NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

ANDRE MIMS,

***Petitioner*,**

v.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Is the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague, given the Court's holding in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) that the identical definition in 18 U.S.C. § 16(b) is unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015)?

2. Can a Hobbs Act robbery under 18 U.S.C. § 1951(b) categorically be a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A), if the offense is indivisible, and juries in three circuits are routinely instructed according to those circuits' pattern instructions that the "property" taken may include "intangible rights" and the offense may be committed by simply causing the victim to "fear harm" which includes "*fear of financial loss* as well as fear of physical violence"?

3. Did the Eleventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-74 (2017) in denying Petitioner a certificate of appealability based upon adverse circuit precedent, when all of the above issues are nonetheless debatable among reasonable jurists?

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

Andrew Mims ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's Order denying Petitioner a certificate of appealability, *Mims v. United States*, Order (11th Cir. Oct. 31, 2018) (No. 18-11146), is included in the Appendix at 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 denying Petitioner a certificate of appealability was entered on October 31, 2018. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16. Crime of violence defined

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and 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. § 922. Unlawful acts

> **(g)(1)** It shall be unlawful for any person [] who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm or ammunition ...

18 U.S.C. § 924. Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

> **(i)** be sentenced to a term of imprisonment of not less than 5 years;

> **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

> **(i)** be sentenced to a term of imprisonment of not less than 25 years . . .

(c)(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. . . .

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony

(2) As used in this subsection – . . .

> **(B)** the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, ... , 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. § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

> **(1)** The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of 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, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.
>
> **(2)** The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Petitioner was charged by a second superseding Indictment with two counts of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 1 and 4); two counts of using a firearm during and in relation to a "crime of violence," in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts 2 and 5); and two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Counts 3 and 6).

Petitioner proceeded to trial and was convicted on all counts on December 23, 1999. In the February 11, 2000 presentence investigation report, the probation officer calculated his guideline imprisonment range to be 110 to 137 months imprisonment on the Hobbs Act and felon-in-possession counts. However, the probation officer reported, as to Counts 2 and 5, a mandatory minimum term of imprisonment of five years and 20 years, respectively, were to be imposed consecutively to each other as well as to any other term of imprisonment.

On October 30, 2002, the district court sentenced Petitioner to concurrent terms of 110 months as to Counts 1 and 4 (Hobbs Act robbery) and 3 and 6 (felon-in-possession). The court further ordered that Petitioner be sentenced to 60 months imprisonment as to Count 2, and 240 months imprisonment as to Count 5, both terms to run consecutively to each other and the sentence imposed on Counts 1, 3, 4, and 6 for a total sentence of 410 months. *Id.*

Petitioner appealed from the denial of his motion to dismiss his indictment, but the Eleventh Circuit dismissed that appeal for lack of jurisdiction.

Thereafter, Petitioner filed a *pro se* motion to vacate under 28 U.S.C. § 2255, arguing among other things, ineffective assistance of counsel. That petition was denied.

On May 2, 2016, the Eleventh Circuit granted Petitioner authorization to proceed with a second or successive § 2255 motion challenging his § 924(c) convictions as unconstitutional in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). In its authorization order, the Eleventh Circuit noted that as of that juncture it had not determined whether *Johnson* rendered the "crime of violence" definition in § 924(c)(3)(B) unconstitutionally vague; the language of that provision was similar to § 924(e)(2)(B)(ii); and other courts of appeals had authorized § 2255 petitions based on *Johnson* in § 924(c) cases. *In re Mims*, Order (11th Cir. May 27, 2016) (No. 16-12085).

Accordingly, on June 23, 2016, Petitioner filed a duly-authorized successive § 2255 motion arguing that his § 924(c) conviction should be vacated since § 924(c)'s

residual clause was unconstitutionally vague in light of *Johnson*, and Hobbs Act robbery was not otherwise a "crime of violence" within § 924(c)(3)(A)'s elements clause. On the latter issue, Petitioner noted that it was clear from 11th Cir. Pattern Jury Inst. 70.3 (2010), that the Hobbs Act robbery offense was indivisible, and the offense did not require the use or threat of *violent physical force* against person or property in every case, because "property" included "intangible assets." Indeed, he noted, a Hobbs Act robbery could be committed by simply threatening to cause a devaluation of some economic interest.

The government responded that Petitioner had procedurally defaulted his claims, and both his challenge to the constitutionality of § 924(c)(3)(B) and to Hobbs Act robbery as a "crime of violence" within § 924(c)(3)(A) lacked merit given the Eleventh Circuit's decision in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), holding Hobbs Act robbery necessarily qualified as a "crime of violence" within § 924(c)(3)(A), based simply upon the plain language of the statute, tracked in the indictment. *Id.* at 1340. After *Saint Fleur*, the government argued, Petitioner could not show either "actual innocence" or prejudice from failing to challenge his convictions on these grounds previously; *Johnson* had no impact on his case; and it was unnecessary to consider whether *Johnson* invalidated § 924(c)'s residual clause. Thereafter, however, the government filed a notice of supplemental authority advising that an Eleventh Circuit panel had just held in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017)(*Ovalles I*), that *Johnson's* holding that the ACCA's

residual clause was unconstitutionally vague did not apply to 18 U.S.C. § 924(c)(3)(B).

