

APPENDIX 1

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

KDW:fw

UNITED STATES DISTRICT COURT
Southern District of MississippiUNITED STATES OF AMERICA
V.
MICHAEL CHANEYJUDGMENT IN A CRIMINAL CASE
BY J. T. NOBLIN, CLERK
DEPUTY

Case Number: 3:09cr100DPJ-LRA-002

USM Number: 09752-043

Clarence Guthrie (601) 991-1099
350 Arbor Drive, Suite D, Ridgeland, MS 39157-4810

Defendant's Attorney:

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 2☐ pleaded nolo contendere to count(s)
which was accepted by the court.☐ was found guilty on count(s)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2119	Carjacking	07/24/09	1
18 U.S.C. § 924(c)	Brandishing a Firearm During a Violent Crime	07/24/09	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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.

April 23, 2010

Date of Imposition of Judgment

Signature of Judge

The Honorable Daniel P. Jordan III

U.S. District Court Judge

Name and Title of Judge

4-29-10

Date

DEFENDANT: MICHAEL CHANEY
CASE NUMBER: 3:09cr100DPJ-LRA-002

IMPRISONMENT

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

55 months as to Count 1 and 84 months as to Count 2, to run consecutively, for a total term of 139 months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be placed in the 500-hour Residential Drug Treatment Program during the term of incarceration, if eligible.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL CHANEY
CASE NUMBER: 3:09cr100DPJ-LRA-002**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years as to Counts 1 and 2, to run concurrently

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.

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.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

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 to 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; and
- 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.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C — Supervised Release

Judgment—Page 4 of 6

DEFENDANT: MICHAEL CHANEY
CASE NUMBER: 3:09cr100DPJ-LRA-002

SPECIAL CONDITIONS OF SUPERVISION

- 1) The defendant shall submit to random urinalysis testing, as directed by the supervising U. S. Probation Officer.
- 2) The defendant shall submit to a search of his person or property, conducted in a reasonable manner, at any time, by the supervising U. S. Probation Officer.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary PenaltiesJudgment — Page 5 of 6DEFENDANT: MICHAEL CHANEY
CASE NUMBER: 3:09cr100DPJ-LRA-002**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$1,000.00	
	(\$100 per count)		

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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TOTALS	\$	0.00	\$	0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* 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: MICHAEL CHANEY
CASE NUMBER: 3:09cr100DPJ-LRA-002**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 \$ _____ due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Payment in equal monthly (e.g., weekly, monthly, quarterly) installments of \$ 50.00 over a period of 20 month(s) (e.g., months or years), to commence 60 day(s) (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court P. O. Box 23552, Jackson, MS 39225-3552.

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

- ☐ Joint and Several

Case Numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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.

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:09CR100 DPJ-LRA

MICHAEL CHANEY

ORDER

This criminal matter is before the Court on Defendant Michael Chaney's motion under 28 U.S.C. § 2255 [52]. Chaney says the Court erred in sentencing him under an unconstitutionally vague residual clause. Though he later switched the focus of his argument, the Court concludes that his motion is untimely and otherwise without merit.

I. Background

Chaney and an accomplice committed armed carjacking on July 24, 2009. On December 29, 2009, Chaney entered an open plea, admitting the charges in a two-count indictment. Count One charged him with carjacking by force under 18 U.S.C. § 2119, for which he received a 55-month sentence. Count Two charged Chaney with brandishing a firearm during the carjacking, which triggered an enhancement under 18 U.S.C. § 924(c)(1). He received the mandatory seven years consecutive for that offense. Chaney then filed an unsuccessful appeal before the Fifth Circuit Court of Appeals and a failed writ of certiorari before the United States Supreme Court.

More than a year after his judgment became final, Chaney filed a pro se motion under § 2255. In it, he claims that *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidates the residual clause found in § 924(c). The procedural history after that is a little complicated but largely irrelevant. In short, the Public Defender's Office picked up Chaney's cause and filed a

series of briefs on his behalf. The issues have been thoroughly and thoughtfully briefed, and the Court is prepared to rule.

II. Analysis

The Court sentenced Chaney under § 924(c)(1)(A)(ii). That statute mandates a minimum seven-year consecutive sentence when a defendant brandishes a firearm “during and in relation to any crime of violence.” 18 U.S.C. 924(c)(1)(A)(ii) (2012). The statute then 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.

Id. § 924(c)(3). Thus, § 924(c)(3) provides alternative means for finding that an underlying offense constitutes a “crime of violence.” The first alternative, under § 924(c)(3)(A), is sometimes called the use-of-force provision, whereas § 924(c)(3)(B) provides a residual clause.

In *Johnson*, the Supreme Court invalidated a similar yet distinctly worded residual clause under the Armed Career Criminal Act (“ACCA”). That residual clause applied to crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.” *Id.* § 924(e)(2)(B)(ii). The Court concluded that the ACCA’s residual clause is unconstitutionally vague. And according to Chaney, the same is true for the residual clause found in § 924(c)(3)(B).

The threshold question is whether Chaney's motion was filed on time. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2255(f), establishes a one-year statute of limitations for federal inmates seeking post-conviction relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255(f) (2012). Here, Chaney invokes § 2255(f)(3), which starts the one-year clock when "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." *Id.* § 2255(f)(3). Chaney says his motion meets this test because *Johnson* recognized a new right and *Welch v. United States* made that right retroactively applicable. 136 S. Ct. 1257 (2016).

There is no question that *Johnson* would trigger § 2255(f)(3) for inmates sentenced under the ACCA. But Chaney was not sentenced under the ACCA; he was sentenced under § 924(c). And significantly, "*Johnson* does not invalidate [the residual clause found in] § 924(c)(3)(B)." *United States v. Davis*, No. 16-10330, 2017 WL 436037, at *2 (5th Cir. Jan. 31, 2017). Because *Johnson* provides no new, retroactively applicable rights regarding § 924(c)(3)(B), Chaney's motion is untimely. *See also In re Fields*, 826 F.3d 785, 786–87 (5th Cir. 2016) (rejecting successive habeas petition under 28 U.S.C. § 2255(h)(2) because *Johnson* has not been retroactively applied to § 924(c)(3)(B)).

Even assuming a timely motion, Chaney's argument lacks merit in this circuit. Although *United States v. Davis* is unpublished—and therefore non-binding—it is persuasive authority that this Court will follow. As the court noted in that case, § 924(c)(3)(B) materially differs from the residual clause found in the ACCA, leading the Fifth Circuit and other circuits to hold that *Johnson* does not impact § 924(c)(3)(B). *See Davis*, 2017 WL 436037, at *2 (citing *United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135,

145–49 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016), *petition for cert. filed*, No. 16-6392 (Oct. 6, 2016)).

Chaney appropriately acknowledges that the Fifth Circuit would reject his *Johnson* argument, so he merely preserves the issue for appeal. *See* Def.’s Reply [58] at 2. He also shifts focus away from the residual clause under § 924(c)(3)(B) to the use-of-force clause found in § 924(c)(3)(A). According to Chaney, *if* the residual clause is unconstitutional under *Johnson*, then carjacking by force does not constitute a “crime of violence” under the use-of-force clause. *Id.* at 11. As he notes, carjacking can be accomplished “by intimidation.” *See* 18 U.S.C. § 2991 (2012). And Chaney believes that “intimidation” would not necessarily require “the use, attempted use, or threatened use of physical force against the person.” *Id.* § 924(c)(3)(A)); *see* Def.’s Reply [58] at 11.

Chaney’s use-of-force argument faces procedural and substantive problems. Procedurally, the argument is untimely because it is not based on a newly announced and retroactively applicable right related to § 924(c). *See* 28 U.S.C. § 2255(f)(3). Substantively, the argument prevails only if the residual clause is invalid; as noted above, it is not. Finally, other circuits have rejected similar arguments that committing carjacking through “intimidation” fails to satisfy the use-of-force prong. *See United States v. Evans*, 848 F.3d 242, 246 (4th Cir. 2017) (holding that “intimidation” “denotes a threat to use violent force”); *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) (same). While the merits of Chaney’s use-of-force argument seem dubious, this Court will not address them because the motion is untimely and the crime otherwise satisfies the residual clause under § 924(c)(3)(B). *See Davis*, 2017 WL 436037, at *2 (refusing to consider use-of-force prong because § 924(c)(3)(B) applied).

III. Conclusion

The Court has considered all of the parties' arguments. Those not addressed would not have changed the results. And for the reasons stated, the Court holds that Chaney's motion [52] should be dismissed.

SO ORDERED AND ADJUDGED this the 9th day of March, 2017.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:09CR100 DPJ-LRA

MICHAEL CHANEY

CERTIFICATE OF APPEALABILITY

A final order adverse to the applicant having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court or a proceeding pursuant to 28 U.S.C. § 2255, the court, considering the record in the case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, hereby finds that:

A Certificate of Appealability should not issue. The applicant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED AND ADJUDGED this the 9th day of March, 2017.

s/ Daniel P. Jordan III
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60163
USDC No. 3:16-CV-517
USDC No. 3:09-CR-100-2



A True Copy
Certified order issued Nov 07, 2017

Styl W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL CHANEY,

Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

ORDER:

Michael Chaney, federal prisoner # 09752-043, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion. He seeks to argue that his conviction for brandishing a firearm during a crime of violence, pursuant to 18 U.S.C. § 924(c)(1), should be vacated in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

To obtain a COA, Chaney must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To meet that standard, a movant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues

No. 17-60163

presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks and citation omitted). When a § 2255 motion is dismissed on procedural grounds without reaching the underlying merits, “a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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.” *Id.* at 484.

Chaney has not made the required showing. Accordingly, his motion for a COA is DENIED.

A handwritten signature in black ink, reading "W. Eugene Davis". The signature is written in a cursive, flowing style.

W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE