

IN THE
SUPREME COURT OF THE UNITED STATES

TERRILL KINCHEN
Petitioner,

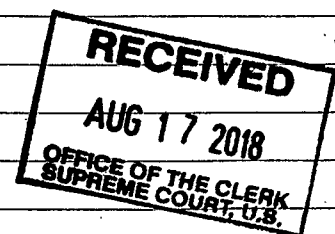
VS.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

TERRILL KINCHEN
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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the trial court plainly erred when it accepted the defendant's guilty plea to conspiracy to commit robbery and two 924(c) charges where the defendant was actually innocent of these charges Pursuant to Johnson v. United States 135 S. Ct. 2557 (2015)

II.

Whether Sessions v. Dimaya, 584 U.S. _____, 138 S. Ct. 1204 (2018) Pursuant to Ovalles v. United States, 861 F.3d 1267 (11th Cir. 2017) are beneficial to Mr. Kinchen

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Terrill Kinchen respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-10849-JJ in that court on July 17, 2018, *United States v. Terrill Kinchen*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

Statement of Jurisdiction

Jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and part III of the rules of the Supreme Court of the United States. The decision of the court of appeals was entered on July 17, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742, which provide that court of appeals shall have jurisdiction for all final decisions of United States District Courts.

Statutory And Other Provisions Involved

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

Title 18, United States Code, section 924(c)(1). Under 924(c) a crime of violence is a felony 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) 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.

For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

STATEMENT OF THE CASE

On July 21, 2016, a grand jury sitting in Miami, Florida returned a twenty-three count second superseding indictment against the defendant and his four codefendants. (DE #115) The defendant was charged in six of the counts. The indictment also included a forfeiture count. Count 1 charged that all defendants from September 2014 to May 4, 2016, in Miami Dade County, the defendants, conspired to commit a Hobbs act robbery, in violation of 18 U.S.C. 1951(a).

Count 5 and 19 charged that the defendant on April 21, 2015 and May 17, 2015 with two counts of Hobbs act robbery of a family Dollar store and a Puerto Habana Dollar Market respectively in violation of 18 U.S.C. 1951 and 2. In counts 6 and 20 the defendant was charged that he did knowingly use and carry a firearm during and in relation to a crime of violence for which the defendant may be prosecuted in a court of the United States, and did possess a firearm in furtherance of such crime; in violation of title 18 United States Code, 924(C)(1)(A) and 2. The indictment further alleged in counts 6 and 20 that pursuant to 18 U.S.C. 924(C)(1)(A)(ii) that the firearms as to each count were brandished. Finally, in count 21 the defendant was charged with possession of a firearm by a convicted felon on May 19, 2015 in violation of 18 U.S.C. 922(g).

On August 10, 2016, the defendant appeared before United States Magistrate Judge John J. O'Sullivan in Miami and the was ordered temporarily detained. (DE #131) on August 15, 2016, the defendant was ordered detained pending trial. (DE #136) Also on August 15, 2016, the defendant was arraigned and pled not guilty to the six charges contained in the indictment in which he was named. (DE #136)

On November 30, 2016, the defendant entered a guilty plea pursuant to a written plea agreement with the government (DE #231, 353) the court accepted the defendant's guilty plea (DE #353-18-19) and set sentencing in the matter. In the plea agreement, the defendant pled guilty to count 1 (Hobbs Act Conspiracy), Count 6 and count 20 (two counts of brandishing a firearm). In exchange for his guilty plea, the government agreed to dismissed the remaining at time of sentencing. In addition, in exchange for the dismissal of the remaining counts, the parties agreed in paragraph 13 of the plea agreement that to jointly recommend a sentence of 420 months inclusive of the mandatory sentence consecutive 32 year sentence for the two counts of brandishing of the firearm. (DE #232)

Prior to sentencing, counsel for Mr. Kinchen filed a motion for extension of time to file objections to the presentence investigation report ("PSI"). (DE #281) In the first set of objections to the PSI, the defendant requested a downward but ultimately filed no objections to the PSI.

At sentencing the court affirmed that the defendant was a career offender thereby finding that his guideline range at that time for count 1 and 10 was months (offense level 29, Criminal History Category VI) and a mandatory consecutive seven years (84 months and 200 months) as to count 6 and 20 for the brandishing of the firearms, pursuant to the presentence investigation report. (DE# 349-9) in light of the career offender enhancement yielding a total guideline sentence of 535 months, that a reasonable sentence in this case was what the parties had agreed to in the plea agreement, or 420 months (DE# 349).

