 924(c)(1) was clearly erroneous under Supreme Court and Tenth Circuit precedent and constitutes plain error.

REMANDED for resentencing, with instructions to the district court to vacate count 3 of Mr. Salas's conviction.

All Citations

— F.3d —, 2018 WL 2074547

Footnotes

1 A Molotov cocktail qualifies as a "destructive device" for the purposes of § 924(c)(1)(B)(ii) and as an "explosive" for the purposes of § 844(i). E.g., United States v. Gillespie, 452 F.3d 1183, 1185 (10th Cir. 2006).

2 For the sake of comparison, § 16 provides:

> The term "crime of violence" means ... (b) any other offense that is a felony and 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.

And § 924(c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and ... (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.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 11-cr-20188
Hon. GEORGE CARAM STEEH

vs.

BERNARD EDMOND D-5,

Defendant.
_____/

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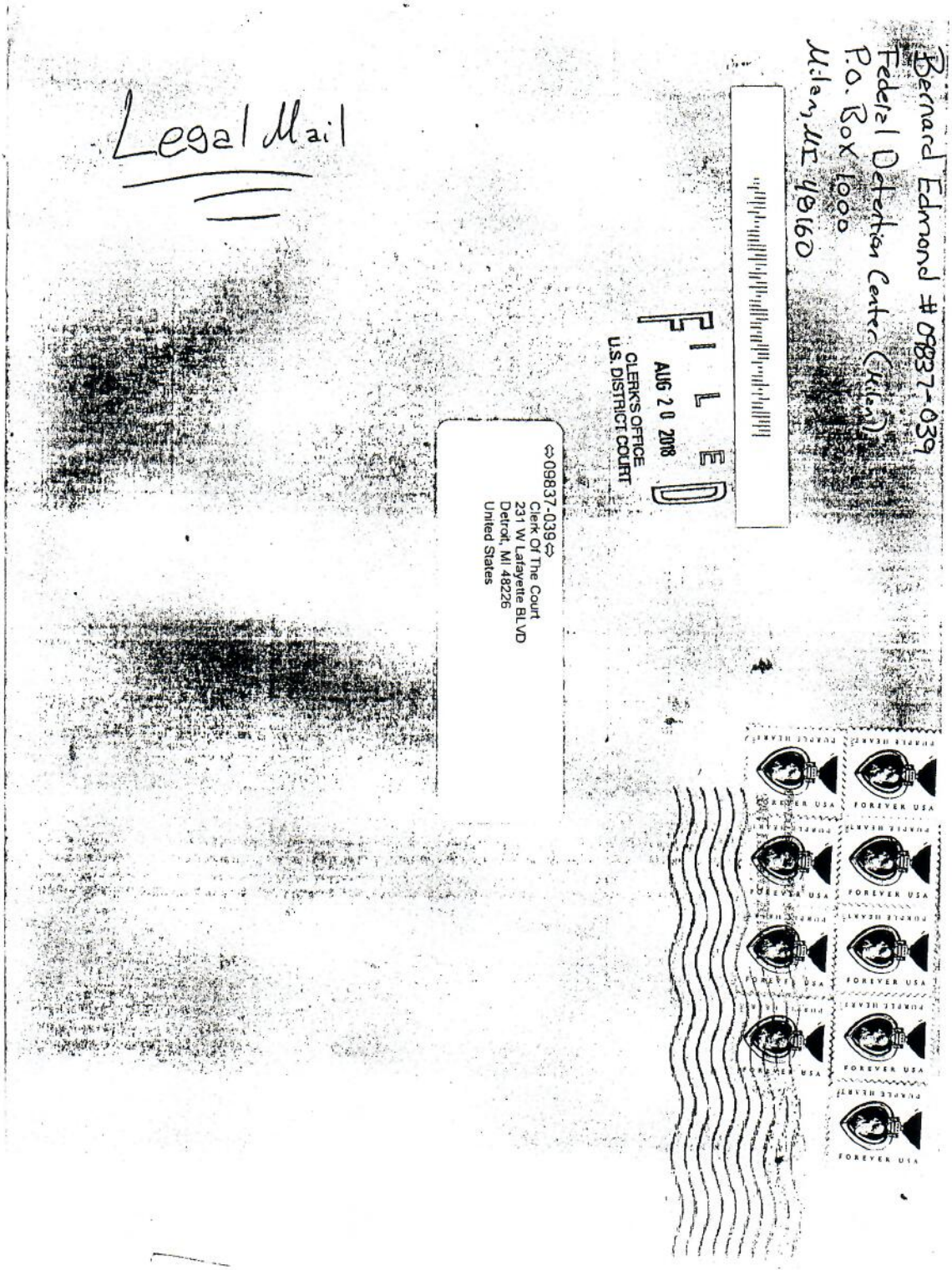
DEFENDANT, BERNARD EDMOND'S RE-SENTENCING MEMORANDUM

NOW COMES the Defendant, BERNARD THOMAS EDMOND, by and through his attorney, SANFORD A. SCHULMAN, and states in support of his Re-Sentencing Memorandum as follows:

More specifically, the defense sought to argue that the petitioner had no advanced knowledge of car jackings or that firearms were going to be used in the commission of car jackings. Indeed, there was no evidence that Mr. Edmond entered into an agreement with any third-party for the purpose of furthering a conspiracy. That even if Mr. Edmond was the individual who purchased the stolen vehicles that this was insufficient to assume he was part of the conspiracy or had any advanced knowledge. Just as a pawn broker is not liable for the items he sells if they are discovered to be stolen, Mr. Edmonds was barred from arguing and instructing the jury that he had "advanced knowledge" of the carjackings or firearm offenses. In short, the defense argued that the alleged carjackings were spontaneous and not only lacked any real planning but there was no evidence that Mr. Edmond suggested, requested, encouraged or even assisted in the thefts or the carjackings. (R. 166, Pg. 164-168-169, Pg ID 1673, 1677-1678). Moreover, there was no evidence that Mr. Edmond had any nexus or connection to any of the firearms purportedly used. (R. 166, Pg 164, 179, Pg ID 1673, 1688).

Finally, the defense noted that the lead agent, Agent Southard, had presented false and perjured testimony to the grand jury in order to obtain an indictment. Defense counsel did not raise this issue timely before the trial court and as such the appellate court found it not to have been properly preserved even though Mr. Edmond specifically asked that this issue be raised timely.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Legal Mail - 08/16/2018 -

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX E: Supplemental Brief, R. 360, PgID 4961-4980

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 11-cr-20188
Hon. GEORGE CARAM STEEH

vs.

BERNARD EDMOND D-5,

Defendant.
_____/

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DEFENDANT, BERNARD EDMOND'S SUPPLEMENTAL MOTION UNDER 28 U.S.C. SEC. 2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE

NOW COMES the Defendant, BERNARD THOMAS EDMOND, by and through his attorney, SANFORD A. SCHULMAN, and states in support of his Supplemental Motion Under 28 USC Sec. 2255 to Vacate, Set Aside or Correct the Sentence as follows:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 9, 2013 a 23 count Third Superseding Indictment was filed charging Bernard Edmond with Count One: Conspiracy, Carjacking and Attempted Carjacking, Use and Carrying a Firearm During and in relations to a Crime of Violence, Causing Interstate Transportation of Stolen Motor Vehicles, Falsification and Removal of Motor Vehicle Identification Numbers, Trafficking in Motor Vehicle with Falsified Altered or Removed Identification Numbers and Operating a Chop Shop) (R. 109, pp 1-20, Third Superseding Indictment, Pg. Id 435-454).

The Government alleged that beginning in 2009 the Detroit Police Department began investigating allegations of vehicles that were stolen and retagged in the Detroit area. Mr. Edmond was investigated and several searches were conducted. However, it was not until October, 2010 that there was any allegation of carjacking. (R. 109, pp 1-20, Third Superseding Indictment, Pg Id 435-454).

In early 2011 several carjackings were reported from various locations throughout the city of Detroit. The carjackings continued until March, 2011 and a minivan associated with the carjackings was owned by Stratford Newton's father was located in the possession of Kayla Grady, Mr. Newton's girlfriend. The Government theorized that Bernard Edmond created a market for the theft of the high-end and sport utility vehicles and purportedly would compensate for domestic and foreign vehicles. The Government suggested that an individual named Omar Johnson would interact with Stratford Newton, Phillip Harper, Frank

Harper, Justin Bowman and Darrell Young. (R. 109, pp 1-20, Third Superseding Indictment, Pg Id 435-454).

There was no evidence, however, or testimony or even suggestion that Mr. Edmond was present during any carjackings and that the vehicles were stolen spontaneously by various individuals. (R. 166, Tr. 9/3/2013, p. 164, 168-169; Pg ID 1673, 1677-1678). In fact, on one such occasion Mr. Newton stated he got the idea from a t.v. show. (R. 166, Tr. 9/3/2013, p. 179; Pg ID 1688).

