

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13441-F

ERIC HANNA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Eric Hanna is a federal prisoner who was charged by indictment with:
(1) one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); (2) two counts of Hobbs Act robbery, in violation of § 1951(a) and 18 U.S.C. § 2; and (3) two counts of using, carrying, or possessing a firearm in furtherance of a “crime of violence”—specifically, the two Hobbs Act robbery

counts—in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2.¹ At trial, the district court instructed the jury on both actually committing Hobbs Act robbery and a theory of aiding and abetting. The jury returned a guilty verdict against Hanna on all counts charged in the indictment in a general verdict. The court sentenced Hanna to 435 months' imprisonment. On appeal, we affirmed his convictions and sentences.

In June 2016, Hanna filed a *pro se* 28 U.S.C. § 2255 motion and a memorandum in support, asserting that his conviction under § 924(c) must be vacated because, following *Johnson v. United States*, 135 S. Ct. 2551 (2015) (holding that 18 U.S.C. 924(e)(2)(B)(ii), the residual clause of the Armed Career Criminal Act (“ACCA”), was unconstitutionally vague), the residual clause of § 924(c)(3)(B) was unconstitutionally vague, and conspiracy to commit Hobbs Act robbery and substantive Hobbs Act robbery were not crimes of violence.² The district court appointed counsel, who filed a supplemental brief raising the same claim. Neither Hanna nor his counsel raised an argument regarding the district court’s jury instruction on aiding and abetting Hobbs Act robbery.

¹ 18 U.S.C. § 2 states that whoever “aids, abets, counsels, commands, induces or procures” the commission of an offense against the United States is punishable as a principal. Accordingly, Hanna’s indictment charged substantive Hobbs Act robbery, as well as aiding and abetting Hobbs Act robbery.

² Hanna argued that conspiracy to commit Hobbs Act robbery was not a crime of violence, but the indictment did not rely on the conspiracy charge as the companion offense for his § 924(c) counts.

The Government responded, arguing, in relevant part, that Hanna's motion was procedurally defaulted and meritless. Hanna replied that his claim was not procedurally barred because he was actually innocent of violating § 924(c), in that Hobbs Act robbery was not a crime of violence.

A magistrate judge issued a report and recommendation ("R&R"), recommending denying the motion and a certificate of appealability ("COA"). First, the magistrate judge noted that the indictment charged Hanna with violations of § 924(c) based on the substantive Hobbs Act offenses, not conspiracy to commit Hobbs Act robbery. Then, the magistrate judge found that Hanna's claim was procedurally barred because he had not raised it at trial or on direct appeal. Although not explicitly stating that Hanna had established cause to overcome the bar, the magistrate judge implied the same when explaining that a claim based on the new rule announced in *Johnson* was not reasonably available to counsel at the time of Hanna's direct appeal.

Nonetheless, the magistrate judge found that Hanna could not establish the existence of prejudice, which is necessary to overcome the procedural bar, because Hobbs Act robbery qualified as a crime of violence based on this Court's precedent in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). In *Saint Fleur*, we held that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A). For the same reason, the magistrate judge reasoned that Hanna

could not establish his actual innocence. The magistrate judge noted that, as Hanna's claim was procedurally barred because Hobbs Act robbery constituted a crime of violence under § 924(c)(3)(A)'s elements clause, it was unnecessary to decide whether *Johnson* invalidated § 924(c)(3)(B)'s residual clause.

Over Hanna's objections, the district court adopted the R&R and denied Hanna's motion to vacate. The district court noted Hanna's objection that a COA should issue because "reasonable jurists can and do debate" whether Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)'s elements clause, but found that reasonable jurists would not debate the correctness of the court's procedural rulings.

In his counseled motion for a COA, filed in this Court in August 2017, Hanna argues that it is unclear whether the jury based his § 924(c) conviction on substantive Hobbs Act robbery or aiding and abetting Hobbs Act robbery, as the court had instructed the jury on both theories of culpability, and the jury returned a general verdict. Accordingly, Hanna argues that we must presume that his § 924(c) convictions rested solely on aiding and abetting Hobbs Act robbery. Hanna acknowledged our holding in *In re Colon*, 826 F.3d 1301 (11th Cir. 2016), that aiding and abetting Hobbs Act robbery is a crime of violence under § 924(c). Nevertheless, he argued that we should instead follow the dissenting opinion in that case.

Thereafter Hanna moved to hold his COA motion in abeyance because a petition for writ of *certiorari*, seeking review of the question whether § 924(c)(3)(B)'s residual clause was unconstitutional, was then pending in the Supreme Court. While no formal ruling was issued, we did hold the motion for a COA abeyance. Since then, the Supreme Court has issued its opinion in *United States v. Davis*, 139 S. Ct. 2319, 2324-25, 2336 (2019), holding that § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

DISCUSSION:

In order 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). Where the district court has denied a motion to vacate on procedural grounds, the movant must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (quotations omitted). Moreover, “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) (quotation omitted).

As is relevant to this appeal, § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a crime of violence, which is defined as 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.

18 U.S.C. § 924(c)(3)(A), (B). We have referred to § 924(c)(3)(A) as the “elements clause,” while § 924(c)(3)(B) is referred to as the “residual clause.” *Ovalles v. United States*, 905 F.3d 1231, 1234 n.1 (11th Cir. 2018) (*en banc*).

As noted above, in *Johnson*, the Supreme Court struck down as unconstitutionally vague a similarly worded residual clause in the ACCA. 135 S. Ct. at 2555-58, 2563; *see* 18 U.S.C. § 924(e)(2)(B)(ii). Hanna’s present claim is based on his argument that *Johnson* also rendered invalid the residual clause in § 924(c)(3)(B). Since Hanna litigated his § 2255 motion in the district court and filed his appeal, the Supreme Court in *Davis* resolved a circuit split and struck down the residual clause in § 924(c)(3)(B) as unconstitutionally vague. *Davis*, 139 S. Ct. at 2324-25, 2336. However, the Supreme Court’s decision in *Davis* does not undermine the district court’s denial of Hanna’s § 2255 motion because the magistrate judge concluded that, even assuming that the residual clause of § 924(c)(3)(B) is invalid, Hanna could not show the prejudice necessary to overcome his procedural default because, based on our precedent, Hobbs Act robbery still qualifies as a crime of violence under the elements clause of § 924(c)(3)(A).

As the magistrate judge acknowledged, collateral review under § 2255 is not a substitute for a direct appeal. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). Thus, claims that could have been raised on direct appeal are procedurally barred from review in a § 2255 proceeding, absent a showing of cause and prejudice or actual innocence. *Id.* at 1234. A defendant can overcome this procedural bar by establishing either: (1) cause for the default and actual prejudice from the alleged error or (2) that he is actually innocent of the crimes for which he was convicted. *Id.*

Here, reasonable jurists would not debate the district court's denial of Hanna's claim as procedurally barred. As Hanna did not argue on direct appeal that his § 924(c) convictions were invalid because Hobbs Act robbery was not a crime of violence under § 924(c), he must establish either cause and prejudice for his default or demonstrate his actual innocence. We will assume, as the magistrate judge did, that Hanna established cause for not raising a *Johnson* or *Davis*-based claim on appeal because the new rules announced in those opinions were not reasonably available to counsel at the time of Hanna's direct appeal. But, like the magistrate judge, we likewise conclude that Hanna cannot establish prejudice because it is clear that the companion crimes that provided the basis for his § 924(c) convictions meet the elements clause of § 924(c)(3)(A). This is so because the companion crimes charged in each § 924(c) count were Hobbs Act robberies, as well as the aiding and

abetting of such robberies. Importantly, conspiracy to commit Hobbs Act robbery was not included as a predicate crime for the § 924(c) charges, therefore, there is no possibility that this offense had any impact on Hanna's conviction for a § 924(c) violation. Our precedent makes it clear that both substantive Hobbs Act robbery and aiding and abetting Hobbs Act robbery meet the elements clause of § 924(c)(3)(A). *See, e.g., St. Fleur*, 824 F.3d at 1341 (holding that Hobbs Act robbery is a crime of violence under the elements clause of § 924(c)(3)(A)); *Colon*, 826 F.3d at 1305 (holding that, because the substantive offense of Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A), aiding and abetting a Hobbs Act robbery necessarily qualifies as a crime of violence under § 924(c)(3)(A) as well). Finally, and for the same reason, Hanna did not establish that he was actually innocent of violating § 924(c), as the predicate offenses underlying the charge qualified as crimes of violence under § 924(c)(3)(A)'s elements clause.

Accordingly, because reasonable jurists would not debate the district court's conclusion that his *Johnson* challenge to his § 924(c) convictions was procedurally barred, Hanna's motion for a COA is DENIED. *Slack*, 529 U.S. at 478. Indeed, even leaving aside the issue of procedural bar, reasonable jurists would not disagree that Hanna cannot sustain his stated claim because he cannot show that the residual clause played any role in his § 924(c) conviction. *See Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (a § 2255 litigant bears the burden of proving his

claim). Because the Supreme Court has now issued its opinion in *Davis* regarding the constitutionality of § 924(c)(3)(B), Hanna's motion to hold the appeal in abeyance pending the Supreme Court's resolution of that issue is DENIED AS MOOT.



UNITED STATES CIRCUIT JUDGE