NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

RICHARD BEN
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60378

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under Supreme Court precedent established in *Johnson* and *Dimaya*, Mr. Ben's conviction for brandishing a firearm in relation to a crime of violence should be vacated because robbery under § 2111 is no longer a "crime of violence."

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Richard Ben on September 27, 2012.[1] The conviction was for brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). The purported crime of violence was robbery under 18 U.S.C. § 2111. The district court case number is 4:12cr11-HTW-LRA. The subject § 2255 Petition arises from this § 924(c) brandishing conviction.

In 2015, after entry of Mr. Ben's brandishing conviction, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutionally vague. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).[2] Later, in *Sessions v*, *Dimaya*, 138 S.Ct. 1204 (2018), this Court relied on the holdings in *Johnson* (2015) and ruled that the residual clause in 18 U.S.C. § 16 is unconstitutionally vague as well.

Invoking the holdings in *Johnson* (2015) and *Dimaya*, Mr. Ben filed the subject § 2255 Petition to Vacate Sentence on June 23, 2016. In the Petition, Mr. Ben argued that post-*Johnson* (2015) and post-*Dimaya*, robbery is no longer a

[1] The district court's Judgment is attached hereto as Appendix 1.

[2] This Petition cites two important Supreme Court cases captioned "*Johnson v. United States*." One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the parameters of the phrase "physical force" in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as "*Johnson* (2015)," and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as "*Johnson* (2010)."

crime of violence, so his § 924(c) conviction for brandishing a firearm during a crime of violence should be vacated. The district court case number for the § 2255 case is 4:16cv1-HTW.

The district court denied Mr. Ben's § 2255 Petition via an Order entered on May 18, 2018. On the final page of the Order, it denied a Certificate of Appealability.[3] Mr. Ben appealed his case to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit case number is 18-60378. On November 6, 2019, the appeals court entered an Order affirming the district court's rulings. It filed a Judgment on the same day.[4] This Petition for Writ of Certiorari followed.

[3] The district court's Order is attached hereto as Appendix 2.
[4] The Fifth Circuit's Opinion and its Judgment are attached hereto as composite Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on November 6, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

In *Johnson* (2015), the primary case that Mr. Ben's argument is based on, this Court found that the "residual clause" portion of the ACCA's definition of "violent felony" is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: "No person shall … be deprived of life, liberty, or property, without due process of law[.]"

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Ben asked the district court to vacate his conviction under 18 U.S.C. § 924(c) for brandishing a firearm during a crime of violence. The § 2255 Petition concerns an underlying conviction filed in the United States District Court for the Southern District of Mississippi. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the § 924(c) brandishing conviction arose from the laws of the United States of America.

B. Statement of material facts.

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Ben for brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). Robbery under 18 U.S.C. § 2111 was the purported crime of violence that the brandishing charge is based on. The Grand Jury returned the Indictment on May 9, 2012.

Mr. Ben accepted responsibility for his actions by pleading guilty to the charge on July 10, 2012. The court conducted a sentencing hearing on September 19, 2012. It sentenced Mr. Ben to serve 84 months in prison, followed by five

years of supervised release.[5] The court entered a Judgment reflecting this sentence on September 27, 2012. Mr. Ben did not file a direct appeal of the conviction and sentence.

After the district court filed Mr. Ben's Judgment, this Court established new sentencing law in *Johnson* (2015). Based on the new law, he filed the instant § 2255 Petition on June 23, 2016. The district court denied the Petition on May 18, 2018. Through the same Order, the district court denied a Certificate of Appealability (hereinafter "COA").

Mr. Ben filed a timely Notice of Appeal on May 21, 2018. Since the district court denied a COA, Mr. Ben had to move the Fifth Circuit for the same. The Fifth Circuit granted a COA on January 11, 2019, stating, "a COA is GRANTED as to whether the district court erred in its assessment of the merits of Ben's claim." Pursuant to this Order, Mr. Ben filed his Appellant's Brief with the Fifth Circuit on February 27, 2019.

In a one-paragraph Opinion, the Fifth Circuit affirmed the district court's rulings on November 6, 2019. Supporting its ruling, the court cited a prior Fifth Circuit Opinion, *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017). In *Brewer*,

[5] According to the Federal Bureau of Prisons' website, Mr. Ben was released from prison on January 25, 2019. However, this appeal is not moot because he continues to be on supervised release. Since the brandishing conviction was his only conviction in this case, his supervised release must end if the Court vacates the conviction.

the court found that robbery by "intimidation" meets the definition of "crime of violence." Since robbery under § 2111 can be committed by intimidating a victim, the court concluded that the robbery purportedly committed by Mr. Ben supported his § 924(c) brandishing conviction. Dissatisfied with that ruling, Mr. Ben seeks certiorari from this Court.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." For the following reasons, this Court should exercise its discretion and grant certiorari in this case.

Federal district and appeal courts are flush with cases arising from this Court's rulings in *Johnson* (2015).[6] As with Mr. Ben's case, many of the issues focus in part on defining action that constitutes "*physical force* against the person of another." The "physical force" requirement must be met for a prior conviction to count as a "crime of violence" under 18 U.S.C. § 924(c). This Court provided a level of guidance on the "physical force" requirement in *Johnson* (2010),[7] and *Stokeling v. United States*, 139 S.Ct. 544 (2019).

Notwithstanding the holdings in *Johnson* (2010) and *Stokeling*, lower courts still struggle with determining what types of actions constitute "physical force" under § 924(e)(2)(B)(i). Granting certiorari in this case will give the Court an opportunity to clarify the definition of "physical force" in the context of both § 924(c) and the ACCA. Therefore, the Court should grant Mr. Ben's Petition for Writ of Certiorari.

[6] *See supra*, footnote 2.
[7] *See supra*, footnote 2.

B. Section 2255 standard.

Mr. Ben's Petition is filed under the provisions of 28 U.S.C. § 2255. Section 2255(a) 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 court was without jurisdiction to impose such sentence, 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.

(Emphasis added).

Mr. Ben contends that his conviction "was imposed in violation of the Constitution." His argument is based on the rulings in *Johnson* (2015), which was decided by this Court on June 26, 2015, as well as *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), which this Court decided on April 17, 2018. In *United States v. Welch*, 136 S.Ct. 1257 (2016), this Court ruled that the holdings in *Johnson* (2015) are retroactively applicable to cases on collateral review.

C. The holdings in *Johnson* (2015) and *Dimaya*.

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

> Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must

> decide *whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws*.

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion focuses on a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

> (e)(1) In the case of a person who violates section 922(g)[8] of this title and has three previous convictions by any court referred to in section 922(g)(1)[9] of this title for a *violent felony* or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and *imprisoned not less than fifteen years*, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

Johnson (2015) pertains to the "violent felony" language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

> (e)(2) As used in this subsection –
>
> * * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]

[8] 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.
[9] 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]"

(Emphasis added).

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of "violent felony" includes any act that "otherwise involves conduct that presents a serious potential risk of physical injury to another." This language is commonly referred to as the ACCA's "residual clause." *See Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court's framing of the issue in light of the case-specific facts:

> After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses – including unlawful possession of a short-barreled shotgun, *see* Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

> [I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.

> Our contrary holdings in *James*[10] and *Sykes*[11] are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

Under the above holdings in *Johnson* (2015), it is unconstitutional to increase a defendant's sentence under § 924(e)(1) because he has any prior "violent felonies," as defined under the residual clause of § 924(e)(2)(B)(ii). This ruling does not apply to the enumerated "violent felonies" stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a "violent felony" under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

(1) have "as an element the use, attempted use, or threatened use of physical force against the person of another" (§ 924(e)(2)(B)(i)); or

(2) be "burglary, arson, or extortion" or "involve[] use of explosives" (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent

[10] The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).
[11] The full cite for *Sykes* is *Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267 (2011).

felony. Under the residual clause, a prior conviction is deemed a violent felony if it "otherwise involve[ed] conduct that present[ed] a serious potential risk of injury to another[.]" *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

In *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), this Court found that the residual clause in 18 U.S.C. § 16 unconstitutionally vague. The *Dimaya* Court relied on the holdings in *Johnson* (2015) to reach that conclusion.

Section 16's residual clause states "crime of violence" includes "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." 18 U.S.C § 16(b). This is identical to the § 924 residual clause at issue in Mr. Ben's case. *See* 18 U.S.C. § 924(c)(3)(B) (stating "crime of violence includes any offense, "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.").

In *United States v. Davis*, 903 F.3d 483, 485-86 (5th Cir. 2018), the Fifth Circuit held that *Johnson* (2015) and *Dimaya* apply to 18 U.S.C. § 924(c). Accordingly, the court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *Id.* at 486.

D. Mr. Ben's conviction for brandishing a firearm during a crime of violence should be vacated under the holdings in *Johnson* (2015).

As stated above, Mr. Ben's conviction for brandishing a firearm during a crime of violence is premised on robbery under 18 U.S.C. § 2111 being a "crime of violence." For the following reasons, it is not. Therefore, Mr. Ben's conviction and sentence must be vacated, and his supervised release must be terminated.

The brandishing conviction is under 18 U.S.C. § 924(c)(1)(A)(ii), which states in relevant part:

> 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 … 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--
>
> * * * * *
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years[.]

(Emphasis added). The phrase "crime of violence" is defined as follows:

> (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. § 924(c)(3) (emphasis added). Subsection (3)(A) contains the physical force definition of crime of violence and subsection (3)(B) contains the residual clause definition.

The residual clause definition of "crime of violence" stated in § 924(c)(3)(B) is unconstitutional under Fifth Circuit precedent. *Davis*, 903 F.3d at 486. This means the only option for determining whether a robbery counts as a crime of violence is the physical force clause of § 924(c)(3)(A). So we must analyze whether robbery under § 2111 "has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]" If it does not, then the brandishing a firearm during a crime of violence conviction must be vacated.

In *Johnson* (2010) the Supreme Court defined the level of force required to meet the "physical force" requirement of § 924(e)(2)(B)(i). "[T]he phrase 'physical force' means *violent* force – that is, force capable of causing physical pain or injury to another person." *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). "It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, *intellectual force or emotional force*." *Id.* at 138 (emphasis added).

This Court revisited the meaning of "physical force" in *Stokeling v. United States*, 139 S.Ct. 554 (2019). In the context of a prior conviction for robbery, the

court held that a crime satisfies the "physical force" aspect of the elements clause if the force required for a conviction "is sufficient to overcome a victim's resistance." *Id.* at 554. *Stokeling* did not affect the *Johnson* (2010) Court's holding that intellectual or emotional force are insufficient to meet the definition of physical force.

In the context of *Johnson* (2010), we must analyze the robbery statute – 18 U.S.C. § 2111. This statute states in relevant part:

> Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or *by intimidation*, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

Id. (emphasis added).

Under the plain language of § 2111, robbery can be committed "by intimidation," which requires no physical force whatsoever. Robbery "by intimidation" is more akin to committing an offense through exertion of "intellectual force or emotional force," which the *Johnson* (2010) Court explicitly found insufficient to meet the physical force clause. Therefore, Mr. Ben's purported robbery crime is not a "crime of violence" under § 924(c), and his conviction under § 924(c) should be vacated.

VI. CONCLUSION

Based on the arguments presented above, Mr. Ben asks the Court to grant his Petition for Writ of Certiorari in this case.

Submitted January 31, 2020 by:

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