[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14749
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-00514-MHT-CSC; 1:13-cr-00107-MHT-CSC-2

THRONE THOMAS SMILEY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(July 10, 2020)

Before JILL PRYOR, BRANCH and MARCUS, Circuit Judges.

PER CURIAM:

Throne Smiley, a federal prisoner, appeals from the district court's denial of his 28 U.S.C. § 2255 motion to vacate. He argues that, in light of Johnson v. United States, 135 S. Ct. 2551 (2015), and United States v. Davis, 139 S. Ct. 2319 (2019),

his 18 U.S.C. § 924(c) conviction is unconstitutional because his underlying offense, aiding and abetting attempted Hobbs Act robbery, no longer qualifies as a valid predicate offense under § 924(c)'s elements clause. After careful review, we affirm.

In a § 2255 proceeding, we review the district court's factual findings for clear error and the legal issues de novo. Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004). Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting en banc." In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015) (quotations omitted). The prior precedent rule applies and binds a subsequent panel to its decision even if existing Supreme Court precedent was overlooked or misinterpreted when the prior precedent was issued. United States v. Fritts, 841 F.3d 937, 942 (11th Cir. 2016). We've also held that the "law established in published three judge orders 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 subsequent panels of this Court." United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), abrogated on other grounds by Davis, 139 S. Ct. at 2323.

Under § 924(c), anyone who uses a firearm during a "crime of violence" or "drug trafficking crime" shall receive an additional term of imprisonment, which

may not run concurrently with any other term of imprisonment. 18 U.S.C. § 924(c)(1). A "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). We refer 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 (11th Cir. 2018) (en banc), abrogated on other grounds by Davis, 139 S. Ct. at 2323. In 2015, the Supreme Court in Johnson held that the residual clause in the Armed Career Criminal Act ("ACCA") was unconstitutionally vague, 135 S. Ct. at 2557-58, 2563, and in 2019, the Supreme Court in Davis likewise held that § 924(c)(3)(B), which has language similar to the ACCA's residual clause, was unconstitutionally vague. 139 S. Ct. at 2323.

To determine whether a predicate offense qualifies as a crime of violence under § 924(c)'s elements clause, we apply the categorical approach, in which we "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts qualify as crimes of violence." St. Hubert, 909 F.3d at 348-49 (quotations omitted). In In re Fleur, we held that a conviction for Hobbs Act robbery has as an element the use, attempted use, or threatened use of physical force and, therefore, categorically qualifies as a

crime of violence under § 924(c)'s elements clause. 824 F.3d 1337, 1340 (11th Cir. 2016). Relying on this holding, in In re Colon, we held that, because an aider and abettor is responsible for the acts of the principal, aiding and abetting Hobbs Act robbery constitutes a crime of violence under § 924(c)'s elements clause. 826 F.3d 1301, 1305 (11th Cir. 2016). Similarly, in St. Hubert, we held that attempted Hobbs Act robbery also categorically qualifies as a crime of violence under § 924's elements clause. 909 F.3d at 351.

In Rosemond v. United States, the Supreme Court held that a defendant could aid or abet a § 924(c) crime by facilitating either the predicate offense or the use of the firearm. 572 U.S. 65, 67, 74 (2014). The Court determined that it was "inconsequential" that the defendant's acts did not satisfy each element of the § 924(c) offense, so long as he facilitated at least one component. Id. at 74-75.

Here, we are unpersuaded by Smiley's claim that aiding and abetting attempted Hobbs Act robbery no longer qualifies as a valid predicate offense under § 924(c)'s elements clause. For starters, Rosemond's holding -- which applies only to the aiding and abetting of a § 924(c) offense itself (be it a "crime of violence" or a "drug trafficking crime"), and does not address what constitutes a "crime of violence" for purposes of § 924(c)'s underlying offense -- does not abrogate St. Hubert, Fleur, or Colon. Indeed, the Supreme Court has never said that Hobbs Act robbery, aiding and abetting Hobbs Act robbery, or attempted Hobbs Act robbery