After hearing arguments of counsel it was the ruling of the court that the defendant should be sentenced to a total term of incarceration of 420 months as to the counts of conviction among other things. (DE# 349-9-11) (DE# 335) on February 23, 2017 the defendant timely filed a notice of appeal. (DE# 339) After the filing of the notice of appeal, the parties entered into a joint stipulation wherein they agreed that the amount of restitution should be \$1,000 joint and severable with his codefendants. (DE# 361) An amended judgement was entered to reflect the restitution. (DE# 379)

Reasons For Granting The Writ

I.
Whether the trial court plainly erred when it accepted the Defendant Guilty Plea to Conspiracy to Commit Robbery and Two 924(c) charges where the defendant was actually innocent of those charges pursuant to *Johnson v. United States* 135 S. Ct. 2551 (2015).

Since the defendant did not object to the plea agreement in the district court nor did he raise this issue before the district court, this court must review this claim under the plain error standard. See Fed. R. Crim. P. 52 (B).

United States v. Olano ("clarified" the standard for 'plain error' review), 507 U.S. 725, 731, 113 S. Ct. 1770, 1776, (1993) when it held that forfeited errors are subject to plain error review, *id.* at 731, 113 S. Ct. at 1776 and outlined a test to determine if a district court had committed plain error, *id.* at 732-37, 113 S. Ct. at 1776-79. The plain-error test has four prongs: there must be (1) an error (2) that is plain and (3) that has affected the defendant's substantial right; and if the first three prongs are met, then a court may exercise its discretion to correct the error if (4) the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732, 113 S. Ct. at 1776 (alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046 (1985)). Importantly, "a court of appeals may correct the error... only if it meets these criteria." *Id.* at 752, 113 S. Ct. at 1777 (First emphasis added); *United States v. Madden*, 733 F.3d 1314, 1320 (11th Cir. 2013).

In light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) which held that the "residual clause" of the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. 924(c)(2)(B)(ii), is unconstitutionally vague. It is Kinchen's position that *Johnson* applies to his 924(c) convictions and consequently, that his sentence for that count violates due process and the laws of the United States, and was entered in excess of the court jurisdiction.

Like the ACCA, 18 U.S.C. 924(c) provides for an enhanced sentence when any person uses, carries, or brandishes a firearm in furtherance of a "crime of violence" or a drug trafficking crime. Section 924(c) defines a "crime of violence" in two different ways. First, under the use-of-force clause, a "felony offense" is defined as a "crime of violence" if it has "an element the use, attempted use, or threatened use of physical force against the person or property of another."

18 U.S.C. 924(c)(3)(A). Second, a crime of violence is defined under section 924(c)'s residual clause as a crime "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)(B) (emphasis added). Like the ACCA, section 924(c)'s residual clause requires courts to conduct a risk assessment as to whether physical force would be used in the ordinary, "judicially imagined" version of the crime at issue.

In *Benitez v. United States*, 2017 WL 2271504 (S.D. Fla April 6, 2017) the district court concluded that the Supreme Court decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidated the residual clause of 18 U.S.C. 924(c). Accordingly, the court found that the defendant's convictions for conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. 1951(a), no longer qualified as "crime of violence" under 924(c). Thereby invalidating 924(c)'s residual clause.

However while this matter was pending resentencing, the district court granted the government motion for reconsideration in light of this court opinion in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), which held that *Johnson* did not invalidate 924(c)'s residual clause.

The Eleventh Circuit generally found that *Johnson* does not apply to or invalidate 18 U.S.C. 924(c)(3)(B) and that *Ovalles* attempted carjacking conviction qualifies as a crime of violence under 924(c)(3)(B). After affirming the denial of the 2255 on that basis, the court went on to hold that as an independent and alternative ground that *Ovalles* attempted carjacking charge qualified as a crime of violence under the "use-of-force" clause of 924(c)(3)(B).

In its opinion the Eleventh Circuit noted that it was joining the second, sixth and eighth in finding that the void-for-vagueness holding in *Johnson* does not apply to or invalidate 924(c)(3)(B). The eleventh circuit did acknowledge that the seventh circuit in *United States v. Cardena*, 842 F.3d 959, 995-99 (7th Cir. 2016) has found that *Johnson* does apply to 924(c)(3).

