

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11531
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22647-MGC; 1:10-cr-20855-MGC-4

EMILE MYRTHIL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(May 3, 2018)

Before MARCUS, ROSENBAUM and FAY, Circuit Judges.

PER CURIAM:

Federal prisoner Emile Myrthil appeals the district court's dismissal of his second motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. We affirm.

I. BACKGROUND

Myrthil pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), attempted Hobbs Act robbery, also in violation of § 1951(a), and possession of a firearm in furtherance of a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The "crimes of violence" that supported Myrthil's § 924(c) conviction were his convictions for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery. Myrthil received a 151-month total sentence of imprisonment.

Myrthil filed his first § 2255 motion in 2013; the district court denied it on the merits. In 2016, he filed the instant second or successive § 2255 motion with our authorization, arguing that he was actually innocent of his § 924(c) conviction. He contended that § 924(c)(3)(B)'s "risk-of-force" clause was void for vagueness in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and, further, that his convictions for conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery were not appropriate § 924(c) companion convictions because they were not categorically "crimes of violence" under § 924(c)(3)(A)'s "use-of-force" clause. The district court denied Myrthil's § 2255 motion on the merits, based on

its finding that Myrthil's conviction for attempted Hobbs Act robbery was a valid "crime of violence" companion conviction under § 924(c)(3)(A)'s "use-of-force" clause. The district court also denied Myrthil a certificate of appealability ("COA").

Myrthil appealed; we granted him a COA on the following two issues:

(1) Whether Myrthil's conviction for attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951, qualifies as a crime of violence necessary to support his 18 U.S.C. § 924(c) conviction, in light of *Johnson v. United States*, 135 S. Ct. 2251 (2015).

(2) Whether Myrthil's conviction for conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951, qualifies as a crime of violence necessary to support his 18 U.S.C. § 924(c) conviction, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On appeal, Myrthil argues that § 924(c)'s "risk-of-force" clause is void for vagueness for the same reasons that led the Supreme Court to declare in *Johnson* that § 924(e)'s similar "residual" clause was unconstitutionally vague. Therefore, he contends that, absent § 924(c)'s "risk-of-force" clause, his § 924(c) conviction can stand only if his convictions for attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery qualify as "crimes of violence" under § 924(c)'s "use-of-force" clause. He argues that those convictions are not categorically "crimes of violence" necessary to support his § 924(c) conviction.

II. DISCUSSION

In reviewing a § 2255 proceeding, we review legal conclusions *de novo* and factual findings for clear error. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). Under the Armed Career Criminal Act (“ACCA”), a defendant convicted of being a felon in possession of a firearm who has 3 or more prior convictions for a “serious drug offense” or “violent felony” faces a mandatory minimum 15-year sentence. *See* 18 U.S.C. § 924(e)(1). The ACCA defines a violent felony as any crime punishable by a term of imprisonment exceeding one year that:

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

§ 924(e)(2)(B)(i), (ii).

The first prong of this definition is referred to as the “elements clause,” while the second prong contains the “enumerated crimes” clause, and finally, what is commonly called the “residual clause.” *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012). In 2015, the Supreme Court, in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court clarified, in holding that the “residual” clause was void, that it did not call into question the application of the “elements” and “enumerated

offense" clauses of the ACCA's definition of a violent felony. *Id.* at 2563. In 2016, the Supreme Court held that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016).

Distinct from the provision in § 924(e), § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or a "drug-trafficking crime." 18 U.S.C. § 924(c)(1). A conviction and sentence under § 924(c) requires only one companion conviction, not two. *See* § 924(c)(1)(A). For purposes of § 924(c), "crime of violence" means 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.

§ 924(c)(3)(A), (B). The first prong of the definition is referred to as the "use-of-force" clause; the second prong is referred to as the "risk-of-force" or "residual" clause. *Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir. 2017).

In *Ovalles*, we held that the Supreme Court's decision in *Johnson* did not invalidate § 924(c)(3)(B)'s "risk-of-force" clause. *Id.* at 1267. We affirmed the denial of a defendant's § 2255 motion to vacate her conviction and sentence for

using and carrying a firearm during and in relation to a crime of violence, namely, attempted carjacking, in violation of 18 U.S.C. § 2119. *Id.* at 1258-60. We determined that *Johnson*'s void-for-vagueness ruling did not extend to § 924(c)(3)(B), because the "risk-of-force" clause in § 924(c)(3)(B) had a distinct purpose of punishing firearm use in connection with a specific crime rather than recidivism, had not caused the same difficulty in interpretation, did not encompass risks arising after the offense is completed, and lacked the confusing enumerated offenses. *Id.* at 1265-66. Accordingly, because Ovalles had never argued that her attempted-carjacking offense would not qualify as a crime of violence under the "risk-of-force" clause if that clause were constitutionally valid, we determined that her conviction for attempted carjacking qualified as a "crime of violence" under § 924(c)(3)(B). *Id.* at 1267.

Most recently, we held that a conviction for Hobbs Act robbery was a valid § 924(c) companion conviction because it qualified as a "crime of violence" under both of the clauses of § 924(c)(3). *United States v. St. Hubert*, 883 F.3d 1319, 1328-29 (11th Cir. 2018). We also held that a conviction for attempted Hobbs Act robbery is categorically a "crime of violence" under § 924(c)(3)(A)'s "use-of-force clause." *Id.* at 1334.

Here, the district court did not err in denying Myrthil's § 2255 motion, as *Ovalles* holds that *Johnson* did not invalidate § 924(c)(3)(B)'s "risk-of-force"

clause. *Ovalles*, 861 F.3d at 1259. Therefore, Myrthil's conviction and sentence under § 924(c) are still valid following *Johnson*, and his claim is foreclosed by Circuit precedent.

Additionally, even assuming that *Johnson* invalidated § 924(c)(3)(B)'s "risk-of-force" clause, Myrthil's § 924(c) conviction and sentence is still valid because his conviction for attempted Hobbs Act robbery still qualifies as a "crime of violence" companion conviction under § 924(c)(3)(A)'s "use-of-force" clause. *St. Hubert*, 883 F.3d at 1334. That conclusion also means that we need not consider whether Myrthil's conviction for conspiracy to commit Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A) or (B), because a conviction and sentence under § 924(c) requires only one companion conviction, not two. *See* § 924(c)(1)(A).

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11531-CC

EMILE MYRTHIL,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

BEFORE: MARCUS, ROSENBAUM, and FAY, Circuit Judges.

PER CURIAM:

The petition for panel rehearing filed by Emile Myrthil is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

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**United States District Court
Southern District of Florida
MIAMI DIVISION**

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number - 1:10-20855-CR-COKE-4

EMILE MYRTHIL

USM Number: 96038-004

Counsel For Defendant: Manuel Gonzalez, Esq.
Counsel For The United States: Karen Stewart, AUSA
Court Reporter: Judy Shelton

The defendant pleaded guilty to Counts one, two and three of the Indictment.
The defendant is adjudicated guilty of the following offenses:

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18, U.S.C. § 1951(a)	Conspiracy to commit Hobbs Act Robbery.	November 11, 2010	1
18, U.S.C. § 1951(a)	Attempted Hobbs Act Robbery.	November 11, 2010	2
18, U.S.C. § 924(c)(1)(A)(iii)	Possession of a firearm in furtherance of a crime of violence.	November 11, 2010	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/20/2011

Marcia G. Cooke
Marcia G. Cooke
United States District Judge

April 20, 2011

DEFENDANT: EMILE MYRTHIL
CASE NUMBER: 1:10-20855-CR-COOKE-4

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **31 months as to Counts 1 and 2, concurrently; 120 months as to Count 3, to be served consecutively to Counts 1 and 2 for a total of 151 months imprisonment.**

The Court makes the following recommendations to the Bureau of Prisons:

for the defendant to be designated to a facility in the Southern District of Florida and that he participate in the Bureau of Prison's Residential (500 Hr) Drug Program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: EMILE MYRTHIL
CASE NUMBER: 1:10-20855-CR-COOKE-4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EMILE MYRTHIL
CASE NUMBER: 1:10-20855-CR-COOKE-4

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

DEFENDANT: EMILE MYRTHIL
CASE NUMBER: 1:10-20855-CR-COOKE-4

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$300.00	\$	\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: EMILE MYRTHIL
CASE NUMBER: 1:10-20855-CR-COOKE-4

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **\$300.00** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.