There was no phone records or testimony that Mr. Newton or Mr. Bowman had any contact with Bernard Edmond. (R. 169, Transcript 9/11/13, Pg. 92, 95-96; Pg ID No. 2237, 2240-2241). Nevertheless, Mr. Newton, Mr. Bowman and the lead agent, Alan Southard, testified before the grand jury that there had been telephone communication between Mr. Edmond and the other co-defendants as it relates to stealing and selling the vehicles. Based on this testimony Bernard Edmond was indicted. (R. 169, Transcript 9/11/13, Pg. 92, 95-96; Pg ID No. 2237, 2240-2241). However, at trial the very opposite testimony was presented, and it was clear that the testifying cooperating witnesses not only did not speak with Mr. Edmond, but did not even have his phone number or contact information. (R. 166, Tr. 9/3/2013, p. 157-159, 162, Pg ID 1666-1668, 1671).

The defendant, Bernard Edmond, was specifically charged with an October 14, 2010 carjacking from Club Elysium where three vehicles were taken including a 2010 GMC Yukon, a 2009 Chrysler Aspen and a 2006 Mercury Milan. The vehicles were later recovered. (R. 168, Trial Tr. 9/10/13, p. 27, Pg ID 1932).

Amongst the vehicles stolen, it was alleged that on December 10, 2010 Darrell Young stole a 2009 Mercedes Benz S550 from a woman who handed him her keys and on March 12, 2011, it was alleged that Phillip Harper attempted to steal a 2011 Porsche Panamera 4s from the valet of the Greektown Casino. (R. 168, Trial Tr. 146-168, Pg ID 2051-2073).

The defense argued that the alleged carjackings were spontaneous and no evidence that Mr. Edmond suggested, requested, encouraged or even assisted in the thefts or the carjackings. (R. 166, Pg. 164-168-169, Pg ID 1673, 1677-1678). Moreover, there was no evidence that Mr. Edmond had any nexus or connection to any of the firearms purportedly used. (R. 166, Pg 164, 179, Pg ID 1673, 1688).

On September 17, 2013 the jury returned a verdict of guilty to Conspiracy; four counts of Carjacking, three counts of Use and Carrying a Firearm During and in relations to a Crime of Violence, one count of Causing Interstate Transportation of Stolen Motor Vehicles, two counts of Falsification and Removal of Motor Vehicle Identification Number, two counts of Trafficking in Motor Vehicle with Falsified Altered or Removed Identification Numbers and one count of Operating a Chop Shop. (R. 183, Trial transcripts 9/17/2013, p 13-14, Pg ID 3373-3374)

At the time of sentencing, the defense urged the court to consider as a factor that Mr. Edmond would be sentenced to a mandatory and consecutive sentence of fifty-five years for the three convictions 18 USC Sec. 924© convictions. The court refused to consider the fifty-five-year mandatory minimum

and added an additional 20 years to the sentence. (R. 235, Sentencing Tr. pp 34-35, Pg Id 4145-4147 and R. 210, Judgment, 3720-3727)

On October 27, 2014, the appellant was sentenced to 60 months to be served concurrent with Counts 2-7, 12 and 18-22 and 180 months on each count to be served concurrently with one another and to all other counts. Count 4s: 240 months to be served concurrently to all other counts. Counts 18s through 22s: 120 months, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5 and 7 each 25 years to be served consecutive to all other counts for a total of 75 years. (R. 235, Sentencing Tr., pp 1-40; Pg Id 4112-4152 and R. 210, Judgment, 3720-3727) (APPENDIX G: Judgment as to BERNARD EDMOND)

The case was remanded for resentencing considering the Supreme Court's recent decision in Dean v. United States, 137 S. Ct. 1170, 197 L. Ed. 2d 490 (2017). On May 9, 2018 an Amended Judgment was entered imposing the following amended sentence: Counts 1s and 17s: 1 day on each count to be served concurrent with Counts 2s, 3s, 4s, 5s, 6s, 7s, 12s and 18s through 22s. Counts 2s, 6s, 12s and 22s: 1 day on each count to be served concurrently with one another and to all other counts. Count 4s: 1 day to be served concurrently to all other counts. Counts 18s through 22s:1 day, each count, to be served concurrently and concurrent to all other counts. Count 3s: 60 months to be served consecutive to Counts 1s, 2s, 4s through 7s, 12s, and 17s through 22s. Count 5s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s,

4s, 6s, 7s, 12s and 17s through 22s. Count 7s: 25 years (300 months) to be served consecutive to Counts 1s, 2s, 3s, 4s, 5s, 6s, 12s and 17s through 22s. (R. 311, Amended Judgment, PgID 4680-4687).

On August 20, 2018, the defendant filed in pro per a Motion Under 28 USC Sec. 2255 to Vacate, Set Aside, Or Correct the Sentence Imposed. In his motion the defendant asserts that his convictions for18 USC Sec. 924© and 2, Using and Carrying a Firearm During and in Relation to a Crime of Violence should be vacated because the residual clause contained in 18 U.S.C. Sec. 924© is unconstitutional vague.

SUPPLEMENTAL ARGUMENT

Mr. Edmunds brings this action under 28 U.S.C. § 2255. Section 2255 which provides that a prisoner serving a sentence for violation of a federal criminal law who claims that his sentence was imposed in violation of the Constitution "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). In order to obtain relief under § 2255, a petitioner "'must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict.'" Humphress v. United States, 398 F.3d 855, 858 (6th Cir. 2005) (quoting Griffin v. United States, 330 F.3d 733, 736 (6th Cir. 2003)).

This Court appointed counsel and noted that the issues presented is whether the residual clause of 18 U.S.C. sec 924(c) is unconstitutionally vague considering the reasoning of the Supreme Court in Sessions v. Dimaya, 138 S.Ct. 1204 (2018) and Johnson v. United States, 135 S.Ct. 2551 (2015). As the Sixth Circuit Court of Appeals has noted and this Court is aware, the Supreme Court has since held that the residual clause of section 924(c)(3)(B) is unconstitutionally vague. United States v. Davis, 139 S.Ct. 2319 (2019); United States v. Ledbetter, 929 F.3d 338, 361 (6th Cir. 2019) (setting aside 924(c) conviction that relied on residual clause).

Section 924(c) provides enhanced penalties for anyone who "uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," "during and in relation to a crime of violence." 18 U.S.C. § 924(c)(1)(A). As relevant here, an individual convicted of a crime of violence during which a firearm is discharged is subject to a mandatory minimum sentence "in addition to the punishment provided" for the underlying crime of violence. 18 U.S.C. § 924(c)(1)(A)(iii).

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, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.18 U.S.C. § 924(c)(3). Courts commonly refer to § 924(c)(3)(A) as the "force clause" or "elements clause" and to § 924(c)(3)(B) as the "residual clause."

Bernard Edmond was charged with and convicted under Section 924©(3)(B) which is the residual clause of the firearm statute. The facts as described by the Sixth Circuit Court of Appeals note as follows: "The jury convicted Edmond of one count of conspiring to commit carjackings, three carjackings through a co-conspirator theory of liability, and one attempted carjacking, also through a co-conspirator theory. To prove the conspiracy charge, the government had to show: "(1) that the conspiracy was willfully formed and was existing at or about the time alleged; (2) that the defendant voluntarily became a member of the conspiracy; (3) that one of the conspirators knowingly committed an overt act; and (4) that the overt act was knowingly done in furtherance of the conspiracy." United States v. McGahee, 257 F.3d 520, 530 (6th Cir. 2001).

The Sixth Circuit found that the evidence met these requirements. As to the first two elements, the defendants intentionally formed a conspiracy, and Edmond willfully participated in it through an assortment of acts. He bought and sold cars carjacked by the Harpers and their cohorts. He falsified titles and vehicle identification numbers and paid others to do so. He knew that the cars had been carjacked. And he paid more for stolen vehicles that included the keys, a premium that encouraged carjackings, as opposed to less dangerous forms of vehicle theft. Obtaining the keys often means taking them physically from a person, as most individuals do not lightly part with the keys to expensive pieces of property. As to the third and fourth elements, Edmond's co-conspirators knowingly committed the overt acts (carjackings and an attempted carjacking),

and they did so to further the ends of the conspiracy. The same evidence that supports the brothers' carjacking convictions supports these elements. Faced with considerable evidence of Edmond's pivotal role in the conspiracy, the jury had good reason to find that the carjackings were "reasonably foresee[able]" results of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 648 (1946).

Most relevant to the case at bar is the Sixth Circuit Court of Appeals summary of the gun charge. The Sixth Circuit noted that "the district court instructed the jury that it could convict Edmond of the § 924(c)violations under a co-conspirator theory of liability. The question for the jury was this: Was the use of a firearm in connection with the carjackings reasonably foreseeable? See United States v. Myers, 102 F.3d 227, 237 (6th Cir. 1996). It is clear that the firearm convictions were obtained pursuant to § 924(c)(3)(B) commonly referred to as the "residual clause

In Johnson v. United States, supra, the Supreme Court invalidated the so-called residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Johnson, 135 S. Ct. 2551, 2563, 192 L. Ed. 2d 569 (2015). Since then, courts and litigants have continued to grapple with the full import of Johnson both with respect to how it affects the interpretation of the still-valid parts of the ACCA and how it pertains to other similarly worded statutes.

While other circuit courts disagreed, the Sixth Circuit had held, in the wake of Johnson, that the § 924(c)(3)'s residual clause remained valid. See United States v. Taylor, 814 F.3d 340, 375-76 (6th Cir. 2016), cert. denied, 138 S. Ct.

1975, 201 L. Ed. 2d 247 (May 14, 2018), rehr'g denied, 138 S. Ct. 2646, 201 L. Ed. 2d 1045 (June 11, 2018). The Supreme Court, however, has now resolved the circuit split, holding that § 924(c)(3)'s residual clause, like that in the ACCA, is unconstitutionally vague. United States v. Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019). Davis effectively invalidated Taylor, and it is now clear that a **conviction for conspiracy to commit such offenses such as Hobbs Act robbery or carjacking cannot be sustained as a predicate crime of violence for purposes of a conviction under the residual clause of § 924(c)(3)(B)**. It also does not fall within the scope of the elements clause, § 924(c)(3)(A).

In Taylor, 814 F.3d at 379, the Sixth Circuit erroneously held that the residual clause of § 924(c)(3), despite its similarities to the residual clause in the ACCA, was not unconstitutionally vague. That holding was abrogated by Davis, in which the Supreme Court held that the residual clause of § 924(c)(3) is unconstitutionally vague. Davis, 139 S. Ct. at 2324. In that case, the Fifth Circuit had held that the defendants' convictions for Hobbs Act robbery qualified as predicate crimes of violence under the elements clause of § 924(c) but that their conviction for Hobbs Act conspiracy qualified only under the residual clause of § 924(c), which it found to be unconstitutionally vague. 903 F.3d 483, 486 (5th Cir. 2018) (per curium), cited in Davis, 139 S. Ct. at 2325. The court therefore vacated the § 924(c)(1)(A) conviction that was predicated upon Hobbs Act conspiracy. The defendant in the case at bar, Bernard Edmonds, presents the identical argument.

Indeed, the United States Supreme Court affirmed Davis, 139 S. Ct. at 2336 ("We agree . . . that § 924(c)(3)(B) is unconstitutionally vague."). The government in Davis did not attempt to argue that Hobbs Act conspiracy qualified under the elements clause as a predicate crime of violence, and the Supreme Court did not expressly reach that question. However, it did hold that courts must apply the "categorical" approach, rather than a case-specific approach, in determining whether an offense is a crime of violence under § 924(c). Davis, 139 S. Ct. at 2326-32.

Since Davis, the first Circuit to address this issue post-Davis was the Second Circuit Court of Appeals in the case of United States v. Barrett, No. 14-2641-cr, 2019 U.S. App. LEXIS 26461 (2d Cir. Aug. 30, 2019) (2d Cir. Aug. 30, 2019), which held that Davis compelled the conclusion that Hobbs Act conspiracy does not qualify categorically as a crime of violence under the elements clause of § 924(c)(3)(A) either. In Barrett, the Second Circuit, following remand for reconsideration after Davis, vacated the defendant's § 924(c) conviction "for using a firearm in committing Hobbs Act robbery conspiracy." The court was clearly reluctant to vacate the conviction but understood Davis to require it:

> "We are obliged to vacate Barrett's Count Two conviction because Davis precludes us from concluding, as we did in our original opinion, that Barrett's Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence. At the outset, we note that there can be no question but that the particular Hobbs Act robbery conspiracy committed by Barrett and his co-conspirators was violent, even murderous. There is also no question, however, that, in Davis, the Supreme Court held that a crime could not be identified as a crime of violence under § 924(c)—even by a trial jury—on a case-specific basis. The decision must be made categorically. In so holding, the Supreme Court acknowledged that a case-specific approach to § 924(c), particularly to the statute's residual clause, see 18 U.S.C. §

> 924(c)(3)(B), would avoid both the Sixth Amendment and vagueness concerns that have doomed other, similarly worded residual clauses.

Nevertheless, the Court held that the text, context, and history of § 924(c) could not support such an approach. Id. (internal citations omitted).

The court then went on to address § 924(c)(3)(A). It had previously affirmed Barrett's Count Two conviction based, in part, on its conclusion that "Hobbs Act robbery conspiracy could be categorically identified as a crime of violence by reference only to its elements." 2019 U.S. App. LEXIS 26461, [WL] at *2. Post-Davis, however, the court recognized that its "elements-based conclusion . . . depended on both § 924(c)(3)(A) and § 924(c)(3)(B). We reasoned that where the elements of a conspiracy's object crime (here, Hobbs Act robbery) establish it as a categorical crime of violence under § 924(c)(3)(A), the agreement element of a conspiracy categorically establishes the 'substantial risk' of violence under § 924(c)(3)(B)." Id. Although the Supreme Court did not address this "hybrid approach," since the issue was not presented to it, the Second Circuit read Davis as foreclosing that approach, insofar as it depended in part on § 924(c)(3)(B), which the Supreme Court had left "no longer valid in any form." 2019 U.S. App. LEXIS 26461, [WL] at *3. The court therefore concluded that the Hobbs Act conspiracy conviction did not fall within § 924(c)(3)(A) either. Accord United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019) (holding, pre-Davis, that conspiracy to commit Hobbs Act robbery "does not categorically qualify as a crime of violence under the elements-based categorical approach, as the United States now concedes," and that the residual clause of § 924(c)(3)(B)

is unconstitutionally vague, and, therefore, vacating a conviction under § 924(c)(1) predicated on conspiracy to commit Hobbs Act robbery).

The Sixth Circuit has not directly addressed the issue, but several district courts have. In the case of McQuiddy v. United States, No. 3:16-cv-02820, 2019 U.S. Dist. LEXIS 172815 (M.D. Tenn. Oct. 3, 2019), the district court indicated that it was persuaded that (1) Davis requires a categorical approach to §924(c)(3)(A) as well as to § 924(c)(3)(B) and (2) Hobbs Act conspiracy is not categorically a crime of violence under the elements clause of § 924(c)(3)(A). Under Davis, § 924(c)(3)(B) is unconstitutionally vague. The district court in McQuiddy concluded that McQuiddy's conviction under 18 U.S.C. § 924(c)(1) must be vacated.

The Sixth Circuit issued an opinion in United States v. Ledbetter, 929 F.3d 338 (6th Cir. 2019) just one month after Davis. In Ledbetter, our Sixth circuit considered a case involving similar issues. The relevant facts were summarized as follows: "For their participation in the Cunningham home invasion and Moon murder, Harris and Robinson were also convicted of murder by firearm during a crime of violence, 18 U.S.C. § 924(c), (j)(1). Here, the purported "crime of violence" was conspiracy to commit Hobbs Act robbery, which makes it a crime to conspire to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. § 1951(a).

Section 924(c)(3) defines "crime of violence" in two ways, but the parties agree that conspiracy to commit Hobbs Act robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition. By that definition, a "crime of violence" is a felony offense "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." § 924(c)(3)(B).

In the case at bar the conspiracy charge to which Bernard Edmond was convicted cannot qualify under the elemental clause in section 924(c)(3)(A), because it does not require proof of any element directly implicating the use of force. In United States v. Simms, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit sitting en banc held that "conspiracy to commit Hobbs Act robbery [] does not categorically qualify as a crime of violence under the elements-based categorical approach[,] because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act[, and] such an agreement does not invariably require the actual, attempted, or threatened use of physical force," id. at 233-34.

Similarly, in United States v. Davis, 903 F.3d 483 (5th Cir. 2018), the Fifth Circuit held that "conspiracy to commit an offense is merely an agreement to commit an offense. Therefore . . . the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force," id. at 485. The Fifth Circuit went on to conclude that section 924(c)(3)(B) was unconstitutionally vague, and its holding on that point was affirmed by the

Supreme Court in Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757, although the judgment was vacated on other grounds.

Edmond is in the identical situation and argues that his convictions under § 924(c) must be set aside because § 924(c)(3)(B)'s residual clause is unconstitutionally vague. The Supreme Court has now held that § 924(c)(3)(B)'s residual definition is unconstitutionally vague. See United States v. Davis, No. 18-431, 139 S. Ct. 2319, 204 L. Ed. 2d 757, 2019 U.S. LEXIS 4210, 2019 WL 2570623 at *13 (June 24, 2019). Because the Government relies only on that now-invalidated clause to support Edmond's convictions under § 924(c), those convictions must be set aside. United States v. Ledbetter, 929 F.3d 338, 360-61 (6th Cir. 2019)

The issues presented have been the subject of recent law review articles most relevant and cited by several district courts being: Plagued By Vagueness: The Effect of Johnson v. United States and the Constitutionality of 18 U.S.C. § 924(c)(3)(B), 54 No. 4 Crim. Law Bulletin ART 3 (Summer 2018).

Indeed, the Middle District of Tennessee was presented with the identical issue in the 2255 petition filed by Demario Winston. Judge David M. Lawson issued an Opinion and Order granting Motion to Vacate. (See attached, Demario Winston vs. United States of America, Case No. 16-00865, Criminal Case Number 11-00012).

This Court is faced with a nearly identical issue and analysis. To determine whether a specific conviction is a "crime of violence," the Court employs the "categorical approach" laid out in Taylor v. United States, 495 U.S.