However, on July 6, 2017—merely one week after *Ovalles* was issued, and before a rehearing petition was filed there—the Eleventh Circuit sua sponte withdrew the mandate in *Ovalles*. (Citing *Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017) ("Mandate withheld pursuant to court Instructions.") This near-immediate, sua sponte reaction indicates that there is an interest on the court in rehearing *Ovalles* en banc." *Id.* as of the date and time of the preparation of this brief, the mandate has yet to issue. As a result, the district court has stayed this matter pending further action from this court.

Likewise the district court also ruled in *Darius Scott West v. United States*, Case No.: 16-22459-Civ-Williams (S.D. Fla March 22, 2017) that the residual clause under 18 U.S.C. 924(c) was unconstitutionally vague and that conspiracy to commit Hobbs Act Robbery does not qualify as a crime of violence under the element clause. (CR D.E #34) Mr. West was resentenced without the enhanced 924(c) since the district court had found him actually innocent of that charge.

To convict on a Hobbs Act Robbery Conspiracy, the government must show that: (i) two or more people agreed to commit a Hobbs Act Robbery; (ii) that the defendant knew of the conspiratorial goal; and (iii) that the defendant voluntarily participated in furthering that goal. *United States v. Ransfer*, 749 F.3d 914, 936 (11th Cir. 2014). While persuasive authority indicates that Hobbs Act Robbery qualifies as a "crime of violence" under 924(c)'s use of force clause, it does not necessarily follow that conspiracy to commit Hobbs Act Robbery meets 924(c)(3)(A)'s Criteria. See *In re Fleur*, 824 F.3d 1337 (11th Cir. 2016); *United States v. Hill*, 832 F.3d 135 (2nd Cir. 2016).

However, although at present the binding circuit precedent forecloses the relief sought by this appellant, a rehearing en banc of a circuit could overrule that precedent.

II.

Whether *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204 (2018)
Pursuant to *Oralles v. United States*, 861 F.3d 1267 (11th Cir. 2017)
are beneficial to Mr. Kinchen

Mr. Kinchen stands convicted of conspiracy to commit robbery together with two separate violations of 18 U.S.C. 924(c) charges for brandishing a firearm in furtherance of a crime of violence. Mr. Kinchen was sentenced to a total of 384 months as to the two 924(c) offenses to run consecutive to his 36 months sentence for the Hobbs Act Robbery Conspiracy.

On May 7, 2018 United States District Court of Appeals, per Judge Wilson, Martin and Rosenbaum entered a five page order which, in its material part, granted in part the government's motion to dismiss the appeal based on Kinchen's guilty plea and the sentence appeal waiver but denied Kinchen challenge to the reasonableness of his sentence. The district court further granted the government's alternative request for summary affirmance as to Kinchen's challenge to his 924(c) convictions.

In the summary affirmance the district court relied on *United States v. St. Hubert*, *Supra*, the district court held that Kinchen's conspiracy conviction was not the predicate offense underlying his 924(c) convictions. Instead, his 924(c) convictions were based on two substantive Hobbs Act robberies that were charged in the second superseding indictment but dismissed as part of the plea agreement. The district court of the Eleventh Circuit held that substantive Hobbs Act Robbery is a crime of violence under the use-of-force clause in 924(c)(3)(A). Order at 4 citing to *St. Hubert*, 883 F.3d at 1328-29.

In light of the United States Supreme Court's decision in *Sessions v. Dimaya*, *Supra*, the district court has vacated its prior opinion in *Ovalls v. United States*, 861 F.3d 1267 (11th Cir. 2017) and ordered that the matter reheard en banc. See *Ovalls v. United States*, 2018 WL 2209427 (11th Cir. May 15, 2018). In addition, the district court opinion in *St. Hubert*, which was relied on this panel, is not a final opinion. Similarly to *Ovalls*, the three judge panel ordered that the mandate in *St. Hubert* be withheld.

In *Sessions v. Dimaya*, *Supra*, the United States Supreme Court struck down the residual clause in 18 U.S.C. 16(B) as unconstitutionally vague. Justice Kagan authored the opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and in operative part, Justice Gorsuch. Though it turned on the constitutionality of 16(B) — a broadly applicable criminal statute — the case itself was an immigration proceeding in which the petitioner was challenging his pending deportation for an aggravated felony. The definition of aggravated felony in the Immigration and Nationality Act includes crimes of violence defined by 16(B). 8 U.S.C. 1101(a)(43)(F).

Section 16(B) defines "crime of violence" as any felony "that, by its nature, involves a substantiated risk that physical force against the person or property of another may be used in the course of committing the offense." This now-invalidated definition is identical to the commonly-used residual clause in 924(c)'s prohibition on possessing a firearm in the course of a crime of violence (a point noted by chief Justice Roberts in dissent).

