

No.

In The Supreme Court Of The United States

Randy Ancheta, Eric Banks, Lance Grandberry, Cameron Muhlenberg, Vu Nguyen,
Tremayne Reeves, Quincy Stephens, and Lonnie Troy, III,

Petitioners,

v.

United States of America,

Respondent.

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

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RANDY MACARIO ANCHETA,

Defendant-Appellant.

No. 18-16414

D.C. Nos. 3:16-cv-00348-HDM

3:12-cr-00015-HDM-WGC-1

District of Nevada,

Reno

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on July 16, 2019 (Docket Entry No. 6), is lifted.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,	)	3:12-cr-00015-HDM-WGC
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
RANDY MACARIO ANCHETA,	)	
	)	
Defendant.	)	
	)	

Defendant filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence contending that his sentence should be vacated because the Hobbs Act robbery offense which served as a predicate for his 18 U.S.C. § 924(c) conviction no longer qualifies as a "crime of violence" in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015) (ECF Nos. 123, 128). This court denied defendant's motion on June 29, 2018 (ECF No. 142) based on the Ninth Circuit Court of Appeals' decision in *United States v. Howard*, 650 Fed.Appx. 466, 468 (9th Cir. 2016) wherein the court held that Hobbs Act robbery qualifies as a crime of violence under § 924(c). Defendant requests that this court issue a certificate of appealability.

The standard for issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows: "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must

1 demonstrate that reasonable jurists would find the district court's
2 assessment of the constitutional claims debatable or wrong." *Slack*
3 *v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221
4 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further
5 illuminated the standard for issuance of a certificate of
6 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The
7 Court stated in that case:

8 We do not require petitioner to prove, before the
9 issuance of a COA, that some jurists would grant the
10 petition for habeas corpus. Indeed, a claim can be
11 debatable even though every jurist of reason might
12 agree, after the COA has been granted and the case
13 has received full consideration, that petitioner
14 will not prevail. As we stated in *Slack*, "[w]here a
15 district court has rejected the constitutional
16 claims on the merits, the showing required to
17 satisfy § 2253(c) is straightforward: The petitioner
18 must demonstrate that reasonable jurists would find
19 the district court's assessment of the
20 constitutional claims debatable or wrong."

21 *Miller-El*, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

22 The court has considered the issues raised by defendant, with
23 respect to whether they satisfy the standard for issuance of a
24 certificate of appeal, and the court determines that none meet that
25 standard. The court therefore denies a certificate of
26 appealability in this case.

27 DATED: This 29th day of June, 2018.

28

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,) 3:12-cr-00015-HDM-WGC
)
Plaintiff,)
) ORDER
vs.)
)
RANDY MACARIO ANCHETA,)
)
Defendant.)
)
)

Defendant filed an abridged 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence and a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence contending that his sentence should be vacated because the Hobbs Act robbery offense which served as a predicate for his 18 U.S.C. § 924(c) conviction no longer qualifies as a “crime of violence” in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (ECF Nos. 123, 128). The government responded arguing, in part, that defendant’s motion should be denied because Hobbs Act robbery does qualify as a crime of violence (ECF No. 131).

The Ninth Circuit has held that Hobbs Act robbery “indisputably qualifies as a crime of violence” under § 924(c).

1 *United States v. Howard*, 650 Fed.Appx. 466, 468 (9th Cir. 2016)
2 (citing *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir.
3 1993)). Given the binding nature of the Ninth Circuit's ruling,
4 defendant's motions (ECF Nos. 123, 128) are **DENIED**. Because the
5 court's decision in this matter is dispositive, the court declines
6 to address the other arguments raised in the defendant's motion and
7 the government's response.

8 IT IS SO ORDERED.

9 DATED: This 29th day of June, 2018.

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12 UNITED STATES DISTRICT JUDGE
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 1 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC BANKS,

Defendant-Appellant.

No. 18-16085

D.C. Nos. 2:16-cv-01379-KJD

2:12-cr-00201-KJD-VCF-2

District of Nevada,
Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on December 3, 2018 (Docket Entry No. 8), is lifted.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

v.

ERIC BANKS,

Petitioner/Defendant.

Case No. 2:12-cr-00201-KJD-VCF

ORDER

Presently before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Criminal Convictions and Sentence Pursuant to 28 U.S.C. § 2255 (##62, 67). The Government filed a response (#70) to which Petitioner replied (#71).

I. Background

On May 14, 2013, Petitioner pled guilty to two counts of Hobbs Act robbery under 18 U.S.C. § 1951, and one count of use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). On August 21, 2013, Petitioner received a sentence of 121 months for the Hobbs Act robbery convictions, followed by an additional 84-months to run consecutively, for his 924(c) conviction. Petitioner had a total offense level of 29 and criminal history category of IV. Without the 924(c) enhancement, Petitioner would not have received the 84-month

consecutive sentence. Petitioner now seeks relief from his 924(c) enhancement, arguing he is no longer eligible for it based on a new, substantive rule retroactively applicable to cases on collateral review.

II. Analysis

A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of limitations for seeking habeas relief runs from “the date on which the right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and that he is entitled to relief.

A. Johnson v. United States Invalidates 18 U.S.C. § 924(c)(3)(B)

As an initial matter, this Court finds that Johnson, in light of Dimaya, holds 924(c)’s residual clause unconstitutional. On June 26, 2015, the United States Supreme Court decided Johnson v. United States, finding the residual clause of the Armed Career Criminal Act (“ACCA”) violates the Constitution’s guarantee of due process. See Johnson v. U.S., 135 S. Ct. 2551, 2557 (2015). On April 18, 2016, the Supreme Court held Johnson announced a new, substantive rule that has retroactive effect on cases on collateral review. See Welch v. U.S., 136 S. Ct. 1257, 1268 (2016). On June 17, 2016, within the one-year statute of limitations, Petitioner filed the present motion based on the new, retroactively applicable rule announced in Johnson.

On April 17, 2018, the United States Supreme Court decided Sessions v. Dimaya, No. 15–1498, slip op. (Apr. 17, 2018), finding the residual clause of 18 U.S.C. § 16(b) to be unconstitutionally vague. The Supreme Court did so by expanding the logic of Johnson, stating §16’s residual clause violates the Constitution’s guarantee of due process in the same way the

1 ACCA’s residual clause did. Dimaya, No. 151498, slip op., at 8–9. Based on the Court’s
 2 willingness to expand the reach of Johnson to § 16(b) because it too shares the same fatal
 3 features the ACCA’s residual clause possesses, it follows that Johnson must logically apply to
 4 924(c), to invalidate its identical residual clause.

5 *B. Johnson Does Not Entitle Petitioner to Relief*

6 Petitioner argues that in light of Johnson and the chain of precedent that flows from it, his
 7 Hobbs Act robbery conviction may no longer be considered a predicate “crime of violence”
 8 warranting an enhancement under 924(c). While the Supreme Court has made clear that the
 9 924(c)(3)(B) residual clause is seemingly unconstitutional, Johnson and its progeny have no
 10 effect on Petitioner’s conviction because Hobbs Act robbery is decidedly a crime of violence
 11 under the constitutional 924(c)(3)(A) force clause. On May 23, 2016, the Ninth Circuit decided
 12 Howard v. United States, 650 Fed. Appx. 466 (9th Cir. May 23, 2016, amended Jun. 24, 2016)
 13 (unpublished),¹ holding Hobbs Act robbery is a crime of violence under the constitutional force
 14 clause of 924(c)(3)(A). There, like Petitioner here, the defendant argued Hobbs Act robbery
 15 could be committed by “fear of injury,” thus making it not a categorical match for the
 16 924(c)(3)(A) force clause. However, the Ninth Circuit held this argument was “unpersuasive
 17 and . . . foreclosed by” the court’s previous published decision in United States v. Selfa, 918 F.2d
 18 849 (9th Cir. 1990).

19 Thus, Petitioner’s Hobbs Act robbery conviction is unquestionably a qualifying crime of
 20

21
 22 ¹ While Howard was not chosen for publication, it is of note because it was decided after Johnson. Thus, it
 23 validates the previous logic of Ninth Circuit decisions issued prior to Johnson, finding Hobbs Act robbery qualifies as
 24 a crime of violence under the constitutional 924(c)(3)(A) force clause. Additionally, many courts throughout the
 district have found Howard persuasive and held Hobbs Act Robbery qualifies as a crime of violence. See, e.g., U.S.
v. Ali, 2017 WL 3319115 (D. Nev. Aug. 3, 2017); U.S. v. Stain, 2017 WL 2974951 (D. Nev. July 12, 2017); U.S. v.
Mendoza, 2017 WL 2200912 (D. Nev. May 19, 2017); U.S. v. Hayes, 2017 WL 58578 (D. Nev. Jan 5, 2017); U.S. v.
Loper, 2016 WL 4528959 (D. Nev. Aug. 29, 2016); U.S. v. Barrows, 2016 WL 4010023 (D. Nev. July 25, 2016).

1 violence. As such, his previously-imposed sentence including the enhancement under 924(c)
2 must stand.

3 *C. Certificate of Appealability*

4 In order for Petitioner to assert a right to appeal this final order, he must first warrant a
5 certificate of appealability. 28 U.S.C. §2253(b), (c)(1). To do so, Petitioner must make “a
6 substantial showing of the denial of a constitutional right,” and “must demonstrate that
7 reasonable jurists would find the district court’s assessment of the constitutional claims debatable
8 or wrong.” Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). Petitioner has not demonstrated a
9 substantial showing of the denial of a constitutional right, and reasonable jurists would not
10 debate that Petitioner’s motion lacks merit. Thus, this Court denies Petitioner a certificate of
11 appealability.

12 III. Conclusion

13 Accordingly, IT IS HEREBY ORDERED that Petitioner’s Motion to Vacate, Set Aside,
14 or Correct Criminal Convictions and Sentence Pursuant to 28 U.S.C. § 2255 (##62, 67) is
15 **DENIED.**

16 Dated this 14th day of May, 2018.

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19 _____
Kent J. Dawson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 1 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LANCE GRANDBERRY,

Defendant-Appellant.

No. 19-17280

D.C. Nos. 2:16-cv-01389-JCM

2:07-cr-00060-JCM-VC-1

District of Nevada,

Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff(s),

v.

LANCE GRANDBERRY, et al.,

Defendant(s).

Case No. 2:07-CR-60 JCM (VCF)

ORDER

Presently before the court is petitioner Lance Grandberry's abridged motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 167).

Also before the court is petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF No. 171). The government filed a response (ECF No. 177), to which petitioner replied (ECF No. 178). Per the court's order lifting the stay on this case and allowing supplemental briefing (ECF No. 186), the government has also filed a supplemental brief with respect to petitioner's motion to vacate, set aside, or correct sentence (ECF No. 187). Petitioner filed a response to the supplemental brief (ECF No. 189), to which the government replied (ECF No. 190).

I. Background

On January 14, 2008, petitioner pleaded guilty to one count of interference with commerce by robbery (18 U.S.C. § 1951) ("Hobbs Act robbery") and one count of discharging a firearm in the course of a robbery affecting interstate commerce (18 U.S.C. § 924(c)). (ECF No. 66).

On April 21, 2008, the court sentenced petitioner to ninety-six (96) months imprisonment for the Hobbs Act robbery conviction. (ECF No. 82). The court also sentenced petitioner to one hundred twenty (120) months imprisonment for the § 924(c) conviction, to run consecutively. *Id.*

1 This resulted in a combined imprisonment term of two hundred sixteen (216) months. *Id.* The
 2 court entered judgment on April 24, 2018. (ECF No. 84). Petitioner did not appeal the judgment.

3 In the instant motions, petitioner moves to vacate his conviction pursuant to *Johnson v.*
 4 *United States*, 135 S. Ct. 2551 (2015) (“*Johnson*”). (ECF No. 171). Petitioner also requests that
 5 the court immediately release him.¹ *Id.*

6 **II. Legal Standard**

7 Federal prisoners “may move . . . to vacate, set aside or correct [their] sentence” if the court
 8 imposed the sentence “in violation of the Constitution or laws of the United States . . .” 28 U.S.C.
 9 § 2255(a). Relief pursuant to § 2255 should be granted only where “a fundamental defect” caused
 10 “a complete miscarriage of justice.” *Davis v. United States*, 417 U.S. 333, 345 (1974); *see also*
 11 *Hill v. United States*, 368 U.S. 424, 428 (1962).

12 Limitations on § 2255 motions are based on the fact that the movant “already has had a fair
 13 opportunity to present his federal claims to a federal forum,” whether or not he took advantage of
 14 the opportunity. *United States v. Frady*, 456 U.S. 152, 164 (1982). § 2255 “is not designed to
 15 provide criminal defendants multiple opportunities to challenge their sentence.” *United States v.*
 16 *Johnson*, 988 F.2d 941, 945 (9th Cir. 1993).

17 **III. Discussion**

18 In the instant motion, petitioner requests that the court vacate his allegedly erroneous
 19 convictions pursuant to *Johnson*. (ECF No. 171). In particular, petitioner argues that the § 924(c)
 20 conviction violates the Constitution’s guarantee of due process. *Id.*

21 In *Johnson*, the United States Supreme Court held that the residual clause in the definition
 22 of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)
 23 (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines “violent felony”
 24 as any crime punishable by imprisonment for a term exceeding one year, that:

25 (i) has as an element the use, attempted use, or threatened use of physical force
 26 against the person of another; or

27
 28 ¹ As an alternative, petitioner requests release pending resolution of the instant motion.
 (ECF No. 171).

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The emphasized portion above is known as the ACCA’s “residual clause.” *Johnson*, 135 S. Ct. at 2555–56. The Court held that “increasing a defendant’s sentence under the clause denies due process of law.” *Id.* at 2557.

Petitioner asserts that his conviction is not subject to the provisions of § 924(c)(3) because his underlying conviction (Hobbs Act robbery) does not constitute a “crime of violence.” (ECF No. 171). Petitioner argues that his sentence is unconstitutional under *Johnson* because *Johnson*’s holding applies equally to the residual clause in § 924(c). *Id.* Further, petitioner asserts that Hobbs Act robbery cannot constitute a crime of violence without relying on the residual clause. *Id.* The court disagrees.

