NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ERIK LINDSEY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION TO FILE AN OUT-OFTIME PETITION FOR A WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Erik Lindsey Smith, respectfully requests leave to file a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Eleventh Circuit out of time. In support of the request, Mr. Smith states as follows:

1. Mr. Smith sought to appeal the denial of his 28 U.S.C. § 2255 motion. Mr. Smith filed a request for a certificate of appealability from the Eleventh Circuit Court of Appeals in Eleventh Circuit Case No. 17-15435. On July 20, 2018, the Court of Appeals for the Eleventh Circuit denied Mr. Smith's request for a certificate of appealability. That would have made Mr. Smith's

petition for a writ of certiorari due in this Court on October 18, 2018.

2. However, undersigned counsel miscalculated the due date as October 21, 2018. On October 9, 2018, prior to the actual due date, undersigned counsel filed a request for a 60-day extension of time to file the petition for a writ of certiorari. In the request, undersigned counsel requested an extension "up to and including December 21, 2018."

3. This Court granted the extension. (18A387). However, this Court only granted the extension until December 17, 2018.

4. Undersigned counsel having requested an extension to an including December 21, 2018, and noting that the request had been granted, incorrectly noted the new due date as December 21, 2018, the date requested.

5. On December 19, 2018, undersigned counsel filed Mr. Smith's petition for a writ of certiorari under the mistaken belief that the petition was two days early when in fact it was two days late.

The issue raised in Mr. Smith's case is identical to the issue decided by an *en banc* panel of the Eleventh Circuit in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), where an en banc Eleventh Circuit addressed whether, given the identical wording, § 924(c)(3) would also be unconstitutionally vague in light of this Court's opinion in *Dimaya*. Mr. Smith's initial request for an extension of time to file the petition in this Court was based on a belief that counsel for the petitioner in *Ovalles* would file a petition raising the exact same issue to be raised by Mr. Smith.

Counsel for the petitioner in *Ovalles* has requested and received an extension of time to file a petition for a writ of certiorari with this Court. *See Ovalles v. United States*, No. 18A621 (U.S. Dec. 14, 2018). The petition in *Ovalles* is currently due in this Court on March 8, 2019. *Id.* This Court's decision on that petition in a published, *en banc* decision will likely dictate the disposition of Mr. Smith's petition.

Rather than request a second extension, undersigned counsel filed Mr. Smith's petition noting the status of the *Ovalles* case and requesting that the petitions be reviewed together. However, because leave had only been granted until December 17, 2018, Mr. Smith's petition was returned as untimely. Based on the above, undersigned counsel respectfully request that Mr. Smith's petition for a writ of certiorari to the Eleventh Circuit Court of Appeals be filed by this Court. No party will be prejudiced by the granting of an out-of-time filing.

Accordingly, Petitioner respectfully requests that he be granted leave to file his petition for a writ of certiorari to the Eleventh Circuit out of time.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

By: */s/ Bernardo Lopez*

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January 3, 2019

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.

Barbara B. Martin
UNITED STATES CIRCUIT JUDGE

Additional material from this filing is available in the Clerk's Office.