NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

SCOTT MEECE
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. 19-60681

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under this Court's rulings in *Johnson* and *Dimaya*, Mr. Meece's conviction and sentence for brandishing a firearm in relation to a crime of violence should be vacated because bank robbery under § 2113 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 Scott Meece on February 26, 2008. The conviction was for:

- count 1, bank robbery in violation of 18 U.S.C. § 2113(a) and (d); and
- count 2, brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1).

The district court case number is 3:07cr50-HTW-LRA. The subject § 2255 Petition arose out of conviction and sentence for count 2, brandishing a firearm in relation to a crime of violence.

In 2015, after Mr. Meece's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).[1] Invoking the holdings in *Johnson* (2015), Mr. Meece filed the subject § 2255 Petition to Vacate Sentence on June 27, 2016. The district court assigned the Petition civil case number 3:16cv513-HTW.

[1] This Brief 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 phrase "physical force" in § 924(e)(2)(B)(i). In this Brief, *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)."

In the Petition, Mr. Meece argued that his conviction and sentence for count 2, brandishing a firearm in relation to a crime of violence, should be vacated under the holdings in *Johnson* (2015). The district court entered an Order denying the relief sought in the § 2255 Petition on September 5, 2019. The final page of the Order states that a Certificate of Appealability is denied. The district court's Order is attached hereto as Appendix 1.

Mr. Meece appealed the case to the United States Court of Appeals for the Fifth Circuit on September 10, 2019. The Fifth Circuit case number is 19-60681. Because the district court denied Mr. Meece a Certificate of Appealability, he had to move the Fifth Circuit for the same. The Fifth Circuit entered an Order denying a Certificate of Appealability on September 5, 2019. The Fifth Circuit's Order is attached hereto as Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed its final Order in this case on July 1, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's Covid-19 related Order dated March 19, 2020. 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 case that Mr. Meece bases his argument on, this Court found that the "residual clause" portion of 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 § 2255 case arises out of a criminal conviction entered against Mr. Meece for bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Meece arose from the laws of the United States of America.

B. Statement of material facts.

This Petition presents an issue that is purely legal in nature. The only relevant fact is Mr. Meece's count 2 conviction for brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). The count 1 bank robbery conviction was the "crime of violence" that the count 2 brandishing conviction was based on.

The sentence on the count 2 brandishing conviction was seven years (84 months). The sentence on the count 1 bank robbery conviction was 37 months. The district court ordered Mr. Meece to serve the two sentences consecutively, for a total of 121 months in prison. It also ordered him to serve a five-year term of supervised release following his prison sentence.

V. ARGUMENT

A. Introduction.

Mr. Meece asks the Court to vacate his conviction and sentence under count 2, which is for brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c). In support of his argument, Mr. Meece relies on this Court's holdings in *Johnson* (2015) and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018).

In *Johnson* (2015), this Court found that the "residual clause" stated in the definition of "violent felony" in ACCA is unconstitutionally vague. In *Dimaya*, this Court applied the reasoning in *Johnson* (2015) and found that the similarly worded "crime of violence" definition in 18 U.S.C. § 16(b) is unconstitutionally vague. 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), which is the statute at issue under count 2 in Mr. Meece's case.

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

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion." Rule 10(c) goes on to state that a reason to grant certiorari is when "a United States court of appeals … "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Based on the analysis presented in the following subsections of this Petition, the Fifth Circuit in this case rendered a decision "that conflicts with

relevant decisions of this Court." Specifically, the Fifth Circuit's rulings in *Meece* conflict with this Court's rulings in *Johnson* (2110).[2] Therefore, this Court should grant certiorari.

C. Section 2255 standard.

Mr. Meece'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. Meece contends that his sentence "was imposed in violation of the Constitution." His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to case on collateral review. *United States v. Welch,* 136 S.Ct. 1257 (2016).

D. The holdings in *Johnson* (2015).

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

[2] *See supra*, footnote 1.

> 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)[3] of this title and has three previous convictions by any court referred to in section 922(g)(1)[4] 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 –

[3] 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.
[4] 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[.]"

> (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*[.]

(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*[5] and *Sykes*[6] 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)).

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

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 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.

E. Under this Court's rulings in *Johnson* and *Dimaya*, Mr. Meece's conviction and sentence for brandishing a firearm in relation to a crime of violence should be vacated because bank robbery under § 2113 is no longer a "crime of violence."

As stated above, the bank robbery conviction in count 1 is the "crime of violence" that the count 2 conviction for brandishing a firearm is based upon. The crime of violence definition regarding the brandishing conviction is under 18 U.S.C. § 924(c)(3)(B), which is comparable but not identical to the § 924(e)(2)(B)(ii) definition found unconstitutional in *Johnson* (2015).[7] Even though the language is not identical, case law subsequent to *Johnson* (2015) holds that the rulings in *Johnson* (2015) apply to the residual clause of § 924(c). The cases that hold this are *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) and *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018).

[7] 18 U.S.C. § 924(c)(3)(B) defines crime of violence to include conduct that "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 *Dimaya*, this Court ruled that the residual clause in 18 U.S.C. § 16 is unconstitutionally vague. The *Dimaya* Court relied on the holdings in *Johnson* (2015) to reach that conclusion. Section 16's residual clause states a "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. Meece'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 *Davis*, 903 F.3d at 485-86, the Fifth Circuit held that *Johnson* (2015) and *Dimaya* apply to 18 U.S.C. § 924(c). Accordingly, the Fifth Circuit held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *Id.* at 486. So under *Johnson* (2015), *Dimaya* and *Davis*, the residual clause of § 924(c) is no longer a legal option to analyze whether bank robbery is a crime of violence.

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.

As analyzed above, the residual clause definition of "crime of violence" stated in § 924(c)(3)(B) is unconstitutional under the law of both this Court and the Fifth Circuit. *See Davis*, 903 F.3d at 486. This means the only option for determining whether the bank robbery conviction counts as a crime of violence is the physical force clause of § 924(c)(3)(A). So we must analyze whether robbery under § 2113 "has as an element the use, attempted use, or threatened use of ***physical force*** against the person or property of another[.]" *Id.* (emphasis added).

Next, we consider the language of the bank robbery statute. Section 2113 is titled "Bank robbery and incidental crimes." Section 2113(a) states:

> (a) Whoever, by force and violence, or by *intimidation*, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

(Emphasis added).

In *Johnson* (2010) this 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.

This Court recently revisited the meaning of "physical force" in *Stokeling v. United States*, 139 S.Ct. 544 (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.

To determine whether the robbery is a "crime of violence" on the basis that the prohibited conduct involves "physical force," we look to "the least of the[] acts" enumerated in the statute. *Johnson* (2010) 559 U.S. at 137 (citation omitted). Committing robbery by "intimidation" is the "least act" that will satisfy the statutory elements of § 2113(a). Intimidation is comparable to inflicting "intellectual force or emotional force" to commit the crime, and *Johnson* (2010) clearly holds that this does not meet the definition of "physical force" under § 924(e)(2)(B)(i). *Johnson* (2010), 559 U.S. at 138. For this reason, robbery under § 2113(a) does not define a "crime of violence" under the Guidelines. This Court should grant certiorari to address the issue.

VI. CONCLUSION

Based on the arguments presented above, Mr. Meece asks the Court to grant his Petition for Writ of Certiorari.

Submitted November 18, 2020, by:

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CERTIFICATE OF SERVICE

I, Michael L. Scott, appointed under the Criminal Justice Act, certify that today, November 18, 2020, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 772114787708, addressed to:

The Honorable Noel Francisco
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
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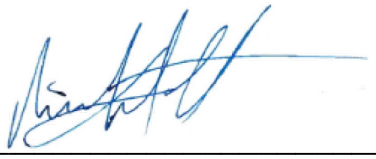
I further certify that all parties required to be served with this Petition and the Motion have been served.



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