DOCKET NO. 16-13508-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANNY HERRERA,

Petitioner – Appellant,

v.

UNITED STATES OF AMERICA,

Respondents – Appellee.

On Appeal from the United States District Court for the
Southern District of Florida, Civil Action No. 0:16-cv-60929-WPD

PETITIONER-APPELLANT'S BRIEF

Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 14th St. NE, Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
spalmer@caplancobb.com

Counsel for Petitioner-Appellant

February 13, 2017

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Petitioner-Appellant certifies that the following have an interest in the outcome of this appeal:

Bhagwandeen, Sharmila D.

Brewerton-Palmer, Sarah A.

Brown, Bruce O.

Caplan Cobb LLP

Caplan, Michael A.

Dimitrouleas, Hon. William P.

Feiler, Jeffrey Evan

Feldman, Andrew S.

Ferrer, Wifredo A.

Gonzalez, Adrian

Herrera, Danny

Katzef, Mark Clifford

Navarro, Neil

Powell, Roger W.

Salyer, Kathleen M.

Smachetti, Emily M.

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Smith II, Jan Christopher

Snow, Hon. Lurana S.

Tomas, Ayuban Antonio

Valle, Hon. Alicia O.

The undersigned counsel of record certifies that this is a full and complete list of all parties in this action. Upon information and belief, no party listed herein has a parent corporation or stock, nor is there a parent corporation or publicly-held corporation involved in this action.

STATEMENT REGARDING ORAL ARGUMENT

This Court will be significantly aided by oral argument. The issue in this case—whether the Supreme Court of the United States's decision in *Johnson v. United States* invalidates the residual clause of 18 U.S.C. § 924(c)(3)—is a complicated question of first impression and is likely to recur frequently in the cases before this Court. In addition, this question is the subject of a split in authority among the circuit courts of appeal. Given the importance and complexity of the issue, Petitioner-Appellant respectfully requests that this Court grant oral argument.

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal in the Eleventh Circuit Court of Appeals is proper under 28 U.S.C. § 2253(a). The district court had proper jurisdiction over this matter under 28 U.S.C. § 2255. The district court issued a final order in this case on May 31, 2016. The Petitioner-Appellant filed a notice of appeal on June 13, 2016.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that Petitioner-Appellant's conviction under 18 U.S.C. § 924(c) was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

STATEMENT OF THE CASE

Introduction

This appeal arises from the dismissal of Danny Herrera's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2255 in the United States District Court for the Southern District of Florida. Mr. Herrera is currently incarcerated and is serving consecutive sentences of 41 months' and 60 months' imprisonment. Consistent with the Certificate of Appealability granted by this Court, Mr. Herrera advances the following ground for relief: that the residual clause found in 18 U.S.C. § 924(c)(3)(B) is unconstitutional under *Johnson v. United States*, and therefore Mr. Herrera's sentence for his § 924(c)(1) conviction, which rests on the residual clause, was imposed in violation of the Constitution.

Background

On November 6, 2014, Petitioner-Appellant Danny Herrera was indicted in the Southern District of Florida on six counts. Case No. 14-cr-60277, Doc. 27. On January 16, 2015, pursuant to a written plea agreement and factual proffer, Mr. Herrera pled guilty to two counts: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(b)(1) & (b)(3) (Count 1); and carrying a firearm in relation to a crime of violence or drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count 5). Case No. 14-cr-60277, Docs. 63 & 64. In exchange for Mr.

Herrera's plea, the government agreed to drop the remaining charges. Case No. 14-cr-60277, Doc. 63 ¶ 2.

According to the plea agreement, the violation of § 924(c)(1) was based on Mr. Herrera's possession of a firearm during and in relation to both the crime of violence charged in Count 1 and the drug trafficking crime charged in Counts 2 and 3 of the indictment. However, at the plea colloquy, when describing the nature of the offenses as required by Rule 11 of the Federal Rules of Criminal Procedure, the district court referenced only the crime of violence charged in Count 1 as a predicate offense for the violation of 18 U.S.C. § 924(c) charged in Count 5. For example, when taking Mr. Herrera's plea, the Court asked:

> THE COURT: And is this what you want to do, plead guilty to Counts 1 and 5, where the grand jury charges that from on or about October the 10th of last year, through October 22nd of last year, in Broward County, in the Southern District of Florida and elsewhere, that you, Mr. Navarro, Mr. Herrera, and Mr. Gonzalez, did knowingly and willfully combine, conspire, confederate, and agree with each other to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce by means of robbery, in that you did unlawfully plan to take personal property from the person and the presence of an individual, against their will, by means of actual and threatened force, violence, and fear of injury to that individual. And that in Count 5, they charge on October the 22nd, that you three did knowingly, ***during and in relation to a crime of violence***, carry a firearm and possess a firearm in furtherance of a crime of violence, that is Count 1. . . .
>
> DEFENDANT HERRERA: Yes, sir.

Case No. 14-cr-60277, Doc. 120 at 55-56 (emphasis added).

The Court also described exactly what the prosecution would have to prove in order to sustain Count 5 against Mr. Herrera: "As to Count 5, the government would have had to have proven that you committed the ***crime of violence*** charged in Count 1, that you used or possessed a firearm, and that you used the firearm in furtherance of ***a crime of violence***." *Id.* at 72 (emphasis added). At the end of the hearing, the Court found that "the facts which the government is prepared to prove are sufficient to constitute the crimes of conspiracy to commit Hobbs Act robbery and use of a firearm ***during a crime of violence*** as to Mr. Navarro, Mr. Gonzalez, and Mr. Herrera . . . ." *Id.* at 74-75 (emphasis added). The district court did not find that there was sufficient factual support to base Count 5 on a drug trafficking crime. Indeed, the court never even mentioned a drug trafficking crime in relation to Count 5.

The district court entered a final judgment on March 24, 2015, convicting Mr. Herrera of Counts 1 and 5 and sentencing him to 41 months' imprisonment for Count 1 and 60 months' imprisonment for Count 5, to be served consecutively. Case No. 14-cr-60277, Doc. 83 at 2.

Mr. Herrera then filed a notice of appeal *pro se*, and the district court appointed counsel to represent him on appeal. Case No. 14-cr-60277, Docs. 94 & 107. Counsel filed a brief with this Court but did not raise a claim under *Johnson*

v. United States or challenge the sentencing calculations; Mr. Herrera's plea had included a waiver of his right to appeal his sentence. Case. No. 14-cr-60277, Doc. 63 ¶ 9. Mr. Herrera's appellate counsel then moved this Court to dismiss his appeal without prejudice, and this Court granted the dismissal on November 17, 2015.

On April 19, 2016, Mr. Herrera filed a motion in the district court to vacate his conviction pursuant to 28 U.S.C. § 2255, arguing that he was wrongly convicted under 18 U.S.C. § 924(c)(1) because § 924(c)(3)(B) is no longer valid in light of *Johnson v. United States*. Case No. 16-cv-60920, Doc. 1. The district court denied Mr. Herrera's motion and then issued an amended order on May 31. In its order, the district court based its denial on three alternate conclusions: (1) Mr. Herrera's conviction was based in part on a drug trafficking crime and was therefore unaffected by *Johnson*; (2) Mr. Herrera's conviction was also based on conspiracy to commit Hobbs Act robbery, which is a crime of violence under § 924(c)(3)(A) and is therefore unaffected by *Johnson*; and (3) even if Mr. Herrera's conviction implicated § 924(c)(3)(B), that subsection is unaffected by *Johnson*. Case No. 16-cv-60920, Doc. 9 at 2.

On June 13, Mr. Herrera filed a *pro se* Application for a Certificate of Appealability with this Court. On November 30, 2016, this Court granted Mr.

Herrera's Application as to one issue and appointed the undersigned counsel to represent Mr. Herrera during this appeal.

