DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

GILLIAN HARPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

1:11-cr-00004-1

TO: Gillian Harper, *Pro Se*
Reg. #08218-094
Federal Correctional Complex – Coleman Medium
P.O. Box 1032
Coleman, FL 33521

ORDER and REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon Petitioner Gillian Harper's Motion To Vacate under 28 U.S.C. § 2255 (ECF No. 274) and memorandum in support thereof (ECF No. 275). Because Petitioner did not provide any payment with the motion, the undersigned will construe the motion as a motion for leave to proceed *in forma pauperis*, which is sufficient to trigger the undersigned's initial screening of the motion pursuant to 28 U.S.C. § 1915(e)(2) and 28 U.S.C. § 1915A.

I. RELEVANT PROCEDURAL HISTORY

One year after Luis Orlando Encarnacion was killed in the filed behind the Evelyn Williams Elementary School, Gillian Harper and Kalif Flanders were charged with his murder. Found guilty by a jury, the co-defendants were sentenced on several counts, including murder in the first degree for which they were sentenced to life without parole.

Harper and Flanders were sentenced to 10 years for possession of a firearm during a crime of violence (18 U.S.C. § 924(c)(1)(A)(iii)), five years for possession of firearm in school zone (18 U.S.C. § 922(q)), 15 years for unauthorized firearm possession (18 V.I.C. § 2253(a)), life without parole for murder in the first degree (18 V.I.C. §§ 922(a)(1), 923(a)), and stayed their sentencing for assault in the third degree (14 V.I.C. § 297(2)). (ECF Nos. 204, 211). By mandate entered June 16, 2016, the Third Circuit affirmed their conviction. (ECF No. 223; *United States v. Flanders*, 635 Fed. App'x 74 (3d Cir. 2016)).

II. APPLICABLE LEGAL STANDARDS

"Motions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution." *Okereke v. United States*, 307 F.3d 117, 120 (3d Cir. 2002) (citing *Davis v. United States*, 417 U.S. 333, 343 (1974)).

Before ordering an answer, the court must review a § 2255 motion and "dismiss the motion" 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." 28 U.S.C. § 2255 Proc. R. 4.

A petitioner properly raises ineffective assistance of counsel arguments under § 2255 rather than on direct appeal. *See, e.g., Massaro v. United States*, 538 U.S. 500, 504 (2003) (explaining that it is "preferable" that such claims be considered on collateral review where the record for such claims may be properly developed); *accord United States v. Garcia*, 516 F. App'x 149, 151 (3d Cir. 2013) ("It is well-settled that this Court ordinarily does not review claims of ineffective assistance of counsel on direct appeal.") (citing *United States v. Thornton*, 327 F.3d 268, 271 (3d Cir. (2003)).

Pro se pleadings are liberally construed and must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nonetheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013).

III. DISCUSSION

A. Ground One

In ground one of his Petition, Petitioner cites to *United States v. Davis*, 139 S. Ct. 2319 (2019) in support of his contention that he is "actually factually and legally innocent of his 18 U.S.C. [§] 924(c) conviction." (ECF No. 274 at 4). In *Davis,* the Supreme Court held that the residual clause of 18 U.S.C. § 924(c)(3)(B), which sets forth penalties for those found guilty of using or carrying a firearm during crimes of violence and drug trafficking crimes, was unconstitutionally vague. 139 S. Ct. at 2336.

Section 924(c) prohibits using or carrying a firearm during and in relation to a "crime of violence," or possessing a firearm in furtherance of a "crime of violence." 18 U.S.C. § 924(c)(1)(A). The statute defines a "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). Subpart A is known as the "elements clause" and subpart B is known as the "residual clause." *Davis*, 139 S. Ct. at 2324. In *Davis*, the Supreme Court invalidated the residual clause, holding that it is unconstitutionally vague. *Id.* at 2336. Accordingly, convictions under § 924(c) may only be predicated on offenses that qualify as crimes of violence under the elements clause.