575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990) and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). See United States v. Begay, 934 F.3d 1033, 1038 (9th Cir. 2019). Under the categorical approach, the court does not look to the facts underlying the conviction, but, instead, compares "the elements of the statute forming the basis of the defendant's conviction with the elements of a 'crime of violence.'" Id. (quoting Descamps, 570 U.S. at 257); see also United States v. Sahagun—Gallegos, 782 F.3d 1094, 1098 (9th Cir. 2015) (A court applying the categorical approach must "determine whether the [offense] is categorically a 'crime of violence' by comparing the elements of the [offense] with the generic federal definition"—here, the definition of "crime of violence" set forth in section 924(c)(3).).

The defendant's crime cannot be a categorical 'crime of violence' if the conduct proscribed by the statute of conviction is broader than the conduct encompassed by the statutory definition of a 'crime of violence.'" United States v. Begay, 934 F.3d 1033 at 1038 (9th Cir. 2019). (Begay found that Second-degree murder did not constitute a crime of violence under the elements clause of 18 U.S.C.S. § 924(c)(3)(A) because it could be committed recklessly. That the defendant's 18 U.S.C.S. § 924(c) conviction for discharging a firearm during and in relation to a crime of violence therefore could not stand under either the elements clause or residual clause of § 924(c)(3)

To find an offense overbroad, there must be a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct not encompassed by the generic federal definition. Gonzales v. Duenas—Alvarez,

549 U.S. 183, 193, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007); accord United States v. McGuire, 706 F.3d 1333, 1337 (11th Cir. 2013) (applying the "realistic probability" standard to a crime of violence determination under section 924(c)(3)). "Crimes of violence," as defined in § 924(c), requires purposeful conduct, i.e., an intentional use of force. Begay, 934 F.3d at 1039.
See Duncan v. United States, No. 2:17-cv-00091-EJL, 2019 U.S. Dist. LEXIS 198866, at *4-5 (D. Idaho Nov. 15, 2019)

In the case at bar, Bernard Edmond was convicted under 18 U.S.C. § 924(c), which prohibits possession of a firearm during commission of or in relation to a crime of violence. That statute, as applied to Mr. Edmonds case carries a mandatory minimum sentence of five years. 18 U.S.C. § 924(c)(1)(A). Section 924(c) defines "crime of violence" as a felony that: "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Id. The first clause is commonly referred to as the elements clause while the second is known as the residual clause. United States v. Jackson. 918 F.3d 467, 485 (6th Cir. 2019).

In light of Dimaya and Davis, the defendant, Bernard Edmonds petition warrants sentencing relief because his offense for which he was convicted meets the definition of a crime of violence under the elements clause of § 924(c)(3)(B), which has been invalidated. In Davis, the Supreme Court scrutinized the language of section 924(c)(3)(B), applying the principles announced by it in

Johnson and Dimaya. Based on those principles, the Supreme Court held that the identically worded penalty provision in section 924(c)(3)(B) also is unconstitutionally vague. Id. at 2336. Thus, deprived of any constitutionally sound footing under the now defunct residual clause.

This Court should be guided by Federal District Court Judge David M. Lawson's Opinion and Order Granting Motion to Vacate Sentence in the case of Demario Winston vs. United States of America, habeas petition filed in Middle District of Tennessee, Nashville Division, civil case No. 16-00865 and Criminal Case Number 11-00012. In Winston, Judge Lawson was confronted with the identical issue at bar. The application of the Supreme Court decisions in Johnson vs. United States and more recently Session v. Dimaya and United States vs. Davis. Like Davis and Winston, Mr. Edmonds argues that his conviction under 18 USC Sec. 924© has been rendered unconstitutional because the conspiracy offense charged could qualify as a crime of violence only under the residual clause, which the US Supreme Court has found unconstitutional. As such, the 924(c) convictions must be vacated and, like Winston, remanded for resentencing.

Judge Lawson noted in Winston that under section 1951(a) of Title 28, persons may be convicted of conspiracy to commit Hobbs Act Robbery where they "conspire to 'in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery.'" United States v. Ledbetter, 929 F.3d 338, 360-61 (6th Cir. 2019) (quoting 18 U.S.C. § 1951(a)). The Ledbetter court observed that "conspiracy to commit Hobbs Act

robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition," and, following the invalidation of that clause in Davis, held that the 924(c) convictions predicated on the conspiracy offense must be vacated. Id. at 361.

Other courts of appeals that squarely have addressed the issue similarly have concluded that conspiracy to commit Hobbs Act Robbery cannot qualify under the elemental clause in section 924(c)(3)(A), because it does not require proof of any element directly implicating the use of force. In United States v. Simms, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit sitting en banc held that "conspiracy to commit Hobbs Act robbery [] does not categorically qualify as a crime of violence under the elements-based categorical approach[,] because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act[, and] such an agreement does not invariably require the actual, attempted, or threatened use of physical force," id. at 233-34.

Similarly, in United States v. Davis, 903 F.3d 483 (5th Cir. 2018), the Fifth Circuit held that "conspiracy to commit an offense is merely an agreement to commit an offense. Therefore . . . the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force," id. at 485. The Fifth Circuit went on to conclude that section 924(c)(3)(B) was unconstitutionally vague, and its holding on that point was affirmed by the Supreme Court in Davis, 139 S. Ct. 2319, 204 L. Ed. 2d 757, although the judgment was vacated on other grounds.

CONCLUSION

WHEREFORE, the Defendant, BERNARD EDMOND, by and through his attorney, SANFORD A. SCHULMAN, requests this court conclude that the convictions for the various offenses for which Bernard Edmonds was convicted under a conspiracy theory does not qualify as a crime of violence under the elements clause of section 924(c)(3)(A), and it cannot qualify under the now invalidated residual clause of section 924(c)(3)(B). There is no other qualifying predicate offense to support the conviction under section 924(c).

Bernard Edmond therefore has established that he is in custody in violation of the federal constitution, and his motion to vacate his sentence should be granted and respectfully requests this Honorable Court grant the Defendant's Motion and Supplemental Motion Under 28 USC Sec. 2255 to Vacate, Set Aside or Correct the Sentence for the reasons so stated herein.

Respectfully submitted,

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Date: December 5, 2019

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX F: Defense Supplemental Authority, R. 400, Supplemental Brief, PgID 5276-5280).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 11-cr-20188
Hon. GEORGE CARAM STEEH

vs.

BERNARD EDMOND D-5,

Defendant.
_____/

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DEFENDANT, BERNARD EDMOND'S ADDITIONAL ARGUMENT RE: AIDDING AND ABETTING ARGUMENT PRESENTED BY THE GOVERNMENT

NOW COMES the Defendant, BERNARD THOMAS EDMOND, by and through his attorney, SANFORD A. SCHULMAN, and states in support of his Additional Argument Re: Aiding and Abetting Argument Presented by the Government in Response to Defendant's Motion and Supplemental Motion Under 28 USC Sec. 2255 to Vacate, Set Aside or Correct the Sentence as follows:

The Government during oral argument on the defendant's motion argues that the defendant, BERNARD EDMOND, could be found guilty under both a Pinkerton theory and an aiding and abetting theory. However, the Sixth Circuit in our case acknowledged that the trial court's failure to provide a Rosemond instruction (requiring evidence of foreseeability) was clear error but because the Government also argued a Pinkerton theory the conviction would hold. As such, the aiding and abetting theory presented by the Government and their argument that the elements clause of 924©(3)(A) does not hold weight. The court failed to give a Rosemond instruction and the only valid Government theory is Pinkerton under a conspiracy theory and the residual clause of 924(c)(3)(B) applies which has been invalidated by the United States Supreme Court.

The Sixth Circuit Court of Appeals noted as follows:

"Even if that is true, Edmond points out, the jury instructions offered two paths to conviction: Pinkerton co-conspirator liability or aiding and abetting liability. That is a problem, he says, because the district court did not correctly state the advance-knowledge requirement for aiding and abetting. See Rosemond, 134 S. Ct. at 1249-51. Any such mistake would not alter the conviction. As Edmond concedes, his argument faces plain error review because he did not raise the point below. Given the abundant evidence that would permit the jury to convict on the Pinkerton co-conspirator theory, any error in the aiding and abetting instructions did not prejudice him and thus did not affect his substantial rights. See Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

In the aftermath of Rosemond, several circuits have addressed this situation—where the judge gave a correct Pinkerton instruction and a faulty aiding and abetting instruction—and each one upheld the convictions so long as the Pinkerton theory supported them. See United States v. Young, 561 F. App'x 85, 92 (2d Cir. 2014); United States v. Stubbs, 578 F. App'x 114, 118 n.6 (3d Cir. 2014); United States v. Saunders, 605 F. App'x 285, 288-89 (5th Cir. 2015) (per curiam); United States v. Rodriguez, 591 F. App'x 897, 904-05 (11th Cir. 2015) (per curiam); see also Musacchio v. United States, 136 S. Ct. 709, 715-16, 193 L. Ed. 2d 639 (2016)."

The Sixth Circuit stated that the jury instructions in our case were faulty given Rosemond but the conviction was sustained because of the Pinkerton and conspiracy theory only. The Government cannot now argue aiding and abetting when the conviction was sustained on the sole basis of Pinkerton and the conspiracy theory. Indeed, in the Indictment Count One of the Overt Acts under Conspiracy set forth the overt acts. The jury was never provided an instruction pursuant to Rosemond and as such any conviction for aiding and abetting was invalidated.

