ORIGINAL

No: 18-9782

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

IN RE: CARLOUS LINDELL DAILY,

Petitioner,

VS.

D. SHINN (Complex Warden);

UNITED STATES OF AMERICA,

Respondent(s).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PRO-SE BRIEF OF PETITIONER

By: Carlous L. Daily

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I. QUESTIONS PRESENTED

(1). Whether The Lower Court(s) Erred In Concluding That Petitioner Did Not Suffer Ineffective Assistance Of Counsel At His Resentencing And On Appeal Of His Resentencing:

(a). In Light Of Shepard?; And

(b). Whether A Sentence Which Exceeds The Statutory Maximum, Is Harmless Error?

(2). Whether The Lower Court(s) Erred In Concluding That Petitioner's Instant And Predicate Offense(s) Qualify As A Crime Of Violence For Purposes Of U.S.S.G. § 4B1.2?

(3). Whether The Lower Court(s) Erred In Concluding That:

(a). Even Applying Johnson To § 924(c), Petitioner's Conviction would Still Stand?;

(b). The Language In 18 U.S.C. § 924(c)(3)(B), Similar To ACCA's Residual Clause, Is Not Void For Vagueness In Light Of Johnson?

(4). Whether The Lower Court(s) Erred In Concluding That Petitioner Failed To Make A Substantial Showing Of The Denial Of A Constitutional Right?

These Questions Are Collectively Addressed Respecting The Arguments Petitioner Makes Herein.

No:

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CORPORATE DISCLOSURE STATEMENT

All Parties appear in the Caption of the Case on the Cover Page.

There is no parent or publicy held company that owns 10% or more of a corporation stock.

Petitioner respectfully Prays that A Petition for Writ of Certiorari Issue to review the Judgment(s) below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals appears at Appendix A, attached to the Petition and is reported at Daily v. U.S., 2018 U.S. App. LEXIS 1455.

The Opinion of the United States District Court appears at Appendix B, attached to the Petition and is reported at U.S. v. Daily, 2017 U.S. Dist. LEXIS 64057.

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CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE [V].

Under the Fifth Amendment to the United States Constitution states:

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

ARTICLE [VI].

Under the Sixth Amendment to the United States Constitution states:

> "In all criminal prosecutions, the accused shall enjoy the right to a trial by an impartial jury."

Taken together, these rights require that:

> "Any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury and proven beyond a reasonable doubt." Id.

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IV. JURISDICTIONAL STATEMENT

28 U.S.C. § 2255 states:

> "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 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."

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

> "(1) the date on which the judgment of conviction became final." 28 U.S.C. § 2255(f)(1).

1. On April 27, 2017, the United States District Court for the District of Minnesota entered its final Order and Judgment Denying Petitioner's Motion To Vacate, Set Aside Or Correct Sentence pursuant to 28 U.S.C. § 2255.

2. On December 6, 2017, the United States Court of Appeals for the Eighth Circuit Denied Petitioner's Application for a Certificate of Appealability.

3. On December 19, 2017, Petitioner filed A Petition for Rehearing. On January 19, 2018, the Court Denied the Petition for Rehearing.

4. On January 29, 2018, Petitioner filed a Petition for Stay of Mandate. Shortly thereafter, the Court Denied the Petition for Stay of Mandate.

5. On April 19, 2018, Petitioner filed a Motion for Extension of Time. The Court Granted the Motion and Extended the Time to June 18, 2018.

6. Therefore, the Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a); this Petition is timely filed on or before June 18, 2018.

V. REASONS FOR GRANTING THE PETITION

The Lower Courts has decided an important question of Federal Law that has not been, but should be, settled by this Court and conflict with relevant decisions by this Court. Moreover, this case is of such imperative public importance as to justify deviation from normal appellate practice and require an immediate determination by this Court.

Accordingly, there exist exceptional circumstances that warrant the exercise of this Court's discretionary powers and adequate relief cannot be obtain in any other form or from any other court.

VI. BACKGROUND AND PROCEDURAL HISTORY

Petitioner is currently incarcerated at U.S.P. Victorville, P.O. Box 3900, Adelanto, CA 92301, in the custody of D. Shinn (Complex Warden), pursuant to the Sentencing Reform Act of 1984 ("SRA").

1. A multi-count superseding indictment was returned against Petitioner and others in the District of Minnesota, Crim. No.: 03-381 (JRT/FLN), (before the Honorable Judge John R. Tunheim).

2. Count One charged Petitioner and others with Conspiracy to Commit Bank and Armed Bank Robberies from January 2003 to March 2003 in the State and District of

Minnesota and elsewhere, in violation of 18 U.S.C. §§§ 2113(a) and (d), and 371. Petitioner was found guilty after a jury trial of this count.

3. Count Two charged that on or about January 29, 2003, Petitioner and others with Bank and Armed Bank Robbery, in violation of 18 U.S.C. §§§ 2113(a) and (d) and 2. Petitioner was found guilty by a general verdict after a jury trial of this count. No special verdict sheet was requested or supplied as the jury was not required to, and did not, determined whether Petitioner committed any specific act as alleged in the superseding indictment.

4. Count Three charged that on or about March 28, 2003, Petitioner and others with Bank and Armed Bank Robbery, in violation of 18 U.S.C. §§§ 2113(a) and (d), and 2. Petitioner was found not guilty of this count.

5. Count Four charged that on or about January 29, 2003, Petitioner did Use and Carry a Firearm During and in Relation to a crime of violence set forth in Count Two, in violation of 18 U.S.C. §§ 924(c)(1) and 2. Petitioner was found gulity by a general verdict after a jury trial of this count. No special verdict sheet was requested or supplied as the jury was not required to, and did not determined whether Petitioner committed any specific act with respect to Count Two as alleged in the superseding indictment, nor was the jury instructed to determine which of the clause defining the term 'crime of violence' under § 924(c)(3) its verdict rested.

6. Count Five charged that on or about March 28, 2003, Petitioner did Use and Carry a Firearm During and in

Relation to a Crime of Violence set forth in Count Three, in violation of 18 U.S.C. §§ 924(c)(1) and 2. Petitioner was found not guilty of this count.

7. On October 3, 2005, Petitioner was sentenced to a total of 444 months imprisonment. (Doc. No. 165). The Eighth Circuit affirmed Petitioner's convictions and the Supreme Court Denied Petitioner's Petition for Writ of Certiorari. U.S. v. Daily, 488 F. 3d 796 (8th Cir. 2007), cert. denied, 552 U.S. 1222 (2008).

8. On January 28, 2009, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. No. 265). In reviewing the Motion, the court noticed an error in the Sentencing Guideline calculation applied at Petiitoner's sentencing, and after requesting briefing from both parties, found Peitioner was entitled to relief based on his counsel's failure to object to the erroneous guideline range. (Doc. No. 274). On August 11, 2011, considering an alternative Guideline range, the court resentenced Petitioner to a total term of 420 months imprisonment. (Doc. No. 295). The court Denied Petitioner's Motion to Vacate in all other respects. (Doc. No. 293). The Eighth Circuit upheld the new sentence. U.S. v. Daily, 703 F. 3d 451 (8th Cir. 2013).

9. In 2014, Petitioner attempted to file a 28 U.S.C. § 2255 Motion. The Clerk of Court rejected the Application explaining that Petitioner needed to obtain pre-authorization from the Eighth Circuit prior to filing. (Doc. No. 317). On April 28, 2014, Petitioner responded by filing a Motion to Amend Judgment pursuant to Rule 59(e), which the court Denied on May, 2014. (Doc. No. 319).

X

10. Petitioner appealed the court's denial of his Motion to Amend Judgment. (Doc. No. 320). The Eighth Circuit construed the appeal as a Petition for a Writ of Mandamus, which it Granted, and Directed the court "to rule on Petitioner's § 2255 Motion." (Doc. No. 327). The Eighth Circuit Denied the United States' Petition for Rehearing.

11. On October 26, 2015, Petitioner refiled the attempted 2014 Motion with the court. (Doc. No. 331). Petitioner also filed several Supplemental Motions with the court. (Doc. Nos. 337, 343 and 345 among others.).

12. The court previously stayed consideration of Petitioner's Motions pending the Supreme Court's consideration of Beckles v. U.S., 616 F. App'x 415 (11th Cir. 2015). (Doc. No. 347). This Court issued its opinion in Beckles on March 6, 2017. 137 S. Ct. 886 (2017).

VII. STANDARD OF REVIEW

28 U.S.C. § 2255(a), allows a federal prisoner a limited opportunity to seek post-conviction relief on the grounds that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." "Relief under § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." Walking Eagle v. U.S., 1079, 1081-82 (8th Cir. 2014).

A court of appeals generally reviews de novo whether a state conviction qualifies under Armed Career Criminal

Act's ("ACCA") definition of violent felony. U.S. v. Dixon, 805 F. 3d 1193, 1195 (9th Cir. 2015).

A court of appeals is not limited to plain error review when the court is presented with a question that is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. U.S. v. Evans-Martinez, 611 F. 3d 635, 642 (9th Cir. 2010).

Cases interpreting the similar provisions of 18 U.S.C. § 16(a) and U.S. Sentencing Guidelines Manual § 4B1.2(a)(1) are relevent to interpretation of ACCA's force clause. The force clauses in the ACCA and the Guidelines remain identical. Because the wording of 18 U.S.C. § 924(c)(3) and 18 U.S.C. § 16 is virtually identical, a court interpret there plain meaning in the same manner. See, U.S. v. Walton, 881 F. 3d 768 (9th Cir. 2018).

VIII. SUMMARY OF THE ARGUMENTS

First, Petitioner challenged: (1) the district court's imposition of a sentencing enhancement based on his counsels' failure to object: (a) in light of this Court's ruling in Shepard; (b) his sentence on Count 2 exceeded the statutory maximum under 18 U.S.C. §§ 2113(a) and (d); (3) the district court's reliance on his instant and four prior robbery offenses under California robbery statute to be a crime of violence under U.S.S.G. § 4B1.2; and (3) his conviction on Count 4--for use of a firearm during a crime of violence must be vacated under Johnson.

First, the court concluded that a challenge under the U.S.S.G. § 4B1.1, however, is foreclosed by recent Supreme

Court opinion, Beckles, in which the Court rejected extending the Johnson holding to U.S.S.G. § 4B1.2(a)(2), reasoning that the Advisory Guidelines were "not subject to vagueness challenges under the Due Process Clause." Beckles v. U.S., 137 S. Ct. 886, 890 (2017). (Doc. No. 348, id., at 7-8). However, the district court's assessment addressed [only the argument] that the residual clause in the Sentencing Guidelines is not void for vagueness. (Id., at 10-13).

Second, the court concluded that the error made at his resentencing and on appeal of his resentencing based on his counsels' failure to object to the fact his sentence exceeded the statutory maximum, was harmless. (Id., at 13-14).

Third, the court concluded that even applying Johnson to § 924(c), Petitioner's conviction would stand because his conviction for bank robbery under § 2113(a) and (d) "[h]ad as an element the use, attempted use, or threatened use of physical force against the person or property of another." Accordingly, Petitioner's challenge under Johnson fails. (Id., at 8-10).

IX. ARGUMENTS

(1). Whether The Lower Court(s) Erred In Concluding That Petitioner Did Not Suffer Ineffective Assistance Of Counsel At His Resentencing And On Appeal Of His Resentencing: (a). In Light Of Shepard?

Petitioner argued that he suffered ineffective assistance of counsel at his resentencing, and on appeal of his resentencing based on his counsels' failure to argue that the career criminal portion of the Sentencing Guidelines did

not apply, and that his counsel was ineffective for allowing him to be sentenced as a career offender.

"A defendant claiming ineffective assistance of counsel must show (1) that counsel's representation 'fell below an objective standard of reasonableness,' and (2) that counsel's deficient performance prejudiced the defendant." Keys v. U.S., 545 F. 3d 644, 646 (8th Cir. 2008) (quoting Roe v. Flores-Ortega, 528 U.S. v. 470, 476-77 (2000)).

First, Petitioner argued that his counsel was ineffective by failing to object to the court's reliance on the Presentence Investigation Report ("PSR") and its description of Petitioner's prior offenses--which were based on police reports and complaints, rather than the convictions themselves--to determine that Petitioner was a career offender.

In Shepard v. U.S., this Court ruled that the sentencing court may look to statutory elements, charging documents, and jury instructions, but not police reports or complaint applications, when determining whether a crime satisfies the generic definition of burglary in the ACCA. 544 U.S. 13, 16 (2005).

Petitioner argued that under Shepard, the court should not have relied on police reports or criminal complaint to determine whether his prior crimes were crimes of violence, and his counsel was ineffective for allowing him to be sentence as a career offender.

The district court sentenced Petitioner as a career offender under U.S.S.G. § 4B1.1(c)(2). To do so, the court had to find that Petitioner's instant offense was a crime of

violence and that at least two of his prior felony convictions were either crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1(a). The court concluded that the jury found Petitioner guilty of Count 4 for using a firearm during a crime of violence, and thus, the court was only required to consider whether two of Petitioner's prior convictions were either crimes of violence or controlled substance offenses. (Id., at 12). The court further reasoned that Petitioner was convicted of four robberies offenses, which qualifed as crimes of violence under the Sentencing Guidelines. U.S.S.G. § 4B1.2 cmt. n.1 (2011) (including robbery as a crime of violence); see also, U.S. v. McDougherty, 920 F. 2d 569, 573-74 (9th Cir. 1990) (finding conviction under California robbery statute to be a crime of violence). Accordingly, the court Denied Petitioner's Motion on this ground.

Second, counter-intuitive though it may seem, to determine whether a defendant's prior conviction under a state criminal statute qualifies as a violent felony under the ACCA's force clause as a predicate, courts do not look to the underlying facts of the defendant's actual conviction. See, Mathis v. U.S., 136 S. Ct. 2243, 2251 (2016). Rather, this Court's established precedent requires that courts employ a so-called "categorical" approach, looking "only to the fact of conviction and the statutory definition of the prior offense" to determine whether the state statute under which the defendant was convicted criminalizes only conduct that is a violent felony under ACCA. Taylor v. U.S., 495 U.S. 575, 602 (1990). Under this approach, "even the least

egregious conduct the statute covers must qualify" for a defendant's conviction under that statute to count towards ACCA's mandatory sentence. U.S. v. Lopez-Solis, 447 F. 3d 1201, 1206 (9th Cir. 2006).

If a statute is divisible--that is, if it list alternative sets of elements, in essence several different crimes--a court applies the modified categorical approach, under which the court consult a limited class of documents, such as indictment and jury instructions, Shepard v. U.S., 544 U.S. 13, (2005), to determine which alternative formed the basis of the defendant's prior conviction, Taylor, 495 U.S. 575, 602, and then applies the categorical approach to the subdivision under which the defendant was convicted. See, Descamps v. U.S., 570 U.S. 254, 257 (2013). If the Government fails to produce those documents, courts determine whether the least of those acts described in the statute can serve as a predicate offense. See, Moncrieffe v. Holder, 569 U.S., 184, 190-91 (2013). If a state's highest court has not ruled on the level of force required to support a conviction, lower courts are bound by reasoned intermediate court rulings. See, West v. Am. Tel.& Tel. Co., 311 U.S. 223, 236 (1940).

The physical force required under ACCA's force clause must be violent force or force capable of causing physical pain or injury to another person. Johnson v. U.S., 559 U.S. 133, 137 (2010) ("Johnson I"). The mere potential for some trivial pain or slight injury will not suffice. Rather, "violent" force must be "substantial" and "strong." Id. "Violent felony" has been defined as a crime characterized by

extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon. Id. at 140-41 (alteration omitted).

This Court in U.S. v. Castleman, 134 S. Ct. 1405 (2014), has further explained the need for substantial force for a conviction to qualify as a violent felony under ACCA's force clause. Id., at 1411-12. In that case, this Court distinguished "[m]inor uses of force," from the "substantial degree of force" required for violent felonies under ACCA. Id. As this Court noted, minor uses of force are insufficient both because they are not violent in the generic sense and because it would be anomalous to apply the ACCA to crimes which, though dangerous, are not typically committed by those whom one normally labels armed career criminals. Begay v. U.S., 553 U.S. 137, 146 (2008), (abrogated on other grounds by Johnson II, 135 S. Ct. at 2563).

The Eighth Circuit have explicitly so held that statutes that can be violated by such minor use of force are not violent under ACCA or similar statutes. See, U.S. v. Bell, 840 F. 3d 963, 966 (8th Cir. 2016) (Missouri robbery not crime of violence because it has been committed by a defendant who "bumped" the victim's shoulder and "yanked" her purse away).

Because the Government has not argued that the statute is divisible, any such argument is waived. See, U.S. v. Parnell, 818 F. 3d 974, at 981 (9th Cir. 2016) (declining to conduct a modified categorical analysis because "the Government [did] not argue [that the defendant's] conviction [fell] under § 924(e)(2)(B)(ii) or that the modified

categorical approach applie[d]."

(b). Whether A Sentence Which Exceeds The Statutory Maximum, Is Harmless Erorr?

Petitioner argued that he recieved ineffective assistance of counsel at his resentencing and on appeal of his resentencing based on his counsel's failure to object to the fact that his sentence on Count 2 exceeded the statutory maximum. The United States conceded that an error was made, and the court agreed, but concluded that the error was harmless. Id.

Petitioner was originally sentenced to a total of 444 months, which the court distributed as 60 months on Count 1 and 300 months on Count 2, to run concurrently, and 144 months on Count 4, to run consecutively to Counts 1 and 2. At Petitioner's resentencing hearing, the court reduced Petitioner's total sentence to 420 months, but did not break down the sentence by count. (Resentencing Tr. at 27:22-25). In the subsequent Amended Judgment, the court distributed the total of 420 months as 60 months on Count 1 and 336 months on Count 2, to run concurrently, and 84 months on Count 4, to run consecutively to Counts 1 and 2. (Am. J. at 2). Count Two charged Petitioner with Bank and Armed Bank Robbery, in violation of 18 U.S.C. § 2113(a) and (d) and 2, which carries a "prescribed statutory maximum" ("PSM") sentence of imprisonment from 20 to 25 years (240 to 300 months)--which the court extended Petitioner's sentence to 336 months--far beyond the PSM sentence of imprisonment from 240 to 300 months for which Congress authorized by statute.

Petiitoner argued that "[a] sentence is illegal if it

exceeds the permissible statutory penalty for the crime or violates the Constitution." U.S. v. Bibler, 495 F. 3d 621, 624 (9th Cir. 2007). Thus, there is not just a possibility, but a certainty, that the alleged error influenced the outcome of Petitioner's sentencing. A sentence that is not authorized by law is certainly an "actual and substantial disadvantage" of "constitutional dimensions." U.S. v. Frady, 456 U.S. 152, 168 (1982).

(2). Whether The Lower Court(s) Erred In Concluding That Petitioner's Instant And Predicate Offense(s) Qualify As A Crime Of Violence For Purposes Of U.S.S.G. § 4B1.2?

First, turning to Petitioner's conviction for second-degree robbery under California law, California's robbery statute prohibits:

> "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211.

At the time of Petitioner's original and resentencing hearing, the Ninth Circuit had held that California robbery was a violent felony under ACCA's residual clause. See, U.S. v. Prince, 772 F. 3d 1173, 1176-77 (9th Cir. 2014). However, after this Court struck down the residual clause in Johnson II, the Ninth Circuit revisited that decision and held that California robbery is not a violent felony under ACCA's force clause because it can be committed where force is only negligently used and because the statute is indivisible. See, Dixon, 805 F. 3d at 1197-98. The Dixon court relied on

People v. Anderson, in which the California Supreme Court affirmed the conviction of a man who, while steeling a car, accidentally ran over its owner as he sped away. 51 Cal. 4th 989 (Cal. 2011) ("It was robbery even if, as he claims, he did not intend to strike [the owner], but did so accidentally.").

Petitioner asserts that the Ninth Circuit Court of Appeals panel's decision in Dixon, which held that:

> "California robbery is not a violent felony under ACCA's force clause because it can be committed where force is only negligently used and because the statute is indivisible,"

is dipositive as far as Petitioner's conviction for second-degree robbery under Calif. Penal Code § 211 is concerned. 805 F. 3d 1193 (9th Cir. 2015).

Indeed, neither the district court nor the Government offered no counter-argument to Dixon's application here beyond simply citing to U.S.S.G. § 4B1.2 cmt. n.1 (2011) (including robbery as a crime of violence); see also, McDougherty, 920 F. 2d 569, 573-74 (9th Cir. 1990) (finding conviction under California robbery statute to be a crime of violence), [a] case that pre-date Johnson I and II, and Dixon, and so applied the incorrect analysis.

Petitioner argued in the courts below, that he did not have the required number of prior felonies necessary for enhancement under the U.S.S.G. § 4B1.1(c)(2), and the district court erred in attributing each of his previous robbery convictions; and while he may not have made this precise argument that he makes on this appeal, "it is claims

that are deemed waived or forfeited, not arguments." U.S. v. Pallares-Galan, 359 F. 3d 1088, 1095 (9th Cir. 2004).

Because the district court expressly reasoned that Petitioner was convicted of four robberies offenses, which qualifed as crimes of violence under the U.S.S.G. § 4B1.2, and McDougherty, the court Denied Petitioner's Motion on this ground. However, the court manifestly erred in its determination and conclusion. See, U.S. v. Walton, 881 F. 3d 768, 775 (9th Cir. 2018) (Holding that Walton's conviction for second-degree robbery under California law does not qualify as a "violent felony" under ACCA's force clause).

Simply put, Petitioner should not have been subject to the enhancement the court sentenced him as a career offender under U.S.S.G. § 4B1.1(c)(2); therefore, Petitioner's sentence must be vacated.

(3). Whether The Lower Court(s) Erred In Concluding That:

(a). Even Applying Johnson To § 924(c), Petitioner's Conviction would Still Stand?

Thus, the district court concluded that: "Petitioner's conviction would still be supported if he used or carried a firearm during and in relation to a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(1)(A),(c)(3). (Id., at 9-10).

In Johnson, this Court considered a provision of the ACCA, which defined "violent felony" as:

"Any crime punishable by imprisonment exceeding one year ... that--

(i) has as an element the use, attempted use, or

threatened use of physical force against the person or property 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).

This Court invalidated part of the second portion, referred to as the "residual clause," as unconstitutionally vague, because it "denie[d] fair notice to the defendants and invite[d] arbitrary enforcement by judges." Johnson v. U.S., 135 S. Ct. 2551, at 2557 (2015) ("Johnson II"). In Johnson this Court established a new rule of substantive law, and thus, it applies retroactively to cases on collateral review. Welch v. U.S., 136 S. Ct. 1257, 1265 (2016).

18 U.S.C. § 924(c)(1)(A) imposes an additional sentence on:

"any person who, during and in relation to any crime of violence or drug trafficking crime, if committed by the use of a deadly or dangerous weapon or devise, uses or carries a firearm." Id.

For purpose of this subsection, the term "crime of violence" means an offense that is a felony and--

"(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(A) and (B).

The first clause of this definition is generally referred to as the "force clause" and the second is referred to as the "residual clause."

The Bank Robbery statute, 18 U.S.C. § 2113(a), states as follows:

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank;
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a), assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be imprisoned not more than twenty-five years." 18 U.S.C. § 2113(a) and (d).

In light of this Court's ruling in Sessions v. Dimaya, No. 15-1498 (2018), Petitioner claimed that he was not legally convicted of an 'essential element' of his 18 U.S.C. §§ 924(c)(1)(A) and 2 charge on Count 4, i.e., a "crime of violence" as that term is defined in § 924(c)(3)(A), because the law which has developed since he was tried and convicted now requires that [a jury] (rather than a judge), find that the alleged Aiding and Abetting of a Bank and Armed Bank Robbery offense:

> "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another. Id.

Petitioner claimed therefore, that Count 4 must be vacated because the return of the jury's general guilty verdict cannot support a conviction without a jury finding based on an applicable instruction that the Aiding and Abetting of a Bank and Armed Bank Robbery constitute a crime of violence.

Petitioner challenged the constitutionality of his jury's instructions given at the time of his trial, inwhich the court instructed the jury that: "the term "crime of violence" means an offense that is a felony and has one of its:

> (A) essential elements 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)(A) and (B).

(Exhibit A, "Jury Trial Trans." Vol. V, id., at 788, ln. 19-25 (stating: "Armed Bank Robbery is a crime of violence"; "Verdict Form," Doc. 150).

For Petitioner's conviction to stand, the jury was required to compare the elements of 18 U.S.C. §§§ 2, and 2113(a) and (d), to the definition of crime of violence in § 924(c)(3)(A). See, U.S. v. McDaniels, 147 Supp. 3d 427, 432 (E.D. Va. 2015) ("The phrase 'crime of violence' is an element of § 924(c)--rather than a sentencing factor--and therefore 'must be submitted to a jury and found beyond a reasonable doubt.'") (citing, Alleyne v. U.S., 570 U.S. 99,

107 (2013).

As the Supreme Court explained in that context:

> "A jury verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the jury may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested."

Zant v. Stephens, 462 U.S. 862, 881 (1983).

Including under this theory, when it is unclear upon which § 924(c)(3)'s clause the jury may have rested a predicated offense, the Petiitoner's burden is to show only that the jury may have used the residual clause.

Thus, it is unclear from the present record which clause the jury rested its verdict within the meaning of the statutory term "crime of violence," under § 924(c)(3)(A) or (B).

Here, the record of all necessary facts [are] clearly before this Court. The jury's determination of the facts of the charged offenses unmistakably shed[s] light on whether the predicate offense was committed by means of an offense that: (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," U.S. v. Robinson, 844 F. 3d 137 (3rd Cir. 2016); 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." (Id., at 788, ln. 19-25).

(b). The Language In 18 U.S.C. § 924(c)(3)(B), Similar To ACCA's Residual Clause, Is Not Void For Vagueness In Light Of Johnson?

Similarly, other petitioners have also challenged their § 924(c)'s conviction(s) under Johnson. Although a challenge to this specific statute had yet to be decided by this Court, the Court had granted certiorari in Dimaya v. Lynch, 803 F. 3d 1110 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016). There the Ninth Circuit Court of Appeals ("NCCA") addressed a challenge to the 'residual clause' found in 18 U.S.C. § 16(b), which contains a residual clause identical to the one contained within § 924(c), but not identical to the ACCA's residual clause at issue in Johnson. The NCCA ultimately held that § 16(b)'s 'residual clause' was also void for vagueness. Id. at 1119.

Although this Court had heard oral arguments in Dimaya earlier last year in 2017, it had set the case for re-argument for its next term. Sessions v. Dimaya, 137 S. Ct. 31 (2017).

Accordingly, during the pendency of Petitioner's Dimaya's appeal in the NCCA, this Court decided Johnson II, which held that the ACCA's, so-called "residual clause" definition of "violent felony" is unconstitutionally vague under the Fifth Amendment's Due Process Clause. 576 U. S., at ___-___ (slip op., at 13-14).

The panel's decision in Dimaya, relying on Johnson II, considered whether the language similar to ACCA's residual clause in 18 U.S.C. § 16(b), which is incorporated

into 8 U.S.C. § 1101(a)(43)(F)'s definition of "crime of violence" is also void for vagueness. Reaffirming that a noncitzen may bring a void for vagueness challenge to the definition of a "crime of violence" in the Immigration and Nationality Act ("INA"), the panel held that the language in 18 U.S.C. § 16(b), suffers from the same indeterminacy this Court found in the ACCA's "residual clause" definition of a "violent felony" in Johnson II, was also unconstitutionally vague, and accordingly ruled in Dimaya's favor. Id.

The NCCA denied the Petition for Rehearing en Banc. See, Dimaya v. Lynch, Case No. 11-17307, Dkt No. 114, 201 U.S. App. LEXIS 20634 (Jan. 25, 2016), leaving the panel's decision final.

However, this Court granted Certiorari in Sessions v. Dimaya, No. 15-1498. There this Court in Sessions v. Dimaya, reaffirmed the Judgment of the panel's decision on April 17, 2018, concluding that § 16(b)'s "residual clause" is unconstitutionally vague. Pp. 6-11, 16-25.

In the instant case, Petitioner's sentence was enhanced and conviction obtained under the clause's definition of a "crime of violence" contained in 18 U.S.C. § 924(c)(3)(B), not § 924(e)(2)(B) of the ACCA found in Johnson. However, Petitioner argued that Johnson's ruling should be extended to the 'residual clause' of § 924(c)(3)(B). The question of whether Johnson applies to invalidate the residual clause language in § 924(c), was an unsettled question at the time Petitioner had refiled his 28 U.S.C. § 2255 Motion in the distirct court.

In Johnson, this Court had indicated that its ruling

did not place the language of statutory provisions like the § 924(c)(3)(B) residual clause in constitutional doubt. 135 S. Ct. at 2561. The lower courts had divided on the question of whether the application of the Johnson ruling apply to § 924(c) and similarly worded provsions. Compare U.S. v. Hill, 832 F. 3d 135, 146 (2nd Cir. 2016); U.S. v. Taylor, 814 F. 3d 340, 375 (6th Cir. 2016); and U.S. v. Prickett, 839 F. 3d 697, 699 (8th Cir. 2016) (declining to find § 924(c) void for vagueness), with U.S. v. Vivas-Ceja, 808 F. 3d 719, 723 (7th Cir. 2015) (finding language similar to § 924(c) void for vagueness); Dimaya v. Lynch, 803 F. 3d 1110, 1120 (9th Cir. 2015) (holding similar language in the Immigration and Nationality Act void); In re Smith, 829 F. 3d 1276, 1278-80 (11th Cir. 2016) (noting the issue but not deciding it in the context of an application for permission to file a second or successive § 2255 motion).

In Ovalles v. U.S., 861 F. 3d 1257, 1265 (11th Cir. 2017), the panel held:

> "that Johnson's void-for-vagueness ruling does not apply to or invalidate the 'risk-of-force' clause in § 924(c)(3)(B)." Id.

There, the panel of the Eleventh Circuit Court of Appeals recently agreed with decisions by the Second, Sixth and Eighth Circuits.

Petitioner asserts that this Court's decision in Sessions v. Dimaya, has shed significant light and have a tremendous impact upon the resolution of his §§ 924(c)(1) and 2 charge and the constitutionality of the 'residual clause' under the § 924(c)(3)(B) statute upon which his conviction

primarily rest. In that case, this Court has decided that the residual clause of 18 U.S.C. § 16(b), which is identical to the residual clause of § 924(c)(3)(B), is unconstitutional for the same reasons as the residual clause found in Johnson.

Thus, to the extent these prior Circuits' decisions are not pure dictum, they have been deemed effectively overruled or undermined to the point of abrogation by this Court in Dimaya, when this intervening higher authority has "undercut the theory or reasoning underlying the prior Circuit's precedent in such a way that they are "clearly irreconcilable." See, Miller v. Gammie, 335 F. 3d 889, 893, 900 (9th Cir. 2003) (en banc).

The prohibition of "vagueness in criminal statutes," this Court in Johnson explained, is an "essential" of due process, required by both "ordinary notion of fair play and settled rules of law." 576 U.S., at (slip op., at 4) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). The void-for-vagueness doctrine, guarantees that ordinary people have "fair notice" of the conduct the statute proscribes. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972). And the doctrine guards against arbitrary and discriminatory law enforcement by insisting that a statute provide standards to govern the action of police officers, prosecutors, juries, and judges. See, Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

In that sense, the doctrine is a corollary of the separation of powers--requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf., id., at 358, n.7 ("[I]f

the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

With the fair notice standard now in hand, all that remains is to ask how it applies to 18 U.S.C. § 924(c)(3)(B). Just like the statute in Johnson and Dimaya, the statute here instruct courts to impose special penalties on individuals involved in a "crime of violence." Just like the statute in Johnson and Dimaya, the § 924(c)(3)'s statute fails to specify which crimes qualify for that label.

Instead, and again like the statute in Johnson and Dimaya, the statute here seems to require a judge to guess about the ordinary case of the [crime of conviction] and then guess whether a "substantial risk" of "physical force" attends its commission. 18 U.S.C. § 16(b); Johnson, 576 U.S., at (slip op., at 4-5).

Johnson held that a law that asks so much of courts while offering them so little by way of guidance is unconstitutionally vague. And there is no reason that the Government could offer why this Court should reach a different result in the Judgment here.

The majority of this Court in Dimaya has reasoned and indicated that a straightforward application of Johnson effectively applies with equally staightforward application here. Section 16(b) has the same two features as ACCA's and § 924(c)'s residual clause--an ordinary-case requirement and an ill-defined risk threshold--combined in the same

constitutionally problematic way.

"In the first place," Johnson explained, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a hypothesis about the crime's "ordinary case." Id., at ___ (slip op., at 5). Under the clause, a court focused on neither the "real-world facts" nor the bare "statutory elements" of an offense. Ibid.

Instead, a court was supposed to "imagine" an "idealized ordinary case of a crime"--or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves." Ibid.

"The residual clause," Johnson summarized, "offer[ed] no reliable way" to discern what the ordinary version of any offense looked like. Ibid. And without that no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, Johnson continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any crime a "violent felony." Ibid. This Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine. The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As this Court explained:

> "[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree[.] The residual clause, however, requires application of the

'serious potential risk' standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual ... facts." Id., at (slip op., 12).

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As this Court again put the point, in the punch line of its decision: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for a crime to qualify as a violent felony, the residual clause" violates the guarantee of Due Process. Id., at (slip op. at 6).

Just like the ACCA's 'residual clause' in Johnson and § 16(b)'s 'residual clause' in Dimaya violates that promise, § 924(c)(3)(B) violates that promise in the same problematic way. To begin where Johnson and Dimaya did, § 924(c)(3)(B) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk.

And just as ACCA in Johnson, § 924(c)(3)(B) also possesses the second fatal feature as § 16(b)'s residual clause: uncertainty about the level of risk that makes a crime "violent." In ACCA, that threshold was "serious potential risk"; in § 16(b), like § 924(c), it is "substantial risk."

Once again, the point is not that such a non-numeric standard is alone problematic: In Johnson's words, "we do not doubt" the constitutionality of applying 16(b)'s "substantial

risk [standard] to real-world conduct." Id., at ___ (slip op., at 12). The difficulty comes, in § 16(b)'s--like § 924(c)'s residual clause just as in ACCA's, from applying such a standard to "a judge-imagine abstraction"--i.e., "an idealized ordinary case of the crime." Id., at ___, ___ (slip op., at 6, 12). It is then that the standard ceases to work in a way consistent with Due Process.

In sum, § 924(c)(3)(B) has the same "[t]wo features" that "conspire[d] to make [ACCA's and 16(b)'s residual clause] unconstitutionally vague." Id., at ___ (slip op., at 5). It too "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk. Id., at ___ (slip op., at 4). The result is that § 924(c)(3)(B) produces, just as ACCA's and § 16(b)'s residual clause did, "more unpredictability and arbitrariness than the Due Process Clause tolerates." Id., at ___ (slip op., at 6).

Generally, to decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what it has called the categorical approach. Leocal v. Ashcroft, 543 U.S. 1, 7 (2004). The question this Court have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that § 16(b) demands. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers. The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. Ibid. (referring

to § 16(b)'s "by its nature" language). The statute, directs courts to consider whether an offense, by its nature, poses the requisite risk of force. An offense's "nature" means its "normal and characteristics quality."

More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk. James v. U.S., 550 U.S. 192, 208 (2007). To assess that claim, start with the meaning of § 16(b)'s "in the course of" language which is identical to § 924(c)(3)(B). That phrase, understood in the normal way, includes the conduct occurring throughout a crime's commission--not just the conduct sufficient to satisfy the offense's formal elements. The Government agrees with that construction, explaining that the words "in the course of" sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57-58 (Oct. 2, 2017) (illustrating that idea with reference to ["Conspiracy"], burglary, kidnapping, and escape from prison). So, for example, "conspiracy" may be a crime of violence under § 16(b) (like § 924(c)(3)(B)) because of the risk of while the conspiracy is ongoing (i.e., "in the course of" the conspiracy); it is irrelevant that conspiracy's elements are met as soon as the participants have made the agreement. See ibid.; U.S. v. Doe, 49 F. 3d 859, 866 (CA2 1995); see also, In re Chance, 2016 U.S. App. LEXIS 14122 (U.S.C.A. 11th Cir. 2016); U.S. v. Duhart, 2016 U.S. Dist. LEXIS 12220 (U.S.D.C. S.D. Fla. 2016).

A Hobbs Act Robbery Conspiracy has three elements:

"(1) An agreement to commit Hobbs Act Robbery between two or more persons;

(2) the defendants' knowledge of the conspiratorial goal; and

(3) the defendants' voluntary participation in furthering the goal."

In re Pinder, 824, F. 3d 977, 979 n.1 (11th Cir. 2016).

In other words, a court in applying § 16(b), just like § 924(c) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, § 16(b)'s like § 924(c)(3)(B)'s "in the course of" language does little to narrow or focus the statutory inquiry; rather, ask what usually happens when a crime goes down. Thus, the analyses under ACCA's and § 16(b)'s residual clause, just like § 924(c)(3)(B)'s coincide.

The upshot is that the phrase "in the course of" makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA's or § 16(b)'s residual clause might equally fall within § 924(c)(3)(B).

As this Court have emphasized before, § 16(b) is a criminal statute with applications outside the immigration context. See, id., at 2, 13.

And of course, this Court's experience in deciding both ACCA and § 16(b) cases only support the conclusion that § 924(c)(3)(B) is too vague. For that record reveals that a statute with all the same hallmarks as ACCA and § 16(b) could not be applied with the predictability the Constitution demands. See id., at ___-___ (slip op. at 6-9). "Insanity," Justice Scalia wrote in the last ACCA residual clause case before Johnson, "is doing the same thing over and over again, but expecting different results." Sykes v. U.S., 1, at 28

(2011) (dissenting opion). In Dimaya, this Court stated: "it abandoned that lunatic practice in Johnson and see no reason to start it again." Ibid.

This Court's decision in Johnson and Dimaya, is very instructive to lower courts on how to resolve this case in the § 924(c)(3)(B)'s context." As this Court clearly noted: "Of special concern, § 16 is replicated in the definition of "crime of violence" applicable to § 924(c), which prohibits using or carrying a firearm "during and in relation to any crime of violence," or possession of a firearm "in furtherance of any such crime." 18 U.S.C. §§ 924(c)(1)(A), (c)(3).

And while a challenge directly to § 924(c) is currently before this Court, usaully lower courts would defer ruling on the issue until this Court decide U.S. v. Begay, No. 14-10080. ECF No. 87, 2017 U.S. App. LEXIS 12604 (9th Cir. 2017). However, that was not the case here.

Lower courts has discretionary power to stay proceedings in its own court. See, Landis v. North American Co., 299 U.S. 248, 254 (1936). In habeas cases, "special considerations" are implicated "that place unique limits on courts authority to stay a case in the interest of judicial economy." Id.

However, just recently in U.S. v. Salas, 2018 BL 158863, (No. 16-2170, 10th Cir. May 4, 2018), the defendant was found guilty of various arson-related offenses, and he appealed from his conviction and sentence under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a "crime of violence." The Tenth Circuit remanded to the

district court with instructions to vacate Salas' § 924(c) conviction and resentence him because § 924(c)(3)(B), the provision defining a "crime of violence" for the purpose of his conviction, is unconstitutionally vague. See Sessions v. Dimaya, (No. 15-1498) (S. Ct. April 17, 2018).

(4). Whether The Lower Court(s) Erred In Concluding That Petitioner Failed To Make A Substantial Showing Of The Denial Of A Constitutional Right?

The district court concluded and found it unlikely that another court would decide the issues raised in Petitioner's Motions differently and the issues are not debatable or deserving of further proceedings. (Id., at 14-15). These Conclusions are Incorrect.

On December 6, 2017, the Court of Appeals for the Eighth Circuit likewise Affirmed the district court's Denial of Petitioner's Application for a COA.

A district court should issue a certificate of appealability ("COA") for any issue on which a petitioner makes a "substantial showing of the denial of constitutional right." 28 U.S.C. § 2253(c)(2). This showing is "relatively low" and "permits appeal where [a] petitioner can 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the issues are adequate to deserve encouragement to proceed further.'" Slack v. McDaniels, 529 U.S. 473, 475 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)) (second alteration in original). This Court recently emphasized that this inquiry" is not coextensive with a merit analysis." Buck v. Davis, 137 S. Ct. 759, 773 (2017). The

threshold debatability question "should be decided without full consideration of the factual or legal bases adduced in support of the claims." Id. For all the foregoing reasons, as well as those set forth in toto, the lower courts should have GRANTED the Petitioner a COA; any other relief as justice so requires, because Petitioner has made a substantial showing of the denial of a constitutional right.

Therefore, on the present record, and in light of the foregoing authorities which well establishes that Petitioner has at least, raised a valid claim(s) of the denial of a Constitutional right, and that the issue(s) raised, is one "that reasonable jurists would find the district court's assessment of the Constitutional claim(s) ... at least debatale." Slack, supra.

X. CONCLUSION

For the foregoing reasons, this Court should Grant the Petition, Vacate the Judgment below, and Remand the case back to the district court for further proceedings consistent with this Court's Opinion.