NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

LEON ESCOURSE-WESTBROOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), this Court held the "crime of violence" definition in 18 U.S.C. § 16(b) void for vagueness for the same reasons it held 18 U.S.C. § 924(e)(2)(B)(ii) void for vagueness in *Johnson v. United States*, 135 S.Ct. 2551 (2015). This was a "straightforward application" of *Johnson*, the Court explained, since – just like the ACCA's residual clause – § 16(b)'s residual clause required the court to identify a crime's "ordinary case" in order to measure the crime's risk under the categorical approach, and also employed an "ill-defined risk threshold," which together conspired to make § 16(b) unconstitutionally vague and void just like § 924(e)(2)(B)(ii). 138 S.Ct. 1215-16, 1223 (citing *Johnson*, 135 S. Ct. at 2557).

In *United States v. Davis*, 139 S.Ct. 782 (U.S. Jan. 4, 2019) (No. 18-431), the Court will resolve whether the "crime of violence" definition 18 U.S.C. § 924(c)(3)(B), a provision worded identically to § 16(b), is unconstitutionally vague for the above reasons, or whether the Court can avoid declaring that provision unconstitutionally vague by reinterpreting § 924(c)(3)(B) to permit a "conduct-based" approach instead of the categorical approach. However, since *Davis* is a direct appeal case, it will not likely resolve the following questions which will be crucial after *Davis* for cases on collateral review:

A. If *Davis* holds § 924(c)(3)(B) is unconstitutionally vague, is that ruling retroactively applicable to cases on collateral review?

B. If *Davis* reinterprets § 924(c)(3)(B) to require a "conduct-based" approach because the statute is unconstitutionally vague under the categorical approach, does a § 2255 petition challenging a conviction under the unconstitutional categorical approach "contain . . . a new rule of constitutional law" as required by § 2255(h)(2)?

2. Did the Eleventh Circuit err under *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003) and *Buck v. Davis*, 137 S.Ct. 759, 773-774 (2017) in denying Petitioner a certificate of appealability based implicitly upon adverse circuit precedent, when the above issues are nonetheless debatable among reasonable jurists?

INTERESTED PARTIES

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

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Leon Escourse-Westbrook ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12040 in that court on January 7, 2019.

OPINION BELOW

The Eleventh Circuit's denial of Mr. Escourse's application for a COA in Appeal No. 17-12040 is provided in the Appendix at A-1. The district court's order declining to adopt the recommendations of the magistrate judge and denying a certificate of appealability is reproduced in the Appendix at A-2. The report and recommendation of the magistrate judge recommending granting of the § 2255 petition is reproduced in the Appendix at A-3.

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 7, 2019. On March 27, 2019, Justice Thomas extended the time to file this petition until May 7, 2019. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

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

The term "crime of violence" means –

> **(a)** an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> **(b)** any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; . . .
>
> **(c)(1)(C)** In the case of a second or subsequent conviction under this subsection, the person shall –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 25 years; and
> >
> > (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(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. . . .

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, and fined under this title or both . . .

18 U.S.C. § 1951. Interference with commerce by threats or violence.

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

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his family or anyone in his company at the time of the taking or obtaining.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review . . .

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain – . . .

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2253. Appeal

> (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

Mr. Escourse pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count one), and brandishing a firearm during a crime of violence, in violation of § 924(c)(1)(A)(ii) (count three). The alleged "crime of violence" for count 3 was the Hobbs Act conspiracy in count 1. The district court sentenced Mr. Escourse to a term of imprisonment of 114 months: 30 months on the count of conspiracy to commit Hobbs act robbery and a consecutive term of 84 months on Count 3, the § 924(c) Count. He did not appeal his conviction or sentence. On June 24, 2016, Mr. Escourse filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 18 U.S.C. § 2255. The motion was referred to a magistrate judge for a report and recommendation.

On November 14, 2016, United States Magistrate Judge McAliley issued her Report and Recommendation that the district court *grant* Mr. Escourse's petition, finding that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) and that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague after *Johnson*.

The district court did not adopt the Report and Recommendation, but rather denied Mr. Escourse's petition after finding that *Johnson* does not render Section 924(c)'s residual unconstitutionally vague, which was in direct opposition to the findings in the Report and Recommendation. Moreover, even after acknowledging that "[t]he Court of Appeals for the Eleventh Circuit has yet to decide the precise question presently before the Court, that is, whether the residual clause of 924(c) is

unconstitutionally vague," the district court denied Mr. Escourse a certificate of appealability. The district court's denial of the COA was without explanation and occurred after declining to adopt the recommendations of the magistrate judge that the petition should be granted.

On May 12, 2017, Mr. Escourse filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) conviction is unconstitutional in light of *Samuel Johnson*. In his application, Mr. Escourse noted that reasonable jurists were actually debating (i) whether *Samuel Johnson* invalidated § 924(c)'s residual clause, as evidenced by the conflicting decisions of the magistrate judge and district court judge in his case; as well as 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. Mr. Escourse's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a certificate of appealabilty 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."

Specifically, Mr. Escourse pointed to an existing split among the Circuits on the precise issue of whether *Samuel Johnson* invalidates § 924(c)'s residual clause.[1]

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1 After Mr. Escourse filed his first motion for a COA, the Eleventh Circuit decided

Mr. Escourse 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. Thus, he argued, reasonable jurists were presently debating the precise issues for which he sought the COA and therefore a COA should issue.

On July 18, 2017, a single Eleventh Circuit judge denied a COA in an order that stated in summary fashion that Mr. Escourse had failed to make a substantial showing of denial of a constitutional right. Mr. Escourse filed a petition for writ of certiorari with this Court arguing that *Johnson* invalidates § 924(c)'s residual clause and that reasonable jurists could at least debate the issue, therefore, the Eleventh Circuit erred in denying the COA. This Court granted, vacated and remanded the case for further consideration in light of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). On remand, the Eleventh Circuit once again summarily denied the motion for certificate of appealability with no analysis and with no explanation other than "Escourse has not made a substantial showing of the denial of a constitutional right."

Ovalles v. United States, 861 F.3d 1257 (11th Cir. 2017), holding that the rule announced in *Samuel Johnson* does not apply to § 924(c)'s residual clause. After *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), the Eleventh Circuit vacated the opinion in *Ovalles I*, granted rehearing en banc, and again concluded that § 924(c)(3)(B) was not void for vagueness. *Ovalles v. United States*, 905 F.3d 1231(11th Cir. Oct. 4, 2018) (en banc) (*Ovalles II*). There remains a Circuit split on this issue.

REASON FOR GRANTING THE WRIT

I. *Davis* will be dispositive of whether Petitioner was unconstitutionally convicted of Count 3 under § 924(c)(3)(B).

In *United States v. Davis*, 139 S.Ct. 782 (2019), this Court will resolve whether *Johnson* and *Dimaya* have rendered the residual clause in § 924(c)(3)(B) unconstitutionally vague. There is no dispute between the parties in *Davis* that § 924(c)(3)(B) is unconstitutionally vague under the ordinary case/categorical approach, or that the Respondents in *Davis* were convicted under that approach. Nonetheless, the government has asked the Court to apply the doctrine of constitutional avoidance, and hold, as the en banc Eleventh Circuit did in *Ovalles II*, that a vagueness finding can be avoided by jettisoning the categorical approach, and adopting a "conduct-based" approach to § 924(c)(3)(B) in its stead. At the *Davis* oral argument, counsel for the government took the position that any error in convicting the Respondents under the unconstitutional categorical approach "could be found harmless," but that if the Court did not agree, the case could be sent "back to the court of appeals and possibly there could be a retrial." Transcript of Oral Argument, *United States v. Davis*, 2019 WL 1672439, at *7 (U.S. Apr. 17, 2019) (No. 18-431).

Notably, the predicate for Petitioner's Count 3 conviction here is the same predicate as that at issue in *Davis*: a conspiracy to commit a Hobbs Act robbery. And indeed, the government has conceded in *Davis* that such a predicate does *not* independently qualify as a "crime of violence" within the elements clause of §

924(c)(3)(A). *See* Gov't Br., *United States v. Davis*, 2019 WL 629976, at *50 (Feb. 12, 2019) (No. 18-431) ("A Hobbs Act conspiracy . . . does not 'have as an element the use, attempted use, or threatened use of physical force against the person or property of another,' so as to qualify as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A).").[2] Since there is no dispute that conspiracy to commit a Hobbs Act robbery is *not* a "crime of violence" under § 924(c)(3)(A)'s elements clause, Petitioner could only have been convicted under § 924(c)(3)(B)'s residual clause. And therefore, whether the Court agrees with the Respondents in *Davis* that § 924(c)(3)(B) is void for vagueness, or it avoids that conclusion by jettisoning the categorical approach and adopting a conduct-based approach in its stead – *Davis* should confirm that Petitioner was unconstitutionally convicted of the Count 3 offense under the now-clearly-unconstitutional ordinary case, categorical approach to § 924(c)(3)(B).

Nonetheless, since *Davis* is a direct appeal case, it will not likely answer the crucial question for § 2255 petitions challenging § 924(c) convictions after *Johnson*: whether a *Davis* ruling holding § 924(c) unconstitutionally vague under *Johnson* is

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2 The government has made the same concession multiple times before the courts of appeals as well. *See United States v. Simms*, 914 F.3d 299, 233 (4th Cir. 2019) (en banc) (noting government's concession); *Lewis*, 907 F.3d 891, 895 (5th Cir. 2018) (same); *United States v. Douglas*, 907 F.3d 1, 6 n.7 (1st Cir. 2018) (quoting government's explicit assertion that "'[T]he Department of Justice's position is that a conspiracy offense does not have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'"), *petition for cert. filed*, (U.S. Jan. 9, 2019) (No. 18-7331); *United States v. Eshetu*, 898 F.3d 36, 38 n.2 (D.C. Cir. 2018) (*per curiam*) (noting government's concession that only the residual clause in § 924(c)(3)(B) is at issue), *reh'g en banc denied* (Feb. 19, 2019).

retroactively applicable to cases on collateral review. That question is directly presented here.

II. If the Court declares the residual clause in § 924(c)(3)(B) unconstitutionally vague in *Davis*, it should either summarily reverse this case under *Welch*, or use this case to "make" *Davis* retroactive to cases on collateral review.

If the Court holds in *Davis* that invalidating § 924(c)(3)(B) as unconstitutionally vague is no more than a "straightforward" application of *Dimaya*, which in turn was a "straightforward" application of *Johnson*, *see Dimaya*, 138 S.Ct. 1215-16, 1223 (citing *Johnson*, 135 S.Ct. at 2557), resolution of this case would also be "straightforward." The Court should, in that circumstance, summarily reverse this case under *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016).

It is *only* if the Court finds § 924(c)(3)(B) unconstitutionally vague for reasons different than those in *Johnson* and *Dimaya*, that the Court would need to determine if *Davis* then sets forth a "new rule," and whether that "new rule" is retroactive to cases on collateral review. While the "new rule" question might require further briefing, the retroactivity question would be easily answered by *Welch*. Indeed, any arguably "new" vagueness rule *Davis* might announce would be substantive, and retroactive, for the same reasons *Johnson* was held retroactive in *Welch*. *See id.* at 1264-65 (*Johnson* announced a substantive rule with retroactive effect, because it "alters the range of conduct or the class of persons that the law punishes;" citing *Schiro v. Summerlin*, 542 U.S. 348, 353 (2004)).

The instant case would be an ideal vehicle to follow *Davis*, and quickly resolve these issues – as the Court did in *Welch* following *Johnson* – since there would be only 1 year to file collateral proceedings if, in fact, the Court were to hold that the right confirmed by *Davis* is "new." *See* 28 U.S.C. § 2255(f)(3). Briefing could be expedited and the case argued at the beginning of the new term, and a decision could issue well in advance of the running of the 1-year statute of limitations. Defendants who did not challenge their § 924(c) convictions within a year of *Johnson* could file timely petitions within a year of *Davis*. Defendants with collateral proceedings still in the pipeline could supplement those proceedings to address the impact of *Davis*. And if the Court were to "make" *Davis* retroactive by its decision in this case, that would allow defendants in a successive posture who did not previously file or were previously denied authorization under *Ovalles II*, to timely file within 1-year of *Davis*. Notably, while the Eleventh Circuit has refused to authorize any successive § 2255 motions after *Ovalles II*, *see In re Garrett*, 908 F.3d 686, 688-89 (11th Cir. 2018), it has acknowledged that defendants in a successive posture who were previously denied authorization can refile if "controlling authority has since made a contrary decision of law applicable to [the] issue." *In re Baptiste*, 828 F.3d 1337, 1341 (11th Cir. 2016).

III. If the Court adopts a conduct-based approach in *Davis*, the Court should hold in this case that a petition challenging a conviction under the concededly-unconstitutional categorical approach "contains a new rule of constitutional law" sufficient for 28 U.S.C. § 2255(h)(2).

If the Court in *Davis* jettisons the categorical approach as the Eleventh Circuit did in *Ovalles II*, and adopts a "conduct-based" approach to § 924(c)(3)(B) because that provision is unconstitutionally vague under the categorical approach, the Court will need to determine whether Petitioner's § 2255 motion challenging his conviction under the now-admittedly unconstitutional categorical approach to § 924(c)(3)(B), "contains . . . a new rule of constitutional law" as required by 28 U.S.C. § 2255(h). And it should hold that it does because the *Ovalles II* majority ***only*** adopted a new interpretation of § 924(c)(3)(B) because that provision was unconstitutional under the ordinary case/categorical approach which had applied under binding Supreme Court and Circuit precedent until that time. A claim challenging a prior conviction under an approach which is now-concededly-unconstitutional under *Johnson* easily "contain[s] . . . a new rule of constitutional law."

To suggest otherwise is inconsistent with this Court's precedents recognizing that the Due Process Clause does not permit a court to uphold a conviction on a different theory from that which the defendant was charged and tried, *see Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *Rabe v. Washington*, 405 U.S. 313, 315 (1972), particularly where the Court adopts a narrowing construction of a statute to avoid unconstitutionality. *See Ashton v. Kentucky*, 384 U.S. 195, 198 (1966);

Shuttlesworth v. Birmingham, 394 U.S. 147, 155 (1969). And indeed, notice and *ex post facto* principles would preclude the Eleventh Circuit from punishing Petitioner post-*Davis* for pre-ruling conduct that did not violate § 924(c) at the time of commission, *see Bouie v. City of Columbia*, 378 U.S. 347, 350, 353-54 (1964); *Marks v. United States*, 430 U.S. 188, 195-97 (1977).

Since the Fifth Amendment indictment clause would likewise preclude the district court from retrying Petitioner after *Davis* on a different "crime of violence" theory than that presented in the grand jury's indictment, *See Stirone v. United States*, 361 U.S. 212, 217 (1960), Petitioner's Count 3 conviction should be vacated and he should be resentenced.

IV. Under this Court's precedents, the Eleventh Circuit applied an erroneous COA standard.

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

Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005). Although the Eleventh Circuit did not specifically cite *Hamilton* in denying Mr. Escourse's motion for COA, it implicitly relied on this erroneous view.

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

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

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

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

Reasonable jurists continue to debate the issue of whether *Johnson* and *Dimaya* require the constitutional invalidation of § 924(c)(3)(B). *See United States v. Davis*, 903 F.3d 483 (5th Cir.), *cert. granted*, 139 S. Ct. 782 (2019). Mr. Escourse has met the standard for granting a motion for COA which is simply that a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2) requires a showing *only* that reasonable jurists could debate whether "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) (citation omitted) – not that Petitioner would win on the merits.

Upon this Court's remand to the Eleventh Circuit for reconsideration of the denial of a COA after *Dimaya*, the Eleventh Circuit failed to follow the actual mandate of this Court's precedent regarding when a COA should issue. Instead, the Eleventh Circuit's single judge order provided no reasoning or explanation for denial of the motion for COA and failed to follow the requirements of *Miller-El v. Cockrell and Buck v. Davis* in assessing whether the issue that Mr. Escourse seeks to appeal is debatable.

CONCLUSION

If the Court rules in *Davis* that § 924(c)(3)(B) is unconstitutionally vague, the Court should either summarily reverse this case under *Welch*, or use this case as a vehicle to "make" *Davis* retroactively applicable to cases on collateral review. If, however, the Court adopts a conduct-based approach due to the fact that *Johnson* and *Dimaya* have rendered § 924(c)(3)(B) unconstitutionally vague under the categorical approach, it should use this case as a vehicle to determine whether a petition challenging a § 924(c)(3)(B) conviction under the categorical approach "contains . . . a new rule of constitutional law" sufficient for 28 U.S.C. § 2255(h)(2). Alternatively, the Court should grant certiorari on the COA issue.

Respectfully submitted,

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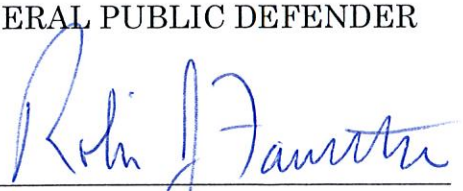
By: 

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