NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2018

Thomas Lee Farmer - Petitioner,

v.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the concurrent sentence doctrine should be applied to deny § 2255 relief when one of a set of multiple sentences is now invalid because of a new rule of constitutional law made retroactive on collateral review by the Supreme Court that was previously unavailable?

(2) Whether application of *Johnson v. United States*, 135 S. Ct. 2551 (2015), to the virtually identical residual clause in 18 U.S.C. § 3559(c), requires a new rule of constitutional law, or merely requires a straightforward application of *Johnson*'s reasoning to that statute.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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The petitioner, Thomas Lee Farmer ("Farmer"), through counsel, respectfully requests that a writ of certiorari issue to review the March 20, 2018, judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 17-3488, denying his application for a certificate of appealability ("COA"). Farmer's petition for rehearing by the panel was denied on May 29, 2018.

OPINION BELOW

The Eighth Circuit Court of Appeals' denial of Farmer's application for a COA in Case No. 17-3488 is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Farmer's petition for rehearing is provided in Appendix B. The order of the district court denying Farmer's § 2255 motion is provided in Appendix C.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Farmer's case under 18 U.S.C. § 3231. The district court denied Farmer's 28 U.S.C. § 2255 motion on September 15, 2017. Farmer timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on March 20, 2018. (Appendix A). Farmer filed a petition for rehearing by the panel, which was denied on May 29, 2018. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 924 (2012). Penalties. Subsection (e) . . .

> (2) As used in this subsection . . .
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 3559. Sentencing classification of offenses.

(c) Imprisonment of certain violent felons.–

(1) Mandatory life imprisonment.–Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if–

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or a State of–

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions.–For purposes of this subsection . . .

(F) the term "serious violent felony" means–

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and ((a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118);

carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

STATEMENT OF THE CASE

On January 11, 1995, a five-count superseding indictment was filed in the Northern District of Iowa charging petitioner with two counts of Hobbs Act robbery (counts one and two), in violation of 18 U.S.C. § 1951, one count of possession of a firearm during a crime of violence (count three), in violation of 18 U.S.C. § 924(c), one count of felon in possession of a firearm (count four), in violation of 18 U.S.C. § 922(g)(1), and one count of forfeiture (count six). (Crim. Doc. 31).[1] Farmer first proceeded to trial in March 1995, but a mistrial was declared when the jury was unable to reach a unanimous verdict. (Crim. Doc. 89). Farmer was tried again and on May 22, 1995, the jury returned guilty verdicts on all counts. (Crim. Doc. 142).

The court conducted sentencing on August 14, 1995. (Crim. Doc. 170). The district court found that Farmer's Hobbs Act robbery charges in counts one and two were qualifying convictions for purposes of imposing a mandatory life sentence

[1] In this petition, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. CR94-2020-LRR, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. References to the sentencing transcript will be to "Sent. Tr." followed by the page number. Any references to Farmer's previous § 2255 motion will also be to the criminal docket because, at that time, § 2255 petitions were filed under the criminal docket in the Northern District of Iowa. References to Farmer's petition to bring a second or successive § 2255 petition, filed May 27, 2016, under Eighth Circuit No. 16-2448, will be referenced as "SOS" followed by the Eighth Circuit Entry ID number. References to the § 2255 petition underlying the instant petition for writ of certiorari, N.D. Iowa Case No. 6:16-cv-2056-LRR will be to "Civ. Doc.", followed by the docket entry number.

under 18 U.S.C. § 3559(c). (Sent. Tr. 54–58). His predicate convictions under § 3559(c)(2)(F) included: (1) a 1971 Iowa conviction for second degree murder (PSR 70); (2) a 1979 Iowa conviction for first degree robbery (PSR 73); and (3) a 1983 Iowa conviction for conspiracy to commit murder (PSR 74). The sentencing court also determined that Farmer qualified as an armed career criminal based upon the same three convictions that qualified as predicates under § 3559(c). (Sent. Tr. 69–70).

Before imposing sentence, the court made three findings: (1) Farmer was subject to mandatory life imprisonment pursuant to § 3559(c) on counts one and two; (2) he was subject to a mandatory five-year consecutive sentence pursuant to 18 U.S.C. § 924(c) on count three; and (3) Farmer was subject to a guideline range of 262 to 327 months imprisonment on count four, based on an offense level of 34 and a criminal history category of VI. (Sent. Tr. 70). The court then imposed concurrent sentences of life imprisonment on counts one and two, a concurrent term of 327 months on count four, and a five-year consecutive term of imprisonment on count three. (Crim. Doc. 172).

Farmer filed a direct appeal arguing that: (1) his life sentence imposed under § 3559(c) was in violation of his constitutional rights; (2) insufficient evidence existed to support his convictions for Hobbs Act robbery; and (3) the district court abused its discretion in denying his motion for a new trial. *United States v. Farmer*, 73 F.3d 836, 839–45 (8th Cir. 1996). On January 18, 1996, the Court affirmed

Farmer's convictions and sentences. *Id.* at 845. Certiorari was denied on June 24, 1996. *Farmer v. United States*, 518 U.S. 1028 (1996).

In June 1997, Farmer filed a pro se motion to vacate, set aside, and correct his sentence under 28 U.S.C. § 2255. (Crim. Doc. 191). He argued that: (1) the prosecution failed to disclose favorable evidence to the defense; (2) his life sentence under § 3559(c) was unconstitutional; (3) the evidence was insufficient to support convictions under the Hobbs Act; and (4) he did not receive a fair trial based on witness statements. (Crim. Doc. 196). The district court denied his motion in August 1998. (*Id.*). Farmer then filed a motion to reconsider the denial of his § 2255 motion and a motion to amend his § 2255 motion. (Crim. Docs. 198, 199). The court denied both motions in October 1998. (Crim. Doc. 202). Farmer then filed a motion to reconsider in November 1998, which the court denied in December 1998. (Crim. Docs. 203, 204). In March 1999, Farmer filed a motion for a certificate of appealability which was denied. (Crim. Docs. 207, 208). He appealed and in April 1999, the Eighth Circuit dismissed his appeal as untimely. *Farmer v. United States*, No. 99-1686, 8th Cir. Entry ID: 1119967.

On May 25, 2016, the petitioner, through counsel, filed a motion under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). In the motion, the parties jointly requested that the court stay full briefing and disposition of petitioner's claim until January 2, 2017, or until further motion of the parties. (*Id.*) On May 27, 2016, petitioner requested leave from the Eighth Circuit

to pursue the motion, as it was a second or successive ("SOS") petition pursuant to § 2255. (SOS Entry ID 4404544). In particular, petitioner's SOS motion sought to challenge application of the three strikes statute, the ACCA, and § 924(c) in his § 2255 petition. (*Id.*). On October 6, 2016, the Eighth Circuit granted petitioner's request in part, stating: "The request for authorization to file a successive motion under 28 U.S.C. § 2255 is granted on the issue of whether applicant's sentence on Count IV of the indictment against him is valid under 18 U.S.C. § 924(e)." (SOS Entry ID 4456272). On March 22, 2017, the district court entered an order directing the parties to brief the issue of whether petitioner was properly subjected to sentencing under the ACCA. (Civ. Doc. 6).

On September 15, 2017, the district court filed an order denying Farmer's § 2255 motion. (Appendix C). Farmer timely appealed from the court's denial of his § 2255 motion by filing a request for a certificate of appealability in the Eighth Circuit pursuant to Federal Rule of Appellate Procedure 22(b)(2). (Civ. No. 24). His application for a COA was denied on March 20, 2018. (Appendix A). Farmer then filed a petition for panel rehearing, which was denied on May 29, 2018. (Appendix B).

The Order denying Farmer's Application for a Certificate of Appealability does not state any reasons for the panel's decision, so Farmer assumes that the panel relied upon the reasons given by the district court when it denied his 28 U.S.C. § 2255 motion seeking to vacate his sentences under the ACCA, the three

strikes statute, 18 U.S.C. § 3559(c), and 18 U.S.C. § 924(c), based upon *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Appendix C).

