APPENDIX

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17685
Non-Argument Calendar

D.C. Docket Nos. 8:16-cv-01105-VMC-TBM; 8:10-cr-00438-VMC-TBM-3

RYKEITH ANDRE LEVATTE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(February 19, 2020)

Before BRANCH, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Rykeith Andre Levatte appeals from the district court's dismissal of his 28 U.S.C. § 2255 motion to vacate his sentence. A single judge of this Court granted a Certificate of Appealability (COA) to Levatte on one issue: whether his convictions under 18 U.S.C. § 924(c), predicated on convictions for aiding and abetting Hobbs Act robbery, are unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). After review,[1] we affirm the district court's dismissal.

Section 924(c) of Title 18 of the United States Code criminalizes the use or carrying of a firearm in furtherance of a crime of violence or drug-trafficking crime. 18 U.S.C. § 924(c). A "crime of violence" is a felony offense that either:

> (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).

Subsection (A) is known as the "elements clause," while subsection (B) is known as the "residual clause." *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). In *Davis*, the Supreme Court extended its holdings in *Johnson* and

[1] In reviewing a denial of a motion to vacate under § 2255, we review the district court's legal conclusions *de novo* and findings of fact for clear error. *Stoufflet v. United States*, 757 F.3d 1236, 1239 (11th Cir. 2014).

Sessions v. Dimaya, 138 S. Ct. 1204 (2018), to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the Armed Career Criminal Act and 18 U.S.C. § 16(b), is unconstitutionally vague. *Davis*, 139 S. Ct. at 2324-25, 2336.

A federal prisoner raising a *Davis* claim cannot show that he was sentenced under § 924(c)'s residual clause if current binding precedent clearly establishes his predicate offense qualifies as a crime of violence under the elements clause. *In re Pollard*, 931 F.3d 1318, 1321 (11th Cir. 2019); *see also United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019), *and abrogated in part on other grounds by Davis*, 139 S. Ct. at 2336 (holding decisions published in the context of applications for leave to file a second or successive § 2255 motion are binding precedent on all subsequent panels of this Court). We have held aiding and abetting a crime of violence qualifies as a crime of violence for purposes of § 924(c)(3)(A). *Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019). In *In re Colon*, we held the defendant's § 924(c) conviction was valid, regardless of the validity of the residual clause, because its predicate crime of aiding and abetting Hobbs Act robbery qualified as a crime of violence under § 924(c)(3)(A). 826 F.3d 1301, 1305 (11th Cir. 2016).

As an initial matter, Levatte has preserved his argument that the predicate crimes on which his § 924(c) convictions were based—the charges of aiding and

abetting Hobbs Act robbery—do not qualify as crimes of violence under the elements clause in § 924(c)(3)(A), because he raised this argument in his original, *pro se* § 2255 motion. His argument that his § 924(c) convictions were no longer valid because his predicate "Hobbs Act offense[s]" did not qualify as crimes of violence under the elements clause in § 924(c)(3)(A) was clear and simple enough for the district court to understand his claim, even if he did not specifically assert that his predicate offenses were aiding and abetting Hobbs Act robbery. *See United States v. Corbett*, 921 F.3d 1032, 1043 (11th Cir. 2019) (stating to preserve an issue for appeal, a defendant must raise the issue "in such clear and simple language that the trial court may not misunderstand it" (quotations omitted)); *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017) (explaining a *pro se* pleading is held to a less stringent standard than a pleading drafted by an attorney and is liberally construed).

As another initial matter, although this Court's COA was written before *Davis* issued and referenced only *Johnson*, the COA may be viewed as broad enough to encompass whether Levatte's § 924(c) convictions remain valid after *Davis*. Specifically, the COA could be read to encompass whether the *Johnson* line of cases, of which *Davis* is a part, invalidated § 924(c)(3)(B). *See Davis*, 139 S. Ct. at 2325-27. Because this is Levatte's first § 2255 motion, his case is similar

in posture to *Steiner*, in which the COA referenced *Johnson* but this Court analyzed the appeal under *Davis*.[2] *Steiner*, 940 F.3d at 1288.

On the merits, Levatte cannot show that his § 924(c) convictions are invalid in light of *Davis* because, regardless of *Davis*'s holding that the residual clause in § 924(c)(3)(B) is unconstitutionally vague, this Court has held that aiding and abetting Hobbs Act robbery qualifies as a crime of violence under the elements clause in § 924(c)(3)(A). *See Davis*, 139 S. Ct. at 2324-25; *Steiner*, 940 F.3d at 1293; *Colon*, 826 F.3d at 1305; *St. Hubert*, 909 F.3d at 346. Because current binding precedent establishes that Levatte's predicate offenses qualify as crimes of violence under the elements clause, his convictions under § 924(c) remain valid. *See Pollard*, 931 F.3d at 1321.

AFFIRMED.

[2] We note this case does not present the issue of whether a second or successive claim was properly authorized.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

RYKEITH ANDRE LEVATTE,

v. Case No. 8:16-cv-1105-T-33TBM
8:10-cr-438-T-33TBM

UNITED STATES OF AMERICA.

O R D E R

This cause is before the Court on the Government's motion to dismiss Rykeith Andre Levatte's 28 U.S.C. § 2255 motion to vacate, set aside or correct an illegal sentence in which Levatte seeks to challenge his conviction under 18 U.S.C. § 924(c). (Doc. cv-14). Although Levatte contends that he is entitled to relief on collateral review under *Johnson v. U.S.*, 135 S. Ct. 2251 (2015), and *Welch v. U.S.*, 136 S. Ct. 1257 (2016), Levatte is not challenging a sentence imposed under the Armed Career Criminal Act -- the topic of those decisions -- and instead is seeking to extend *Johnson* and *Welch* to section 924(c)(3)(B) on collateral review.

BACKGROUND

In *Johnson,* the Supreme Court "h[e]ld that imposing an increased sentence under the residual clause of the Armed Career Criminal Act," in 18 U.S.C. § 924(e)(2)(b)(ii), "violates the Constitution's guarantee of due process" because the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. at 2563. In *Welch*, the Supreme Court held that *Johnson*'s invalidation of the residual clause -- a provision that results in a mandatory minimum that is higher than the statutory maximum without the ACCA -- is "a substantive decision and so has retroactive effect … in cases on collateral review." 136 S. Ct. at 1265. Levatte, though, is not challenging an ACCA sentence. Instead, he is seeking to extend both *Johnson* and *Welch* to a new, readily distinguishable context -- section 924(c)(3)(B).

At this point, the Supreme Court and the Eleventh Circuit have not found that *Johnson*

invalidates section 924(c)(3)(B). The Eleventh Circuit has not treated *Johnson* as having dictated, to all reasonable jurists, that section 924(c)(3)(B) is unconstitutionally vague. *See, e.g., In re Hines*, 2016 WL 3189822, at *2 (11th Cir., June 8, 2016) ("[O]ur Court has not held that *Johnson* invalidates § 924(c)(3)(B)."). Indeed, it has indicated on multiple occasions that it may not. *See U.S. v. Fox*, 2016 WL 3033067, at *2 (11th Cir., May 27, 2016) (no plain error because section 924(c)(3)(B) and the ACCA's residual clause are not identical in language or application); *In re Saint Fleur*, 2016 WL 3190539, at *3 n.1 (11th Cir., June 8, 2016) ("[W]e note that *Johnson* did not address the definition for "crime of violence" under § 924(c)(3), and, as shown above, the ACCA residual clause and the § 924(c)(3)(B) residual clause have somewhat different language… We also note that the ACCA § 924(e) sentence enhancement and the § 924(c) penalty each appear to serve a different statutory purpose."). As the Court recently noted in *In re Jeffrey Smith*, "there are good reasons to question the argument" that it does. 2016 WL 3895243, at *2 (11th Cir., July 18, 2016). Those reasons range from differences in language between the two residual clauses, the Supreme Court's decision in *Johnson* not to invalidate section 924(c)'s residual clause and not to broadly condemn other criminal laws with risk-based terms, and the fact that section 924(c)'s residual clause lacks the same historical uncertainty that plagued and ultimately doomed the ACCA's residual clause. *Id*. Moreover, the Supreme Court recently denied a certiorari petition raising a *Johnson* challenge to section 924(c), rather than simply granting the petition and vacating and remanding for reconsideration in light of *Johnson. Santana v. U.S.*, 136 S. Ct. 2007 (2016).

The above authority shows that defendants seeking to challenge section 924(c) convictions under *Johnson* are premature. If the Supreme Court invalidates section 924(c)(3)(B) and that ruling is retroactive, defendants will at that point have one year to file a section 2255 petition.

Accordingly, the Court orders:

That the Government's motion to dismiss Levatte's 28 U.S.C. § 2255 motion to vacate (Doc. cv-14) is granted. Levatte's motion to vacate is dismissed. The Clerk is directed to close this case.

CERTIFICATE OF APPEALABILITY AND

LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

The Court declines to issue a certificate of appealability because Defendant has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Nor will the Court authorize the Defendant to proceed on appeal in forma pauperis because such an appeal would not be taken in good faith. See 28 U.S.C. § 1915(a)(3). Defendant shall be required to pay the full amount of the appellate filing fee pursuant to § 1915(b)(1) and (2).

ORDERED at Tampa, Florida, on August 11, 2016.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Counsel of Record