**NO:**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2019**

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**JORGE BAEZ,**
***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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

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# 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 therefore his conviction under 18 U.S.C. § 924(c) was obtained in violation of due process.

2. Whether the Eleventh Circuit erred by denying Petitioner a certificate of appealability when the issue was nonetheless being debated among jurists around the country -- and has since been resolved in Petitioner's favor in *United States v. Davis*, --- S. Ct. ---, 2019 WL 2570654 (U.S. June 24, 2019).

## INTERESTED PARTIES

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

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Jorge Baez ("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, *Baez v. United States*, No. 18-15174-F (11th Cir. Mar. 4, 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 4, 2019. An extension of time to file this petition was granted by Justice Thomas until July 18, 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 February 26, 2009, Mr. Baez was named in a four-count indictment returned in the Southern District of Florida. *United States v. Baez, et. al.*, No. 09-cr-60052-JAL (S.D.Fl Feb. 26, 2009) (Docket Entry 12) ("Cr-DE" 12). Count 1 of the indictment alleged a conspiracy to possess with intent to distribute 5 kilograms or more of cocaine; Count 2 alleged a conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a); and Count 3 alleged that the defendants did knowingly use and carry a firearm during and in relation to a drug trafficking offense and during and in relation to a crime of violence as set forth in Counts 1 and 2. (Cr-DE 12:1-2). Count 4 alleged that the defendant possessed a firearm after previously having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). (Cr-DE 12:3).

Mr. Baez pled guilty to all counts of the Indictment. (*See* Cr-DE 36). On September 14, 2009, Mr. Baez was sentenced to a total of 180 months' imprisonment, consisting of 120 months as to Counts 1, 2 and 4 to run concurrently and 60 months as to Count 3 to run consecutively to the term of prison imposed on the other counts. (Cr-DE 66). Mr. Baez appealed his sentences, and the Eleventh Circuit affirmed the sentences in an unpublished opinion dated March 9, 2011. *United States v. Baez*, 517 F. App'x 852 (11th Cir. 2011).

On July 1, 2016, Mr. Baez filed a *pro se* motion to vacate in the district court. *Baez v. United States*, 1:16-cv-61559-JAL (DE 1) ("Cv-DE" 1). In his *pro se* motion, Mr. Baez challenged his conviction under 18 U.S.C. § 924(c) as being

unconstitutional in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015). (Cv-DE 1). Counsel was appointed, and filed a supplemental briefing arguing that Mr. Baez was actually innocent of Count 3, the § 924(c) count, in light of *Johnson*. (Cv-DE 9).

On August 29, 2017, a federal magistrate judge issued a report recommending that the motion be denied. (Cv-DE 12). 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 12:8). 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 conspiracy to commit Hobbs Act robbery is a "qualifies as a crime of violence and thus remains a valid predicate offense for purposes of a § 924(c) conviction." (Cv-DE 12:19).[2] The R&R recommended that no certificate of appealability ("COA") should issue.

Mr. Baez 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 applied to 18 U.S.C. § 924(c)(3)(B). (*See* Cv-DE 13:1-2). Mr. Baez objected to the panel's decision in *Ovalles I*, and argued that the same ordinary case inquiry that led the Supreme Court to conclude that the ACCA residual clause is

[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).

unconstitutionally vague applies to § 924(c)(3). (Cv-DE 13:4-5). He also objected to the R&R's finding that conspiracy to commit Hobbs Act robbery was a crime of violence, and argued that a certificate of appealability should issue. (Cv-DE 13:4-8).

After the objections were filed in September 2017, there was no movement in the district court, except for that filing of a supplemental authority by Mr. Baez,[3] until October 2018. On October 3, 2018, the district court formally held the case in *abeyance* pending the *en banc* Court's decision in *Ovalles*, and ordered the parties to file a written notice of the *en banc* ruling "within seven days of the mandate's issuance." (Cv-DE 16:2). The Court's *en banc* ruling issued the following day. *See Ovalles II*, 905 F.3d 1231.

On October 10, 2018, prior to the issuance of the mandate in *Ovalles II*, the district court issued a final order denying Mr. Baez's motion and finding that Mr. Baez was "not entitled to relief irrespective of the *Ovalles* opinion, and for reasons not discussed in" the R&R. (Cv-DE 18:2). Specifically, the court held that Mr. Baez's § 924(c) conviction was "supported by the drug trafficking crime charged in Count 1 of the Indictment." (Cv-DE 18:6). The court noted that Count 3 charged Mr. Baez 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. (Civ-DE 18:6) (emphasis supplied by the court). The district court then found that, "[a]ccordingly, even assuming arguendo that conspiracy to commit Hobbs Act robbery no longer qualify as crimes of violence under 924(c), Movant is not entitled to relief because

[3] On April 18, 2018, Mr. Baez filed a notice of supplemental authority regarding the U.S. Supreme Court's ruling in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

his 924(c) conviction in Count 3 is supported by the drug trafficking crime charged in Count 1 (to which he pleaded guilty)." *Id.* The district court also denied a certificate of appealability, finding that reasonable jurists would not debate the issue. (Cv-DE 18:7).

**Mr. Baez's Appeal to the Eleventh Circuit**

Mr. Baez filed a timely notice of appeal (Cv-DE 21). Mr. Baez 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. Baez is entitled to relief on his motion…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. Baez's 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.

Pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), Mr. Baez 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. Baez also argued that the district court erred by assuming that his guilty plea to a single violation of 18 U.S.C. § 924(c) was supported by multiple, independent predicate crimes. Mr. Baez argued that the court should follow well-established precedents governing the categorical approach, including *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011), and presume that he pled guilty to the least culpable conduct at issue in Count 3. 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 4, 2019, Eleventh Circuit Judge Stanley Marcus issued a one page (consisting of two sentences) written order denying a COA. *Baez v. United* States, No. 18-15174 (11th Cir. Mar. 4, 2019) ("App. A-1"). In the Order, the single judge summarily stated that Mr. Baez "failed to make a substantial showing of the denial of a constitutional right." The summary opinion denying the certificate of appealability did not address any of Mr. Baez's substantive arguments, including the Circuit split on the issue of the 924(c) residual clause, nor the *Davis* petition pending in this Court. *United States v. Davis*, --- S. Ct. ---, 2019 WL 2570654 (U.S. June 24, 2019) has now been decided in a manner that overrules the Eleventh Circuit precedent in *Ovalles II*, and that should result in Mr. Baez's appeal being heard. 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. Baez 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. Baez 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. Baez is entitled to relief or, at least, remand.**

The Eleventh Circuit's Order denying Mr. Baez a COA did not explain the basis for its decision. However, it may be presumed that it rested exclusively on the erroneous circuit precedent holding that 18 U.S.C. § 924(c)(3)(B) is ***not*** unconstitutionally vague. *Ovalles II,* 905 F.3d at 1252. The Order did not address the district court's equally erroneous theory that Mr. Baez's conviction on Count 3 could be sustained by finding that Mr. Baez's 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. Baez was not entitled to relief "irrespective of the *Ovalles* opinion, and for reasons not discussed in [the R&R]." (Cv-DE 12:2). The Court wrote that: "even assuming arguendo that Hobbs act conspiracy no longer qualify as crimes of violence under Section 924(c), Movant is not entitled to relief because his 924(c) conviction in Count 3 is supported by the drug trafficking crime charged in Count 1 (to which he pleaded guilty)." (Cr-DE 12:7). This

reasoning is fatally flawed, because it assumes Mr. Baez 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 3 of Mr. Baez' indictment, which enumerated two separate predicate offenses, charged four separate and distinct crimes. (Cr-DE 12:2). 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. Baez 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 for issuance of a certificate of appealability.

Respectfully submitted,

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