NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON MAURICE BLAYLOCK,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Should a certificate of appealability have issued after the district court denied as untimely a 28 U.S.C. § 2255 motion to vacate that sought to challenge the constitutionality of 18 U.S.C. § 924(c)(3)(B) based on this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) to be unconstitutional?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Constitutional Provisions

Sentencing Guidelines

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OPINION BELOW

On November 16, 2018, the court of appeals entered its judgment denying the application for a certificate of appealability filed by Aaron Maurice Blaylock. *Blaylock v. United States*, No. 18-2408 (not reported). A copy of the judgment is attached at Appendix ("App.") A. The district court entered its order adopting the magistrate's report and recommendation and denying Mr. Blaylock's 28 U.S.C. § 2255 motion to vacate on April 30, 2018. *Blaylock v. United States*, No. 1:12-CR-10010-1, 2018 WL 2007521 (W.D. Ark. Apr. 30, 2018). A copy of the district court's order is attached at App. B, and the magistrate's report and recommendation is attached at App. C.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2018. *See* App. A. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

U.S. Const. amend. V:

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

shall private property be taken for public use, without just compensation.

18 U.S.C. § 924(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.

STATEMENT OF THE CASE

1. On August 22, 2012, Mr. Blaylock was named, along with two co-defendants, in a three-count second superseding indictment filed in the Western District of Arkansas. Blaylock was charged in Count One with conspiracy to commit bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d), 2, and 371; in Count Two with aiding and abetting bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d) and 2; and in Count Three with aiding and abetting the use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. The § 924(c) violation charged in Count Three was predicated upon the "crime of violence" of aiding and abetting bank robbery as charged in Count Two.

Mr. Blaylock pleaded guilty to Counts Two and Three of the second superseding indictment and, on February 14, 2014, was sentenced to a total of 272 months imprisonment, consisting of 188 months on Count Two and 84 months on Count Three to be served consecutively. Blaylock appealed to the Eighth Circuit

Court of Appeals, and the district court's decision was affirmed on November 20, 2014.

2. On April 26, 2016, Mr. Blaylock filed a pro se motion to vacate under 28 U.S.C. § 2255. The Office of the Federal Public Defender was appointed to represent Blaylock in connection with this motion on May 19, 2016. On July 21, 2016, Blaylock, through counsel, filed a memorandum in support of the § 2255 motion. In his motion and memorandum, Blaylock argued: (1) that the sentence imposed by the court in connection with his conviction on Count Three should be vacated because the residual clause of 18 U.S.C. § 924(c)(3)(B) is void for vagueness pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (2) that he should no longer be considered a career offender because the residual clause of U.S.S.G. § 4B1.2(a)(2) was unconstitutionally vague in light of *Johnson*. After this Court rendered its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), Mr. Blaylock filed a supplemental brief acknowledging that *Beckles* foreclosed relief on his career-offender claim, but continuing to assert that he was entitled to relief on his § 924(c) claim.

3. On June 23, 2017, the magistrate judge filed a report and recommendation recommending that Blaylock's § 2255 motion be dismissed or denied and that any request for a certificate of appealability ("COA") be denied. The magistrate concluded that Blaylock's § 2255 motion was not timely filed because it was not filed within one year of his conviction becoming final as provided under § 2255(f)(1), and because this Court's decision in *Johnson* did not announce a new rule of substantive law in relation to § 924(c). Blaylock filed timely objections to the

report and recommendation, asserting that his motion had been timely filed because the reasoning of *Johnson* also extends to invalidate § 924(c)(3)(B)'s residual clause. While recognizing that the Eighth Circuit's prior precedent (namely *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016)) prevented the district court from ruling in his favor, Blaylock continued to assert that *Prickett* had been incorrectly decided and that § 924(c)(3)(B) is void for vagueness. Blaylock also argued that a COA should issue because he had made a substantial showing of the denial of a constitutional right, as a split among the circuits had clearly demonstrated that the issue of the constitutionality of § 924(c)(3)(B) is debatable among reasonable jurists. On April 30, 2018, the district court entered its order adopting the report and recommendation and dismissing Mr. Blaylock's § 2255 motion as time-barred. The court also declined to issue a COA.

4. On June 28, 2018, Blaylock filed a timely notice of appeal from the court's dismissal of his § 2255 motion, which constituted a request for a COA to the court of appeals pursuant to Federal Rule of Appellate Procedure 22(b)(2). Blaylock also submitted an Application for Certificate of Appealability in further support of that request. Blaylock requested a COA on two issues: (1) whether his § 2255 petition was timely filed, and (2) whether *Johnson* invalidated the residual clause of § 924(c)(3)(B).

On November 16, 2018, the court of appeals entered its judgment denying Blaylock's request for a COA. *See* App. A. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Mr. Blaylock filed a § 2255 motion to vacate his § 924(c) conviction, arguing that the residual clause of § 924(c)(3)(B) is unconstitutionally vague, based upon the same reasoning the Court used in holding § 924(e)(2)(B)(ii) to be unconstitutionally vague in *Johnson*. He argued that his § 924(c) conviction was unconstitutional because the offense upon which it was predicated—aiding and abetting federal bank robbery—could only have qualified as a crime of violence under the unconstitutionally vague residual clause. He asserted that his motion was timely pursuant to § 2255(f)(3) because it was filed within one year of *Johnson*. In *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), this Court held that *Johnson* announced a new substantive rule of law and made it retroactively applicable to cases on collateral review.