Subsection (3) of § 924(c) defines the term “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).

Petitioner argues that Hobbs Act robbery cannot categorically fall under the force clause of § 924(c)(3)(A) because “Hobbs Act robbery . . . can be accomplished through acts that do not require the use, attempted use or threatened use of ‘violent force.’” (ECF No. 171).

Prior to the Supreme Court’s holding in *Johnson*, the Ninth Circuit held that Hobbs Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993). Petitioner asks the court to revisit this question in light of *Johnson*.

In 2016, the Ninth Circuit was confronted with essentially the same argument that petitioner raises here, that “because Hobbs Act robbery may also be accomplished by putting

1 someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not necessarily involve ‘the use, attempted
 2 use, or threatened use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” *United States v. Howard*, 650
 3 Fed App’x. 466, 468 (9th Cir. 2016). The court held that Hobbs Act robbery nonetheless qualified
 4 as a crime of violence under the force clause:

5 [Petitioner’s] arguments are unpersuasive and are foreclosed by
 6 *United States v. Selfa*, 918 F.2d 749 (9th Cir. 1990). In *Selfa*, we
 7 held that the analogous federal bank robbery statute, which may be
 8 violated by “force and violence, or by *intimidation*,” 18 U.S.C. §
 9 2113(a) (emphasis added), qualifies as a crime of violence under
 10 U.S.S.G. § 4B1.2, which uses the nearly identical definition of
 11 “crime of violence” as § 924(c). *Selfa*, 918 F.2d at 751. We
 12 explained that “intimidation” means willfully “to take, or attempt to
 13 take, in such a way that would put an ordinary, reasonable person *in*
fear of bodily harm,” which satisfies the requirement of a
 14 “threatened use of physical force” under § 4B1.2. *Id.* (emphasis
 15 added) (quoting *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th
 16 Cir. 1983)). Because bank robbery by “intimidation”—which is
 17 defined as instilling fear of injury—qualifies as a crime of violence,
 18 Hobbs Act robbery by means of “fear of injury” also qualifies as [a]
 19 crime of violence.

20 *Id.*

21 Since *Howard*, at least two courts in this district have found that “Hobbs Act robbery is
 22 categorically a crime of violence under the force clause.” *United States v. Mendoza*, no. 2:16-cr-
 23 00324-LRH-GWF, 2017 WL 2200912, at *2 (D. Nev. May 19, 2017); *see also United States v.*
 24 *Barrows*, no. 2:13-cr-00185-MMD-VCF, 2016 WL 4010023 (D. Nev. July 25, 2016).

25 The court holds that Hobbs Act robbery constitutes a crime of violence under § 924(c)(3)’s
 26 force clause. Under the elements set forth in the language of § 1951, petitioner’s underlying felony
 27 offense (Hobbs Act robbery) is a “crime of violence” because the offense has, “as an element the
 28 use, attempted use, or threatened use of physical force against the person or property of another.”
 18 U.S.C. § 924(c)(3)(A); *see Mendoza*, 2017 WL 2200912, at *2. Therefore, *Johnson* is
 inapplicable here because petitioner’s sentence does not rest on the residual clause of § 924(c).
 Petitioner’s argument, relying primarily on *United States v. Torres-Miguel*, 701 F.3d 165, 167–
 169 (4th Cir. 2012), is unpersuasive. (ECF No. 171 at 16–19).

1 In light of the foregoing, petitioner has failed to show that his sentence violates the
 2 Constitution or laws of the United States under *Johnson* or otherwise. Accordingly, the court will
 3 deny petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

4 **IV. Certificate of appealability**

5 The court declines to issue a certificate of appealability. The controlling statute in
 6 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as
 7 follows:

8 (a) In a habeas corpus proceeding or a proceeding under section
 9 2255 before a district judge, the final order shall be subject to
 10 review, on appeal, by the court of appeals for the circuit in which
 11 the proceeding is held.

12 (b) There shall be no right of appeal from a final order in a
 13 proceeding to test the validity of a warrant to remove to another
 14 district or place for commitment or trial a person charged with a
 15 criminal offense against the United States, or to test the validity of
 16 such person's detention pending removal proceedings.

17 (c)

18 (1) Unless a circuit justice or judge issues a certificate of
 19 appealability, an appeal may not be taken to the court of appeals
 20 from—

21 (A) the final order in a habeas corpus proceeding in which
 22 the detention complained of arises out of process issued by
 23 a State court; or

24 (B) the final order in a proceeding under section 2255.

25 (2) A certificate of appealability may issue under paragraph (1) only
 26 if the applicant has made a substantial showing of the denial of a
 27 constitutional right.

28 (3) The certificate of appealability under paragraph (1) shall indicate
 which specific issue or issues satisfy the showing required by
 paragraph (2).

28 U.S.C. § 2253.

Under § 2253, the court may issue a certificate of appealability only when a movant makes
 a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a

1 substantial showing, the movant must establish that “reasonable jurists could debate whether (or,
2 for that matter, agree that) the petition should have been resolved in a different manner or that the
3 issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v.*
4 *McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted).

5 The court finds that petitioner has not made the required substantial showing of the denial
6 of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists
7 would not find the court’s determination that movant is not entitled to relief under § 2255
8 debatable, wrong, or deserving of encouragement to proceed further. *See id.* Accordingly, the
9 court declines to issue a certificate of appealability.

10 **V. Conclusion**

11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that petitioner’s abridged
13 motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 167) be,
14 and the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that petitioner’s motion to vacate, set aside, or correct
16 sentence pursuant to 28 U.S.C. § 2255 (ECF No. 171) be, and the same hereby is, DENIED.

17 DATED September 10, 2019.

18 
19 UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CAMERON MUHLENBERG,

Defendant-Appellant.

No. 18-16415

D.C. Nos. 3:17-cv-00558-HDM

3:12-cr-00015-HDM-WGC-2

District of Nevada,

Reno

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on July 16, 2019 (Docket Entry No. 6), is lifted.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES OF AMERICA,) 3:12-cr-00015-HDM-WGC
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Plaintiff,)
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vs.) ORDER
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CAMERON MUHLENBERG,)
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Defendant.)
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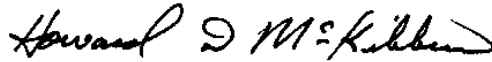
1 demonstrate that reasonable jurists would find the district court's
2 assessment of the constitutional claims debatable or wrong." *Slack*
3 *v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v. Giles*, 221
4 F.3d 1074, 1077-79 (9th Cir. 2000). The Supreme Court further
5 illuminated the standard for issuance of a certificate of
6 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The
7 Court stated in that case:

8 We do not require petitioner to prove, before the
9 issuance of a COA, that some jurists would grant the
10 petition for habeas corpus. Indeed, a claim can be
11 debatable even though every jurist of reason might
12 agree, after the COA has been granted and the case
13 has received full consideration, that petitioner
14 will not prevail. As we stated in *Slack*, "[w]here a
15 district court has rejected the constitutional
16 claims on the merits, the showing required to
17 satisfy § 2253(c) is straightforward: The petitioner
18 must demonstrate that reasonable jurists would find
19 the district court's assessment of the
20 constitutional claims debatable or wrong."

21 *Miller-El*, 123 S.Ct. at 1040 (quoting *Slack*, 529 U.S. at 484).

22 The court has considered the issues raised by defendant, with
23 respect to whether they satisfy the standard for issuance of a
24 certificate of appeal, and the court determines that none meet that
25 standard. The court therefore denies a certificate of
26 appealability in this case.

27 DATED: This 29th day of June, 2018.

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UNITED STATES DISTRICT JUDGE

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,	)	3:12-cr-00015-HDM-WGC
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
CAMERON MUHLENBERG,	)	
	)	
Defendant.	)	
	)	
_____	)	

Defendant filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence contending that his sentence should be vacated because the Hobbs Act robbery offense which served as a predicate for his 18 U.S.C. § 924(c) conviction no longer qualifies as a "crime of violence" in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) (ECF No. 135). The government responded arguing, in part, that defendant's motion should be denied because Hobbs Act robbery does qualify as a crime of violence (ECF No. 138).

The Ninth Circuit has held that Hobbs Act robbery "indisputably qualifies as a crime of violence" under § 924(c). *United States v. Howard*, 650 Fed.Appx. 466, 468 (9th Cir. 2016)

1 (citing *United States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir.
2 1993)). Given the binding nature of the Ninth Circuit's ruling,
3 defendant's motion (ECF No. 135) is **DENIED**. Because the court's
4 decision in this matter is dispositive, the court declines to
5 address the other arguments raised in the defendant's motion and
6 the government's response.

7 IT IS SO ORDERED.

8 DATED: This 29th day of June, 2018.

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10 UNITED STATES DISTRICT JUDGE
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 1 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VU NGUYEN,

Defendant-Appellant.

No. 20-16054

D.C. Nos. 2:17-cv-00740-KJD

2:03-cr-00158-KJD-PAL

District of Nevada,
Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

VU NGUYEN,

Defendant.

Case No. 2:03-cr-0158-KJD-PAL
2:17-cv-0740-KJD

ORDER

Presently before the Court is Petitioner Vu Nguyen's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#244/257). The Government filed responses in opposition and supplements (#246/252/258) to which Petitioner replied (#248/253/259).

I. Background

Nguyen was found guilty after a jury trial to a three crimes: (1) Count One -- Conspiracy to interfere with commerce; (2) Count Two -- Interference with commerce by robbery (Hobbs Act Robbery); and (3) Count Three -- carrying and use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference with commerce by robbery charged in Count Two of the superceding indictment. This Court sentenced Nguyen to sixty (60) months imprisonment on Count One; sixty-three (63) months on Count 2; and two hundred and ninety-three (293) months of imprisonment on Count 3, to be served consecutively to Counts One and Two, followed by five years of supervised release. In the instant motion, Nguyen moves to vacate his § 924(c) conviction and sentence pursuant to Johnson v. United States, 135 S. Ct. 2551 (2015) and United States v. Davis, 139 S. Ct. 2319, 2336 (2019) , and requests that the court vacate his conviction.

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1 II. Analysis

2 A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was
3 imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief
4 pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of
5 limitations for seeking habeas relief runs from “the date on which the right asserted was initially
6 recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of
7 demonstrating that his petition is timely and that he is entitled to relief.

8 In Johnson, the United States Supreme Court held that the residual clause in the
9 definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §
10 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines
11 “violent felony” as any crime punishable by imprisonment for a term exceeding one year, that:
12 (i) has as an element the use, attempted use, or threatened use of physical force against the
13 person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise
14 involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C. §
15 924(e)(2)(B). Subsection (ii) above is known as the ACCA’s “residual clause.” Johnson, 135 S.
16 Ct. at 2555-56. The Supreme Court held that “increasing a defendant’s sentence under the clause
17 denies due process of law.” *Id.* at 2557.

18 Nguyen was not, however, sentenced pursuant to ACCA. Rather, he was convicted of
19 violating 18 U.S.C. § 924(c) for carrying and use of a firearm during and in relation to a crime of
20 violence. Section 924(c)(3) provides:

21 the term “crime of violence” means an offense that is a felony and—

22 (A) has as an element the use, attempted use, or threatened use of
23 physical force against the person or property of another, or

24 (B) that by its nature, involves a substantial risk that physical force
25 against the person or property of another may be used in the course
of committing the offense.

26 As with the ACCA, subsection (A) is referred to as the force or elements clause while subsection
27 (B) is referenced as the residual clause. Nguyen argues that Johnson is equally applicable to §
28 924(c) cases and that his instant motion is timely as it was filed within one year of Johnson. The

1 Ninth Circuit, however, subsequently held to the contrary. When Nguyen filed his present
 2 motion, “[t]he Supreme Court [had] not recognized that § 924(c)’s residual clause is void for
 3 vagueness in violation of the Fifth Amendment.” United States v. Blackstone, 903 F.3d 1020,
 4 1028 (9th Cir. 2018). As indicated by the Ninth Circuit, “[t]he Supreme Court may hold in the
 5 future that Johnson extends to sentences imposed ... pursuant to 18 U.S.C. § 924(c), but until
 6 then [defendant’s] motion is untimely.” Id. Accordingly, Nguyen’s motion (#241) was premature
 7 when it was filed.

8 The Supreme Court has, however, subsequently applied the principles first outlined in
 9 Johnson to the residual clause of § 924(c), holding “that § 924(c)(3)(B) is unconstitutionally
 10 vague.” Davis, 139 S. Ct. at 2336. Accordingly, while Nguyen’s motion was premature when it
 11 was filed, the Court will now consider the motion as timely given the Supreme Court’s decision
 12 in Davis, extending the principles of Johnson to § 924(c), and will treat the motion as if filed
 13 seeking relief pursuant to Davis. Further, Defendant received permission from the Court of
 14 Appeals to file this second or successive § 2255 motion (#243).

15 A. Hobbs Act Robbery

16 Nguyen asserts that his conviction is not subject to the provisions of § 924(c)(3) because
 17 the crime (Hobbs Act Robbery) underlying his 924(c) conviction does not constitute a “crime of
 18 violence.” He argues that his § 924(c) conviction and sentence is unconstitutional under Davis
 19 because a Hobbs Act Robbery cannot constitute a crime of violence without relying on the
 20 unconstitutional residual clause. The court disagrees.

