APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13129
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-22605-UU,
1:11-cr-20700-UU-1

GERARD MANN,

Petitioner-Appellee,

versus

UNITED STATES OF AMERICA,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 26, 2018)

Before WILLIAM PRYOR, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

The government appeals the district court's order granting Gerard Mann relief under 28 U.S.C. § 2255, which invalidated Mann's conviction under 18 U.S.C. § 924(c) based on Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551

(2015). After careful review, we conclude the government's appeal is timely. And we conclude our en banc decision in Ovalles v. United States, No. 17-10172, __ F.3d __, 2018 WL 4830079 (11th Cir. Oct. 4, 2018) (en banc), requires us to vacate the district court's decision and remand.

I.

Mann pled guilty in 2011 to conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c).[1] The district court sentenced Mann to 26 months for the conspiracy conviction and a mandatory consecutive 84 months for the § 924(c) conviction.

On June 24, 2016, Mann filed a § 2255 motion asking the district court to vacate his § 924(c) conviction. He argued that conspiracy to commit Hobbs Act robbery is not a "crime of violence" as defined in § 924(c)(3) after Johnson and Descamps v. United States, 570 U.S. 254, 133 S. Ct. 2276 (2013). The district court granted the motion on March 16, 2017 and filed the order in Mann's civil habeas case as well as his underlying criminal case. The next day, the court entered an order sua sponte closing the civil case and an order in the criminal case scheduling a resentencing hearing. The government then filed a motion for reconsideration in the civil case, which the district court denied on April 19, 2017.

[1] In exchange for Mann's guilty plea to these charges, the government agreed to dismiss a third charge of Hobbs Act robbery.

At the resentencing hearing on June 8, 2017, the court sentenced Mann to 84 months for the conspiracy conviction. The amended judgment issued on June 13, 2017. The government filed a notice of appeal in the civil case on July 10, 2017, saying it was appealing the amended judgment, the order granting Mann's § 2255 motion, and the order denying reconsideration. On July 11, 2017, the government filed a motion for a stay in light of this Court's decision in Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), which the district court granted.

II.

Mann argues the government's appeal is untimely, because it was filed outside the 60-day period following the district court's denial of the government's motion for reconsideration in his civil case. See Fed. R. App. P. 4(a)(1)(B). The government disagrees, arguing it had 60 days from the date of the amended judgment to file its notice of appeal. At bottom, this is a dispute about when the § 2255 proceedings were complete: when the court denied the government's motion for reconsideration on April 19, 2017, or when the court resentenced Mann and issued the amended judgment on June 13, 2017. This is a jurisdictional question, so we must address it before reaching the merits. See Bowles v. Russell, 551 U.S. 205, 208–09, 213, 127 S. Ct. 2360, 2363, 2366 (2007); United States v.

Lopez, 562 F.3d 1309, 1311 (11th Cir. 2009). The government has the better of the argument here.

A line of cases defines what constitutes a "final judgment on application for a writ of habeas corpus" from which "[a]n appeal may be taken to the court of appeals." 28 U.S.C. § 2255(d); see Andrews v. United States, 373 U.S. 334, 338–40, 83 S. Ct. 1236, 1239–40 (1963); United States v. Futch, 518 F.3d 887, 894 (11th Cir. 2008); United States v. Dunham Concrete Prods., Inc., 501 F.2d 80, 81–82 (5th Cir. 1974).[2] These cases have defined "final judgment" under § 2255(d) with reference to "[t]he long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded." Andrews, 373 U.S. at 339, 83 S. Ct. at 1240; see Futch, 518 F.3d at 894; Dunham, 501 F.2d at 81. These cases have also defined "final judgment" with reference to the relief § 2255 authorizes the district court to grant, the relief the movant requests, and the relief the district court in fact granted. See Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40; Futch, 518 F.3d at 894; Dunham, 501 F.2d at 81–82.

In Andrews, the Supreme Court held a § 2255 proceeding was not final within § 2255(d) where a resentencing order had issued but the resentencing had not yet occurred. See Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40. In

[2] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

Dunham, the former Fifth Circuit concluded an order granting a new trial was final under § 2255, observing that "[a] more final termination of the § 2255 action can scarcely be imagined." Dunham, 501 F.2d at 82. And in Futch, this Court held that entry of a new sentence after the district court granted and held a resentencing hearing "completed the § 2255 proceedings by providing the relief awarded in that § 2255 case," even though the court had previously denied the § 2255 movant relief on his claims challenging his underlying convictions. See Futch, 518 F.3d at 890–891, 894.

