

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

NATHAN E. WING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Mr. Wing's 28 U.S.C. § 2255 motion challenging the constitutionality of the residual clause of 18 U.S.C. § 924(c) was timely because it was filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015);
2. Whether the offense of aggravated assault on a federal officer, 18 U.S.C. § 111(a) & (b) (2006) is a crime of violence.

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PETITION FOR A WRIT OF CERTIORI

Petitioner, Nathan Wing, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is available in online databases at *United States v. Wing*, No. 17-1007, 2018 WL 1616856 (10th Cir. Apr. 4, 2018). The order of the district court denying Mr. Murphy's motion to vacate is attached as App. B.

JURISDICTION

The Tenth Circuit entered judgment in this case on April 4, 2018. No petition for rehearing was filed. This petition is timely under Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(f):

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

18 U.S.C. § 924(c)(3):

(3) For purposes of this subsection the term “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.

STATEMENT OF THE CASE

In 2006, Mr. Wing pleaded guilty to aggravated assault on a federal officer, in violation of 18 U.S.C. § 111(a) & (b) (2006), and to using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), predicated on the aggravated assault. The court sentenced Mr. Wing to a total of 147 months' imprisonment: 27 months' imprisonment on the aggravated assault count and 120 months' imprisonment on the § 924(c) count, to run consecutively to the 27-month sentence.

A decade later, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court held that a portion of the Armed Career Criminal Act, 18 U.S.C. § 924(e), which requires increased sentences for certain defendants with three prior convictions for a “violent felony,” was unconstitutionally vague. Specifically, *Johnson* invalidated the so-called residual clause—the part of § 924(e) that defines “violent felony” to include felony offenses that “involve[] conduct that presents a serious potential risk of physical injury to another.” *Johnson* left undisturbed that part of § 924(e) that defines “violent felony” to include felonies that “ha[ve] as an element the use, attempted use, or threatened use of physical force,” the so-called elements clause.

“[T]he definition of a violent felony under § 924(e)” (the statute addressed in *Johnson*) “and a crime of violence under § 924(c)” (the statute under which

Mr. Wing was convicted) “are essentially identical.” *United States v. Brown*, 200 F.3d 700, 706 (10th Cir. 1999). Specifically, § 924(c)(3) provides:

the term “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 [“the elements clause”], 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 [“the residual clause”].

The record is silent about whether Mr. Wing was convicted under the elements clause, § 924(c)(3)(A), or the residual clause, § 924(c)(3)(B).

On May 22, 2016, Mr. Wing filed a motion under 28 U.S.C. § 2255 asking the district court to vacate the judgment against him on the ground that it is in violation of *Johnson*. R. at 55–63. Mr. Wing argued that the predicate offense for his § 924(c) conviction did not qualify as a “crime of violence” under the elements clause. Rather, he maintained, aggravated assault on a federal officer could qualify as a crime of violence only under the residual clause, § 924(c)(3)(B), which is unconstitutional under *Johnson*. R. at 60–63. The district court denied relief without reaching the question of whether § 924(c)(3)(B) survives *Johnson*. R. at 90–105. The court reasoned “that conviction under § 111(b) includes as an element the use, attempted use, or threatened use of physical force,” and that Mr. Wing’s conviction is therefore supported by § 924(c)(3)(A).

Mr. Wing appealed. On appeal, the Tenth Circuit denied Mr. Wing’s motion on two grounds. First, the Tenth Circuit found that Mr. Wing’s motion was untimely. Specifically, the Tenth Circuit held that “*Johnson* did not recognize a new right relative to § 924(c)(3)(B)” and therefore “Mr. Wing’s attempt to rely on § 2255(f)(3) to establish the timeliness of his habeas motion fail[ed].” *United States v. Wing*, No. 17-1007, 2018 WL 1616856, at *3 (10th Cir. Apr. 4, 2018). Second, the Tenth Circuit held that Mr. Wing’s motion failed on the merits because his predicate conviction for § 111(b) offense qualified as a “crime of violence” because the offense categorically entails the actual or threatened use of violent physical force regardless of the specific means employed by a given defendant when committing the offense. *Id.* at *4.

However, after the Tenth Circuit denied Mr. Wing’s appeal, this Court issued a decision in *Sessions v. Dimaya*, — U.S. —, 138 S.Ct. 1204, — L.Ed.2d — (2018), which held that 18 U.S.C. § 16(b)’s definition of a “crime of violence” is unconstitutionally vague in light of its reasoning in *Johnson*. The *Dimaya* Court explained that the same two features rendered the clauses unconstitutionally vague: they “require[] a court to picture the kind of conduct that the crime involves in “the ordinary case,” and to judge whether that abstraction presents’ some not-well-specified-yet-sufficiently-large degree of risk.” *Dimaya*, 138 S.Ct. at 1216 (quoting *Johnson*, 135 S.Ct. at 2557). After

Dimaya, it is clear that the logic of *Johnson* extends to the residual clause of § 924(c)(3)(B)’s definition of a “crime of violence,”—which is identical to § 16(b)’s definition. Given this further clarification of post-*Johnson* case law, it is clear that the Tenth Circuit’s reasoning below holding that Mr. Wing’s motion was untimely is unsound.

REASONS FOR GRANTING CERTIORARI

The Court should grant review in this case because, after *Sessions v. Dimaya*, it is clear that section 2255 motions predicated on the invalidity of § 924(c)(3)(B)’s definition of a “crime of violence” must be timely if they were filed within one year of *Johnson*. Prior to *Sessions v. Dimaya*, the circuits were divided as to the constitutionality of § 924(c)(3)(B)’s residual clause. After *Dimaya*, however, there can be no doubt that § 924(c)(3)(B)’s residual clause is unconstitutional. Moreover, the circuits are divided over how to apply the force clause analysis to various crimes of violence after *Johnson*, including the predicate conviction in this case.

I. Mr. Wing’s motion was timely.

In *Johnson*, this Court invalidated as unconstitutionally vague the ACCA’s residual clause, which defined “violent felony” to include offenses that “involve[] conduct that presents a serious potential risk of physical injury to another.” 135 S. Ct. at 2558 (quoting 18 U.S.C. § 924(e)(2)(B)). In *Dimaya*, this Court invalidated an unrelated statute, 18 U.S.C. § 16(b), which defined a different term, “crime of violence,” using different words: a felony 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.” The Supreme Court reasoned that “*Johnson* is a straightforward decision, with equally straightforward application” to § 16(b). *Dimaya*, 138 S. Ct. at 1203. Indeed, it said that *Johnson* itself “effectively resolved” the question of whether § 16(b) was unconstitutionally vague. *Id.*

After *Dimaya*, there is little doubt that Mr. Wing’s vagueness challenge to § 924(c)’s residual clause is timely under 28 U.S.C. § 2255(f)(3). Mr. Wing has claimed that § 924(c)’s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015). Acknowledging that his attack on § 924(c)(3)(B) would otherwise be barred by the statute of limitations, Mr. Wing has maintained that § 2255(f)(3) renders his claim timely. That statute provides that a federal post-conviction motion is

timely if it is filed within one year of “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” The question presented in this case is, therefore, whether Mr. Wing’s challenge to § 924(c)(3)(B) asserts a violation of the right recognized in *Johnson* for purposes of § 2255(f)(3).

Dimaya invalidates the Tenth Circuit’s reasoning that Mr. Wing’s petition was untimely. The Tenth Circuit declined to apply § 2255(f)(3) to Mr. Wing’s claim because, at the time that Mr. Wing’s appeal was pending, the Tenth Circuit had already decided that *Johnson*’s reasoning did not apply to the residual clause of the mandatory guidelines. *Wing*, 2018 WL 1616856, at *3 (“*Dimaya* clarifies that the right recognized in *Johnson* is not limited to the ACCA and, further, that it applies to § 924(c)’s residual clause. Accordingly, Mr. Wing’s *Johnson*- based § 2255 motion was timely.”) (quoting *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018)).

Should the Tenth Circuit’s decision stand in this case it is likely that many defendants in the circuit will be unable to test the legality of a § 924(c) conviction even if this Court were to deem § 924(c)(3)(B) unconstitutional. As noted, § 2255(f)(3) requires that for a petition to be timely it must be filed within one year from when “the right asserted was initially recognized by the

Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” As a result, defendants seeking to challenge their § 924(c) convictions filed § 2255 motions within one year of the Johnson decision. Like Mr. Wing, these defendants argued that the right recognized in *Johnson* extended beyond the ACCA and applied to all statutes containing the same two layers of indeterminacy. Dimaya proves that this is the case.

Even if this Court holds that § 924(c)(3)(B) is unconstitutional, these same defendants will be likely barred from seeking relief. In order for a defendant to file a second or successive § 2255 motion, they must first seek approval from the appropriate court of appeals. 28 U.S.C. § 2255(h). The appellate court must certify that the motion contains “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.” *Id.* If this Court strikes down the residual clause of § 924(c)(3)(B) it will likely do so because such a result is dictated by *Johnson*. *C.f. Dimaya*, 138 S. Ct. at 1213 (“*Johnson* is a straightforward decision, with equally straightforward application here.”). Accordingly, the rule will not be new. *See Teague v. Lane*, 498 U.S. 288, 301 (1989) (“[A] case announces a new rule if the result was not dictated by precedent . . .”). Because *Dimaya* demonstrates that the “new” rule was the one recognized in *Johnson*, a second or

successive petition will likely not be authorized should this Court apply *Johnson* to strike down the residual clause of § 924(c). As such, it is an issue of exceptional importance deserving of this Court’s review.

II. The aggravated assault conviction is not a crime of violence.

Mr. Wing is entitled to relief after *Johnson* because his § 924(c) conviction is sustained solely by the residual clause, § 924(c)(3)(B), which is unconstitutional. The record doesn’t reveal whether Mr. Wing was convicted under the elements clause or the residual clause, but Mr. Wing is entitled to relief if he can show that the predicate offense for his § 924(c) conviction wouldn’t qualify as a crime of violence under the parts of § 924(c) that remain standing after *Johnson*.

An offense qualifies as a valid predicate under the categorical approach only if every conviction for the offense would necessarily be based on conduct that satisfies the definition of “crime of violence.” *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). In other words, if “[i]t is possible to commit a violation of” the statute of conviction without committing a crime of violence, the offense is not a valid predicate. *See Ibarra-Hernandez v. Holder*, 770 F.3d 1280, 1282 (9th Cir. 2014); *United States v. Hart*, 578 F.3d 674, 681 (7th Cir. 2009) (holding that federal escape is not a crime of violence because “one can commit escape under the federal statute” without satisfying the definition of

“crime of violence”). The predicate for Mr. Wing’s § 924(c) conviction, aggravated assault on a federal officer, doesn’t qualify as a crime of violence under the elements clause, § 924(c)(3)(A), and the lower courts erred in holding otherwise. The offense at issue in this case is aggravated assault on a federal officer, which 18 U.S.C. § 111 (2006) defines as follows:

(a) In general.—Whoever—

- (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or
- (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.—*Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.*

(Emphasis added.)

Section 111 “defines three separate offenses, each element of which must be charged in the indictment and proven beyond a reasonable doubt”:

1. Misdemeanor assault on a federal officer, *i.e.*, “simple assault, which, in accord with the common-law definition, does not involve touching;”
2. Felony assault on a federal officer, *i.e.*, “all other cases,’ meaning assault that does involve contact but does not result in bodily injury or involve a weapon;” and
3. Aggravated assault on a federal officer, *i.e.*, “assaults resulting in bodily injury or involving a weapon.”

See, e.g., United States v. Hathaway, 318 F.3d 1001, 1007–09 (10th Cir. 2003).

Aggravated assault on a federal officer may be committed either by intentionally injuring the victim or by using a weapon to attempt to injure or threaten to injure the victim. *See* 18 U.S.C. § 111(b). Aggravated assault on a federal officer by means of causing physical injury doesn’t satisfy the elements clause because a person can cause and intend to cause injury without using physical force, such as by intentionally placing a barrier in front of a car and causing an accident, intentionally but surreptitiously poisoning a person’s drink, or intentionally exposing someone to a dangerous disease through non-forcible sexual contact. In the alternative, but for much the same reasons, aggravated assault on a federal officer by means of using a weapon doesn’t satisfy the elements clause. The term “dangerous or deadly weapon” in § 111(b) just means

anything capable of inflicting death or serious bodily injury. Pattern Crim. Jury Instr. 10th Cir. § 2.09 (2011). A barrier, poison, or dangerous disease would certainly qualify as a dangerous weapon. Thus, the statute can be satisfied without the use of physical force.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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