Petitioner argues that "[m]urder and assault are not 'crimes of violence' in light of … *Davis*", and, that, accordingly, he is an innocent man. (ECF No. 275 at 7). While Petitioner does cite a few examples of crimes that might not constitute crimes of violence, he offers little authority other than his own blanket statements that the assault and murder for which he was convicted do not constitute acts of violence. Further, it belies common sense to suggest that actual murder would not be a crime of violence when the District Court has, in fact, already defined mere *attempted* murder as a crime of violence when making a determination as to whether a criminal defendant should have been detained:

> The Court finds that attempted first degree murder qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). At the outset, the Court notes that this conclusion is supported by a common-sense understanding of the meaning of a "crime of violence." In *Johnson I*, the Supreme Court analyzed the elements clause of the definition of "violent felony" in the armed Career Criminal Act. 559 U.S. at 140. Similar to the definition of "crime of violence" at issue here, the elements prong of the "violent felony" definition is a felony 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). In interpreting the term "physical force," the Supreme Court considered "the context of [the]

statutory definition," *i.e.*, a "violent felony." *Johnson I*, 559 U.S. at 140. The Supreme Court observed that "[w]hen the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer" and cited Black's Law Dictionary as defining "'violent felony' as '[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.'" *Id.* at 140-41.

The Court finds it significant that murder was one of the examples in the definition the Supreme Court used in *Johnson I* to describe the connotation conveyed by "violent felony." Just as it did with the term "violent felony," the Court finds that first degree murder exemplifies the connotation conveyed by the term "crime of violence." Finding that attempted first degree murder is not a crime of violence would—in this Court's view—strain common sense.

....

In addition to the serious nature of the charges, the circumstances surrounding the alleged offenses are deeply troubling. Defendant allegedly was riding in a white sedan that blocked the path of Mr. Benjamin-Edwards' vehicle while Defendant leaned out of the passenger-side window and fired shots at Mr. Benjamin-Edwards' occupied car. The alleged attack was unprovoked and seriously jeopardized the lives of five individuals, including two children. (*Id.*). Defendant's alleged conduct evinces a blatant disregard both for human life and the law and strongly suggests that Defendant is a danger to the community. *See, e.g., [United States v.] Wrensford*, [No. CR 2012-0012,] 2012 WL 6028628, at *4 (holding that the nature and circumstances of premediated murder and several felony firearms charges that took place in populated area "raise substantial concerns about the safety of the community if the [d]efendants are not detained prior to trial"); *[United States v.] Flanders*, [No. CR 2010-0029,] 2010 WL 4054442, at *8 (holding that crime charged—murder—is a crime of violence, and was carried out with a firearm, with brutality, in the vicinity of a school, which militates in favor of detention); *United States v. Thomas*, [No. CR 2008-0020,] 2009 WL 2996532, at *4 (D.V.I. Sept. 16, 2009) (stating that "users of firearms in commission of crimes of violence are dangerous in a very real sense" and holding that pretrial detention was warranted); *United States v. Carey*, 578 F. Supp. 2d 190, 192 (D. Me. 2008) (noting that the nature of firearm offenses weighs against release). Thus, the nature and circumstances of the offenses weigh strongly in favor of detaining Defendant prior to trial. Accordingly, the Court finds that this factor weighs heavily in favor of detention.

United States v. Matthias, No. CR 2016-0025, 2017 WL 1536430, at *10, 16 (D.V.I. Apr. 27, 2017) (some internal citations omitted). Of particular interest and worthy of note is that contained within the District Court's analysis above is a case citation to *United States v. Flanders*, No. CR 2010-0029, 2010 WL 4054442, at *8, in which District Judge Curtis Gomez concluded that Petitioner's co-defendant Kalif Flanders had committed crimes of violence. Although Judge Gomez's decision was issued in 2010, well before *Davis*, the undersigned finds that Judge Gomez's analysis should be highly persuasive.

As to the third-degree assault, the Third Circuit has confirmed that this too constitutes a "crime of violence." In *United States v. Saldana*, 719 Fed. App'x 120, 125-27 (3d Cir. 2017), a three-judge panel explained that:

> The relevant variation of third degree assault has two elements: (1) "assault[ing] another"; and (2) "inflict[ing] serious bodily injury upon the person assaulted." 14 V.I. Code Ann. § 297(a)(4). An individual can commit "assault" in one of two ways. The first way is by attempting to "use[] any unlawful violence upon the person of another with intent to injure [that person]." *Id.* §§ 291, 292 (defining assault and battery). The second way is by making "a threatening gesture showing in itself an immediate intention coupled with an ability to" use unlawful violence. *Id.* Third degree assault "does not . . . require proof of intent to do serious bodily injury, but simply that serious bodily injury resulted from a defendant's conduct." *People v. Lima,* 57 V.I. 118, 126 (V.I. Super. Ct. 2012) (emphasis omitted).
>
> ….
>
> Saldana argues that, assuming his conduct constituted third degree assault, this offense did not constitute a Grade A violation because, under the categorical approach, third degree assault is not a crime of violence. Generally, in the § 4B1.2 context, we apply the categorical approach to determine whether a defendant's conviction constitutes a crime of violence. *See, e.g.*,

> *United States v. Brown*, 765 F.3d 185, 188–89 (3d Cir. 2014). Under this approach, courts look "only to the statutory definitions of the ... offense[ ], and not to the particular facts underlying th[e] conviction[ ]." *Taylor v. United States*, 495 U.S. 575, 600, 110 S. Ct. 2143, 109 L.Ed.2d 607 (1990).
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> In the supervised release revocation context, the strict categorical approach does not apply because § 7B1.1 allows the district court to determine the grade of the violation based upon the defendant's actual conduct. *United States v. Carter*, 730 F.3d 187, 192 (3d Cir. 2013). After determining the offense the defendant's actual conduct constitutes, the district court must then apply the categorical approach's focus on the elements of the offense. This entails asking whether the offense "has the use or threat of physical force [against the person of another] as an element." *Brown*, 765 F.3d at 189 (alteration in original) (internal quotation marks omitted). As noted above, "physical force" refers to "force capable of causing physical pain or injury to another person." *Johnson [v. United States]*, 559 U.S. at 140, 130 S. Ct. 1265.
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> Here, the District Court concluded that Saldana committed assault in the third degree under 14 V.I. Code Ann. § 297(a)(4), which requires that the assault "inflicts serious bodily injury upon the person assaulted." Because this offense, by definition, requires that "serious bodily injury" result, it inevitably follows that this offense is one which requires force capable of causing physical pain or injury. *See Roberts v. Holder*, 745 F.3d 928, 930–31 (8th Cir. 2014) (per curiam) (concluding that third degree assault under Minnesota law constituted a crime of violence because the statute required the infliction of substantial bodily harm and therefore would ordinarily involve the intentional use of physical force). Accordingly, the District Court correctly concluded that assault in the third degree under Virgin Islands law is a crime of violence, and thus Saldana committed a Grade A supervised release violation.

The undersigned finds that *Saldana* forecloses Petitioner's claim that his third-degree assault was not a "crime of violence." As such, Petitioner cannot prevail on the claims asserted in ground one of his Petition.

B. Ground Two

In ground two of his Petition, Petitioner cites to *Rehaif v. United States*, 139 S. Ct. 2191 (2019) in support of his contention that he "is innocent of his 18 U.S.C. [§] 922(g) conviction" and that he was "not given proper jury instructions to the four subsequent elements in *Rehaif*." (ECF No. 274 at 5). In *Rehaif*, the Supreme Court held that the Government must prove that a defendant charged with possession of a firearm or ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g), "knew he possessed a firearm and . . . knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. However, the District Court should not reach the merits of this claim, because Petitioner has already filed a habeas petition (ECF No. 237) in which he could have made the same argument. Thus, his claim in ground two would a second successive habeas claim.

Before a second or successive § 2255 motion may be considered by the district court, it must be certified by a three-judge panel of the appropriate court of appeals to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). Petitioner has not offered any support to indicate that he is entitled to review of a second successive habeas petition, and the undersigned recommends dismissal on this basis.

Of significance to this recommendation is the Third Circuit's recent explanation that the Supreme Court's ruling in *Rehaif* does not provide adequate grounds for the filing of a second successive habeas petition:

> First and foremost, *Rehaif* did not state a rule of constitutional law at all. Rather, it addressed what the *statutes* enacted by Congress require for a conviction under 18 U.S.C. §§ 922(g) and 924(a)(2). Specifically, *Rehaif* addressed what it means for someone to have "knowingly" violated § 922(g). *Id.* at 2195-96. At all events, it did not set forth a new rule of *constitutional* law as contemplated by § 2255(h). *See In re Palacios,* 931 F.3d 1314, 1315 (11th Cir. 2019) (per curiam) (concluding that *Rehaif* construed the text of § 922(g) to mean that "the government must prove that the defendant knew he violated each of the material elements of § 922(g)."). Indeed, the Supreme Court mentioned the Constitution only once in the opinion announcing its decision and that mention came when the Court was explaining why the word "knowingly" in the statute did not modify the statute's jurisdictional element. *Rehaif,* 139 S. Ct. at 2196. Sampson asserts that the Supreme Court in *Rehaif* overturned a long-established interpretation of an important criminal statute. That may be, *see id.* at 2201 (Alito, J. dissenting), but that does not transform its decision into a rule of constitutional law.

