

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COREY DURAN BERRY — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

APPENDIX

1. **Appendix A** - decision of the United States Court of Appeals for the Eleventh Circuit.
2. **Appendix B** - decision of the United States District Court for the Southern District of Florida.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12473-A

COREY DURAN BERRY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Corey Duran Berry, proceeding pro se, seeks a certificate of appealability ("COA") to appeal the District Court's denial of his habeas corpus petition filed pursuant to 28 U.S.C. § 2255.

I.

On February 18, 2014, Mr. Berry pled guilty to carjacking and attempted carjacking, in violation of 18 U.S.C. § 2119(1) (Counts 1 and 3), and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 2). The crime of violence supporting Mr. Berry's § 924(c)

Appendix "A"

conviction was the attempted carjacking charged in Count 3. He was sentenced to 134-months imprisonment for Counts 1 and 3, to run concurrently with each other, and 84-months imprisonment for Count 2, to run consecutively to Counts 1 and 3.

On June 23, 2016, Mr. Berry filed a counseled 28 U.S.C. § 2255 motion to vacate, arguing that his § 924(c) conviction no longer was valid in light of Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). Specifically, he argued that Johnson invalidated § 924(c)'s risk-of-force clause, meaning that carjacking could no longer serve as a predicate crime of violence.

A Magistrate Judge issued a report and recommendation ("R&R"), that recommended denying the § 2255 motion on the merits, or in the alternative, dismissing it as time-barred. The R&R noted that this Court had not yet decided if Johnson applied to § 924(c), but it was not necessary to reach that issue because In re Smith, 829 F.3d 1276 (11th Cir. 2016) (per curiam), held that carjacking qualifies as a crime of violence under the use-of-force clause of § 924(c). The R&R also found that the § 2255 motion was untimely, because it was filed more than a year after Mr. Berry's convictions became final, and Johnson was not applicable to offer him an extended limitations period under § 2255(f)(3).¹ Mr. Berry did not object to the R&R.

¹ Pursuant to § 2255(f)(1), a one-year limitations period runs from the date on which the judgment of conviction became final. 28 U.S.C. § 2255(f)(1). Under § 2255(f)(3), the limitations period runs from the date on which the right asserted was initially recognized by the

The District Court then issued an order that adopted the R&R, dismissed the § 2255 motion, and denied a COA. Mr. Berry filed a notice of appeal, and a motion for leave to proceed IFP, which the District Court granted. He now seeks a COA from this Court.

II.

In order to obtain a COA, a § 2255 movant must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Under this standard, a petitioner must demonstrate that reasonable jurists would find the District Court’s assessment of the constitutional claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 483–84, 120 S. Ct. 1595, 1603–04 (2000).

In Johnson, the Supreme Court held the residual clause of the armed career criminal act (“ACCA”) was unconstitutionally vague. Johnson, 135 S. Ct. at 2557, 2563. The residual clause was contained within the ACCA definition of “violent felony” and codified under 18 U.S.C. § 924(e)(2)(B). Distinct from the provisions of § 924(e), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence. 18 U.S.C. § 924(c). “Crime of violence” is defined in § 924(c)(3).

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f)(3).

Mr. Berry's claim that his § 924(c) conviction is invalidated by Johnson is foreclosed by this Court's decision in In re Smith. In that case the Court assumed that Johnson could apply to a § 924(c) conviction, but nonetheless held that carjacking would still qualify as a crime of violence. In re Smith, 829 F.3d at 1280. The Court recognized that "[t]ak[ing] or attempt[ing] to take by force and violence or by intimidation," as used in § 2119, the statute of Mr. Berry's conviction, satisfies the use-of-force clause in § 924(c)(3)(A). Id. Thus, even if Mr. Berry could demonstrate that Johnson extended to a conviction under § 924(c), binding precedent from this Court prevents him from obtaining relief.

As such, Mr. Berry has not demonstrated that reasonable jurists would debate the District Court's dismissal of his § 2255 motion, and his motion for a COA is DENIED.


UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-22411-CIV-ALTONAGA/O'Sullivan

COREY DURAN BERRY,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

On June 23, 2016, Movant, Corey Duran Berry ("Berry"), filed a Motion to Correct Sentence Pursuant to 28 U.S.C. Section 2255 . . . ("Motion") [ECF No. 1]. Pursuant to 28 U.S.C. section 636(b)(1), Federal Rule of Civil Procedure 72, and the Magistrate Rules of the Local Rules of the Southern District of Florida, the Court referred the case to Magistrate Judge John J. O'Sullivan for a report and recommendation. (*See* Order . . . [ECF No. 3]). The case now comes before the Court on Judge O'Sullivan's January 10, 2017 Report and Recommendation ("Report") [ECF No. 10], recommending the Motion be dismissed, or in the alternative, denied.

When a magistrate judge's "disposition" has been objected to, district courts must review the disposition *de novo*. FED. R. CIV. P. 72(b)(3). When no party has timely objected, however, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72 advisory committee's notes (citation omitted). Although Rule 72 itself is silent on the standard of review, the Supreme Court has acknowledged Congress's intent was to only require a *de novo* review where objections have been properly filed, not when neither party objects. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not

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appear that Congress intended to require district court review of a magistrate[] [judge]'s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings." (alterations added)). To date, no objections have been received, and so the Court reviews the Report for clear error.

On February 18, 2014, Berry plead guilty to: (1) one count of attempted carjacking in violation of 18 U.S.C. section 2119; (2) one count of brandishing a firearm during a crime of violence, that is, the attempted carjacking, in violation of 18 U.S.C. section 924(c)(1)(A)(ii); and (3) carjacking in violation of 18 U.S.C. section 2119. (See Indictment [CR ECF No. 1] 1–2, in *United States v. Berry*, Case No. 13-CR-20857-CMA¹; Plea Agreement [CR ECF No. 26] ¶ 1). Relying on *Johnson v. United States*, 135 S. Ct. 2551 (2015), Berry seeks to vacate his conviction and sentence for brandishing a firearm during a crime of violence.

In *Johnson*, the United States Supreme Court considered the legality of a conviction under the so-called "residual clause" in 18 U.S.C. section 924(e)(2)(B) of the Armed Career Criminal Act's ("ACCA['s] or the "Act['s]") definition of "violent felony." The ACCA requires a 15-year mandatory minimum sentence on a defendant convicted of being a felon in possession of a firearm, who also has three previous convictions for a "violent felony" or "serious drug offense." See 18 U.S.C. § 924(e)(1). Under the Act, a "violent felony" is any crime punishable by more than a one-year term that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. § 924(e)(2)(B)(i); or "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," *id.* § 924(e)(2)(B)(ii).² In *Johnson*, the Supreme

¹ Further references to docket entries in the criminal case will be denoted as "CR ECF No."

² Section 924(e)(2)(B)(i) is known as the "elements clause," while the first and second parts of section 924(e)(2)(B)(ii) are known as the "enumerated clause" and the residual clause, respectively.

Court struck down the third part of this definition, the residual clause, as void for vagueness. *See* 135 S. Ct. at 2557–60, 2563.

Distinct from the ACCA, section 924(c) imposes a five-year mandatory consecutive sentence for any defendant who uses a firearm during a “crime of violence” or a “drug trafficking crime.” 18 U.S.C. § 924(c)(1)(A)(i). Under section 924(c)(3), a “crime of violence” means a felony offense 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.

18 U.S.C. § 924(c)(3)(A)–(B). Subsection (A) of section 924(c)(3) is known as the “use-of-force” or “elements” clause; subsection (B) is frequently referred to as the “residual clause.” *See, e.g., In re Sams*, 830 F.3d 1234, 1237 (11th Cir. 2016).

The Report correctly notes the Supreme Court stated *Johnson* applied to the ACCA’s residual clause only (*see* Report 3 (citing *Johnson*, 135 S. Ct. at 2563)), and Berry was convicted under section 924(c), not the ACCA (*see id.*). Although several courts have noted the similarities between the residual clause in section 924(c) and the ACCA, the Eleventh Circuit has not decided whether *Johnson* applies to section 924(c), calling the matter an “open question.” *In re Sams*, 830 F.3d at 1237; *see also In re Pinder*, 824 F.3d 977, 978 (11th Cir. 2016).

Here, it is unnecessary to reach the issue of *Johnson*’s applicability to section 924(c)’s residual clause since, as the Report determines, attempted federal carjacking qualifies as a crime of violence under the section’s use-of-force clause. (*See* Report 4–5); *see also United States v. Albertini*, 472 U.S. 675, 680 (1985) (stating courts must generally exercise judicial restraint and construe statutes “to avoid constitutional questions”).

To determine whether an offense qualifies as a crime of violence under section 924(c), courts use the “categorical approach” or “modified categorical approach.” *See United States v. McGuire*, 706 F.3d 1333, 1336–37 (11th Cir. 2013). The categorical approach is dictated by the text of section 924(c), which requires courts to consider whether the defendant committed an offense that “*has as an element* the use, attempted use, or threatened use of physical force” or “*by its nature* involves a substantial risk that physical force . . . may be used” 18 U.S.C. § 924(c)(3)(A)–(B) (emphasis and alterations added); *see also McGuire*, 706 F.3d at 1336–37; *Mathis v. United States*, 136 S. Ct. 2243, 2246 (“The underlying brute facts or means by which the defendant commits his crime . . . make no difference; even if the defendant’s conduct, in fact, fits within the definition of the generic offense, the mismatch of elements saves him from an ACCA sentence. [The] ACCA requires a sentencing judge to look only to the elements of the [offense], not to the facts of [the] defendant’s conduct” (citations and internal quotation marks omitted; ellipsis and first alteration added)). Thus, a defendant may be found guilty of a crime of violence under the use-of-force clause only if all the applications of the predicate statute require “the use, attempted use, or threatened use of physical force.” *See McGuire*, 706 F.3d at 1337.

Berry’s section 924(c) conviction is predicated on his conviction for attempted carjacking under the federal carjacking statute, which criminalizes the conduct of a person who “with intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so” 18 U.S.C. § 2119 (alteration added; footnote call number omitted). By requiring the taking to occur “by force and violence or intimidation,” *id.*, this crime clearly “has as an element the use, attempted use, or threatened use

of physical force against the person or property of another,” *Id.* § 924(c)(3)(A); *see also United States v. Moore*, 43 F.3d 568, 572 (11th Cir. 1995)³ (“The term ‘crime of violence’ as Congress defined it in 18 U.S.C. § 924(c)(3) clearly includes carjacking. ‘Tak[ing] or attempt[ing] to take by force and violence or by intimidation,’ . . . encompasses ‘the use, attempted use, or threatened use of physical force’” (first ellipsis added; alterations and second ellipsis in original) (quoting 18 U.S.C. § 2119, then quoting *id.* § 924(c)(3)(A))).

As the Report notes, the fact the taking may also occur “by intimidation” in the carjacking statute does not remove the offense from the category of “crime of violence.” (*See* Report 5–7). Section 924(c)(3)(A) states a “threatened use of physical force” is enough. 18 U.S.C. § 924(c)(3)(A). The fact Berry’s predicate conviction was for *attempted* carjacking (*see* Indictment 1; Plea Agreement ¶ 1), is also of no moment since section 924(c)(3)(A) states an “attempted use” of force may qualify a crime of violence, *see* 18 U.S.C. § 924(c)(3)(A).

Because Berry’s section 2119 conviction for attempted carjacking is a crime of violence under section 924(c)’s use-of-force clause, his section 924(c) conviction remains valid, even if *Johnson* applies to section 924(c)’s residual clause. Accordingly, the Report correctly finds Berry may not invoke *Johnson* to prolong his limitations period under 28 U.S.C. section 2255, and the Motion is untimely. (*See id.* 7–9, 7 n.2).

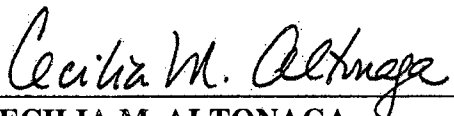
³ *Moore* was construing an earlier version of the federal carjacking statute, but the current version retains the “by force and violence or by intimidation” language. *See In re Smith*, 829 F.3d 1276, 1283 n.2 (11th Cir. 2016) (Jill Pryor, J., dissenting) (noting same). Although *Moore* does not state it follows the categorical approach, the court nevertheless looked only to the elements of the federal carjacking statute rather than the real-world facts of the particular case. This approach is explained by the fact *Moore* was deciding a double jeopardy question and, in that realm as with the categorical approach, “the proper focus is on the statutory elements of the two crimes.” *Moore*, 43 F.3d at 571 (citation omitted).

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The undersigned has reviewed the Report, record, and applicable law to assure herself no clear error appears on the face of the record. In light of that review, the undersigned agrees with the Report's analysis and recommendations. Accordingly, it is

ORDERED AND ADJUDGED that the Report [ECF No. 10] is **ACCEPTED AND ADOPTED**. Movant, Corey Duran Berry's Motion [ECF No. 1] is **DISMISSED**. The Clerk of the Court is directed to **CLOSE** this case, and all pending motions are **DENIED as moot**. No certificate of appealability shall issue.

DONE AND ORDERED in Miami, Florida this 28th day of February, 2017.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge John J. O'Sullivan;
counsel of record