21 Nguyen argues that a Hobbs Act Robbery cannot categorically fall under the force or
 22 elements clause of § 924(c)(3)(A) because a Hobbs Act Robbery can be committed by any
 23 amount of force necessary to accomplish the taking, it does not necessarily require the use of
 24 violent force. Prior to the Supreme Court’s holding in Davis, the Ninth Circuit held that Hobbs
 25 Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). United States v.
 26 Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was confronted with
 27 essentially the same argument that Nguyen raises here, that “because Hobbs Act Robbery may
 28 also be accomplished by putting someone in ‘fear of injury,’ 18 U.S.C. § 1951(b), it does not

necessarily involve ‘the use, attempted use, or threatened use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” United States v. Howard, 650 Fed App’x. 466, 468 (9th Cir. 2016). The Ninth Circuit held that Hobbs Act Robbery nonetheless qualified as a crime of violence under the force clause:

[Petitioner’s] arguments are unpersuasive and are foreclosed by United States v. Selfa, 918 F.2d 749 (9th Cir. 1990). In Selfa, we held that the analogous federal bank robbery statute, which may be violated by “force and violence, or by intimidation,” 18 U.S.C. § 2113(a) (emphasis added), qualifies as a crime of violence under U.S.S.G. § 4B1.2, which uses the nearly identical definition of “crime of violence” as § 924(c). Selfa, 918 F.2d at 751. We explained that “intimidation” means willfully “to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm,” which satisfies the requirement of a “threatened use of physical force” under § 4B1.2. Id. (quoting United States v. Hopkins, 703 F.2d 1102, 1103 (9th Cir. 1983)). Because bank robbery by “intimidation”—which is defined as instilling fear of injury—qualifies as a crime of violence, Hobbs Act robbery by means of “fear of injury” also qualifies as [a] crime of violence.

Id.

The Court holds that a Hobbs Act Robbery constitutes a crime of violence under § 924(c)(3)’s force clause. Under the elements set forth in the language of § 1951, Nguyen’s underlying felony offense (Hobbs Act Robbery) is a “crime of violence” because the offense has, “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A); see also United States v. Jay, 705 F. App’x 587 (9th Cir. 2017) (*unpublished*) (finding Hobbs Act Robbery a crime of violence). Davis is inapplicable here because Nguyen’s conviction and sentence do not rest on the residual clause of § 924(c). The Court sees no reason to depart from the well-reasoned cases of nine other circuit courts of appeals that have found Hobbs Act Robbery to be a crime of violence after Johnson. See United States v. Garcia-Ortiz, 904 F.3d 102, 106 (1st Cir. 2018); United States v. Hill, 890 F.3d 51, 60 (2d Cir. 2018); United States v. Mathis, 932 F.3d 242, 265-67 (4th Cir. 2019); United States v. Buck, 847 F.3d 267, 274–75 (5th Cir. 2017); United States v. Gooch, 850 F.3d 285, 292 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States v. Nguyen, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Melgar-Cabrera, 892 F.3d

1 1053, 1064-6 (10th Cir. 2018); In re Pollard, 931 F.3d 1318 (11th Cir. 2019).

2 As the Supreme Court found in Stokeling v. United States, 139 S. Ct. 544, 553 (2019),
 3 “Robbery . . . has always been within the category of violent, active crimes” that merit enhanced
 4 penalties under statutes like 924(c). As stated by the Supreme Court “Congress made clear that
 5 the ‘force’ required for common-law robbery would be sufficient to justify an enhanced
 6 sentence.” Id. at 551. Like the statute in Florida, Hobbs Act Robbery is “defined as common-law
 7 robbery.” United States v. Melgar-Cabrera, 892 F.3d 1053, 1064. Section 924(c) includes crimes
 8 that involve “physical force.” 18 U.S.C. § 924(c)(3)(A). Stokeling forecloses Petitioner’s
 9 argument that the “force” required for Hobbs Act Robbery does not meet the standard set by 18
 10 U.S.C. § 924(c)(3)(A).

11 Defendant argues that Hobbs Act Robbery fails to constitute a crime of violence under
 12 the elements clause because it does not categorically require the use of intentional force against
 13 the person or property of another, but instead, can be committed by causing fear of future injury
 14 to property, tangible or intangible. However, “[a] defendant cannot put a reasonable person in
 15 fear” of injury to their person or property without “threatening to use force.” United States v.
 16 Gutierrez, 876 F.3d 1254, 1257 (9th Cir. 2017). “[Robbery] by intimidation thus requires at least
 17 an implicit threat to use the type of violent physical force necessary” to satisfy the requirements
 18 of the elements clause. Id.; see also Estell v. United States, 924 F.3d 1291, 1293 (8th Cir. 2019)
 19 (bank robbery by intimidation requires threatened use of force causing bodily harm). Like the
 20 court in Mathis, this Court sees no reason to discern any basis in the text of elements clause for
 21 creating a distinction between threats of injury to tangible and intangible property for the
 22 purposes of defining a crime of violence. 932 F.3d at 266. Therefore, Hobbs Act Robbery
 23 constitutes a crime of violence under the elements clause of Section 924(c).

24 III. Certificate of Appealability

25 To appeal this order, Nguyen must receive a certificate of appealability. 28 U.S.C. §
 26 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1 (a). To obtain that certificate, he “must
 27 make a substantial showing of the denial of a constitutional right, a demonstration that ...
 28 includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the

1 petition should have been resolved in a different manner or that the issues presented were
2 adequate to deserve encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483-
3 84 (2000) (quotation omitted). This standard is “lenient.” Hayward v. Marshall, 603 F.3d 546,
4 553 (9th Cir. 2010) (en banc). Given the cold-blooded murder of the security guard in this case,
5 whose back was turned as he washed windows, the Court cannot find that other reasonable jurists
6 would find it debatable that the Court's determination that Hobbs Act Robbery is a crime of
7 violence pursuant to the force clause of § 924(c) is wrong. Accordingly, the court denies
8 Defendant a certificate of appealability.

9 IV. Conclusion

10 Accordingly, IT IS HEREBY ORDERED that Petitioner Vu Nguyen’s Motion to Vacate,
11 Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (#244/257) is **DENIED**;

12 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for
13 Respondent and against Petitioner in the corresponding civil action, 2:17-cv-0740-KJD, and
14 close that case,

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

16 DATED this 31st day of March 2020.

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19 Kent J. Dawson
20 United States District Judge
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 1 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TREMAYNE REEVES, AKA Fremayne
Reeves,

Defendant-Appellant.

No. 18-16086

D.C. Nos. 2:16-cv-01380-KJD
2:12-cr-00201-KJD-VCF-1

District of Nevada,
Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on December 3, 2018 (Docket Entry No. 7), is lifted.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Respondent/Plaintiff,

v.

TREMAYNE REEVES,

Petitioner/Defendant.

Case No. 2:12-cr-00201-KJD-VCF

ORDER

Presently before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Criminal Convictions and Sentence Pursuant to 28 U.S.C. § 2255 (##64, 66). The Government filed a response (#72) to which Petitioner replied (#73).

I. Background

On May 14, 2013, Petitioner pled guilty to three counts of Hobbs Act robbery under 18 U.S.C. § 1951, and one count of use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). Petitioner had a total offense level of 29 and criminal history category of IV, with a corresponding guideline range of 121–151 months, followed by an additional 84-month consecutive sentence, due to the 924(c) sentence enhancement. Without the 924(c) enhancement, Petitioner would have had a total offense level of 29 and criminal history category

of IV, with a corresponding guideline range of 121–151 months, but no additional 84-month consecutive sentence. Petitioner seeks relief from his sentencing enhancement imposed under 924(c), arguing he is no longer eligible for it based on a new, substantive rule retroactively applicable to cases on collateral review.

II. Analysis

A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks relief pursuant to a right recognized by a United States Supreme Court decision, a one-year statute of limitations for seeking habeas relief runs from “the date on which the right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The petitioner bears the burden of demonstrating that his petition is timely and that he is entitled to relief.

A. Johnson v. United States Invalidates 18 U.S.C. § 924(c)(3)(B)

As an initial matter, this Court finds that Johnson, in light of Dimaya, holds 924(c)’s residual clause unconstitutional. On June 26, 2015, the United States Supreme Court decided Johnson v. United States, finding the residual clause of the Armed Career Criminal Act (“ACCA”) violates the Constitution’s guarantee of due process. See Johnson v. U.S., 135 S. Ct. 2551, 2557 (2015). On April 18, 2016, the Supreme Court held Johnson announced a new, substantive rule that has retroactive effect on cases on collateral review. See Welch v. U.S., 136 S. Ct. 1257, 1268 (2016). On June 17, 2016, within the one-year statute of limitations, Petitioner filed the present motion based on the new, retroactively applicable rule announced in Johnson.

On April 17, 2018, the United States Supreme Court decided Sessions v. Dimaya, No. 15–1498, slip op. (Apr. 17, 2018), finding the residual clause of 18 U.S.C. § 16(b) to be unconstitutionally vague. The Supreme Court did so by expanding the logic of Johnson, stating

§16's residual clause violates the Constitution's guarantee of due process in the same way the ACCA's residual clause did. Dimaya, No. 151498, slip op., at 8–9. Based on the Court's willingness to expand the reach of Johnson to § 16(b) because it too shares the same fatal features the ACCA's residual clause possesses, it follows that Johnson must logically apply to 924(c), to invalidate its identical residual clause.

B. Johnson Does Not Entitle Petitioner to Relief

Petitioner argues that in light of Johnson and the chain of precedent that flows from it, his Hobbs Act robbery conviction may no longer be considered a predicate “crime of violence” warranting an enhancement under 924(c). While the Supreme Court has made clear that the 924(c)(3)(B) residual clause is seemingly unconstitutional, Johnson and its progeny have no effect on Petitioner's conviction because Hobbs Act robbery is decidedly a crime of violence under the constitutional 924(c)(3)(A) force clause. On May 23, 2016, the Ninth Circuit decided Howard v. United States, 650 Fed. Appx. 466 (9th Cir. May 23, 2016, amended Jun. 24, 2016) (unpublished),¹ holding Hobbs Act robbery is a crime of violence under the constitutional force clause of 924(c)(3)(A). There, like Petitioner here, the defendant argued Hobbs Act robbery could be committed by “fear of injury,” thus making it not a categorical match for the 924(c)(3)(A) force clause. However, the Ninth Circuit held this argument was “unpersuasive and . . . foreclosed by” the court's previous published decision in United States v. Selfa, 918 F.2d 849 (9th Cir. 1990).

¹ While Howard was not chosen for publication, it is of note because it was decided after Johnson. Thus, it validates the previous logic of Ninth Circuit decisions issued prior to Johnson, finding Hobbs Act robbery qualifies as a crime of violence under the constitutional 924(c)(3)(A) force clause. Additionally, many courts throughout the district have found Howard persuasive and held Hobbs Act Robbery qualifies as a crime of violence. See, e.g., U.S. v. Ali, 2017 WL 3319115 (D. Nev. Aug. 3, 2017); U.S. v. Stain, 2017 WL 2974951 (D. Nev. July 12, 2017); U.S. v. Mendoza, 2017 WL 2200912 (D. Nev. May 19, 2017); U.S. v. Hayes, 2017 WL 58578 (D. Nev. Jan 5, 2017); U.S. v. Loper, 2016 WL 4528959 (D. Nev. Aug. 29, 2016); U.S. v. Barrows, 2016 WL 4010023 (D. Nev. July 25, 2016).

1 Thus, Petitioner's Hobbs Act robbery conviction is unquestionably a qualifying crime of
2 violence. As such, his previously-imposed sentence including the enhancement under 924(c)
3 must stand.

4 *C. Certificate of Appealability*

5 In order for Petitioner to assert a right to appeal this final order, he must first warrant a
6 certificate of appealability. 28 U.S.C. §2253(b), (c)(1). To do so, Petitioner must make "a
7 substantial showing of the denial of a constitutional right," and "must demonstrate that
8 reasonable jurists would find the district court's assessment of the constitutional claims debatable
9 or wrong." Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). Petitioner has not demonstrated a
10 substantial showing of the denial of a constitutional right, and reasonable jurists would not
11 debate that Petitioner's motion lacks merit. Thus, this Court denies Petitioner a certificate of
12 appealability.

13 III. Conclusion

14 Accordingly, IT IS HEREBY ORDERED that Petitioner's Motion to Vacate, Set Aside,
15 or Correct Criminal Convictions and Sentence Pursuant to 28 U.S.C. § 2255 (##64, 66) is
16 **DENIED.**

17 Dated this 14th day of May, 2018.

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20 Kent J. Dawson
21 United States District Judge
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QUINCY STEPHENS,

Defendant-Appellant.

No. 20-15706

D.C. Nos. 2:16-cv-01452-LDG

2:13-cr-00351-LDG-VCF-1

District of Nevada,
Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 QUINCY STEPHENS,

14 Defendant.
15

Case No. 2:13-cr-00351-LDG (VCF)

ORDER

16 Presently before the court is defendant Quincy Stephens' motion to vacate, set
17 aside, or correct sentence pursuant to 28 U.S.C. § 2255. (ECF Nos. 46, 47). The
18 government filed a response (ECF No. 49), to which Stephens replied (ECF No. 51).

19 I. Background

20 Stephens pled guilty to five counts of interference with commerce by robbery
21 ("Hobbs Act robbery") under 18 U.S.C. § 1951, as charged in Counts 1, 3, 5, 7, and 9 of
22 the indictment. He also pled guilty to a single count of carrying and use of a firearm during
23 and in relation to a crime of violence under 18 U.S.C. § 924(c), specifically the interference
24 with commerce by robbery charged in Count 9 of the indictment. This Court sentenced
25 Stephens to 67 months of imprisonment as to each of the Hobbs Act robbery convictions,
26 to be served concurrently. The Court also found that, as to Stephens' conviction in Count

1 10 for violating §924(c) by carrying and use of a firearm during and in relation to a crime of
 2 violence, his conviction on Count 9 for the Hobbs Act robbery qualified as a “crime of
 3 violence.” Accordingly, the Court imposed an 84-month term of imprisonment as to the
 4 §924(c) conviction to be served consecutive to the sentence for the Hobbs Act robbery
 5 convictions, resulting in a total term of imprisonment of 151 months.

6 In the instant motion, Stephens moves to vacate his §924(c) conviction and
 7 sentence pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and requests that
 8 the court resentence him to 67 months imprisonment as to his conviction on the five counts
 9 of Hobbs Act robbery.

10 II. Analysis

11 A federal prisoner may move to “vacate, set aside or correct” his sentence if it “was
 12 imposed in violation of the Constitution.” 28 U.S.C. § 2255(a). When a petitioner seeks
 13 relief pursuant to a right recognized by a United States Supreme Court decision, a
 14 one-year statute of limitations for seeking habeas relief runs from “the date on which the
 15 right asserted was initially recognized by the Supreme Court.” 28 U.S.C. § 2255(f)(3). The
 16 petitioner bears the burden of demonstrating that his petition is timely and that he is entitled
 17 to relief.

18 In *Johnson*, the United States Supreme Court held that the residual clause in the
 19 definition of a “violent felony” in the Armed Career Criminal Act of 1984, 18 U.S.C. §
 20 924(e)(2)(B) (“ACCA”), is unconstitutionally vague. 135 S. Ct. at 2557. The ACCA defines
 21 “violent felony” as any crime punishable by imprisonment for a term exceeding one year,
 22 that:

23 (i) has as an element the use, attempted use, or threatened use of physical
 24 force against the person of another; or

25 (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise
 26 involves conduct that presents a serious potential risk of physical injury to
 another.

1 18 U.S.C. § 924(e)(2)(B). Subsection (ii) above is known as the ACCA's "residual clause."
 2 *Johnson*, 135 S. Ct. at 2555–56. The Supreme Court held that "increasing a defendant's
 3 sentence under the clause denies due process of law." *Id.* at 2557.

4 Stephens was not, however, sentenced pursuant to ACCA. Rather, he was
 5 convicted of violating 18 U.S.C. §924(c) for carrying and use of a firearm during and in
 6 relation to a crime of violence. Section 924(c)(3) provides:

7 the term "crime of violence" means an offense that is a felony and—

8 (A) has as an element the use, attempted use, or threatened
 9 use of physical force against the person or property of another,
 or

10 (B) that by its nature, involves a substantial risk that physical
 11 force against the person or property of another may be used in
 the course of committing the offense.

12 As with the ACCA, subsection (a) is referred to as the force clause while subsection (B) is
 13 referenced as the residual clause. Stephens argues that *Johnson* is equally applicable to
 14 §924(c) cases and that his instant motion is timely as it was filed within one year of
 15 *Johnson*. The Ninth Circuit, however, subsequently held to the contrary. When Stephens
 16 filed his present motion, "[t]he Supreme Court [had] not recognized that § 924(c)'s residual
 17 clause is void for vagueness in violation of the Fifth Amendment." *United States v.*
 18 *Blackstone*, 903 F.3d 1020, 1028 (9th Cir. 2018). As indicated by the Ninth Circuit, "[t]he
 19 Supreme Court may hold in the future that *Johnson* extends to sentences imposed . . .
 20 pursuant to 18 U.S.C. § 924(c), but until then [defendant's] motion is untimely." *Id.*
 21 Accordingly, Stephens' motion was premature when it was filed.

22 The Supreme Court has, however, subsequently applied the principles first outlined
 23 in *Johnson* to the residual clause of §924(c), holding "that § 924(c)(3)(B) is
 24 unconstitutionally vague." *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).
 25 Accordingly, while Stephens' motion was premature when it was filed, the Court will now
 26 consider the motion as timely given the Supreme Court's decision in *Davis*, extending the

1 principles of *Johnson* to §924(c), and will treat the motion as if filed seeking relief pursuant
2 to *Davis*.

3 Stephens asserts that his conviction is not subject to the provisions of § 924(c)(3)
4 because his underlying conviction (Hobbs Act robbery) does not constitute a “crime of
5 violence.” He argues that his §924(c) conviction and sentence is unconstitutional under
6 *Davis* because a Hobbs Act robbery cannot constitute a crime of violence without relying
7 on the residual clause. The court disagrees.

8 Stephens argues that a Hobbs Act robbery cannot categorically fall under the force
9 clause of § 924(c)(3)(A) “[b]ecause a “Hobbs Act robbery . . . can be committed by any
10 amount of force necessary to accomplish the taking, it does not necessarily require the use
11 of violent force.” Prior to the Supreme Court's holding in *Davis*, the Ninth Circuit held that
12 Hobbs Act “[r]obbery indisputably qualifies as a crime of violence” under § 924(c). *United*
13 *States v. Mendez*, 992 F.2d 1488, 1491 (9th Cir. 1993). In 2016, the Ninth Circuit was
14 confronted with essentially the same argument that Stephens raises here, that “because
15 Hobbs Act robbery may also be accomplished by putting someone in ‘fear of injury,’ 18
16 U.S.C. § 1951(b), it does not necessarily involve ‘the use, attempted use, or threatened
17 use of physical force,’ 18 U.S.C. § 924(c)(3)(A).” *United States v. Howard*, 650 Fed App'x.
18 466, 468 (9th Cir. 2016). The Ninth Circuit held that Hobbs Act robbery nonetheless
19 qualified as a crime of violence under the force clause:

20 [Petitioner's] arguments are unpersuasive and are foreclosed by *United*
21 *States v. Selfa*, 918 F.2d 749 (9th Cir. 1990). In *Selfa*, we held that the
22 analogous federal bank robbery statute, which may be violated by “force and
23 violence, or by *intimidation*,” 18 U.S.C. § 2113(a) (emphasis added), qualifies
24 as a crime of violence under U.S.S.G. § 4B1.2, which uses the nearly
25 identical definition of “crime of violence” as § 924(c). *Selfa*, 918 F.2d at 751.
26 We explained that “intimidation” means willfully “to take, or attempt to take, in
such a way that would put an ordinary, reasonable person *in fear of bodily*
harm,” which satisfies the requirement of a “threatened use of physical force”
under § 4B1.2. *Id.* (emphasis added) (quoting *United States v. Hopkins*, 703
F.2d 1102, 1103 (9th Cir. 1983)). Because bank robbery by
“intimidation”—which is defined as instilling fear of injury—qualifies as a crime

1 of violence, Hobbs Act robbery by means of “fear of injury” also qualifies as
2 [a] crime of violence.

Id.

3 The Court holds that a Hobbs Act robbery constitutes a crime of violence under §
4 924(c)(3)'s force clause. Under the elements set forth in the language of § 1951,
5 Stephens' underlying felony offense (Hobbs Act robbery) is a “crime of violence” because
6 the offense has, “as an element the use, attempted use, or threatened use of physical
7 force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). Therefore,
8 *Davis* is inapplicable here because Stephens' conviction and sentence do not rest on the
9 residual clause of § 924(c). Accordingly, Stephens' motion, which rests upon the premise
10 that his conviction rests upon the residual clause of §924(c), is without merit.

11 Certificate of Appealability

12 To appeal this order, Stephens must receive a certificate of appealability. 28 U.S.C.
13 § 2253(c)(1)(B); Fed. R. App. P. 22(b)(1); 9th Cir. R. 22–1(a). To obtain that certificate, he
14 “must make a substantial showing of the denial of a constitutional right, a demonstration
15 that . . . includes showing that reasonable jurists could debate whether (or, for that matter,
16 agree that) the petition should have been resolved in a different manner or that the issues
17 presented were adequate to deserve encouragement to proceed further.” *Slack v.*
18 *McDaniel*, 529 U.S. 473, 483–84 (2000) (quotation omitted). This standard is “lenient.”
19 *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010) (en banc).

20 The Court will deny the certificate of appealability for the same reasons that it has
21 denied Stephens' claims. Reasonable jurists would not find the Court's determination that
22 the Ninth Circuit has held that a Hobbs Act robbery is a crime of violence pursuant to the
23 force clause of §924(c) is debatable, wrong, or deserving of encouragement to proceed
24 further. Accordingly, the court will decline to issue a certificate of appealability.

25 Therefore, for good cause shown,
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1 THE COURT **ORDERS** that the United States' Motion for Leave to Advise the Court
2 of Relevant New Authority (ECF No. 53) is GRANTED;

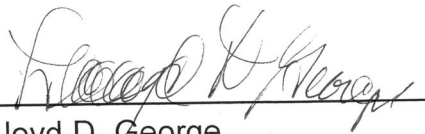
3 THE COURT FURTHER **ORDERS** that Quincy Stephens' Motion to Stay His Motion
4 to Vacate Pending Resolution of Published Ninth Circuit Decision (ECF no. 54) is DENIED
5 as moot;

6 THE COURT FURTHER **ORDERS** that Quincy Stephens' Motion to Vacate, Set
7 Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (ECF Nos. 46, 47) is DENIED;

8 THE COURT FURTHER ORDERS that the Clerk of Court shall enter a separate civil
9 judgment denying defendant Quincy Stephens' 28 U.S.C. § 2255 motion. The Clerk also
10 shall file this order and the civil judgment in this case and in the related civil case number
11 2:16-cv-1452-LDG.

12 THE COURT **DECLINES** to issue a Certificate of Appealability.

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14 DATED this 18 day of February, 2020.

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17 Lloyd D. George
18 United States District Judge
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LONNIE TROY III, AKA Lonnie Williams,

Defendant-Appellant.

No. 18-17342

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

D.C. Nos. 2:16-cv-01223-LDG
2:10-cr-00221-LDG-GWF-1

District of Nevada,
Las Vegas

ORDER

Before: HAWKINS and FRIEDLAND, Circuit Judges.

The stay entered on September 9, 2019 (Docket Entry No. 4), is lifted.

The request for a certificate of appealability (Docket Entry No. 3) is denied because the underlying 28 U.S.C. § 2255 motion fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (“When . . . the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘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.’”) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020).

Any pending motions are denied as moot.

DENIED.

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 LONNIE TROY,

14 Defendant.
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Case No. 2:10-cr-00221-LDG (GWF)

ORDER

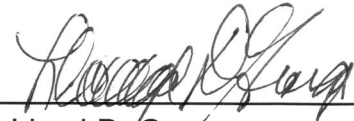
16 The Ninth Circuit remanded this case for the limited purpose of permitting this court
17 to grant or deny a certificate of appealability. The Court will deny a certificate of
18 appealability.

19 The Court declines to issue a certificate of appealability because (a) the Court
20 denied defendant's 28 U.S.C. §2255 motion as untimely; (b) the timeliness of defendant's
21 28 U.S.C. §2255 motion required a determination that the Supreme Court recognized, in
22 *Johnson v. United States*, 135 S.Ct 2551 (2015), that 18 U.S.C. §924(c)'s residual clause
23 is void for vagueness in violation of the Fifth Amendment; but (c) the Ninth Circuit resolved
24 that question, holding that it did not. *United States v. Blackstone*, 903 F.3d 1020, 1028 (9th
25 Cir. 2018) (*cert. denied* 2019 WL 2211790, U.S., June 24, 2019).

26 Accordingly,

1 THE COURT **DECLINES** to issue a Certificate of Appealability for defendant's
2 appeal of this Court's Order (CM/ECF #64) denying his motion brought pursuant to 28
3 U.S.C. §2255.

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5 DATED this 30 day of July, 2019.



Lloyd D. George
United States District Judge

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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 LONNIE TROY,

14 Defendant.
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Case No. 2:10-cr-00221-LDG (GWF)

ORDER

18 The defendant, Lonnie Troy, moves to vacate, set aside, or correct his conviction for
19 violating 18 U.S.C. §924(c) (ECF Nos. 52, 54, 55), which motion the government has
20 opposed (ECF No. 57). As Troy filed the instant motion more than one year after his
21 conviction became final, and as the Supreme Court has not recognized that § 924(c)'s
22 residual clause is void for vagueness, the Court must deny his motion as untimely.

23 Troy pled guilty to two counts of interference of commerce by robbery ("Hobbs Act
24 robbery") in violation of 18 U.S.C. § 1951 and one count of using a firearm during and in
25 relation to a crime of violence under 18 U.S.C. § 924(c). His § 2255 motion attacks the
26 latter conviction.

1 In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held that
2 the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), (2)(B)(ii), was
3 unconstitutionally vague. Troy filed the instant motion arguing that *Johnson* is equally
4 applicable to §924(c) cases and that his instant motion is timely as it was filed within one
5 year of *Johnson*. The Ninth Circuit, however, has recently held to the contrary, finding that
6 “[t]he Supreme Court has not recognized that § 924(c)’s residual clause is void for
7 vagueness in violation of the Fifth Amendment.” *United States v. Blackstone*, 2018 WL
8 4344096, *7 (9th Cir., Sept 12, 2018). As indicated by the Ninth Circuit, “[t]he Supreme
9 Court may hold in the future that *Johnson* extends to sentences imposed . . . pursuant to
10 18 U.S.C. § 924(c), but until then [defendant’s] motion is untimely.” *Id.*

11 Troy moves to stay (ECF No. 62) his §2255 motion until the Ninth Circuit issues “the
12 mandate in *Blackstone* or until the United States Supreme Court resolves certiorari of
13 *Blackstone*, whichever is later.” As the Ninth Circuit has issued its decision in *Blackstone*,
14 however, this Court is bound to follow that decision. *Yong v. I.N.S.*, 208 F.3d 1116, 1119
15 n.2 (9th Cir. 2000).

16 Accordingly,

17 THE COURT **ORDERS** that the United States’ Motion for Leave to Advise the Court
18 of Relevant New Authority (ECF No. 61) is GRANTED.

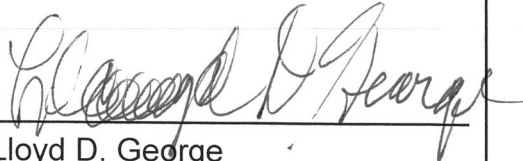
19 THE COURT FURTHER **ORDERS** that Defendant’s Motion to Stay (ECF No. 62) is
20 DENIED.

21 THE COURT **ORDERS** that Defendant’s Motion to Vacate, Set Aside, or Correct
22 Sentence pursuant to 28 U.S.C. §2255 (ECF Nos. 52, 54, 55) is DENIED as untimely.

23 THE COURT FURTHER **ORDERS** that the Clerk of Court is directed to enter a
24 separate civil judgment denying defendant Lonnie Troy’s § 2255 motion. The Clerk also
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26

1 shall file this order and the civil judgment in this case in the related civil case number 2:16-
2 cv-01223-LDG-GWF.

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5 DATED this 11 day of October, 2018.

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7 Lloyd D. George
8 United States District Judge
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