20-7629 ORIGINAL

No. 21-_____

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT EARL MARTIN,

Petitioner-Appellant.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT EARL MARTIN
REG. NO. 39869-066
FCI BUTNER MEDIUM II
FEDERAL CORR. INSTITUTION
P.O. 1500
BUTNER, NC 27509
APPEARING *PRO SE*

QUESTIONS PRESENTED

I. Whether application of *Johnson* to the virtually identical residual clause in § 3559(c) does not require a new rule of constitutional law, but merely requires a straightforward application of *Johnson*'s reasoning to that statute.

PARTIES TO THE PROCEEDINGS

Petitioner-Appellant, ROBERT EARL MARTIN ("Martin"), was a criminal defendant in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, in USDC Criminal No. 2:98-cr-00178-MAK-1; as a Movant in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, in USDC Civil No. 2:20-cv-00108-MAK; and as Appellant in the United States Court of Appeals for the Third Circuit ("Third Circuit") in USCA No. 20-1907. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Third Circuit.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Rules and Regulations

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Order of the United States Court of Appeals for the Third Circuit in *USA v. Robert Martin,* No. 20-1907 (3rd Cir. 2020), is attached in the Appendix at 1A.

STATEMENT OF JURISDICTION

Petitioner-Appellant timely appealed from the district court's Judgment in a Civil Case to the United States Court of Appeals for the Third Circuit. On September 9, 2020, the Court of Appeals for the Third Circuit issued an Order denying Martin's Motion for Certificate of Appealability; and on November 2, 2020, the Third Circuit denied Martin's Petition for Panel Rehearing. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken, for public use, without just compensation.

18 U.S.C. § 924 (2012). Penalties. Subsection (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 . . . .

18 U.S.C. § 3559. Sentencing classification of offenses.

(c) Imprisonment of certain violent felons.—

(1) Mandatory life imprisonment.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or a

State of—

(i) 2 or more serious violent felonies; or
(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions.—For purposes of this subsection ...

(F) the term "serious violent felony" means—
(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and ((a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

STATEMENT OF THE CASE

A. The Proceedings Below

On April 7, 1998, a grand jury sitting in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division, returned a two (2) count Indictment charging Martin. See Doc. 10.[1] Count 1 charged Martin with Armed Bank Robbery, in violation of 18 U.S.C. § 2113(d). *Id.* Count 2 charged Martin with Using of a Firearm in Furtherance of a Crime of Violence, in violation of 18 U.S.C. § 924(c). *Id.*

On May 28, 1998, the United States filed an Information charging prior offenses to establish penalty of mandatory life imprisonment, pursuant 18 U.S.C. § 3559(c). See Doc. 15.

On July 1, 1998, Martin was found guilty of both counts by a jury trial before Honorable Norma L. Shapiro. See Docs. 28, 29.

On August 1, 2001, Martin was sentenced to a total term of Life imprisonment, 3 years supervised release, $6,694.00 in Restitution, and a Mandatory Special Assessment Fee of $200. See Docs. 83, 84.

B. The Factual Background

1. Offense Conduct

On March 6, 1998, at approximately 12:40 p.m., there

---

1 "Doc." refers to the Docket Report in the United States District Court for the Eastern District of Pennsylvania, Philadelphia Division in Criminal No. 2:98-cr-00178-MAK-1, which is immediately followed by the Docket Entry Number. "PSR" refers to the Presentence Report in this case, which is immediately followed by the paragraph ("¶") number.

was a robbery of the United Bank branch located at 280-West Girard Avenue, Philadelphia, PA. The United Bank's deposits are insured by the Federal Deposit Insurance Corporation (FDIC). In the March 6 robbery, a black male entered the United Bank alone, carrying a sawed-off double-barreled shotgun. The robber was wearing a green baseball cap, a blue hooded zip-up sweatshirt, blue jeans, and tan work boots.

The robber approached an unarmed female bank guard who was standing in the bank lobby and announced that this was a bank robbery. He placed the sawed-off shotgun next to her head and demanded that he be let into the teller area. The teller area is separated from the bank lobby by two locked doors, both of which can be entered from the bank lobby side only by use of a buzzer system.

At first, the guard pushed the shotgun barrel away from her head. The robber hit her in the head with the shotgun, and told her that he was not joking, he would shoot her. The robber told bank personnel in the teller area that he would blow the guard's head off if they did not let him in.

A customer service representative buzzed the robber through the two locked doors, into the teller area. The robber held the sawed-off shotgun on the bank guard as he came in. Once inside the teller area, the robber shoved the bank guard onto the floor and opened a cash drawer, removing approximately $6,694 in United States currency. The robber held the shotgun on the customer service representative while he rifled the cash drawer.

The robber left the bank, stuffing the money into his sweatshirt pockets as he left. He escaped on foot, running eastbound on West Girard Avenue and north on 28th Street.

After the robbery, FBI agents interviewed a bank teller from whose drawer the robber had taken the money. She was present during the robbery, standing in the teller area when the robber took the money from her drawer. In describing robber, she stated that he struggled --when he walked.

A series of surveillance photographs depicting the robber were obtained from United Bank. They show a man wearing a baseball cap, zip-up sweatshirt, blue jeans and work boots. In several pictures, the robber can be seen standing in a "pigeon-toed" manner, that is, with his toes facing inward.

Philadelphia Police Department officers showed surveillance photographs to a woman who lives in the area of the bank. She stated that she knew the man in the photos, as "Rob." She told the officers that "Rob" worked at a barber shop at 25th and Master Streets. Officers went to the barber shop and determined that the person known to her as "Rob" was named Robert Earl Martin. Martin was taken into custody by the officers on a local bench warrant for failure to appear on charges of theft and unlawful taking.

See PSR ¶¶ 7-14.

2. Trial Proceeding

Three bank employees testified at trial and positively identified him as the person who committed the bank robbery. See PSR ¶ 15. On July 1, 1998, a jury found Martin guilty on both counts. See Docs. 28, 28. The case was referred to the Probation Office for the preparation of the PSR.

3. Presentence Report Calculations and Recommendations

On March 6, 2000, the Probation Office prepared Martin's PSR, using the 1998 edition of the Guidelines Manual. Count 1: Armed Bank Robbery calls for a Base Offense Level of 20, pursuant to U.S.S.G. § 2B3.1. See PSR ¶ 21. Two (2) levels were added for taking property of a financial institution, pursuant to U.S.S.G. § 2B3.1(b)(1). See PSR ¶ 22. The PSR calculated Martin's Total offense Level to be level 22. See PSR ¶ 30. Martin's total criminal history points of 5, placed him in Criminal History Category III. See PSR ¶ 36. Based upon a Total Offense Level of 22 and a Criminal History Category of III, the guideline range for imprisonment was 51 to 63 months to be followed by 240 months consecutive term. However, based on the provisions of 18 U.S.C. § 3559(c), the guideline sentence is life. (§ 5G1.1(b)). See PSR ¶ 60.

4. Sentencing Proceeding

Prior to sentencing, the United States sought life imprisonment under section 3559(c), known as the "three-strikes" statute, based on his 1974 conviction for second-degree murder and the 1988 conviction for carrying a firearm in relation to the bank robbery and armed bank robbery.

On August 1, 2001, a Sentencing Hearing was held before Judge Norma L. Shapiro. See Doc. 83. The Court adopted the PSR as its own and sentence Martin to a total term of Life imprisonment, followed by 3 years of supervised release. See Doc. 84. The Court also ordered payment of $6,694.00 in Restitution and a Mandatory Special Assessment Fee of $200. *Id.* A timely Notice of Appeal was filed on August 2, 2001. See Doc. 86.

5. Appellate Proceeding

On Appeal, Martin makes two arguments - first, that the prosecutor denied his right to due process and a fair trial by stating her beliefs regarding the evidence and mischaracterizing the testimony of the photographic evidence expert; second, that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the government was required to prove his two prior violent felony convictions to the jury beyond a reasonable doubt in order for the "three strikes" mandatory life sentence to apply. See *United States v. Martin*, 46 Fed.Appx. 119 (3d Cir. 2002).

6. PostconvictionProceeding

On March 11, 2004, Martin filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion"), arguing that his trial counsel committed three errors that violate an objective standard of reasonableness, and these errors individually and cumulatively resulted in prejudice sufficient to undermine confidence in the outcome of his trial. See Doc. 92. On May 17, 2005, the Court issued an Order denying Martin's § 2255 Motion. See Doc. 106.

On January 6, 2020, Martin filed a § 2255 Motion, through the Federal Defender, argued the Supreme Court in *Johnson* invalidated the residual clause definitions of "serious violent felony" in the three-strikes statute, 18 U.S.C. § 3559, and "crime of violence" in ACCA, § 924(c)(3).

On May 10, 2018, the United States Court of Appeals for the Third Circuit, No. 16-2623, denied Martin's application under 28 U.S.C. §§ 2244 and 2255 to file a second or successive § 2255 motion. The Court of Appeals found "[e]ven if those residual clause definitions were

invalid under *Johnson*, however, [Martin] has not made a *prima facie* showing that his convictions of armed bank robbery under 18 U.S.C. § 2113(d) would not remain 'serious violent felonies' or 'crimes of violence' under the 'elements clause' definitions contained in those statutes." On February 28, 2020, after the mandate from the Third Circuit Court of Appeals denied Martin leave to file a second or successive petition, the District Court denied Martin's § 2255 motion and declined to issue a certificate of appealability ("COA"). See Doc. 137; Appendix 1B.

On June 8, 2020, Martin filed an Application for COA (after his request for an extension of time to file application for COA was granted), which the Third Circuit denied on September 9, 2020. See Appendix 1C. On September 25, 2020, Martin filed a Petition for Rehearing En Banc and before Original Panel. On November 2, 2020, the Third Circuit denied his petition. See Appendix 1A.

Note: Due to the ongoing coronavirus pandemic (COVID-19), prisoners at FCI Butner Medium II, where Martin is currently incarcerated, are on lockdown and/or observing special procedures during the COVID-19 pandemic (including but not limited to social distancing). Also, due to delays in mail processing caused by COVID-19 mitigation efforts and stay-in-place orders, Martin did not receive the Court's Order denying his Petition for Rehearing promptly. Therefore, Martin needed additional time to prepare his Petition for Writ of Certiorari as he has very limited, barely any, resources needed to prepare his brief.

REASONS FOR GRANTING THE WRIT

As a preliminary matter, Martin respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*,

404 U.S. 519, 520 (1972).

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1)(B), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.* To satisfy the "substantial showing" requirement, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Walker v. Gov't of the Virgin Islands*, 43 V.I. 265 (3rd Cir. 2000). The petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Slack* at 483-84 (quoting *Barefoot* at 893 & n.4). A substantial showing must be made for each issue presented. *Barefoot v. Estelle*, 463 U.S. 880 (1983). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003).

In the instant case, the district court denied the Martin's claim that he is entitled to relief under *Johnson* by invoking the concurrent sentence doctrine. See Appendix 1B. Apparently, the district court opined that *Davis* is a challenge to the ambiguity in the residual clause of ACCA. This 2019 decision does not affect Martin's sentence under the three-strikes statute. . . But even if the Supreme Court held the residual clause of the three-strikes statute is unconstitutional, Martin's crimes may fall within the elements clause of the three-strikes statute. The authorizing statute identifies armed bank robbery as a predicate offense. The second-degree state court murder conviction also qualifies under the then-existing Pennsylvania law. Judge

Shapiro correctly held Martin's criminal history warranted the life sentence under the three-strikes statute. *Id.* at 8. The district court did not give Martin the opportunity to demonstrate why his sentence cannot be enhanced under the three-strikes statute under *Johnson*. Clearly, the question of whether *Johnson* applies to the three-strikes statute, is debatable among jurists of reason.

Application of *Johnson* to the Virtually Identical Residual Clause in § 3559(c) Does Not Require a New Rule of Constitutional Law, but Merely Requires a Straightforward Application of *Johnson*'s Reasoning to That Statute

A. A New Constitutional Rule Is Not Necessary to Apply *Johnson* to the Residual Clause of 18 U.S.C. § 3559(c)

When Martin filed his request for permission to file an SOS petition, he sought permission to challenge his life sentences under the three strikes statute, 18 U.S.C. § 3559(c), specifically claiming that his second-degree murder conviction did not constitute serious violent felony for purposes of triggering the life sentence mandated by § 3559(c). In denying his SOS request [ECF Doc. No. 127; In re Robert Earl Martin, No. 16-2623], however, the Court of Appeals found "[e]ven if those residual clause definitions were invalid under *Johnson*, however, [Martin] has not made a prima facie showing that his convictions of armed bank robbery under 18 U.S.C. § 2113(d) would not remain 'serious violent felonies' or 'crimes of violence under the 'elements clause' definitions contained in those statutes." *Id.*

In *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017), a panel of the Sixth Circuit concluded that movant's claim was barred by the statute of limitations in 28 U.S.C.

§ 2255(f)(3) because *Johnson* did not recognize a new "Constitutional right not to be sentenced as [a] career offender[] under the residual clause of the mandatory Sentencing Guidelines." *Id.* at 631. On April 17, 2018, in *Sessions v. Dimaya*, 138 S. Ct. at 1213-15, this Court struck down the residual clause of 18 U.S.C. § 16(b) as unconstitutionally vague: Doing so required only a "straightforward application" of the "straightforward decision" in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Dimaya*, 138 S. Ct. at 1213. In *Dimaya*, the Court identified two features of the ACCA residual clause that applied with equal force to 18 U.S.C. § 16(b). First, both statutes require that the assessment of risk posed by the offense focus on the conduct that the crime involves "in the ordinary case." *Id.* at 1215. Second, both statutes then require the court to judge whether that abstract ordinary case presents "some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216.

