No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS HERNANDEZ MACHIN,

***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
M. Caroline McCrae
Assistant Federal Public Defender
Attorney for Appellant Hernandez Machin
450 South Australian Avenue, Suite 500
West Palm Beach, FL 33401
561-833-6288
Email: *caroline_mccrae@fd.org*

QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 924(c) criminalizes possessing a firearm during and in relation to a crime of violence. A first conviction carries a five-year mandatory minimum penalty. This petition presents the following question:

Whether the Eleventh Circuit's denial of a certificate of appealability is in conflict with this Court's precedent when reasonable jurists are currently debating whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)?

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

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY:

PETITION FOR WRIT OF CERTIORARI

Petitioner Carlos Hernandez Machin respectfully petitions 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 number 18-11890 in that court on January 16, 2019.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Hernandez Machin's application for a certificate of appealability ("COA") in Appeal No. 18-11890 is provided in Appendix A-1. The district court's order adopting the report and recommendation ("R&R") of the magistrate judge and denying a COA is reproduced in Appendix A-3. The R&R of the magistrate judge recommending denying of the § 2255 petition is reproduced in Appendix A-4. The Judgment and Sentence of the district court in the underlying criminal case is reproduced in Appendix A-5.

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 jurisdiction of the district court was invoked under 28 U.S.C. § 2255. The decision of the court of appeals was entered on January 16, 2019. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

process of law.

18 U.S.C. § 924(c) provides in pertinent part:

> (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;
>
> . . .
>
> (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.

18 U.S.C. § 1951 provides in pertinent part:

> (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 to do so, 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. § 2253(c) provides in pertinent part:

> (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

Mr. Hernandez Machin was convicted after pleading guilty to conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846 (count one); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count three); and possession of 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) (count six). A-4, at 4. The district court sentenced Mr. Hernandez Machin to a term of imprisonment of 211 months: 151 months on counts one and three and a

consecutive term of 60 months on count six, the § 924(c) Count. A-4, at 7.

Mr. Hernandez Machin filed a pro se Motion to Vacate. A-4, at 8. After counsel was appointed, Mr. Hernandez Machin, through counsel, filed a memorandum in support of his motion to vacate. A-4, at 8. The motion was referred to a magistrate judge for an R&R. *See* A-4, at 1.

On January 26, 2018, United States Magistrate Judge White issued his R&R that the district court deny Mr. Hernandez Machin's petition, because the Eleventh Circuit held in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) that *Johnson v. United States*, 135 S. Ct. 2551 (2015) did not invalidate the residual clause in § 924(c). A-4, at 12. The district court adopted the R&R, and denied Mr. Hernandez Machin's petition. A-3. The district court also denied a COA. A-3, at 2.

On May 24, 2018, Mr. Hernandez Machin filed a motion for COA with the Eleventh Circuit, requesting a COA on the issue of whether the district court erred by denying his motion to correct sentence, because in light of Samuel Johnson, he is actually innocent of violating § 924(c). A-2, at 1. In his application, Mr. Hernandez Machin noted that reasonable jurists were actually debating (i) whether *Samuel Johnson* invalidated § 924(c)'s residual clause, as evidenced by the conflicting decisions among district court judges in the Southern District of Florida and a split among the Circuits, and (ii) whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s use-of-force or

elements clause. A-2, at 7-42.[1] Mr. Hernandez Machin also argued that his § 924(c) conviction was unconstitutional, because it charged four separate and distinct offenses. A-2, at 38-39. Mr. Hernandez Machin's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a COA should issue when "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." A-2, at 4-5.

Specifically, Mr. Hernandez Machin pointed to the existing split among the Circuits on the precise issue of whether *Samuel Johnson* invalidates § 924(c)'s residual clause. A-2, at 13-17. Mr. Hernandez Machin also cited a number of decisions from other district courts within the Southern District of Florida and in other districts that have held *Samuel Johnson* invalidated § 924(c)'s residual clause and that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)'s force clause. A-2, at 17-18. Thus, he argued, reasonable jurists were presently debating the precise issues for which he sought a COA and therefore a COA should issue. A-2.

On January 16, 2019, a single Eleventh Circuit judge denied a COA in an order that stated that Mr. Hernandez Machin's claim failed to show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. A-1. The order offers no

[1] Page references to Appendix 2 are based on the number in the bottom middle of the page.

discussion of this Court's decision in *Dimaya* where this Court, compelled by a "straightforward application" of the "straightforward decision" in *Samuel Johnson v. United States*, 576 U.S. , 135 S. Ct. 2551 (2015), declared unconstitutionally vague 18 U.S.C. § 16(b). *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

REASONS FOR GRANTING THE WRIT

I. There is conflict among the circuits over whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague

The circuits are divided on whether § 924(c)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. *Compare United States v. Davis*, 903 F.3d 483 (5th Cir. Sept. 7, 2018), *cert. granted United States v. Davis*, 139 S.Ct. 782 (Jan. 4, 2019) (holding that § 924(c)'s residual clause is unconstitutionally vague), *United States v. Salas,* 889 F.3d 681, 686 (10th Cir. May 4, 2018) (*Dimaya*'s reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B)), *and United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), *with United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (holding that § 924(c)'s residual clause is constitutional), *and United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same). A similar split previously existed regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. *Compare Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), *and Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), *with United States v. Gonzalez-Longoria*, 831 F.3d 670,

677 (5th Cir. 2016) (*en banc*) (holding that § 16(b)'s residual clause is constitutional). However, this Court decided that issue in *Dimaya* and declared 18 U.S.C. § 16(b) to be unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The residual clauses in § 16(b) and § 924(c) are identically worded, and the result in *Dimaya* should resolve the circuit split over § 924(c)(3)(B).

However, even after *Dimaya*, the Eleventh Circuit has continued to entrench itself in its view that *Samuel Johnson* does not affect § 924(c). In *Myrthil v. United States* the Eleventh Circuit held post-*Dimaya* that *Ovalles* remains binding precedent on whether *Samuel Johnson* applies to § 924(c)'s residual clause. *Myrthil v. United States*, 733 F. App'x 480, 482 (11th Cir. May 3, 2018). *Dimaya* abrogates the Eleventh Circuit's contrary precedents in *Ovalles v. United States*, 861 F.3d 1257, 1263-67 (11th Cir. 2017), *vacated and reh'g en banc granted* 889 F.3d 1259 (5/15/2018), and *United States v. St. Hubert*, 883 F.3d 1319, 1327-28 (11th Cir. 2018). Indeed, that precedent was based on the exact same purported distinctions that *Dimaya* has now rejected as immaterial. *See Ovalles*, 861 F.3d at 1263-66. And while that precedent had preemptively sought to distinguish § 16(b) from § 924(c)(3)(B), that was dictum. *See id.* at 1267; *St. Hubert*, 883 F.3d at 1336-37. In any event, the purported distinction was premised on the view that the categorical approach does not fully apply to § 924(c), which is directly contrary to earlier (and thus controlling) circuit precedent. *In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016); *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013).

Based on this Court's treatment of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Hernandez Machin respectfully moves for a COA. The single judge order denying the Motion for COA conflicts with this Court's precedent, and Mr. Hernandez Machin merely asks for the ability to appeal an issue that is currently being debated by reasonable jurists across the country.

The standard for granting a Motion for COA is simply that 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, 120 S. Ct. 1595, 1603-04 (2000) (internal quotation marks omitted).

As this Court has previously 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, 123 S. Ct. 1029, 1039 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court has 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.*, 537 U.S. at 338, 123 S. Ct at 1040. Because Mr. Hernandez

Machin's petition revolves entirely around two issues that reasonable jurists are currently debating, he should be permitted to proceed in his appeal on the merits.

The Eleventh Circuit's single judge order failed to follow the actual mandate of this Court's precedent regarding when a COA should issue. In that order, there is no reasoning or other explanation for why the motion for COA was denied when at all levels of decision making there are conflicting decisions on this issue. Within the same district, there are conflicting decisions on that issue, with at least two other judges in the Southern District of Florida finding that *Samuel Johnson* does invalidate the residual clause of §924(c). *See, Duhart v. United States*, Case No. 16-CV-61499-Marra, 2016 W L 4720424 (S.D. Fla. Sept. 9, 2016) and *Hernandez v. United States*, Case No. 16-CV-22657-Huck, 2016 WL 321545 (S.D. Fla. Sept. 26, 2016). Further, there is currently a Circuit split between the appellate courts on precisely the same issue. *Compare Salas,* 889 F.3d at 686 *and Cardena*, 842 F.3d at 996, *with Taylor*, 814 F.3d at 375–79 *and Hill*, 832 F.3d at 150. Moreover, this Court's decision in *Dimaya* that § 16(b) is unconstitutionally vague, further supports Mr. Hernandez Machin's position that § 924(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists are debating whether § 924(c)'s residual clause is unconstitutionally vague.

Given the differing opinions and decisions at every level of jurisprudence on this issue, it is clear that "reasonable jurists would find debatable" the merits

of the petitioner's underlying claim such that a COA is warranted. *Slack v. McDaniel*, 529 U.S. at 478. Here, the Court of Appeals single judge order failed to follow the requirements of *Slack v. McDaniel* in assessing whether the issue that Mr. Hernandez Machin seeks to appeal is debatable. The Court should therefore grant the petition to issue a COA to ensure that Mr. Hernandez Machin is not serving a sentence that includes a consecutive five year term of imprisonment that is unwarranted.

II. This case presents an important question, because § 924(c)'s residual clause is unconstitutionally vague after *Samuel Johnson* and *Dimaya*.

Section 924(c)'s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Samuel Johnson*, this Court determined that "[t]wo features of the [ACCA's] residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime," because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime" rather than "to real-world facts or statutory elements." *Id*. Second, the ACCA's residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," stating "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558.

Like the ACCA's residual clause, § 924(c)(3)(B) requires an analysis of

an "ordinary case" and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (O'Connor, Sandra Day, Assoc. Justice (Ret.)) (applying categorical approach to § 924(c)(3)(B)). Section 924(c)(3)(B) therefore fails, like the ACCA's residual clause, because it requires "courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the "vagueness of the residual clause rests in large part on its operation under the categorical approach." *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA's enumerated offenses were not necessary to this Court's vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA's residual clause left too much uncertainty about "how much risk it takes for a crime to qualify as a violent felony," but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a

> judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses."

Id. The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as "substantial risk." *Id.* at 2561. After noting that "[a]lmost none" of these laws included "a confusing list of examples," the Court stated:

> More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct . . . . The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime.

Id. Samuel Johnson thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a "crime of violence." For example, the Court acknowledged that a commonsense approach had not provided "a consistent conception of the degree of risk posed by each of the four enumerated crimes"; it therefore doubted it would "fare any better with respect to thousands of unenumerated crimes."

Samuel Johnson, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA's residual clause, is unconstitutionally vague. At a minimum, reasonable jurists may debate the issue.

III. Mr. Hernandez Machin's case presents a good vehicle to resolve the circuit conflict, because his § 924(c) conviction (count 6) is based, in part, on the predicate offense of conspiracy to commit Hobbs Act robbery.

a. Mr. Hernandez Machin's § 924(c) conviction is duplicitous because it charges four separate and distinct offenses.

Mr. Hernandez Machin's indictment charged more than one predicate offense – conspiracy to commit Hobbs Act robbery, attempt to commit Hobbs Act robbery, conspiracy to possess with intent to distribute five kilograms or more of cocaine, and attempt to possess with intent to distribute five kilograms or more of cocaine – in support of the § 924(c) offense. Under similar circumstances, *Gomez* held, the jury could have convicted on the § 924(c) offense "without reaching unanimous agreement on during which crime it was that [the defendant] possessed the firearm." *In re Gomez*, 830 F.3d at 1227. And the "lack of specificity" in the verdict had Sixth Amendment significance under *Alleyene v. United States*, 133 S. Ct. 2151, 2155 (2013) because the jury's undifferentiated findings increased a minimum mandatory. *Gomez*, 830 F.3d at 1228-1229.

Because it is impossible to know the true basis for the Count 6 conviction, and *Alleyne* and the Sixth Amendment preclude any further judicial fact-finding on that point, the Court must presume Count 6 rested upon the least culpable crime charged – conspiracy to commit Hobbs Act robbery. Any other result would be tantamount to the type of judicial fact-finding prohibited by *Alleyne*. 830 F.3d at 1227-1228.

> b. Reasonable jurists could debate whether conspiracy to commit Hobbs Act robbery, which may be committed by a verbal or written agreement to commit Hobbs Act robbery, has as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). Pursuant to this categorical approach, if conspiracy to commit Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause. The term "physical force" under the elements clause "connotes a substantial degree of force." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). It means "violent force . . . force that is capable of causing physical pain or injury to another person." *Id.* Conspiracy to commit Hobbs Act robbery may be committed without the use of violent "physical force." Therefore, it does not qualify as a "crime of violence"

under § 924(c)'s force 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); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) (quoting *United States v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003)). 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, under the least-culpable act rule, this Court must presume that Mr. Hernandez Machin's conspiracy offense was committed by a verbal or written agreement to commit Hobbs Act robbery. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *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). Committing the offense in this way 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 agreed. *See, e.g.*, *United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. 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."); *Duhart v. United States*, No. 16-CV-61499-Marra, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) ("[C]onspiracy to commit Hobbs Act robbery . . . cannot be a 'crime of violence' under the elements clause of § 924(c)."); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016) ("[C]onspiracy to commit Hobbs Act robbery is not a crime of violence as defined by the force clause."); *United States v. Ledbetter*, No. 2:14-CR-127, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("[T]his 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*, No. CR 2:99-00433 WBS, 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.").

In sum, it appears that several courts that have addressed the issue after *Samuel Johnson* have concluded that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s force clause. At a minimum, reasonable jurists can debate the issue.

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: *s/ M. Caroline McCrae*
M. Caroline McCrae
Assistant Federal Public Defender
Counsel for Petitioner
450 South Australian Avenue, Suite 500
West Palm Beach, Florida 33401
Telephone: (561) 833-6288

West Palm Beach,
Florida April 16, 2019