FILED: October 13, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 20-6089
(3:13-cr-00134-JFA-2)
(3:16-cv-02587-JFA)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

IZELL DELOREAN GRISSETT, JR., a/k/a Buddy

Defendant - Appellant

---

ORDER

---

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Agee, Judge Diaz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 20-6089**

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IZELL DELOREAN GRISSETT, JR., a/k/a Buddy,

Defendant - Appellant.

---

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:13-cr-00134-JFA-2; 3:16-cv-02587-JFA)

---

Submitted: July 21, 2020 Decided: July 23, 2020

---

Before AGEE, DIAZ, and HARRIS, Circuit Judges.

---

Dismissed by unpublished per curiam opinion.

---

Izell Delorean Grissett, Jr., Appellant Pro Se.

---

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Izell Delorean Grissett, Jr., seeks to appeal the district court's orders denying relief on his 28 U.S.C. § 2255 (2018) motion and motion to reconsider. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Grissett has not made the requisite showing. Accordingly, we deny his motions for a certificate of appealability and to amend, and we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*DISMISSED*

APPENDIX B, 4a

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | CR NO. 3:13-134-JFA |
| | ) | |
| v. | ) | ORDER ON |
| | ) | § 2255 PETITION |
| IZELL DELOREAN GRISSETT | ) | |
| | ) | |

This matter is before the court upon defendant's *pro se*[1] motion and amended motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255 and in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 135 S. Ct. 2551 (2015) and other recently decided cases. Here, the defendant challenges his convictions under 18 U.S.C. § 924(c). He also raises various other errors involving his conviction and sentence. The matters have been briefed and are ripe for review. For the reasons discussed below, the court finds that the grounds asserted by the defendant in his § 2255 motion are without merit, and that the government's motion to dismiss should be granted.[2]

## I. INTRODUCTION

While the defendant's 2255 motion was before this court, several cases were pending or became ripe in the Fourth Circuit Court of Appeals and the Supreme Court that had the potential to impact whether certain crimes qualify as a "crime of violence." Thus, motions

[1] Because the defendant/petitioner is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer and therefore, they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

[2] In deciding a § 2255 motion, the court may summarily dismiss the motion "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief." Rules Governing Section 2255 Proceedings 4(b); *see* 28 U.S.C. § 2255(b) (a hearing is not required on a § 2255 motion if the record of the case conclusively shows that petitioner is entitled to no relief).

presenting this and other related issues were stayed awaiting a decision on the various cases under review.

By way of background, the Supreme Court in *Johnson* held unconstitutionally vague the "residual clause" of 18 U.S.C. § 924(e)(2)(B)(ii) of the Armed Career Criminal Act ("ACCA") and reversed the defendant's sentence that was increased as a result of the ACCA enhancement. Thereafter, in *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that its 2015 decision in *Johnson* applies retroactively to cases on collateral review.

Then, in the case of *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court decided that the advisory sentencing guidelines are not subject to constitutional challenge under the void-for-vagueness doctrine.

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court held that the residual clause in 18 U.S.C. § 16 (which defines a "crime of violence" and is incorporated by reference in the Immigration and Nationality Act's mandatory removal provisions) is void for vagueness. The Court concluded that the residual clause of § 16 possessed the same flaws as the ACCA's residual clause, which the Court invalidated in *Johnson* in 2015.

This court then held in further abeyance the defendant's § 2255 motion until the Fourth Circuit issued a decision in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019). The *Simms* case was decided en banc on January 24, 2019, wherein the court ruled that the residual clause found in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. The Fourth Circuit then stayed the issuance of its mandate in the *Simms* case pending a decision by the United States Supreme Court in *United States v. Davis*, 139 S. Ct. 2319 (2019).

On June 24, 2019, the Supreme Court ruled in *Davis* that the substantial risk of force clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, reaching the same conclusion as the Fourth Circuit in the *Simms* case. Thus, a conviction under § 924(c)(3)(B) could not be supported by a conviction for conspiracy to commit a Hobbs Act robbery. However, a conviction for Hobbs Act robbery under the force clause of § 924(c)(3)(A) categorically remains a crime of violence.

In addition, the Fourth Circuit decided the case of *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), holding that Hobbs Act robbery is a violent felony and satisfies the force elements clause of § 924(c)(3)(A) so that this clause remains constitutional.

Finally, the Supreme Court recently decided that Florida robbery—requiring use of force sufficient to overcome a victim's resistance, even if that force is "slight"—categorically qualifies as a predicate offense under § 924(e), as overcoming resistance is inherently "violent." *Stokeling v. United States*, 586 U.S. ___, 139 S.Ct. 533, 553 (2019).

