

No. 17-6368

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IN THE  
**Supreme Court of the United States**

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**LEON ESCOURSE WESTBROOK,**  
*Petitioner,*

v.

**UNITED STATES OF AMERICA,**  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**SUPPLEMENTAL BRIEF**

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## TABLE OF AUTHORITIES

### CASES:

<i>Hamilton v. Sec’y Fla. Dep’t of Corr.</i> , 793 F.3d 1261 (11th Cir. 2015) .....	3
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015) .....	1-2
<i>Ovalles v. United States</i> , 861 F.3d 1257 (11th Cir. 2017) .....	2-3
<i>Sessions v. Dimaya</i> , No. 15-1498 (U.S., argued Oct. 2, 2017) .....	1, 3
<i>United States v. St. Hubert</i> , No. 16-10874, 2018 WL 1081206 (11th Cir. Feb. 28, 2018) .....	1, 3

### STATUTORY AND OTHER AUTHORITY:

18 U.S.C. § 16(b) .....	1
18 U.S.C. § 924(c) .....	1-3
18 U.S.C. § 924(c)(1)(A)(ii) .....	1
18 U.S.C. § 924(c)(3)(A) .....	1-2
18 U.S.C. § 924(c)(3)(B) .....	1-2
18 U.S.C. § 1951(a) .....	1
28 U.S.C. § 2255 .....	1

## SUPPLEMENTAL BRIEF

Petitioner Leon Escourse Westbrook, pursuant to Supreme Court Rule 15.8, brings to this Court's attention *United States v. St. Hubert*, No. 16-10874, 2018 WL 1081206 (11th Cir. Feb. 28, 2018), a new decision of the U.S. Court of Appeals for the Eleventh Circuit that was published after Mr. Escourse filed his petition for a writ of certiorari.<sup>1</sup> *St. Hubert* concludes that this Court's decision in *Sessions v. Dimaya*, No. 15-1498 (U.S., argued Oct. 2, 2017) (which will address whether 18 U.S.C. § 16(b)'s residual clause is unconstitutionally vague) will not affect 18 U.S.C. § 924(c)'s identically-worded residual clause. 2018 WL 1081206, at \*16 (“[W]e conclude that no matter the outcome about § 16(b)'s residual clause in *Dimaya*, *St. Hubert*'s § 924(c) convictions and sentences must be affirmed under both clauses in § 924(c)(3)(A) and (B).”). Mr. Escourse therefore respectfully requests that this Court grant his petition and schedule briefing and oral argument.

1. Mr. Escourse pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count one), and brandishing a firearm during a “crime of violence,” in violation of § 924(c)(1)(A)(ii) (count three). The “crime of violence” underlying his conviction on count three was the conspiracy offense alleged in count one.

2. On June 24, 2016, Mr. Escourse filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Mr. Escourse claimed that after *Johnson*, § 924(c)'s residual

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<sup>1</sup> A copy of the decision is attached to this supplemental brief.

clause was unconstitutionally vague and that his § 924(c) conviction could no longer stand. The United States magistrate judge issued a report recommending that the district court grant Mr. Escourse's petition, finding that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) and that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague after *Johnson*. But the district court found that *Johnson* does not apply to § 924(c) and denied Mr. Escourse's claim. The district court also denied Mr. Escourse a certificate of appealability (COA).

3. Mr. Escourse appealed to, and requested a COA from, the Eleventh Circuit. After Mr. Escourse filed his motion, however, the Eleventh Circuit decided *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), holding that *Johnson* does not apply to § 924(c)'s residual clause.

4. On July 18, 2017, the Eleventh Circuit denied Mr. Escourse's application for a COA, citing no case law but simply stating that the motion was denied because Mr. Escourse "has failed to make a substantial showing of the denial of a constitutional right."

5. On October 13, 2017, Mr. Escourse filed his petition with this Court, arguing, among other things, that *Johnson* invalidates § 924(c)'s residual clause. Given the circuit split on the issue, Mr. Escourse argued that at a minimum, reasonable jurists could debate the issue, and therefore the Eleventh Circuit erred by denying his request for a COA.

6. On December 18, 2017, the government filed a three-paragraph memorandum in response to Mr. Escourse's petition, suggesting that since the validity of § 924(c)'s residual clause "is closely related to the issue currently before this Court in *Dimaya* . . . the petition should be held pending *Dimaya* and then disposed of as appropriate in light of that decision." Memorandum at 2. In other words, the government suggested a ruling in *Dimaya* that is favorable to Mr. Escourse might affect the Eleventh Circuit's decision in *Ovalles*.

7. The Eleventh Circuit's recent decision in *St. Hubert*, however, has made it clear that this Court's decision in *Dimaya* will not affect *Ovalles*. 2018 WL 1081206, at \*16 ("[W]e conclude that no matter the outcome about § 16(b)'s residual clause in *Dimaya*, *St. Hubert*'s § 924(c) convictions and sentences must be affirmed under both clauses in § 924(c)(3)(A) and (B).").<sup>2</sup> Therefore, even if *Dimaya* is favorable to Mr. Escourse, the Eleventh Circuit will not reconsider *Ovalles*, and thus will not issue Mr. Escourse a COA. See *Hamilton v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (Stating that a COA may not issue where a claim is foreclosed by binding circuit precedent "because reasonable jurists will follow controlling law.").<sup>3</sup>

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<sup>2</sup> According to the *St. Hubert* court, although the two clauses are identically-worded (and employ the same analysis), they are different insofar as § 924(c) predicate offenses are federal crimes, are listed in the same indictment as the § 924(c) count, and have a specified nexus to the use, carrying, or possession of a firearm, whereas § 16(b) predicate offenses usually address prior state convictions that have no nexus to the instant federal proceeding. 2018 WL 1081206, at \*15–\*16.

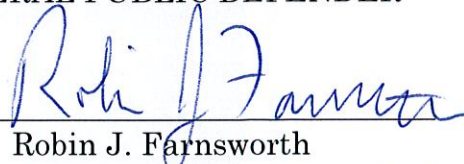
<sup>3</sup> Arguably, if *Dimaya* is favorable to Mr. Escourse, the issue is even more debatable than it was at the time Mr. Escourse filed his petition. However, even then, the

8. Because the Eleventh Circuit has clearly stated that this Court's decision in *Dimaya* will not affect its analysis of § 924(c)'s residual clause, Mr. Escourse respectfully requests that if the decision in *Dimaya* is favorable to Mr. Escourse, this Court grant his petition, allow the parties to brief the issues raised in Mr. Escourse's petition, and schedule oral argument.

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Eleventh Circuit has made itself clear that Mr. Escourse will not be issued a COA since it will not issue COAs on claims foreclosed by binding circuit precedent. See *Hamilton*, 793 F.3d at 1266.