When the district court denied and dismissed Mr. Blaylock's motion after finding that *Johnson* did not apply retroactively to allow collateral attack of § 924(c) convictions, he sought a COA from the court of appeals. Blaylock argued to the Eighth Circuit that other courts of appeals had recently addressed the timeliness of similar claims that had been asserted under § 2255 based on *Johnson* but which claims did not involve § 924(e). For example, in *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018), the court concluded that a § 2255 motion had been timely asserted under § 2255(f)(3) when the movants claimed the right to be resentenced on the ground that the vague residual clause of the mandatory Sentencing Guidelines unconstitutionally fixed their terms of imprisonment. The court found that "[t]he

right not to be sentenced under a rule of law using this vague language was recognized in *Johnson*," and that the requirements of § 2255(f)(3) had been met. *Id.* While the Government had argued that *Johnson* only applied to the residual clause of § 924(e), the court noted that this argument

> improperly reads a merits analysis into the limitations period. Section 2255(f)(3) runs from "the date on which the right *asserted* was initially recognized by the Supreme Court." It does not say that the movant must ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized. An alternative reading would require that we take the disfavored step of reading "asserted" out of the statute.

Id. at 293-94 (internal citations omitted). Blaylock likewise asserted that the new right announced by this Court in *Johnson* entitled him to relief, and that his § 2255 motion to vacate was timely filed under § 2255(f)(3).

Blaylock also pointed out that the First Circuit reached a similar conclusion concerning whether a claim unrelated to § 924(e) may be asserted based on the new rule announced by *Johnson*. *See Moore v. United States*, 871 F.3d 72 (1st Cir. 2017). The court in *Moore* explained that the matter

> turns on the degree of generality with which we define that rule adopted in [*Johnson*]. Does one describe the rule as being no more than the technical holding that the residual clause as employed in the ACCA is unconstitutionally vague? If so, then arguably only successive § 2255 motions based on the ACCA's residual clause would satisfy § 2255(h)(2). Or, does one describe the rule as being that the text of the residual clause, as employed in the ACCA, is too vague to provide a standard by which courts must fix sentences? If so, then one might reasonably conclude that such a rule could be relied upon directly to dictate the striking of any statute that so employs the ACCA's residual clause to fix a criminal sentence.

Id. at 82. The court noted that Congress used words such as "rule" and "right" rather than "holding" in the text of § 2255, and reasoned that these broader terms were used because Congress "recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and more consistency in our law." *Id.* The court in *Moore* concluded that the successive § 2255 motion contained a claim related to the new rule announced in *Johnson* despite the fact that the claim was based on the asserted vagueness of the mandatory Guidelines rather than § 924(e).

Mr. Blaylock also argued that a COA should be granted as to his claim regarding the unconstitutional vagueness of § 924(c)(3)(B) in light of *Johnson*. As he argued to the district court, the Seventh Circuit had recently held § 924(c)(3)(B) to be unconstitutionally vague in light of *Johnson*, as had several district courts. *See United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016). Blaylock further pointed out that five circuits had held the residual clause of 18 U.S.C. § 16(b)—which contains language materially identical to § 924(c)(3)(B)—to be unconstitutionally vague in light of *Johnson*. *See Baptiste v. Attorney Gen.*, 841 F.3d 601 (3d Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *aff'd sub nom. Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016). By the time Blaylock was making application to the Eighth Circuit for a COA, this Court had affirmed the Ninth Circuit's decision in *Dimaya* and held the residual clause of § 16(b) to be unconstitutionally vague in light of *Johnson*, thus

strengthening his argument as to the unconstitutionality of § 924(c)(3)(B). *See Dimaya*, 138 S. Ct. 1204. If § 16(b)'s residual clause was unconstitutional in light of *Johnson*, Blaylock argued, surely so was § 924(c)(3)(B). But the Eighth Circuit apparently rejected this argument and denied Blaylock's application.

The Eighth Circuit's denial of Mr. Blaylock's request for a COA was unreasonable and conflicts with this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Under 28 U.S.C. § 2253(c)(1)(B), Blaylock may only appeal the district court's dismissal of his § 2255 petition if a circuit justice or judge issues a COA. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to merit a COA, an applicant must only demonstrate 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. *Miller-El*, 537 U.S. at 327. "[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. Blaylock has clearly shown that the resolution of both of the issues presented in his application for COA—the timeliness of his motion to vacate, and the constitutionality of § 924(c)(3)(B)—is debatable among reasonable jurists, as other courts of appeals have disagreed with the Eighth Circuit in deciding these issues. Blaylock has made a substantial showing of the denial of a constitutional right by stating a plausible claim

that he was convicted and sentenced under an unconstitutionally vague statute. The Eighth Circuit should have issued a COA.

In the wake of *Dimaya*, four more circuits have held that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc); *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018) (per curiam); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam). Three have held that it is not. *See United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018); *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc); *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018). This Court has granted certiorari in *Davis*. *See United States v. Davis*, No. 18-431, 2019 WL 98544 (Mem) (Jan. 4, 2019). The issue of the constitutionality of § 924(c)(3)(B) will therefore be definitively addressed by this Court in the near future.

Accordingly, Mr. Blaylock suggests that it would be appropriate to hold his petition in abeyance pending resolution of *Davis*. Blaylock suggests that, if this Court ultimately finds § 924(c)(3)(B) to be unconstitutional in *Davis*, such a decision would constitute an "'intervening development[]'" giving rise to a "'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). Under such circumstances, Blaylock suggests that it would be appropriate to grant certiorari in this case, vacate the judgment of the court of appeals, and remand for further consideration in light of *Davis*.

CONCLUSION

For all of the foregoing reasons, Petitioner Aaron Maurice Blaylock respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 14th day of February, 2019.

Respectfully submitted,

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