II. APPLICABLE LAW

Prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. In order to move the court to vacate, set aside, or correct a sentence under § 2255, a petitioner must prove that one of the following occurred: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

Nonconstitutional claims may be brought pursuant to § 2255, but will not provide a

On June 24, 2019, the Supreme Court ruled in *Davis* that the substantial risk of force clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, reaching the same conclusion as the Fourth Circuit in the *Simms* case. Thus, a conviction under § 924(c)(3)(B) could not be supported by a conviction for conspiracy to commit a Hobbs Act robbery. However, a conviction for Hobbs Act robbery under the force clause of § 924(c)(3)(A) categorically remains a crime of violence.

In addition, the Fourth Circuit decided the case of *United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019), holding that Hobbs Act robbery is a violent felony and satisfies the force elements clause of § 924(c)(3)(A) so that this clause remains constitutional.

Finally, the Supreme Court recently decided that Florida robbery—requiring use of force sufficient to overcome a victim's resistance, even if that force is "slight"—categorically qualifies as a predicate offense under § 924(e), as overcoming resistance is inherently "violent." *Stokeling v. United States*, 586 U.S. ___, 139 S.Ct. 533, 553 (2019).

II. APPLICABLE LAW

Prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. In order to move the court to vacate, set aside, or correct a sentence under § 2255, a petitioner must prove that one of the following occurred: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

Nonconstitutional claims may be brought pursuant to § 2255, but will not provide a

basis for collateral attack unless the error involves a "fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185, 99 S. Ct. 2235, 2240 (1979); *United States v. Morrow*, 914 F.2d 608, 613 (4th Cir. 1990). A petitioner cannot ordinarily bring a collateral attack on the basis of issues litigated on direct appeal. *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) (stating petitioner "cannot 'circumvent a proper ruling ... on direct appeal by re-raising the same challenge in a § 2255 motion'"); *United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009); *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976). An exception occurs where there has been an intervening change in the law. *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 2302 (1974).

Additionally, where a defendant could have raised a claim on direct appeal but fails to do so, the claim may only be raised in a federal habeas proceeding if the defendant can show both cause for and actual prejudice from the default. *See Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, (1986), or that he is actually innocent, *see Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, (1986).

Title 18 U.S.C. § 924(c) provides that a defendant shall be subject to a consecutive sentence if he or she "during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . . . 18 U.S.C. § 924(c)(1)(A). If the firearm is brandished, the defendant shall be sentenced to a consecutive term of imprisonment of not less than 7 years, and if discharged, not less than 10 years. *Id* at (ii)–(iii).

The statute defines a "crime of violence" as: an offense that is a felony and — (A) has 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 "drug trafficking crime" for purposes of § 924(c) means "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or Chapter 705 of Title 46." 18 U.S.C. § 924(c)(2).

The Hobbs Act, 18 U.S.C. § 1951, prohibits obstructing, delaying, or affecting commerce or the movement of any article or commodity in commerce by robbery. It defines robbery as "the unlawful taking or obtaining of personal property from a person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." *Id.* Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A) because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See United States v. Mathis*, 932 F.3d 242 (4th Cir. 2019) (holding that a Hobbs Act robbery constitutes a crime of violence under the force clause of Section 924(c)). Virtually every appellate court and district court to address this issue has found that Hobbs Act robbery is a "crime of violence" under the force clause of § 924(c). Likewise, attempted Hobbs Act robbery constitutes a "crime of violence" under the force clause of § 924(c)(3)(A). *See United States v. Brown*, 2019 WL 3451306, *3 (E.D.VA July 30, 2019)("Like completed

Hobbs Act robbery, attempted Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause because that clause expressly includes "attempted use" of force.")(*quoting United States v. St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018)).

Although the Supreme Court found that the residual clause of § 924(c)(3)(B) is unconstitutionally vague, the force (or elements) clause of § 924(c)(3)(A) remains a violent felony and can serve as a predicate for a § 924(c) conviction. A court must look to the substantive Hobbs Act robbery conviction as it relates to the §924(c) count.

## III. PROCEDURAL BACKGROUND

On February 7, 2014, the defendant was found guilty by a jury of the following:

Count 1: conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 280 grams or more of "crack" cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846;

Count 4: Hobbs Act robbery, aiding and abetting, in violation of 18 U.S.C. § 1951 and 18 U.S.C. § 2;

Count 5: discharging a firearm during and in relation to a drug trafficking crime or a crime of violence, in violation of 18 U.S.C. § 924(c)(1);

Count 6: felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Count 7: possession with intent to distribute 500 grams or more of cocaine, and a quantity of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), (b)(1)(C), and 18 U.S.C. § 2.

The Presentence Report ("PSR") prepared by the United States Probation Office determined the defendant's offense level was 45. The defendant's criminal history category was IV, resulting in a Guidelines range of Life. The court found that the murder cross reference in U.S.S.G. § 2D1.1(d)(1) applied.