The opinion of the court described its holding as a "straightforward application" of the "straightforward decision" in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The court identified two features which it said had controlled the *Johnson* decision striking down the ACCA's residual clause in 924(E)(2)(B), and which it determined applied with equal force to the similar language in 16(B). First both statutes require that the assessment of the risk posed should focus on the "ordinary case" of an offense, rather than the particular case. As it had in *Johnson*, the court stressed the problematic nature of this inquiry, especially

because judges are given no guidance as to how to determine what constitutes the ordinary case. Second, both statutes contain an ill-defined risk threshold - "substantial risk" in 16(B) and "serious potential risk" in 924(E)(2)(B). While the court, as it had in Johnson, stressed that qualitative standards may well pass constitutional muster in the general course, such a standard was fatally vague where combined with the already vague ordinary case inquiry.

Recently the tenth circuit in *United States v. Salas*, 2018 WL 2674547 (10th Cir. May 4, 2018) held that 18 U.S.C. 924(c)'s residual clause (924(c)(3)(B)) is unconstitutionally vague; vacating the defendant's 924(c) conviction where the predicate offense was arson, in violation of 18 U.S.C. 824(i); rejecting as insubstantial any distinctions in 18 U.S.C. 924(c)'s "crime of violence" definition and the "crime of violence" definition in 18 U.S.C. 16(B) that was reviewed in *Dimaya*; explaining that the Eleventh circuit then valid opinion in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), "upheld 924(c)(3)(B)'s constitutionality, but *was* not faced, as we are here, with binding authority holding 16(B) unconstitutional"; and concluding that "*Dimaya's* reasoning for invalidating 16(B) applies equally to 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague". Rejecting the government's attempt to rely on a distinction noted in *Ovalles*, the require nexus to a firearm, the *Salas* court held:

"The only way the government distinguishes 924(c)(3)(B) from 16(B) is by noting, that, pursuant to 924(c)(1)(A), the former requires a sufficient nexus to a firearm, which narrows the class of offenses that could qualify as crime of violence. See *Ovalles v. United States*, 861 F.3d 1257, 1265-66 (11th Cir. 2017); vacated by *Ovalles v. United States*, 2018 WL 2209427 (11th Cir. May 15, 2018) ('the required 'nexus' between the 924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable'). But this firearm requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that 924(c)(3)(B) possesses the same two features that rendered the ARCA's residual clause and 16(B) unconstitutionally vague: "an ordinary case requirements and an ill-defined risks threshold," *Dimaya*, 138 S. Ct. at 1223. Requiring a sufficient nexus to a firearm does not remedy those two flaws." *United States v. Salas*, 2018 WL 2674547 at *3.

Recently the district court in New Mexico vacated a defendant 300 months consecutive sentence for brandishing a firearm during a crime of violence (escape) finding that pursuant to *United States v. Salas*, *Supra*, that since the residual clause was unconstitutionally vague, that 300 months consecutive sentence and conviction pursuant 924(c) should be vacated in its entirety. See *Chubbuck v. United States*, 2018 WL 2113236 (D.N.M. May 8, 2018).

The district court panel cited to the two substantive robbery counts that were dismissed by the court to support the factual basis for the 924(c) conviction but did not focus on the defendant's guilty plea to Conspiracy to commit Hobbs Act Robbery. Whether conspiracy to commit Hobbs Act Robber qualifies as a crime of violence

Under 924(c)'s force clause was not reached by the panel and must be addressed categorically and not by the defendant's conduct. *United States v. McGuire*, 706 F.3d 1333, 1326 (11th Cir. 2014) Using this approach, conspiracy to commit Hobbs Act Robbery may not qualify since it may be committed without "the use, attempted use, or the threatened use of physical force."

Thus under the "least culpable act" rule, the district court must presume that Kinchen's conspiracy to commit Hobbs Act Robbery conviction was committed by a verbal or written agreement to commit the offense. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013) committing the offense in this was clearly lacks "the use, attempted use or threatened use of violent, physical force." Therefore, conspiracy to commit Hobbs Act Robbery is categorically overbroad and does not qualify as a "crime of violence".

Therefore, Mr. Kinchen's two 924(c) convictions are unconstitutional and should be set aside.

CONCLUSION

Based upon the foregoing petition, The court should grant a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
Terrill Kinchen
/s/ J. R. F.