

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-15435-C

ERIK LINDSEY SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Erik Lindsey Smith is a federal prisoner currently serving a total term of 327 months' imprisonment after he pled guilty to using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). In his indictment, Mr. Smith was also charged with conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and attempted Hobbs Act robbery, and both of these charges served as predicates for the § 924(c) charge. These charges were later dismissed, in accordance with Smith's plea agreement. After he was convicted, Mr. Smith filed a direct appeal, and this Court affirmed his conviction and sentence.

In June 2014, Mr. Smith filed a motion to vacate, pursuant to 28 U.S.C. § 2255, which was denied in October 2014, and he did not appeal the denial of his § 2255 motion. On June 21, 2016, Mr. Smith filed, with this Court, an application for leave to file a successive § 2255 motion, arguing that *Johnson v. United States*, 135 S. Ct. 2551, 2560-63, 192 L. Ed. 2d 569 (2015), eliminated his § 924(c) firearm conviction because § 924(c) contained a residual clause provision similar to the one declared unconstitutional in *Johnson*. This Court granted Mr. Smith's application, and he filed a successive § 2255 motion, reiterating his *Johnson* claim.

The magistrate judge entered a report and recommendation ("R&R"), recommending that Mr. Smith's § 2255 motion be denied. The district court adopted the magistrate judge's R&R, denied his § 2255 motion, and denied a COA. Mr. Smith now seeks a COA from this Court.

To get a COA, a § 2255 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts will grant a COA if the petitioner can show 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, 120 S. Ct. 1595, 1603-04 (2000) (quotation omitted). But "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." Hamilton v. Sec'y, Fla.

Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015) (per curiam) (quotation omitted).

A “crime of violence” under § 924(c) is 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.

Id. § 924(c)(3). This Court has held that Hobbs Act robbery and attempted Hobbs Act robbery are a crimes of violence under § 924(c)(3)(A). United States v. St. Hubert, 883 F.3d 1319, 1331–34 (11th Cir. 2018).

In connection with his plea, Mr. Smith stipulated to a factual proffer that established he committed attempted Hobbs Act robbery. Because attempted Hobbs Act robbery is a crime of violence under the use-of-force clause in § 924(c)(3)(A), Mr. Smith’s § 924(c) conviction remains valid regardless of whether Johnson invalidated the residual clause in § 924(c)(3)(B). Thus, reasonable jurists would not debate the denial of Mr. Smith’s § 2255 motion, and his motion for a COA is DENIED. See 28 U.S.C. § 2253(c)(2); Hamilton, 793 F.3d at 1266.


UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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July 20, 2018

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-15435-C
Case Style: Erik Smith, et al
District Court Docket No: 1:16-cv-23307-KMM
Secondary Case Number: 1:12-cr-20208-KMM-1

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: Walter Pollard/mg, C
Phone #: (404) 335-6186

Enclosure(s)

DIS-4 Multi-purpose dismissal letter