

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

BRYAN TIMOTHYLEENARD SMITH,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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October 15, 2019

QUESTIONS PRESENTED

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED
BY DENYING PETITIONER'S APPLICATION FOR CERTIFICATE OF
APPEALABILITY.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Bryan Timothyleenard Smith, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying his application for a certificate of appealability.

OPINION BELOW

The Eleventh Circuit's initial opinion was unpublished and was issued on July 17, 2019. The Petitioner filed a motion for reconsideration, which was denied on September 25, 2019 in an unpublished decision.

JURISDICTION

The jurisdiction of this Court is invoked under Supreme Court Rule 10(c). The United States District Court for the Middle District of Florida had original jurisdiction of this federal criminal case pursuant to 18 U.S.C. §3231, and the Eleventh Circuit had jurisdiction pursuant to 18 U.S.C. § 1291.

STATEMENT OF THE CASE

I. Procedural History

A trial jury convicted Mr. Smith of committing seven of the offenses charged in the Superseding Indictment. In essence, four of the offenses of conviction related to Hobbs Act robberies, and the remaining three offenses of conviction were for accompanying 18 U.S.C. § 924(c) violations. These offenses of conviction were charged in: Count One (conspiracy to obstruct commerce by robbery, *i.e.*, “Hobbs Act robbery,” in violation of 18 U.S.C. § 1951); Count Six (the Hobbs Act robbery of the Island Food Store on November 27, 2005, in violation of 18 U.S.C. §§ 1951 & 2); Count Seven (carrying and discharging a firearm in relation to the offense in Count Six, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(iii) & 2); Count Nine (the Hobbs Act robbery of a Circle K convenience store on November 27, 2005, in violation of 18 U.S.C. § 1951 & 2); Count Ten (carrying and brandishing a firearm in relation to the Offense in Count Nine, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(ii) & 2); Count Eleven (the attempted Hobbs Act robbery of Bill’s Market on December 2, 2005, in violation of 18 U.S.C. §§ 1951 & 2); and Count Twelve

(carrying and discharging a firearm in relation to Count Eleven, in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(A)(iii) & 2).

At sentencing, the district court imposed the maximum term of imprisonment, 20 years, for each of the four Hobbs Act offenses, and did so consecutively, totaling 80 years. Again, these were Count One (conspiracy), Counts Six and Nine (substantive), and Count Eleven (attempt). The court then imposed the statutory minimum sentences for the § 924(c) counts, and did so consecutively, totaling another 60 years. (According to amendments to 18 U.S.C. § 924(c)(1)(C) in the First Step Act, enacted December 21, 2018, the “stacking” of §924(c) counts is no longer permissible.) The district court also ordered the Hobbs Act and §924(c) counts to run consecutively to each other, for a total of 140 years, or 1,680 months. Again, the § 924(c) offenses of conviction were Count Seven (discharging a firearm in the Hobbs Act robbery of the Island Food Store), sentenced to minimum mandatory 10 years under 18 U.S.C. § 924(c)(1)(A)(iii), Count Ten (brandishing a firearm in the Hobbs Act robbery of a Circle K), sentenced to a minimum mandatory 25 year sentence under 18 U.S.C. § 924(c)(1)(C), and Count Twelve (discharging a firearm in the attempted Hobbs Act robbery of Bill’s Market), sentenced to another minimum mandatory 25 year sentence under 18 U.S.C. § 924(c)(1)(C).

Notably, the grand jury did not charge, and the trial jury did not convict, Mr. Smith in Count 12 with the enhanced punishment permitted by 18 U.S.C. § 924(j), which provides that a §924(c) violation, if the death of a person is caused by the use of a firearm, may be subject to a sentence that includes death or life imprisonment, if that killing amounts to murder as defined by 18 U.S.C. § 1111.

Mr. Smith appealed his judgment and sentence, and on November 13, 2007, the Eleventh Circuit Court of Appeals affirmed in all respects. *United States v. Smith*, 255 F. App'x 391 (11th Cir. 2007) (unpublished). The court noted that, “Neither party filed objections to the PSI [Presentence Investigation Report, also known as “PSR.”] Moreover, at sentencing, Smith did not object to the factual statements or the recommended Guidelines range.” Slip op. at 12. The court also noted that, for purposes of the Hobbs Act convictions, the PSI applied grouping rules under the Sentencing Guidelines in which the Island Foods and Circle K robberies had base offense levels of 20, but that the Bill’s Market attempted robbery in Count Eleven had a base offense level of 43, or life, under the Guidelines, “due in large part to [Remesh] Desai’s death.” *Id.* at 11-12. The court observed that, regarding Count Eleven, the PSI noted that U.S.S.G. § 2B3.1(c)(1), cross-references the Guidelines life sentence of § 2A1.1(a), if a victim is killed under circumstances that would constitute murder under 18 U.S.C. § 1111. *Id.* (However, the court also noted that, although the Guidelines sentence was life, this

Court imposed a 140-year sentence by accounting for the statutory maximums, *id.*, that is, 80 years for the Hobbs Act convictions alone.)

With assistance of his original collateral counsel, on June 4, 2008, Mr. Smith filed a timely 28 U.S.C. § 2255 motion to vacate his conviction and sentence based on claims of ineffective assistance of counsel. On July 20, 2011, the district rejected all but two of the discrete claims of ineffective assistance, ordering an evidentiary hearing on the claims of ineffective assistance of counsel based on the absence of pretrial motion to suppress Mr. Smith's statements, and the failure to investigate his alibi claim. The magistrate judge conducted an evidentiary hearing on those two claims on September 14, 2011, and on February 28, 2012 issued his Report & Recommendation recommending that Mr. Smith's 28 U.S.C. § 2255 motion be denied.

The district court issued a clarifying order on September 25, 2013. The district court permitted Mr. Smith to file objections to the February 28, 2012 R&R, and also permitted Mr. Smith to move for reconsideration of a previous order rejecting a claim of ineffective assistance specifically regarding trial counsel's failure before sentencing to file objections to the preliminary Presentence Report (PSR). Through counsel, Mr. Smith filed his objections to the R&R on October 18, 2013, focusing exclusively on the ineffective assistance claim involving the failure to file a pretrial motion to suppress statements. Also through counsel, and

on the same day, Mr. Smith filed a Fed. R. Civ. P. 60(b) motion for relief from judgment, requesting reconsideration of the ineffective assistance claim that emphasized the failure to file objections to the Presentence Report.) Specifically, the motion emphasized that the failure to file objections resulted in a Guidelines sentence of life, which would have applied only if the defendant could have been convicted of murder under 18 U.S.C. § 1111. The motion noted the district court's prior comments that it "saw no evidence that [Smith] participated in the decision to execute [Mr. Desai]...." The government filed responses in opposition.

Acting *pro se*, Mr. Smith filed his own motion to amend on February 3, 2014. Mr. Smith argued that his subsequent acquittal on October 28, 2008 in state court for the felony-murder of Mr. Desai (*see State v. Bryan Smith*, Case No. 06-CF-47301 (Fla. 10th Cir., Polk County)), prevents an enhanced sentence on Count Eleven based on the death of Mr. Desai, and that his trial counsel was ineffective at sentencing for failing to request that the Hobbs Act counts of conviction should all run concurrently to each other.

While those matters were pending, on June 26, 2016, the Office of the Federal Defender, which was appointed by order of the court, filed a second or successive §2255 motion directed exclusively to *Johnson v. United States*, 135 S. Ct. 2551 (2015), which was made retroactively available to cases on collateral review by *Welch v. United States*, 136 S. Ct. 1257 (2016). By order issued on the

same day, the district court consolidated that motion into the pending §2255 case, treating all claims as part of the initial §2255 motion - and not subject to the heightened burdens governing second or successive post-conviction motions - denying as moot all motions that had been pending in this case, and staying the proceedings.

Through the undersigned, court-appointed attorney, Mr. Smith then moved to amend his initial 28 U.S.C. § 2255 motion, and made the following additional claims (without waiving any claim that was raised but denied by the district court previously in the July 20, 2011 Order):

1. *Ineffective assistance in failing to file a pretrial motion to suppress statements.*
2. *Ineffective assistance in failing to object to the Presentence Report (PSR).*
3. *Ineffective assistance in failing to object at sentencing to consecutive sentences on the four Hobbs Act convictions, and ineffective assistance in failing to object at sentencing to an enhanced sentence for Count Eleven related to the death of Mr. Desai.*
4. *Ineffective assistance by failing to object to the calculation of the 18 U.S.C. § 924(c) sentences.*

5. *The Hobbs Act convictions are not “crimes of violence” for purposes of 18 U.S.C. § 924(c), and therefore Counts Seven, Ten, and Twelve should be dismissed.*

6. *The 18 U.S.C. § 924(c) convictions are invalid under Rosemond v. United States, 134 S. Ct. 1240 (2014).*

On November 2, 2018, the district court denied each of these claims in Mr. Smith’s §2255 petition.

First, the district court rejected the claim that trial counsel was constitutionally ineffective by failing to investigate the circumstances of Mr. Smith’s custodial interrogation and by failing to move to suppress statements made to law enforcement during the interrogation. Second, noting that Mr. Smith abandoned the claim, the district court rejected the claim that counsel failed to investigate alibi witnesses. Third, the district court rejected the claim that counsel was ineffective in failing to object to the PSR’s assertion that Mr. Desai “died as a result of the gun shot,” which established a Guidelines range of life imprisonment. The district court reasoned that Mr. Smith failed to demonstrate that the death was caused by anything other than a gunshot wound during a robbery. *Id.* The district court also rejected the related claim that *Alleyne v. United States*, 570 U.S. 99 (2013), which held that a fact that increases a mandatory minimum sentence must

be asserted in the indictment and found by a jury beyond a reasonable doubt, does not apply retroactively on collateral review. Doc. 96 at 11.

Fourth, the district court also rejected the “*Johnson* claim,” better described now as a “*Davis* claim,” noting that the Eleventh Circuit, in *Ovalles v. United States*, 905 F. 3d 1231, 1253 (11th Cir. 2018) (*en banc*), found that the residual (or risk-of-force) clause, 18 U.S.C. §924(c)(3)(B), was not unconstitutionally void for vagueness. *Id.* The district court also reasoned that this Court has previously held in *United States v. St. Hubert*, 883 F. 3d 1319, 1328-34 (11th Cir. 2018), that Hobbs Act robbery and attempted Hobbs Act robbery are crimes of violence under the use-of-force clause, 18 U.S.C § 924(c)(3)(A).

Fifth, the district court reasoned that the *Rosemond* claim was untimely filed on April 28, 2017, because *Rosemond* was issued on March 5, 2014, and more than three years had passed. Doc. 96 at 13-14. The district court noted that there was no prior claim to which *Rosemond* may have related back, and the fact that Mr. Smith was unrepresented at the time of its issuance was of no moment.

Sixth, the district court found that Mr. Smith’s counsel was not deficient in failing to object that the first § 924(c) sentence, was not ten years, but seven (to then be following by the 50-year consecutive sentence established the other two § 924(c) claims). (Again, the First Step Act, as of December 21, 2018, bars such

“stacking” of § 924(c) counts altogether.) Mr. Smith, then, argued for a 57-year, not 60-year, total sentence on the §924(c) counts.

Seventh, and finally, the district court rejected the claim that counsel was ineffective for failing to object to consecutive sentences of 20 years each for the four Hobbs Act convictions, for a total of 80 years. Doc. 96 at 15. The district court reasoned that, because this Court affirmed the reasonableness of Mr. Smith’s sentence, an objection to a consecutive sentence could not have achieved a different result.

The district court denied a Certificate of Appealability on any of these claims.

In its July 17, 2019 order, the Eleventh Circuit Court of Appeals also denied petitioner’s application for a Certificate of Appealability (COA). In its order dated September 25, 2019, the Eleventh Circuit Court of Appeals denied petitioner’s motion for reconsideration of its order denying petitioner’s application for a Certificate of Appealability.

REASONS FOR GRANTING THE WRIT

The Petition should be granted so that this Court can reverse the Eleventh Circuit’s denial of petitioner’s COA.

An appellate court may issue a COA where an “applicant has made a substantial showing of a denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotation marks omitted). Mr. Smith has satisfied this standard. Reasonable jurists could find that Mr. Mathis could prevail. Accordingly, issuance of a COA and, alternatively, remand to the district court for an evidentiary hearing, is appropriate.

Trial counsel offered ineffective assistance in failing to object at sentencing to consecutive sentences on the four Hobbs Act convictions, and ineffective assistance in failing to object at sentencing to an enhanced sentence for Count Eleven related to the death of Mr. Desai.

These claims were raised by Mr. Smith and by collateral counsel generally, in the assertion that trial counsel was ineffective by failing to object to the Presentence Report. Mr. Smith argued additionally that the prejudice was made clear by his subsequent acquittal, on October 28, 2008, of felony murder in state

court, in *State v. Bryan Smith*, Case No. 06-CF-47301 (Fla. 10th Cir., Polk County, Florida).

Mr. Smith acknowledged that, although his Guidelines sentence for Count Eleven was life on the rationale that a base offense level of 43 was applicable under U.S.S.G. § 2A1.1(a), the trial court was constrained by the 20-year maximum sentence available for violations of 18 U.S.C. § 1951. However, the district court ultimately determined that “stacking” the four Hobbs Act counts of conviction, for a total of 80 years (consecutive to the 60 years applicable to the three § 924(c) counts of conviction), resulted in a reasonable sentence. (Again, according to the First Step Act, the anti-stacking principle “shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.”)

At the time of sentencing, the district court noted that Mr. Smith did not participate in the decision to execute Mr. Desai. In addition, a state court jury determined that Mr. Smith was not guilty of felony murder for the death of Mr. Desai. The absence of an objection to the determination of a Guidelines life sentence on Count Eleven, in these circumstances, could have plausibly affected the district court’s decision to impose consecutive sentences on each of the four Hobbs Act convictions, and the absence of an objection to consecutive sentences

only exacerbated the prejudice. Accordingly, Mr. Smith is entitled to a COA on this issue.

Trial counsel offered ineffective assistance by failing to object to the calculation of the 18 U.S.C. § 924(c) sentences. Mr. Smith's first claim relating to the §924(c) counts was that, at the time of sentencing, the total consecutive, minimum mandatory sentence for the §924(c) counts should have been 57 years, not 60 years. The jury convicted Mr. Smith of two counts of discharging a firearm, and one count of brandishing a firearm. The former carried a ten-year minimum mandatory sentence, but the latter a seven-year minimum mandatory sentence. Therefore, the appropriate approach at sentencing would have been to impose a seven-year sentence on Count Ten under 18 U.S.C. § 924(c)(1)(A)(ii), and then additional 25 year consecutive sentences each for Counts Seven and Twelve. In *United States v. Chapman*, 851 F. 3d 363 (5th Cir. 2017), the Fifth Circuit recently addressed very similar circumstances. In *Chapman*, the defendant was convicted of two §924(c) counts, one carrying a five-year minimum mandatory sentence, and one carrying a ten-year minimum mandatory sentence. *Id.* at 373. Conviction of one of the counts required a 25-year sentence consecutive to the other; the question was whether the 25-year sentence should be applied consecutively to a five-year sentence, or to a ten-year sentence. *Id.* The *Chapman* court applied the rule of lenity, and observed that "all of our sister circuits that have considered the issue

have held that the rule of lenity requires that the conviction with the lowest mandatory minimum sentence be considered the first conviction for the purposes of applying the 25-year enhanced penalty.” *Id.* The Fifth Circuit adopted this approach. *Id.* On this basis, then, the district court’s sentence should have been no more than 57 years on the three § 924(c) counts.

The Hobbs Act convictions are not “crimes of violence” for purposes of 18 U.S.C. § 924(c), and therefore Counts Seven, Ten, and Twelve should be dismissed.

As asserted in the *Johnson* motion, the 18 U.S.C. § 924(c) counts, Counts Seven, Ten, and Twelve, because the Hobbs Act offenses to which they are tied, Hobbs Act robbery (Counts Six and Nine) and attempted Hobbs Act robbery (Count Eleven) are not “crimes of violence” under the applicable residual clause, 18 U.S.C. § 924(c)(3)(B). Moreover, this claim is made retroactively applicable to cases on collateral review by *Welch v. United States*, 136 S. Ct. 1257 (2016).

More important, since the “*Johnson* claim” issue was litigated in both the district court and the appeals court, the Supreme Court ruled that the residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally void-for-vagueness in *United States v. Davis*, 139 S. Ct. 2319 (2019). Likewise, the Hobbs Act counts, Hobbs Act robbery and attempted Hobbs Act robbery, are not crimes of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

The 18 U.S.C. § 924(c) convictions are invalid under *Rosemond v. United States*, 134 S. Ct. 1240 (2014). In *Rosemond*, this Court addressed aiding and abetting liability under 18 U.S.C. § 2 for violations of 18 U.S.C. § 924(c). The *Rosemond* Court severely constrained the government's authority to establish liability under this theory, and under the Court's standard, Mr. Smith's § 924(c) convictions in Counts Seven, Ten, and Twelve should be invalidated. The Court held that, to establish guilt of aiding and abetting a violation of § 924(c) – again, the offense of using or carrying a firearm “during and in relation to any crime of violence or drug trafficking crime” – the government must prove that “the defendant actively participated in the underlying drug trafficking or violent crime with advance notice that a confederate would use or carry a gun during the crime’s commission.” 134 S. Ct. at 1243. The *Rosemond* Court ruled that the jury instructions given in that case were erroneous “because they failed to require that the defendant knew in advance that one of his cohorts would be armed.” *Id.* The *Rosemond* Court emphasized that, to prove a defendant guilty of the offense of aiding and abetting a §924(c) offense, the critical element is proof of advance knowledge of another's use of a firearm.

In this case, there was no such proof, and the jury was not instructed of this critical requirement.

Like *Johnson*, *Rosemond* is retroactive to cases on collateral review, according to the dictates of *Welch*. As the *Welch* Court reasoned, although new constitutional rules of criminal procedure do not apply to those cases that have become final by direct appeal before the new rule is announced, new *substantive* rules apply retroactively. 134 S. Ct. at 1264. First, *Rosemond*, like *Johnson*, announced a new rule, as the result in *Rosemond* was not dictated by precedent in existence at the time the defendant's conviction became final. *Id.* Second, the new rule in *Rosemond* was substantive, as it ““alter[ed] the range of conduct or the class of persons that the law punishes.”” *Id.* at 1264-65 (citation omitted). The *Welch* Court explained further that, ““This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.”” *Id.* at 1265 (citation omitted). Clearly, because *Rosemond* dramatically limits 18 U.S.C. §2 aiding and abetting liability for §924(c) offenses, the new rule is substantive, and thus retroactively applicable to this, Mr. Smith’s first motion to vacate pursuant to 28 U.S.C. § 2255.

As Mr. Smith acknowledged below, he did not file his *Rosemond* claim within one year of its March 5, 2014 issuance. However, the retroactivity of *Rosemond* remains undecided.

Accordingly, this Court should grant the petition and remand with instructions to the Eleventh Circuit to grant a COA on these claims.

CONCLUSION

For the foregoing reasons, Bryan Timothy Leonard Smith respectfully requests that his Petition for Writ of Certiorari be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15043-F

BRYAN TIMOTHYLEENARD SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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

ORDER:

Bryan Timothyleenard Smith's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15043-F

BRYAN TIMOTHYLEENARD SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

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

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Bryan Smith has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1, of this Court's July 17, 2019, order denying him a certificate of appealability from the district court's order denying his 28 U.S.C. § 2255 motion. Upon review, Smith's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.