Like the movants in Andrews and Futch, Mann asked the district court to alter his sentence. See Andrews, 373 U.S. at 339, 83 S. Ct. at 1239; Futch, 518 F.3d at 890, 894; Motion at 1, Mann v. United States, 1:16-cv-22605-UU (S.D. Fla. June 24, 2016), Doc. No. 1 ("MOTION TO CORRECT SENTENCE UNDER 28 U.S.C. § 2255"). And, like the district courts in Andrews and Futch, the district court here properly ordered a resentencing hearing after vacating Mann's § 924(c) conviction. See 28 U.S.C. § 2255(b) (authorizing the district court to "vacate and set the [illegal] judgment aside and . . . discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate"); Andrews, 373 U.S. at 339–40, 83 S. Ct. at 1239–40; Futch, 518 F.3d at 890, 894.

While Dunham might weigh in Mann's favor, Futch suggests we should treat resentencings differently from new trials. See Futch, 518 F.3d at 893–94.

Though it might "'waste litigants' and the district courts' resources to conduct the new trial only for the appellate court to determine, after the trial was completed, that it was not necessary in the first place," Futch noted "these efficiency considerations are not present when the district court conducts a run-of-the-mill resentencing." Id. (quotation marks omitted and alteration adopted).

Perhaps most important, a ruling that the district court's vacatur of Mann's conviction started the appeal clock would be inconsistent with the rule against piecemeal litigation. The government's appeal was timely, and this Court has jurisdiction.

III.

We now turn to the merits question before us. Mann argued to the district court that § 924(c)(3)(B) is unconstitutionally vague under Johnson. He also argued that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). He thus asked the district court to vacate his § 924(c) conviction. The district court accepted Mann's arguments and granted relief.

In Ovalles, our en banc Court concluded that § 924(c)(3)(B) is not unconstitutionally vague under Johnson and its progeny, as long as we do not apply the categorical approach. See Ovalles, 2018 WL 4830079, at *1–2. As a result, this Circuit no longer applies the categorical approach in assessing whether

an offense qualifies as a crime of violence under § 924(c)(3)(B). See Ovalles, 2018 WL 4830079 at *1–2. Instead, we apply "a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense." Id. at *2.

The district court applied the categorical approach in evaluating Mann's challenge to his § 924(c) conviction, both as to § 924(c)(3)(A) and § 924(c)(3)(B). That remains proper as to § 924(c)(3)(A), see Ovalles v. United States, No. 17-10172, 2018 WL 4868740, at *2 (11th Cir. Oct. 9, 2018) (per curiam), but not as to § 924(c)(3)(B). We therefore **VACATE** the district court's decision and **REMAND** for reconsideration in light of our en banc decision in Ovalles. We also **DENY** Mann's motion to hold this case in abeyance.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:16-cv-22605-UU
Criminal Case No.: 11-cr-20700-UU

GERARD MANN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING IN PART MAGISTRATE JUDGE'S REPORT

THIS CAUSE is before the Court upon Petitioner's Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 (the "Motion"). D.E. 1.

THE COURT has considered the Motion and the pertinent portions of the record, and is otherwise fully advised of the premises.

This matter was referred to Magistrate Judge Alicia M. Otazo-Reyes, who, on January 24, 2017, issued a Report (the "Report") recommending that Movant's Motion be denied because Movant's 2013 conviction for Conspiracy to commit Hobbes Act Robbery, in violation of 18 U.S.C. § 1951(a), qualifies as crime of violence under 18 U.S.C. § 924(c)'s residual clause. D.E. 20. The Magistrate Judge further found that Movant's conviction did not qualify as a crime of violence under § 924(c)'s use of force clause. Movant timely filed Objections on February 3, 2017. D.E. 21. The Government did not file objections to the Report. *See LoConte*, 847 F.2d 145 (holding that failure to file timely objections bars the parties from attacking factual findings on appeal).

Upon *de novo* review, the Court affirms and adopts the Magistrate Judge's finding that Movant's conviction for conspiracy to commit Hobbes Act Robbery does not qualify as a crime of violence under 18 U.S.C. § 924(c)'s use of force clause. However, the Court respectfully rejects the Magistrate Judge's finding regarding § 924(c)'s residual clause and concludes that such clause is unconstitutionally vague in light of the U.S. Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court addresses the residual clause of § 924(c) below.