On July 9, 2014, the court sentenced the defendant to Life imprisonment on Count 1 (drug conspiracy); 240 months on Count 4 (Hobbs Act robbery); 120 months on Count 6 (felon in possession); 480 months on Count 7 (possession with intent to distribute cocaine and crack), all to run concurrently; and 120 months consecutive on Count 5 (§ 924(c)). The defendant was not subject to an enhancement under 21 U.S.C. § 851, nor was he sentenced under the ACCA.

Thereafter, the defendant filed a notice of appeal and the Fourth Circuit Court of Appeals affirmed the defendant's conviction. *See United States v. Grissett*, 606 Fed. Appx. 717 (4th Cir. 215). The defendant did not file a petition for writ of certiorari with the United States Supreme Court.

## IV. DISCUSSION

*The Defendant's § 2255 Motion*

On July 21, 2016, the defendant filed his first *pro se* motion pursuant to 28 U.S.C. § 2255, raising four Grounds for relief. In Grounds 1, 2, and 4, the defendant argues that he should not have been sentenced in Count 1 to the murder cross reference because to do so required the judge to find facts that the jury had not found, in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). He also challenges his sentences on Counts 4 and 7 under *Apprendi*. In Ground 3, the defendant argues, as it relates to his conviction on Count 5— § 924(c)(1)(A)(iii)—that Hobbs Act robbery is no longer a crime of violence after *Johnson*.

The defendant also raises various other claims in his supplemental briefs.

*The Government's Motion to Dismiss*

As to the defendant's *Apprendi* claims relating to Counts 1, 4, and 7, the government asserts that these claims have been litigated on appeal and are procedurally defaulted. In a § 2255 proceeding, a petitioner cannot "recast, under the guise of a collateral attack, questions fully considered" on direct appeal. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976). The law of the case doctrine forecloses relitigation of issues expressly or impliedly decided by the appellate court. *United States v. Bell*, 5 Fed. 3d 64, 66 (4th Cir. 1993). The government submits that the defendant is barred from raising any further sentencing errors under § 2255 unless he can show cause for his failure to raise such claims, or show actual prejudice stemming from the alleged constitutional error, or he can demonstrate actual innocence. *United States v. Frady*, 456 U.S. 152, 167 (1982). The procedural default doctrine reflects the "general rule" that "claims not raised on direct appeal may not be raised on collateral review." *Massaro v. United States*, 538 U.S. 500, 504 (2003). "It is well established that where an appeal was taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those that could have been presented but were not are deemed waived." *Teague v. Lane*, 489 U.S. 288, 297, (1989) (internal citation and quotation omitted). *See also, Bousley v. United States*, 523 U.S. 614, 621, (1998) (habeas review is an "extraordinary remedy" and is not a proper substitute for an appeal). The defendant is barred from raising the defaulted claims in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. *Teague*, 489 U.S. at 298. The defendant does not attempt to show cause for his default, and he cannot show prejudice. "Actual prejudice" requires more than the mere possibility of prejudice; it requires a showing that the alleged error "worked to [defendant's]

actual and substantial disadvantage." *Frady*, 456 U.S. at 170.

In its supplemental response in support of its motion to dismiss (ECF No. 203), the government asserts that in addition to *Johnson*, the recent decisions in *Simms* and *Davis* do not invalidate the defendant's conviction for Hobbs Act robbery, and thus his § 2255 motion is without merit.

The government notes that Count 5 of the Indictment charged the defendant and a co-defendant with discharging a firearm during and in relation to a drug trafficking crime or a crime of violence on June 23, 2010, in violation of 18 U.S.C. § 924(c). This incident occurred as a result of the defendant robbing his drug supplier on June 23, 2010, and killing a person as a result of the robbery. The defendant's § 924(c) charge in Count 5 was based upon his charge in Count 4 for a Hobbs Act robbery and was under the force clause of § 924(c)(3)(A), not part (B). Thus, neither *Davis* or *Simms* is applicable.

The government also points out that because the § 924(c) conviction was based upon both a Hobbs Act robbery (Count 4) and a drug trafficking crime (Count 7), either of which would support the § 924(c) conviction.

The government filed its last supplemental brief (ECF No. 206) on September 23, 2019, replying to the defendant's two supplemental briefs (ECF Nos. 204, 205). The government notes that in those two briefs, the defendant reasserts arguments previously made and addressed by the government. The government suggests that other arguments are now procedurally barred as the defendant failed to raise these arguments at sentencing or on appeal.

The government contends that the defendant's reliance on *Johnson*, *Davis,* or *Simms* is misplaced. The government also notes that "aiding and abetting" a crime has a broader application than a conspiracy as a defendant is deemed to be a principal actor because he consciously shares in any criminal act whether or not there is a conspiracy. *Nye & Nissen, A Corporation, et al. v. United States*, 336 U.S. 613, 620, 69 S. Ct. 766 (1949). A defendant is guilty of aiding and abetting a crime if he has knowingly associated himself with and participated in the criminal venture. *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996) (en banc). "An active participant in a ... transaction has the intent needed to aid and abet a § 924(c) violation when he knows [in advance] that one of his confederates will carry a gun." *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240, 1249 (2014). At least two Circuits have held that aiding and abetting Hobbs Act robbery is a crime of violence. *United States v. Richardson*, 966 F.3d 417 (6th Cir. 2018), *United States v. Colon*, 826 F.3d 1301 (11th Cir. 2016). *See also Hendrickson v. Kizziah*, No. 18-316, 2019 U.S. Dist. WL 2271123 (E.D. Ky May 28, 2019).

## V. CONCLUSION

The defendant's drug trafficking crime charged in Count 7 serves as a valid basis for the § 924(c) violation charged in Count 5. The defendant's Hobbs Act robbery charged in Count 4 serves as a valid basis for the § 924(c) violation of Count 5. The decisions in *Simms*, *Davis*, and *Johnson* do not alter the conclusion that Count 5 is predicated on a valid drug trafficking crime or crime of violence under the force clause of § 924(c)(3)(A).

The claims made by the defendant regarding *Apprendi* are procedurally barred and without merit.

Accordingly, the government's motion to dismiss is granted (ECF No. 179) and the defendant's § 2255 motions and amendments (ECF Nos. 173, 204) are dismissed with prejudice.

It is further ordered that a certificate of appealability is denied because the petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).[3]

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

October 11, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

[3] A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2018). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the court finds that the defendant has failed to make "a substantial showing of the denial of a constitutional right."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| IZELL DELOREAN GRISSETT, JR. | ) | CRIMINAL NO.: 3:13-cr-00134 |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Respondent. | ) | |

**GOVERNMENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION UNDER 28 U.S.C. §2255 AND MOTION FOR SUMMARY JUDGMENT**

## I. PROCEDURAL HISTORY

On February 19, 2013, a federal grand jury returned a seven count Indictment charging Izell Delorean Grissett, Jr., and his co-defendant with a number of offenses. Grissett was charged in count one with conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine and 280 grams or more of "crack" cocaine, in violation of Title 21, United States Code, §§ 841(a)(1), 841(b)(1)(A), and 846; count four, Hobbs Act Robbery, in violation of Title 18, United States Code, §§ 1951 and 2; count five, discharging a firearm during and in relation to a drug trafficking crime or a crime of violence, in violation of Title 18, United States Code, § 924(c)(1); count six, felon in possession of a firearm and ammunition, in violation of Title 18, United States Code, § 922(g)(1) and 924(a)(2); and count seven, possession with intent to distribute 500 grams or more of cocaine, and a quantity of cocaine base ("crack" cocaine), in violation of

Title 21, United States Code, § 841(a)(1), (b)(1)(B), (b)(1)(C), and Title 18, United States Code, § 2.[1]

Grissett elected to exercise his right to a jury trial, and the trial began on February 3, 2014. On February 7, 2014, the jury returned a verdict of guilty on all counts.

Prior to sentencing, Grissett's counsel filed objections to the Presentence Report (PSR) and a Motion to Depart from the Guidelines. (ECF # 119.) On July 9, 2014, after overruling all objections to the PSR, the Court sentenced Grissett to a total term of LIFE imprisonment. (ECF #s 120, 123.)

Grissett appealed and counsel for Grissett filed a brief in accordance with Anders v. California, 386 U.S. 738 (1967) conceding that there were no meritorious issues for appeal but questioning whether the district court erred in denying Grissett's motion for judgment of acquittal pursuant to FED. R. CRIM. P. 29. Grissett filed a *pro se* supplemental brief raising two additional issues: (1) whether the district court erred when it issued a modified Allen charge to the jury; and (2) whether the district court erred in applying the murder cross-reference (U.S.S.G. § 2D1.1(d)(1)) at sentencing. The Fourth Circuit Court of Appeals upheld Grissett's conviction and sentence on April 13, 2015, in United States v. Grissett, 606 Fed. Appx. 717 (4th Cir. 2015) and issued a mandate on May 5, 2015. (ECF #s 157, 158.) Grissett timely filed his Motion to vacate under Title 28, United States Code, § 2255 on July 21, 2016 raising four grounds. Claims one, two, and four allege Apprendi error in the imposition of sentences on three of the counts of conviction. Ground three alleges that Hobbs Act Robbery is no longer a crime of violence after Johnson v. United States, 135 S.Ct. 2551 (2015).

[1] Grissett was not named in counts two and three.

## II. STATEMENT OF FACTS

On June 23, 2010, officers with the Columbia Police Department (CPD) responded to 725 Colleton Street in Columbia, South Carolina, in reference to a shooting incident. Upon arriving, officers located four Hispanic males, later identified as Joel Trejo, Jose Trejo, Hector Carrion, and Jose Ortiz, inside the residence. Carrion and Ortiz both had sustained serious gunshot injuries and were transported to the hospital. Carrion died from his injuries on June 26, 2010.

After being advised of his Miranda warnings in Spanish, Jose Trejo admitted that Ortiz had called him earlier in the day and asked permission to use Trejo's house to distribute a kilogram of cocaine. According to Trejo, Ortiz offered him $500.00 for the use of his house. Trejo advised that he was in the bathroom of the house when he heard shots coming from the front of the house and became afraid. When he came out of the bathroom, Trejo retrieved a gun from the bedroom and observed two black men, later identified as Wayne Mobley and Izell Grissett, running towards a grey car and attempting to drive away. While attempting to flee, Mobley and Grissett drove into a ditch. Mobley and Grissett got out of the car and fired shots towards the residence. Trejo returned fire. Trejo later provided a description of Mobley and Grissett to CPD.

The resulting investigation revealed that at the time of the shooting, the Trejos were suppliers of cocaine to Mobley and Grissett. On June 23, 2010, Mobley and Grissett came up with a plan to rob the Trejos during the course of a two kilogram cocaine deal anticipated to occur later that day. Mobley and Grissett, each armed with a .40 caliber handgun, went to the residence on Colleton Street. According to Mobley, after

cooking some of the cocaine into crack, Grissett began shooting without warning or a signal from Mobley. After getting the car stuck in the ditch while attempting to flee, Mobley and Grissett fled the scene on foot, exchanging gunfire as they ran.

Mobley ultimately cooperated and pled guilty to the Count 1 drug conspiracy, acknowledging in his plea agreement that the murder cross-reference would apply. Mobley subsequently testified against Grissett, fully laying out the drug conspiracy and the events leading up to the murder. Additionally, other cooperating witnesses, and civilian acquaintances not involved in illegal activity testified at Grissett's trial. These witnesses testified to their knowledge of Mobley's and Grissett's involvement in a drug conspiracy, as well as statements made by Grissett following the murder. Additionally, law enforcement and civilians testified corroborating the chain of events and the physical evidence gathered during the investigation.

At sentencing Grissett was held accountable for the conservative estimate of 9,296.6 grams of cocaine and 504 grams of "crack" cocaine. Finding that the murder cross-reference in United States Sentencing Guidelines § 2D1.1(d)(1) applied, Grissett's was sentenced to LIFE on Count 1 (drug conspiracy), 240 months on Count 4 (Hobbs Act Robbery), 120 months on Count 6 (922(g)), 480 months on Count 7 (Possession with Intent to Distribute), all concurrent, and 120 months consecutive on Count 5 (924(c)).

## III. ARGUMENT

Grissett's Motion fails on several grounds. First, contrary to Grissett's assertion, his sentences did not violate Apprendi. Also, Hobbs Act robbery satisfies the force clause of § 924(c)(3)(A), which unquestionably remains constitutional. Finally, Grissett

procedurally defaulted on Claims two, three and four, and Claim one has been litigated. Each of these grounds will be addressed below.

**1. Grissett's sentences on Counts 1, 4, and 7 do not violate the rule of Apprendi v. New Jersey (Grissett's Claims 1, 2 and 4).**

(A) Grissett's sentences on Counts 1, 4, and 7 are lawful.

Grissett claims that he should not have been sentenced on Count 1pursuant to the "murder cross-reference" because, to do so, required the judge to find facts that the jury had not found, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Because Grissett's LIFE sentence exceeded his otherwise applicable guidelines on Count 1, Grissett believes his sentence was unlawfully imposed.

Grissett misapprehends the holdings in Apprendi, Booker, and progeny. Apprendi was concerned with judge found factors (other than the fact of a prior conviction) that increased the statutory maximum, not factors which increase the guidelines range within the statutory maximum. As the Supreme Court in Apprendi made clear, it remains permissible "for judges to exercise discretion—taking into account various factors relating both to offense and offender—in imposing judgment within the range prescribed by statute." 530 U.S. at 481.

Grissett was sentenced post-Booker, and the Guidelines were applied as advisory rather than mandatory. The Supreme Court held in Rita v. United States, 551 U.S. 338, 350-52 (2007), that sentences pursuant to advisory rather than mandatory guidelines, may be based in part on facts found by a judge by a preponderance of the evidence. Accord United States v. Grubbs, 585 F.3d 793, 798-99 (4th Cir. 2009) (the court's

underlying ability to make factual findings regarding uncharged conduct does not violate the Sixth Amendment's jury trial guarantee); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2009) (sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict); United States v. Battle, 499 F.3d 315, 322-23 (4th Cir. 2007) (when applying the Guidelines in an advisory manner, the district court can make factual findings using the preponderance of the evidence standard); and directly addressing the murder cross-reference, United States v. Williams, 343 Fed. Appx. 912, **3 (4th Cir. 2009) (unpublished) (District Court finding, by a preponderance of the evidence, that the murder cross-reference applied, did not result in a sentence that exceeded the statutory maximum authorized by the jury's verdict on a charge under 21 U.S.C. § 841(b)(1)(A), providing for maximum sentence of life).

Because Grissett's statutory maximum on the Count 1 drug conspiracy was LIFE; applying the murder cross-reference did not increase his statutory maximum, and therefore did not violate Apprendi.

Similarly, Grissett challenges his sentences on Counts 4 and 7 as violative of Apprendi. As Grubbs, Benkahla, Battle, and Williams make clear, Grissett's belief that the sentencing judge is not allowed to find facts that increase the advisory guidelines sentencing range beyond the base offense level (BOL) is wrong. Grissett was sentenced to the statutory maximum of twenty years on Count 4, Hobbs Act Robbery, and to the statutory maximum of 40 years on Count 7, Possession with Intent to Distribute 500 grams or more of cocaine and a quantity of "crack" cocaine. The fact that the District

Court appropriately found specific offense characteristics that increased his BOL did not result in an increase of his sentence above the statutory maximum, in violation of Apprendi, or any other rule or constitutional right.

(B) Grissett's Claims 1, 2 and 4 (regarding his sentences on Counts 1, 4 and 7) have been litigated.

Grissett challenged the application of the murder cross-reference on direct appeal. The Fourth Circuit held that the application of the cross-reference was proved by a preponderance of the evidence and upheld Grissett's Life sentence. United States v. Grissett, 606 Fed. Appx. 717, 719-20 (4th Cir. 2015) (unpublished).

In a § 2255 proceeding, a petitioner cannot "recast, under the guise of a collateral attack, questions fully considered" on direct appeal. Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976). The law of the case doctrine forecloses relitigation of issues expressly or impliedly decided by the appellate court. United States v. Bell, 5 Fed. 3d 64, 66 (4th Cir. 1993).

Should Grissett allege that his claims as to his sentences on Counts 1, 4, and 7 are somehow different from the objections raised in his direct appeal, he has defaulted those claims. Because Grissett did not raise any other alleged sentencing errors in his appeal, he is barred from having new claims reviewed under § 2255 unless he can demonstrate "cause" for his failure to raise the claims on appeal and then show "actual prejudice" stemming from the alleged constitutional error, or he can demonstrate actual innocence. United States v. Frady, 456 U.S. 152, 167 (1982). The procedural default doctrine reflects the "general rule" that "claims not raised on direct appeal may not be raised on collateral review." Massaro v. United States, 538 U.S. 500, 504 (2003). "It is well

established that where an appeal was taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those that could have been presented but were not are deemed waived." Teague v. Lane, 489 U.S. 288, 297, (1989) (internal citation and quotation omitted). See also, Bousley v. United States, 523 U.S. 614, 621, (1998) (habeas review is an "extraordinary remedy" and is not a proper substitute for an appeal). Petitioner is barred from raising the defaulted claims in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. Teague, 489 U.S. at 298. Petitioner does not attempt to show cause for his default, and he cannot show prejudice. "Actual prejudice" requires more than the mere possibility of prejudice; it requires a showing that the alleged error "worked to [defendant's] actual and substantial disadvantage." Frady, 456 U.S. at 170.

(2) Grissett's 10 year consecutive sentence on Count 5 (924(c)) does not violate Johnson v. United States (Claim 3).

Finally, Grissett claims that his 10 year sentence under 924(c)(1)(A)(iii) violates due process because Hobbs Act Robbery is not a crime of violence. For the reasons stated in (2) *infra*, Grissett's claim is subject to procedural default, as he did not raise it in the district court or on direct appeal. Additionally, Grissett's motion is untimely pursuant to the one-year statute of limitations set forth in 28 U.S.C. § 2255. United States v. Cuong Gia Le, ---F.Supp. 3d---, 2016 WL 4035441, *9 (E.D. Va. July 25, 2016) (Ellis, J.) (Because it is not apparent to all reasonable jurists that the decision in Johnson operates to invalidate the residual clause of § 924(c), § 2255(f)(3) does not apply).

Even if Grissett's claim was not procedurally barred and untimely, he could not prevail, because Hobbs Act Robbery is a crime of violence under 18 U.S.C. § 924(c).

As of today, no court to the government's knowledge has ever held that substantive Hobbs Act robbery fails to satisfy § 924(c)(3)(A). On the contrary, all of the Circuit Courts of Appeal to directly address the issue have held that Hobbs Act robbery is a crime of violence under either § 924(c)(3)(A), (c)(3)(B), or both. See United States v. Hill, ___F.3d____, 2016 WL 4120667 (2d Cir. Aug. 3, 2016) (Hobbs Act Robbery is categorically a "crime of violence"); In Re St. Fleur, ___F.3d___, 2016 WL 3190539 (11th Cir. June 8, 2016) (Hobbs Act Robbery clearly qualifies as a crime of violence under § 924(c)(3)(A)); United States v. Prickett, ___Fed. 3d ____, 2016 WL 4010515 (8th Cir. July 27, 2016); (§ 924(c)(3)(B) is not unconstitutionally vague); and United States v. Taylor, 814 F.3d 340, 375-78 (6th Cir. 2016) (§ 924(c)(3)(B) is not unconstitutionally vague under Johnson).

Numerous motions like Grissett's have been filed following the 2015 Johnson opinion with district courts in the Fourth Circuit. These judges have rejected arguments in evaluating challenges to § 924(c) counts that rely on a Hobbs Act robbery. See, e.g., Brown v. United States, ---F.Supp.3d---, 2016 WL 787450 (E.D.Va. Feb. 9, 2016) (Smith, C.J.); United States v. Bennett, 2016 WL 354753 (E.D.Va. Jan. 27, 2016) (Spencer, J.); United States v. Walker, 2016 WL 153088 (E.D.Va. Jan. 12, 2016) (Lauck, J.); United States v. Wilson, no. 4:15-cr-21 (E.D.Va. Dec. 8, 2015) (Allen, J.); United States v. McDaniels, 147 F.Supp.3d 427, (E.D.Va. Nov. 23, 2015) (Ellis, J.); United States v. Wyche, no. 2:15-cr-97 (E.D.Va. Nov. 9, 2015) (Davis, J.); United States v. Hunter, 2015 WL 6443084 (E.D.Va. Oct. 23, 2015) (Jackson, J.); United States v. Standberry, 139 F.Supp.3d 734, (E.D.Va. Oct. 9, 2015) (Hudson, J.).

The views of these judges are not unique. See, e.g., United States v. Pena,

---F.Supp.3d--, 2016 WL 690746 (S.D.N.Y. Feb. 11, 2016) (providing especially extensive analysis of why Hobbs Act robbery satisfies § 924(c)(3)(A) even after Johnson); United States v. Tsarnaev, ---F.Supp.3d---, 2016 WL 184389 (D. Mass. Jan. 15, 2016) (same); United States v. Crawford, 2016 WL 320116, *3 (N.D. Ind. Jan. 27, 2016) (collecting authorities); Clark v. United States, 2016 WL 845271, *25 (E.D. Wisc. Mar. 4, 2016) (same).

Importantly, the Fourth Circuit recently held that federal bank robbery under 18 U.S.C. § 2113 satisfies § 924(c)(3)(A). United States v. McNeal, 818 F.3d 141, 153 (4th Cir. 2016). And the similarities of Hobbs Act robbery to federal bank robbery justify holding that both satisfy § 924(c)(3)(A). See, e.g., United States v. Howard, --F. App'x--, 2016 WL 2961978, *1 (9th Cir. May 23, 2016) ("Because bank robbery by 'intimidation' - which is defined as instilling fear of injury - qualifies as a crime of violence, Hobbs Act robbery by means of 'fear of injury' also qualifies as [a] crime of violence" under § 924(c)(3)(A)).

## IV. EVIDENTIARY HEARING NOT REQUIRED

Since it is clear from the pleadings, files, and records that Grissett is not entitled to relief, an evidentiary hearing is not necessary. See 28 U.S.C. § 2255; Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970). Grissett has presented no arguments that would mandate a hearing, and his motion must be dismissed. "A hearing is not required . . . on a § 2255 motion if the record of the case conclusively shows that petitioner is entitled to no relief." United States v.Yearwood, 863 F.2d 6, 7 (4th Cir. 1988).

## V. CONCLUSION

Based on the foregoing arguments and the established law, the Government respectfully submits that this Court should deny Grissett's § 2255 Motion and grant the Government's Motion for Summary Judgment.