REASONS FOR GRANTING THE WRIT

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1)(B), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.*

To satisfy the "substantial showing" requirement, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)). The petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). A substantial showing must be made for each issue presented. *Parkus v. Bowersox*, 157 F.3d 1136, 1148 (8th Cir. 1998). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003).

In the instant case, the district court summarily denied the petitioner's claim

that he is entitled to relief under *Johnson* by invoking the concurrent sentence doctrine. (Appendix C, p. 1). Apparently, the district court assumed that the petitioner could not attack any sentences other than his Armed Career Criminal Act sentence because of "procedural obstacles." (Appendix C, p. 2, n.1). In its footnote, the district court relied upon a Sixth Circuit case to support its conclusion that Farmer could not challenge his other sentences unless this Court recognizes a new constitutional right not to be sentenced under the three strikes statute. (Appendix C, p. 2, n.1). The district court did not give Farmer the opportunity to demonstrate why his other sentences were also subject to attack under *Johnson*. Clearly, the question of whether *Johnson* applies to sentences imposed under the pre-*Booker* career offender guideline, and the three strikes statute, are debatable among jurists of reason.

I. THE CONCURRENT SENTENCE DOCTRINE SHOULD NOT BE APPLIED TO DENY § 2255 RELIEF WHEN ONE OF A SET OF MULTIPLE SENTENCES IS NOW INVALID BECAUSE OF A NEW RULE OF CONSTITUTIONAL LAW MADE RETROACTIVE ON COLLATERAL REVIEW BY THE SUPREME COURT THAT WAS NOT PREVIOUSLY AVAILABLE.

The government conceded that Farmer should be entitled to relief on his ACCA sentence. (Civ. No. 11, pp. 8–9). Nevertheless, the district court, invoking cases such as *United States v. Smith*, 601 F.2d 972, 973–74 (8th Cir. 1979), *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011), and *Olten v. United States*, 565 F. App'x 558, 561 (8th Cir. 2014), *cert. denied*, ___ U.S. ____, 135 S. Ct. 1893 (2015), denied relief under the concurrent sentence doctrine. (Appendix C).

The concurrent sentence doctrine has been summarized as follows:

> Under [the] concurrent sentence doctrine, an appellate court may, in its discretion, decline to review the validity of a defendant's conviction where (a) the defendant has received concurrent sentences on plural counts of an indictment, (b) a conviction on one or more of those counts is unchallenged or found to be valid, and (c) a ruling in the defendant's favor on the conviction at issue would not reduce the time he or she is required to serve under the sentence for the valid conviction(s). A reviewing court will not, however, apply the concurrent sentence rule in cases where its application would be *substantially prejudicial to a defendant or expose him to a substantial risk of adverse collateral consequences* that might flow from an invalid but unreversed conviction.

United States v. Smith, 601 F.2d 972, 973 (8th Cir. 1979) (emphasis added).

The origins of the concurrent sentence doctrine are obscure. *Benton v. Maryland*, 395 U.S. 784, 789 (1969). One thing that is clear about the concurrent sentence doctrine is that it is not a jurisdictional rule; rather, it is a matter of judicial discretion. *Id.* at 790. The Court stated in *Benton* that the doctrine's only "continuing validity" is as a "rule of judicial convenience." *Id.* at 791. The concurrent sentence doctrine certainly does not arise from the text of 28 U.S.C. § 2255, which provides that when the court finds a violation of a petitioner's constitutional rights, "the court *shall* vacate and set the judgment aside and *shall* discharge the prisoner or resentence him . . . or correct the sentence as *may appear appropriate*." 28 U.S.C. § 2255(b) (emphasis added).

Applying this discretionary rule of judicial convenience to the instant case would unduly restrict the range of relief to which the petitioner is entitled under 28 U.S.C. § 2255(b). When a defendant has been sentenced on multiple counts, and

one of those counts has been vacated, "a district court proceeding under § 2255 may vacate the entire sentence so that the district court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. § 3553(a)." *United States v. Tidwell*, 827 F.3d 761, 764 (8th Cir. 2016) (quoting *United States v. Parker*, 762 F.3d 801, 806 (8th Cir. 2014)); *United States v. McKnight*, 17 F.3d 1139, 1145, n.8 (8th Cir. 1994).

When conducting resentencing following the grant of a § 2255 motion, the district court may apply the law in effect at the time of the resentencing, not at the time of the original sentencing. *Tidwell*, 827 F.3d at 764. Upon resentencing, the court could consider recent cases such as *Johnson*, *Mathis*, *Dimaya*, *Booker*, and *Kimbrough*. The invocation of the concurrent sentence doctrine by the district court and, presumably, by the Eighth Circuit Court of Appeals effectively deprives Farmer of the right to have his sentencing package unbundled and his sentence considered anew by the district court.

As discussed infra, based upon *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210, 1213–15 (2018), it is entirely plausible that *Johnson* will be held applicable to the three strikes statute in 18 U.S.C. § 3559(c). Should this occur, Farmer could challenge whether the mandatory life sentencing enhancement in § 3559(c) applied to counts one and two, and if successful, be resentenced on counts one and two to a finite term of incarceration. If the concurrent sentencing doctrine is invoked to deny Farmer ACCA relief in the present case, however, he would still be serving a

sentence of 327 months on the felon in possession of a firearm charge in count four, even though such sentence should be subject to a maximum statutory term of 120 months. Clearly, this would constitute either significant prejudice or an adverse collateral consequence to Farmer because he would not again be permitted to challenge the ACCA sentence in such a scenario.

The Court has indicated a general willingness to "presume" that an unlawful conviction "has continuing collateral consequences." *Spencer v. Kemna*, 523 U.S. 1, 8 (1998). That presumption should certainly apply in the instant case.

II. APPLICTION OF *JOHNSON* TO THE VIRTUALLY IDENTICAL RESIDUAL CLAUSE IN § 3559(c) DOES NOT REQUIRE A NEW RULE OF CONSTITUTIONAL LAW, BUT MERELY REQUIRES A STRAIGHTFORWARD APPLICATION OF *JOHNSON*'S REASONING TO THAT STATUTE.

A. A new constitutional rule is not necessary to apply *Johnson* to the residual clause of 18 U.S.C. § 3559(c).

When Farmer filed his request for permission to file an SOS petition, in addition to challenging his ACCA sentence under *Johnson*, he sought permission to challenge his life sentences under the three strikes statute, 18 U.S.C. § 3559(c), specifically claiming that his two Hobbs Act convictions did not constitute serious violent felonies for purposes of triggering the life sentence mandated by § 3559(c). (No. 16-2448, Entry ID: 4404544, ¶3). In granting his SOS request, however, this Court restricted Farmer to the claim that his ACCA sentence on count IV violated *Johnson*. (No. 16-2448, Entry ID: 4456272).

The Eighth Circuit's limitation of its SOS grant was undoubtedly informed by

Donnell v. United States, 826 F.3d 1014 (8th Cir. 2016). In *Donnell*, the Court refused to authorize an SOS petition raising a challenge to the residual clause of the career offender guideline on the grounds that *Donnell* impermissively "urge[d] the creation of a second rule." *Id.* at 1017. This was the procedural obstacle to which the district court alluded in a footnote, stating that, "the movant is unable to advance non-Armed Career Criminal Act claims as a result of procedural obstacles." (Appendix C, p. 2, n.1, citing *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017)). In *Raybon*, a panel of the Sixth Circuit concluded that movant's claim was barred by the statute of limitations in 28 U.S.C. § 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as [a] career offender[] under the residual clause of the mandatory Sentencing Guidelines." *Id.* at 631.

On April 17, 2018, in *Sessions v. Dimaya*, 138 S. Ct. at 1213–15, this Court struck down the residual clause of 18 U.S.C. § 16(b) as unconstitutionally vague. Doing so required only a "straightforward application" of the "straightforward decision" in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Dimaya*, 138 S. Ct. at 1213. In *Dimaya*, the Court identified two features of the ACCA residual clause that applied with equal force to 18 U.S.C. § 16(b). First, both statutes require that the assessment of risk posed by the offense focus on the conduct that the crime involves "in the ordinary case." *Id.* at 1215. Second, both statutes then require the court to judge whether that abstract ordinary case presents "some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216.

Dimaya refutes the basic underlying premise of *Donnell* and *Raybon* – that application of *Johnson* outside the ACCA context requires a new rule – by its "straightforward *application*" of the new substantive rule announced in *Johnson* to a virtually identical residual clause in another sentencing statute. *Dimaya*, 138 S. Ct. at 1213 (emphasis added). The rule recognized in *Johnson*, 135 S. Ct. at 2557–58, and made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), is that a defendant has the right not to have his sentence "fixed" by an unconstitutionally vague residual clause. The residual clause was not held unconstitutionally vague because it was in the ACCA, but because it required judges to assess the risk posed by an ill-defined hypothetical "ordinary case," and then to determine whether the "ordinary case" met an unclear threshold level of risk. *Dimaya*, 138 S. Ct. at 1216. The residual clause in 18 U.S.C. § 3559(c)(2)(F)(ii) does not differ in any material way from the residual clauses invalidated in *Johnson* and *Dimaya*.

Johnson's reasons for finding the ACCA residual clause void for vagueness apply with equal force to the substantially similar statutory residual clause in 18 U.S.C. § 16(b), rendering that provision unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court explicitly rejected three arguments the government made in an attempt to distinguish § 16(b) from the ACCA's residual clause in § 924(e)(2)(B)(ii). First, the Court found that § 16(b)'s requirement that risk arise "in the course of committing the offense" does not

significantly affect a court's obligation to assess the way in which a crime is "ordinarily" committed. *Id.* at 1219–20 ("In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later."). Second, the Court found that § 16(b)'s reference to "physical force" did not differentiate it from the ACCA's residual clause, which required "physical injury." *Id.* at 1220–21 ("[E]valuating the risk of 'physical force' itself entails considering the risk of 'physical injury.'"). Finally, the Court declined to find that § 16(b) was distinguishable from the ACCA's residual clause based on the fact that § 16(b) lacks a "confusing list of exemplar crimes." *Id.* at 1221 ("To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem.").

In light of *Dimaya*, it seems probable that the substantially similar residual clause in 18 U.S.C. § 3559(c) is unconstitutionally vague as well. Indeed, there is no significant textual difference between the residual clauses found in § 924(e)(2)(B)(ii) and § 16(b), and those found in § 924(c)(3)(B), § 3559(c)(2)(F)(ii), and the pre-*Booker* version of USSG § 4B1.2(a)(2). *See United States v. Salas*, 889 F.3d 681, 687–88 (10th Cir. 2018) (noting that § 924(c)(3)(B) is identical to § 16(b); *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018) (finding the language in the pre-Booker career offender guideline identical to the ACCA residual clause language deemed unconstitutional in Johnson); *Haynes v. United States*, 237 F. Supp. 3d 816, 823 (C.D. Ill. 2017) (noting that the government conceded that the language of §

3559(c)(2)(F)(ii) is "almost identical to the language in the residual clauses that have been found unconstitutionally vague and that the Court is bound by circuit precedent").

Prior to *Dimaya*, only one Court of Appeals had held that § 924(c) – which contains a residual clause identical to that in § 16(b) and virtually identical to the residual clause in § 3559(c) – was unconstitutionally vague under the reasoning in *Johnson*. *See United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). By contrast, the Eighth Circuit had rejected a void for vagueness challenge to § 924(c). *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (noting that the Second and Sixth Circuits had also found *Johnson* inapplicable to § 924(c)). *Prickett* and other pre-*Dimaya* decisions finding § 924(c) constitutional, however, have almost certainly been abrogated by *Dimaya*. Indeed, since *Dimaya* was decided in April 2018, the D.C. Circuit and the Tenth Circuit have both determined that § 924(c) is unconstitutionally vague for precisely the reasons set forth in *Johnson* and *Dimaya*. *See Salas*, 889 F.3d at 687–88; *United States v. Eshetu*, No. 15-3010, 2018 WL 367907, at *1–2 (D.C. Cir. Aug. 3, 2018). Likewise, at least one Court of Appeals has held post-*Dimaya* that the pre-*Booker* career offender guideline residual clause – which is identical to the ACCA residual clause struck down in *Johnson* – is unconstitutionally void for vagueness. *See Cross*, 892 F.3d at 300–03; *but see United States v. Green*, 17-2906, 2018 WL 3717064 (3d Cir. Aug. 6, 2018) (declining to find that Johnson opened a new one-year window to raise § 2255 challenges to

the pre-Booker career offender guideline because the Supreme Court in Beckles expressly left that question open). There is little, if any, reason to think that the reasoning of *Johnson* and *Dimaya* does not also render the residual clause in § 3559(c) unconstitutionally vague.

The Court's decision in *Beckles* bolsters the case for applying *Johnson* to § 3559(c). *Beckles* held that the advisory guidelines are not subject to vagueness challenges because the "advisory Guidelines do not fix the permissible range of sentences." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). Importantly, the pre-*Booker* mandatory sentencing guidelines were not at issue in *Beckles*, leading Justice Sotomayor to acknowledge that the decision "at least leaves open the question of whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] . . . may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring). Justice Sotomayor explicitly acknowledged, however, that defendants sentenced prior to *Booker* were sentenced "during the period in which the Guidelines *did* 'fix the permissible range of sentences.'" *Id.* For this reason alone, a "straightforward application" of *Johnson* would seem to dictate that the residual clause in the pre-*Booker* mandatory sentencing guidelines is unconstitutionally void for vagueness. *See Dimaya*, 138 S. Ct. at 1213.

The case for applying *Johnson* to the residual clause in § 3559(c) is as strong as the case for applying it to the pre-*Booker* guidelines, especially when viewed in light of *Dimaya*'s analysis of the virtually identical language in § 16(b). First,

Johnson is applicable to § 3559(c) because § 3559(c) does more than "fix the permissible range of sentences"– it *mandates* a single specific sentence of life imprisonment. *See Beckles*, 137 S. Ct. at 892. Second, although the residual clause in § 3559(c) is contained in a separate subsection, it is textually linked to § 3559(c)(2)(F)(i), which provides an even lengthier and more "confusing set of examples [than those] that plagued the Supreme Court" in *Johnson*. *Prickett*, 839 F.3d at 699. Third, § 3559(c) requires sentencing courts to do exactly what they were required to do pursuant to both the ACCA and § 16(b) – examine an "ordinary case" to assess the level of risk of conduct that "is remote from the [present] criminal act." *Dimaya*, 138 S. Ct. at 1211; *Prickett*, 839 F.3d at 699 (quotation marks and citations omitted). Thus, even if pre-*Dimaya* decisions such as *Prickett* are correct that § 924(c)'s residual clause is distinguishable from the ACCA's residual clause because § 924(c) focuses only on a *contemporaneous offense*, § 3559(c) simply cannot be distinguished in this way. Finally, the residual clause in § 3559(c)(2)(F)(ii) suffers from the second defect that, combined with the "ordinary case" standard, rendered the ACCA and § 16(b) residual clauses unconstitutionally vague – it employs a "fuzzy risk standard" that "le[aves] unclear what threshold level of risk ma[kes] any crime a '[serious] violent felony.'" *Dimaya*, 138 S. Ct. at 1214. "In sum, [§ 3559(c)] has the same two features that conspired to make [ACCA's and 16(b)'s residual clauses] unconstitutionally vague. It too requires 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." *Id.* at 1216. "The result is that [§ 3559(c)] produces, just as the ACCA's [and 16(b)'s] residual clause[s] did, more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

B. Hobbs Act robbery is not a serious violent felony under 18 U.S.C. § 3559(c).

Notwithstanding the Eighth Circuit's opinions in *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016), and *United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996), Farmer has a compelling argument that, in the absence of the residual clause, Hobbs Act robbery does not constitute a serious violent felony under § 3559(c). In *Farmer*, the Eighth Circuit held that Hobbs Act robbery was a serious violent felony under both the elements clause and the residual clause of § 3559(c)(2)(F)(ii). *Farmer*, 73 F.3d at 842. In *House*, the Court relied on *Farmer* to again find that Hobbs Act robbery qualifies as a serious violent felony under the elements clause of 18 U.S.C. § 3559(c)(2)(F)(ii). Both *Farmer* and *House* fail to recognize that the Hobbs Act robbery statute is indivisible, and allows for conviction based on conduct that contains no element involving the use or threatened use of violent physical force against the person of another.

Farmer argued that Hobbs Act robbery did not qualify as a predicate offense under § 3559(c)(2)(F)(i) because it was not a robbery "as described" in §§ 2111, 2113, or 2118 of Title 18. *Farmer*, 73 F.3d at 842. The Court never reached that issue, finding, instead, that Hobbs Act robbery qualified under either the force clause or

the residual clause of § 3559(c). *Id.* In reaching those conclusions, the Court focused on the language of the charging document and the specific circumstances of Farmer's crime, thereby omitting any analysis of the alternative methods of committing Hobbs Act robbery contained in the statutory text. Proper application of the categorical approach, however, requires a reviewing court to look "only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990).

In *Mathis v. United States*, 136 S. Ct. 2243, 2256–57 (2016), the Court clarified the distinction between alternative elements, which make a statute divisible, and alternative means, which do not. "'Elements' are the 'constituent parts' of a crime's legal definition – the things the 'prosecution must prove to sustain a conviction.'" *Id.* at 2248 (citation omitted). "Means," on the other hand, are "diverse means of satisfying a single element of a single crime – or otherwise said, spell[ ] out various factual ways of committing some component of the offense – a jury need not find (or a defendant admit) any particular item[.]" *Id.* at 2249.

A Hobbs Act crime, then, has two elements: (1) robbery or extortion, and (2) interference with commerce. 18 U.S.C. § 1951. Assuming that the Hobbs Act is divisible between "robbery" and "extortion," it is not further divisible. *See United States v. O'Connor*, 874 F.3d 1147, 1152 (10th Cir. 2017) citing *United States v. Gooch*, 850 F.3d 285, 291 (6th Cir. 2017) (finding that the Hobbs Act includes two separate crimes – Hobbs Act robbery and Hobbs Act extortion). Robbery, as defined

by the Hobbs Act, is committed when a person unlawfully takes property from 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*." 18 U.S.C. § 1951(b)(1) (emphasis added). The alternatives set out in this subsection, as clearly indicated in the statutory text, are merely alternative means for satisfying the robbery element of a Hobbs Act offense. Jurors are not required to elect which of these alternatives apply. They do not have to determine whether the defendant took property by means of actual or threatened force or violence, by means of fear of injury against a person, or by means of fear of injury against property. Section 3559(c)(1)(F)(ii), however, specifically requires that the offense involve physical force against *the person* of another; by its plain terms, it does not apply to offenses involving physical force against *property*.

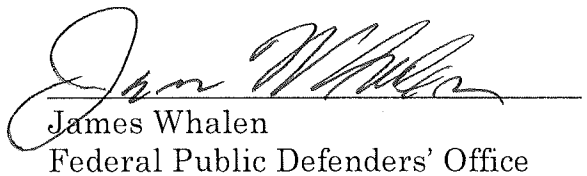
Relying on precisely this distinction, the Tenth Circuit held in *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017), that Hobbs Act robbery is not a crime of violence under USSG § 4B1.2. In *O'Connor*, the Court was applying the nearly identical enumerated and elements clauses of the Sentencing Guidelines' definition of crime of violence to Hobbs Act robbery. *Id.* at 1150. Like the definition contained in § 3559(c)(2)(F)(ii), the force clause of the guidelines required the use or threatened use of physical force against the *person* of another. *Id.* at 1152. The *O'Connor* court found that because Hobbs Act robbery includes conduct that exceeds the scope of the guidelines force clause – specifically use of or threats of violence

against *property* – it would not qualify under that clause. *Id.* at 1158. Applying the categorical approach, the *O'Connor* court further concluded that Hobbs Act robbery was broader than the enumerated offense of generic robbery, which correlates to the enumerated offense clause in § 3559(c)(2)(F)(i), for precisely the same reason, i.e., because it encompassed the use of force or threats of force against the *property* of another. *Id.* at 1154 (emphasizing that the "categorical approach must focus on the 'minimum conduct' criminalized by the underlying statute" and that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so."

CONCLUSION

For the foregoing reasons, Farmer respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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