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,

Respondent – 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 REPLY BRIEF

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March 29, 2017

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION

The Supreme Court's decision in *Johnson v. United States* struck down the residual clause of the Armed Career Criminal Act (the "ACCA") as unconstitutionally vague because it required 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); *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015). Despite minor textual differences, 18 U.S.C. § 924(c)(3)(B) suffers from the same fundamental flaw—it requires the assessment of risk inherent in the "ordinary case" of a crime. For this reason, § 924(c)(3)(B) is unconstitutionally vague under the logic of *Johnson*.

The government's brief skirts this basic similarity between the two statutes and instead highlights superficial differences. But these differences are either illusory or irrelevant to the Supreme Court's holding in *Johnson*. For example, the two statutes use a slightly different risk standard: "serious potential risk of physical injury" versus "substantial risk" that physical force will be used. The difference between these standards is irrelevant. The Supreme Court has specifically stated that the ACCA was not vague because of its "serious potential risk" standard; it was vague because that risk standard had to be applied to a judge-imagined abstraction. Likewise, § 924(c)(3)(B)'s "substantial risk" standard must be applied to an abstract "ordinary case," too.

Similarly, the government relies on § 924(c)(3)'s use of the phrase "in the course of committing the offense"—which does not appear in the ACCA—to argue that the statute is more limited in scope and therefore less vague. This difference is not supported by case law; federal courts give § 924(c)(3) a much broader scope than the government asserts here. But again, the exact scope of the risk inquiry is irrelevant under *Johnson*. What matters is whether the inquiry is applied to an ordinary case under the categorical approach.

Finally, the government points out that § 924(c)(3) does not include the list of enumerated offenses that appear in the ACCA's residual clause. Interestingly, in *Johnson*, the government argued to the Supreme Court that the enumerate offenses actually made the ACCA clearer and easier to apply than similar statutes that do not include such a list. In any case, the *Johnson* opinion characterizes the categorical approach as the most important problem with the ACCA and regarded the enumerated offenses as mere confirmation that the residual clause focused on an abstract "ordinary case" of a crime, rather than on the defendant's real world conduct or the elements of a crime.

In sum, all of the government's attempts to distinguish § 924(c)(3) fail because the statute shares the same analytical framework that led to the ACCA's unconstitutional vagueness. None of the differences relied on by the government undermine this basic similarity between the two statutes. This Court should

therefore hold that § 924(c)(3) is unconstitutional under *Johnson*.

The government attempts to avoid this conclusion through a litany of potential procedural stumbling blocks, but these also all fail. First, Mr. Herrera never waived his right to habeas relief; he waived only his right to directly appeal his sentence. Second, Mr. Herrera's sentence implicates § 924(c)(3)(B) because the only predicate crime for his conviction was a crime of violence—not a drug trafficking crime. The resolution of a habeas petition filed by Mr. Herrera's co-defendant is not conclusive on this point because Mr. Herrera raises different arguments and because the law-of-the-case doctrine does not apply to separate habeas claims filed by different litigants. Finally, Mr. Herrera's claim is not procedurally barred because he is actually innocent of the § 924(c)(1) charge. He need not prove his innocence of the other charges in his indictment because none of them are more serious than the offense to which he pled guilty. Despite the government's kitchen-sink approach, none of these procedural hurdles apply here. Accordingly, this Court must reach the merits of Mr. Herrera's petition.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Government's Attempts to Throw Up a Procedural Road Block Fail.

In its response brief, the government feverishly tries to avoid the merits of this case by repeatedly throwing up procedural road blocks to bar Mr. Herrera's petition. None of these road blocks has any merit, and this Court should resolve

the merits of Mr. Herrera's petition—that is, whether the reasoning of *Johnson* renders § 924(c)(3)(B) unconstitutionally vague.

A. Mr. Herrera's Appeal Waiver Does Not Bar This Petition.

The government first argues that Mr. Herrera waived his right to post-conviction relief in his plea agreement.[1] But this Court has unequivocally held that an appeal waiver does not bar a § 2255 petition when the waiver "do[es] not specifically contemplate collateral attacks." *Thompson v. United States*, 353 Fed. App'x 234, 236 (11th Cir. 2009); *see also Gordon v. United States*, 518 F.3d 1291, 1294 (11th Cir. 2008) (considering merits of § 2255 petition where criminal defendant waived only his right to "appeal from any sentence, so long as it is within the guideline range"); *Krecht v. United States*, 846 F.Supp. 2d 1268, 1280 (S.D. Fla. 2012) ("In this case, Krecht's plea agreement waived only his right to a direct appeal; therefore, Krecht may still bring ineffective assistance claims under § 2255."). In other words, a defendant cannot knowingly and voluntarily waive his right to habeas relief when the plain language of the plea agreement waives only a defendant's right to direct appeal. *See Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2006) ("[Because] [t]he plain language of the

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[1] The government failed to raise this argument in the district court, presumably because the waiver's plain language shows that it has no application here. Because the government did not bring up the appeal waiver, the district court did not rule on it. Not only did Mr. Herrera not waive his right to habeas relief, the government has in fact waived its right to argue otherwise.

agreement informed Williams that he was waiving a collateral attack on his sentence . . . the sentence-appeal waiver precludes a § 2255 [petition]."); *Allen v. Thomas*, 161 F.3d 667, 670 (11th Cir. 1998) ("At a minimum, the would-be petitioner must know at the time of the guilty plea that the right to federal habeas review exists, and he must realize he is giving up that right as part of his plea bargain."); *see also Lattimore v. United States*, 185 Fed. App'x 808, 810-11 (11th Cir. 2006) (refusing to bar habeas petition where magistrate judge failed to clearly inform defendant of his waiver of habeas rights).

The appeal waiver in Mr. Herrera's plea agreement reads as follows:

> The defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, ***the defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed***, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or and upward variance from the advisory guideline range that the Court establishes at sentencing.

Case No. 14-cr-60277-WPD, Doc. 63 at 4-5 (emphasis added). The provision is very specific as to the rights being waived—namely, those conferred by 18 U.S.C. § 3742 and 28 U.S.C. § 1291. Nowhere does the waiver suggest that by signing it, Mr. Herrera was waiving his right to collaterally attack his sentence. This waiver is just like the one at issue in *Thompson*. As in that case, because the

plain language of the waiver applies only to direct appeal, it cannot bar Mr. Herrera's § 2255 petition.[2]

B. Mr. Herrera's Conviction Was Based Solely on Conspiracy to Commit Hobbs Act Robbery.

The government attempts to show that Mr. Herrera's *Johnson* argument is irrelevant because his § 924(c)(1) conviction alternately rested on a drug trafficking charge. However, as detailed in Mr. Herrera's opening brief, Mr. Herrera pled guilty *only* to a § 924(c)(1) charge based on conspiracy to commit Hobbs Act robbery. Appellant's Br. at 19-21.

The government is correct that a defendant need not be *convicted* of a drug trafficking offense in order for it to serve as a § 924(c)(1) predicate crime; the facts admitted in a written plea agreement can be sufficient proof that a predicate crime occurred. Appellee's Br. at 12-13. Mr. Herrera does not argue otherwise. But proving a predicate offense is not enough to support a § 924(c) conviction—the

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[2] Had the government intended for Mr. Herrera to waive his right to habeas relief, it knew well how to write an appeal waiver with that effect. This Court has considered likely hundreds of cases where an appeal waiver specified that it applied to both direct appeals and collateral attacks. *See, e.g.*, *Gomez-Diaz v. United States*, 433 F.3d 788, 790 (11th Cir. 2005) ("The defendant expressly waives the right to appeal defendant's sentence, ***directly or collaterally***, on any ground."); *Williams*, 396 F.3d at 1341 ("[Defendant] expressly waives the right to appeal [his] sentence, ***directly or collaterally***, on any ground."); *United States v. Bushert*, 997 F.2d 1343, 1345 (11th Cir. 1993) ("Bushert agreed that 'he cannot and will not challenge that decision, whether by appeal, ***collateral attack*** or otherwise.'" (emphasis added)). Mr. Herrera cannot now be penalized for the government's failure to write a broad appeal waiver.

government must also secure a knowing and voluntary guilty plea (or jury verdict) to a § 924(c)(1) violation based on that predicate offense. The government did not do so here.[3] Even if Mr. Herrera admitted in his plea agreement to facts sufficient to show a drug trafficking offense, he did not plead guilty to a § 924(c)(1) charge based on a drug trafficking offense.

Tellingly, the government admitted Mr. Herrera's argument in its brief when it stated that "the government allowed [Mr.] Herrera to plead to the § 924(c) count ***with only the crime of violence predicate (conspiracy to commit Hobbs Act robbery), rather than the drug predicate***, which was originally also charged in the indictment." Appellee's Br. at 23 (emphasis added).[4] The government's

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[3] The government points to the written plea agreement, which describes Count 5 as alternately based on a crime of violence or a drug trafficking crime. But a plea agreement is not sufficient to show a valid guilty plea where, as here, the district court never described the elements of a § 924(c)(1) charge based on a drug trafficking crime and never accepted a plea to that charge. *See United States v. James*, 210 F.3d 1342, 1345-46 (11th Cir. 2000). Under these circumstances, the government cannot show that Mr. Herrera's § 924(c)(1) charge was based on drug trafficking. The government's reliance on *United States v. Bascomb*, 451 F.3d 1292 (11th Cir. 2006), is similarly inapposite because "[t]he Supreme Court has emphasized the importance of treating pleas and plea agreements distinctly." *In re Vasquez-Ramirez*, 443 F.3d 692, 695 (11th Cir. 2006). The issue in this case is not about the written plea agreement but about Mr. Herrera's guilty plea itself. The plea colloquy shows that the Rule 11(b) requirements were not met for a § 924(c)(1) charge based on a drug trafficking crime.

[4] The government similarly stated elsewhere in its brief that "[f]or Herrera's § 924(c) conviction (Count 5), ***the listed predicate crime of violence was Count 1, conspiracy to commit Hobbs Act robbery***." Appellee's Br. at 12.

concession is confirmed by the district court's statements at the plea colloquy, which make clear that Mr. Herrera did not plead guilty to Count 5 based on a drug trafficking crime. Appellant's Br. at 19-22. In order for a guilty plea to become operative, it must be made knowingly and voluntarily, and a district court must accept the plea and find that it has a factual basis. To satisfy these requirements, the district court must follow Federal Rule of Criminal Procedure 11, which requires the district court to inform the defendant of "the nature of each charge to which the defendant is pleading" before accepting a guilty plea. Fed. R. Crim. Proc. 11(b)(1)(G). This Court has held that a district court's failure to ensure that a defendant understands the charges to which he is pleading guilty "requires automatic reversal." *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985). This Court has reversed a conviction where a district court did not describe the elements of a § 924(c)(1) charge based on a drug trafficking offense at any point during the plea colloquy. *United States v. Quinones*, 97 F.3d 473, 474 (11th Cir. 1996).

Just as in *Quinones*, the district court here never described the elements of a § 924(c)(1) charge predicated on a drug trafficking offense. Indeed, the district court never even mentioned drug trafficking as a predicate crime for Count 5.[5] In

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[5] Notably, the district court described the dropped Count 4 as charging "conspiracy to use a firearm during the commission of a crime of violence or a

the context of this case, the district court's omission shows that Mr. Herrera never pleaded guilty to, and was never convicted of, a § 924(c)(1) violation based on a drug trafficking offense. Mr. Herrera's conviction for Count 5 was predicated solely on conspiracy to commit Hobbs Act robbery, as conceded in the government's brief. This predicate crime qualifies as a crime of violence only under § 924(c)(3)(B), which is unconstitutionally vague under *Johnson*. Appellant's Br. at 21-23; *see also* Appellee's Br. at 13 n.5 ("[C]onspiracy to commit Hobbs Act robbery constitutes a crime of violence under [§ 924(c)(3)(B)]").

The government finally argues that this Court must resolve Mr. Herrera's petition in the same way it resolved his co-defendant's petition—by holding that his § 924(c)(1) conviction rested on a drug trafficking crime—because the law-of-the-case doctrine applies. Appellee's Br. at 17. However, this Court's previous decision in *United States v. Navarro*, No. 16-13740, 2017 WL 765772 (11th Cir. Feb. 28, 2017), has no effect here. The law-of-the-case doctrine applies only when a court considers "the same issues in subsequent stages of the ***same case***." *Pepper v. United States*, 562 U.S. 476, 506 (2011) (internal quotation marks omitted). This Court has applied the law-of-the-case doctrine to co-defendants only in the

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drug trafficking crime." Case No. 14-cr-60277, Doc. 120 at 6. By contrast, the court described Count 5 as "using a firearm in furtherance of a crime of violence. . . ." *Id.* at 5.

context of direct appeals in a criminal case. *See, e.g.*, *Bushert*, 997 F.2d at 1356. This is so because a criminal conviction and a subsequent appeal are considered one proceeding. But Mr. Navarro's civil habeas proceeding is not the "same case" as Mr. Herrera's civil habeas proceeding. *United States v. Lawrence*, 179 F.3d 343 (5th Cir. 1999) ("[The co-defendant's] § 2255 motion is not the same 'case' as Lawrence's § 2255 motion"). "[S]ubsequent post-conviction motions are distinct both from the initial proceeding and from each other," and therefore the law-of-the-case doctrine is inapplicable. *Id.*

The *Navarro* opinion is not otherwise binding on this Court because it is an unpublished decision, and it is not persuasive authority because Mr. Herrera has raised arguments here that were never made by Mr. Navarro. In briefing to this Court, Mr. Navarro argued only that his § 924(c)(1) charge could not be based on a drug trafficking offense because the government dropped the drug trafficking charges against him during plea negotiations. By contrast, Mr. Herrera instead argues that he never pled guilty to, and was therefore not convicted of, a § 924(c)(1) charge based on a drug trafficking offense. As detailed above, this argument is quite different than the one made by Mr. Navarro. Mr. Herrera should not be bound by his co-defendant's waiver of an argument in a separate civil habeas proceeding.

Because the law-of-the-case doctrine does not apply here and because Mr.

Herrera raises different arguments than his co-defendant, this Court's resolution of Mr. Navarro's petition is irrelevant to its resolution of this case.

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

For the reasons stated in Mr. Herrera's opening brief, his petition overcomes any procedural bar because Mr. Herrera is actually innocent of the § 924(c)(1) conviction. Appellant's Br. at 23-24. The government argues that this is not the case because *Johnson* does not invalidate § 924(c)(3)(B) and because Mr. Herrera has not shown actual innocence of the other charges listed in his indictment. Appellee's Br. at 22. The question of actual innocence turns on the merits of Mr. Herrera's argument that § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson*. Accordingly, before resolving the parties' dispute over the procedural bar, this Court "must first examine the merits of [Mr. Herrera's] underlying claim to determine if he is actually innocent of the crime to which he pled guilty. . . ." *United States v. Montano*, 398 F.3d 1276, 1280 (11th. Cir. 2005).

If this Court determines that the logic of *Johnson* invalidates § 924(c)(3)(B), then Mr. Herrera is actually innocent of his § 924(c)(1) charge, and his petition is not procedurally barred. The government argues that Mr. Herrera cannot establish actual innocence of the § 924(c)(1) charge "because the stipulated facts contain sufficient evidence to convict him of the untouched drug trafficking prong." Appellee's Br. at 15 n.7. Of course, as discussed above, Mr. Herrera never pled

guilty to using or carrying a firearm in relation to a drug trafficking offense.[6] He therefore need not show that he was actually innocent of that crime; he only needs to show actual innocence of the crime of conviction, a burden that he has met. Appellant's Br. at 23-24.

The government also relies on *Bousley v. United States* to argue that, even if *Johnson* applies here, Mr. Herrera cannot make the required showing that he is actually innocent of the "more serious charges" that the government dropped in the course of plea negotiations. 523 U.S. 614, 624 (1998). The charges dropped during plea bargaining—Counts 2 through 4 and Count 6—were not "more serious" than the § 924(c)(1) charge to which Mr. Herrera pled guilty—Count 5. Count 5 had a maximum penalty of life in prison. Counts 2 and 3 had a maximum penalty of life in prison, 21 U.S.C. § 841(b)(1)(A); Count 4 had a maximum penalty of 20 years in prison, 18 U.S.C. § 924(o); and Count 6 had a maximum penalty of 10 years in prison, 18 U.S.C. § 924(g). Thus, none of the dropped charges are more serious than Count 5,[7] and Mr. Herrera does not bear the burden

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[6] A § 924(c)(1) charge based on a drug trafficking crime is a separate offense from a § 924(c)(1) charge based on a crime of violence. *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. 2016) ("[A] § 924(c) crime based on any one of these separate companion convictions would likewise be a separate offense."). Therefore, the government's on *Tannebaum v. United States*, 148 F.3d 1262 (11th Cir. 1998), is misplaced. Appellee's Br. at 15 n.7.

[7] The government seems to argue that when the Supreme Court said "more

of proving his actual innocence of those charges. His innocence of Count 5 is sufficient to overcome the procedural bar in this case.[8]

II. The Reasoning of Johnson Invalidates 18 U.S.C. § 924(c)(3)(B).

In its response brief, the government attempts to distinguish § 924(c)(3)(B) from the ACCA on several grounds, including minor textual differences between the statutes. The government's arguments entirely overlook or mischaracterize the clear reasoning of *Johnson*. The Supreme Court held that the ACCA was unconstitutionally vague because of the interaction of "two features of the residual clause"—namely, the "imprecise 'serious potential risk' standard" and the categorical approach. *Johnson*, 135 S. Ct. at 2557-58. In *Welch*, the Supreme Court again confirmed that *Johnson*'s holding rested "in large part on its operation under the categorical approach." 136 S. Ct. at 1262. "The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that

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serious charges" in *Bousley*, it actually meant "charges that are equally as serious or more serious." To the contrary, this Court has applied the plain language of *Bousley* and required petitioners to show only that they are actually innocent of "more serious charges" that were dropped during plea negotiations—not of equal or lesser charges. *Jones v. United States*, 153 F.3d 1305, 1308 (11th Cir. 1998). The Eighth Circuit has held the same. *United States v. Johnson*, 260 F.3d 919, 921 (8th Cir. 2001) (holding that a § 924(c) charge was not "more serious" than another § 924(c) charge).

[8] If this Court determines that there is insufficient evidence to determine whether the dropped charges are "more serious," the proper course would be to remand this case to the district court to make that determination. *Jones*, 153 F.3d at 1308.

standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.*

It is clear, based on the Supreme Court's repeated explanation of the ACCA's vagueness, that § 924(c)(3)(B) shares the same problems that doomed the residual clause. Namely, it requires courts to apply an indeterminate risk standard to the "ordinary case" of a crime, using the categorical approach. This is exactly the problem that led the Supreme Court to strike down the ACCA's residual clause in *Johnson,* and it should lead this Court to strike down § 924(c)(3)(B) as unconstitutionally vague.

A. The Textual Differences Between the ACCA and § 924(c)(3) are Irrelevant Under the *Johnson* Analysis.

i. "Substantial Risk" is Equivalent to "Serious Potential Risk" for the Purposes of Johnson.

The government argues that § 924(c)(3)(B) is not vague because it adopts a different risk standard than the ACCA. Where the ACCA asked whether an offense involves a "serious potential risk of physical injury," § 924(c)(3)(B) asks whether an offense involves a "substantial risk that physical force against the person or property of another may be used." According to the government, this difference in risk levels means the logic of *Johnson* does not apply.

The government's argument rests on a distinction without a difference. Certainly the two statutes use different language to describe the level of risk that

courts must assess. But the Supreme Court has been very clear, in both *Johnson* and *Welch*, that the problem with the ACCA's residual clause was not the "serious potential risk" standard itself. As the Court has twice noted, federal courts are quite adept at applying various indeterminate risk standards that "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Johnson*, 135 S. Ct. at 2561; *see also Welch*, 136 S. Ct. at 1262 (same). Thus, risk standards alone are not problematic.[9] Rather, they become unconstitutionally vague when combined with the categorical approach because "this abstract inquiry offers significantly less predictability than one that deals with the actual, not with an imaginary condition other than the facts." *Johnson*, 135 S. Ct. at 2561 (internal quotation marks and alterations omitted).

As the government admits in its brief, § 924(c)(3)(B) uses the exact same "abstract inquiry" of the categorical approach as did the ACCA. Appellee's Br. at

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[9] In *Johnson*, the government cited to a host of other statutes—including § 16(b) and § 924(c)(3)—that use indeterminate risk standards, including "substantial risk" and "unreasonable risk." Supp. Br. for the United States at 22-23, *Johnson v. United States*, 135 S. Ct. 2251 (2015) (No. 13-7120) (hereinafter, "Gov't *Johnson* Br."). The Supreme Court stated that "almost all" of those statutes pass constitutional muster because they "require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion." *Johnson*, 135 S. Ct. at 2561. The Supreme Court did not include § 16(b) or § 924(c)(3) in the category of constitutional statutes because both require gauging the riskiness of conduct in an "ordinary case" of a crime. While this analysis is dicta, it shows that the wording of the risk standard in § 924(c)(3) is irrelevant. What matters is the use of the categorical approach.

41. *Johnson*'s holding rested on the use of the categorical approach; the wording of the risk standard was irrelevant. Thus, the difference between the "serious potential risk" required by the ACCA and the "substantial risk" required by § 924(c)(3)(B) has no bearing on whether *Johnson*'s logic applies to the latter. Rather, *Johnson* invalidates § 924(c)(3)(B) because it applies an indeterminate risk standard—regardless of its exact wording—to a "judge-imagined abstraction," rather than the defendant's real-world conduct. *Johnson*, 134 S. Ct. 2558; *see also* Order at 5, *Jardines v. United States*, No. 16-cv-22604-UU (March 16, 2017), ECF No. 17 ("While there are some contextual differences [between the ACCA's residual clause and § 924(c)(3)(B)], the fundamental problem in applying the objective ordinary case test to a risk-based measure remains.").

ii. Section 924(c)(3)'s Risk Inquiry Has the Same Scope as the ACCA's Risk Inquiry.

The government next notes that § 924(c)(3)(B), but not the ACCA, includes the language "in the course of committing the offense." This language, the government argues, "confines the risk assessment to risks that arise during the commission of the offense," which in turn makes the inquiry more straightforward and less vague. Appellee's Br. at 42. But the government cites no authority for this proposition, and courts have routinely refused to restrict their inquiries under § 924(c)(3)(B) in the way the government posits. For example, many if not all circuits have held that inchoate offenses can qualify as "crimes of violence" under

§ 924(c)(3)(B). In *United States v. Lampley*, the Tenth Circuit noted that "[a] conspiracy may function as the predicate crime for a section 924(c)(1) conviction." 127 F.3d 1231, 1240 n.6 (10th Cir. 1997). The court held that conspiracy to knowingly make and possess an explosive device qualified as a crime of violence under the residual clause because "the construction of an explosive device inherently involves a substantial risk that physical force will be used against the person or property of another." *Id.* at 1240. Conspiracy, of course, is complete as soon as a defendant makes some overt act toward committing the underlying crime, which means that a defendant may use no physical force at all "in the course of committing" conspiracy.

Lampley and analogous cases make clear that a court's risk assessment under § 924(c)(3)(B) can account for risks that would arise after the crime is complete and thus would not be "in the course of committing the offense." *See, e.g., United States v. Taylor*, 176 F.3d 331, 338 (6th Cir. 1999); *United States v. Johnson*, 962 F.2d 1308, 1311-12 (8th Cir. 1992); *United States v. Cruz*, 805 F.2d 1464, 1474 n.11 (11th Cir. 1986) (holding that, for purposes of the identical 18 U.S.C. § 16(b), conspiracy to commit a crime of violence "create[s] a substantial risk of violence"). If the government were correct that the risk assessment in § 924(c)(3)(B) looks only at the "risks that arise during the commission of the offense," then inchoate crimes such as conspiracy would not be crimes of

violence.[10]

Federal courts' application of § 924(c)(3)(B) shows that the statute's use of the words "in the course of committing the offense" has no limiting effect on the risk analysis. Still, even if the government were correct that § 924(c)(3)(B) is concerned with a more limited course of conduct, the statute is no less difficult to apply than the ACCA. Courts applying § 924(c)(3)(B) still must imagine the "ordinary case" of a crime and then assess whether that "ordinary case" involves enough risk to qualify as a violent crime. That inquiry still "leaves grave uncertainty about how to estimate the risk posed" by the "ordinary case" of a crime. *Johnson*, 135 S. Ct. at 2557. Accordingly, while § 924(c)(3)(B) includes a phrase not found in the ACCA, the two statutes still function in the same manner—the manner that led the Supreme Court to strike down the ACCA's residual clause.

iii. Section 924(c)(3) is Unconstitutionally Vague Even Without a List of Enumerated Offenses.

Finally, the government relies on the lack of enumerated offenses in

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[10] The facts of this case confirm that the government's argument is flawed. Mr. Herrera's predicate crime of violence for his § 924(c)(1) conviction was conspiracy to commit Hobbs Act robbery. This crime requires that a defendant knowingly agree to commit Hobbs Act robbery and voluntarily participate to further that agreement. Mr. Herrera did not use any physical force against the person or property of another in committing this conspiracy, nor would force be common in the "ordinary case" of such a conspiracy. Indeed, the crime was complete long before the use of force would have arisen. Mr. Herrera's own predicate offense, then, would not be a crime of violence under the residual clause if the government were correct.

§ 924(c)(3)(B) to argue that the statute is not unconstitutionally vague.[11] This is a complete reversal of the government's position in *Johnson*, when it argued that the lack of enumerated offenses actually rendered § 924(c)(3)(B) *more* vague than the ACCA, not less. In its briefing to the Supreme Court, the government argued that the inclusion of the enumerated offenses, "far from pointing towards vagueness, make the residual clause more concrete in application than other criminal statutes tied to risk." Gov't *Johnson* Br. at 26. "The enumeration of the offenses makes the residual clause clearer because it puts felons on notice that all offenses that are at least as risky as the enumerated crimes qualify as ACCA predicates." *Id.* at 29. Under the government's own logic, then, § 924(c)(3)(B) is more vague than the ACCA because its lack of any enumerated offenses provides potential defendants with less notice of the type of crime that would be a § 924(c)(1) predicate offense.

Reversing course, the government now argues that the *Johnson* opinion suggests that the enumerated offenses contributed to uncertainty about the level of risk required to qualify as a violent felony under the ACCA. Appellee's Br. at 43. The *Johnson* Court noted that the ACCA's language forced courts to interpret the "serious potential risk" standard in light of the enumerated offenses. But as the Seventh Circuit held when it struck down the identical § 16(b), "[t]he government

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[11] The enumerated offenses in the ACCA's residual clause include "burglary, arson, or extortion." 18 U.S.C. § 924(e)(2)(B)(ii).

overreads this part of the [*Johnson*] Court's analysis." *United States v. Vivas-Cejas*, 808 F.3d 719, 723 (7th Cir. 2015). The Supreme Court's real focus was on the "two features" that combined to make the residual clause unconstitutionally vague. Only after discussing those two features did the Court mention the enumerated offenses. The main import of the enumerated offenses was as "confirm[ation] that the court's task also goes beyond evaluating" risk based on the elements of a crime and instead considers the "ordinary case." *Johnson*, 135 S. Ct. 2557. The Supreme Court made clear that the "[m]ore important[]" problem with the ACCA was that it "require[d] application of the 'serious potential risk' standard to an idealized ordinary case of the crime"—not that it included the list of enumerated offenses. The two features that led the Supreme Court to strike down the ACCA are the features shared by § 924(c)(3)(B). Because the Supreme Court did not rely on the enumerated offenses in striking down the ACCA's residual clause, the lack of enumerated offenses in § 924(c)(3)(B) does not save it from being unconstitutionally vague.

B. Section 924(c)(3)(B) Has Been Dogged by the Same Disagreements as the ACCA.

The government argues that § 924(c)(3)(B) cannot be unconstitutionally vague because it does not have the same history of Supreme Court jurisprudence as did the ACCA. This argument fails for several reasons.

First, it completely ignores the confusion the lower courts have shown in

applying § 924(c)(3)(B). The statute has generated several circuit splits, for example on whether mere possession of a dangerous weapon constitutes a crime of violence. *United States v. Serafin*, 562 F.3d 1105, 1111 (10th Cir. 2009) ("Other circuits have struggled with the definition of a crime of violence under these provisions. Several have concluded that statutes proscribing mere possession of a weapon, without more, lack the necessary nexus to the risk of force as required by the definition."); *see also Gonzales v. Tombone*, 132 F.3d 1455 (5th Cir. 1997) (noting a circuit split on the validity of the Bureau of Prisons' interpretation of § 924(c)(3)(B)); *United States v. Barnett*, 426 F. Supp. 2d 898, 910 n.2 (N.D. Iowa 2006).

Second, while the government is correct that the Supreme Court has not yet interpreted § 924(c)(3)(B), this is of no moment. Section 924(c)(3)(B) uses the same categorical approach as the ACCA and as 18 U.S.C. § 16(b). As a result, federal courts across the country have routinely applied the Supreme Court's ACCA and § 16(b) cases when interpreting § 924(c)(3). In other words, federal courts have refined the categorical approach via cases interpreting the ACCA and have then mapped that framework onto § 924(c)(3). For example, in *United States v. Torres Villalobos*, 487 F.3d 607, 616 (8th Cir. 2007), the Eighth Circuit held that its decision in *United States v. Moore*, 38 F.3d 977, 981 (8th Cir. 1994), which interpreted § 924(c)(3), had been abrogated by the Supreme Court's interpretation

of § 16(b) in *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004).[12] This borrowing of precedent has not only kept § 924(c)(3)(B) off the Supreme Court's docket, it also shows that the same confusion and disagreement that plagued the lower courts interpreting the ACCA likewise appears in the context of § 924(c)(3).

Finally, and perhaps most importantly, the analysis in *Johnson* did not rely on the ACCA's history of disputes in the Supreme Court. Instead, that history was simply "evidence of vagueness" that "confirm[ed] [the ACCA's] hopeless indeterminacy." *Johnson*, 135 S. Ct. at 2558. The Supreme Court has never *required* such a history of interpretive attempts before striking down a statute as vague. Indeed, federal courts have routinely struck down unconstitutionally vague statutes even if they have never been applied by any court nor been construed by the Supreme Court. *See, e.g.*, *United States v. Evans*, 333 U.S. 483, 495 (1948).

In short, the lack of Supreme Court case law interpreting § 924(c)(3) is meaningless because the Supreme Court's numerous decisions attempting to interpret the ACCA apply equally to the analogous residual clause in § 924(c)(3). In any case, a troubled jurisprudential history is not a prerequisite for striking a

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[12] *See also, e.g.*, *United States v. McGuire*, 706 F.3d 1333, 1338 (11th Cir. 2013) (citing *James*, 550 U.S. at 203); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011) (citing *Leocal*, 543 U.S. at 2); *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).

vague statute and was not vital to the *Johnson* analysis. The history of § 924(c)(3)—either in the Supreme Court or elsewhere—should not guide this Court's decision regarding the statute's unconstitutional vagueness.

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 29th day of March, 2017.

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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 5,912 words.

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CERTIFICATE OF SERVICE

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

This 29th day of March, 2017.

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