NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

KELBY GERMAINE PARSON,

***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

MICHAEL CARUSO
Federal Public Defender

Panayotta Augustin-Birch
Assistant Federal Public Defender
Counsel for Petitioner
109 North 2nd Street
Fort Pierce, Florida 34950
Telephone No. (772) 489-2123
E-mail: panayotta_augustin-birch@fd.org

QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a seven-year mandatory minimum penalty. This petition presents the following questions:

I. 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.

II. 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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PETITION FOR WRIT OF CERTIORARI

Kelby Germaine Parson respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10337-AA in that court on July 24, 2019, *Kelby Germaine Parson v. United States*.

OPINION AND ORDER BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (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 was entered on July 24, 2019 where Court of Appeals denied an application for a Certificate of Appealability. *See* Apendix A-1. This petition is timely filed under SUP. CT. R. 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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 December 13, 2012, Mr. Parson was named in a two-count indictment returned in the Southern District of Florida. *United States v. Parson*, No. 9:12-cr-80232-KAM (S.D.Fl Mar. 9, 2006) (Docket Entry 15) ("Cr-DE" 15). Count 1 alleged an attempt to commit Hobbs Act robbery. (Cr-DE 15). Count 2 alleged that he did knowingly "use, carry, and brandish 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... as set forth in Count 1 of this Indictment." (Cr-DE 28).

On February 26, 2013, Mr. Parson entered a plea of guilty to attempted Hobbs act robbery (count one) and possession of a firearm in furtherance of a crime of violence (count two). On May 21, 2016, he was sentenced to a total sentence of

141 months imprisonment, consisting of 57 months as to attempt Hobbs act robbery on count one, and 84 months on count two, the § 924(c) count, to run consecutively. Mr. Parson did not file an appeal.

Mr. Parson moved *pro se* to vacate his sentence under 28 U.S.C. § 2255. Cr-DE 39); (DE 1, *Parson v. United States*, 16-cv-81142 (S.D.Fl. June 24, 2016) ("Cv-DE")). Counsel was appointed, and filed on October 24, 2016, an amended motion to vacate was filed arguing that his § 924(c) convictions should be vacated since § 924(c)'s residual clause was unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015); and that Hobbs Act conspiracy and Hobbs Act robbery were not categorically crimes of violence. (Cv-DE 10). Mr. Parson also objected to the Report & Recommendation's finding that the attempted Hobbs Act robbery was a crime of violence, and argued that a certificate of appealability ("COA") should issue. (Cv-DE 22)

On November 29, 2017, however, the district court judge entered an order adopting the report and recommendation, which stated that the conviction for Hobbs Act robbery qualified as a predicate § 924(c) offenses. (Cv-DE23). The district court also denied Mr. Parson a COA.

On February 20, 2018, Mr. Parson filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) convictions are unconstitutional in light of *Samuel Johnson*. *Johnson v. United States*, 135 S.Ct. 2551 (2015). In his application, Mr. Parson argued that reasonable jurists could debate whether *Samuel Johnson* invalidated § 924(c)'s residual clause and

whether Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause. Regarding Hobbs Act robbery, Mr. Parson argued that under the least-culpable-act rule, his robbery conviction was presumably committed by causing a victim to fear financial loss, and therefore Hobbs Act robbery does not categorically have as an element the "use, attempted use, or threatened use of physical force."

Mr. Parson acknowledged that in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), the Eleventh Circuit published an order denying an application to file a second or successive § 2255 motion, holding that Hobbs Act robbery qualifies as a "crime of violence" under the force clause. However, Mr. Parson argued that given the unique nature of how orders are resolved at the SOS stage, such orders are not binding outside that context. Mr. Parson also argued that regardless of *Saint Fleur*'s precedential value, its reasoning was unpersuasive. Mr. Parson explained that in *In re Garcia*, No. 16-14320 (11th Cir. July 27, 2016), one member of the *Saint Fleur* panel stated that, upon further reflection, she believed her decision in *Saint Fleur* may have been erroneous. Based on the foregoing, Mr. Parson respectfully submitted that, at a minimum, he had made the threshold showing necessary to obtain a COA, because reasonable jurists could (and do) debate whether his § 924(c) convictions are unconstitutional in light of *Samuel Johnson*.

On July 2, 2019, counsel for Mr. Parson filed a letter pursuant to F.R.A.P. 28(j) notifying the Court of the decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019). Mr. Parson asserted, following *Davis*, reasonable jurists could

debate whether § 924(c)(3)(B) is unconstitutionally vague under Johnson, and therefore Mr. Parson's motion for certificate of appealability should be granted.

On July 24, 2019, the Eleventh Circuit denied Mr. Parson's application for a COA. The Court stated that "a COA may not issue where Mr. Parson cannot demonstrate that his conviction is invalid, and reasonable jurists would not debate the district court's denial of his § 2255 motion." The Court also held that it did not need to resolve the threshold issues in *United States v. Davis*, 139 S. Ct. 2319 (2019), because Mr. Parson's conviction was for attempted Hobbs Act robbery under the element clause. It further held that attempted Hobbs Act robbery qualified as a crime of violence under the element clause of § 924(c)(3)(B). *United States v. St. Hubert*, 909 F.3d 335, 352-52 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). The Court denied Mr. Parson a COA.

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*, 588 U.S. ___, 139 S.Ct. 2319 (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. Parson 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.

In *Bachiller*, this Court recently granted the petition for a *writ of certiorari*, vacated the judgment, and the case was remanded to the Eleventh Circuit Court of Appeals[1]. *Bachiller v. United States*, __ S.Ct. __, 2019 WL 4921147 (October 7, 2019). Mr. Parson 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

[1] This court granted the petition to review the judgment, where Mr. Bachiller sought a certificate of appealability, and dealt with whether *Johnson* applied retroactively to a 28 U.S.C. § 2255 motion attacking a conviction and sentence imposed under 18 U.S.C. § 924(c)(3).

(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.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: *Panayotta Augustin-Birch*
Panayotta Augustin-Birch
Assistant Federal Public Defender
Counsel for Petitioner

Fort Pierce, Florida
October 22, 2019