A. *Johnson* and the ACCA

In *Johnson*, the Supreme Court examined the constitutionality of the residual clause of the Armed Career Criminal Act (the "ACCA"). The ACCA provides that any person who violates 18 U.S.C. § 922(g), possession of a firearm by a convicted felon, and has three previous convictions for a violent felony or serious drug offense, shall be imprisoned for a minimum of 15 years. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is known generally as the "elements clause", the second prong as the "enumerated crimes clause", and the last as the "residual clause."

After examining the application of the ACCA's residual clause, the Supreme Court found that the residual clause was unconstitutionally vague because it is too difficult and uncertain to

measure the risk that a "judicially imagined' ordinary crime poses, rather than looking to actual facts or statutory elements:

> How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct? To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out.

Johnson, 135 S. Ct. at 2557-58 (internal quotation omitted). The *Johnson* court further reasoned that the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates". *Id.* at 2558 (internal quotation omitted). These uncertainties "'created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently.'" *Id.* at 2560, *quoting Chambers v. United States*, 555 U.S. 122, 133 (2009). As a result, the Supreme Court held the ACCA's residual clause to be unconstitutionally vague.

B. *Johnson*'s Application to 18 U.S.C. § 924(c)'s Residual Clause

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". 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.

Movant argues that the Residual Clause of Section 924(c) is unconstitutionally vague in light of *Johnson* as the language of the ACCA's residual clause is substantially similar to that of Section 924(c). There is no on-point binding precedent from the Eleventh Circuit on this issue.[1] Further, no uniform consensus has formed as courts have consistently reached contrary conclusions as to whether Section 924(c)'s residual clause is constitutionally vague in light of *Johnson. Compare U.S. v. Hill*, 832 F.3d 135 (2nd Cir. 2016), *and U.S. v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *and U.S. v. Prickett*, 2016 WL 5799691 (8th Cir. 2016) (all three aforementioned courts holding that § 924(c)'s residual clause is not unconstitutionally vague), *with Vasquez v. U.S.*, Case No. 16-cv-14247-JEM (S.D.Fla. 2017), *and Duhart v. U.S.*, 2016 WL 4720424 (S.D.Fla. 2016), *and Hernandez v. U.S.*, Case No. 16-cv-22657-PCH (S.D.Fla. 2016), *and U.S. v. Bell*, 158 F. Supp.3d (N.D.Cal. 2016), *and U.S. v. Lattanaphom*, 159 F.Supp.3d 1157 (E.D. Cal. 2016), *and U.S. v. Edmundson*, 153 F.Supp.3d 857 (D.MD. 2015) (all six aforementioned cases finding § 924(c)(3)(B) unconstitutionally vague after *Johnson*).

When comparing the language of the two residual clauses, § 924(c)(3)(B) appears to suffer from the same defects as the ACCA's residual clause. Respondent argues that the two

[1] In its *In re: Devon Chance* decision, 831 F.3d 1335, 1337 (11th Cir. 2016), the Eleventh Circuit recognized that the law is unsettled on the question of whether the "*Johnson* holding may invalidate the 'very similar' § 924(c)(3)(B) residual clause", *citing In re: Pinder*, 824 F.3d 977 (11th Cir. 2016), and "left it to the district court to decide in the first instance what effect *Johnson* had on § 924(c)'s residual clause." *See also, U.S. v. Fox*, 650 Fed.Appx. 734, 737-38 (11th Cir. 2016) (stating that "it is not clear or obvious that *Samuel Johnson* invalidated § 924(c)(3)(B)" and leaving it for *de novo* consideration).

clauses are contextually different, thus permitting a more reliable risk determination than the ACCA. While there are some contextual differences, the fundamental problem in applying the objective ordinary case test to a risk-based measure remains. Like the ACCA, § 924(c)(3)(B) requires courts to imagine what kind of conduct the "ordinary case" involves, instead of analyzing actual facts or statutory elements, and to determine whether there exists, in the imagined case, a "substantial risk" that physical force will be used. Additionally, though the Government argues that § 924(c)(3)(B)'s risk assessment is more reliable than that of the ACCA, Respondent does not provide a practical, concrete example of how § 924(c)'s residual clause yields a qualitatively simpler and more reliable risk measurement, one that allays the Supreme Court's concerns.

Respondent also argues that the ACCA's residual clause is distinguishable from § 924(c)(3)(B) because "unlike the ACCA's residual clause, § 924(c)(3)(B) is not preceded by a list of enumerated offenses of widely differing risk levels" which was "a key concern of the *Johnson* Court." Government's Response, D.E. 69, at *163. However, "the government overreads this part of the Court's analysis." *U.S. v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015). The heart of the *Johnson* opinion establishes why the two aspects of § 924(c)(3)(B)—the "ordinary case" determination and the risk assessment—"conspire" to make the clause unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557. Only later did the Court observe that the ACCA's residual clause also "forces courts to interpret serious potential risk in light of the four enumerated crimes," which are "far from clear in respect to the degree of risk each poses." *Id.* at 2558 (internal quotation omitted). "In other words, the enumeration of specific crimes did nothing to clarify the quality or quantity of risk necessary to classify offenses under the statute. The list itself wasn't one of the 'two features' that combined to make the

clause unconstitutionally vague." *U.S. v. Vivas-Ceja*, 808 F.3d at 723. *See also, Golicov v. Lynch*, 837 F.3d 1065, 1074 (10th Cir. 2016).

Furthermore, multiple Circuit Courts have found that the residual clause of 18 U.S.C. § 16(b), a provision that is identical to that of § 924(c)(3)(B), is unconstitutionally vague. *See Shuti v. Lynch*, 828 F.3d 440, 447 (6th Cir. 2016) ("Neither term—"substantial" in the [§ 16(b)] or "serious" in the ACCA—sets forth objective criterion to determine how much risk it takes to qualify as a crime of violence or violent felony") (internal quotation omitted); *Golicov*, 837 F.3d at 1074 ("But even if we assume that the standard employed in § 16(b) is "marginally narrower" than the standard employed in the ACCA's residual clause, the fact remains that they are both abstractions all the same.") (internal quotation omitted); *Vivia-Ceja*, 808 F.3d at 722 ("Any difference between these two phrases is superficial. Just like the [ACCA's] residual clause, § 16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'"); *Dimaya v. Lynch*, 803 F.3d 1110, 1117 (9th Cir. 2015) (*cert. granted* 2016 WL 3232911 (U.S. Sep. 29, 2016) (No. 15-1498) ("As with ACCA's residual clause, § 16(b)'s definition of a crime of violence, combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as" a crime of violence.") (*quoting Johnson*, 135 S.Ct. at 2558). Not only is § 16(b) identical to § 924(c)(3)(B), but case law has treated the residual clauses of all three statutes—the ACCA, § 924(c), and § 16(b)—as analogous generally. *See, e.g., U.S. v. Sanchez-Espinal*, 762 F.3d 425 (5th Cir. 2014) (noting that while the residual clauses of the ACCA and § 16(b) differ in their focus, case law nevertheless has looked to the ACCA to decide whether offenses are crimes of violence under § 16(b)). Indeed, the Eleventh Circuit has relied on the ACCA to make crime of violence determinations in the § 16(b) context. *See U.S. v. Keelan*, 786 F.3d 865 (11th

Cir. 2015). As such, if the identically-worded residual clause of 18 U.S.C. § 16(b) is void for vagueness, then the residual clause of Section 924(c) should be void for vagueness as well.

Accordingly, the Court finds 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague in light of *Johnson* and therefore, rejects the Magistrate Judge's finding that Movant's conspiracy to commit Hobbes Act robbery conviction qualifies as a crime of violence under the residual clause of Section 924(c).

CONCLUSION

Given that Movant's conviction for conspiracy to commit Hobbes Act robbery is not a predicate violent felony under § 924(c)'s residual or use of force clause, Movant is actually innocent of his 18 U.S.C. § 924(c)(1)(A)(ii) charge.

Accordingly, it is hereby

ORDERED AND ADJUDGED that:

(1) The Report, D.E. 20, is **RATIFIED**, **ADOPTED**, and **AFFIRMED** *in part* in so far as Movant's conviction for Conspiracy to Commit Hobbes Act Robbery, in violation of 18 U.S.C. § 1951(a), does not qualify as violent felony under 18 U.S.C. § 924(c)(3)(A);

(2) The remainder of the Report, D.E. 20, is respectfully **REJECTED**;

(3) Movant's Objections, D.E. 21, are **SUSTAINED**; and

(4) Movant's Motion, D.E. 1, is **GRANTED**.

DONE AND ORDERED in Chambers at Miami, Florida, this _16th___ day of March, 2017.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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counsel of record via cm/ecf