

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 16 2022

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE LUIS RAMIREZ-DORANTES,

Defendant-Appellant.

No. 21-55988

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

D.C. Nos. 3:16-cv-01632-JAH
3:10-cr-01793-JAH-2

Southern District of California,
San Diego

ORDER

Before: SILVERMAN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [28 U.S.C. § 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOSE LUIS RAMIREZ-DORANTES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Civil No.: 16cv01632 JAH
Criminal No.: 10cr01793 JAH

**ORDER DENYING PETITIONER'S
MOTION TO VACATE, SET ASIDE
OR CORRECT HIS SENTENCE
UNDER 28 U.S.C. § 2255
[Doc. Nos. 236, 257]**

Petitioner Jose Luis Ramirez-Dorantes moves this Court to vacate and correct his sentence under 28 U.S.C. section 2255. Respondent opposes the motion. After a thorough review of the record and the parties' submissions, and for the reasons set forth below, this Court DENIES Petitioner's motion.

BACKGROUND

On January 10, 2013, Petitioner pled guilty to one count of conspiracy to kidnap a federal officer and commit robbery in violation of 18 U.S.C. section 371 and one count of using and carrying a firearm in furtherance of crimes of violence in violation of 18 U.S.C. section 924(c). *See* Doc. No. 154. On December 19, 2013, the Hon. M. James Lorenz sentenced Petitioner to 60 months in prison on count 1 and 600 months on count 5, to run consecutively, followed by supervised release for 3 years on count 1 and 5 years on count 5 to run concurrently. *See* Doc. Nos. 228, 231.

1 On June 24, 2016, Petitioner filed a motion seeking relief under 28 U.S.C. section
2 2255. Doc. No. 236. Respondent filed an opposition and Petitioner filed a reply. Doc.
3 Nos. 244, 245. Thereafter, the action was transferred to this Court. Petitioner, later, filed
4 supplemental briefing and notices of supplemental authority. Doc. Nos. 247, 248, 249,
5 250.

6 Following the Supreme Court decision in *United States v. Davis*, 139 S.Ct 2319
7 (2019), this Court ordered Respondent to file a brief addressing the decision. Respondent
8 filed a response in opposition and Petitioner filed a reply. Doc. Nos. 252, 253.

9 Thereafter, Petitioner filed an amended motion to vacate in which he renews and
10 amends his petition to include all claims and arguments presented in his original petition,
11 reply and supplement briefing to ensure his petition is timely filed.¹ Doc. No. 257.

LEGAL STANDARD

13 A section 2255 motion may be brought to vacate, set aside or correct a federal
14 sentence on the following grounds: (1) the sentence “was imposed in violation of the
15 Constitution or laws of the United States,” (2) “the court was without jurisdiction to impose
16 such sentence,” (3) “the sentence was in excess of the maximum authorized by law,” or (4)
17 the sentence is “otherwise subject to collateral attack.” 28 U.S.C. § 2255(a).

DISCUSSION

19 Petitioner moves this Court to vacate and correct his sentence under section 2255
20 and asserts he should not have received a sentence of fifty years for the section 924(c)
21 count because the underlying offense was not necessarily a crime of violence. He argues
22 the residual clause of the section 924(c) is unconstitutionally vague based upon the
23 Supreme Court's ruling in *Johnson v. United States*, 576 U.S. 591 (2015) and *Davis*. In
24 opposition, Respondent argues the motion should be dismissed because Petitioner waived
25 his right to collaterally attack his sentence and the motion is procedurally barred for failure

¹ Also pending before the Court is Petitioner's motion to withdraw a previously filed amended motion to vacate and Petitioner's motion to expedite determination. Doc. Nos. 256, 258.

1 to raise the argument on direct appeal. Respondent further argues Petitioner fails to carry
2 his burden of proving he was convicted under the residual clause of section 924(c).

3 **I. Waiver**

4 Respondent contends the motion should be dismissed because Petitioner waived his
5 right to collaterally attack his sentence. As part of his plea agreement, Petitioner waived
6 his right to appeal or collaterally attack his sentence. *See Plea Agreement at 11 (Doc. No.*
7 153). A knowing and voluntary waiver of a statutory right is enforceable. *United States*
8 *v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). The right to collaterally attack a
9 sentence pursuant to 28 U.S.C. section 2255 is statutory in nature, and a defendant may
10 therefore waive the right to file a section 2255 petition. *See United States v. Abarca*, 985
11 F.2d 1012, 1014 (9th Cir. 1993) (holding that, by entering a plea agreement whereby
12 defendant waived right to appeal his sentence, defendant relinquished his right to directly
13 or collaterally attack his sentence on the ground of newly discovered exculpatory
14 evidence). The scope of a section 2255 waiver may be subject to potential limitations. For
15 example, a defendant's waiver will not bar an appeal if the trial court did not satisfy certain
16 requirements under Federal Rule of Criminal Procedure 11 to ensure that the waiver was
17 knowingly and voluntarily made. *See Navarro-Botello*, 912 F.2d at 321. Such a waiver
18 might also be ineffective where the sentence imposed is not in accordance with the
19 negotiated agreement or violates the law. *See Id.; United States v. Littlefield*, 105 F.3d 527,
20 528 (9th Cir. 1997).

21 If Petitioner prevails on his claim that he was sentenced under unconstitutionally
22 vague language, his sentence is illegal and he is not precluded from challenging his
23 sentence despite the waiver. As such, whether Petitioner is barred from seeking collateral
24 relief rests on the merits of his claim.

25 **II. Procedural Bar**

26 Respondent argues Petitioner procedurally defaulted his challenge because he failed
27 to file an appeal. A federal prisoner who fails to raise a claim on direct appeal procedurally
28 defaults the claim and must demonstrate cause and prejudice or actual innocence to obtain

1 relief under section 2255. *Bousley v. United States*, 523 U.S. 614, 622 (1998). Respondent
2 contends Petitioner cannot establish cause or prejudice to overcome the bar.

3 Petitioner maintains any procedural default is excused by cause and prejudice
4 because his challenge was not reasonably available until *Johnson* overruled two prior
5 Supreme Court decisions holding the residual clause was not void for vagueness and
6 overturned lower courts' practice of imposing punishment under the section 924(c) residual
7 clause. Petitioner further maintains he can show he is actually innocent of the section
8 924(c) conviction.

9 A petitioner may demonstrate cause if his "constitutional claim is so novel that its
10 legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984).
11 Prior to the Supreme Court's ruling in *Johnson*, vagueness challenges to the residual clause
12 of the Armed Career Criminal Act ("ACCA") were not reasonably available. Similarly,
13 the possible extension of the reasoning of *Johnson* to the guidelines' similar language was
14 not reasonably available. As such, Petitioner demonstrates cause.

15 Petitioner also demonstrates prejudice because an application of an incorrect
16 Guidelines range and sentencing affects a defendant's substantial rights. *Molina-Martinez*
17 v. *United States*, 136 S.Ct. 1338, 1346-47 (2016); *United States v. Bonilla-Guizar*, 729
18 F.3d 1179, 1188 (9th Cir. 2013).

19 III. Merits of Petitioner's Claim

20 A. Parties' Arguments

21 In his original petition, Petitioner argues the holding in *Johnson* invalidating the
22 residual clause of the ACCA applies equally to the residual clause of section 924(c)
23 because the definition of "crime of violence" in the residual clause of section 924(c) is
24 similar to the invalidated residual clause of the ACCA. He maintains the elements of
25 section 924(c) to which he pled guilty are that he aided and abetted the discharge of a
26 firearm in furtherance of "[a]t least one of the crimes of violence in Count 5 of the
27 Superseding Indictment." Motion at 3. Count 5 lists robbery of personal property of the
28 United States, unlawful confinement of a federal officer resulting in death, and murder of

1 a federal officer committed in perpetration of a robbery. Superseding Indictment at 5.
2 Because he did not specify which of the three offenses he was admitting to, if any of the
3 offenses fall exclusively under the residual clause, Petitioner argues, he did not admit the
4 elements necessary to sustain his section 924(c) conviction and his sentence must be
5 vacated. Petitioner contends unlawful confinement does not require the use of force and
6 has only been found to be a crime of violence under the residual clause. Petitioner further
7 contends neither robbery nor murder requires intentional, violent use of physical force.
8 Because none of the three offenses to which his section 924(c) conviction potentially
9 related require the use of force, he argues his conviction is not a crime of violence under
10 the force clause and it cannot be a crime of violence under the discredited residual clause.

11 In response, Respondent argues Petitioner fails to carry his burden to demonstrate
12 he was convicted under the residual clause of section 924(c) and maintains Petitioner fails
13 to demonstrate the statute is vague as applied to him. Specifically, Respondent maintains
14 Petitioner's underlying crimes involve a substantial risk that violent physical force against
15 the person of another may be used during their commission. Additionally, Respondent
16 argues robbery is a crime of violence under the force clause and, contrary to Petitioner's
17 argument, only one of the predicate crimes must be a crime of violence under the force
18 clause.

19 In his reply, Petitioner argues he meets his burden to show he was convicted under
20 the residual clause of section 924(c). He contends the government's argument that he must
21 prove he was sentenced under the residual clause is an unworkable approach that would
22 deprive him years of liberty if the court failed to mention the residual clause at sentencing
23 and argues this Court should decline to apply the approach in this matter.

24 He further argues the plain language of his plea demonstrates he did not admit that
25 all three of the offenses, robbery, unlawful confinement, and felony murder, were
26 committed. He only admitted that "at least one of" them was committed and did not specify
27 which one. Therefore, the Court must assume that Petitioner's plea admitted only the
28 conduct necessary to sustain the elements of the offense, including either unlawful

1 confinement or felony murder which the government agrees are not crimes of violence
2 post-*Johnson*. Additionally, Petitioner argues the government fails to show robbery under
3 18 U.S.C. section 2112 is a crime of violence under the elements clause of section
4 924(c)(3)(A).

5 While the instant petition was pending, Petitioner filed a notice of the Supreme
6 Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), in which the Court struck
7 down the residual clause of section 924(c)(3)(B) as void for vagueness. In addition,
8 Petitioner contends, the Supreme Court rejected the invitation to take a case specific
9 approach reasoning advanced by Respondent here.

10 In response, the government argues that while the Court in *Davis* held the residual
11 clause of section 924(c) is vague and unenforceable, the instant motion fails because
12 robbery of federal property remains a “crime of violence” and a sentence for violation of
13 section 924(c) based on a guilty plea is still lawful if at least one alleged and admitted
14 conduct remains a crime of violence. The government maintains Petitioner admitted the
15 robbery of federal property in his plea agreement. Because Petitioner’s admitted conduct
16 violates section 924(c), Respondent contends, Petitioner is not legally innocent and his
17 sentence for that count remains lawful.

18 Respondent also contends Petitioner’s argument that he did not admit the robbery he
19 committed was a categorical match for robbery as defined by 18 U.S.C. section 2112 fails.
20 Respondent maintains no authority requires that a defendant admit in a guilty plea or a jury
21 find after a trial that the defendant’s conduct “categorically” matches the crime with which
22 he is presently charged. The government maintains Petitioner admitted the robbery and
23 the facts plainly offend section 2112 and argues every robbery in violation of that statute
24 is a crime of violence. Therefore, the government argues, the 2255 motion should be
25 denied.

26 In reply, Petitioner argues the Ninth Circuit provided a road map for courts to
27 determine whether a petitioner qualifies for *Johnson* relief in *United States v. Geozos*, 870
28 F.3d 890, 895 (9th Cir. 2017). Petitioner maintains courts must apply the “Stromberg

1 principle" when the record is unclear as to whether a petitioner's conviction rested on the
2 residual clause. Because his plea agreement only required him to admit that at least one of
3 the crimes of violence in count 5 of the Superseding Indictment was committed, without
4 specifying which, Petitioner argues his conviction could have rested on unlawful
5 confinement or robbery or felony murder, even though two of the three were
6 constitutionally deficient. He argues applying the "Stromberg principle" requires this
7 Court hold his section 924(c) conviction is unconstitutional.

8 He further argues the government incorrectly claims that a section 924(c) conviction
9 may rest on multiple underlying crimes. He maintains the Ninth Circuit has held that each
10 section 924(c)(1) charge must be based on a separate predicate offense even if the separate
11 predicate crimes arose from the same act or incident.² As such, he contends, the
12 government's argument that his conviction rested on all three underlying crimes fails as it
13 is a legal impossibility.

14 **B. Analysis**

15 In *Johnson*, the Supreme Court held that the "residual clause" of the ACCA, which
16 authorized a sentence enhancement based on a finding that a defendant's prior conviction
17 "present[ed] a serious potential risk of physical injury to another," was unconstitutionally
18 vague and could not be relied upon to enhance a sentence. 135 S.Ct. 1557. Here, Petitioner
19 challenges section 924(c) which generally prohibits the possession, carrying, or use of a
20 firearm in relation to a crime of violence and carries a mandatory sentence. It defines a
21 "crime of violence" as an offense that is a felony and

22 (A) has as an element the use, attempted use, or threatened use of physical force
23 against the person or property of another, or
24 (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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26
27 ² Petitioner cites to *United States v. Smith*, 924 F.2d 889, 894 (9th Cir. 1991); *United States v. Martinez*,
28 967 F.2d 1343, 1348 (9th Cir. 1992); *United States v. Castaneda*, 9 F.3d 761, 765 (9th Cir. 1993); and
United States v. Andrews, 75 F.3d 552, 558 (9th Cir. 1996).

1 18 U.S.C. § 924(c)(3). Courts generally refer to clause (A) as the “force clause” and to
 2 clause (B) as the “residual clause.” *See United States v. Gutierrez*, 876 F.3d 1254, 1256
 3 (9th Cir. 2017). In *Davis*, the Supreme Court struck down the residual clause of section
 4 924(c) as unconstitutionally vague. In doing so, the Court rejected the government’s
 5 suggestion the Court utilize a case specific analysis rather than the categorical approach
 6 when determining whether an offense is a crime of violence under the force clause. *Id.* at
 7 2326 - 2333.

8 Conceding the residual clause is unenforceable, the government, argues Petitioner’s
 9 sentence, based on a guilty plea, is still lawful because at least one of the alleged and
 10 admitted conduct, robbery, remains a crime of violence. Petitioner argues robbery is not
 11 a crime of violence under the force clause.

12 Utilizing the categorical approach, the Court finds robbery under section 2112
 13 qualifies as a crime of violence under the force clause. Section 2112 punishes “[w]hoever
 14 robs or attempts to rob another of any kind or description of personal property belonging
 15 to the United States.” 18 U.S.C. § 2112. “Rob” is not defined in the statute, therefore, the
 16 term is defined by common law. *See Carter v. U.S.*, 530 U.S. 255, 267 n.5 (2000); *United*
 17 *States v. Ornelas*, 906 F.3d 1138, 1143 (9th Cir. 2018). In *Stokeling v. United States*, the
 18 Supreme Court recognized that robbery, at common-law, required the use of force or
 19 violence and noted an unlawful taking, at common law, was “merely larceny unless the
 20 crime involved ‘violence’ and ‘violence’ was ‘committed if sufficient force [was] exerted
 21 to overcome the resistance encountered.’” 139 S. Ct. 544, 550 (2019) (citing 2 J. Bishop,
 22 Criminal Law § 1156, p. 860 (J. Zane & C. Zollman eds., 9th ed. 1923)). “If an act
 23 physically overcame a victim’s resistance, ‘however slight’ that resistance might be, it
 24 necessarily constituted violence.” *Id.* Accordingly, robbery under section 2112 qualifies
 25 as a crime of violence under the force clause of section 924(c)(3).

26 Petitioner argues the Court cannot assume his section 924(c) plea rested on robbery,
 27 rather than unlawful confinement or murder. The Ninth Circuit has explained a court may
 28 determine whether a sentencing court relied on the residual clause, even when the record

1 lacks an explicit statement, by looking to the record and legal background at the time of
2 sentencing. *United States v. Dade*, 6 F.4th 1013 (9th Cir. 2021) (citing *Geozos*, 870 F.3d
3 895).

4 Here, the plea agreement explained that Petitioner understood count 5 included the
5 following elements:

- 6 1. At least one of the crimes of violence in Count 5 of the Superseding Indictment
7 was committed; and
- 8 2. Defendant knowingly used, carried, brandished, or discharged a firearm during
and in relation to that crime.

9 Plea Agreement at 3 (Doc. No. 153).

10 He admitted there was a factual basis for the plea and did not dispute the following
facts:

- 11 1. On July 23, 2009, Defendant, Jose Juan Chacon-Morales, Marcos Rodriguez-
Perez, Christian Daniel CastroAlvarez, and Emilio Samyn Gonzales-Arenazas
traveled by car and foot to a remote area on the Mexican side of the U.S.-Mexico
border near Campo, California. All five were carrying firearms and, at the direction
of Chacon-Morales, sought to rob U.S. Border Patrol agent of his night vision
device.
- 12 2. Defendant and Chacon-Morales remained on the Mexican side of the border fence
and stood watch. As Agent Robert W. Rosas, Jr., in uniform and performing his
official duties, responded to the area, Rodriguez-Perez, Castro-Alvarez, and
Gonzales-Arenazas entered the United States through a hole in the border fence.
After Agent Rosas exited his vehicle, Rodriguez-Perez, Castro-Alvarez, and
Gonzales-Arenazas detained Agent Rosas at gunpoint. Agent Rosas resisted.
- 13 3. During the ensuing struggle, Rodriguez-Perez, CastroAlvarez, and Gonzales-
Arenazas shot Agent Rosas multiple times, killing him. Rodriguez-Perez, Castro-
Alvarez, and Gonzalez-Arenazas stole Agent Rosas's bag, firearm, handcuffs, and
night vision device, among other things, and fled back to Mexico. They rejoined
Defendant and Chacon-Morales, and all five fled the area.

22 Plea Agreement at 4.

23 During the change of plea hearing, Judge Lorenz explained, at trial, the government
24 would have to prove that

25 at least one of the crimes of violence in count five of the superseding indictment was
26 committed, that [he] knowingly used, carried, brandished or discharged a firearm
27 during and in relation to that crime.

1 Reporter's Transcript ("RT") 6:8-18. When asked to provide a factual basis at the hearing,
2 defense counsel paraphrased the language of the plea. *See* RT 10:20-11:19. Petitioner
3 responded affirmatively when the court asked if he did everything his counsel stated. RT
4 11:20-25.

5 The record clearly demonstrates the court sentenced Petitioner based upon all three
6 offenses, including robbery. Petitioner argues his conviction can only rely on one
7 predicate. The Court disagrees. The cases cited by Petitioner do not support his argument.
8 They address the issue of multiple firearm counts charged under section 924(c) based upon
9 a single offense. Here, the Court is addressing a single firearm count based upon multiple
10 offenses. Additionally, the court in *United States v. Espudo* noted the two petitioners
11 committed two separate predicate offenses while brandishing or discharging a firearm, a
12 RICO conspiracy and conspiracy to distribute a controlled substance. 768 Fed.Appx. 623
13 (9th Cir. 2019). The court determined the petitioners were not entitled to section 2255
14 relief because their convictions were based in part on drug-trafficking crimes. *Id.*

15 Because Petitioner's sentence was based upon the robbery predicate which qualifies
16 as a crime of violence under the force clause, he is not entitled to relief under *Davis* or
17 *Johnson*. Therefore, his sentence is not illegal and his waiver bars collateral attack.
18 Petitioner's motion is DENIED.

19 CERTIFICATE OF APPEALABILITY

20 Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, a district court
21 "must issue or deny a certificate of appealability when it enters a final order adverse to the
22 applicant" in Section 2255 cases such as this. A habeas petitioner may not appeal the denial
23 of a Section 2255 habeas petition unless he obtains a certificate of appealability from a
24 district or circuit judge. 28 U.S.C. § 2253(c)(1)(B); *see also United States v. Asrar*, 116
25 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue
26 certificates of appealability under AEDPA). A certificate of appealability is authorized "if
27 the applicant has made a substantial showing of the denial of a constitutional right." 28
28 U.S.C. § 2253(c)(2). To meet this threshold showing, a petitioner must show that: (1) the

1 issues are debatable among jurists of reason, (2) that a court could resolve the issues in a
2 different manner, or (3) that the questions are adequate to deserve encouragement to
3 proceed further. Lambright v. Stewart, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (citing
4 Slack v. McDaniel, 529 U.S. 473 (2000)).

5 Based on this Court's review of the record, this Court finds no issues are debatable
6 among jurists of reason and no issues could be resolved in a different manner. This Court
7 further finds that no questions are adequate to deserve encouragement to proceed further.
8 Therefore, Petitioner is not entitled to a certificate of appealability.

9 **CONCLUSION AND ORDER**

10 Based on the foregoing, IT IS HEREBY ORDERED:

11 1. Petitioner's motion to withdraw docket number 255 due to a clerical error
12 (Doc. No. 256) is **GRANTED**;

13 2. Petitioner's motion to expedite (Doc. No. 258) is **DENIED as moot**;

14 2. Petitioner's motion to vacate, set aside or correct his sentence is **DENIED**;
15 and

16 2. Petitioner is **DENIED** a certificate of appealability.

17 DATED: September 7, 2021

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19 JOHN A. HOUSTON
20 United States District Judge
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