does not qualify as a crime of violence under § 924(c)'s elements clause, and has not otherwise overruled St. Hubert, Fleur, or Colon, nor undermined them to the point of abrogation. Lambrix, 776 F.3d at 794. Moreover, and in any event, we decided these cases years after the Supreme Court's decision in Rosemond, making clear that our decisions in St. Hubert, Fleur, and Colon remain binding on us. Fritts, 841 F.3d at 942. Thus, under the prior panel precedent rule, Hobbs Act robbery, aiding and abetting Hobbs Act robbery, and attempted Hobbs Act robbery all categorically qualify as crimes of violence under § 924(c)'s elements clause. St. Hubert, 909 F.3d at 348; Colon, 826 F.3d at 1305; Fleur, 824 F.3d at 1340; Lambrix, 776 F.3d at 794.

Further, based on these decisions, aiding and abetting attempted Hobbs Act robbery also categorically qualifies as a crime of violence under § 924(c)'s elements clause. As we explained in Colon, an aider and abettor is responsible for the acts of the principal, which means that Smiley is responsible for attempted Hobbs Act robbery. Colon, 826 F.3d at 1305. And, as we also held in Colon, attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s elements clause. See id.; St. Hubert, 909 F.3d at 351. Thus, Smiley's conviction for aiding and abetting attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s elements clause, and his conviction and sentence under § 924(c) have not been affected by Johnson's or Davis's invalidation of § 924(c)'s residual clause. The district court did not err in denying Smiley's motion to vacate.

AFFIRMED.

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

For rules and forms visit
www.ca11.uscourts.gov

July 10, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-14749-JJ
Case Style: Throne Smiley v. USA
District Court Docket No: 1:16-cv-00514-MHT-CSC
Secondary Case Number: 1:13-cr-00107-MHT-CSC-2

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. 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 Tiffany A. Tucker, JJ at (404)335-6193.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

Pet App. 1b

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

THRONE THOMAS SMILEY,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION NO.**
v.	)	**1:16cv514-MHT**
	)	**(WO)**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Petitioner's objections (doc. nos. 19 & 23) are overruled.

(2) The United States Magistrate Judge's recommendation (doc. no. 14) is adopted.

(3) The 28 U.S.C. § 2255 petition for writ of habeas corpus (doc. no. 1) is denied.

No costs are taxed.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment

pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

DONE, this the 25th day of September, 2019.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov
Effective on December 1, 2013, the fee to file an appeal is $505.00

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders:** Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. § 1291:** Final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983) (citing *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(b); *Perez-Priego v. Alachua County Clerk of Court*, 148 F.3d 1272 (11th Cir. 1998). However, under 28 U.S.C. § 636(c)(3), the Courts of Appeals have jurisdiction over an appeal from a final judgment entered by a magistrate judge, but only if the parties consented to the magistrate's jurisdiction. *McNab v. J & J Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001).

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S.Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. § 1292(a):** Under this section, appeals are permitted from the following types of orders:

i. Orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; However, interlocutory appeals from orders denying temporary restraining orders are not permitted. *McDougald v. Jenson*, 786 F.2d 1465, 1472-73 (11th Cir. 1986);
ii. Orders appointing receivers or refusing to wind up receiverships; and
iii. Orders determining the rights and liabilities of parties in admiralty cases.

(d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5:** The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93

L.Ed. 1528 (1949); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. *Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1):** A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the order or judgment appealed from is entered. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3):** "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P. 4(a)(4):** If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P. 4(a)(5) and 4(a)(6):** Under certain limited circumstances, the district court may extend or reopen the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time to file an appeal may be reopened if the district court finds, upon motion, that the following conditions are satisfied: the moving party did not receive notice of the entry of the judgment or order within 21 days after entry; the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice, whichever is earlier; and no party would be prejudiced by the reopening.

(e) **Fed.R.App.P. 4(c):** If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. *See also* Fed.R.App.P. 3(c). A *pro se* notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal:** A district court lacks jurisdiction, *i.e.*, authority, to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

THRONE THOMAS SMILEY,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION NO.**
v.	)	**1:16cv514-MHT**
	)	**(WO)**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

OPINION

Pursuant to 28 U.S.C. § 2255, petitioner, a federal inmate, filed this lawsuit seeking habeas relief. This lawsuit is now before the court on the recommendation of the United States Magistrate Judge that the § 2255 petition be denied. Also before the court are petitioner's objections to the recommendation. After an independent and de novo review of the record, the court concludes that petitioner's objections should be overruled and the magistrate judge's recommendation adopted.

An appropriate judgment will be entered.

DONE, this the 25th day of September, 2019.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

Pet App. 1c

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, SOUTHERN DIVISION

THRONE THOMAS SMILEY,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION NO.**
v.	)	**1:16cv514-MHT**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

It is ORDERED that petitioner's motion for certificate of appealability (doc. no. 27) is granted as to the following issue: whether petitioner's 18 U.S.C. § 924(c) conviction is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015) and/or *United States v. Davis*, 139 S. Ct. 2319 (2019).

DONE, this the 26th day of November, 2019.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

Pet App. 1d

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

THRONE THOMAS SMILEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 1:16cv514-MHT
	)	[WO]
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Before the court is federal inmate Throne Thomas Smiley's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence. Doc. # 1.[1]

I. INTRODUCTION

On February 28, 2014, Smiley pleaded guilty to one count of aiding and abetting a Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (Count 3); one count of attempted Hobbs Act robbery, also in violation of 18 U.S.C. § 1951 (Count 5); and one count of brandishing and discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count 6). The attempted Hobbs Act robbery served as the predicate "crime of violence" for Smiley's § 924(c) conviction. *See* Doc. # 8-1 at 4. After a sentencing hearing on December 17, 2014, the district court sentenced Smiley to 300 months in prison, consisting of 180 months on Counts 3 and 5, to be served concurrently,

[1] References to "Doc. No(s)." are to the document numbers of the pleadings, motions, and other materials in the court file, as compiled and designated on the docket sheet by the Clerk of Court. Pinpoint citations are to the page of the electronically filed document in the court's CM/ECF filing system, which may not correspond to pagination on the "hard copy" of the document presented for filing.

and 120 months on Count 6, to be served consecutively to the other counts. *See* Doc. # 8-5 at 2. Smiley took no appeal.

On June 27, 2016, Smiley filed the instant § 2255 motion arguing that, in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), attempted Hobbs Act robbery cannot qualify as a predicate "crime of violence" for his § 924(c) conviction, and therefore his conviction and sentence under § 924(c) are invalid. Doc. # 1.

For the reasons that follow, the court finds that Smiley's § 2255 motion should be denied and this case dismissed with prejudice.

II. DISCUSSION

Title 18 § 924(c), United States Code, provides in part that a defendant who uses or carries a firearm "during and in relation to any crime of violence or drug trafficking crime," or possesses a firearm in furtherance of such crimes, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to a separate and consecutive term of imprisonment. And if, as here, the firearm is discharged during the crime, the consecutive sentence shall be "not less than 10 years." 18 U.S.C. § 924(c)(1)(A)(iii).

For purposes of § 924(c), a "crime of violence" is defined as a felony offense 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) … 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). Subsection (A) of § 924(c)(3) is referred to as the "use-of-force clause," and subsection (B) is referred to as the "§ 924(c)(3)(B) residual clause." *See In re Saint Fleur*, 824 F.3d 1337, 1339 (11th Cir. 2016).

A separate but similar sentencing provision, the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e),[2] defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives; or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition, § 924(e)(2)(B)(i), is known as the "elements clause." *See In re Sams*, 830 F.3d 1234 (11th Cir. 2016). The second prong, § 924(e)(2)(B)(ii), is split into two clauses. The first part, listing burglary, arson, extortion, or an offense involving the use of explosives, is known as the "enumerated offenses clause," and the second part is known as the "residual clause." *Id.*

In *Johnson v. United States*, decided on June 26, 2015, the United States Supreme Court held that the residual clause of the ACCA is unconstitutionally vague. *See* 135 S.Ct. at 2557–59, 2563. Based on that holding, the Court concluded that "imposing an increased [ACCA] sentence under the residual clause . . . violates the Constitution's guarantee of due process." *Id*. at 2563. The Court also stated, "Today's decision does not call into question

[2] Under the ACCA, a defendant who violates 18 U.S.C. § 922(g) (by possessing a firearm as a convicted felon) and has three prior convictions for a "violent felony" or a serious drug offense is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1).

application of the [ACCA] to the four enumerated offenses, or the remainder of the [ACCA's] definition of a violent felony." *Id*. at 2563.

In April 2016, the Supreme Court held 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). In the wake of *Johnson* and *Welch*, inmates sentenced as armed career criminals based on prior convictions deemed "violent felonies" under the ACCA's residual clause could challenge their ACCA sentences through § 2255 motions.

Johnson did not address the definition of a crime of violence found in 18 U.S.C. § 924(c). However, Smiley argues that the holding in *Johnson* applies to § 924(c); that *Johnson* invalidates the "924(c)(3)(B) residual clause" (whose language is similar to that of the ACCA's unconstitutionally vague residual clause); and that attempted Hobbs Act robbery does not meet the definition of a crime of violence under the "use-of-force clause" in § 924(c)(3)(A). Thus he argues that his § 924(c) conviction, which relied on his attempted Hobbs Act robbery as the predicate "crime of violence," cannot stand.

Whether the holding in *Johnson* extends to the residual clause in § 924(c)(3)(B) is currently an open question in the Eleventh Circuit. Until recently, that question seemed to be settled by *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), where the Eleventh Circuit held that *Johnson* did not apply to § 924(c) and concluded expressly that "*Johnson*'s void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause [i.e., the residual clause] in § 924(c)(3)(B)." 861 F.3d at 1265. On May 15, 2018, however, the Eleventh Circuit vacated its panel opinion in *Ovalles* and ordered that the case be reheard

en banc. *Ovalles v. United States*, 889 F.3d 1259 (11th Cir. 2018); *see* Eleventh Circuit General Order No. 43, May 17, 2018.

That said, the Eleventh Circuit has stated: "Even assuming that *Johnson* invalidated § 924(c)'s residual clause [§ 924(c)(3)(B)], that conclusion would not assist [a defendant whose] underlying conviction on which his § 924(c) conviction was based . . . [met] the requirements that the force clause in § 924(c)(3)(A) sets out for a qualifying underlying offense." *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016). The Eleventh Circuit has held that Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *Saint Fleur*, 824 F.3d at 1340–41. More recently, and more to the point for purposes of Smiley, the Eleventh Circuit has specifically held that attempted Hobbs Act robbery (the predicate for Smiley's § 924(c) conviction) is categorically a crime of violence under § 924(c)(3)(A)'s use-of-force clause. *United States v. St. Hubert*, 883 F.3d 1319, 1334 (11th Cir. 2018).

Because binding Eleventh Circuit precedent establishes that attempted Hobbs Act robbery is categorically a crime of violence under § 924(c)(3)(A)'s use-of-force clause, Smiley's conviction and sentence under § 924(c) are still valid following *Johnson*, and Smiley's instant claim is foreclosed. And because Smiley's *Johnson* claim lacks merit, there is no need to address the government's other arguments.

III. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the 28 U.S.C. § 2255 motion be DENIED and his case DISMISSED WITH PREJUDICE.

It is further

ORDERED that the parties shall file any objections to this Recommendation or before **August 3, 2018**. A party must specifically identify the factual findings and legal conclusions in the Recommendation to which objection is made; frivolous, conclusive, or general objections will not be considered. Failure to file written objections to the Magistrate Judge's findings and recommendations in accordance with the provisions of 28 U.S.C. § 636(b)(1) will bar a party from a *de novo* determination by the District Court of legal and factual issues covered in the Recommendation and waives the right of the party to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); 11th Cir. R. 3-1. *See Stein v. Lanning Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

DONE this 20th day of July, 2018.

/s/ Charles S. Coody
CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE