

Petitioner's Appendices

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14077-C

JOHANN BRITO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Georgia

ORDER:

Johann Brito, a federal prisoner serving a 480-month total sentence for conspiracy to commit Hobbs Act robbery, attempted Hobbs Act robbery, attempted possession with intent to distribute at least 500 grams of cocaine, possession with intent to distribute at least 500 grams of cocaine, and possession of a firearm during a crime of violence and drug-trafficking crimes, through counsel seeks a certificate of appealability (“COA”) to appeal from the denial of his counseled 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence on the issue of “[w]hether after *United States v. Davis*, 139 S. Ct. 2319 (2019), which struck down § 924(c)’s residual clause, an attempted Hobbs Act robbery under 18 U.S.C. § 1951(a) remains a crime of violence through § 924(c)’s elements clause?”

To obtain a COA, Brito must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He would satisfy this requirement by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” or that the issues “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations marks omitted). “[N]o 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 marks omitted).

We have held that attempted Hobbs Act robbery categorically qualifies as a crime of violence under § 924(c)(3)(A)’s elements clause. *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), *overruled in part on other grounds by United States v. Davis*, 139 S. Ct. 2319 (2019). We also have held that § 924(c)(3)(A)’s elements clause is an adequate and independent ground to affirm a defendant’s § 924(c) conviction, regardless of the constitutionality of § 924(c)(3)(B)’s residual clause. *Id.*

Here, reasonable jurists would not debate the district court’s conclusion that Brito’s § 2255 motion was meritless. He was convicted of possessing a firearm in furtherance of an attempted Hobbs Act robbery, which we have determined qualifies as a crime of violence under § 924(c)(3)(A)’s elements clause. *See id.* at 352. Even though *Davis* struck down § 924(c)(3)(B)’s residual clause after Brito was convicted and sentenced, the district court correctly concluded that his offense conduct for attempted Hobbs Act robbery still qualified as a crime of violence under § 924(c)(3)(A)’s elements clause because the § 924(c)(3)(A)’s elements clause is an independent and alternative ground to uphold his § 924(c) conviction and sentence, regardless of the constitutionality of § 924(c)(3)(B)’s residual clause. *See id.*

Thus, Brito's claim that it is debatable whether his § 924(c) conviction and sentence is unlawful in light of *Davis* is foreclosed by binding circuit precedent, and he has not made a substantial showing of the denial of a constitutional right.

For these reasons, Brito's motion for a COA is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

FILED IN CHAMBERS
USDC AtlantaIN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AUG 28 2020

UNITED STATES OF AMERICA

v.

JOHANN BRITO

CRIMINAL ACTION NO.

1:11-CR-60-5-ODE

James M. Harten, Clerk
AMC:mcORDER

This closed criminal case is before the Court on Defendant's § 2255 motion [Doc. 441]. The Government has filed a response in opposition [Doc. 461]. For the reasons set forth below, the motion is DENIED and the Court declines to issue a certificate of appealability because Defendant has not made a substantial showing of the denial of a constitutional right.

This criminal case was tried to a jury in February 2012; the jury convicted Defendant Brito of numerous crimes including conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count One); attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Nine); attempted possession with intent to distribute at least five kilograms of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (Count Ten); possession with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(A) (Count Eleven); and using and carrying a firearm during a crime of violence and drug trafficking crimes in violation of 18 U.S.C. §§ 924(c) (Count Twelve). The Court imposed a total sentence of 480 months in prison at the June 21, 2012 sentencing hearing. This consisted of 240 months each on the conspiracy and attempted robbery counts, to run concurrently, plus a

consecutive term of 60 months on each of the two drug counts, plus an additional consecutive sentence of 120 months on the § 924(c) crime (because the firearm was discharged). The conviction and sentences were affirmed on appeal.

On June 24, 2019, the United States Supreme Court held in United States v. Davis, 139 S. Ct. 2319, that the residual clause of § 924(c) is unconstitutionally vague. The residual clause of § 924 is contained in 18 U.S.C. § 924(c)(3)(B). It defines "crime of violence" as an offense that is a felony and "that by its nature, includes a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Subsequent to Davis, the United States Court of Appeals for the Eleventh Circuit ruled in United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018) that an attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), which states that the term "crime of violence" means that an offense is a felony and "has as an element the use, attempted use or threatened use of physical force against the person or property of another."

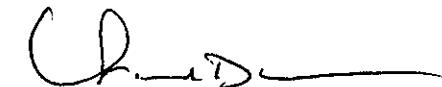
The counts of conviction here include both a conspiracy to commit Hobbs Act robbery and an attempted Hobbs Act robbery. The Government's argument is that these crimes had "as an element, the use, attempted use or threatened use of physical force against the person or property of another." Thus, the Government argues that even though the residual clause was found to be unconstitutionally vague in Davis, the so-called elements clause in § 924(c)(3)(A) leaves Defendant's conviction on Count

Twelve intact. Defendant acknowledges that the St. Hubert decision defeats his argument. He states he maintains it only to preserve the record in case the law should change.

In addition, the Government points out that Defendant's § 924(c) conviction on Count Twelve was also predicated on and supported by his convictions for drug trafficking (Counts Ten and Eleven). Therefore the Government argues that even if Defendant is right regarding his argument on the § 924(c) residual clause, the conviction is supported by his convictions for drug trafficking counts (Counts Ten and Eleven). Defendant responds that it is unclear whether the jury relied on the drug trafficking counts when deciding Count Twelve, the § 924(c) count.

In summary, Defendant's § 2255 motion [Doc. 441] must be DENIED. The Court declines to issue a certificate of appealability because Defendant has not made a substantial showing of the denial of a constitutional right.

SO ORDERED this 27 day of August, 2020.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE