NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MANUEL REYES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Questions Presented

1. Whether Petitioner is entitled to relief on his claim that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague and his conviction under 18 U.S.C. § 924(c) was obtained in violation of due process.

2. Whether the Eleventh Circuit erred under *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003) and *Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017), by denying Petitioner a certificate of appealability based on adverse circuit precedent, when the issue was nonetheless being debated among jurists around the country -- and has since been resolved in Petitioner's favor.

INTERESTED PARTIES

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

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Manuel Reyes ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's Order denying Petitioner a certificate of appealability, *Reyes v. United States*, No. 18-15099 (11th Cir. Mar. 26, 2019), is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals denying Petitioner a certificate of appealability was entered on March 26, 2019. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; ...
>
> ...
>
> **(c)(3)** For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> > **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > **(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. . . .

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

The term "crime of violence" means –

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

STATEMENT OF THE CASE

On March 6, 2006, Mr. Reyes was named in a seven-count indictment returned in the Southern District of Florida. *United States v. Reyes*, *et. al.*, No. 1:06-cr-20149-JAL (S.D.Fl Mar. 9, 2006) (Docket Entry 28) ("Cr-DE" 28). Counts 1 and 2 of the indictment alleged a conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, and an attempt to do the same. (Cr-DE 28:1-2). Count 3 alleged a conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a). (Cr-DE 28:1-3). Count 4 alleged an attempt to commit Hobbs Act robbery. (Cr-DE 28:4). Count 5 alleged a conspiracy to "use and carry a firearm during and in relation to a crime of violence and a drug trafficking crime, and to possess a firearm in furtherance of a crime of violence and a drug trafficking crime ... as set forth in Counts 1, 2, 3, and 4 of this Indictment." (Cr-DE 28:5). Count 6 of the indictment alleged that the defendant "did knowingly carry firearms during and in relation to a crime of violence and a drug trafficking crime, and did possess said firearm in furtherance of a crime of violence and a drug trafficking crime, . . . as set forth in Counts 1, 2, 3, and 4 of this Indictment." (Cr-DE 28:6). Count 7 alleged that the defendant possessed firearms after previously having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). (Cr-DE 28:7).

Mr. Reyes pled guilty to Counts 1, 5, and 6 of the Indictment, *i.e.*, the drug trafficking conspiracy, the § 924(c) conspiracy, and the substantive § 924(c) count. (*See* Cr-DE 462:8). On July 25, 2006, Mr. Reyes was sentenced to a total of 322 months' imprisonment, consisting of 262 months as to Count 1 and 240 months as

to count 5 running concurrently, and 60 months as to Count 6, to run consecutively to Counts 1 and 5. (Cr-DE 112:2). The judgment identified the "Nature of Offense," with respect to Count 6, as "Carrying a Firearm During Crime of Violence and Drug Trafficking. (Cr-DE 112:1). Mr. Reyes did not file an appeal.

On May 23, 2016, Mr. Reyes filed a *pro se* application in the court of appeals for leave to file a second or successive motion to vacate, pursuant to 28 U.S.C. §§ 2255(h) and 2244(b)(3)(A). *See In re Manuel Reyes*, No. 16-12805-J (11th Cir. 2016). The motion was denied as unnecessary because Mr. Reyes had not previously filed a § 2255 motion.

On July 5, 2016, Mr. Reyes, still acting *pro se,* filed a motion in the district court pursuant to 28 U.S.C. § 2255, alleging that his convictions under 18 U.S.C. § 924(c) and § 924(o) are unconstitutional in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). (Cr-DE-460); (DE 1, *Reyes v. United States*, 16-cv-22877 (S.D.Fl. July 5, 2016) ("Cv-DE")). The United States conceded that the motion was filed within one year of the date *Johnson* was decided, and was therefore timely under 28 U.S.C. § 2255(f)(3). (Cv-DE 14). Counsel was appointed, and filed an amended complaint, arguing that Mr. Reyes was actually innocent of Count 6, the substantive § 924(c) count, in light of *Johnson*. (Cv-DE 11).

On November 15, 2017, a federal magistrate judge issued a report recommending that the motion be denied. (Cv-DE 17). In the report and recommendation ("R&R"), the magistrate ruled that the motion was untimely

because *Johnson's* "new rule of constitutional law applies only to ACCA[1] cases involving ACCA's residual clause." (Cv-DE 17:8). The R&R also recommended that the motion be denied on substantive grounds in light of the Eleventh Circuit's decision in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) (*"Ovalles I"*), *vacated*, *Ovalles v. United States*, 905 F.3d 1231 (2018) (*en banc*) (*"Ovalles II"*). The R&R found that attempted Hobbs Act robbery is a "crime of violence" under the "use-of-force" clause of 18 U.S.C. § 924(c)(1)(A), and that "conspiracy to commit Hobbs Act robbery qualifies as a crime of violence and thus remains a valid predicate offense for purposes of a § 924(c) conviction." (Cv-DE 17:22, 26).[2] The R&R recommended that no certificate of appealability ("COA") should issue.

Mr. Reyes moved for additional of time to file objections to the R&R, which the district court granted *nunc pro tunc*, deeming his objections timely filed. (Cv-DE 18-20). Mr. Reyes objected to the R&R's finding regarding timeliness, and argued that his motion was timely under 28 U.S.C. § 2255(f)(3), because *Johnson*'s new rule of constitutional law applies to 18 U.S.C. § 924(c)(3)(B). (*See* Cv-DE 19:1-2). Mr. Reyes argued that "the same ordinary case inquiry that led the Supreme Court to conclude that the ACCA residual clause is unconstitutionally vague applies to § 924(c)(3)." (Cv-DE 5).

Mr. Reyes argued that the magistrate judge erred by separately examining the predicate offenses of attempted Hobbs Act robbery and conspiracy to commit

[1] *See* 18 U.S.C. § 924(e), the "Armed Career Criminal Act."

[2] Although the reasoning of the R&R is opaque, the district court interpreted the R&R as finding that the conspiracy satisfied the "use-of -force" clause. (*See* Cv-DE 26:4).

Hobbs Act robbery, because the court was required to presume the conviction rested upon "the least of the acts criminalized." (Cv-DE 19:2) (citations omitted). *See also Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2011) ("Because we examine what the ... conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense.") (further citation omitted). In this case, the Hobbs Act conspiracy was the least of the predicate offenses alleged in Count 6, and it is not a crime of violence. (Cv-DE 19:3). Mr. Reyes also objected to the R&R's finding that the attempted Hobbs Act robbery was a crime of violence, and argued that a certificate of appealability should issue. (Cv-DE 19:8-10)

On December 11, 2017, the government filed a response to Mr. Reyes' objections in which it claimed, for the first time and contrary to its earlier position, that Mr. Reyes' motion was untimely because his challenge to § 924(c)(3)(B) was not cognizable under *Johnson*. (Cv-DE 22:1-2).

On October 10, 2018, the district court denied Mr. Reyes' motion and found that Mr. Reyes was "not entitled to relief ... for reasons not discussed in" the R&R. (Cv-DE 26:2). Specifically, the court held that Mr. Reyes' § 924(c) conviction was "supported by the drug trafficking crime charged in Count 1 of the Indictment." (Cv-DE 26:6). The court noted that Count 6 charged Mr. Reyes with "using and carrying a firearm during and in relation to a drug trafficking crime ***and*** during

and in relation to a crime of violence." (Cv-DE 26:6) (emphasis supplied by the court).

> Accordingly, even assuming arguendo that conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery no longer qualify as crimes of violence under 924(c), Movant is not entitled to relief because his 924(c) conviction in Count 6 is supported by the drug trafficking crime charged in Count 1 (to which he pleaded guilty). And because the Court finds that reasonable jurists would not debate the issue, the Court denies a Certificate of Appealability.

(Cv-DE 26:7-8).

Mr. Reyes' Appeal to the Eleventh Circuit

Mr. Reyes filed a timely notice of appeal (Cv-DE 29), and moved the United States Court of Appeals for the Eleventh Circuit to issue a certificate of appealability on the following questions:

> (1) Whether reasonable jurists could debate whether Mr. Reyes is entitled to relief on his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, which alleged that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and that he is actually innocent of his conviction under that statute;
>
> (2) Whether reasonable jurists could debate the district court's finding that Mr. Reyes' guilty plea to a single count of violating 18 U.S.C. § 924(c) was supported by multiple, independent predicate offenses;
>
> [and]
>
> (3) Whether it is fairly debatable among jurists of reason that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

Mr. Reyes argued that reasonable jurists could -- and did -- debate whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. He pointed to an existing circuit split on the issue, and noted that the government had filed a petition for

certiorari in, *inter alia*, *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *cert. granted,* 139 S. Ct. 782 (Jan. 4. 2019) (No. 18-431), *and vacated in part*, *United States v. Davis*, --- F.3d ---, 2019 WL 2570623 (U.S. June 24, 2019).

Mr. Reyes also argued that the district court erred by assuming that Mr. Reyes' guilty plea to a single violation of 18 U.S.C. § 924(c) was supported by multiple, independent predicate crimes. Mr. Reyes argued that the court should follow well-established precedents governing the categorical approach and presume that Mr. Reyes pled guilty to the least culpable conduct at issue in Count 6. In this case, the least culpable predicate offense was the Hobbs Act conspiracy, which is not a crime of violence.

The Eleventh Circuit's Order Denying a COA

On March 26, 2019, Eleventh Circuit Judge Robin S. Rosenbaum issued a written order denying a COA. *Reyes v. United* States, No. 18-15099 (11th Cir. Mar. 26, 2019) ("App. A-1"). In the Order, Judge Rosenbaum cited circuit precedent holding that "no COA should issue where the claim is foreclosed by binding circuit precedent because reasonable jurists will follow controlling law." App. A-1 at 2 (alteration and quotation omitted). And, as Judge Rosenbaum also noted, the substantive issue presented in Mr. Reyes' petition was foreclosed by Eleventh Circuit law.

In *Ovalles v. United States*, 905 F.3d 1231 (2018) (*en banc*) (*Ovalles II*), the Eleventh Circuit candidly recognized that, in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), "if § 924(c)(3)'s residual clause is interpreted to require determination

of the crime-of-violence issue using . . . 'the categorical approach,' the clause is doomed." *Ovalles II*, 905 F.3d at 1233. Therefore, under the guise of applying the "constitutional avoidance" doctrine, the Eleventh Circuit reinterpreted the clause to "embod[y] a conduct-based approach that accounts for the actual, real-world facts of the companion offense's commission." *Ovalles II* at 1253.

Subsequently, in *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), the court held that "a vagueness challenge to § 924(c)(3)(B)'s residual clause under *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), cannot satisfy the statutory requirements of § 2255(h)." App. A-1 at 3 (citing *In re Garrett*, 908 F.3d 686 (11th Cir. 2018)). In the mind-boggling reasoning of the *Garrett* ruling, a conviction obtained under the court's prior interpretation of 18 U.S.C. § 924(c)(3)(B) -- which utilized the categorical approach -- was not the product of ***constitutional*** error, but merely a ***statutory*** one. *See In re Garrett*, 908 F.3d at 689 ("The substitution of one interpretation of a statute for another never amounts to 'a new rule of constitutional' law. ... And there certainly is no rule of constitutional law that guarantees a defendant a sentencing free of statutory error.") (emphasis and internal citations omitted). *But see Davis*, 2019 WL 2570623, slip op. at 10 ("[S]aving 924(c)(3)(B) by changing its meaning ... would also call into question countless convictions premised on the categorical approach.").

Finding that the court was "bound by *Garrett*," Judge Rosenbaum concluded that "Reyes's vagueness challenge to § 924(c)(3)(B) fails to state a constitutional claim," and denied the motion for a COA. App. A-1 at 3. This petition follows.

REASONS FOR GRANTING THE WRIT

I.

Title 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

The primary issue in this case has now been resolved by this Court: 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. *United States v. Davis*, --- S. Ct. ---, 2019 WL 2570654 (U.S. June 24, 2019).

The *Davis* holding was the logical result of this Court's rulings in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Dimaya*, the Court held that the definition of "crime of violence" under 18 U.S.C. § 16(b) - which is identical to § 924(c)(3)(b) -- was void for vagueness, for the same reasons that the Court held 18 U.S.C. § 924(e)(2)(B)(ii) invalid in *Johnson*. The problem resided in the statute's application of the categorical approach. Specifically, both statutes required courts to identify a crime's "ordinary case" in order to measure the crime's risk, and thereafter determine whether that crime presented a "serious potential risk." *See Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557.

In light of *Dimaya* and *Johnson*, the government agreed that: "read in the way nearly everyone (including the government) has long understood it," 18 U.S.C. § 924(c)(3)(B) "provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague." *Davis*, 2019 WL 2570654, slip op. at 2. Thus, the constitutional issue was not debated. The question was whether the statute could be saved by applying a conduct-based approach, similar

to that adopted by the Eleventh Circuit. After examining the "text, context, and history," of the statute, the Court held that "the statute simply cannot support the ... newly minted case-specific theory." *Davis*, 2019 WL 257064. Thus, as Mr. Reyes argued below, there is only one plausible construction of § 924(c)(3)(B): It requires the categorical approach. And that approach renders § 924(c)(3)(B) unconstitutionally vague.

Mr. Reyes should have been granted a COA on his claim that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague and his conviction under 18 U.S.C. § 924(c) was obtained in violation of due process.

II. The Eleventh Circuit applies an erroneous COA standard.

In the Eleventh Circuit, COAs are not granted where binding circuit precedent forecloses a claim. In the view of the Eleventh Circuit, "reasonable jurists will follow controlling [circuit] law," and that ends the "debatability" of the matter for COA purposes. *Hamilton v. Sec'y, Fla. Dept. of Corr.,* 793 F.3d 1261, 1266 (11th Cir. 2015) ("we are bound by our Circuit precedent, not by Third Circuit precedent"; circuit precedent "is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent") (citation omitted). *See also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Eleventh Circuit's rule that adverse circuit precedent precludes a finding that "reasonable jurists could debate" an issue is an egregious misapplication of the

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

The Eleventh Circuit has adopted an erroneous rule requiring that COAs be adjudicated on the merits. Such a rule places too heavy a burden on movants at the COA stage, like Petitioner. As the Court explained in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too

> heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774. Indeed, as the Court stated in *Miller-El*, "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016).

That was, obviously, not the case here.

III. Mr. Reyes is entitled to relief or, at least, remand.

The Eleventh Circuit's Order denying Mr. Reyes a COA rested exclusively on the erroneous circuit precedent holding that 18 U.S.C. § 924(c)(3) is ***not*** unconstitutionally vague. The Order did not address the district court's equally erroneous theory that Mr. Reyes' conviction on count 6 could be sustained by finding that Mr. Reyes' guilty plea to a single violation of 18 U.S.C. § 924(c) rested on multiple, alternative predicate offenses.

The district court found that Mr. Reyes was not entitled to relief "irrespective of the *Ovalles* opinion, and for reasons not discussed in [the R&R]." (Cv-DE 26:2). The Court wrote that: "even assuming arguendo that conspiracy to commit Hobbs act robbery and attempted Hobbs Act robbery no longer qualify as crimes of violence under Section 924(c), Movant is not entitled to relief because his 924(c) conviction in Count 6 is supported by the drug trafficking crime charged in Count 1 (to which he pled guilty)." (DE 26:7). This reasoning is fatally flawed, because it assumes Mr.

Reyes pled guilty ***to multiple separate and distinct crimes*** in a single count of conviction. This cannot be.

Title 18 U.S.C. § 924(c) makes it an offense to carry or possess a firearm "during and in relation to ***any*** crime of violence ***or*** drug trafficking offense." 18 U.S.C. § 924(c) (emphasis added). The statute identifies the predicate offenses disjunctively ("or") and uses the singular form of the words "crime" and "offense." 18 U.S.C. § 924(c). Any indictment enumerating two or more predicate crimes in a single § 924(c) count actually alleges two or more separate and independent § 924(c) offenses. *In re Gomez*, 830 F.3d 1225, 1227 (11th Cir. July 25, 2016). Thus, Count 6 of Mr. Reyes' indictment, which enumerated four separate predicate offenses, charged four separate and distinct crimes. (Cr-DE 28:6). Following the categorical approach, which always governed 18 U.S.C. § 924(c), the court was required to presume that conviction rested upon "the least of the acts criminalized." *Moncrieffe*, 133 S.Ct. at 1684. In this case, the "least of the acts criminalized" was the conspiracy to commit Hobbs Act robbery, which cannot be considered a crime of violence without reliance on the unconstitutionally-vague residual clause.

It is therefore clear that Mr. Reyes is entitled to relief on his claim that his conviction under 18 U.S.C. § 924(c)(3)(B) was obtained in violation of due process and must be vacated. Alternatively, his case should be remanded to the Eleventh Circuit for a determination of the same. At a minimum, he was entitled to a COA on this issue.

CONCLUSION

For the reasons stated herein, the Court should grant the writ and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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