NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

KENNETH H. BURKE JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Kenneth H. Burke Jr. respectfully requests a sixty-day extension of time from May 20, 2019 to and including July 19, 2019, within which to file a petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Eleventh Circuit. *See* S. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

On December 2, 2011, a jury found Mr. Burke guilty of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), attempted Hobbs Act robbery (count two), in violation of § 1951, brandishing and discharging a firearm during a "crime of violence," in violation of § 924(c) (count three), and possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (count four). The "crime[s] of violence" referenced in count three were the conspiracy and attempted offenses alleged in counts one and two. On February 24, 2012, he was sentenced to 355 months' imprisonment—235 months on counts one, two, and four, to run concurrently, and 120 months on count three, to run consecutive to the other counts.

After this Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Burke sought authorization from the Eleventh Circuit to file a successive § 2255 motion. In his application, Mr. Burke raised two claims. First, he claimed that his sentence on count four was improperly enhanced based on the residual clause of the Armed Career Criminal Act ("ACCA"). Second, he claimed that his conviction on count three was improperly based on § 924(c)'s residual clause. Both claims relied on the new rule of constitutional law announced in *Samuel Johnson*. The Eleventh Circuit granted the application in part. It denied Mr. Burke's first claim, holding that he failed to make a *prima facie* showing that *Samuel Johnson* affects his ACCA sentence; however it granted Mr. Burke authorization on his § 924(c) claim, stating:

> Burke's application and the record indicate that his § 924(c) conviction was based on his convictions for conspiracy and attempt to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a). In light of [our] grant of an application in [*In re Pinder*, 824 F.3d 977 (11th Cir. 2016),] a case involving conspiracy to commit Hobbs Act robbery as a companion crime under § 924(c)(3)(A), Burke has made a *prima facie* showing that he may be entitled to relief under the rule announce in [*Samuel*] *Johnson* as to his conviction and sentence under § 924(c).

Based on the Eleventh Circuit's authorization, Mr. Burke moved in the district court for relief under § 2255, arguing that his § 924(c) conviction must be vacated in light of *Samuel Johnson*. Without requiring a response from the government, the district court denied the motion, stating that Mr. Burke failed to meet the procedural requirements for filing a second or successive motion under § 2255(h) because *Samuel Johnson* does not apply to § 924(c). The district court also denied Mr. Burke a certificate of appealability (COA).

Mr. Burke filed a timely notice of appeal, and on February 22, 2017, the Eleventh Circuit granted Mr. Burke a COA on these issues:

> (1) Whether the district court erred, under 28 U.S.C. § 2244(b)(4), by finding that Burke had not met the requirements to file a second or successive § 2255 motion.
>
> (2) Whether Burke's § 924 conviction is now unconstitutional based on [*Samuel Johnson*]

After Mr. Burke was granted a COA by the Eleventh Circuit, the court issued a sharply divided en banc opinion, holding that § 924(c)'s residual clause is not unconstitutionally vague. *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. Oct. 4, 2018) (en banc). Although all members of the Eleventh Circuit recognized that § 924(c)(3)(B) was unconstitutionally vague under the categorical approach, to save it from the "trash heap," the majority employed the doctrine of constitutional avoidance to "jettison" the categorical approach, and it instead adopted a "conduct-based approach that accounts for the actual, real-world facts of the crime's commission." *Id*. at 1253. The dissent, however, maintained that the majority ignored this Court's contrary precedents in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which dictated that the plain text of § 924(c)(3)'s residual clause requires application of the categorical approach. *See id*. at 1277–99 (Jill Pryor, J., joined by Wilson, Martin, and Jordan, JJ., dissenting).

After the en banc decision in *Ovalles*, the Eleventh Circuit issued an unpublished decision vacating the district court's denial of Mr. Burke's § 2255 motion. In pertinent part, the Eleventh Circuit stated:

> Until recently, this Court used the same categorical approach to decide whether a particular offense counts as a crime of violence under § 924(c)(3)(B). *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013) (O'Connor, J.), *overruled by Ovalles*, 905 F.3d 1231. However, *Ovalles*, which is a "successor" to Johnson, abandoned the categorical approach for purposes of deciding whether an offense counts as a crime of violence under § 924(c)(3)(B). 905 F.3d 1231, 1233–1235. In an effort to avoid the constitutional problems identified in *Johnson*, this Court adopted instead what we called a "conduct-based" approach to § 924(c)(3)(B). *Id.* at 1233–1235. Rather than imagine an ordinary case in the abstract, *Ovalles* now requires us to ask whether a defendant's actual conduct "by its nature[ ] involve[s] a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B); *Ovalles*, 905 F.3d at 1253–54. Because this is a factual determination that increased punishment, *Ovalles* recognized that juries, not judges, must decide whether a defendant's conduct involved such a substantial risk. *See* 905 F.3d at 1249–51. Importantly for this case, *Ovalles* recognized that the use of the categorical approach under § 924(c)(3)(B) implicates the same vagueness problems at issue in *Johnson*. *Id.* at 1233.
>
> It seems likely that the conspiracy to commit robbery and attempted robbery charges were categorically treated as crimes of violence here. The jury was instructed they could find Burke guilty of the § 924(c) charge only if they found beyond a reasonable doubt that Burke "committed either or both of the crimes of violence charged in Counts One or Two." Counts One and Two charged conspiracy to commit robbery and attempted robbery. This instruction appears to have told the jury that the crimes charged were crimes of violence, rather than ask the jury to decide whether Burke's conduct made those counts crimes of violence. If the jury was instructed that conspiracy to commit robbery and attempted robbery were to be treated as crimes of violence under § 924(c)(3)(B), Burke may well have stated a *Johnson* claim. As a result, he may be entitled under *Ovalles* to have a jury decide whether his offenses posed a substantial risk that force would be used. We leave it to the district court to reconsider its decision to deny Burke's § 2255 petition and to decide in the first instance what relief, if any, Burke is entitled to in light of *Ovalles*.

About a week later, the Eleventh Circuit *sua sponte* vacated its decision and affirmed the district court's denial of Mr. Burke's § 2255 motion. In its new opinion, the Eleventh Circuit stated:

> We *sua sponte* vacate our earlier opinion in this case and affirm the district court's judgment denying Kenneth Burke's motion to vacate his conviction and sentence under 28 U.S.C. § 2255.
>
> Burke says the Supreme Court's decision in *Johnson v. United States*, ––– U.S. ––––, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), invalidated his conviction for carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Section 924(c) defines a crime of violence in part as any felony "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.* § 924(c)(3)(B). *Johnson* held similar language in 18 U.S.C § 924(e)(2)(B)(ii) unconstitutionally vague. 135 S. Ct. at 2557. This Court recently ruled in *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), that neither *Johnson* nor *Sessions v. Dimaya*, ––– U.S. ––––, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), invalidate § 924(c). *Garrett* thus forecloses Burke's argument.[1]

Notably, several circuits have disagreed with the Eleventh Circuit's decision in *Ovalles*, and the Court has granted certiorari in *United States v. Davis*, 138 S.Ct. l1979 (U.S. May 14, 2018) (No. 18-431) to resolve the circuit conflict. Since the predicate for the § 924(c) conviction here is the same predicate at issue in *Davis* – a conspiracy to violate the Hobbs Act, which the government has conceded does not independently qualify as a "crime of violence" within §

[1] After the Eleventh Circuit decided *Ovalles*, it decided *In re Garrett*, 908 F.3d 686 (11th Cir. 2018), and *Solomon v. United States*, 911 F.3d 1356 (11th Cir. 2019). Those cases held that individuals convicted of § 924(c) offenses before *Ovalles* cannot obtain relief pursuant to a second or successive § 2255 motion because such individuals cannot satisfy § 2255(h)(2) gateway requirement of relying on a "new rule of constitutional law." *Solomon*, 911 F.3d at 1360 (quoting *Garrett*, 908 F.3d at 689) ("[G]iven *Ovalles II* 's holding that § 924(c)(3)(B) is not unconstitutionally vague, 'neither *Johnson* nor *Dimaya* supplies any 'rule of constitutional law' . . . . that can support a vagueness-based challenge to the residual clause of section 924(c).'"). According to the Court, any challenge an individual might raise to the use of the categorical approach would be "statutory in nature." *Id.*

924(c)(3)(A) – resolution of Mr. Burke's case will depend on how the Court resolves *Davis*.[2] Nonetheless, *Davis* is a direct appeal case. And therefore, it may not resolve all of the questions that are necessary to determine its impact for cases on collateral review.

Plainly, if the Court agrees with the government that § 924(c)(3)(B)'s residual clause is unconstitutionally vague in light of *Samuel Johnson* and *Dimaya*, that would definitively abrogate *Ovalles*, and resolution of Mr. Burke's case should be straightforward—relief should be granted.[3] However, *if* the Court jettisons the categorical approach and adopts a "circumstance-specific" approach to § 924(c)(3)(B), as the Eleventh Circuit did in *Ovalles* and as the government has urged in *Davis*, the Court will need to determine whether a § 2255 motion like Mr. Burke's which challenges a conviction under the now-admittedly unconstitutional categorical approach to § 924(c)(3)(B), "contains . . . a new rule of constitutional law" as required by 28 U.S.C. § 2255(h) for all second or successor motions.

If Mr. Burke must file his petition for certiorari by the current May 20th due date, he will be forced to hypothesize various ways *Davis* may be resolved and address all of the possibilities. That would be inefficient, wasteful, and unnecessarily complicated, particularly if the Court thereafter declares § 924(c)(3)(B) unconstitutionally vague. It would make more sense at this juncture to extend Mr. Burke's due date for seeking certiorari, so that counsel may consider the Court's actual reasoning in *Davis*, and address the impact of that – rather than alternative, hypothetical rulings – upon cases like this, in a second or successive posture on collateral review.

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[2] Mr. Burke's § 924(c) count was duplicitous because it relied on two predicate offenses—attempted Hobbs Act robbery and conspiracy to commit Hobbs Act robbery. Consequently, it must be assumed his conviction is based on the least culpable offense—conspiracy to commit Hobbs Act robbery. *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016).

[3] The rule announced in *Samuel Johnson* applies retroactively on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

*Davi*s will be argued April 17th, and a decision is expected by the end of the term in June. To allow counsel sufficient time to consider the Court's reasoning in *Davis* before filing certiorari in this case, the undersigned respectfully requests that the Court extend the due date for Mr. Burke's petition for writ of certiorari by sixty days, from May 20 to July 19, 2019.

Neither the government nor Mr. Burke would be prejudiced by such an extension.

Respectfully submitted,

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