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

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November 01, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-14937-HH
Case Style: Marcus Smith v. USA
District Court Docket No: 2:16-cv-00394-WKW-SRW
Secondary Case Number: 2:06-cr-00021-WKW-SRW-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Christopher Bergquist, HH at 404-335-6169.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14937
Non-Argument Calendar

D.C. Docket Nos. 2:16-cv-00394-WKW-SRW,
2:06-cr-00021-WKW-SRW-1

MARCUS RASHAWN SMITH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(November 1, 2019)

Before MARCUS, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

Marcus Rashawn Smith appeals the denial of his 28 U.S.C. § 2255 motion to vacate his convictions and sentences under 18 U.S.C. § 924(c). The district court granted a certificate of appealability ("COA") on the issue of whether his § 924(c) convictions were unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (*en banc*), *abrogated by United States v. Davis*, 139 S. Ct. 2319 (2019). On appeal, Smith argues his convictions for bank robbery under 18 U.S.C. § 2113(a) and (d) do not qualify as crimes of violence under either the elements or residual clauses of § 924(c). After review,[1] we affirm.

As brief background, a federal grand jury indicted Smith in 2006 on two counts of bank robbery "by force and violence and by intimidation," in violation of § 2113(a) and (d) (Counts One and Four), two counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, namely, the bank robberies alleged in Counts One and Four, in violation of § 924(c)(1) (Counts Two and Five), and two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Counts Three and Six).

[1] In a § 2255 proceeding, we review legal issues *de novo* and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). The scope of our review of an unsuccessful § 2255 motion is limited to the issues enumerated in the COA. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011).

Pursuant to a plea agreement, Smith agreed to plead guilty to all counts in the indictment. According to the factual proffer, on two separate occasions, Smith "knowingly and willfully [took] by force and violence and by intimidation from the person or presence of person(s), money, belonging to and in the care, custody, control, management, and possession of Banc Corp South Bank" and "did knowingly use and carry and brandished a firearm during and in relation to a bank robbery, a crime of violence which is punishable by a term of imprisonment of more than one (1) years."

Section 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). Under § 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.

Id. § 924(c)(3)(A), (B). Subsection (A) is commonly referred to as the elements clause, while subsection (B) is commonly called the residual clause. *In re Sams*, 830 F.3d 1234, 1236–37 (11th Cir. 2015).

In *Johnson*, the Supreme Court struck down as unconstitutionally vague 18 U.S.C. § 924(e)(2)(B)(ii), the Armed Career Criminal Act's (ACCA) residual

clause, which had defined a violent felony, in part, as any crime punishable by a term of imprisonment exceeding one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 135 S. Ct. at 2555–58, 2563. Thereafter, the Supreme Court held in *Welch* that *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016).

Later, in *Dimaya*, the Supreme Court struck down a similar residual clause in 18 U.S.C. § 16(b), which had been incorporated into the Immigration and Nationality Act and had defined a "crime of violence" as "any other offense that is a felony and 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." 138 S. Ct. at 1211 (quoting 18 U.S.C. § 16(b)). After *Dimaya*, we held *en banc* in *Ovalles* that § 924(c)(3)(B)'s "residual clause" was not unconstitutionally vague because interpretation of that provision required a conduct-based approach instead of a categorical approach. *Ovalles*, 905 F.3d at 1253.

However, on June 24, 2019, the Supreme Court in *Davis* held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. at 2324–25, 2336. The Supreme Court emphasized that there was no "material difference" between the language or scope of § 924(c)(3)(B) and the residual clauses

invalidated in *Johnson* and *Dimaya*. *Id.* at 2325–26. In *In re Hammoud*, we recently held that *Davis*, like *Johnson*, announced a new rule of constitutional law that applies retroactively on collateral review. *In re Hammoud*, 931 F.3d 1032, 1037–39 (11th Cir. 2019).

Here, we note, as an initial matter, that the district court's COA, though it explicitly references only *Johnson*, *Dimaya*, and *Ovalles*, is sufficient to encompass *Davis*'s application to the constitutionality of Smith's § 924(c) convictions. As to whether Smith has any viable claim based on *Davis*, we conclude that the district court properly denied Smith's § 2255 motion because, notwithstanding *Davis*'s invalidation of § 924(c)(3)(B)'s residual clause, under our binding precedent, Smith's bank robbery convictions qualify as crimes of violence under § 924(c)(3)(A)'s elements clause.[2]

In *In re Sams*, we denied an application for leave to file a second or successive § 2255 motion to challenge a § 924(c) conviction after *Johnson*, holding that a standard bank robbery conviction under § 2113(a) by force and violence or by intimidation categorically qualified as a crime of violence under § 924(c)(3)(A). *In re Sams*, 830 F.3d at 1239. "[L]aw established in published three-judge orders

[2] In addition to arguing that Smith's challenge to his § 924(c) convictions fails on the merits, the government contends that Smith's § 2255 motion was time-barred and procedurally defaulted. Because we readily conclude that Smith's claim fails on the merits, we need not address the government's procedural arguments.

issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all panels of this Court, including those reviewing appeals and collateral attacks." *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated in part on other grounds by Davis*, 139 S. Ct. at 2324, 2336.

Thus, our prior precedent, which we are bound to follow, precludes Smith's claim that his bank robbery convictions do not qualify as "crime[s] of violence" under § 924(c). *See Scott v. United States*, 890 F.3d 1239, 1257 (11th Cir. 2018) ("The prior-panel-precedent rule requires subsequent panels of the court to follow the precedent of the first panel to address the relevant issue, unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." (quotation marks omitted)). Accordingly, we affirm the district court's denial of Smith's § 2255 motion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARCUS RASHAWN SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:16-CV-394-WKW
	)	[WO]
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Is a standard bank robbery categorically a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)? The answer is yes. The Magistrate Judge's Recommendation (Doc. # 18) is therefore due to be adopted as modified below.

Petitioner Marcus Rashawn Smith pleaded guilty to two counts of brandishing a firearm during a "crime of violence," a violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Doc. # 1-2, at 1; Doc. # 9-2, at 2–3.) The term "crime of violence" is statutorily defined to mean 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.

18 U.S.C. § 924(c)(3). Clause (A) is called the "use-of-force clause," while clause (B) is known as the "residual clause." The predicate crimes of violence for Smith's

convictions were two "standard" bank robberies in violation of 18 U.S.C. § 2113(a).[1] (Doc. # 9-2, at 2–3.)

While incarcerated, Smith moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. # 1.) He argues that standard bank robbery is not a "crime of violence" because it does not satisfy the § 924(c)(3)(A) use-of-force clause and because the § 924(c)(3)(B) residual clause is unconstitutionally vague. (Doc. # 2.) The Magistrate Judge recommended that the court deny Smith's motion. (Doc. # 18.) Smith filed a timely objection to that Recommendation. (Doc. # 23.)

The court reviewed *de novo* those portions of the Recommendation to which objections were made. *See* 28 U.S.C. § 636(b). That review revealed that the Recommendation commits two related errors. But neither error affects the outcome.

The Recommendation's first mistake was to state that Smith was convicted of two "armed" bank robberies under 18 U.S.C. § 2113(d). (Doc. # 18, at 1, 5.) Smith was actually convicted of committing two *standard* bank robberies in violation of § 2113(a). (Doc. # 9-2, at 2–3.) The Recommendation is due to be modified to reflect the true nature of his convictions. The second mistake was to rely on *In re Hines*, 824 F.3d 1334 (11th Cir. 2016) (per curiam). In *Hines*, the Eleventh Circuit

[1] A so-called "standard" bank robbery, which is defined in § 2113(a), may be committed either "by force and violence" or "by intimidation." It is a lesser-included offense of *armed* bank robbery, which is defined in § 2113(d) and requires the use of a dangerous weapon. *See United States v. McNeal*, 818 F.3d 141, 148 (4th Cir. 2016).

held that armed bank robbery is categorically a crime of violence under the § 924(c)(3)(A) use-of-force clause. *Id.* at 1337. But because Smith was not convicted of armed bank robbery, *Hines* does not control here.

Despite those errors, the Recommendation still reached the right result. That is because after the Eleventh Circuit decided *Hines*, it decided *In re Sams*, 830 F.3d 1234 (11th Cir. 2016) (per curiam). *Sams* held that a conviction for standard bank robbery under § 2113(a) "falls within the scope of the § 924(c)(3)(A) use-of-force clause." *Id.* at 1239. *Sams* controls here.

Because the predicate offenses for Smith's § 924(c)(1)(A)(ii) convictions are crimes of violence under the use-of-force clause, there is no need to consider whether the residual clause is unconstitutionally vague. *See United States v. St. Hubert*, 883 F.3d 1319, 1328 (11th Cir. 2018); *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) (per curiam).

Thus, after *de novo* review of the record and the Recommendation, it is ORDERED that:

1. The Recommendation of the Magistrate Judge (Doc. # 18) is ADOPTED AS MODIFIED above;

2. The objections to the Recommendation (Doc. # 23) are OVERRULED;

3. The motion under 28 U.S.C. § 2255 (Doc. # 1) is DENIED; and

4. This case is DISMISSED WITH PREJUDICE.

A separate Final Judgment will be entered.

DONE this 28th day of September, 2018.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARCUS RASHAWN SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:16-CV-394-WKW
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the court is Petitioner Marcus Smith's Application for a Certificate of Appealability (Doc. # 26) as to this issue:

> Whether Mr. Smith's two 18 U.S.C. § 924(c) convictions are unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc).

That application is due to be granted.

A certificate of appealability is necessary before a petitioner may pursue an appeal in a habeas corpus proceeding. *See* 28 U.S.C. § 2253(c). Before a certificate of appealability may issue, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits," that showing is straightforward: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003); *see Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

The court dismissed Mr. Smith's § 2255 petition on the merits. (Doc. # 24.) However, the court finds that reasonable jurists would find it debatable whether Mr. Smith has stated a valid claim of the denial of constitutional rights. Reasonable jurists already disagree about whether a statute that can be violated "by intimidation" is categorically a crime of violence. *In re Smith*, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J., dissenting). Reasonable jurists also disagree about whether panel orders decided in the context of an application for leave to file a second or successive § 2255 motion should be applied to initial § 2255 motions. *See Ovalles v. United States*, 905 F.3d 1231, 1268 (11th Cir. 2018) (Martin, J., dissenting); *In re Williams*, 898 F.3d 1098, 1100 (11th Cir. 2018) (Wilson, J., specially concurring).

It is therefore ORDERED that Mr. Smith's Application for a Certificate of Appealability (Doc. # 26) is GRANTED.

DONE this 10th day of December, 2018.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE