NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

QUINTON BANNISTER,

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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QUESTION PRESENTED FOR REVIEW

This case presents important issues concerning the proper application of 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking crime. Specifically, **first**, whether the Eleventh Circuit erred in denying Mr. Bannister a certificate of appealability by relying on its holding in *Ovalles v. United States*, 861 F. 3d 1257 (11th Cir. 2016) (*Ovalles I*) (*Johnson* does not apply to the "force clause" of § 924(c)). *Ovalles* has been seriously called into question by this Court's decision in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018) and is contrary to this Court's earlier decision in *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). Reasonable jurists would find the court's reliance on *Ovalles* debatable in light of *Dimaya*. **Second**, whether Bannister's § 924(c) predicate convictions for conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery qualify as crimes of violence.

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

Quinton Bannister respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA), rendered and entered in case number 17-14176-K in that court, *Quinton Bannister v. United States.*

OPINION AND ORDER BELOW

The district court entered a written order adopting a magistrate judge's report and recommendation and denying the petition and denying a certificate of appealability. The Eleventh Circuit entered a written order denying the Petitioner's motion for a certificate of appealability in Appeal No. 17-14176. (Appendix A-1). Copies of the report and recommendation and all relevant orders are included in the appendix attached hereto.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Florida had jurisdiction over Mr. Bannister's case under 28 U.S.C. § 2255. The United States Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 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 upon Supreme Court remand was entered on November 16, 2018. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of 18 U.S.C. § 924(c)(1)(A), (C) and (3). Subsection (c)(1)(A) of that statute states in pertinent part:

> 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 a crime of violence . . . (including a crime of violence . . . 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 . . .
> ---
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm was brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years;
>
> . . .

Subsection (c)(1)(C) provides:

> 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.

In relevant part, the § 924(c) defines a "crime of violence" as:

> [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.

Mr. Bannister was charged and convicted of three counts of conspiracy to commit armed bank robbery under 18 U.S.C. § 371. In pertinent part, that statute provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined

> under this title or imprisoned not more than five years, or both.

The substantive charge in Count 2 and the alleged object of the § 371 conspiracy charges was armed bank robbery under 18 U.S.C. § 2113(a) and (d). The relevant portions of that statute state:

> Whoever, by force or violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

Finally, Bannister was charged with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). That section provides:

> 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.

STATEMENT OF THE CASE

Mr. Bannister was charged in all counts of a ten count superseding indictment: **Count 1**, conspiracy to commit armed bank robbery in violation of **18 U.S.C. § 371**; **Count 2**, armed bank robbery in violation of **18 U.S.C. § 2113(a) and (d)**; **Count 3**, conspiracy to commit Hobbs Act robbery in violation of **18 U.S.C. § 1951(a)**; **Count 4**, using a firearm during or in furtherance of a crime of violence in violation of **18 U.S.C. § 924(c)(1)(A)**; **Count 5**, conspiracy to commit

armed bank robbery in violation of **18 U.S.C. § 371**; **Count 6**, conspiracy to commit Hobbs Act robbery in violation of **18 U.S.C. § 1951(a)**; **Count 7** using a firearm during or in furtherance of a crime of violence in violation of **18 U.S.C. § 924(c)(1)(A)**; **Count 8**, conspiracy to commit armed bank robbery in violation of **18 U.S.C. § 371**; **Count 9**, conspiracy to commit Hobbs Act robbery in violation of **18 U.S.C. § 1951(a)**; and **Count 10**, using a firearm during or in furtherance of a crime of violence in violation of **18 U.S.C. § 924(c)(1)(A)**. (CR:DE 32).

Of particular importance, **the superseding indictment charged multiple predicate counts for each § 924(c) count**. For the § 924(c) charge in **Count 4**, the grand jury **charged as predicates the crimes charged in Counts 1, 2 and 3** (conspiracy to commit bank robbery, bank robbery, and conspiracy to commit Hobbs Act robbery); for the charge in **Count 7**, the grand jury **charged as predicates the crimes alleged in Counts 5 and 6** (conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery); and for **Count 10**, the grand jury **charged as predicates the crimes alleged in Counts 8 and 9** (conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery). (CR:DE 32). Mr. Bannister was convicted after a jury trial. (CR:DE 123). The verdicts were general verdicts and gave no indication of which § 924(c) predicates the jury relied upon. *Id.*

Prior to sentencing, a presentence report was prepared. (PSR). It recommended that Mr. Bannister be designated as a career offender, based on two prior felony convictions for Florida battery on a detention staff member and Florida

battery on a law enforcement officer. PSI, at paragraph 66. Mr. Bannister filed a written objection to those priors being considered "crimes of violence." (CR:DE 134). The Court denied the objection and sentenced Mr. Bannister as a career offender.

The district court sentenced Mr. Bannister to a total of 946 months of imprisonment, including consecutive sentences of 84, 300 and 300 months for § 924(c) convictions. (CR:DE 137).

Mr. Bannister appealed his conviction and sentence, but his appeal was denied. (CR:DE 138, 160).

In 2009, Mr. Bannister filed of petition for a writ of *habeas corpus* under 28 U.S.C. § 2255, *Bannister v. United States*, Case No. 09-cv-81070-DTKH, Southern District of Florida. In his petition, Mr. Bannister complained of ineffective assistance of counsel. The petition was ultimately denied by the Honorable Daniel T. K. Hurley in 2012. (DE 49, 58). There was no appeal.

On July 27, 2016, the Eleventh Circuit granted Mr. Bannister's request for leave to file a second or successive § 2255 *habeas corpus* petition based upon *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). (DE 1). The Court granted the request because Mr. Bannister's convictions on Counts 4, 7 and 10 were based on multiple charged predicate offenses, some of which were arguably not "crimes of violence" as required for conviction under 18 U.S.C. § 924(c) and there was no way for the Court to determine which predicates the jury relied upon.

Accordingly, with leave granted, Mr. Bannister filed a second or successive petition in the district court. *Bannister v. United States*, Southern District of

Florida, Case No. 16-cv-81345 DTKH, (DE 10). After full briefing, the magistrate judge issued a report and recommendation denying relief. (DE 15). The district judge adopted the report and recommendation and denied a certificate of appealability. (DE 16-17).

Mr. Bannister filed a timely of appeal and a motion for a certificate of appealability. (DE 23). The Eleventh Circuit denied a certificate of appealability on February 9, 2018. On November 2, 2018, this Court vacated the denial and remanded with instructions to reconsider the case in light of *Sessions v. Dimaya* ___ U.S. ___, 138 S.Ct. 1204 (2018).

In November 16, 2018, the Eleventh Circuit again denied a certificate of appealability. This petition follows.

REASONS FOR GRANTING THE WRIT

I. **The lower court erred in failing to issue a certificate of appeal. On remand, the circuit court failed to follow this Court's directions. The circuit avoided reconsideration of the case in light of *Sessions v. Dimaya* by simply presuming that the jury found Mr. Bannister's conviction for armed bank robbery was the predicate for all of his § 924(c) counts. The circuit court improperly made this assumption based on no more than the trial judge's mention at sentencing that firearms were used during multiple armed robberies. It then applied *In re Sams*, 830 F.2d 1234 (11th Cir. 2016) (bank robbery is a crime of violence for § 924(c)(3)(A) purposes) as binding precedent in the Eleventh Circuit, about which reasonable jurists could not disagree.**

There was no such finding by the jury in Mr. Bannister's case. In fact, two of the three § 924(c) counts, Counts 7 and 10, did not even charge armed robbery as a predicate. The circuit's assumption violated the holdings in *Moncrieffe v. Holder*, 569 U.S. 184, 190 - 91, 133 S.Ct. 1678, 1684, 185 L.Ed. 2d 727 (2013) ("we must presume that the conviction rested upon nothing more than the least of the acts criminalized...") and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013) (any fact that increases the mandatory minimum sentence is an element and must be found by the jury). Had the circuit court chosen the least of the predicates criminalized, i.e., conspiracy to commit bank robbery or Hobbs Act conspiracy, reasonable jurists could disagree whether such predicates constitute crimes of violence under § 924(c).

Certificate of Appealability

A certificate of appealability (COA) must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve

encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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." *Id.* at 338. "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 . . . This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 773 (2017) (quoting

Miller-El, 537 U.S. at 336). Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Court recently applied this standard in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-64. In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively in cases on collateral review. *Id.* at 1268. But, in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA, because "reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence." *Id.* at 1264, 1268. In that case, the parties disputed whether Welch's Florida robbery conviction would continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See, Id.* at 1263-64, 1268. Accordingly, the Court held that a COA should issue.

As explained below, Bannister has satisfied this standard.

Mr. Bannister's § 924(c) convictions for using a firearm in relation to a "crime of violence" are void because the "crime of violence" element cannot be satisfied here. The predicate offenses of conspiracy to commit bank robbery and conspiracy to commit Hobbs Act robbery do not qualify as a "crimes of violence" as a matter of law.

Mr. Bannister was convicted of a violation of 18 U.S.C. § 924(c) in Counts 4, 7 and 10.

At the time of conviction, § 924(c)(1) provided:

> Whoever, during and in relation to any crime of violence . . . 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 . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty five years . . .

Under § 924(c)(3), the term "crime of violence" as used therein was (and still is) defined to mean 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.

Initially, it must be noted that in the instant denial of a COA, the Eleventh Circuit incorrectly stated that the sentencing judge, "identified the armed-bank-robbery offense as the predicate for the 924(c) charge." The sentencing judge never discussed which of the charged predicates supported the § 924(c) counts. Moreover, *two of the three § 924(c) counts (Counts 7 and 10) did not even charge armed bank robbery as a predicate.* The circuit court clearly did not make a careful and accurate review of the record in this case.

Under the categorical approach, in determining whether a predicate conviction is a crime of violence, a sentencing court must assume that the alleged predicate rests upon the least culpable elements available. The Court may not

engage in speculation regarding what particular facts were found by the jury. "Because we examine what the state conviction necessarily involved, not the facts of the underlying case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, ___U.S.___, 133 S.Ct. 1678 (2013); *See also, Donawa v. U.S. Attorney General*, 735 F.3d 1275, 1280 (11th Cir. 2013) (quoting *Moncrieffe,* "we must presume that the conviction rested upon nothing more than the least of the acts criminalized...").

In *United States v. Gomez*, ___F.3d ___, 2016 WL 3971720 (11th Cir. July 25, 2016), the Eleventh Circuit held that a court reviewing a collateral challenge to a § 924(c) conviction could not speculate as to which of the multiple charged predicates the jury had found. There, the indictment of a § 924(c) count charged multiple predicates on the same day, i.e., two drug trafficking crimes, an attempted Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery. The jury had returned a simple general verdict of guilty. Following the dictates of *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013), the court declined to theorize as to which of the charged § 924(c) predicates the jury had found:

> [A] general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others... The way Gomez's indictment is written, we can only guess which predicate the jury relied on. It's possible that we can make a guess based on the PSI or other documents from Gomez's trial or sentencing. But *Alleyne* expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence.

Gomez, at 2, *See, Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2155 (2013).[1]

In the instant case, the grand jury charged multiple predicate crimes for each § 924(c) count. Count 3 relied on the crimes charged in Count 1, conspiracy to commit armed bank robbery (18 U.S.C. § 371), Count 2, armed bank robbery (18 U.S.C. § 2113(a) and (d)), and Count 3, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Count 7 relied on the crimes charged in Count 5, conspiracy to commit armed bank robbery (18 U.S.C. § 371) and Count 6, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Finally, Count 10 relied on the crimes charged in Count 8, conspiracy to commit armed bank robbery (18 U.S.C. § 371) and Count 9, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Other than a question about whether the defendant "brandished" a firearm, the verdict was a general verdict and gave no indication of which charged predicate(s) the jury relied upon in finding Mr. Bannister guilty of the 924(c) counts.

Mr. Bannister respectfully contends that should it be found that any of the predicates charged for a particular § 924(c) count does not qualify as a categorical crime of violence, under controlling precedent a sentencing court must presume that the jury found Mr. Bannister guilty based upon that predicate alone. In those circumstances, under the holdings in *Moncrieffe*, *Alleyne* and *Gomez*, the § 924(c)

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[1] In its order granting Mr. Bannister's Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence (July 27, 2016) a panel of the Eleventh Circuit based its decision to permit a successive petition on the fact that the Bannister jury did not indicate which predicate(s) were found and circuit precedent recognized that it remained undecided whether Hobbs Act conspiracy was a crime of violence under § 924 (c)(B)(3). *See In re Pinder*, 824 F.3d 977 (11th Cir. 2016).

counts cannot survive because it cannot be determined that they were based upon a predicate categorical crime of violence.

II. Reasonable jurists could disagree whether the residual clause of § 924(c) is unconstitutionally vague. This Court has granted certiorari in *United States v. Davis*, 903 F.3d 483 (5th Cir.), *cert granted*, 2019 WL 98544 (U.S. Jan. 4, 2019) (No. 18-413) to decide that issue. The Court should hold this case in abeyance until *Davis* is decided.

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 v. United States,* 905 F.3d 1231 (11th Cir. 2018) (*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.[2] 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 §

[2] *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").

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 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. Ashcroft*, 543 U.S. 1, 7 (2004)), the Fourth Circuit noted. *Simms*, 2019 WL 311906 at **4-8. The Fourth Circuit went well beyond those 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*.

As noted, neither conspiracy to commit bank robbery or Hobbs Act conspiracy categorically constitutes a crime of violence.

III. Reasonable jurists could disagree whether Mr. Bannister's § 924(c) predicate convictions for conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery qualify as crimes of violence under the "Elements Clause."

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

Thus, for present purposes, a verbal or written agreement to commit Hobbs Act robbery is the least culpable way of committing the offense. *See, e.g.*, *Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). That way of committing the offense clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a "crime of violence."

Several courts around the country have already persuasively so held. *See, e.g., United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. Dec. 23, 2015) ("The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another."); *United States v. Ledbetter*, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("this Court agrees" that conspiracy to commit Hobbs Act robbery "qualifie[d] *only* under the 'residual clause' from § 924(c)(3)(B)"); *United States v. Luong*, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) ("The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause."). These decisions are persuasive, as reflected by the Eleventh Circuit's favorable citation to them in *In re Pinder*, 824 F.3d 977, 979 n.1 (11th Cir. June 1, 2016).

And, in fact, the Eleventh Circuit has held that a "prior conviction for non-overt act criminal conspiracy" to commit strong-arm robbery was not a crime of violence under the Sentencing Guidelines. *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010). That case focused on whether the offense satisfied the Sentencing Guidelines Residual Clause, indicating that the parties and the Court considered it

obvious that conspiracy to commit a violent offense does not satisfy the Elements Clause where no overt act is required. The court reasoned that the crime was complete once an agreement was reached. The same is true here.

For these reasons, this Court should conclude that reasonable jurists could disagree on whether § 1951 Hobbs Act conspiracy qualifies categorically as a crime of violence.

IV. Reasonable jurists could disagree whether Mr. Bannister's § 924(c) predicate convictions for conspiracy to commit bank robbery, under 18 U.S.C. § 371, qualify as crimes of violence under the "Elements Clause."

Proof of a § 371 conspiracy requires the following elements:

1. Two or more people in some way agreed to try to accomplish a shared and unlawful plan;
2. The defendant knew the unlawful purpose of the plan and willfully joined in it;
3. During the conspiracy, one of the conspirators knowingly engaged in at least one overt act described in the indictment; and
4. The overt act was knowingly committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy

Eleventh Circuit Pattern Jury Instructions, O13.6, 2016. Clearly, the only element which could possibly be considered as involving the use of actual or threatened physical force is the "overt act."

"An 'overt act' is any transaction or event, *even one which may be entirely innocent when viewed alone*, that a conspirator commits to accomplish some object of the conspiracy." Eleventh Circuit Pattern Jury Instructions, O13.6, 2016 (emphasis added). A § 371 conspiracy is complete upon commission of the first charged overt act. *United States v. Dominguez*, 661 F.3d 1051, 1064 (11th Cir. 2011). "'[P]hysical force' means violent force-that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 1271 (2010).

A review of the instant superseding indictment shows that most, if not all, of the charged overt acts did not require "the use, attempted use, or threatened use of physical force against the person or property of another..." 18 U.S.C. § 924(c). In the alternative, each of the § 371 general conspiracy counts charged multiple overt acts which are unquestionably nonviolent. Given the general verdict returned in this case, it is impossible to determine which of the overt acts the jury found beyond a reasonable doubt. Therefore under *Alleyne* and *Gomez*, the Court must assume that the requisite overt act(s) were nonviolent ones.

Count 1 of the superseding indictment charged that "at least one of the coconspirators *committed at least one of the following overt acts* ... (emphasis added):

1. "Some of the coconspirators drove in stolen cars to the vicinity of the First National Bank and Trust Company in Tequesta, Florida.
2. Some of the coconspirators covered their faces and wore gloves.

3. Some of the coconspirators armed themselves with one or more firearms.
4. Some of the coconspirators entered the First National Bank and Trust Company.
5. Some of the coconspirators, using one or more firearms, demanded money from First National Bank and Trust Company employees.
6. Some of the coconspirators stole approximately $94,100 in United States currency from the First National Bank and Trust Company.
7. Some of the coconspirators fled the First National Bank and Trust Company in a stolen car."

(CR:DE 32).

Under *Dominguez*, the offense was complete after the conspirators, drove in stolen cars to the vicinity of the First National Bank and Trust in Tequesta, Florida," or when they "covered their faces and wore gloves." It was not necessary, nor can it now be determined, that the jury found Mr. Bannister guilty of any more serious or violent overt acts. Under the precedent of *Alleyne* and *Gomez*, the sentencing court cannot speculate as to which overt acts were found by the jury. It must presume that the jury only based its verdict on the nonviolent acts alleged.

The same principles and argument apply to Counts 5 and 8. In both counts, the superseding indictment again alleges that "at least one of the coconspirators *committed at least one of the following overt acts* ..." (emphasis added). Count 5

charged no overt acts which constituted attempted, threatened or actual violent force:

1. "A coconspirator stole a van in Palm Beach County, Florida.
2. Quinton Bannister and his coconspirators drove in vehicles, including the stolen van, to Volusia County, Florida.
3. A coconspirator waited behind a building in the vicinity of Colonial Bank in Port Orange, Florida, while Quinton Bannister and other coconspirators, who were armed with one or more firearms and dressed in dark clothing, entered the stolen van and drove to the Colonial Bank.
4. Some of the coconspirators, who were armed with one or more firearms and dressed in dark clothing, attempted to enter the Colonial Bank by pulling on the locked front doors of the bank.
5. The coconspirators fled in the stolen van after Colonial Bank employees refused to unlock the front doors.
6. Quinton Bannister and some of his coconspirators returned in the stolen van to the area behind a building where a coconspirator was waiting and got out of the van.
7. Quinton Mr. Bannister and his coconspirators fled the area in three vehicles."

(CR:DE 32).

Again, under *Dominguez*, the crime was complete when overt act 1, the stealing of a van, was accomplished. This act would certainly not involve attempted, threatened or actual physical force. It cannot now be determined that the jury necessarily found any further overt acts were committed.

Count 8 also requires that the coconspirators "committed at least one of the following overt acts:"

1. "The coconspirators acquired a stolen vehicle from Palm Beach County, Florida.
2. Quinton Bannister and his coconspirators drove in two vehicles, including the stolen vehicle, to Palm Bay, in Brevard County, Florida.
3. Quinton Bannister and his coconspirators parked behind a building in the vicinity of Harbor Federal Savings Bank, in Palm Bay, Florida.
4. Some of the coconspirators armed themselves with firearms and put on masks and gloves.
5. Some of the coconspirators entered the Harbor Federal Savings Bank.
6. Some of the coconspirators, using one or more firearms, ordered the persons inside the bank to the floor.
7. One of the coconspirators demanded money from a bank employee and repeatedly hit the employee on the head.

8. Some of the coconspirators stole approximately $47,500 in United States currency from Harbor Federal Savings Bank.

9. Some of the coconspirators fled the bank in a stolen car."

(CR:DE 32).

In this count, the first two charged overt acts are not even necessarily criminal, much less purposeful, violent and aggressive. From the general verdict returned on this count it cannot be determined that the jury must have found Mr. Bannister guilty of a predicate crime of violence.

Thus, reasonable jurists could disagree on whether the § 371 counts charged against Mr. Bannister can stand categorically as a predicate crime of violence for § 924(c) purposes.

* * *

For all the reasons discussed above, reasonable jurists would find it debatable whether Hobbs Act conspiracy and conspiracy to commit bank robbery are crimes of violence under § 924(c) and whether the residual clause of § 924(c) is unconstitutionally vague. Accordingly, this Court should hold this case in abeyance until *Davis* is decided. In *Davis*, the Court should find that the residual clause of § 924(c) in unconstitutionally vague. Subsequently, in this case, a writ of certiorari should issue, vacating the Eleventh Circuit order denying a certificate of appealability, and remand the case with instructions to reconsider in light of *Moncrieffe*, *Sessions* and *Davis*.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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