NO .

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO BACHILLER,

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

MICHAEL CARUSO
Federal Public Defender
Bernardo Lopez
Assistant Federal Public Defender
Attorney For Petitioner Bachiller
One E. Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301
Telephone No. (954) 356-7436

QUESTIONS PRESENTED FOR REVIEW

18 U.S.C. § 924(c) criminalizes using a firearm during and in relation to a crime of violence. A first conviction carries a five-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. This petition presents the following questions:

I. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to a 28 U.S.C. § 2255 motion attacking a conviction and sentence imposed under 18 U.S.C. § 924(c)(3) so that such a 28 U.S.C. § 2255 motion filed within a year of the *Johnson* decision is timely?

II. Whether the residual clause of 18 U.S.C. § 924(c)(3) is unconstitutionally vague pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and thus, whether appellant, Mr. Erik Lindsey Smith, is actually innocent of his conviction and sentence imposed pursuant to 18 U.S.C. § 924(c)? [1]

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA)?

---

[1] The issue of whether 18 U.S.C. § 924(c)(3) is unconstitutionally vague after *Samuel Johnson* was decided by an en banc panel of the Eleventh Circuit in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc). The petition for a writ of certiorari in that appeal is currently pending before this Court. *See Ovalles v. United States*, No. 18-8393 (U.S. March 12, 2019).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTORY AND OTHER AUTHORITY

IN THE
SUPREME COURT OF THE UNITED STATES

No:

MARIO BACHILLER,
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

Mr. Mario Bachiller respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number18-11161, in that court on January 7, 2019, *Bachiller v. United States,* which denied a certificate of appealability necessary to appeal the judgment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied a certificate of appealability to appeal the judgment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

The United States District Court had jurisdiction over this 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 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 was entered on January 3, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V.:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(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; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

. . .

(3) For purposes of this subsection the term "crime of violence" means a 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.

18 U.S.C. § 1951:

(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 company at the time of the taking or obtaining.

28 U.S.C. § 2244(b)(3):

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

The underlying prosecution in this case is colloquially referred to as a fake stash house sting case. A staple of law enforcement, these cases are basically the same where an undercover agent, or someone acting at the direction of an agent, gets a defendant to agree to rob a stash house where illicit drugs are allegedly stashed prior to distribution. That defendant is then encouraged to get other co-defendants to assist him with the robbery. There is usually talk of armed guards guarding the stash house which encourages the use of firearms. *See United States v. Mclean*, 2016 WL 4179669 at *6 (E.D. Pennsylvania, Aug. 8, 2016) (describing the typical fake stash house robbery sting as "investigative tactics . . . representative of [ATF] 'sting' investigations nationwide."). That is exactly what happened here with the small twist that the government, more specifically a convicted felon working on behalf of the government, changed the story from a large amount of drugs in a stash house to an even larger amount of drugs secreted in a tractor trailer truck.

Specifically, in May 2006, government agents attempted to induce an individual named Alexis Cruzata into robbing a fake stash house alleged to contain a large amount of cocaine that had recently arrived in Miami via airplane. (DE 272:282-286). Cruzata, in turn, recruited Reynaldo Aviles, Nelson Pena, and Joe Guevarra to help him with the robbery. (DE 272:287-92). However, Cruzata and his crew became suspicious and never showed up for the planned robbery. (DE 272:298, 354).

In August 2006, the agents attempted to induce Nelson Pena, who had been involved in the May 2006 robbery planning, into again robbing a fake stash of cocaine. (DE 272:300-301). This time, instead of an undercover agent, the government used a convicted felon, Humberto Gamez, to do the inducing. (DE 272:301-302, 372-376). The government agents also changed the location to be robbed from a stash house to a tractor trailer. (DE 272:304, 400-404). Gamez and Pena met in person and Gamez was able to persuade Pena to commit the robbery, to recruit others and to use firearms. (DE 272:388-408).

A week later, Pena and Gamez met again. (DE 273:450). Instead of the 40 kilograms of cocaine that were discussed in May, Gamez increased that amount by 100% and dangled 80 kilograms of cocaine as the prize for Pena. (DE 273:459-468). Gamez said he wanted to meet the individuals Pena wanted to use. No names were given. (DE 273:464-470).

On September 5, 2006, Pena introduced Gamez to Aviles and Gomez. (DE 273:475-478). Gamez explained that the tractor trailer was arriving that night from Texas with 80 kilograms of cocaine hidden "in the cab, underneath." (DE 273:485-492). When asked about whether anyone guarding the tractor trailer would be armed, Gamez stressed that they should bring their "equipment," which was understood to be firearms, because he could not guarantee how those guarding the truck would react. (DE 273:487-498). The group determined that they would dress up as law enforcement officers and they also discussed how they would split the

cocaine. (DE 273:496, 504). Importantly, Mr. Bachiller was not at the meeting and was not part of the discussions.

The next day, the group met again to discuss the robbery. (DE 273:507-515). Gamez confirmed the arrival of the 80 kilograms of cocaine. Again, Mr. Bachiller was not present and was not involved in the discussions. That night, the same group drove by the tractor trailer to be robbed. DE 273:530-38, 600-605). Gamez explained exactly where the cocaine was hidden, showed them possible escape routes and made sure that firearms would be used. (DE 273: 535-543). Again, Mr. Bachiller was not present and was not involved in the discussions.

Later that night, the group met up at Torres' house where Aviles and Pena provided them with police shorts and walkie talkies. (DE 274:807-809). Guevara and Torres had their own firearms. (DE 274:808-812). Guevara and Torres drove in Torres' Car. (DE 274:816-817). At some point, Mr. Bachiller finally made an appearance and got in the back of Torres' car. (DE 274:819). Torres had previously loaded a shotgun in the back of his car, and when Bachiller got in the car, they told him he was sitting on top of a loaded gun. (DE 274:808-812, 829).

The entire group traveled in three cars to the robbery sight. When they got there, Torres and Guevara got out of the car wearing FBI and DEA shirts, opened the door of the tractor trailer and yelled, "police!" Shots rang out and both Guevara and Torres were shot. (DE 274:824-826). Torres subsequently died from a gunshot wound. (DE 274:674). All participants were arrested, and following the arrests, the police recovered a loaded shotgun in the back seat of the car where Bachiller was

seated. (DE 275:963-69). The shotgun was wrapped in a blanket and there was no evidence that Bachiller had ever touched the shotgun.

A federal grand jury charged Mr. Bachiller, along with Reynaldo Aviles, Emilio Gomez, Nelson Pena and Joe Guevara with: one count of conspiracy with intent to distribute five kilograms or more of cocaine (Count One); one count of attempted possession with intent to distribute five kilograms or more of cocaine (Count Two); conspiracy to commit a Hobbs Act robbery (Count Three); attempted Hobbs Act robbery (Count Four); and possession of a firearm by a previously-convicted felon (Count Six). (DE 18). Importantly, and most germane to this proceeding, Count Five of the indictment charged that all five co-defendants, including Mr. Bachiller, "did knowingly carry a firearm during and in relation to a crime of violence and a drug trafficking crime, and did possess a firearm in furtherance of a crime of violence and a drug trafficking crime," in violation of 18 U.S.C. § 924(c)(1)(A). (DE 18). Pena and Guevara entered a plea of guilty. Guevara testified on behalf of the government and was eventually sentenced to a 78-month term of imprisonment. Mr. Bachiller, along with Aviles and Gomez, proceeded to trial and were each convicted on all counts charged against them. (DE 205). All three were sentence to Life. Specifically, the district court sentenced Mr. Bachiller to a Life term of imprisonment as to Counts One and Two, a 240-month term of imprisonment as to Counts Three and Four and a 180-month term of imprisonment as to Count Six, all to be served concurrently. Finally, the court

sentenced Mr. Bachiller to a mandatory consecutive term of 84 months as to Count Five. (DE 290).

Mr. Bachiller's convictions and sentences were affirmed on appeal. *United States v. Bachiller*, No. 07-15372, *unpublished opinion* (11th Cir. Dec. 10, 2008). Mr. Bachiller subsequently filed a 28 U.S.C. § 2255 motion which was denied by the district court. *Bachiller v. United States*, 10-cv-21030-JORDAN (S.D. Fla. Motion Denied Aug. 28, 2012).

Mr. Bachiller filed a subsequent 28 U.S.C. § 2255 which was transferred to the court of appeals. The court of appeals construed the motion as a petition to file a second or successive § 2255 motion and granted the request. Specifically, the district court ruled as follows:

> In sum, because it is possible that Bachiller's § 924(c) sentence on Count 5 was predicated on Hobbs Act conspiracy and/or attempted Hobbs Act robbery, his claim implicates Johnson. *See id.* Accordingly, as to Count 5, we GRANT Bachiller's application for leave to file a successive § 2255 motion challenging his § 924(c) sentence in only Count 5, filed in case No. 16-16557. To the extent Bachiller makes any other claims as to his sentences on Counts 1 through 4 or Count 6, his application filed in Case No. 16-16557 is denied.

(DE 9).

Mr. Bachiller filed a 28 U.S.C. § 2255 motion raising the one claim as to Count Five as allowed by the Court of Appeals. The district court granted a request for the appointment of counsel. Appointed counsel filed an amended 28 U.S.C. § 2255 addressing the one claim as to Count Five as allowed by the Court of Appeals. (DE 18). The government filed an opposition to the motion. (DE 22). The magistrate judge issued report recommending that the motion be denied and that a

certificate of appealability be denied based on the Eleventh Circuit's decision in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc). (DE 26). The district court adopted the magistrate's report and recommendation, denied the motion and denied a certificate of appealability. Mr. Bachiller filed a notice of appeal and requested a certificate of appealability from the Court of Appeals. (DE 28, 29, 30). The Court of Appeals denied the request for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

I. IN ORDER TO HOLD THAT 18 U.S.C. § 924(C)'S RESIDUAL CLAUSE PASSES CONSTITUTIONAL MUSTER, THE ELEVENTH CIRCUIT ABANDONED THE CATEGORICAL APPROACH ESTABLISHED AND MANDATED BY THIS COURT IN *TAYLOR* AND APPLIED MOST RECENTLY IN *DIMAYA*. BECAUSE THE ELEVENTH CIRCUIT'S HOLDING IS IN DIRECT CONFLICT WITH THE ESTABLISHED PRECEDENT OF THIS COURT, REASONABLE JURISTS COULD DEBATE WHETHER 18 U.S.C. § 924(C)'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court established the categorical approach to determine the definition of a violent felony under the Armed Career Criminal Act (ACCA). Specifically, this Court held that courts must look not to whether the defendant's actual conduct in committing the crime was violent, but rather to whether the statute creating the crime described a violent offense. *Id.* at 600. Subsequently, this Court mandated that the categorical approach must be applied to both the ACCA's elements and residual clauses. *See Curtis Johnson v. United States*, 559 U.S. 133, 137 (2010). This Court has also applied the categorical approach to 18 U.S.C. § 16(b). *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004).

Most recently, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court applied the categorical approach to hold that the residual clause of 18 U.S.C. § 16(b) was unconstitutionally vague. That section defined a crime of violence as "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. § 16(b). The residual clauses in § 16(b) and 18 U.S.C. § 924(c)(3) are identically worded.

In *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), an en banc Eleventh Circuit addressed whether, given the identical wording, § 924(c)(3) would also be unconstitutionally vague in light of this Court's opinion in *Dimaya*. The Eleventh Circuit acknowledged the identical wording and noted that, in light of this Court's decision in *Dimaya*, "if § 924(c)(3)'s residual clause is interpreted to require determination of the crime-of-violence issue using what (in court speak) has come to called the 'categorical approach,' the clause is doomed." *Ovalles*, 905 F.3d at 1233.

However, the Eleventh Circuit concluded that it would abandon the categorical approach established by this Court in determining whether § 924(c)(3)'s residual clause was unconstitutionally vague. *Id.* at 1252. Having abandoned the categorical approach, the Eleventh Circuit concluded that § 924(c)(3)'s residual clause survived constitutional scrutiny. *Id.* at 1252, 1253.

The opinion was not unanimous. Four Eleventh Circuit judges dissented from the decision in *Ovalles*. *Id.* at 1277. Those judges concluded that this Court's precedent required the application of the categorical approach. *Id.* at 1287-1294. Those judges would hold § 924(c)(3)'s residual clause to be Unconstitutionally vague. *Id.* at 1299.

Counsel for the petitioner in *Ovalles* has recently filed a petition for a writ of certiorari with this Court. *See Ovalles v. United States*, No. 18-8393 (U.S. March 12,

2019). Mr. Bachiller respectfully requests that this Court hold his petition in abeyance and decide the petition at the same time it determines whether to grant the petition in *Ovalles*.

II. THE ELEVENTH CIRCUIT'S RULE THAT A COA MAY NOT BE GRANTED WHERE BINDING CIRCUIT PRECEDENT FORECLOSES A CLAIM MISAPPLIES THE COA STANDARD ARTICULATED BY THIS COURT IN *MILLER-EL* AND *BUCK*.

To obtain a certificate of appealability ("COA"), a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 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 rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's rule, COAs may not be granted where

binding circuit precedent forecloses a claim. *See Hamilton v. Sec'y Dep't of Corr.*, 796 F.3d 1261 (11th Cir. 2015) ("[R]easonable jurists will follow controlling law."); *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). The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated 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). Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled

to relief, Mr. Smith respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

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,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____
Bernardo Lopez
Assistant Federal Public Defender
Counsel For Petitioner Bachiller

Fort Lauderdale, Florida
April 5, 2019