In re Sampson, 954 F.3d 159, 161 (3d Cir. 2020). The undersigned believes that the Third Circuit's holding in *Sampson*—coupled with Petitioner's previous habeas petition—foreclose his claim in ground two.

C. Ground Three

In ground three of his Petition, Petitioner states that "[p]ursuant to the First Step Act of 2018[,] Title IV Section 403[,] Petitioner['s'] firearm charges were (double stacked) multiplicitous[,] making Petitioner['s'] sentence unconstitutional[.]" (ECF No. 274 at 7). To this end, he argues that "[i]n this instant case[,] the Government [ ] stacked firearm charges to Petitioner for a higher mandatory penalty."

Section 403 of the First Step Act modified 18 U.S.C. § 924(c) so that consecutive—or, as Petitioner puts it—"stacked" sentences apply only if a defendant's conviction for a first violation of § 924(c) was final at the time of the second conviction. 18 U.S.C. § 924(c)(1)(C) (2019); First Step Act § 403(a). "The First Step Act reduced the mandatory minimum sentence for first-time offenders who commit multiple § 924(c) counts charged in the same indictment." *United States v. Hodge*, 948 F.3d 160, 161 (3d Cir. 2020). "The new minimum applies to defendants convicted before the Act became law if they had not yet had a sentence 'imposed.'" *Id.* (quoting First Step Act, § 403).

In examining and defining the word "imposed" within the context of the First Step Act, a three-judge panel of the Third Circuit has explained that "[a]s a matter of statutory interpretation, [] the new § 924(c) mandatory minimum does not apply to defendants initially sentenced before the First Step Act's enactment." *United States v. Hodge*, 948 F.3d 160, 161 (3d Cir. 2020). *See also United States v. Pearson*, No. 15-20457, 2020 WL 134130, at *3 (E.D. Mich. Jan. 13, 2020) (collecting cases concluding that § 403 does not apply if defendant was sentenced prior to enactment of First Step Act). The First Step Act was enacted on December 21, 2018, well after Petitioner's conviction and sentencing. Therefore, Section 403 does not provide Petitioner with the relief he seeks.[1]

[1] The undersigned also notes that Petitioner claims that the Petition was filed within the one-year statute of limitations as contained in 28 U.S.C. §2255. (ECF No. 274 at 11). While the undersigned has some concerns regarding the accuracy of this statement, it nevertheless finds that it need not be addressed due to the recommended dismissal of the Petition on other grounds.

D. Certificate of Appealability

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. AEDPA limits the issuance of a certificate of appealability to circumstances where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (explaining that movant must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."). The undersigned recommends denying Petitioner's claims as meritless. The undersigned concludes that reasonable jurists would not find this assessment debatable or wrong. Accordingly, the undersigned RECOMMENDS that the District Court not issue a Certificate of Appealability.

IV. CONCLUSION

Based upon the foregoing, IT IS HEREBY RECOMMENDED that Gillian Harper's Petitioner Gillian Harper's Motion To Vacate under 28 U.S.C. § 2255 (ECF No. 274) be **DENIED**. It is further recommended that a certificate of appealability be **DENIED**.

Further, it is hereby **ORDERED**:

1. To the extent that the motion contains a request to proceed *in forma pauperis*, the Court **denies it without prejudice**.

2. As noted on Form AO 243, in order to proceed *in forma pauperis*, "[Petitioner] must submit a certificate signed by an officer at the institution where [he is] confined showing the amount of money that the institution is holding for [him]." Petitioner must provide the appropriate documentation consistent with this directive.

3. 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. *See* 28 U.S.C. § 636(b)(1); LRCi 72.3.

ENTER:

Dated: June 29, 2020

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