As was noted by the Sixth Circuit Court of Appeals, "the jury convicted Bernard Edmond of one count of conspiring to commit carjackings, three carjackings **through a co-conspirator theory of liability**, and one attempted carjacking, **also through a co-conspirator theory**." United States v. Edmond, 815 F.3d 1032 (6th Cir. 2016)

The defense would submit that it has established a Davis claim, the movant must show that it is more likely than not that he was adjudicated guilty of using or carrying a firearm during, or possessing a firearm in furtherance of, a "crime of violence" under 18 U.S.C. § 924(c)(3)(B)'s "residual clause. There is no aiding and abetting claim because no proper instruction was given. Moreover, the Government's entire theory rested on a Conspiracy.

In short, Edmond's **convictions were not under 18 USC Sec. 924©(3)(A) but instead under 18 USC Sec. 924(C)(3)(B) which is the residual clause**. The predicate offense for which Bernard Edmond was convicted is the conspiracy charge. Indeed, from the indictment, through opening arguments, jury instructions and even on appeal, the Government always argued the only predicate it could, conspiracy. Mr. Edmond's case is unique in that he was not present at the time of the carjacking or attempted carjackings. He clearly never possessed or used a firearm in the commission of the offenses charged. His offense was entirely predicated on being part of a conspiracy. This was exactly how the government argued the case at trial and on appeal. Indeed, the issue on appeal was under Pinkerton v. United States, 328 U.S. 640, 645-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), a conspirator may be convicted of a substantive offense that other conspirators commit during and in furtherance of a conspiracy. This includes a § 924(c) offense. See United States v. Myers, 102 F.3d 227, 238 (6th Cir. 1996)

CONCLUSION

WHEREFORE, the Defendant, BERNARD EDMOND, by and through his attorney, SANFORD A. SCHULMAN, requests this court conclude that the convictions for the various offenses for which Bernard Edmonds was convicted under a conspiracy theory does not qualify as a crime of violence under the elements clause of section 924(c)(3)(A), and it cannot qualify under the now invalidated residual clause of section 924(c)(3)(B). There is no other qualifying predicate offense to support the conviction under section 924(c).

Bernard Edmond therefore has established that he is in custody in violation of the federal constitution, and his motion to vacate his sentence should be granted and respectfully requests this Honorable Court grant the Defendant's Motion and Supplemental Motion Under 28 USC Sec. 2255 to Vacate, Set Aside or Correct the Sentence for the reasons so stated herein.

Respectfully submitted,

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Date: September 14, 2020

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX G: District Court's ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 USC § 2255, R. 401

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEMARIO WINSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

Case Number 16-00865
Criminal Case Number 11-00012
Honorable David M. Lawson

OPINION AND ORDER GRANTING MOTION TO VACATE SENTENCE

The term "violent felony" as used in several statutes to denominate certain sentencing-enhancing predicate offenses has been the subject of several appellate decisions that are critical of the definitional language. *See generally Plagued By Vagueness: The Effect of* Johnson v. United States *and the Constitutionality of 18 U.S.C. § 924(c)(3)(B)*, 54 No. 4 Crim. Law Bulletin ART 3 (Summer 2018). The Supreme Court declared one component defining the term — the so-called "residual clause" — void for vagueness in the context of predicate offenses used to enhance sentences under the Armed Career Criminal Act. *See Johnson v. United States*, 576 U.S. ---, 135 S. Ct. 2551 (2015) (invalidating part of 28 U.S.C. § 922(e)(2)(B)(ii)). The Court also invalidated part of the definition of "crime of violence" found in the criminal code, which lent that definition to the Immigration and Nationality Act. *See Sessions v. Dimaya*, --- U.S. ---, 138 S. Ct. 1204 (2018) (finding 18 U.S.C. § 16(b) void for vagueness). The identical offending language is found in 18 U.S.C. § 924(c), which punishes, among other things, the possession of a firearm in furtherance of a crime of violence. The Supreme Court last term followed form and held that the residual clause, which defined an element of that crime, also was void for vagueness. *United States v. Davis*, --- U.S. ---, 139 S. Ct. 2319 (2019) (holding that 18 U.S.C. § 924(c)(3)(B) is unconstitutional).

Petitioner Demario Winston pleaded guilty to conspiracy to commit Hobbs Act Robbery, contrary to 18 U.S.C. § 1951, and using a firearm during and in relation to a "crime of violence" resulting in death, 18 U.S.C. § 924(c), (j) (Count 12 of the Second Superseding Indictment). The Hobbs Act conspiracy was alleged by the government to constitute the crime-of-violence element for the section 924(c) conviction, which was aggravated by the death resulting circumstance under subsection (j). Winston now moves to vacate his substantial prison sentence on Count 12 — 336 months — under 28 U.S.C. § 2255, arguing that the Hobbs Act conspiracy could qualify as a crime of violence only under the residual clause, which the Supreme Court has found unconstitutional. After reviewing the petitioner's motion, the Court must agree. The section 924(c), (j) conviction will be vacated, and Winston will be resentenced on the remaining conviction.

I

Winston pleaded guilty to one count of using a firearm in furtherance of a crime of violence, resulting in death, and one count of conspiracy to commit Hobbs Act Robbery. He was sentenced on September 2, 2015 to prison terms of 240 months on the conspiracy count and 336 months on the 924(j) count, with those sentences to run concurrently. He did not appeal his convictions or sentence.

On May 9, 2016, Winston filed a motion to vacate his sentence under 28 U.S.C. § 2255 in which he argued that the crime of conspiracy to commit Hobbes Act Robbery no longer qualifies as a "crime of violence," as that term is defined in section 924(c), because the language of the statutory definition is unconstitutionally vague under the rule of *Johnson v. United States*. The petitioner also initially raised a claim that his trial counsel was ineffective, but the Court dismissed that claim after the petitioner subsequently filed a renewed response stating that he wished to abandon the ineffective assistance argument. The petitioner also raised certain other jurisdictional

challenges to the convictions in his opening motion. In his prayer for relief, he asked that the Court either vacate the convictions and sentences and his guilty plea or vacate his judgment of sentence and promptly resentence him so that he could file a direct appeal. Because the section 924(c), (j) conviction now is unquestionably constitutionally unsound, the Court will grant the alternative relief sought and resentence the petitioner on the surviving conspiracy count.

II.

A federal prisoner challenging his sentence under section 2255 must show that the sentence "was imposed in violation of the Constitution or laws of the United States," the sentencing court lacked jurisdiction, the sentence exceeds the maximum penalty allowed by law, or it "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "A prisoner seeking relief under 28 U.S.C. § 2255 must allege either: '(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid.'" *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003)).

The only "crime of violence" predicate offense for the section 924(c), (j) conviction in this case was the contemporaneous conviction for conspiracy to commit Hobbs Act Robbery. Section 924(c) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence or drug trafficking crime.'" *Davis*, 139 S. Ct. at 2324 (quoting 18 U.S.C. § 924(c)(1)(A)). "The statute proceeds to define the term 'crime of violence' in two subparts — the first known as the elements clause [section 924(c)(3)(A)], and the second the residual clause [section 924(c)(3)(B)]." *Ibid.* "According to § 924(c)(3), a crime of violence is 'an offense that is a felony' and '(A) has as an element the use, attempted use, or threatened use of physical force against the person or property

of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *Ibid.* (quoting 18 U.S.C. § 924(c)(3)). Section 924(j) further enhances the penalty for a 924(c) violation where the crime results in the death of a person.

In *Davis*, the Supreme Court scrutinized the language of section 924(c)(3)(B), applying the principles announced by it in *Johnson* and *Dimaya*. Based on those principles, the Supreme Court held that the identically worded penalty provision in section 924(c)(3)(B) also is unconstitutionally vague. *Id.* at 2336. Thus, deprived of any constitutionally sound footing under the now defunct residual clause, Winston's 924(c), (j) conviction presently can stand only if the crime of conspiracy to commit Hobbs Act Robbery qualifies as a "crime of violence" under the elements clause in section 924(c)(3)(A).

"Since 1990, the Supreme Court has instructed federal sentencing courts to use the 'categorical approach' to determine whether a defendant's [predicate convictions] have as an element the use, attempted use, or threatened use of physical force against the person of another." *United States v. Burris*, 912 F.3d 386, 392 (6th Cir. 2019) (citing *Descamps v. United States*, 570 U.S. 254, 260-61 (2013)) (quotations omitted). "The question for the [Court] in the elements-clause context is whether every defendant convicted of [the offense] must have used, attempted to use, or threatened to use physical force against the person of another in order to have been convicted, not whether the particular defendant actually used, attempted to use, or threatened to use physical force against the person of another in that particular case." *Ibid.* Thus, "[u]nder the categorical approach, courts look only to the statutory definitions (or elements) of the statute of conviction — not to the particular facts of the defendant's crime." *United States v. Johnson*, 933 F.3d 540, 543 (6th Cir. 2019) (citing *Descamps*, 570 U.S. at 260-61). When doing so, the Court

must "assume that the defendant's conduct rested on nothing more than the least of the acts criminalized," and "[i]f the least of those acts constitutes a crime of violence, the conviction qualifies." *Ibid.* (citations omitted).

Under section 1951(a) of Title 28, persons may be convicted of conspiracy to commit Hobbs Act Robbery where they "conspire to 'in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery.'" *United States v. Ledbetter*, 929 F.3d 338, 360-61 (6th Cir. 2019) (quoting 18 U.S.C. § 1951(a)). The *Ledbetter* court observed that "conspiracy to commit Hobbs Act robbery qualifies only if it meets § 924(c)(3)(B)'s residual definition," and, following the invalidation of that clause in *Davis*, held that the 924(c) convictions predicated on the conspiracy offense must be vacated. *Id.* at 361.

Other courts of appeals that squarely have addressed the issue similarly have concluded that conspiracy to commit Hobbs Act Robbery cannot qualify under the elemental clause in section 924(c)(3)(A), because it does not require proof of any element directly implicating the use of force. In *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), the Fourth Circuit sitting *en banc* held that "conspiracy to commit Hobbs Act robbery [] does not categorically qualify as a crime of violence under the elements-based categorical approach[,] because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act[, and] such an agreement does not invariably require the actual, attempted, or threatened use of physical force," *id.* at 233-34. Similarly, in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), the Fifth Circuit held that "conspiracy to commit an offense is merely an agreement to commit an offense. Therefore . . . the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force," *id.* at 485. The Fifth Circuit went on to conclude that section 924(c)(3)(B) was unconstitutionally

vague, and its holding on that point was affirmed by the Supreme Court in *Davis*, 139 S. Ct. 2319, although the judgment was vacated on other grounds.

III.

The petitioner's conviction for conspiracy to commit Hobbs Act Robbery does not qualify as a crime of violence under the elements clause of section 924(c)(3)(A), and it cannot qualify under the now invalidated residual clause of section 924(c)(3)(B). There is no other qualifying predicate offense to support the conviction under section 924(c), (j). The petitioner therefore has established that he is in custody in violation of the federal constitution, and his motion to vacate his sentence will be granted.

Accordingly, it is **ORDERED** that the petitioner's motion to vacate his sentence is **GRANTED**.

It is further **ORDERED** that the petitioner's conviction of and sentence for possession of a firearm in furtherance of a crime of violence, contrary to 18 U.S.C. § 924(j), is **VACATED**.

It is further **ORDERED** that the petitioner shall be resentenced on the remaining conviction, and the probation department is directed to prepare a new presentence report.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge
Sitting by special designation

Date: September 27, 2019

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX H: Opinion of District Court Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 11-20188

HON. GEORGE CARAM STEEH

BERNARD EDMOND,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND GRANTING CERTIFICATE OF APPEALABILITY [ECF No. 407]

This matter comes before the Court on defendant Bernard Edmond's motion for reconsideration of the order denying his motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 (ECF No. 401). Alternatively, defendant seeks a certificate of appealability. The issues were thoroughly briefed and argued by counsel, and the Court addressed each of defendant's arguments in its opinion and order. Because defendant raises the same arguments in his motion for reconsideration, the Court denies the motion.

In order for a certificate of appealability to issue, the applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22; *Slack v. McDaniel*, 529 U.S.

473, 484 (2000) (petitioner may make such a showing by demonstrating that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (citation omitted)). The Court finds that reasonable jurists could debate whether the carjacking charges defendant was convicted of under a coconspirator theory of liability (*Pinkerton* conspiracy) qualify as substantive crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

The Court therefore grants defendant's request for a certificate of appealability only as to the issue of whether his carjacking convictions, charged as substantive offenses but argued, supported and instructed under a coconspirator theory of liability, qualify as crimes of violence under § 924(c)(3)(A).

Now, therefore,

IT IS HEREBY ORDERED that defendant's motion for reconsideration is DENIED.

IT IS HEREBY FURTHER ORDERED that defendant's request for a certificate of appealability is GRANTED.

Dated: October 21, 2020

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Petitioner,

vs.

BERNARD THOMAS EDMOND,

Defendant-Respondent,

APPENDIX I: Opinion of Sixth Circuit Court of Appeals

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NOT RECOMMENDED FOR PUBLICATION

File Name: 22a0346n.06

No. 20-1929

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERNARD THOMAS EDMOND,
Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,
Respondent - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

Before: GIBBONS, WHITE, and NALBANDIAN, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Petitioner-Appellant Bernard Edmond appeals the denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The district court granted a certificate of appealability on the issue whether Edmond's carjacking offenses, presented to the jury under a coconspirator theory of liability, constitute "crimes of violence" under 18 U.S.C. § 924(c)(3)(A). The government filed a motion to vacate the certificate of appealability as improvidently granted. Because Edmond's carjacking offenses are crimes of violence under § 924(c)(3)(A), we AFFIRM the denial of Edmond's § 2255 motion, and DENY AS MOOT the government's motion to vacate the certificate of appealability.

I.

From 2010 to 2011, Edmond's associates engaged in a carjacking scheme to obtain luxury vehicles. *United States v. Edmond*, 815 F.3d 1032, 1038 (6th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1577 (2017). Usually wielding guns, they threatened valet employees and car owners,

took the keys to the luxury vehicles, and drove the vehicles away. *Id.* Intermediaries then delivered the cars to Edmond, who altered the vehicle identification numbers, paid others to falsify title documents, and sold or traded the vehicles. *Id.* at 1038, 1040. There was evidence that, although Edmond neither ordered nor took part in the carjackings, he knew that some of the vehicles were obtained through violent means. *Id.* at 1041. Testimony also showed that Edmond sought, and paid more for, vehicles with keys. *Id.* at 1040.

A federal grand jury indicted Edmond and others on, as relevant here, one count of conspiracy to violate federal law under 18 U.S.C. § 371; three counts of carjacking and causing carjacking under 18 U.S.C. §§ 2119(1) & 2; one count of attempted carjacking and causing attempted carjacking under 18 U.S.C. §§ 2119(1) & 2;[1] and four counts of using and carrying a firearm during and in relation to a crime of violence[2] under 18 U.S.C. §§ 924(c) & 2.[3]

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[1] The third superseding indictment titled the carjacking counts as "[c]arjacking [and] [c]ausing [c]arjacking" under 18 U.S.C. §§ 2119(1) & 2. R. 109, PID 442–44. The indictment titled the attempted-carjacking count as "[a]ttempted [c]arjacking [and] [c]ausing [a]ttempted [c]arjacking." *Id.* at PID 447. The carjacking counts alleged that Edmond "caused and induced [other defendants] to take a motor vehicle from [another person] with the intent to cause serious bodily harm and death," and the attempted-carjacking count alleged that Edmond "caused and induced [another defendant] to attempt to take a motor vehicle from [another person] with the intent to cause serious bodily harm and death." *Id.* at PID 443–44, 447; *see also id.* at PID 442. The jury instructions described the carjacking charges as "carjacking or causing and aiding carjacking," and the attempted-carjacking charge as "attempted carjacking." R. 181, PID 3320, 3328. The verdict form titled the carjacking charges against Edmond as "[c]ausing carjacking," and the attempted-carjacking charge as "[c]ausing attempted carjacking." R. 137, PID 733–34. The carjacking statute does not reference "causing" carjacking, *see* 18 U.S.C. § 2119, but 18 U.S.C. § 2 states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal," and "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[2] The third superseding indictment titled the § 924(c) counts as "[u]sing and [c]arrying a [f]irearm [d]uring and in [r]elation to a [c]rime of [v]iolence." R. 109, PID 442–44, 447. Those counts alleged that Edmond "caused and induced [other defendants] to intentionally use and carry a firearm during and in relation to the commission of a crime of violence." *Id.* at 443–44, 447; *see also id.* at PID 442. The jury instructions described the § 924(c) counts as "using or causing or aiding the use of a firearm during and in relation to a crime of violence." R. 181, PID 3323. The verdict form titled three of the § 924(c) charges against Edmond as "[c]ausing use or carrying of a firearm during and in relation to carjacking," and the other § 924(c) charge as "[c]ausing use or carrying of a firearm during and in relation to attempted carjacking." R. 137, PID 733–34.

[3] Edmond was also indicted on two counts of causing interstate transportation of a stolen motor vehicle under 18 U.S.C. §§ 2312 & 2; one count of falsification and removal of motor vehicle identification numbers under 18 U.S.C. § 511; three counts of trafficking in motor vehicles with falsified, altered, or removed identification numbers under 18 U.S.C. § 2321; and one count of operating a chop shop under 18 U.S.C. §§ 2322(a)(1) and (b). Count 16—causing

The case went to trial. The government did not suggest that Edmond had committed the carjackings directly; rather, its theory was that, with knowledge of the carjackings, Edmond sought and acquired the vehicles, altered their identifying information, and sold or traded them.

The district court instructed the jury that it could convict Edmond of the carjacking and § 924(c) charges under a coconspirator, or *Pinkerton*,[4] theory of liability—that is, under the rule that "all members of a conspiracy are responsible for acts committed by other members, so long as those acts are committed to help advance the conspiracy[,] occurred after a defendant joined the conspiracy, and are [within the] reasonably foreseeable scope of the agreement." R. 181, PID 3318. The district court also provided an aiding-and-abetting instruction.