Respectfully submitted,

BETH DRAKE
ACTING UNITED STATES ATTORNEY

By: s/Nancy C. Wicker

Nancy C. Wicker (#4633)
Assistant U.S. Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
(803) 929-3081

August 22, 2016

Appendix D 27a

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| IZELL DELOREAN GRISSETT, JR. | ) | Criminal No.: 3:13-cr-00134 |
| | ) | |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA | ) | |

**MOTION TO DISMISS**

The United States, through its undersigned Assistant United States Attorney, moves the Court to dismiss IZELL DELOREAN GRISSETT, JR.'s, motion to vacate sentence pursuant to Title 28, U.S.C. § 2255 and grant judgment in favor of the United States.

In support of its Motion to Dismiss, the United States incorporates herein its Response in Opposition to Defendant's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255.

BETH DRAKE
ACTING UNITED STATES ATTORNEY

s/Nancy C. Wicker
Nancy C. Wicker (ID # 4633)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, SC 29201
Nancy.wicker@usdoj.gov

August 22, 2016

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| IZELL DELOREAN GRISSETT, JR. | ) | Criminal No.: 3:13-cr-00134 |
| | ) | |
| vs. | ) | |
| | ) | |
| UNITED STATES OF AMERICA | ) | |

CERTIFICATE OF SERVICE

I hereby certify that I am an employee in the Office of the United States Attorney for the District of South Carolina, and on August 22, 2016, I caused to be served one true and correct copy of the Government's Motion to Dismiss in the above-captioned case, via the court's e-noticing system, but if that means failed, then by regular mail, on the following person(s):

Izell Delorean Grissett, Jr.
Register # 25101-171
5880 Hwy. 67 S
Florence, CO 81226

s/Nancy C. Wicker
Nancy C. Wicker
Assistant United States Attorney

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517
WWW.CA4.USCOURTS.GOV

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804) 916-2700

December 18, 2019

Robin L. Blume, Clerk
U.S. District Court
District of South Carolina
901 Richland Street
Columbia, SC 29201

**Re:** **US v. Izell Delorean Grissette, Jr.**
3:13-cr-00134-JFA

Dear Ms. Blume:

Review of the district court docket discloses that the district court is considering a motion under Fed. R. Civ. P. 50(b)(for judgment), 52(b)(to amend or make additional findings), 59(to alter or amend judgment or for new trial), or 60 (to vacate) filed within 28 days of entry of judgment. Under Fed. R. App. P. 4(a)(4), a notice of appeal filed after entry of judgment but before disposition of such a motion becomes effective upon entry of an order disposing of the last such motion.

This court will treat the notice of appeal as filed as of the date the district court disposes of such motion and will docket the appeal following disposition of the motion. Please notify this court upon entry of an order disposing of the motion.

If a party wishes to appeal the district court's disposition of the motion, a notice of appeal or amended notice of appeal must be filed within the time prescribed for appeal, measured from entry of the order disposing of the last such motion.

Yours truly,

*/s/ Margaret Thomas*

cc: Izell Delorean Grissett, Jr, Pro se
William Kenneth Witherspoon, AUSA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | CR No.: 3:13-134-JFA |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| IZELL DELOREAN GRISSETT | ) | |
| | ) | |

The defendant has filed *pro se* motions[1] to reconsider this court's order of October 11, 2019 (ECF No. 207), which denied the defendant's § 2255 motion on the merits. The defendant's motions to reconsider are made pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

Shortly after the defendant filed his motions for reconsideration (ECF Nos. 210, 211), the defendant filed a notice of appeal with the Fourth Circuit Court of Appeals. That appeal is now pending, awaiting a decision from this court on the Rule 59(e) motions.

Here, the defendant generally contends that this court erred in denying his § 2255 motion. Motions under Rule 59 are not to be made lightly: "[R]econsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.30[4] (3d ed.). The Fourth Circuit has held such a motion should be granted for only three reasons: (1) to follow an intervening change in *controlling* law; (2) on account

[1] The defendant's first motion (ECF No. 210) was filed on November 22, 2019 and is handwritten. The defendant's second motion (ECF No. 211) was filed on December 6, 2019, is typed, and appears to be a duplicate of the first handwritten motion.

of new evidence; or (3) "to correct a *clear error of law* or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (emphasis added). Rule 59 motions "may not be used to make arguments that could have been made before the judgment was entered." *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002). Nor are motions to reconsider opportunities to rehash issues already ruled upon because a litigant is displeased with the result. *See Tran v. Tran*, 166 F. Supp. 2d 793, 798 (S.D.N.Y. 2001).

Having reviewed the motions, the court finds oral argument would not aid in its decision-making process. In this court's view, the motions present neither new controlling law, nor new evidence, nor point out a clear legal error of this court. The motions are basically attempts to reargue issues already fully briefed and decided by this court. For the foregoing reasons, the motions to reconsider (ECF No. 210, 211) are denied.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

January 15, 2020
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge