

**DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

JAMES CRUZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

1:16-cv-00079

1:15-cr-00021

**TO: James Cruz, 09657-094, *Pro se*
FCI Williamsburg
Federal Correctional Institution
P.O. Box 340
Salters, SC 29590
David White, Esq., AUSA**

REPORT AND RECOMMENDATION

THIS MATTER is before the Court upon the Order (ECF No. 28)¹ of Chief Judge Wilma A. Lewis in Criminal No. 15-00021 referring Petitioner James Cruz's *pro se* Motion under 28 U.S.C. § 2255² to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 25) and the Government's Motion to Dismiss Defendant's Motion to Vacate (ECF No. 27) to the undersigned for a report and recommendation. For the reasons that follow, the undersigned recommends that Petitioner Cruz's motion be denied, that the government's motion be granted, and that a certificate of appealability be granted.

¹ All ECF document numbers are as recorded in 1:15-cr-00021.

² All citations to the United States Code are to the electronic version that appears in Lexis.

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 2

I. Background

On July 28, 2015, James Cruz (Cruz) pleaded guilty to one count of using a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c), with a minimum sentence of seven years pursuant to § 924(c)(1)(A)(ii). On November 25, 2015, he was sentenced to serve 84 months. In accordance with the terms of his plea agreement, he did not appeal.

On November 21, 2016, Cruz timely filed the instant § 2255 motion in which he moves the court for relief under the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding that *Johnson* applies to cases already final when it was issued). In *Johnson*, the United States Supreme Court invalidated the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), on the basis that the language was unconstitutionally vague.

Here, Cruz asks the court to invalidate the residual clause, also known as the risk-of-force clause, at § 924(c)(3)(B), on the basis that the phrase, “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,” is unconstitutionally vague. The ACCA residual clause invalidated by *Johnson* reads: “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). Cruz argues that the § 924 language “by its nature” like the ACCA clause language “presents a serious potential risk” puts the court in the position of having to subjectively imagine a defendant’s conduct rather than objectively compare statutory elements.

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 3

The Third Circuit has not made a definitive statement as to the post-*Johnson* status of § 924(c)(3)(B). But, the Second, Fifth, Sixth, Eighth, and Eleventh Circuits have held that *Johnson* neither applies to nor invalidates § 924(c)(3)(B). See *United States v. Hill*, 832 F.3d 135, 146 (2d Cir. 2016) (“the Supreme Court's explanation for its conclusion in *Johnson II* renders that case inapplicable to the risk-of-force clause”); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017) *cert. denied Jones v. United States*, 138 S. Ct. 242 (Oct. 2, 2017) (“the definition of “crime of violence” under § 924(c)(3)(B) is not unconstitutionally vague”); *United States v. Henry*, 2018 U.S. App. LEXIS 1880 at *8 (6th Cir. 2018) (“Section 924(c)(3)(B) remains constitutional under circuit law.”); *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016), petition for cert. filed (U.S. Dec. 28, 2016) (“*Johnson* does not render § 924(c)(3)(B) unconstitutionally vague”); *Ovalles v. United States*, 861 F.3d 1257, 1267 (11th Cir. 2017) (“Because *Johnson's* void-for-vagueness ruling does not extend to the “risk-of-force” clause in § 924(c)(3)(B), that clause remains valid.”). But see, *United States v. Jackson*, 865 F.3d 946, 956 (7th Cir. 2017) (holding, under stare decisis principles, that “§ 924(c)(3)(B) is unconstitutionally vague” and, “in so doing, we recognize that with the exception of the Ninth Circuit in *Dimaya*, most circuits to have considered the issue since have declined to extend *Johnson's* holding to invalidate [] § 924(c)(3)(B).”).

Even absent guidance from the Third Circuit regarding the nexus of *Johnson* and § 924(c)(3)(B), Cruz’s adjudicated plea, and the sentence imposed pursuant to his guilty plea, are valid for two reasons: first, because brandishing a firearm was charged and adjudicated contemporaneously with the carjacking charge and second, because even if § 924(c)(3)(B) is void for vagueness, carjacking is a crime of violence for the purposes of § 924(c)(3)(A).

Cruz v. United States
 1:16-cv-00079; 1:15-cr-00021
 Report and Recommendation
 Page 4

II. Crimes tried contemporaneously

The Third Circuit has held that the categorical approach need not be applied when the facts underlying an instant offense "have either been found by [a] jury or admitted by the defendant in a plea."³ *United States v. Robinson*, 844 F.3d 137, 143 (3d Cir. 2016) ("analyzing a § 924(c) predicate offense in a vacuum is unwarranted when the convictions of contemporaneous offenses, read together, necessarily support the determination that the predicate offense was committed with the "use, attempted use, or threatened use of physical force against the person or property of another"). *See also United States v. Young*, 705 Fed. Appx. 94, 95 (3d Cir. 2017) *accord United States v. Kennedy*, 2017 U.S. App. LEXIS 25473, *14-15 (3d Cir. 2017).

In his plea, Cruz admitted the underlying facts of the instant offense:

Defendant acknowledges that the Government can prove the following essential elements of Count Two specifically that:

- On February 21, 2015 in St. Croix, District of the Virgin Islands
- 1) Defendant knowingly used or carried a firearm;
- 2) The using or carrying of said firearm occurred during and in relation to a crime of violence, that is Carjacking;
- 3) The said firearm was brandished; and

³ To determine whether a predicate offense, such as carjacking, is a crime of violence a court employs either the categorical approach or the modified categorical approach. The categorical approach focuses solely on whether the elements of the crime of conviction sufficiently match the elements of the generic, or commonly known, crime, while ignoring the particular facts of the case. *Mathis v. United States*, 136 S. Ct. 2243 (2016). The modified categorical approach is used when a statute provides for more than one way to commit an element of the crime. *Mathis*, 136 S. Ct. at 2249 ("enumerates various factual means of committing a single element"). This approach "allows courts to examine certain documents (such as charging papers and jury instructions) to determine under which set of alternative elements the defendant was convicted." *United States v. Mathis*, 786 F.3d 1068, 1072 (8th Cir. May 12, 2015) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013)). The statutory language in 18 U.S.C. § 2119, "by force and violence or by intimidation" has troubled courts in determining whether the carjacking statute is indivisible or divisible. In other words, is the statute composed of one way to commit the crime, "by force and violence or by intimidation" or, is the statute composed of two ways to commit the crime, carjacking "by force and violence" and carjacking "by intimidation"? However, regardless of which approach is used to analyze the statute, courts consistently find that carjacking is a crime of violence under the force clause of 924(c).

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 5

4) The said crime of violence, Carjacking, could be prosecuted in a court of the United States;

c. Defendant is pleading guilty because Defendant is in fact guilty of the charges contained in Count Two. In pleading guilty to this offense, Defendant acknowledges that should the case go to trial, the government could present evidence to support this charge beyond a reasonable doubt as follows:

On February 21, 2015 at the St. Croix Educational Complex in St. Croix in the District of the Virgin Islands, [the victims] had been stopped in [the victim's] vehicle, a 2006 white Chevrolet pick-up truck (that had been shipped in interstate commerce) eating pizza. Defendant and an accomplice approached the couple with Defendant pointing a firearm at the couple and ordering both of them onto the ground. Defendant and the accomplice then drove off with the truck. They abandoned the truck a short time later and fled from law enforcement. They were both apprehended shortly by police officers. No firearm was recovered.

The victims identified Defendant and the accomplice as the persons who robbed them. Defendant admitted to participating in stealing the car, but denied that he was armed with a firearm. The accomplice and two victims indicated that Defendant was armed with a firearm. The two victims indicated that Defendant pointed the firearm at them.

Plea Agreement (ECF No. 9) at 2-3.⁴

Cruz's plea agreement makes clear that the "actual or threatened force, or violence, or fear of injury" in his crime of carjacking "sprang from the barrel of gun." *Robinson*, 844 F.3d at 144. This carjacking was thus a crime of violence.

⁴ Cruz's plea agreement shows that his predicate offense, carjacking, is a crime of violence. The plea agreement shows that elements satisfy both §§ 924(c)(3)(A) and (B). To wit: Pointing a gun at someone to take their car "has as an element . . . the threatened use of physical force against the person or property of another"—satisfying A. And, pointing a gun at someone to take their car "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"—satisfying B.

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 6

III. Carjacking is a crime of violence

It seems difficult to deny that carjacking, "by its nature, involves a substantial risk that physical force against the person or property of another may be used." 18 U.S.C. § 924(c)(3)(B). However, for the sake of argument, the Court will assume that we don't know how the instant carjacking was carried-out and, that § 924(c)(3)(B) is unconstitutionally vague for the reasons explained in *Johnson*. Even with these assumptions, Cruz's adjudication and sentence will be upheld if the "crime of violence" underlying his plea of guilty for brandishing a firearm "ha[d] 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).

The "crime of violence" underlying Cruz's adjudication was carjacking. The carjacking statute, 18 U.S.C. § 2119, requires the United States to prove the defendant used "force and violence or intimidation" to take a motor vehicle and, at the moment of the taking, intended "to seriously harm or kill the driver if necessary to steal the car." *Holloway v. United States*, 526 U.S. 1, 11-12 (1999).

Under the carjacking statute, any intimidation, whether it be by aiming a gun, by standing in a way that emphasizes the size and strength of the carjacker, or by saying, "that's a nice car—would you like to be able to continue using it?" could suffice to prove the offense, provided it is the means by which a defendant "takes" a motor vehicle "from the person or presence of another." 18 U.S.C. § 2119. Intimidation facilitates a taking when it is perceived as a threat to use physical force.⁵ A victim's perception of a threat does not

⁵ "To take, or attempt to take by intimidation means willfully to take, or attempt to take, by putting *in fear of bodily harm*." Black's Law Dictionary, 6th Ed. (emphasis added).

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 7

always mean that the defendant made a threat, but the carjacking statute applies when the defendant "takes" a motor vehicle "by force and violence or by intimidation." 18 U.S.C. § 2119 (emphases added). In other words, the statute requires proof of goal-driven behavior by the defendant, be it by force or violence or by intimidation. If a carjacker's intimidation could be accomplished by a threat to inflict economic or reputational injury, then a carjacker might violate § 2119 by means that exclude physical force. The Court is not aware of any case in which carjacking by intimidation is defined that broadly.

The Third Circuit has not yet considered the question of whether carjacking is a crime of violence under the force clause of § 924(c)(3). However, other circuits have held, before and since *Johnson*, that carjacking is a crime of violence under § 924(c)(3)(A). See *United States v. Mohammed*, 27 F.3d 815, 819 (2nd Cir. 1994) (pre-*Johnson*, but relies on force clause definition: "It is clear that a violation of section 2119, the carjacking statute, is a crime of violence within the meaning of section 924(c) [which reads] a 'crime of violence' includes any felony that 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another'"); *United States v. Evans*, 848 F.3d 242, 247 (4th Cir. 2017) ("We are not aware of any case in which a court has interpreted the term 'intimidation' in the carjacking statute as meaning anything other than a threat of violent force."); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017) (finding carjacking is a crime of violence: "Our own precedent, although in the bank robbery context, leads us to conclude that a crime that has as an element a taking 'by force and violence or by intimidation' is a 'crime of violence' under § 924(c)(3)(A)."); *Broadway v. United States*, 2016 U.S. App. LEXIS 13975 at *2 (7th Cir. 2016) (citing *Dawkins v. United States*, 809 F.3d

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 8

953, 954 (7th Cir. 2016)) (“carjacking remains a crime of violence after *Johnson* because it has as an element the use or threatened use of force”); *United States v. Mathijssen*, 406 F.3d 496, 499 (8th Cir. 2005) (pre-*Johnson*, relies on force-clause definition: “the federal offense of carjacking, involving the taking of a vehicle ‘from the person or presence of another by force and violence or by intimidation,’ 18 U.S.C. § 2119, ‘is a crime of violence’ within the meaning of the term in 18 U.S.C. § 924. . . . ‘the use, attempted use, or threatened use of physical force against the person of another’”); *In re Smith*, 829 F.3d 1276 (11th Cir. 2016) (“an element requiring that one take or attempt to take by force and violence or by intimidation, which is what the federal carjacking statute does, satisfies the force clause of § 924(c), which requires the use, attempted use, or threatened use of physical force”).

It seems clear that under § 2119, regardless of whether the defendant takes a vehicle by force and violence or by intimidation, the crime of carjacking necessarily has as an element, the use, attempted use, or threatened use of physical force against the person or property of another. And, the Court is not aware of any holding to the contrary. Whether committed "by force and violence" or merely "by intimidation," to find a defendant guilty of carjacking the United States must prove, as an element, the use, attempted use, or threatened use of physical force. Therefore, carjacking meets the force clause of 18 U.S.C. § 924(c)(3)(A).

IV. Conclusion

Based upon the foregoing, IT IS HEREBY RECOMMENDED that Petitioner James Cruz’s Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person

Cruz v. United States
1:16-cv-00079; 1:15-cr-00021
Report and Recommendation
Page 9

in Federal Custody (ECF No. 25) be **DENIED** without an evidentiary hearing.⁶ It is further RECOMMENDED that the Government's Motion to Dismiss (ECF No. 27) be **GRANTED**.

Reasonable jurists could disagree on the three issues presented here: first, whether carjacking constitutes a "crime of violence" under *Robinson*, second, whether carjacking as defined by 18 U.S.C. § 2119 meets the force clause of 18 U.S.C. § 924(c)(3)(A), and third, whether the residual clause, § 924(c)(3)(B), is unconstitutionally vague under *Johnson*. It is therefore recommended that a certificate of appealability be **GRANTED**.⁷

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 16, 2018

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

⁶ 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).

⁷ "The district court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to the applicant." Rule 11(a), Rules Governing § 2255 Proceedings. A COA should issue as to those claims on which the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied if "jurists of reason could disagree with the district court's resolution of [the] constitutional claims" or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).