SUMMARY OF THE ARGUMENT

In *Johnson v. United States*, the Supreme Court struck down the residual clause of the Armed Career Criminal Act (the "ACCA") because two of its features "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. As the government warned in its briefing to the Supreme Court in *Johnson*, a ruling striking down the residual clause would not just impact the ACCA. At least two other criminal statutes, 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B), require courts to use the same legal analysis as the ACCA's residual clause and are therefore "equally susceptible" to a vagueness challenge. Supp. Br. for the United States at 22-23, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120) (hereinafter, "Gov't *Johnson* Br."). As the government correctly noted, the residual clause of § 924(c)(3)(B)—upon which Mr. Herrera's conviction rests—suffers from the same two infirmities that doomed the ACCA's residual clause in *Johnson*: namely, "indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify" as a crime of violence. *Johnson*, 135 S. Ct. at 2558. Like the ACCA, § 924(c)(3) requires courts first to imagine an "idealized ordinary case of the crime" and then to determine whether a certain level of risk is inherent in that ordinary case. *Id.* at

2557-58. According to the Supreme Court, these two aspects of indeterminacy—found in both statutes—combine to create more ambiguity and arbitrariness than the Due Process Clause can tolerate. Accordingly, the district court erred in concluding that *Johnson* does not impact § 924(c)(3)(B), and the subsection is unconstitutionally vague.

Mr. Herrera's conviction under § 924(c)(1) rested solely on that statute's residual clause. The district court's alternative conclusions that Mr. Herrera's conviction was supported by a drug-trafficking crime under § 924(c)(2) or that conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A) are in error. Mr. Herrera was convicted of violating § 924(c)(1) based on carrying a firearm *only* in relation to conspiracy to commit Hobbs Act robbery—not in relation to a drug trafficking crime. And because it does not have the use of force as an element, conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence"— and thus as a predicate crime for a § 924(c)(1) conviction—only under the residual clause of § 924(c)(3). Mr. Herrera's conviction therefore was solely based on the unconstitutional residual clause, and his sentence was imposed in violation of the Constitution.

Finally, Mr. Herrera has not procedurally defaulted this claim. In light of *Johnson*, Mr. Herrera's conduct does not support a conviction under § 924(c)(1).

He is therefore innocent of the crime of conviction, and procedural default does not apply.

ARGUMENT AND CITATIONS OF AUTHORITY

Standard of Review

In reviewing a district court's denial of a motion made under § 2255, this Court examines legal issues *de novo* and factual findings for clear error. *Jones v. United States*, 224 F.3d 1251, 1256 (11th Cir. 2000). Review is limited to the issues raised in the Certificate of Appealability. *Rhode v. United States*, 583 F.3d 1289, 1290-91 (11th Cir. 2009). This Court granted Mr. Herrera's request for a Certificate as to one issue: Whether the district court erred in concluding that Mr. Herrera's conviction under 18 U.S.C. § 924(c) was unaffected by the Supreme Court's ruling in *Johnson v. United States*.

I. The Reasoning of *Johnson* Renders 18 U.S.C. § 924(c)(3)(B) Unconstitutionally Vague.

This case requires the Court to determine whether the reasoning of *Johnson v. United States* applies to the analogous residual clause of § 924(c)(3)(B). Most circuit courts of appeal to consider this issue have correctly determined that the analysis in *Johnson* necessarily invalidates § 924(c)(3)(B) and the identically-

worded 18 U.S.C. § 16(b).[1] The Supreme Court of the United States has granted *certiorari* to consider whether *Johnson* invalidates § 16(b). *Lynch v. Dimaya,* 137 S. Ct. 31 (2016).[2]

In *Johnson*, the Supreme Court considered the residual clause of the ACCA. The ACCA defined a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year . . . that—

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[1] In light of *Johnson*, the Third, Seventh, Ninth, and Tenth Circuits have held that either 18 U.S.C. § 924(c)(3)(B) or 18 U.S.C. § 16(b) (which contains identical language) is invalid. *Baptiste v. Attorney General*, 841 F.3d 601, 615-21 (3rd Cir. 2016); *United States v. Cardena*, 842 F.3d 959, 995-96 (7th Cir. 2016); *Golicov v. Lynch*, 837 F.3d 1065, 1072-73 (10th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 721-23 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016).

The Second, Fifth, and Eighth Circuits have held that *Johnson* does not apply either to § 924(c)(3)(B) or § 16(b). *United States v. Hill*, 832 F.3d 135, 146-150 (2nd Cir. 2016); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 676-77 (5th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698-700 (8th Cir. 2016).

The Sixth Circuit has held that § 16(b) is invalid in light of *Johnson*, *Shuti v. Lynch*, 828 F.3d 440, 445-48 (6th Cir. 2016), but declined to invalidate the identical language in § 924, *United States v. Taylor*, 814 F.3d 340, 376-379 (6th Cir. 2016).

[2] Many courts, including this Court, consider § 924(c)(3) and § 16(b) to be equivalent statutes. *See United States v. McGuire*, 706 F.3d 1333, 1337-38 (11th Cir. 2013) (applying *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which concerned §16(b), to § 924(c)(3)); *see also Cardena*, 842 F.3d at 996 ("The clause invalidated in *Vivas–Ceja* [§ 16(b)] is the same residual clause contained in the provision at issue, 18 U.S.C. § 924(c)(3)(B).").

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves the use of explosive, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). Subsection (i) of this provision is known as the elements clause, and subsection (ii) is known as the residual clause.

The Supreme Court struck down § 924(e)(2)(B)(ii) because "[t]wo features of the residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, under the categorical approach, the residual clause "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,'" rather than the real-world conduct of the defendant or the elements of the crime at issue. *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). Second, the residual clause asks courts to then discern whether that ordinary case carries a "serious potential risk" of physical injury. 18 U.S.C. § 924(e)(2)(B). "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558.

In the same statutory section as the ACCA, 18 U.S.C. § 924(c)(1) criminalizes using or carrying a firearm "during and in relation to a crime of

violence or drug trafficking crime" or possessing a firearm in furtherance of such a crime. Similar to the ACCA's definition of a violent felony, § 924(c)(3) defines a "crime of violence" as a felony that:

> (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. § 924(c)(3). As with the ACCA, subsection (A) is known as the elements clause, and subsection (B) is known as the residual clause. *In re Chance*, 831 F.3d 1335, 1337, 1337 n.2 (11th Cir. 2016).

Although there are minor textual differences between the two statutes, the two definitions are functionally equivalent and operate in the same manner. *See, e.g.*, *Cardena*, 842 F.3d at 996 ("Subsection (B) is virtually indistinguishable from the clause in *Johnson* that was found to be unconstitutionally vague."). The residual clauses of both the ACCA and § 924(c)(3) require courts to determine whether, in the ordinary case, a crime inherently involves some level of risk that injury will occur or force will be used, even though injury or the use of force is not an element of the crime. Both statutes involve the use of the categorical approach or modified categorical approach, and the application of both statutes has frustrated the lower courts. *See*, *e.g.*, *United States v. Barnett*, 426 F. Supp. 2d 898, 910 n.2

(N.D. Iowa 2006) (describing circuit split as to whether possession of a sawed-off shotgun constitutes a "crime of violence"). This Court considers the analysis under the two statutes equivalent and has relied on Supreme Court precedent regarding the ACCA's residual clause when applying § 924(c)(3)(B). *See, e.g.*, *McGuire*, 706 F.3d at 1338 (citing *James*, 550 U.S. at 203); *see also United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2005) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993) (citing *Taylor*, 495 U.S. at 600-02).

Most important, § 924(c)(3)(B) shares the same two aspects of indeterminacy that doomed the ACCA's residual clause. Indeed, the government acknowledged as much in its briefing to the Supreme Court in *Johnson*. In a section discussing statutes similar to the ACCA, the government highlighted 18 U.S.C. § 16(b) and § 924(c)(3)(B), which both use the same statutory language to define a crime of violence. The government noted that § 16(b), and by extension § 924(c)(3)(B), was "equally susceptible to [the *Johnson*] petitioner's central objection to the residual clause" because it "requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." Gov't

Johnson Br. at 22-23.[3] The government correctly predicted the wide-reaching impact of a decision striking down the ACCA's residual clause. The reasoning of *Johnson* clearly requires that other statutory provisions sharing the same peculiar double-layer of indeterminacy are unconstitutionally vague, as well. As discussed more fully below, § 924(c)(3)(B) is such a provision and therefore must be struck down under *Johnson*.

A. 18 U.S.C. § 924(c)(3)(B) Is Equally Unclear About How to Define the "Ordinary Case."

The *Johnson* Court found that the ACCA's residual clause provided no guidance on this fundamental question: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" 135 S. Ct. at 2557 (internal quotation marks omitted). The Court used *James v. United States* as an example of how reasonable jurists could thoroughly disagree on the contours of the "ordinary case." The majority opinion in *James* determined that, in an ordinary case of attempted burglary, "'[a]n armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner may give chase, and a violent encounter may ensue.'"

[3] Similarly, during oral argument in *Lynch v. Dimaya*, Justice Kagan noted: "[T]he essential problem that the [*Johnson*] court thought existed was the use of the ordinary case analysis. . . . [T]hat is still the same under this statute [§ 16(b)]." Transc. of Oral Arg. at 12-13, No. 15-1498 (U.S. Jan. 17, 2017).

Id. at 2558 (quoting *James*, 550 U.S. at 211) (internal alterations omitted). The dissent disagreed and determined that the ordinary case "'is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away.'" *Id.* (quoting *James*, 550 U.S. at 226 (SCALIA, J., dissenting)). In light of such disagreements, the *Johnson* Court observed that "[t]he residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves." *Id.*

As with the ACCA's residual clause, § 924(c)(3)(B) asks whether a crime "by its nature" involves a risk of the use of force, even though the use of force is not included in the elements of that crime.[4] In interpreting this residual clause, the courts have used the same tests as those that apply to the ACCA's residual clause: Courts apply the categorical approach and imagine the "ordinary case" of a particular predicate offense, then determine whether an abstract level of risk is inherent in that ordinary case. *See, e.g., McGuire*, 706 F.3d at 1336-37 ("[W]e must answer 'categorically'—that is, by reference to the elements of the offense, and not the actual facts of McGuire's conduct. We employ this categorical approach because of the statute's terms: It asks whether McGuire committed 'an offense' that . . . '*by its nature,* involves a substantial risk that physical force

[4] If the use of force were an element of the crime, it would qualify as a crime of violence under the elements clause of § 924(c)(3)(A).

against the person or property of another may be used.'" (internal citations omitted)).

As the Supreme Court reiterated in *Welch v. United States*, "[t]he vagueness of the [ACCA's] residual clause rests in large part on its operation under the categorical approach." 136 S. Ct. 1257, 1262 (2016). Section 924(c)(3)(B) also uses the categorical approach, and it provides no more "reliable way to choose between . . . competing accounts of what [an] 'ordinary' [crime] involves" than does the ACCA. *Johnson*, 135 S. Ct. at 2558. Like the ACCA, the structure and language of § 924(c)(3) "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," resulting in "grave uncertainty about how to estimate the risk posed by a crime." *Id.* at 2557. Because § 924(c)(3)'s residual clause requires the use of the categorical approach and gives no more guidance on defining the "ordinary case" of a crime, it involves the same level of unpredictability and arbitrariness that the Supreme Court found in the ACCA's residual clause.

B. 18 U.S.C. § 924(c)(3)(B) Is Equally Unclear About How to Assess the "Potential Risk" Inherent in the "Ordinary Case."

The *Johnson* Court struck down the ACCA's residual clause because it combined indeterminacy about defining the "ordinary case" of a crime "with indeterminacy about how much risk it takes for the crime to qualify as a violent

felony." *Johnson*, 135 S. Ct. at 2558. In applying the ACCA, a court had to ask whether the ordinary case "involve[d] conduct that presents a serious potential risk of physical injury to another." *Id.* Once again, the residual clause provided no clear method for measuring that potential risk in the abstract, and the courts were unable "to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." *Id.* at 2559.

Section 924(c)(3)(B) shares this second indeterminacy, as well. Like the ACCA's "serious potential risk" standard, the residual clause's "substantial risk"[5] standard "leaves uncertainty about how much risk it takes for a crime to qualify as a [crime of violence]." *Johnson*, 135 S. Ct. at 2558. The confluence of these two types of uncertainty rendered the ACCA's residual clause unconstitutional because, while "[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.* With § 924(c)(3)(B), too, courts must apply a vague "substantial

[5] The difference in wording between these two measures of risk has no bearing on the vagueness analysis. "The [ACCA's] residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch*, 136 S. Ct. at 1262. Whether a risk is "substantial" or "serious" does not matter for the vagueness analysis; what matters is whether a statute forces a court to measure the risk inherent in an "ordinary case" of a crime, rather than in the real-world facts. Both the ACCA and § 924(c)(3) require courts to do just that.

risk" standard to a judge-imagined abstraction of the ordinary case of a crime. The same double layer of indeterminacy exists in § 924(c)(3)'s residual clause as existed in the ACCA, and thus the logic of *Johnson* dictates that "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* Section 924(c)(3)(B) is therefore unconstitutionally vague, and the district court erred in finding otherwise.

II. Mr. Herrera's Sentence Was Imposed in Violation of the Constitution.

After striking down § 924(c)(3)(B), this Court must next determine whether the predicate offense for Mr. Herrera's § 924(c)(1) conviction implicates the unconstitutional residual clause.[6] In rejecting Mr. Herrera's § 2255 motion to vacate his conviction under § 924(c)(1), the district court made three alternative determinations: (1) a drug trafficking crime served as a predicate offense for his conviction, and therefore it is unaffected by *Johnson*; (2) conspiracy to commit Hobbs Act robbery (the actual predicate offense) qualified as a crime of violence under § 924(c)(3)(A), which is unaffected by *Johnson*; and (3) even if Mr. Herrera's conviction implicated § 924(c)'s residual clause, that clause is not unconstitutional in light of *Johnson*. Case No. 16-cv-60929, Doc. 9 at 2. As

[6] If the predicate offense instead qualifies as a "crime of violence" under a subsection not affected by *Johnson*, then the § 924(c)(1) conviction would stand. *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016).

described above, the third conclusion is in error. The district court was also incorrect as to its other two conclusions because Mr. Herrera's § 924(c)(1) conviction was not based on a drug trafficking crime, and conspiracy to commit Hobbs Act robbery implicates the unconstitutional residual clause of § 924(c)(3).

A. Mr. Herrera's § 924(c)(1) Conviction Was Based Solely on Conspiracy to Commit Hobbs Act Robbery.

Mr. Herrera's indictment is ambiguous as to whether the predicate offense for Mr. Herrera's § 924(c)(1) conviction was a crime of violence or a drug trafficking crime.[7] The district court's statements at the plea colloquy clear up this ambiguity and unequivocally show that the only predicate offense for Mr. Herrera's § 924(c)(1) conviction was conspiracy to commit Hobbs Act robbery.

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[7] Count 5 of the indictment charged Mr. Herrera with a violation of § 924(c)(1) by carrying and possessing a firearm "during and in relation to a crime of violence . . ***and*** during and in relation to a drug trafficking crime. . . ." Case No. 14-cr-60277, Doc. 27 at 4 (emphasis added). The "crime of violence" referenced in Count 5 was conspiracy to commit Hobbs Act robbery as charged in Count 1, and the drug trafficking crime referenced in Count 5 was the conduct charged in Counts 2 and 3. *Id.*

As this Court has pointed out, such "duplicitous" indictments make it difficult to determine which of the two offenses served as a predicate for Mr. Herrera's eventual conviction under § 924(c)(1). *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016). In *Gomez*, this Court considered a similar indictment that listed "a crime of violence ***and*** a drug trafficking crime" as the bases for a § 924(c)(1) charge. *Id.* (emphasis added). This Court noted that "[a]n indictment that lists multiple predicates in a single § 924(c) count" is dangerous in part because it leaves the Court to "only guess which predicate" offense led to the § 924(c) conviction. *Id.* at 1228. Here, however, the Court need not guess as to the predicate offense because the plea colloquy transcript shows that Mr. Herrera's conviction was based only on a crime of violence.

At the plea colloquy, when taking Mr. Herrera's guilty plea, the district court described Count 5 as a charge for "using a firearm in furtherance of a crime of violence," meaning conspiracy to commit Hobbs Act robbery. Case No. 14-cr-60277, Doc. 120 at 5. Toward the end of the hearing, the court again confirmed with Mr. Herrera that he wanted to plead guilty to Count 5 and concede that he "did knowingly, during and in relation to ***a crime of violence***, carry a firearm and possess a firearm in furtherance of ***a crime of violence, that is Count 1*** [conspiracy to commit Hobbs Act robbery]." *Id.* at 55 (emphasis added).

In describing the elements of Count 5 to Mr. Herrera, the district court stated: "[T]he government would have had to have proven that you committed the crime of violence charged in Count 1, that you used or possessed a firearm, and that you used the firearm ***in furtherance of a crime of violence.***" *Id.* at 72 (emphasis added). Based on this description, the court then asked Mr. Herrera whether he understood the elements of Count 5, and he responded that he did. *Id.* In concluding that there was a factual basis for Mr. Herrera's plea, the district court found that "the facts which the government is prepared to prove are sufficient to constitute the crimes of conspiracy to commit Hobbs Act robbery and ***use of a firearm during a crime of violence***." *Id.* at 74-75 (emphasis added).

In describing the § 924(c)(1) offense to which Mr. Herrera was pleading, the district court never referenced a drug trafficking crime.[8] The court never determined that there was a factual basis for using a drug trafficking crime as a predicate for Mr. Herrera's § 924(c)(1) conviction. And the district court did not elicit a knowing plea from Mr. Herrera to a § 924(c)(1) violation based on any drug trafficking offense, as would have been required by Federal Rule of Criminal Procedure 11. In short, Mr. Herrera did not plead guilty to a § 924(c)(1) charge based on a drug trafficking crime; he pleaded guilty only to a charge based on conspiracy to commit Hobbs Act robbery. *See United States v. James*, 210 F.3d 1342, 1345-46 (11th Cir. 2000) (overturning conviction where district court did not describe the elements or factual basis for charge during plea colloquy).

B. Conspiracy to Commit Hobbs Act Robbery Qualifies as a Predicate Offense Under the Residual Clause.

Contrary to the district court's conclusion, conspiracy to commit Hobbs Act robbery qualifies as a crime of violence—and therefore as a predicate offense for Mr. Herrera's § 924(c)(1) conviction—only under § 924(c)(3)(B).

Conspiracy to commit Hobbs Act robbery requires proof of the following elements: "that (1) two or more people agreed to commit a Hobbs Act robbery; (2)

[8] Indeed, the district court mentioned drug trafficking only twice during the entire plea colloquy. Both times, the court was describing the predicate offense for the § 924(c)(1) charge in Count 4, which was dismissed as part of the plea agreement. Case No. 14-cr-60277, Doc. 120 at 6, 24.

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). Because "the use, attempted use, or threatened use of physical force" is not an element of conspiracy to commit Hobbs Act robbery, the crime does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A). Instead, it would only qualify as a "crime of violence" under the residual clause. *See, e.g., United States v. Taylor*, 176 F.3d 331, 338 (6th Cir. 1999) (holding that conspiracy to commit Hobbs Act robbery qualifies as a crime of violence under the residual clause, not under the elements clause); *United States v. Elder*, 88 F.3d 127, 129 (2nd Cir. 1996) (same); *United States v. Mendez*, 992 F.2d at 1491 (same); *United States v. Johnson*, 962 F.2d 1308, 1311-12 (8th Cir. 1992) (holding that a conspiracy to commit a "crime of violence" qualifies as a crime of violence under the residual clause); *see also Duhart v. United States*, No. 16-61499-CIV-MARRA, 2016 WL 4720424 at *6 (S.D. Fla. Sept. 9, 2016) ("[C]onspiracy to commit Hobbs Act robbery is not a crime of violence under the elements clause of § 924's definition of 'crime of violence,' and only qualifie[s] for an enhanced sentence under § 924(c)(3)(B).").

In sum, Mr. Herrera's sentence under § 924(c)(1) was predicated on conspiracy to commit Hobbs Act robbery, which qualifies as a crime of violence only under § 924(c)(3)'s residual clause. Because the residual clause is

unconstitutionally vague under the reasoning of *Johnson v. United States*, conspiracy to commit Hobbs Act robbery is not a valid predicate crime of violence, and Mr. Herrera's sentence for his § 924(c)(1) conviction was imposed in violation of the Constitution.

III. Mr. Herrera's Claim is Not Procedurally Barred.

The government argued in the district court that Mr. Herrera's petition is procedurally defaulted because he failed to raise this claim in prior proceedings. The district court correctly rejected that conclusion. Because Mr. Herrera is innocent of his § 924(c)(1) conviction, his claim is not defaulted.

"Under the procedural default rule, a defendant generally must advance an available challenge to a criminal conviction or sentence on direct appeal or else the defendant is barred from presenting a claim in a § 2255 proceeding." *Lynn v. United States*, 365 F.3d 1225, 1234 (11th Cir. 2004). But there is an exception if the defendant shows "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.* (internal quotation marks omitted). That exception applies here. Mr. Herrera is actually innocent of his § 924(c)(1) conviction because it was based on the unconstitutionally vague § 924(c)(3)(B). *Gonzalez v. Abbott*, 967 F.2d 1499, 1504 (11th Cir. 1992) ("[When a petitioner] argues that he was convicted for conduct that was not a

crime and that he is therefore 'actually innocent' . . . habeas relief is not procedurally barred by the petitioner's failure to assert this claim at an earlier stage.") (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Mr. Herrera's claim here establishes that he was convicted of conduct that does not constitute a crime. Because conspiracy to commit Hobbs Act robbery is not a crime of violence, *supra* Parts I & II, Mr. Herrera did not use or carry a gun in furtherance of a crime of violence in violation of § 924(c)(1). Accordingly, his § 2255 petition is not procedurally barred.

CONCLUSION

For the reasons described above, Mr. Herrera respectfully requests that this Court grant his § 2255 motion because the sentence for his conviction under 18 U.S.C. § 924(c)(1) was imposed in violation of the United States Constitution.

Respectfully submitted this 13th day of February, 2017.

/s/ Sarah Brewerton-Palmer
Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 14th St. NE, Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
spalmer@caplancobb.com

CERTIFICATE OF COMPLIANCE

Counsel for the Petitioner-Appellant hereby certifies that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 5,584 words.

This 13th day of February, 2017.

/s/ Sarah Brewerton-Palmer
Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 14th St. NE, Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
spalmer@caplancobb.com

CERTIFICATE OF SERVICE

This is to certify that the undersigned has caused a true and correct copy of the foregoing **PETITIONER-APPELLANT'S BRIEF** to be served on all counsel of record through this Court's CM/ECF system.

This 13th day of February, 2017.

/s/ Sarah Brewerton-Palmer
Sarah Brewerton-Palmer
Georgia Bar No. 589898
CAPLAN COBB LLP
75 14th St. NE, Suite 2750
Atlanta, GA 30309
Tel: (404) 596-5610
Fax: (404) 596-5604
spalmer@caplancobb.com