

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

REMY AUGUSTIN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

1:16-cv-00042

1:00-cr-00004

**TO: Remy Augustin, *Pro Se*, 05550-094
USP Atwater
U.S. Penitentiary
P.O. Box 019001
Atwater, CA 95301**

REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon the Order (ECF No. 356) of Chief Judge Wilma A. Lewis in Criminal No. 00-cr-00004 referring Petitioner Remy Augustin's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody¹ (ECF Nos. 333, 355)² to the undersigned for a report and recommendation. For the reasons that follow, the undersigned recommends that Remy Augustin's motion be denied.

¹ All citations to the United States Code are to the electronic version that appears in Lexis.

² All ECF document numbers are as recorded in 1:00-cr-00004, unless otherwise noted.

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I. Legal Standards

Under 28 U.S.C. § 2255, a federal prisoner may move the court to vacate, set aside, or correct a sentence that is “allegedly in violation of the Constitution.” *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002). Before ordering an answer to a § 2255 motion, the court must review the motion and dismiss it, if it “plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief.” U.S.C. Sec. 2255 Proc R 4. Relief under § 2255 may be granted on several grounds including “that the sentence was imposed in violation of the Constitution or the laws of the United States.” 28 U.S.C. § 2255(a). The statutory remedy for an unlawfully-imposed sentence is that “the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b). The court must construe *pro se* pleadings liberally, reviewing them with “less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court accepts the truth of the defendant's allegations when reviewing a § 2255 motion unless those allegations are “clearly frivolous based on the existing record.” *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005). A court is required to hold an evidentiary hearing when the motion “allege[s] any facts warranting § 2255 relief that are not clearly resolved by the record.” *United States v. Tolliver*, 800 F.3d 138, 141 (3d Cir. 2015) (quoting *Booth*, 432 F.3d at 546).

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II. Discussion

Over a three week period in February 1997, Augustin and three other men committed a series of robberies during which they stole money and property from businesses, and customers and employees thereof. To effectuate the robberies, the men entered the premises, aimed a handgun at the victims and demanded their money and property.³ On April 27, 1999, a grand jury returned a multi-count indictment that charged Augustin with federal and local charges including three counts of interference with commerce by robbery in violation of 18 U.S.C. § 1951 and three counts of use of a firearm during a crime of violence in violation of 18 U.S.C. 924(c). The case went to trial on December 11, 2000. On December 22, the jury returned guilty verdicts against Augustin on Counts 1-12 and not guilty on Count 13 of the indictment. Augustin was sentenced on December 19, 2001. His conviction was affirmed on December 16, 2002. *United States v. Bright*, 54 Fed. Appx. 765 (3d Cir. 2002), *cert. denied*, *Augustin v. United States*, 2003 U.S. LEXIS 2624 (2003.)

On June 23, 2016, Augustin filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (ECF No. 333). In his motion Augustin contends that in light of the Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), his Hobbs Act robbery conviction should not have been classified as a crime of violence for

³ For example, “Atwater testified that . . . [co-defendant] Bright approached her, pointed a silver gun at her and commanded her to give him her jewelry. She refused. Bright pointed the gun at Rick Wheelock. Wheelock emptied the cash register.” Criminal No. 00-00004, Volume 2, Document No. 181, page 5.

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purposes of § 924(c). Section 2255(f)(3) provides prisoners the opportunity to challenge the legality of their sentences outside the 1-year period of limitations, when “a right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” In the spring of 2017, the Supreme Court held that the ruling in *Johnson* is retroactive to cases on collateral review. *Welch v. United States* 136 S. Ct. 1237, Syl. ¶ 3 (2016). Accordingly, Augustin’s § 2255 motion pursuant to *Johnson* was timely. However, Augustin is not a candidate for sentencing modification.

Augustin advances two arguments in support of his claim. First, that a Hobbs Act robbery should not be classified as a crime of violence for purposes of sentencing enhancement because § 924(c)(3)(B) is void for vagueness and second, that Hobbs Act robbery does not satisfy the elements test, as described in *Taylor v. United States*, 495 (1990) and *Mathis v. United States* 136 S. Ct. 2243 (2016).⁴

Third Circuit precedent informs us that a Hobbs Act robbery committed while using a firearm is a crime of violence. *United States v. Young*, 705 Fed. Appx. 94, 95 (3d Cir. 2017). *See also, United States v. Kennedy*, 2017 U.S. App. LEXIS 25473, *14-15 (3d Cir. 2017) *accord United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). In the Third Circuit, when two offenses, here, robbery and using or carrying a gun, “have been tried together and the jury

⁴ *See, e.g. United States v. O’Connor*, 874 F.3d 1147, 1158 (10th Cir. 2017) (“Hobbs Act robbery can be accomplished by threats to property. Both generic robbery and Guidelines extortion . . . are limited to conduct involving physical force or threats of physical force against a person. . . . Hobbs Act robbery under § 1951(b)(1) does not categorically qualify as a crime of violence under the enumerated offense clause of the Guidelines.”).

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has reached a guilty verdict on both offenses, the Hobbs Act robbery qualifies as a crime of violence under the 'elements clause' of 18 U.S.C. § 924(c)(3)(A)." *Robinson*, 844 F.3d at 139.⁵

Like *Robinson*, *Kennedy*, and *Young*, Augustin's predicate offense (robbery) was tried contemporaneously with the enhancement offense (use of a firearm during a crime of violence). The difficulty for sentencing judges, and thus the need for the elements test, arises when the predicate offense is from a previous conviction. In some cases the previous convictions relevant to sentencing enhancement were tried years before the conviction upon which a defendant is being sentenced. As a result, the sentencing judge is not privy to the facts of those previous cases. To avoid vast disparities in sentencing, courts employ the elements test—asking “whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime.” (*Mathis*, 136 S. Ct. at 2245).

In Augustin's case, there is no previous conviction at issue. The jury decided contemporaneously that he was guilty of both robbery and use of a firearm during a crime of violence (i.e. robbery). The record in Augustin's case indicates that the jury was cognizant of the law and applied the law to the facts of his case when they convicted him of both § 1915 and § 924 for the robberies of the Off the Wall Restaurant and the Chocolate Barbeque that occurred on February 12 and 18, 1997, and of § 1915, only, for the robbery

⁵ Therefore, the Court need not address Augustin's “§ 924(c)(3)(B) is void for vagueness” argument.

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of the Saibaba Gift Shop that occurred on February 21, 1997.⁶ Because the jury considered the facts and determined that Augustin was guilty of committing robbery by (1) actual or threatened force, violence, or injury to person or property, and that he (2) used or carried a firearm in doing so, applying the elements test is not necessary.⁷ The combined convictions show that a firearm was the source of the "actual or threatened force, or violence, or fear of injury" in Augustin's Hobbs Act robbery. Accordingly, Augustin's Hobbs Act robbery was properly classified as a crime of violence.

III. Conclusion

Based upon the foregoing, IT IS HEREBY RECOMMENDED that Remy Augustin's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF Nos. 333, 355) be **DENIED** without an evidentiary hearing.⁸ It is further recommended that a certificate of appealability be **DENIED**.⁹

⁶ The jury returned a verdict of "Not Guilty" as to Augustin on Count 13, use of firearm during robbery of Saibaba Gift Shop. Criminal No. 00-00004, Volume 2, Document No. 181, Exhibit 1. Witnesses testified that one or more of the co-defendants pointed a gun at them while in the course of the robberies. *Id.* at 5-7.

⁷ 18 U.S.C. § 924(c)(3) defines a "crime of violence" as a felony that
 (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

⁸ The question of whether to order an evidentiary hearing when considering a motion to vacate a sentence under § 2255 "is committed to the sound discretion of the district court." *Government of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir.1989). A § 2255 evidentiary hearing "is unnecessary when the 'files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Padilla-Castro*, 426 F. App'x 60, 63 (3d Cir.2011) (quoting 28 U.S.C. § 2255(b)). Here, the record in this case conclusively shows that Augustin is not entitled to relief.

⁹ When a district court issues a final order on a § 2255 motion, it must make a determination whether it will permit a certificate of appealability. 3d Cir. L.A.R. 22.2; Fed. R. App. P. 22(b)(1). A district court will issue a certificate of appealability only upon a finding of a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, the record fails to show a violation of Augustin's constitutional rights. Accordingly, a certificate of appealability should be denied.

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Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: April 10, 2018

/s/ George W. Cannon, Jr.
GEORGE W. CANNON, JR.
MAGISTRATE JUDGE