Dimaya refutes the basic underlying premise of *Raybon* - that application of *Johnson* outside the ACCA context requires a new rule — by its "straightforward application" of the new substantive rule announced in *Johnson* to a virtually identical residual clause in another sentencing statute. *Dimaya*, 138S. Ct. at 1213 (emphasis added). The rule recognized in Johnson, 135 S. Ct. at 2657-58, and made retroactive to cases on collateral review in *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016), is that a defendant has the right not to have his sentence "fixed" by an unconstitutionally vague residual clause. The residual clause was not held unconstitutionally vague because it was in the ACCA, but because it required judges to assess the risk posed by an ill defined hypothetical "ordinary case," and then to determine whether the "ordinary case" met an unclear threshold level of risk. *Dimaya*, 138 S. Ct. at 1216. The residual clause in 18 U.S.C. § 3559(c)(2)(F)(ii) does not differ in any material

way from the residual clauses invalidated in *Johnson* and *Dimaya*.

Johnson's reasons for finding the ACCA residual clause void for vagueness apply with equal force to the substantially similar statutory residual clause in 18 U.S.C. § 16(b), rendering that provision unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court explicitly rejected three arguments the government made in an attempt to distinguish § 16(b) from the ACCA's residual clause in § 924(e)(2)(B)(ii). First, the Court found that § 16(b)'s requirement that risk arise "in the course of committing the offense" does not significantly affect a court's obligation to assess the way in which a crime is "ordinarily" committed. *Id.* at 1219-20 ("In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later."). Second, the Court found that § 16(b)'s reference to "physical force" did not differentiate it from the ACCA's residual clause, which required "physical injury." *Id.* at 1220-21 ("[E]valuating the risk of 'physical force' itself entails considering the risk of 'physical injury.'"). Finally, the Court declined to find that § 16(b) was distinguishable from the ACCA's residual clause based on the fact that § 16(b) lacks a "confusing list of exemplar crimes." *Id.* at 1221 ("To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem.").

In light of *Dimaya*, it seems probable that the substantially similar residual clause in 18 U.S.C. § 3559(c) is unconstitutionally vague as well. Indeed, there is no significant textual difference between the residual clauses found in § 924(e)(2)(B)(ii) and § 16(b), and those found in § 924(c)(3)(B), § 3559(c)(2)(F)(ii), and the pre-*Booker* version of U.S.S.G. § 4B1.2(a)(2). See *United States v. Saks*, 889 F.3d 681, 687-88 (10th Cir. 2018) (noting that §

924(c)(3)(B) is identical to § 16(b); *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018) (finding the language in the pre-*Booker* career offender guideline identical to the ACCA residual clause language deemed unconstitutional in *Johnson*); *Haynes v. United States*, 237 F. Supp. 3d 816, 823 (C.D. Ill. 2017) (noting that the government conceded that the language of § 3559(c)(2)(1)(ii) is "almost identical to the language in the residual clauses that have been found unconstitutionally vague and that the Court is bound by circuit precedent").

Prior to *Dimaya*, only one Court of Appeals had held that § 924(c) – which contains a residual clause identical to that in § 16(b) and virtually identical to the residual clause in § 3559(c) – was unconstitutionally vague under the reasoning in *Johnson*. See *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). By contrast, the Eighth Circuit had rejected a void for vagueness challenge to § 924(c). *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (noting that the Second and Sixth Circuits had also found *Johnson* inapplicable to § 924(c)). *Prickett* and other pre-*Dimaya* decisions finding § 924(c) constitutional, however, have almost certainly been abrogated by *Dimaya*. Indeed, since *Dimaya* was decided in April 2018, the D.C. Circuit and the Tenth Circuit have both determined that § 924(c) is unconstitutionally vague for precisely the reasons set forth in *Johnson* and *Dimaya*. See *Salas*, 889 F.3d at 687-88; *United States v. Eshetu*, No. 15-3010, 2018 WL 367907, at *1-2 (D.C. Cir. Aug. 3, 2018). Likewise, at least one Court of Appeals has held post-*Dimaya* that the pre-*Booker* career offender guideline residual clause – which is identical to the ACCA residual clause struck down in *Johnson* – is unconstitutionally void for vagueness. See *Cross*, 892 F.3d at 300-03; but see *United States v. Green*, 17-2906, 2018 WL 3717064 (3d Cir. Aug. 6, 2018) (declining to find that *Johnson* opened a new one-year window to raise § 2255 challenges to the pre-*Booker* career offender guideline because the Supreme Court in *Beckles* expressly left that

question open). There is little, if any, reason to think that the reasoning of *Johnson* and *Dimaya* does not also render the residual clause in § 3559(c) unconstitutionally vague.

The Court's decision in *Beckles* bolsters the case for applying *Johnson* to § 3559(c). *Beckles* held that the advisory guidelines are not subject to vagueness challenges because the "advisory Guidelines do not fix the permissible range of sentences." *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). Importantly, the pre-*Booker* mandatory sentencing guidelines were not at issue in *Beckles*, leading Justice Sotomayor to acknowledge that the decision "at least leaves open the question of whether defendants sentenced to terms of imprisonment before our decision in [*Booker*] . . . may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring). Justice Sotomayor explicitly acknowledged, however, that defendants sentenced prior to *Booker* were sentenced "during the period in which the Guidelines did 'fix the permissible range of sentences.'" *Id.* For this reason alone, a "straightforward application" of *Johnson* would seem to dictate that the residual clause in the pre-*Booker* mandatory sentencing guidelines is unconstitutionally void for vagueness. See *Dimaya*, 138 S. Ct. at 1213.

The case for applying *Johnson* to the residual clause in § 3559(c) is as strong as the case for applying it to the pre-*Booker* guidelines, especially when viewed in light of *Dimaya*'s analysis of the virtually identical language in § 16(b). First, *Johnson* is applicable to § 3559(c) because § 3559(c) does more than "fix the permissible range of sentences"— it mandates a single specific sentence of life imprisonment. See *Beckles*, 137 S. Ct. at 892. Second, although the residual clause in § 3559(c) is contained in a separate subsection, it is textually linked to § 3559(c)(2)(F)(i), which provides an even lengthier and more "confusing set of examples [than those] that plagued the

Supreme Court" in *Johnson*. *Prickett*, 839 F.3d at 699. Third, § 3559(c) requires sentencing courts to do exactly what they were required to do pursuant to both the ACCA and § 16(b) – examine an "ordinary case" to assess the level of risk of conduct that "is remote from the [present] criminal act." *Dimaya*, 138 S. Ct. at 1211; *Prickett*, 839 F.3d at 699 (quotation marks and citations omitted). Thus, even if pre-*Dimaya* decisions such as *Prickett* are correct that § 924(c)'s residual clause is distinguishable from the ACCA's residual clause because § 924(c) focuses only on a contemporaneous offense, § 3559(c) simply cannot be distinguished in this way. Finally, the residual clause in § 3569(c)(2)(F)(ii) suffers from the second defect that, combined with the "ordinary case" standard, rendered the ACCA and § 16(b) residual clauses unconstitutionally vague — it employs a "fuzzy risk standard" that "le[aves] unclear what threshold. level of risk m[kes] any crime a '[serious] violent felony.'" *Dimaya*, 138 S. Ct. at 1214. "In sum, [§ 3559(c)) has the same two features that conspired to make [ACCA's and 16(b)'s residual clauses) unconstitutionally vague. It too requires a court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216. "The result is that [§ 3559(c)] produces, just as the ACCA's [and 16(b)'s] residual clause[s] did, more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

B. Second-Degree Murder Is Not a Serious Violent Felony Under 18 U.S.C. 3559(c)

Notwithstanding the Third Circuit's opinions in his case, Martin has a compelling argument that, in the absence of the residual clause, second-degree murder does not constitute a serious violent felony under § 3559(c).

In *United States v. Begay*, No. 14-10080 (9th Cir. 2019), the panel affirmed a conviction for second-degree murder (18 U.S.C. §§ 1111 and 1153), reversed a conviction for discharging a firearm during a "crime of violence" (18 U.S.C. § 924(c)(1)(A)), reversed a mandatory restitution order, and remanded for resentencing. Affirming the second-degree murder conviction, the panel held that the district court did not plainly err in failing to instruct the jury on absence of "heat of passion" as an element of second-degree murder. The panel held that because second-degree murder can be committed recklessly, it does not categorically constitute a "crime of violence" under the elements clause, 18 U.S.C. § 924(c)(3)(A). Because in light of *United States v. Davis*, 139 S. Ct. 2319 (2019), second-degree murder likewise cannot constitute a crime of violence under the residual clause, 18 U.S.C. § 924(c)(3)(B), the panel concluded that the defendant's § 924(c) conviction cannot stand. The panel held that because second-degree murder is not categorically a crime of violence, the district court erred in imposing mandatory restitution under 18 U.S.C. § 3663A.

To determine whether second-degree murder is a "crime of violence" we apply the "categorical approach" laid out in *Taylor v. United States*, 495 U.S. 575 (1990). *Benally*, 843 F.3d at 352. Based on the facts of this case, it is easy to understand how the shooting of the victim at the lounge [with the use of Martin's shotgun] might not be a "crime of violence." One of the patrons at the lounge swung at Martin with a bar stool and it accidentally hit the gun causing it to fire, fatally injuring an innocent bystander. See PSR ¶ 33. Under the categorical approach, however, we do not look to the facts underlying the conviction, but "compare the elements of the statute forming the basis of the defendant's conviction with the elements of" a "crime of violence." See *Descamps v. United States*, 570 U.S. 254, 257 (2013). The defendant's crime cannot be a categorical

"crime of violence" if the conduct proscribed by the statute of conviction is broader than the conduct encompassed by the statutory definition of a "crime of violence." See *id.*

Martin argues that second-degree murder does not qualify as a predicate offense under § 3559(c)(2)(F)(i) because it was not a murder "as described" in § 1111 of Title 18. The Court never reached that issue, finding, instead, that second-degree murder qualified under enumerated clause of § 3559(c). In reaching the said conclusion, the Court focused on the language of the charging document and the specific circumstances of Martin's crime, thereby omitting any analysis of the alternative methods of committing second-degree murder contained in the statutory text. Proper application of the categorical approach, however, requires a reviewing court to look "only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990).

In *Mathis v. United States*, 136 S. Ct. 2243, 2256-57 (2016), the Court clarified the distinction between alternative elements, which make a statute divisible, and alternative means, which do not. "'Elements' are the 'constituent parts' of a crime's legal definition — the things the 'prosecution must prove to sustain a conviction.'" *Id.* at 2248 (citation omitted). "Means," on the other hand, are "diverse means of satisfying a single element of a single crime — or otherwise said, spell[] out various factual ways of committing some component of the offense — a jury need not find (or a defendant admit) any particular item[.]" *Id.* at 2249.

Three Strike Mandatory Sentencing (18 U.S.C. 3559(c))

The federal three strikes provision calls for a mandatory term of life imprisonment for defendants convicted of a serious violent felony who have two or more federal or state serious violent felony convictions or one or more of such felony conviction plus one or more federal or state serious drug conviction, 18 U.S.C. 3559(c). The qualifying violent felonies are those specifically enumerated within the section—murder, rape, violent robberies, extortion, among others—as well as unenumerated felonies, that is, any state and federal 10-year felony that involves the fact or risk of physical violence. The qualifying serious drug offenses are those punishable by imprisonment for 10 years or more under state or federal law. The section creates an exemption where defendants can prove that an otherwise qualifying conviction involved neither the fact nor risk of injury.

Defendants have regularly challenged the constitutionality of the section and whether their felony convictions constitute convictions for qualified offenses. The question of when a felony should be considered an unenumerated serious violent felony has proven perplexing, but recent Supreme Court construction of the term in another context may be illuminating. The Court has said in *Johnson*, *Chambers*, and *Begay* that for purposes of the Armed Career Criminal Act (ACCA) a violent felony is one that involves the purposeful, aggressive use of force, capable of inflicting physical pain or injury upon another.

18 U.S. Code § 1111 - Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate,

malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
Any other murder is murder in the second degree.

(b) Within the special maritime and territorial jurisdiction of the United States,
Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;
Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.

18 U.S. Code §§ 1111(a)-(b).

Obviously, a defendant may challenge an enhanced federal sentence on direct appeal or collateral review when a prior conviction used to enhance the sentence is void under *Johnson*. This is now relevant because the First Step Act requires enhancement for a "serious violent felony," defined in part as any offense that "by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. § 3559(c)(2)(F)(ii).

In this case, Martin encounters an insurmountable procedural hurdle, and the prior conviction was a "serious violent felony" as defined in 18 U.S.C. § 3559(c)(2), hence, he is now trying to invoke the statutory right to resentencing for such convictions. Only § 851(a) applies, *id.* § 3559(c)(4), and there is a statutory right to resentencing with no procedural bars:

> If the conviction for a serious violent felony . . . that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

18 U.S.C. § 3559(c)(7).

As aforementioned, second-degree murder does not constitute a crime of violence under the elements clause—18 U.S.C. § 924(c)(3)(A)—because it can be committed recklessly.

"[B]ecause the wording of [18 U.S.C. § 924(c)(3) and 18 U.S.C. § 16] is virtually identical, we interpret their plain language in the same manner." *Benally*, 843 F.3d at 354 (analyzing the required mental state for § 924(c)(3) by looking to case law interpreting § 16); see also *Davis*, 139 S.Ct. at 2326 ("Like § 924(c)(3), § 16 contains an elements clause and a residual clause. The only difference is hat § 16's elements clause, unlike § 924(c)(3)'s elements clause, isn't limited to felonies . . . ."). 18 U.S.C. § 16 defines the term "crime of violence" as:

> (a) an offense that has 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.

The only substantive difference is that the felony requirement applies to both subsections of § 924(c)(3) and only to subsection (b) of § 16, but this difference "does not affect the operative language used to interpret the statute's requisite mental state." *Benally*, 843 F.3d at 354 n.1; see also Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality) (holding that a term is given the same meaning "when Congress uses the same language in two statutes having similar purposes.").

A "crime of violence" requires intentional conduct. In *Leocal v. Ashcroft*, the Supreme Court discussed the *mens rea* necessary to commit a "crime of violence" under 18 U.S.C. § 16. 543 U.S. 1 (2004). The Supreme Court reasoned that § 16's requirement that force be used "against" someone or something suggests that "crimes of violence" require "a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9–11.

We have since interpreted *Leocal*'s reasoning to hold that "crimes of violence," as defined in both § 16 and § 924(c), require purposeful conduct. *Benally*, 843 F.3d at 353–54 (applying *Leocal* and *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc) to find that involuntary manslaughter, which requires only gross negligence, is not a crime of violence under § 924(c)); *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1053 (9th Cir. 2011) (concluding from *Leocal*, *Fernandez-Ruiz*, and *United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008) that an intentional use of force was required for a crime of violence as defined in either subsection of 18 U.S.C. § 16); *Gomez-Leon*, 545 F.3d at 787 (holding that a crime of violence under 18 U.S.C. § 16 "must require proof of an

intentional use of force or a substantial risk that force will be intentionally used during its commission"); *Fernandez-Ruiz*, 466 F.3d at 1130 (holding that crimes that can be committed recklessly are not "crimes of violence" for the purposes of § 16 because reckless conduct "is not purposeful").

The elements of second-degree murder are that the defendant (1) "unlawfully kill[ed] a human being" (2) "with malice aforethought." 18 U.S.C. § 1111(a); Ninth Circuit Model Criminal Jury Instruction 8.108. "[M]alice aforethought covers four different kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony." *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010). As such, second-degree murder may be committed recklessly—with a depraved heart mental state—and need not be committed willfully or intentionally. See *United States v. Houser*, 130 F.3d 867, 871–72 (9th Cir. 1997) ("Malice aforethought does not require an element of willfulness if the existence of that malice is inferred from the fact that defendant acted recklessly with extreme disregard for human life.").

It is of no consequence that the recklessness required for second-degree murder must be "extreme" and goes beyond ordinary recklessness. In *Gomez-Leon*, we made clear that, in order to constitute a crime of violence, "the underlying offense must require proof of an intentional use of force or a substantial risk that force will be intentionally used during its commission." 545 F.3d at 787. "[O]ur precedent seems squarely to place crimes motivated by intent on a pedestal, while pushing off other very dangerous and violent conduct that, because not intentional, does not qualify as a 'crime of violence.'" *Covarrubias*, 632 F.3d at 1053. Reckless conduct, no matter how extreme, is not intentional.

Second-degree murder also does not involve a "substantial risk that force will be intentionally used during its commission." *Gomez-Leon*, 545 F.3d at 787. In *Covarrubias*, we held that a California offense prohibiting the malicious and willful discharge of a firearm at an inhabited dwelling was not a "crime of violence" because it could be committed recklessly, not just intentionally. *Covarrubias*, 632 F.3d at 1053–55. Although we conducted our analysis under § 16(b) because the BIA rested its decision on subsection (b), *id.* at 1052, the analysis regarding intent bears upon either subsection of § 16, and by analogy, 18 U.S.C. § 924(c)(3). See, e.g., *Gomez-Leon*, 545 F.3d at 787 (requiring intentional use of force for a crime of violence under either subsection of § 16); *Benally*, 843 F.3d at 354. In contrast to crimes like burglary that can be committed only intentionally, "with a crime committed recklessly, it is unlikely that the reckless actor will, in response to external events, form an intent to use force in furtherance of his crime." *Covarrubias*, 632 F.3d at 1055. "Classic examples of second-degree murder include shooting a gun into a room that the defendant knows to be occupied, a game of Russian roulette, and driving a car at very high speeds along a crowded main street . . . ." *PinedaDoval*, 614 F.3d at 1039. For purposes of our analysis, these examples are substantively indistinguishable from the offense—"Shooting at an Inhabited Dwelling or Vehicle"— that we held was not categorically a crime of violence in *Covarrubias*. This risk that a crime could escalate to the use of intentional force is no more substantial for a defendant who recklessly kills than it is for a defendant who recklessly shoots at a house.

The cases the government cites do not squarely address whether second-degree murder is a crime of violence. Instead, in those cases, we found that other challenges to § 924(c) convictions lacked merit. See, e.g., *United States v. Percy*, 250 F.3d 720 (9th Cir. 2001) (addressing the Sixth

Amendment right to counsel and prosecutorial misconduct); *Houser*, 130 F.3d 867 (discussing the role of the jury and the mens rea required for second-degree murder). Because second-degree murder can be committed recklessly, rather than intentionally, it does not categorically constitute a crime of violence.

Second-degree murder is not categorically a crime of violence under the elements clause, 18 U.S.C. § 924(c)(3)(A). And, pursuant to *Davis*, second-degree murder cannot constitute a crime of violence under the residual clause, section 924(c)(3)(B), as the residual clause is unconstitutionally vague. Hence, the application of the three-strike law does not apply to Martin as his second-degree murder does not qualify as a serious violent felony.

Martin also urges this Court to consider *United States v. Morrison*, Case No.: 19-cr-284-PWG (D. Md. Jun. 24, 2020). In *Morrison*, the U.S. Court of Appeals for the Ninth Circuit recognized that the Supreme Court had extended *Johnson* to the residual clause of another statute in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and remanded the case to the § 2255 court "to reconsider its ruling in light of that decision." The Ninth Circuit also noted that the Supreme Court had granted certiorari in what would become *United States v. Davis*, 139 S. Ct. 2319 (2019), declaring the residual clause of 18 U.S.C. § 924(c) unconstitutional (and decided just days after Morrison's § 2255 was granted). On remand, the district court found that the reasoning in *Johnson*, when applied to the residual clause of § 3559(c), rendered it unconstitutional and granted Morrison's motion. At the time of Morrison's sentencing, a prior conviction qualifying as a "violent felony" under § 3559(c) had to fall under one of three clauses: (1) the "elements clause" requiring the conviction had "as an element the use, attempted use, or threatened use of physical force against the person of another," (2) the "residual clause," requiring

that the conviction involved "a substantial risk that physical force against the person of another may be used," or (3) the "enumerated offenses clause," requiring the conviction matched one of the listed offenses. Section 3559(c)(2)(F). *Johnson* declared unconstitutional language nearly identical to the residual clause contained in § 3559(c), finding that it violated due process because it required a judge to take a "guess" at what would fit under that clause. With no binding case law at the time of Morrison's sentencing, and because the judge didn't say which clause she relied on under § 3559(c), the Court concluded that his sentence "may have" relied on the residual clause. That was enough to invoke *Johnson* relief, the Court ruled. Accordingly, the Court granted Morrison's motion, vacated his mandatory life sentence under the three-strikes law, and ordered a new presentence report detailing his conduct while in prison over the last 20-plus years.

Accordingly, same relief should apply to Martin.

18 U.S. Code § 3553 - Imposition of a Sentence

Prior to the instant case, Martin only had two (2) prior convictions: (1) May 8, 1973 (age 18), second-degree murder; and (2) July 14, 1988, armed bank robbery. See PSR ¶¶ 33-34.

According to the PSR, Martin's 1973 second-degree murder was a result of "one of the patrons swung at him with a bar stool and it accidentally hit the gun causing it to fire, fatally injuring an innocent bystander. See PSR ¶ 33. Indeed, it was an accident, it was not premeditated or intentional. Martin's 1988 armed bank robbery offense was committed with the use of a weapon with no shells and inoperable. An investigation of the weapon by the FBI confirmed that the shotgun was in fact operable and could

not have been fired during the robbery.

At sentencing, Judge Shapiro complained aloud that a life sentence was too harsh for Martin's March 6, 1998, robbery of $6,694 from the United Bank branch on Girard Avenue near 29th Street. See Exhibit 1. Martin's sentencing guidelines called for a prison term in the 20-year range, and that would have been "more adequate" to cover the bank robbery. *Id.* It's questionable social policy," she said of the three-strike law. The Judge also said it was "wrong" of the law-enforcement authorities to use the federal courts to put Martin away for life for a bank robbery because they "think" the seven years he served for murder was inadequate punishment. *Id.*

CONCLUSION

For the above and foregoing reasons, Martin's petition for a writ of certiorari should be granted.

Respectfully submitted,

February 24, 2021. Robert Martin

ROBERT EARL MARTIN
REG. NO. 39869-066
FCI BUTNER MEDIUM II
FEDERAL CORR. INSTITUTION
P.O. 1500
BUTNER, NC 27509
Appearing *Pro Se*