The jury convicted Edmond on all the relevant charges except Count 13—using and carrying a firearm during and in relation to a crime of violence (attempted carjacking) on March 12, 2011. Edmond was sentenced to a total of 900 months, or 75 years. This court affirmed Edmond's conviction, holding that there was sufficient evidence to support Edmond's carjacking and § 924(c) convictions under a *Pinkerton* theory of liability. *See Edmond*, 815 F.3d at 1040–41. Edmond argued on direct appeal that "the jury instructions offered two paths to conviction: *Pinkerton* co-conspirator liability *or* aiding and abetting liability," and that the district court "did not correctly state the advance-knowledge requirement for aiding and abetting." *Id.* at 1041. We reasoned that "[a]ny such mistake would not alter the conviction" because "[g]iven the abundant evidence that would permit the jury to convict on the *Pinkerton* co-conspirator theory, any error in the aiding and abetting instructions did not prejudice him and thus did not affect his substantial rights" under plain-error review. *Id.* We added that "several circuits have addressed this

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interstate transportation of a stolen motor vehicle between November 17, 2010, and December 1, 2010—was dismissed at trial.

[4] *See Pinkerton v. United States*, 328 U.S. 640, 646–48 (1946).

situation—where the judge gave a correct *Pinkerton* instruction and a faulty aiding and abetting instruction—and each one upheld the convictions so long as the *Pinkerton* theory supported them." *Id.* (collecting cases).

The Supreme Court vacated the district court's judgment and remanded the case for further consideration in light of *Dean v. United States*, 137 S. Ct. 1170, 1176–77 (2017), which held that trial courts can consider the length of statutorily mandated sentences for § 924(c) convictions when administering sentences for the underlying predicate offenses. *Edmond v. United States*, 137 S. Ct. 1577 (2017). On remand, the district court resentenced Edmond to one day on eleven of his convictions and a total of 660 months, or 55 years, on his three § 924(c) convictions.

Edmond filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, arguing that the "residual clause" of § 924(c)—which defines a "crime of violence" as a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. § 924(c)(3)(B)—is unconstitutionally vague, and that his trial counsel was ineffective. After the Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that § 924(c)'s residual clause is, indeed, unconstitutionally vague, *id.* at 2336, Edmond's appointed counsel filed a supplemental brief, arguing that "the convictions for the various offenses for which [Edmond] was convicted under a conspiracy theory" do not constitute crimes of violence under § 924(c), R. 360, PID 4980.

The district court denied Edmond's § 2255 motion, rejecting Edmond's arguments that carjacking is not a crime of violence; that Edmond's *Pinkerton*-based carjacking convictions do not constitute crimes of violence under § 924(c) after *Davis*; and that his counsel was ineffective.

Edmond appealed the district court's denial of his § 2255 motion. He then filed a motion for reconsideration and a request for a certificate of appealability. The district court denied Edmond's motion for reconsideration, but granted his request for a certificate of appealability "only as to the issue of whether [Edmond's] carjacking convictions, charged as substantive offenses but argued, supported and instructed under a coconspirator theory of liability, qualify as crimes of violence under § 924(c)(3)(A)." R. 412, PID 5364. The district court "f[ound] that reasonable jurists could debate whether the carjacking charges [Edmond] was convicted of under a coconspirator theory of liability (*Pinkerton* conspiracy) qualify as substantive crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A)." *Id.*

Edmond requested an expanded certificate of appealability from this court on his ineffective-assistance-of-counsel claim, but we denied his request, leaving only the issue certified by the district court.

The government moved to vacate the certificate of appealability as improvidently granted. We deferred ruling on the motion to consider it with the parties' briefs.

II.

"In reviewing the denial of a 28 U.S.C. § 2255 motion, we apply a de novo standard of review to the legal issues and uphold the factual findings of the district court unless they are clearly erroneous." *Greer v. United States*, 938 F.3d 766, 770 (6th Cir. 2019) (quoting *Hamblen v. United States*, 591 F.3d 471, 473 (6th Cir. 2009)). We review de novo whether an offense is a "crime of violence" under § 924(c). *United States v. Woods*, 14 F.4th 544, 551 (6th Cir. 2021).

A.

18 U.S.C. § 924(c) states, in relevant part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in

> relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime [be sentenced to certain penalties depending on the circumstances]. . . .
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Courts refer to § 924(c)(3)(A) as the "elements clause," and § 924(c)(3)(B) as the "residual clause." *See Davis*, 139 S. Ct. at 2324.

In *Davis*, the Supreme Court held that § 924(c)'s residual clause is unconstitutionally vague. *Id.* at 2336. "After *Davis*, a predicate offense qualifies as a crime of violence only if use of force is an element of the offense, and this excludes conspiracy charges." *Woods*, 14 F.4th at 552; *see also Portis v. United States*, 33 F.4th 331, 334 (6th Cir. 2022) ("Since *Davis*, we have limited the statute's application further, ruling that a conspiracy to commit Hobbs Act robbery does not count as a predicate 'crime of violence' for § 924(c) purposes, whether under the residual clause or the elements clause." (citing *United States v. Ledbetter*, 929 F.3d 338, 361 (6th Cir. 2019)).[5]

"We use a categorical approach to determine whether an offense constitutes a crime of violence for purposes of § 924(c)(3). Under this approach, we focus[] on the statutory definition

[5] In *Ledbetter*, the parties agreed that conspiracy to commit Hobbs Act robbery is not a "crime of violence" under the elements clause. *See* 929 F.3d at 361. "Because the Government relie[d] only on th[e] now-invalidated [residual] clause to support [two defendants'] convictions under § 924(c)," we vacated the defendants' § 924(c) convictions. *Id.*

of the offense, rather than the manner in which an offender may have violated the statute in a particular circumstance." *Manners v. United States*, 947 F.3d 377, 379 (6th Cir. 2020) (citations and internal quotation marks omitted). Carjacking under 18 U.S.C. § 2119 is a crime of violence under § 924(c)'s elements clause. *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019).

Edmond argues that the predicate offenses for his § 924(c) charges are actually conspiracy to commit carjacking offenses, rather than substantive carjacking offenses. Edmond reasons that he "was not part of any carjackings," he "was never present," and the government presented only a *Pinkerton* theory of liability at trial. Appellant's Br. at 16; *see also id.* at 29.

This argument is unavailing in part because the indictment, the government's arguments at trial, the jury instructions, and the verdict form all indicate that Edmond's § 924(c) charges were based on the predicate offenses of substantive carjacking, not his single conspiracy offense. *See Woods*, 14 F.4th at 552–53 (reasoning that the defendants' § 924(c) convictions were not predicated on a conspiracy charge because the indictment and jury instructions clearly stated that the § 924(c) charges were based on substantive offenses).

In the operative third superseding indictment, each of the § 924(c) charges of which Edmond was convicted referred explicitly to a corresponding substantive carjacking charge. The § 924(c) charge in Count 3 referred explicitly to the carjacking charge in Count 2 as the predicate crime of violence; the § 924(c) charge in Count 5 referred explicitly to the carjacking charge in Count 4 as the predicate crime of violence; and the § 924(c) charge in Count 7 referred explicitly to the carjacking charge in Count 6 as the predicate crime of violence.

Further, in closing argument, the government explicitly connected each § 924(c) offense to its corresponding substantive carjacking offense. R. 181, PID 3159 ("And so we have the carjackings and the gun charges. They are paired together in order. There are seven of them. So

we have Count 2. That will be a carjacking. The gun [charge] for that is right behind it, Count 3. Then we go like that all the way through to Count 15."); *id.* at PID 3187 ("So they get their new crime car. Take it. Perfect tool, and they use it to commit Counts 4 and 5 [a carjacking and a § 924(c) offense]."); *id.* at PID 3192 ("Here we are[,] Joseph Campau, January 25, 2011, Counts 6 and 7 [a carjacking and a § 924(c) offense].").

Additionally, the jury instructions explained that the predicate offenses for the § 924(c) convictions were the substantive carjacking offenses. *Id.* at PID 3323–24 ("[T]o find that a defendant committed a firearm crime that's charged in Count 3, you must first find that he committed or caused or aided the carjacking crime that is charged in Count 2. In order to find that a defendant committed the firearm crime that is charged in Count 5, you must first find that he committed or caused or aided the carjacking crime that is charged in Count 4, and so on for the rest of [the] firearm counts.").

Finally, the verdict form refers to the § 924(c) counts as "[c]ausing use or carrying of a firearm during and in relation to *carjacking*." R. 137, PID 733–34 (emphasis added).

To the extent Edmond argues that the government's exclusive reliance on *Pinkerton* liability to establish his guilt of the substantive offenses necessarily means that those predicate offenses are not crimes of violence under § 924(c), we reject that argument. This court's decision in *Woods* is instructive. In *Woods*, a jury convicted brothers Antoine and Austin Woods of several offenses under the Violent Crimes in Aid of Racketeering Act (VICAR). 14 F.4th at 548. The jury convicted Antoine of conspiracy to commit murder in aid of racketeering, attempted murder in aid of racketeering, assault with a dangerous weapon in aid of racketeering, two § 924(c) offenses, and obstruction of justice; the jury convicted Austin of conspiracy to commit murder in

aid of racketeering and a § 924(c) offense. *Id.* The predicate offenses alleged in the § 924(c) charges were attempted murder and assault with a dangerous weapon. *See id.* at 552.

On appeal, the defendants argued that those offenses were "not proper predicate offenses because the jury instructions allowed them to be convicted of the [§] 924(c) charges under a theory of *Pinkerton* liability."[6] *Id.* We rejected that argument, reasoning:

> The Woods brothers' argument conflates the predicate crimes of violence underlying their § 924(c) conviction (which are not conspiracy charges) and the basis of liability for the [§] 924(c) charges, which may have been *Pinkerton* liability. The Supreme Court's only inquiry in *Davis* was whether the § 924(c) residual clause was unconstitutionally vague, not whether *Pinkerton* liability is a proper basis for a [§] 924(c) conviction. *See Davis*, 139 S. Ct. at 2327. Finding the Woods brothers guilty through a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the § 924(c) elements clause. *United States v. Myers*, 102 F.3d 227, 238 (6th Cir. 1996) (affirming a § 924(c) conviction based on *Pinkerton* liability). Because both VICAR attempted murder and VICAR assault with a dangerous weapon are crimes of violence,[7] not conspiracy crimes, the Woods brothers' argument fails.
>
> In *Davis*, the conspiracy charge itself was not at issue. Rather, the Court clearly stated that it was the fact that the conspiracy charge rested solely on § 924(c)'s residual clause, and not the elements clause[,] that precluded liability. *Davis*, 139 S. Ct. at 2325. Substantive charges like VICAR murder, on the other hand, rely on the elements clause, not the unconstitutionally vague residual clause. This is true whatever legal theory of liability the jury relies on to find the defendant guilty of § 924(c). . . .
>
> The jury's potential reliance on *Pinkerton* liability to convict of the [§] 924(c) offenses does not change this outcome. Other circuits have come to a similar conclusion, finding that a defendant can be convicted of a § 924(c) charge based on a theory of *Pinkerton* liability.

14 F.4th at 552–53 (collecting cases).

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[6] Austin Woods was convicted of one of the § 924(c) offenses, but was not charged with either of the predicate offenses. *Woods*, 14 F.4th at 553. We explained that "[c]harging the underlying predicate offense is not required for liability under § 924(c); it is enough if the defendant may be prosecuted in a court of the United States for the predicate offense." *Id.* at 554. Of course, the government must prove beyond a reasonable doubt that the defendant in fact committed the underlying predicate offense. *United States v. Nelson*, 27 F.3d 199, 200–01 (6th Cir. 1994).

[7] We note that after *Woods* was decided, the Supreme Court held that attempted Hobbs Act robbery is not a "crime of violence" under § 924(c)'s elements clause. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022).

To be sure, this case differs from *Woods* in that here, the district court instructed the jury that it could convict Edmond of the predicate offenses and the § 924(c) charges based on a *Pinkerton* theory, but the jury charge in *Woods* included a *Pinkerton* instruction for the § 924(c) charges only. Accordingly, the Woods brothers argued that their VICAR offenses were not proper predicate "crimes of violence" because they could have been convicted of the *§ 924(c)* offenses based on a *Pinkerton* theory of liability. *See id.* at 552. By contrast, Edmond argues that his carjacking offenses are not proper predicate "crimes of violence" because he was convicted of *those* offenses based on *Pinkerton* liability.

That distinction does not render *Woods* inapposite. *Woods* not only establishes that "a defendant can be convicted of a § 924(c) charge based on a theory of *Pinkerton* liability," *id.* at 553, but also suggests that a defendant can be convicted under § 924(c) based on a predicate substantive offense proven under a *Pinkerton* theory of liability. There is no indication in *Woods* that Austin Woods committed attempted murder and assault with a dangerous weapon—the predicate offenses for his § 924(c) conviction—as a principal. Austin Woods went with fellow gang members, including Antoine, to surveil a house associated with a rival gang member. *Id.* at 549. He also texted Antoine a link to a YouTube video showing the address of the rival gang member's grandmother's house, and told him that he believed that the rival gang member was hiding there. *Id.* Later, other gang members—but not Austin—fired shots into the house. *Id.* at 550, 554. We concluded that there was sufficient evidence to convict Austin Woods of the predicate offenses for his § 924(c) charge under a *Pinkerton* theory of liability because he was part of the conspiracy on the day of the shooting, the shooting was "intended to advance" the gang, and the shooting was "reasonably foreseeable to [him]." *Id.* at 554–55.

Additionally, *Woods* cited *United States v. Henry*, 984 F.3d 1343 (9th Cir. 2021), approvingly. In that case, Henry and three codefendants were charged with a conspiracy offense, armed bank robberies, bank robberies, and firearm offenses under § 924(c). *Id.* at 1347. The indictment alleged that Henry remained outside the banks while his codefendants robbed the banks. *Id.* After a jury convicted Henry, he argued on appeal that *Davis* prohibited using his armed-bank-robbery convictions, based on *Pinkerton* liability, as predicates for his § 924(c) convictions. *Id.* at 1354. The Ninth Circuit rejected that argument because armed bank robbery "does have violence as an element," and "[d]efendants found guilty of armed bank robbery under either a *Pinkerton* or aiding-and-abetting theory are treated as if they committed the offense as principals." *Id.* at 1355–56. The court explained that "*Davis* does not conflict with or undermine the cases upholding § 924(c) convictions based on *Pinkerton* liability." *Id.* at 1356. Like Henry's predicate offenses, Edmond's predicate offenses were based on *Pinkerton* liability.

We have held that a defendant need not have committed the predicate substantive crime as a principal to be convicted under § 924(c). In *United States v. Richardson*, 948 F.3d 733 (6th Cir. 2020), the defendant was convicted of five counts of aiding and abetting Hobbs Act robbery, and five § 924(c) counts. *Id.* at 737. This court held that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c)'s elements clause, *id.* at 741, reasoning:

> There is no distinction between aiding and abetting the commission of a crime and committing the principal offense. Aiding and abetting is simply an alternative theory of liability indistinct from the substantive crime. Thus, under 18 U.S.C. § 2, an aider and abettor is punishable as a principal. So to sustain a conviction under § 924(c), it makes no difference whether [the defendant] was an aider and abettor or a principal.

Id. at 741–42 (citations omitted). Similarly, under a *Pinkerton* theory of liability, "a defendant may be convicted as a principal even if he did not participate in the offense." *United States v. Hills*, 27 F.4th 1155, 1182 (6th Cir. 2022).

We acknowledge that, unlike *Pinkerton* liability, which requires that an offense be a "reasonably foreseeable 'consequence[] of the unlawful agreement,'" *United States v. Hamm*, 952 F.3d 728, 744 (6th Cir. 2020) (quoting *Pinkerton v. United States*, 328 U.S. 640, 648 (1946)), aiding-and-abetting liability requires that a defendant intend to facilitate the offense, *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). Nevertheless, under *Richardson*'s logic, the fact that Edmond was not convicted of carjacking as a principal does not suggest that his carjacking offenses are not "crimes of violence" under a categorical application of § 924(c)'s elements clause.

Another case relied upon by Edmond is distinguishable. In *Ledbetter*, two defendants were convicted of murder by firearm during a crime of violence under §§ 924(c) and (j)(1). 929 F.3d at 360. The purported "crime of violence" was conspiracy to commit Hobbs Act robbery. *Id.* at 360–61. The parties agreed that conspiracy to commit Hobbs Act robbery could constitute a "crime of violence" only under § 924(c)'s residual clause. *Id.* at 361. We held that "[b]ecause the Government relie[d] only on that now-invalidated clause to support [the defendants'] convictions under § 924(c), those convictions must be set aside." *Id.* Unlike Edmond's § 924(c) convictions, the § 924(c) convictions in *Ledbetter* were predicated on a conspiracy offense, not substantive "crime of violence" offenses.[8]

In sum, because Edmond's § 924(c) convictions were properly predicated on his substantive carjacking offenses, rather than his conspiracy offense, relief is unwarranted.

B.

In support of its motion to vacate the certificate of appealability as improvidently granted, the government argues that Edmond's claim was not "substantial" or "constitutional" in nature.

[8] Other appellate cases cited by Edmond are also distinguishable. In those cases, the defendants' vacated § 924(c) convictions were predicated on conspiracy offenses, not substantive offenses. *See United States v. Barrett*, 937 F.3d 126, 129 (2d Cir. 2019); *United States v. Simms*, 914 F.3d 229, 232 (4th Cir. 2019).

"Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under [28 U.S.C. § 2255]." 28 U.S.C. § 2253(c)(1)(B). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). Because the district court did not err in denying Edmond's motion, we need not address whether the district court improvidently granted the certificate of appealability.[9]

III.

For the foregoing reasons, we AFFIRM the district court's judgment, and DENY AS MOOT the government's motion to vacate the certificate of appealability as improvidently granted.

[9] We note, however, that our conclusion required careful analysis of the issues, and that *Woods* was decided after the certificate of appealability was issued.