On May 4, 2017, the magistrate judge issued his Report and Recommendation ("R&R") recommending that Petitioner's § 2255 motion be denied and that a certificate of appealability ("COA") also be denied. The magistrate judge reasoned that even if *Johnson* rendered § 924(c)'s residual clause unconstitutionally vague, Petitioner could not prevail on his claim that his conviction was no longer lawful since Hobbs Act robbery qualified as a "crime of violence" under § 924(c)'s elements clause pursuant to *Saint Fleur*.

On January 18, 2018, the district court entered an order adopting the Magistrate's R&R based upon *Saint Fleur*, but also based on the Eleventh Circuit's holding in *Ovalles I* that "*Johnson*'s void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in § 924(c)(3)(B)." 861 F.3d at 1265. By separate order, the district court denied Petitioner a COA.

The Appeal to the Eleventh Circuit

On March 27, 2018, Petitioner filed a motion for COA with the Eleventh Circuit, arguing that a COA was warranted on two grounds. First, reasonable jurists could debate whether the residual clause in § 924(c)(3)(B) was unconstitutionally vague after *Johnson*, given that § 924(c)(3)(B) defines "crime of violence" as an offense "that by its nature, involves a substantial risk that physical force against the person of property of another may be used in the course of committing the offense," which is similar to the "violent felony" definition in §

924(e)(2)(B)(ii) struck down in *Johnson*. While recognizing that the Eleventh Circuit had rejected that §924(c)/vagueness argument in *Ovalles I*, Petitioner noted that the "crime of violence" definition in § 924(c)(3)(B) was identical to 18 U.S.C. § 16(b), the circuits were currently split on whether § 16(b) was unconstitutionally vague, and this Court would soon resolve that circuit split in *Sessions v. Dimaya*, No. 15-1498.

Second, Petitioner argued, reasonable jurists could also debate whether the predicate offense for both § 924(c) convictions – Hobbs Act Robbery – categorically qualified as a "crime of violence" under § 924(c)(3)(A), as it did not "have as an element the use, attempted use, or threatened use of physical force against the person or property of another" for multiple reasons. In particular, Petitioner emphasized that the "fear of injury" means of committing that indivisible offense was overbroad. According to the Eleventh Circuit's standard Hobbs Act robbery instruction, he noted, "fear" could be of purely 'financial loss," rather than "physical violence." And the property taken could even include "intangible rights."

After the motion for COA was filed, this Court held in *Sessions v. Dimaya*, 138 S.Ct. 1204 (April 17, 2018) that a "straightforward application" of *Johnson* rendered the identically-worded residual clause in 18 U.S.C. § 16(b) unconstitutionally vague, *id.* at 1213, because "§16(b) has the same '[t]wo features] that 'conspire[d] to make [ACCA's residual clause unconstitutionally vague," *id.* at 1216, namely, "both an ordinary-case requirements and an ill-defined risk threshold"). *Id.* at 1223. Implicitly rejecting much of the Eleventh Circuit's

reasoning in *Ovalles I*, the Court held that "none of the minor linguistic disparities in the statutes makes any real difference." *Id.*

As the Chief Justice noted, the holding in *Dimaya* necessarily "call[ed] into question" convictions under the identically-worded §924(c)(3)(B). 138 S.Ct. at 1241 (Roberts, C.J., dissenting). And for that reason, soon after *Dimaya*, the Eleventh Circuit vacated *Ovalles I*, and granted rehearing en banc, 889 F.3d 1259 (11th Cir. 2018), to determine whether §924(c)(3)(B) was now unconstitutionally vague in light of *Dimaya*, or whether that conclusion could be avoided by overruling *United States v. McGuire*, 706 F.3d 1333, 1336-67 (11th Cir. 2013), to the extent *McGuire* mandated use of the categorical approach for determining whether a prior offense was a "crime of violence" under §924(c)(3)(B).

Ultimately, in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018)(en banc)(*Ovalles II*), a divided Eleventh Circuit concluded that §924(c)(3)(B) was *not* unconstitutionally vague, by abandoning the categorical approach with regard to that provision, and adopting instead a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." *Id.* at 1253. The majority justified its decision to "jettison" the categorical approach, by the canon of "constitutional doubt," *id.* at 1234, otherwise known as "constitutional avoidance." According to the *Ovalles II* dissenters, however, in relying upon that canon to save §924(c)(3)(B) from being void for vagueness after *Dimaya*, the *Ovalles II* majority had ignored this Court's contrary precedents in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Dimaya*, which dictated that the plain text of § 924(c)(3)'s residual

clause requires application of the categorical approach. *See id*. at 1277-99 (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting).

The Eleventh Circuit's Order Denying a COA

On October 31, 2018, Eleventh Circuit Judge Beverly Martin issued a short order denying Petitioner a COA. *Mims v. United States*, Order (11th Cir. Oct. 31, 2018) (No. 18-11146). In the order, Judge Martin stated – without any recognition of the protracted circuit conflict on the issue – that "Nothing in *Johnson* or any later Supreme Court precedent undermined the constitutionality of the § 924(c) elements clause." Order at 3 (citing *Dimaya* as "striking down a statute similar to the § 924(c) residual clause as unconstitutionally vague").

However, the reason the COA would be denied, Judge Martin explained, was that "[r]easonable jurists could not debate the District Court's conclusion that Mr. Mim's Hobbs Act robbery counts [w]as a crime of violence under the § 924(c) elements clause," when:

> This Court has squarely held that Hobbs Act robbery counts as a crime of violence under the elements clause. *See In re Saint Fleur*, 824, F.3d 1337, 1337 (11th Cir. 2016). *Saint Fleur* forecloses Mr. Mims's claims.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding that 18 U.S.C. § 924(c)(3)(B) is constitutional after *Johnson* and *Dimaya* conflicts with decisions of other circuits, and that circuit conflict will be resolved in *Davis*.

In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held the definition of "crime of violence" under 18 U.S.C. § 16(b) is void for vagueness in violation of

due process for the same reasons the Court held the similar residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Indeed, the Court found, "a straightforward application of *Johnson*" effectively "resolve[d]" the case before it, since *Johnson* singled out two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague," and the same two features made § 16(b) vague as well. *Dimaya*, 138 S. Ct. at 1213, 1223 (citing *Johnson*, 135 S. Ct at 2557). Specifically, like the ACCA's residual clause, § 16(b) requires the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "[n]othing in § 16(b) helps courts to perform that task." 138 S. Ct. at 1215. And § 16(b)'s "substantial risk" threshold is no more determinate that the ACCA's "serious potential risk" threshold. *Id.* Thus, the same "[t]wo features" that "conspire[d] to make" the ACCA's residual clause unconstitutionally vague – "the ordinary case requirement and an ill-defined risk threshold" – likewise conspired to make § 16(b) unconstitutionally void. *Id.* at 1216, 1223 (citing *Johnson*, 135 S. Ct. at 2557).

Although the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is identical to § 16(b) and until now, operated in precisely the same way as § 16(b) (with the same categorical "ordinary case" approach and risk threshold), after *Dimaya* the Eleventh Circuit endeavored to avoid the constitutional vagueness finding that *Dimaya* compelled. every judge on the Eleventh Circuit candidly recognized in *Ovalles II* that *Dimaya* had completely undercut the reasoning in *Ovalles I*, and rendered § 924(c)(3)(B) unconstitutional so long as the categorical

approach continued to apply to that provision. *Id.* at 128-1240.[1] The majority of the court, however, chose to reinterpret the statute in lieu of invalidating it. *See id.* at 1233. Under the guise of applying the "constitutional avoidance" doctrine, it "jettisoned" the categorical approach, claiming that a "conduct-based" approach was also a "plausible" reading of § 924(c)(3)(B). *Id.* at 1251-52 (holding that "the tie (or the toss-up, or even the shoulder-shrug) goes to the statute-saving option – which, here, is the conduct-based interpretation;" acknowledging that it did not "conclude that textual, contextual, and practical considerations *compel* a conduct-based reading of § 924(c)'s residual clause," or that such is the "*best* read;" "It is enough for us to conclude" that § 924(c)(3)(B) "is at least 'plausibl[y]' (or 'fairly possibl[y]') understood to embody the conduct-based approach.") (citations omitted).

While the First and Second Circuits agreed with the Eleventh Circuit's analysis, and found § 924(c)(3)(B) constitutional after *Dimaya* on a similar rationale, *see United States v. Douglas*, 907 F.3d 1 (1st Cir. Oct. 12, 2018); *United States v. Barrett*, 903 F.3d 166, 177-85 (2d Cir. 2018), *pet. for cert. pending* (U.S. 18-6985) (filed Dec. 3, 2018), the Fifth, Tenth, and D.C. Circuits sharply disagreed. Each of these circuits readily found §924(c)(3)(B) unconstitutionally vague in light

[1] *See Ovalles II*, 905 F.3d at 1233 ("In the wake of those decisions, all here seem to agree that if § 924(c)(3)'s residual clause is interpreted to require determination of the crime-of-violence issue using . . . 'the categorical approach,' the clause is doomed."); *id.* at 1239-40 ("it seems clear that if we are required to apply the categorical approach in interpreting § 924(c)(3)'s residual clause . . . then the provision is done for."); *id.* at 1244 (recognizing the "near-certain death" that would result to § 924(c)(3)(B), if the categorical approach were retained); *id.* at 1251 n. 9 (responding to the dissent's criticism of rewriting the statute by stating that the Court had "saved it from the trash heap," and arguing that the dissent's insistence on retaining the categorical approach "guarantees its invalidation").

of *Dimaya*. And indeed, at the urging of the government, the Court has just granted certiorari in the Fifth Circuit's case – *Davis* – to resolve the circuit conflict. *See United States v. Davis*, 903 F.3d 483 (5th Cir.), *cert granted*, 2019 WL 98544 (U.S. Jan. 4, 2019) (No. 18-413); *United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir.), *petition for cert. pending* (U.S. 18-428) (filed Oct. 3, 2018)*; United States v. Eshetu*, 898 F.3d 36, 37-38 (D.C. Cir.), *petition for reh'g pending,* No. 15-3020 (D.C. Cir. filed Aug. 31, 2018).

This Court should hold this petition pending *Davis*. And, for the reasons set forth by the dissenters in *Ovalles II*, and the en banc majority in *United States v. Simms*, ___ F.3d ___, 2019 WL 311906 (4th Cir. Jan. 24, 2019), the Court should not only find § 924(c)(3)(B) unconstitutionally vague; it should squarely reject – as even a *plausible* reading of the statute – the "conduct-based" approach adopted by the Eleventh Circuit in *Ovalles II*.

The Fourth Circuit in *Simms* has decisively refuted every component of the Eleventh Circuit's "constitutional avoidance" argument. 2019 WL 311906 at *6. As a threshold matter, it rejected the suggestion that the categorical approach is simply a "savings construction" adopted to "avoid the risk of unfairness that comes with reviewing conduct that underlies long-past convictions." 2019 WL 311906 at *7. "The Supreme Court did not invent the categorical approach out of whole cloth, as the Government would have us believe," the Fourth Circuit explained. "The text and structure of § 924(c)(3)(B) unambiguously require courts to analyze the attributes of an 'offense that is a felony ... by its nature' – that is, categorically." *Id.*

at *8. That was not only clear from *Dimaya* and this Court's pre-*Dimaya* precedent (including *Shepard v. United States*, 544 U.S. 13, 19 (2005); *Taylor v. United States*, 495 U.S. 575, 600-02 (1990); *Leocal v. Ashcrof*t, 543 U.S. 1, 7 (2004)), the Fourth Circuit noted. S*imms*, 2019 WL 311906 at **4-8. The Fourth Circuit went well beyond these precedents, to conduct its own review § 924(c)(3)(B) "on a clean slate." And after doing so, it notably found *no "plausible" construction* of the statutory text that would support a conduct-based approach." *Id.* at **9-11 (emphasis added).

In its *de novo* review of the statute, the Fourth Circuit emphasized first that the plain text of § 924(c)(3)(B), which is "a court's first and foremost guide to its meaning" required the ordinary-case categorical approach through the combination of the phrase 'offense that is a felony' with the qualifier 'by its nature.'" *Id.* at *9. Second, the Fourth Circuit found that the government's reading would not only render the "by its nature" language "superfluous," but also require the Court to interpret the statute's "single reference to an 'offense that is a felony' in contradictory ways for the elements and residual clause," which would render the statute "a chameleon." *Id.* at **9-10. And finally, the Fourth Circuit noted, the "presumption of consistent meaning" likewise prohibited the government's construction because one could not interpret the "materially identical 34-word phrase in § 924(c)(3)(B) and § 16(b) in entirely different ways," when those provisions were created "in the same legislative enactment." *Id.* at *11.

"Where, as here, there is an 'absence of more than one plausible construction," the Fourth Circuit concluded, "the canon of constitutional avoidance

'simply has no application." *Id.* at *18 (citing *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018)). Indeed, where there is only one plausible reading of a statute, a federal court "lack[]s the power" to avoid the "constitutional infirmity" in the language Congress wrote, because that would "usurp the legislative role." "Given the text and context of § 924(c)(3)(B)," the Fourth Circuit concluded, "accepting the Government's new interpretation would amount to judicially rewriting the statute," *id.* at **18-19, which is impermissible.

Even if the Court were to disagree with the foregoing, the avoidance cannon can *only* apply "*if* a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989) (emphasis added); *Dimaya*, 138 S.Ct. at 1254 (The canon does not apply if the alternate reading "create[s] problems of its own.") (Thomas, J., dissenting). And here, a "conduct-based approach" would clearly pose myriad constitutional problems.

For starters, if a "crime of violence" is a "case specific" question that hinges on specific facts rather than the "ordinary case," countless defendants who pled guilty to §924(c) did so without "real notice of the true nature of the charge," which is "the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998). Each of those defendants was also "misinformed as to his right to have the charged ["crime of violence"] proved to a jury," and thus was denied due process, because his plea "was not knowing [and] voluntary." *United States v. Gonzalez*, 420 F.3d 111, 134 (2nd Cir. 2005).

For defendants like Petitioner who went to trial, the indictment did not "fairly inform[] [the] defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). Defendants like Petitioner had neither notice nor the opportunity to defend against a conduct-based "crime of violence" charge, since at the time of trial that was a legal issue for the judge. Such defendants had to basis to understand that the "crime of violence" allegation was an element that they could factually dispute at trial. And indeed, *if* that element required a factual determination that should have been submitted to the jury, then Petitioner's trial judge effectively directed a verdict for the prosecution in violation of the Sixth Amendment, which is *per se* reversible error, irrespective of the evidence. *See Rose v. Clark*, 478 U.S. 570, 578 (1986); *United States v. Martin Linen Supply Co.*, 430 U.s. 564, 572-73 (1977); *Carpenters v. United States*, 330 U.S. 395, 408 (1947).

Moreover, applying a conduct-based approach retrospectively to such a defendant would create a separate constitutional problem: namely, the indictment would "no longer be the instrument of the grand jury who presented it." *Stirone v. United States*, 361 U.S. 212, 216 (1960). Petitioner's grand jury alleged a "crime of violence" in the "ordinary case" (the analysis under the categorical approach), *not* that his "case specific" conduct qualified as a "crime of violence." If the latter was the correct test for §924(c)(3)(B), Petitioner was denied his Sixth Amendment right to have a jury decide that issue in the first instance. But indeed, if *Davis* were to set forth a *new* residual clause test, it would violate the *ex post facto* clause to apply

that test to pre-*Davis* conduct that did not violate §924(c) under then-applicable law. *See Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (The Constitution "bar[s] retroactive criminal prohibitions emanating from courts as well as from legislatures."); *Marks v. United States*, 430 U.S. 188, 196 (1977)(same).

In short, adopting a "conduct-based" reading of § 924(c)(3)(B) would spawn many unconstitutionalities of its own. And for that reason, in addition to the many reasons set forth by the Fourth Circuit in *Simms* for why such a reading is not even "plausible," the Court should squarely reject the First, Second, and Eleventh Circuit's resort to the "constitutional avoidance" doctrine to avoid the import of *Dimaya*. The Court should clarify for the lower courts that there is *only one* "plausible" construction of § 924(c)(3)(B). It requires the categorical approach. And that approach renders § 924(c)(3)(B) unconstitutionally vague for the reasons stated in *Dimaya*.

II. The Eleventh Circuit has decided an important and far-reaching question of federal law which has not been, but should be resolved by the Court, namely, whether Hobbs Act robbery can categorically be a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A) if juries in three circuits are routinely instructed pursuant to those circuits' pattern instructions that the offense can be committed in a non-violent manner.

In *Curtis Johnson v. United States*, 559 U.S 133 (2010), this Court construed the "physical force" language in the ACCA's elements clause to require "*violent* force," which it explained was a "substantial degree of force" "capable of causing pain or injury to another person." *Id.* at 140. The elements clause in § 924(c)(3)(A) is worded identically to § 924(e)(2)(B)(i), except that it may be satisfied by using or

threatening physical force, that is, "*violent* force," against a "person *or property*." Admittedly, not only the Eleventh Circuit in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016) – but several other circuits as well – have held that Hobbs Act robbery categorically satisfies that "crime of violence" definition. *See United States v. St. Hubert*, 909 F.3d 335, 348-49 (11th Cir. 2018)(citing as consistent with *Saint Fleur*: *United States v. Gooch*, 850 F.3d 285, 291-92 (6th Cir. 2017); *United States v. Rivera*, 847 F.3d 847, 848-51 (7th Cir. 2017); *United States v. Anglin*, 856 F.3d 954, 964-65 (7th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138 S.Ct. 126 (2017); *United States v. Hill*, 832 F.3d 135, 140-140-44 (2d Cir. 2016); and *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016)).

Notably, however, none of these circuits has specifically considered the question raised here of whether a Hobbs Act robbery is categorically overbroad if juries are routinely instructed pursuant to a pattern Hobbs Act robbery instruction that a Hobbs Act robbery can be committed without the use, threat, or fear of any physical violence. As Petitioner specifically emphasized to the district court and to the court of appeals in his motion for COA, Eleventh Circuit Pattern Instruction O70.3 (Hobbs Act robbery) provides:

> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts beyond a reasonable doubt.
>
> > (1) the Defendant knowingly acquired someone else's personal property;
> >
> > (2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or

> causing the victim to *fear harm*, either immediately or in the future; ...
>
> "Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.
>
> "Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence*.

(Emphasis added).

According to this instruction, a defendant's taking of intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – is a plausible means of committing a Hobbs Act robbery. Indeed, before the Eleventh Circuit definitively resolved the "crime of violence" issue in *St. Hubert* – by following *Saint Fleur* under its "prior panel precedent" rule, *see* 909 F.3d at 346), Eleventh Circuit judges Martin and Jill Pryor had specifically opined that an offense might *not* categorically be a "crime of violence," if juries were routinely instructed in Hobbs Act cases, that the statute could be violated without the use or threat of physical violence, and simply by causing "fear of financial loss." *See Davenport v. United States*, Order at 6 (11th Cir. Mar. 28, 2017) (No. 16-15939) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s elements clause; noting that, given Eleventh Circuit Pattern Jury Instruction O70.3, a defendant could be convicted of that offense simply because he caused the victim to "fear harm" to "property," which includes "financial loss" and "intangible rights"); *In re Hernandez*, 857 F.3d 1162 (2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting, based on the

same definition of "fear" in the pattern Hobbs Act extortion instruction, that "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force;" citing *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013)).

No similar concerns were voiced in the Second, Fifth, Sixth, or Seventh Circuit decisions cited above for reasons that may not have been obvious at first blush. To this day, the Seventh Circuit does not have a pattern Hobbs Act robbery instruction. When *Gooch* was decided, the Sixth Circuit did not. The Second Circuit has *no* pattern instructions at all. And, although the Fifth Circuit uses the same pattern instruction for both Hobbs Act extortion and Hobbs Act robbery, and defines both "property" and "fear" in that instruction just like the Eleventh Circuit does in its Pattern O70.3, the Fifth Circuit in *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017) did not specifically consider that language in its own pattern instruction. Accordingly, none of these circuits had reason to consider – or likely will reconsider (now that they have binding precedent holding that a Hobbs Act robbery is categorically a "crime of violence" within the elements clause) – whether having a pattern instruction like Eleventh Circuit Pattern O70.3 makes it "plausible" that a Hobbs Act conviction covers "non-violent conduct" such as the taking of the victim's intangible rights, by causing him to fear a financial loss.

Even without a circuit conflict, however, the Court should grant certiorari in this case because of the importance of proper application of the categorical approach under the elements clause. Notably, every member of this Court in *Dimaya* agreed

that the categorical approach continued to apply to § 16(a)'s elements clause. And for the same reason, that approach continues to apply to § 924(c)(3)(A) as well. As former-Justice O'Connor explained, in writing for the Eleventh Circuit in *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), by its terms § 924(c)(3)(A) requires a categorical approach, and pursuant to that approach, a court "must ask whether the crime, in general, plausibly covers any non-violent conduct." *Id.* at 1337 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (requiring a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls out" the standard).[2]

McGuire was clear that "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force can [a defendant] be held guilty of a crime of violence." *Id.* (parallel citations omitted). And in determining whether that standard was met in *McGuire* itself, the Eleventh Circuit simply considered the "possibilities" of purportedly non-violent means of committing the offense of "disabling an aircraft" suggested by the defendant – such as deflating the tires or disabling the ignition while the plane is on the ground, or disconnecting the onboard circuitry or the radio transponder while the plane is airborne. It found that because each of these "minimally forceful acts" is specifically calculated to seriously interfere with the freedom, safety and security of the passengers, or cause damage

[2] In *Ovalles II*, the Eleventh Circuit only vacated the portion of *McGuire* applying the categorical approach to the residual clause. It affirmed in *Ovalles v. United States*, 905 F.3d 1300, 1302-03 (11th Cir. Oct. 9, 2018) (*Ovalles III*), that *McGuire* and the categorical approach most definitely continue to apply in analyzing whether an offense meets § 924(c)'s elements clause.

to the plane, it involves the "use of force against that plane or its passengers." 706 F.3d at 1337-38.

Here, by contrast, the conduct Petitioner has suggested could qualify as a Hobbs Act violation based on the plain language of the Eleventh Circuit pattern instruction, is not even "minimally forceful." Taking a person's "intangible rights" by causing fear of a "financial loss" to "intangible rights" is *not* calculated to cause physical harm to any person, or to property. The Eleventh Circuit has improperly failed to consider that a *completely non-violent* commission of a Hobbs Act robbery was not only "plausible," but "probable," based upon the plain language of its own pattern instruction.

This Court has not yet considered – but should consider – whether the "realistic probability" standard of *Duenas-Alvarez* is met where, as here, the plain language of a circuit's pattern jury instruction establishes that the offense can be committed in a non-violent fashion. That question, notably, is not only relevant and pressing for Eleventh Circuit defendants. The Fifth and Tenth Circuits as well have pattern instructions defining the "property" taken in a Hobbs Act robbery to include purely "intangible rights," and specifying that the offense may be committed by causing "fear" of purely economic harm. *See* Tenth Circuit Pattern Instruction 2.70 ([Robbery][Extortion] By Force, Violence of Fear, 18 U.S.C. § 1951(a)(Hobbs Act)) (In a robbery, "[p]roperty' includes money and other tangible and intangible things of value. 'Fear' means an apprehension, concern, or anxiety about physical

violence or harm or economic loss or harm that is reasonable under the circumstances").

While no other circuit beyond the Fifth, Tenth, and Eleventh have similar Hobbs Act robbery instructions, at least one circuit – the Eighth – has a model instruction specifying very differently, that a Hobbs Act robbery can only be committed by "committing physical violence," or 'threatening physical violence." *See* Eighth Circuit Model Jury Instruction 6.18.1951B (2017, ed.). Ultimately, however, the number of circuits on either side of this sharp divide does not matter under the categorical approach. Even if it were only the Eleventh Circuit that had an instruction informing juries they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act robbery crime. But indeed, the fact that courts in three circuits (covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) now routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the court below in finding that a Hobbs Act robbery by "fear of injury" was categorically violent, based upon *In re Saint Fleur*. And indeed, that error is particularly egregious and prejudicial to all Eleventh Circuit defendants now bound by *Saint Fleur*, given that *Saint Fleur* was a decision rendered by the Eleventh Circuit at the second or successive § 2255 authorization stage, on a barebones petition by a *pro se*

defendant, within a tight 30-day-timeframe, without adversarial testing or oral argument, and without any possibility of appeal.[3]

Another significant point here, which the Eleventh Circuit refused to consider in rigidly following *Saint Fleur*, is that in the Eleventh Circuit – as in the Fifth Circuit – the pattern instructions on Hobbs Act robbery and Hobbs Act extortion define the terms "fear" and "property" *identically*. *See* Eleventh Circuit Pattern Instruction O70.1 (Hobbs Act Extortion) (defining "extortion" as "obtaining property from a person who consents to give it up because of the wrongful use of actual or threatened force, violence, or fear;" defining "property" to include "intangible rights that are a source or part of income or wealth, and "fear" as including "the fear of financial loss as well as fear of physical violence"). And given

[3] The Eleventh Circuit, notably, is the only circuit in this country that continually decides open merits question at the authorization stage of second or successor § 2255 motion, and its practice in this regard has been criticized both within and outside the circuit as inconsistent with 28 U.S.C. § 2244(b)(3)(C), unwise, and unjust. *See, e.g.*, *In re Hoffner*, 870 F.3d 301, 310 n. 13 (3rd Cir. 2017) (refusing to follow the Eleventh Circuit in resolving a merits question at the authorization stage); *In re Williams*, 898 F.3d 1098, 1100-1105 (11th Cir. 2018) (Wilson, J., joined by Martin and Jill Pryor, JJ., specially concurring) (noting that the Eleventh Circuit is truly an "outlier" in its approach to the "gatekeeping" function of § 2244(b)(3)(B) and § 2255(h), in being the only circuit to permit successive petition panels to decide the merits of open issues at the authorization stage, where (as in *St. Fleur*), the inmate does not have the benefit of counsel, and there is an inflexible 30-day deadline for review, no adversarial testing, no oral argument, and no appellate review of a denial); *see also United States v. Seabrooks*, 839 F.3d 1326, 1349-50 (11th Cir. 2016) (Martin, J., concurring); *Davenport v. United States*, Order at 3 (11th Cir. Mar. 28, 2017) (No. 16-15939) (Martin, J., granting COA on whether such decisions are precedential outside the successive petition context); *United States v. Rosales-Acosta*, 2017 WL 562439 at *3 (11th Cir. Feb. 13, 2017)(agreeing, prior to *St. Hubert*, that it "may be true" that an order issued upon an application for second or successive motion "is not controlling" in a direct appeal)(Marcus, Julie Carnes, and Jill Prylor, JJ); Noah Feldman, "This Is What 'Travesty of Justice' Looks Like," available at https://www.bloomberg.com/view/articles/2016-07-22/appeals-court-fumbles-supreme-court-ruling.

the complete identity of the pattern robbery and extortion instructions in these material respects in the Eleventh and Fifth Circuits, it is notable that this Court GVR'd a § 924(c) case after *Dimaya*, where the predicate "crime of violence" was Hobbs Act extortion, and the petitioner had specifically pointed out that courts "routinely" charge juries in Hobbs Act extortion cases "that fear of economic injury is sufficient." *See* Petition for Writ of Certiorari, *Xing Lin v. United States*, No. 17-5767, at 18-19 (Aug. 28, 2017); *Xing Lin v. United States*, 138 S.Ct. 1982 (June 15, 2018)(granting certiorari, vacating the judgment, and remanding the case for further consideration in light of *Dimaya*).

While the government noted in response to the *Xing Lin* petition that the Second Circuit "found it 'far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force for purposes of Section, 924(c)(3)(B)," Memorandum for the United States, *Xing Lin v. United States*, No. 17-5767, at 2-3 (Oct. 30, 2017), the government nonetheless conceded that *Xing Lin* "may be affected by *Dimaya*" and should be held pending that decision. And presumably, the government took that position because it knew the "ordinary case" is irrelevant under § 924(c)(3)(A); the categorical approach required by the "elements" language in that provision is an "every case" analysis; and Hobbs Act extortion is indeed categorically overbroad under an "elements-only," every-case approach, if juries are "routinely" instructed that they may convict a defendant for causing fear of financial loss, without any physical violence.[4]

[4] Notably, in the First, Third, and Ninth Circuits, as well as the Fifth and Eleventh Circuits, juries are routinely instructed that Hobbs Act extortion may be committed

Given the identity of the Hobbs Act robbery and extortion instructions in these material respects in the Eleventh Circuit, the Court should grant certiorari in this case for the same reason it GVR'd in *Xing Lin*. Petitioner specifically predicated his "fear of injury" argument on the Eleventh Circuit pattern instruction, pressed that argument strenuously to both courts below, and those courts ignored his argument because of the all-encompassing and truly unforgiving prior precedent rule in the Eleventh Circuit.[5]

If the Court holds § 924(c)(3)(B) unconstitutionally vague in *Davis*, this case presents an ideal vehicle to follow *Davis*. It will allow the Court to determine definitively whether Hobbs Act robbery is categorically a "crime of violence" as many other courts have held, while considering – finally – all of the relevant

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by causing fear of economic loss, without the use or threat of physical force. *See* First Circuit Pattern Instruction 4.18.1951 ("To prove extortion by fear, the government must show ... that the victim believed that economic loss would result from failing to comply with [defendant's demands"); Third Circuit Pattern Instruction 6.18.1951-4 (Hobbs Act – "Fear of Injury" Defined") (citing an extortion case in the "Comment" section, for the proposition that "fear" "may be of economic or physical harm"); Ninth Circuit Pattern Instruction 8.142A (Hobbs Act – Extortion or Attempted Extortion by Nonviolent Threat)("the defendant [[induced][intended to induce]][name of victim] to part with property by wrongful threat of [economic harm][specify other nonviolent harm]").

[5] *See Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (categorically rejecting *any* exception to obligation to follow prior precedent "based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at th[e] time [the prior decision was rendered]"); *United States v. Steele*, 147 F.3d 1316 (11th Cir. 1998) (en banc) (a panel is precluded from "overrul[ing] a prior one's holding even though convinced it is wrong"); *St. Hubert*, 909 F.3d 335, 346 (11th Cir. Nov. 15, 2018) ("Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks").

circumstances, which should include the fact that juries are routinely instructed in three circuits that the offense can be committed without the use, threat, or fear of violence to person or property.

III. The Eleventh Circuit applies an erroneous COA standard.

In the Eleventh Circuit, COAs are not granted where binding circuit precedent forecloses a claim. In the view of the Eleventh Circuit, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Sec'y, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015) ("we are bound by our Circuit precedent, not by Third Circuit precedent, and circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

While Judge Martin did not expressly cite the above precedent in denying Petitioner a COA here, that precedent was clearly the reason for her COA denial. There is no other explanation for finding reasonable jurists could not debate the constitutionality of § 924(c)'s residual clause in the wake of *Dimaya*, when the circuits were by then intractably split on that issue, and the government had asked this Court to grant certiorari in *Davis* to resolve the conflict.

The rule in *Hamilton* was likewise the reason Judge Martin found reasonable jurists could not have debated the elements clause issue Petitioner raised, because

of *St. Fleur*. Notably, Judge Martin herself (a member of the *St. Fleur* panel), subsequently wrote a lengthy decision questioning the correctness of the panel's reasoning in that case that Hobbs Act robbery was categorically a "crime of violence" based upon the text of the statute alone. *See In re Saint Fleur*, Order (11th Cir. July 22, 2016) (No. 16-14022) (Martin, J., concurring). In that subsequent opinion, issued after Mr. Saint Fleur sought reconsideration with the assistance of counsel, Judge Martin acknowledged that she had "since realized that the issue that seemed easy in *Saint Fleur* wasn't so clear-cut after all," but that

> now Mr. Saint Fleur has lost his opportunity for review. And the decision in his case has been used to deny countless applications.
>
> The *Saint Fleur* panel held that Hobbs Act robbery qualifies as a crime of violence under § 924(c)'s elements clause without citing any caselaw or other authority on that crime. In our haste to rule on Mr. Saint Fleur's application, I overlooked the possibility that Hobbs Act robbery can be committed without any actual attempted, or threatened use of force. For example, the Eleventh Circuit's pattern jury instructions show that a jury can convict a defendant of Hobbs Act robbery so long as it believes the defendant "took the property against the victim's will, by using actual or threatened force, or violence, or *causing the victim to fear harm*, either immediately or in the future. 11th Cir. Pattern Jury Instructions 70.3 (emphasis added). This "causing the victim to fear harm" can include causing fear of "financial loss," which "includes . . . intangible rights that are a source of element of income or wealth." *Id.*; *see also United States v. Local 560 of the Int'l Bhd, of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that "other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible as well as intangible property").

Order, at 13-14. It is unlikely that Judge Martin no longer believe that the analysis above is "reasonable." Far more likely is that Eleventh Circuit precedent – namely, *Hamilton* – precludes her from finding that "reasonable jurists could debate" any-already-decided issue in the circuit.

The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue, is an egregious misapplication – evidencing complete disregard – of this Court's precedents in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck*, the Court confirmed that "[u]ntil a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a baseless and wrong rule requiring that COAs be adjudicated on the merits. Such a rule places too heavy a burden on movants at the COA stage, like Petitioner. As this Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim

> was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774. Indeed, as this Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That was *not* the case here.

CONCLUSION

The Court should hold this petition pending *Davis*. If the Court holds in *Davis* that § 924(c)(3)(B) is indeed unconstitutionally vague in light of *Johnson* and *Dimaya*, the Court should grant the writ to decide whether his § 924(c) convictions can be upheld, alternatively, under § 924(c)(3)(A), or whether – at the very least – a COA should have been granted on that issue.

Respectfully submitted,

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