UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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56 Forsyth Street, N.W.
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David J. Smith
Clerk of Court

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February 11, 2019

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-13911-D
Case Style: Robert Gray v. USA
District Court Docket No: 1:16-cv-22002-JAL
Secondary Case Number: 1:12-cr-20112-JAL-2

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Scott O'Neal, D
Phone #: (404) 335-6189

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13911-D

ROBERT GRAY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Robert Gray is a federal inmate serving a total 161-month sentence after pleading guilty, in 2012, to conspiracy to commit Hobbs Act robbery, under 18 U.S.C. § 1951(a) (Count 1); attempted Hobbs Act robbery, under § 1951(a) (Count 2); and possession of a firearm in furtherance of a crime of violence, under 18 U.S.C. § 924(c) (Count 3). According to Mr. Gray's superseding indictment, Count 3 relied on Counts 1 and 2. Under § 924(c), a "crime of violence" is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or "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)(A)-(B). The former definition is called the "elements clause" and the latter is known as the "residual clause." *See Ovalles v. United States*, 905 F.3d 1231, 1234 (11th Cir. 2018) (en banc).

Mr. Gray did not file a direct appeal. However, in 2016, Mr. Gray filed a 28 U.S.C. § 2255 motion to vacate, arguing that, in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015)—which struck as unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA")—his convictions under § 1951 no longer qualified as crimes of violence and, therefore, his conviction and sentence under § 924(c) was invalid.[1] The district court dismissed Mr. Gray's § 2255 motion as untimely under § 2255(f)(1) and (3). Regarding Mr. Gray's *Johnson* claim, the district court determined that *Johnson* was confined to ACCA's residual clause and did not reach the similarly worded residual clause in § 924(c). Because Mr. Gray was sentenced under § 924(c), and not under ACCA, the court determined that *Johnson* did not apply to his claim and his motion was untimely. Mr. Gray has filed an appeal and seeks a certificate of appealability ("COA").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted).

Here, Mr. Gray is not entitled to a COA because he cannot make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *see Slack*, 529 U.S. at 484. True, the Supreme Court recently granted certiorari to determine the constitutionality of § 924(c)'s residual clause. *See United States v. Davis*, No. 18-431, 2019 WL 98544 (Jan. 4, 2019); *but see Ovalles*, 905 F.3d at 1234 (holding that the residual clause is not unconstitutionally vague and applying a

[1] Mr. Gray did not argue in his § 2255 motion that the conspiracy to commit Hobbs Act robbery, and not the attempted Hobbs Act robbery, served as the predicate offense for his § 924(c) conviction. Nor did he argue that because the indictment listed both, it was impossible to discern which offense served as the predicate. When he pled guilty, Mr. Gray admitted that in July 2011, he and his two co-conspirators planned to rob several high-end jewelry dealers. Mr. Gray did not obtain a firearm, although both of his co-conspirators did. The men attempted to rob the jewelers, but the jewelers drove off in a car. One of Mr. Gray's co-conspirators shot toward the passenger side of the car as the jewelers drove away.

conduct-based approach to that definition of "crime of violence"). However, this Court has held that even if § 924(c)'s residual clause was unconstitutionally vague, attempted Hobbs Act robbery qualifies as a predicate offense under 18 U.S.C. § 924(c)'s elements clause. *United States v. St. Hubert*, 909 F.3d 335, 351-53 (11th Cir. 2018). Thus, binding precedent dictates that Mr. Gray's § 924(c) conviction, predicated on attempted Hobbs Act robbery, is valid notwithstanding any remaining debate over whether § 924(c)'s residual clause is unconstitutionally vague. Accordingly, because Mr. Gray cannot make a "substantial showing of the denial of a constitutional right," his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2); *see Slack*, 529 U.S. at 484.

UNITED STATES CIRCUIT JUDGE