

No: ****

IN THE
Supreme Court of the United States

AHMAD ADAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Robin C. Rosen-Evans
Assistant Federal Public Defender
Counsel for Petitioner
450 S. Australian Ave., Suite 500
West Palm Beach, Florida 33401
Telephone (561) 833-6288

QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence. A first conviction carries a seven-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. This petition presents the following questions:

I. Whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).¹

II. Whether armed bank robbery (18 U.S.C. § 2113), which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, has as an element “the use . . . of physical force against the person or property of another,” under 18 U.S.C. § 924(c)(3)(A).

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759,

¹ The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016).

773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

LIST OF PARTIES

Petitioner, Ahmad Adams, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

Questions Presented.....	i
List of Parties.....	ii
Table of Authorities.....	v
Petition for a Writ of Certiorari.....	1
Opinion and Order Below	2
Jurisdiction.....	2
Relevant Constitutional and Statutory Provisions.....	2
Statement of the Case	6
Reasons for Granting the Writ.....	9
I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague	9
II. Reasonable jurists could debate whether armed bank robbery, which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”	31
III. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in <i>Miller-El</i> and <i>Buck</i>	35
Conclusion.....	38
Appendix	
Decision of the Court of Appeals for the Eleventh Circuit, <i>Ahmad Adams v. United States</i> , 17-13775-H.....	A-1

Order Denying Motion to Vacate, <i>Ahmad Adams v. United States</i> , 16-80974-CV-Hurley	A-2
---	-----

TABLE OF AUTHORITIES

CASES:

Baptiste v. Attorney Gen.,

841 F.3d 601 (3d Cir. 2016).....15, 27

Begay v. United States,

553 U.S. 137 (2008).....26

Buck v. Davis,

137 S. Ct. 759 (2017).....i, 35, 36

Chambers v. United States,

555 U.S. 122 (2009).....22

Dimaya v. Lynch,

803 F.3d 1110 (9th Cir. 2015).....*passim*

Duhart v. United States,

Case No. 16-61499-CV-Marra, DE 13 and DE 18

(Orders of September 9, 2016 and February 1, 2017).....17

Golicov v. Lynch,

837 F.3d 1065 (10th Cir. 2016).....9, 15

Gordon v. Sec’y, Dep’t of Corr.,

479 F.3d 1299, 1300 (11th Cir. 2007).....36

<i>Hamilton v. Sec’y Fla. Dep’t of Corr.,</i>	
793 F.3d 1261 (11th Cir. 2015).....	8, 36
<i>Hernandez v. United States,</i>	
Case No. 16-22657-CV Huck	
(Order of September 27, 2016).....	17
<i>James v. United States,</i>	
550 U.S. 192 (2007).....	14, 21
<i>Jardines v. United States,</i>	
Case No. 16-22604-CV-Ungaro, DE 17 and DE 21	
(Orders of March 17 and April 19, 2017).....	17
<i>Jimenez-Gonzales v. Mukasey,</i>	
548 F.3d 557, 562 (7th Cir. 2008).....	18
<i>Johnson v. United States,</i>	
559 U.S. 133 (2010) (Curtis Johnson).....	31, 33, 34
<i>Johnson v. United States,</i>	
135 S. Ct. 2551 (2015) (Samuel Johnson).....	<i>passim</i>
<i>In re Hubbard,</i>	
825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting split).....	15
<i>In re Jones, No. 16-14106,</i>	
Order at 13 (11th Cir. June 27, 2016).....	7, 35, 37

<i>In re Moore</i> , No. 16-14214,	
Order at 4-9 (11 th Cir. July 27, 2016).....	35, 37
<i>Lawrence v. Florida</i> ,	
421 F.3d 1221 (11th Cir. 2005).....	36
<i>Leocal v. Ashcroft</i> ,	
543 U.S. 1 (2004).....	22, 32
<i>Mann v. United States</i> ,	
Case No. 16-22606-CV-Ungaro, DE 22 & DE 27	
(Orders of March 16 and April 19, 2017).....	16
<i>Mathis v. United States</i> ,	
136 S. Ct. 2243 (2016).....	32
<i>Miller-El v. Cockrell</i> ,	
537 U.S. 322 (2003).....	i, 35-37
<i>Moncrieffe v. Holder</i> ,	
133 S. Ct. 1678 (2013).....	32
<i>Ovalles v. United States</i> ,	
861 F.3d 1257 (11 th Cir 2017).....	<i>passim</i>
<i>Richardson v. United States</i> ,	
526 U.S. 813 (1999).....	32

Sessions v. Dimaya,

137 S. Ct. 31 (2016).....i, 9

Shuti v. Lynch,

828 F.3d 440 (6th Cir. 2016).....*passim*

Singleton v. Commissioner,

439 U.S. 940 (1978).....27

Sykes v. United States,

131 S.Ct. 2267 (2011).....21, 22

Tompkins v. Sec’y, Dep’t of Corr.,

557 F.3d 1257 (11th Cir. 2009).....36

Welch v. United States,

136 S. Ct. 1257 (2016).....*passim*

United States v. Bauer,

990 F.2d 373 (8th Cir. 1993).....18

United States v. Bell,

158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016).....16

United States v. Cardena,

842 F.3d 959 (7th Cir. 2016).....9, 16

United States v. Cornillie,

92 F.3d 1108 (11th Cir. 1996).....33

<i>United States v. Coronado-Cervantes,</i>	
154 F.3d 1242 (10th Cir. 1998).....	18
<i>United States v. Edmondson,</i>	
153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015).....	16, 20, 24
<i>United States v. Gomez-Leon,</i>	
545 F.3d 777 (9th Cir. 2008).....	18
<i>United States v. Gonzalez-Longoria,</i>	
831 F.3d 670 (5th Cir. 2016) (en banc).....	9, 25
<i>United States v. Hernandez-Lara,</i>	
817 F.3d 651 (9th Cir. 2016).....	16
<i>United States v. Hill,</i>	
832 F.3d 135 (2d Cir. 2016).....	9, 28
<i>United States v. Keelan,</i>	
786 F.3d 865 (11th Cir. 2015).....	18, 20-22
<i>United States v. Kelley,</i>	
412 F.3d 1240 (11th Cir. 2005).....	32
<i>United States v. Kirk,</i>	
111 F.3d 390 (5th Cir. 1997).....	18
<i>United States v. Lattaphom,</i>	
159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016).....	16

United States v. McGuire,

706 F.3d 1333 (11th Cir. 2013).....*passim*

United States v. Palomino Garcia,

606 F.3d 1317 (11th Cir. 2010).....32

United States v. Prickett,

893 F.3d 697(8th Cir. 2016).....29

United States v. Smith,

No. 2:11-CR-058-JAD-CWH, 2016 WL 2901661

(D. Nev. May 18, 2016).....16

United States v. Taylor,

814 F.3d 340 (6th Cir. 2016).....9, 28-30

United States v. Vivas-Ceja,

808 F.3d 719 (7th Cir. 2015)*passim*

Statutes

U.S. Const. amend V 2, 30

18 U.S.C. § 16(b).....*passim*

18 U.S.C. § 2113*passim*

18 U.S.C. § 2113(a).....32, 33

18 U.S.C. § 2113(d).....33, 34

18 U.S.C. § 3231 2

18 U.S.C. § 924(c).....	<i>passim</i>
18 U.S.C. § 924(c)(3)(A).....	i, 31
18 U.S.C. § 924(c)(3)(B).....	<i>passim</i>
18 U.S.C. § 924(e)(2)(B)(ii).....	10, 11, 14, 17
18 U.S.C. § 924(j).....	29
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2244(b)(3).....	3
28 U.S.C. § 2253.....	37
28 U.S.C. § 2253(c).....	4
28 U.S.C. § 2253(c)(2).....	35
28 U.S.C. § 2255	2, 4, 6
U.S.S.G. § 2L1.2(b)(1)(C).....	16
U.S.S.G. § 4B1.2.....	19

Other Authorities

11th Cir. Pattern Jury Instructions 76.1.....	32
11th Cir. Pattern Jury Instructions O76.2.....	34

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

No:

AHMAD ADAMS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Ahmad Adams respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA) on the issue of whether his § 924(c) convictions are unconstitutional in light of this Court's decision in *Samuel Johnson*.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Adams' application for a COA in Appeal No. 17-13775-H is provided in Appendix A.

JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction over Mr. Adams' criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Adams' § 2255 motion on July 5, 2017. Mr. Adams subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on October 17, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c) provides in pertinent part:

- (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a

firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

...

(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. § 2113 provides in pertinent part:

(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 . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

...

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) . . . assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or

device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

28 U.S.C. § 2244(b)(3) provides:

- (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
- (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
- (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
- (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
- (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(c) provides in pertinent part:

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On December 9, 2008, Mr. Adams pled guilty to a two count information charging him with knowingly using or carrying a firearm during and in relation to a “crime of violence,” in violation of § 924(c). The “crimes of violence” referenced in each count were conspiracy to commit armed bank robbery. *See* 18 U.S.C. § 2113. On March 13, 2009, he was sentenced to a total of 360 months, which was later reduced pursuant to Rule 35, F.R.Crim.P. to 180 months.

On June 24, 2016, Mr. Adams filed a motion to vacate sentence under § 2255, requesting that his § 924(c) convictions be vacated because they were imposed in violation of due process in light of *Samuel Johnson*. On July 5, 2017 the district court, adopting the Report and Recommendation of the magistrate judge, denied the motion. Specifically, the magistrate judge ruled that the Eleventh Circuit had found, in a number of opinions which included SOS applications, that armed or unarmed bank robbery qualified as a “crime of violence” under the elements/use of force clause of § 924(c) because the underlying robbery conviction “included as an element, and without regard to § 924(c)’s residual clause, ““the use, attempted use, or threatened use of physical force against the person or property of another.”” The district court also denied Mr. Adams a COA.

On August 30, 2017, Mr. Adams filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) convictions

are unconstitutional in light of *Samuel Johnson*. In his application, Mr. Adams argued that reasonable jurists could debate whether *Samuel Johnson* invalidated § 924(c)'s residual clause and whether conspiracy to commit armed bank robbery qualifies as a "crime of violence" under § 924(c)'s force clause.

Regarding the conspiracy to commit armed bank robbery, Mr. Adams argued that, first as to the act of armed bank robbery, under the least-culpable-act rule, the substantive act of armed bank robbery presumably would have to be committed by unintentionally intimidating a victim or by presenting a teller with a demand letter. Mr. Adams further argued that the fact his convictions were for "armed" bank robbery should not affect the analysis because an individual may still be convicted of armed bank robbery without using, attempting to use, or threatening to use, violent "physical force." Therefore, Mr. Adams argued, under the categorical approach, armed bank robbery under § 2113 does not qualify as a predicate offense for purposes of § 924(c)'s force clause.

Mr. Adams explained that in *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016), one member of the Eleventh Circuit stated that she believed these offenses may not qualify as "crimes of violence." He argued furthermore that, since under federal law, conspiracy to commit bank robbery under § 2113 does not even require an overt act in furtherance of the commission of the substantive offense; conspiracy to commit armed bank robbery does not have as an element the

use, attempted use, or threatened use of physical force against the person or property of another. Based on the foregoing analysis, Mr. Adams submitted that, at a minimum, he had made the threshold showing necessary to obtain a COA, because reasonable jurists could (and do) debate whether his § 924(c) convictions are unconstitutional in light of *Samuel Johnson*.

On October 17, 2017, the Eleventh Circuit denied Mr. Adams' application for a COA. The Court, citing *Hamilton v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), stated that a COA may not issue where a claim is foreclosed by binding circuit precedent "because reasonable jurists will follow controlling law;" and that since the filing of his request for a COA, the Eleventh Circuit had decided in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir 2017) that *Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B).

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague.

This Court granted certiorari in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. Compare *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), and *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), with *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)'s residual clause is constitutional). The residual clauses in § 16(b) and § 924(c) are identically worded, and the circuits are also divided on whether § 924(c)'s residual clause is unconstitutionally vague in light of *Johnson*. Compare *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), with *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (holding that § 924(c)'s residual clause is constitutional), and *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same).

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Adams respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr.

Adams' position that § 924(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists may debate whether § 924(c)'s residual clause is unconstitutionally vague.

Section 924(c)'s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Samuel Johnson*, this Court determined that “[t]wo features of the [ACCA’s] residual clause conspire to make it unconstitutionally vague.” 135 S. Ct. at 2557. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime,” because “[i]t ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime” rather than “to real-world facts or statutory elements.” *Id.* Second, the ACCA’s residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony,” stating “[i]t is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.* at 2558.

Like the ACCA’s residual clause, § 924(c)(3)(B) requires an analysis of an “ordinary case” and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (applying categorical approach to § 924(c)(3)(B)).² Section 924(c)(3)(B) therefore fails, like the ACCA’s residual

² Retired Supreme Court Justice O’Connor authored *McGuire*.

clause, because it requires “courts to assess the hypothetical risk posed by an abstract generic version of the offense.” *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the “vagueness of the residual clause rests in large part on its operation under the categorical approach.” *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA’s enumerated offenses were not necessary to this Court’s vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA’s residual clause left too much uncertainty about “how much risk it takes for a crime to qualify as a violent felony,” but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime “*otherwise* involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and crimes

involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.”

Id. (emphasis in underline added). The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as “substantial risk.” *Id.* at 2561. After noting that “[a]lmost none” of these laws included “a confusing list of examples,” the Court stated:

More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct The residual clause, however, requires application of the “serious potential risk” standard to an idealized ordinary case of the crime.

Id. (emphasis in underline added). *Samuel Johnson* thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a “crime of violence.” For example, the Court acknowledged that a commonsense approach had not provided “a consistent conception of the degree of risk posed by each of the four enumerated crimes”; it therefore doubted it would “fare any better with respect to thousands of unenumerated crimes.” *Samuel*

Johnson, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA's residual clause, is unconstitutionally vague. At a minimum, reasonable jurists may debate the issue.

The Eleventh Circuit's decision in *Ovalles* clearly highlights the confusion surrounding the continued validity of § 924(c)(3)(B)'s residual clause, and the need for this Court to issue a definitive ruling on the clause's constitutionality. Without hearing oral argument, a panel of the Eleventh Circuit issued a published decision holding as a matter of first impression that *Johnson*'s determination that the ACCA's residual clause was unconstitutionally vague "does not apply to or invalidate" the similar residual clause in 18 U.S.C. §924(c)(3)(B). *Ovalles v. United States*, ___ F.3d ___, 2017 WL 2829371 at *7 (11th Cir. June 30, 2017). However, the correctness of the *Ovalles* panels reasoning can and is being questioned across the country at this time.

1. Only a week after the issuance of the decision in *Ovalles*, July 6, 2017, the mandate, for reasons unknown, was *sua sponte* withheld by the Court, and that non-final decision may still be reconsidered and withdrawn. See *Ovalles*, 11th

Cir. Case No. 17-10712 (DE of July 6, 2017) (“Mandate Withheld Pursuant to Court Instructions.”).

Notably, it appears that the Eleventh Circuit is itself still debating the constitutional issue in *Dimaya*, since it has ordered re-argument at the beginning of the new term to definitively decide the case. Notably, *Ovalles* made no mention of *Dimaya*, even though the government in *Dimaya* is seeking to distinguish § 16(b) from the ACCA’s residual clause on the same bases that the *Ovalles* panel distinguished § 924(c)(3)(B).

2. Whether *Johnson*’s invalidation of the ACCA’s residual clause as unconstitutionally vague has rendered § 924(c)’s residual clause unconstitutional as well, is an issue that has divided the circuits. In *Johnson*, this Court held the residual clause in § 924(2)(B)(ii) (“ otherwise involves conduct that presents a serious risk of physical injury to another”) to be unconstitutionally vague because the “indeterminacy of the wide ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges.” 135 S.Ct. at 2557. In this Court’s view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the “ordinary case” of an offense, and then of quantifying the “risk” posed by that ordinary case, was constitutionally problematic: “[t]he residual clause offers no reliable way to choose between . . . competing accounts of what ‘ordinary’ . . . involves.” *Id.* at

2558. As a result, “[g]rave uncertainty” as to how to determine the risk posed by the “judicially imagined ordinary case” led the Court to conclude that the residual clause was void for vagueness. *Id.* at 2557.

Notably, the residual clause in § 924(c) is identical to § 16(b). Compare § 924(c)(3)(B) (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”) with § 16(b) (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”).

Other circuits have employed a similar approach in analyzing these provisions, and in the aftermath of *Johnson* the Third, Seventh, Ninth, and Tenth Circuit’s have each ruled that § 16(b) -- which again, is identical to § 924(c)(3)(B) -- is void for vagueness in light of *Johnson*. See *Baptiste v. Attorney Gen.*, 841 F.3d 601 (3d Cir. 2016), *gov’t pet. for cert.* filed Feb. 6, 2017 (No. 16-978); *Golikov v. United States*, 837 F.3d 1065 (10th Cir. 2016), *gov’t pet. for cert.* filed Feb. 2, 2017 (No. 16-966); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), *gov’t pet’n for reh’g denied* (Mar. 22, 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) *cert. granted*, 2016 WL 3232911 (U.S. Sept. 29, 2016); see also *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), *gov’t pet. for cert. filed* Feb. 13, 2017 (No. 16-991); *In re Hubbard*, 825 F.3d 225, 232 n.4 (4th Cir. 2016) (noting

split); *United States v. Hernandez-Lara*, 817 F.3d 651 (9th Cir. 2016) (§ 16(b)'s residual clause as incorporated in § 2L1.2(b)(1)(C) is void for vagueness in light of *Dimaya*), *gov't pet. for cert.* filed Nov. 7, 2016 (No. 16-617).

On November 18, 2016, in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), the Seventh Circuit became the first federal circuit to specifically address the constitutionality of § 924(c)'s residual clause in light of *Johnson*. And notably, the Seventh Circuit held that because § 924(c)'s residual clause was “virtually indistinguishable” from the ACCA’s residual clause which “*Johnson* found to be unconstitutionally vague,” § 924(c)(3)(B) was unconstitutionally vague as well. *Id.* at 996 (noting that § 924(c)'s residual clause was “the same residual clause” in § 16(b) that the court had already invalidated in *Vivas-Ceja*). The Eleventh Circuit’s decision in *Ovalles* directly conflicts with that of the Seventh Circuit in *Cardena*. The divisions amongst jurists as to the continued constitutionality of § 924(c)(3)(B) is highlighted by various circuit court decisions throughout this country. *See United States v. Smith*, No. 2:11-CR-058-JAD-CWH, 2016 WL 2901661 (D. Nev. May 18, 2016); *United States v. Lattaphom*, 159 F.Supp.3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F.Supp.3d 906, 920 (N.D. Ca. Jan. 28, 2016); *United States v. Edmondson*, 153 F.Supp.3d 857, 859-60 (D. Md. Dec. 30, 2015). The divisions even exist within the District where Adams was convicted. *See Mann v. United*

States, Case No. 16-22606-CV-Ungaro, DE 22 & DE 27 (Orders of March 16 and April 19, 2017); *Jardines v. United States*, Case No. 16-22604-CV-Ungaro, DE 17 and DE 21 (Orders of March 17 and April 19, 2017); *Duhart v. United States*, Case No. 16-61499-CV-Marra, DE 13 and DE 18 (Orders of September 9, 2016 and February 1, 2017); and *Hernandez v. United States*, Case No. 16-22657-CV Huck (Order of September 27, 2016).

In rejecting the views of these jurists, the *Ovalles* panel emphasized that the ACCA and § 924(c) are not word for word identical. In particular, the panel found “significant” and “material” the fact that § 924(c)(2)(B)(ii), defines a “violent felony” as an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” while § 924(c)(3)(B) defines a crime of violence as one 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.” *See* 2017 WL at **5-8.

These are minor differences in the wording of the two provisions. They are neither significant materially when considered against this Court’s actual reasoning in *Johnson*. The reasoning detailed below, the *Ovalles* panel’s conclusions to the contrary, shows the need for this Court’s intervention to definitively pronounce on the continued constitutionality of § 924(c)(3)(B).

1. Section 924(c)'s residual clause is not “markedly narrower” than the ACCA residual clause at issue in *Johnson*.

The textural differences between the residual clause of the ACCA at issue in *Johnson* and the residual clause of § 924(c) (and its twin § 16(b)) are not material because they do not impact the constitutional analysis in any manner. The *Ovalles* panel ignored the fact that not only in its own Circuit, but in other circuits as well, these provisions have always been regarded as analogous and analyzed identically. See *United States v. Keelan*, 786 F.3d 865, 871 n.7 (11th Cir. 2015) (describing the ACCA residual clause in the residual clause of § 16(b) as “analogous”); *Vivas-Ceja v. United States*, 808 F.3d at 722 “§ 16(b) substitutes ‘substantial risk’ for the residual clauses ‘serious potential risk.’ Any difference between the two phrases is superficial. Just like the residual clause [in § 924(c)], § 16(b) offers courts new guidance to determine when the risk involved in the ordinary case of a crime qualifies as ‘substantial.’”); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008). (noting that, “[d]espite the slightly different definitions,” the Supreme Court’s respective analyses of the ACCA and § 16(b) “perfectly mirrored” each other). See *United States v. Gomez-Leon*, 545 F.3d 777 (9th Cir. 2008); *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998); *United States v. Kirk*, 111 F.3d 390, 394 (5th Cir. 1997); *United States v. Bauer*, 990 F.2d 373, 374 (8th Cir. 1993) (describing the differences between the

statutes as “in material” and holding that U.S.S.G. § 4B1.2, which uses the ACCA language, “is controlled by” a decision that interprets § 16(b)).

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities. Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both §§ 16(b) and 924(c) is a risk that force will be used against person or property, this difference is immaterial to the due process problem and has no impact on the applicability of *Johnson* to this case. Especially since this Court’s holding in *Johnson* did not turn on the type of risk, but rather how a court assesses and qualifies the risk. In fact, the Solicitor General has candidly conceded that § 16(b) is “equally susceptible to . . . the central objection” in *Johnson* -- namely, that they both “require[d] a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters.” *Johnson*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and § 924(c) (a twin to § 16(b)). All three statutes require courts first to picture the “ordinary case” embodied by a felony, and then decide if that qualifies as a crime of violence by assessing the quantum of risk posed by the “ordinary case.” The *Ovalles* panel unfairly ignored this material identity in the way predicate crimes have always

been analyzed under the statutes -- not only in other circuits, but in its on circuit. There is no acknowledgment of *McGuire*, *Keelan*, or the dictates of the categorical approach in the panels entire discussion of § 924(c)'s residual clause.

As other courts have rightly explained, the “§ 924(c) residual clause suffers from exactly the same double indeterminacy as the ACCA residual clause.” *Edmondson*, 2015 WL 9582736, at *4. Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating § 16(b), the identical twin to § 924(c)(3)(B), as being void for vagueness under *Johnson*. See *Vivas-Ceja*, 808 F.3d at 722; *Dimaya*, 803 F.3d at 1117.

Section § 924(c)'s residual clause, like the ACCA residual clause, similarly requires the “ordinary case” analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is -- the identical analytical steps that brought down the ACCA residual clause -- and thus § 924(c)'s residual clause cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under § 924(c).

To the extent the *Ovalles* panel characterizes the residual clause of § 924(c) as “markedly narrower” than the ACCA's residual clause in two respects, it erred. The panel noted first that § 924(c)'s residual clause requires a “risk of injury” to the victim and in its view that was “more definite” than a “risk of physical force”

being used against the victim. Second, it argued, § 924(c)'s residual clause is also temporally "narrower" than the ACCA's residual clause because it looks to the risk of force "aris[ing] during the commission of the offense." 2017 WL 289371 at **5,7.

But like the absence of enumerated offenses (discussed *infra*), these textual differences simply have no bearing on the threshold "ordinary case" inquiry that the Supreme Court determined is impossibly arbitrary, and that the Eleventh Circuit held in *Keelan* applies to the precise language at issue here. In focusing specifically on the risk during the predicate offense, § 924(c)'s residual clause does not call for any narrower inquiry than the ACCA's residual clause. This Court's determination as to whether certain crimes were sufficiently risky under the ACCA also focused on the risk during the commission of the offense, rather than some time later after it had ended. *See, i.e., James*, 550 U.S. at 203-04, 210 (looking to conduct that typically occurs "while the crime [attempted burglary] is in progress," "while the break-in is occurring," and "during attempted burglaries"); *Sykes*, 131 S.Ct. at 2273-74 (same for crime of vehicular flight from police).

Likewise, the supposedly "typical" conduct this Court found sufficiently risky in the ACCA cases involved conduct during the predicate crime, rather than at some later time. *See, i.e., James*, 550 U.S. at 211-12 ("An armed would-be burglary may be spotted by a police officer, a private security guard, or participate

in a neighborhood watch program. Or a homeowner . . . may give chase”); *Sykes*, 131 S.Ct. at 2274 (driver’s knowingly fleeing law enforcement officer held a violent felony given risk that, during pursuit, driver might cause accident or commit another crime to avoid capture). In no case did this Court actually rely on “post offense conduct” to find a predicate crime sufficiently risky under the ACCA’s residual clause. And in fact, the Court specifically questioned whether this would even be a statutorily permissible basis to qualify an offense a “crime of violence.” *See Chambers v. United States*, 555 U.S. 122, 129 (2009).

Moreover, in assessing riskiness, § 924(c)(3)(B) and its twin, § 16(b) -- just like the ACCA -- looks not just at the initiation of the predicate crime (*i.e.*, the burglar’s climbing through the window), but beyond that, through the entire “course” of the offense to its completion (*i.e.*, while the burglar is in the house, until he successfully flees). *See Leocal*, 543 U.S. at 10 (“[B]urglary, by its nature, involves a substantial risk that the burglar will use force against the victim in completing the crime.”).

The *Ovalles* panel attempted to distinguish § 924(c)(3)(B) from both § 16(b) and the ACCA residual clause by pointing to the “different function” of the statutes -- namely, that § 924(c) is not concerned with recidivism, and requires a “nexus” to the instant companion crime -- which it claimed makes that clause “more precise and predictable.” 2017 WL 2829371 at *7. But the functional difference between

the statutes does not change the vagueness calculus in any manner for the simple reason the *Ovalles* panel ignored: according to *McGuire* and *Keelan* the proper analysis under § 924(c) is not fact-centric, based upon the defendant's real-world conduct. Rather, due to the "by its nature" language used by Congress in both §§ 924(c)(3)(B) and 16(b), it is categorical and based entirely on the elements of the offense. It's categorical approach uses the hopelessly indeterminate, impossibly vague "ordinary case" benchmark to measure risk.

In sum, neither the textual or functional distinctions identified by the *Ovalles* panel establish a material difference between the unconstitutional residual clause in the ACCA and the residual clauses in §§ 924(c) and 16(b). All three clauses require courts to divine what the "ordinary case" of a crime is, and then decide whether that abstraction poses enough of a risk to be a qualifying offense. *See Shuti v. Lynch*, 828 F.3d 440, 448 (6th Cir. 2016) ("[A] marginally narrower abstraction is an abstraction all the same."). Whatever textual differences exist between these clauses they are not significant enough to treat § 924(c)(3)(B) differently with respect to *Johnson*'s vagueness analysis.

2. The list of enumerated offenses preceding the ACCA residual was not dispositive in *Johnson*.

Another basis upon which the *Ovalles* panel distinguished § 924(c)'s residual clause from the ACCA's was the fact that the ACCA's residual clause contained a confusing prefatory list of enumerated offenses which complicated the

assessment of risk, whereas § 924(c) does not have such a list. 217 WL 2829371 at *6-*8. While the *Ovalles* panel deemed this difference “material,” *id.*, analytically it is not because this Court’s decision in *Johnson* did not hinge on the list of enumerated offenses that precedes the ACCA’s residual clause. The Court simply noted that the enumerated offenses which precede the ACCA residual clause were an added problem. *Johnson*, 135 S.Ct. at 2558. The Court said the residual clause was void for vagueness based on the “two features” turning on the ordinary case - not a third feature turning on the enumerated offenses. *Id.* at 2557; *see also Vivas-Ceja*, 808 F.3d at 723 (“The list [of enumerated offenses] itself wasn’t one of the ‘two features’ that combine to make the clause unconstitutionally vague.”) (citing *Johnson*, 135 S.Ct. at 2557).

As a matter of pure logic, *Johnson* could not have turned on the enumerated offenses. The “ordinary case” problem exists with or without enumerated offenses because a lower court must determine the idealized ordinary case of the predicate offense before it can even begin to evaluate and compare the type of risk presented by that offense. *Id.* at 2557-58. Because courts cannot answer the threshold question with any certainty, logic compels that the “ordinary case” analysis itself renders the residual clause unconstitutionally void. If a court cannot determine the “ordinary case” of the predicate offense, then a court cannot proceed with its risk analysis -- enumerated offenses or not. The *Johnson* decision made clear that the

“ordinary case” problem was really the central distinguishing and dispositive feature, by stating: “More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual engages on a particular occasion . . . The residual clause, however, requires application of the ‘serious potential risk’ standard to an idealized ordinary case of the crime.” *Johnson*, 135 S.Ct. at 2561. For this very reason, *Dimaya*, 803 F.3d at 1117-18, *Vivas-Ceja*, 2015 WL 9301373 at *4, and *Edmonson*, 2015 WL 9582736, at *5, all flatly rejected the government’s argument that *Johnson* turned on the enumerated offenses. Reasonable jurists, thus, have seriously debated the very argument the *Ovalles* panel adopted without responding to any of the above concerns.

Notably, this very issue was one that split the Fifth Circuit in *United States v. Gonzales-Longoria*, 831 F.3d 670 (5th Cir. Aug. 5, 2016)(en banc). As four reasonable jurists on that court rightly pointed out in their dissent from that decision, even without a prefatory list of examples “through judicial interpretation, § 16(b) not only contains an example, it contains the very example that most troubled this Court in *Johnson*. Specifically, the Court has previously explained that burglary is the ‘classic example’ of a § 16(b) crime,” “[a]nd ‘burglary’ was the most confusing of the residual clauses ‘confusing examples.’ If ‘burglary’ is a confusing example in one statute, then it is just as confusing in the other.” 831 F.3d at 685 (Jolly, J. joined by Stewart, C.J., Dennis, J., and Graves, J., dissenting)

(“the (judicially created) example in § 16(b) is nearly as confusing as the textual examples in the residual clause;” and again any distinction between the two statutes is not salient enough to constitutionally matter”).

The lack of enumerated examples in § 924(c) thus does not make its residual clause any more clear. If anything, the lack of a prefatory list makes § 924(c)’s residual clause more capacious than the ACCA’s residual clause. Indeed, because § 924(c) lacks a prefatory list of examples, it’s residual clause covers every offense that involves a “substantial risk of the use of physical force against the person or property of another.” *See Begay v. United States*, 553 U.S. 137, 144 (2008) (“Congress rejected a broad proposal that would have [amended the ACCA to cover] every offense that involves a substantial risk of the use of physical force against the person or property of another.” (internal quotation marks omitted)).

In *Welch*, the Court confirmed that “[t]he residual clause failed not because it adopted a ‘serious potential risk’ standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.” 136 S.Ct. at 1262. Significantly, *Welch* did not even mention the list of enumerated crimes, let alone indicate the list was relevant to its holding. Thus, contrary to the findings in *Ovalles*, the list of examples within the ACCA is not a legally “material” difference between the two clauses.

3. The same confusion surrounds § 924(c)'s residual clause (and its twin § 16(b)'s residual clause) as surrounded the ACCA's and, in any event, this was not a dispositive part of the *Johnson*'s holding.

A final reason given by the *Ovalles* panel for why § 924(c)'s residual clause is not unconstitutionally vague is that courts have not had the same difficulty construing it as they have had with the ACCA's residual clause. 2017 WL 2829371 at *7. But that argument simply "ignores the reality of judicial review." *Shuti*, 828 F.3d at 450. That the Court has not taken any cases regarding § 924(c)'s residual clause, and therefore has not experienced "repeated failures" in interpreting § 924(c)'s residual clause, is "probative only of the Courts composition of its docket - not absence of vagueness in the provision." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 n.21 (3d Cir. 2016); *Shuti*, 828 F.3d at 450 (citing *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting the denial of certiorari) ("The Supreme Court's docket is almost entirely discretionary.")). The Court's discussion in *Johnson* of its repeated failures in crafting a "principle an objective standard" was simply additional evidence confirming the residual clauses vagueness. *Shuti*, 828 F.3d at 450 ("[T]he government mistakes correlation for causation; conflicting judicial interpretations only provide ex post 'evidence of vagueness'"). This Court's failures in attempting to develop a workable standard for the ACCA's residual clause "was

not a necessary condition to the Courts vagueness determination.” *Vivas-Ceja*, 808 F.3d at 723.

Moreover, the *Ovalles* panel’s suggestion that § 924(c)(3)(B), unlike the ACCA, is not shrouded in confusion, is at the very least debatable if not demonstrably incorrect since the panel glossed over the fact that cases addressing §§ 16(b) and 924(c) regularly rely on ACCA cases, and vice a versa. Confusion over the meaning of § 924(c)’s residual clause is subsumed in the confusion surrounding the ACCA because federal courts use the same body of precedent to interpret all three. Thus, confusion surrounding the ACCA reflects difficulties with §§ 16(b) and 924(c)(3)(B), even without the same explicit course of criticism. And indeed, some circuits have actually split over how to apply § 16(b), which is additional evidence of the confusion surrounding the language of the residual clause of § 16(b) and its twin in § 924(c)’s residual clause. *See also Dimaya*, 803 F.3d at 1119 (“That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.”).

4. The Contrary Circuit Decisions followed in *Ovalles* are Unpersuasive and highlight the need for a definitive pronouncement by this Court.

The *Ovalles* panel explicitly adopted the arguments advanced in *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016), pet. for cert. filed Oct. 12, 2016 (No. 16-6392); *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); and *United*

States v. Prickett, 893 F.3d 697(8th Cir. 2016), pet. for cert. filed Dec. 30, 2016) (No. 16-7373). But the reasoning in these decisions, upon which *Ovalles* relies, has been rejected as immaterial by numerous jurists. The reasoning *Ovalles* relied upon most extensively -- that of the Sixth Circuit in *Taylor* -- is highly debatable even within the Sixth Circuit itself.

As a threshold matter, the panel decision in *Taylor* upon which *Ovalles* relied, was not itself a unanimous decision. Dissenting jurist, Judge Helene White, persuasively criticized the majority opinion. In doing so, Judge White reiterated the importance of the categorical approach in analyzing crimes of violence under § 924(c)(3)(B), notably citing the Eleventh Circuit's decision in *McGuire* for that proposition. *See i.e.*, at 393-98 & n.19 (White, J., dissenting) (" Although a fact centric approach might make sense in the § 924(j) context because th[at] statute addresses present rather than past conduct, case law squarely holds that the ["by its nature"] language of § 924(c) requires courts to use a categorical approach; citing *McGuire*, 706 F.3d at 1336-1337). The *Taylor* majority opinion, however, minimizes that key point of similarity. *See id.* at 378. For the reasons set forth in Judge White's dissenting opinion, as well as those advanced by the Seventh, Ninth, and Tenth Circuit's, the majority opinion in *Taylor* is unpersuasive.

Furthermore, it is noteworthy that the Sixth Circuit itself appears to have receded from, or at least substantially limited, its decision in *Taylor*. In its July

2016 decision in *Shuti v. Lynch*, a unanimous panel of that court squarely held that *Johnson* rendered §16(b) unconstitutionally vague in the immigration context, notwithstanding its earlier decision in *Taylor*. Specifically, it accepted the petitioner's argument, and expressly agreed with the Seventh and Ninth Circuits, that § 16(b) "suffer[ed] from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws." 828 F.3d at 445. In doing so, the Sixth Circuit rejected the government's attempts to distinguish the two residual clauses. See, i.e., *446-50.

Even more notable, the Sixth Circuit in *Shuti* understood its earlier decision in *Taylor* to be based on the fact that § 924(c) involves "real-world conduct," and therefore did not require application of the categorical approach. *Id.* at 449-50. According to the *Shuti* court, that "ma[de] all the difference," since *Johnson* was limited only to statutes applying the categorical/ordinary case approach. *Id.* at 450. ("We understand *Taylor*, then, as applying *Johnson*'s real-world conduct exception to upholding the constitutionality of" § 924(c)'s elements clause). In that regard, the Sixth Circuit emphasized that this limitation of *Johnson* was subsequently reiterated by the Supreme Court in *Welch*, and the court in *Taylor* "did not have the benefit of the Court's guidance in that regard." *Id.*

II. Reasonable jurists could debate whether conspiracy to commit armed bank robbery, which may be committed by an agreement not requiring an overt act, to either unintentionally intimidate a victim or by presenting a teller with a demand note, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Mr. Adams additionally seeks this Court’s review because reasonable jurists may debate whether conspiracy to commit armed bank robbery under § 2113 is a “crime of violence” under § 924(c)’s force clause. 18 U.S.C. § 924(c)(3)(A). For an offense to qualify under the force clause, it must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* Whether conspiracy to commit armed bank robbery qualifies as a “crime of violence” under § 924(c)’s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant’s conduct. *See McGuire*, 706 F.3d at 1336. Pursuant to this categorical approach, since conspiracy to commit armed bank robbery may be committed without “the use, attempted use, or threatened use of physical force,” then that crime may not qualify as a “crime of violence” under § 924(c)’s force clause.

Under § 924(c)’s force clause, the term “physical force” means “violent force,” “force that is capable of causing physical pain or injury to another person.” *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). Armed bank robbery may be committed “by force and violence, or by intimidation.” 18

U.S.C. § 2113(a). Because the statute lists alternative means, and not alternative elements, it must be presumed that Mr. Adams was convicted of conspiracy to commit the least culpable act—bank robbery by intimidation. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

According to the Eleventh Circuit’s pattern jury instruction, an individual may be convicted of bank robbery by “intimidation” where “an ordinary person in the teller’s position could infer a threat of bodily harm from the defendant’s acts.” 11th Cir. Pattern Jury Instructions 76.1 (citing *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). Notably, it does not require proof of a defendant’s mental state, as required by *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004) and *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010). Indeed, “whether a particular act constitutes intimidation is viewed objectively.” *Kelley*, 412 F.3d at 1244. The defendant need not *intend* for the act to be intimidating. *Id.* However, under *Leocal* and *Palomino Garcia*, a defendant does not “use” force unless some degree of intent is required. *See Leocal*, 543 U.S. at 9 (concluding that the *use* of physical force “most naturally suggests a higher degree of intent than negligent or merely accidental conduct”). Because a bank robbery conviction under § 2113(a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the “use” of physical force.

Moreover, an individual may “intimidate” a victim without the threatened use of violent “physical force.” For instance, the Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. *See United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, violent “physical force” or force “capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 139. Thus, under the least-culpable-act rule, a court must presume the bank robberies Mr. Adams conspired to commit were bank robbery offenses occurring by the use of “intimidation” rather than by force or violence. Because bank robbery under § 2113 committed by intimidation does not necessarily have as an element “the use, attempted use or threatened use” of violent physical force, § 2113(a) bank robbery does not categorically qualify as a “crime of violence” under § 924(c)’s force clause.

That the bank robbery was “armed” under § 2113(d) does not affect the above analysis. Subsection (d) is implicated when a person, in violating subsection (a), “assaults any person, *or* puts in jeopardy the life of any person by the use of a

dangerous weapon or device” 18 U.S.C. § 2113(d). Neither prong converts a bank robbery into a “violent felony” under the elements clause.³

First, committing the offense through “assault” does not require the attempted or threatened use of violent physical force as required by *Curtis Johnson*. The Eleventh Circuit’s pattern jury instruction for § 2113(d) states that an “assault” may be committed without touching another person and occurs when a person “intentionally attempts or threatens to hurt someone else” with an apparent ability to do so. “Hurt” is not defined to require any force, let alone violent physical force. 11th Cir. Pattern Jury Instructions O76.2. Second, committing the offense under the “use of a dangerous weapon” prong cannot convert Mr. Adams’ bank robbery into a crime of violence, because it also does not require the use, attempted use, or threatened use of violent physical force required by *Curtis Johnson*. “[D]angerous weapon or device” is defined as “any object that a person can readily use to inflict serious bodily harm,” which includes poison, Anthrax and other chemical weapons that can inflict serious bodily harm without the use of *any* physical force. *Id.* Furthermore, a conspiracy to commit armed bank robbery requires no overt act be committed towards the accomplishment of the substantive offense, therefore such a

³ Arguably, these alternatives constitute means and not elements. However, the Court need not make that determination. Regardless of which alternative applies, neither converts a bank robbery into a “violent felony.”

conspiracy would not have as an element the use, attempted use, or threatened use of force.

Based on the foregoing, Mr. Adams respectfully submits that, at a minimum, reasonable jurists may debate whether conspiracy to commit armed bank robbery categorically qualifies as a “crime of violence” under § 924(c)’s force clause. Indeed, some have said as much. *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016) (Martin, J. concurring); *In re Moore*, No. 16-14214, Order at 4–9 (11th Cir. July 27, 2016) (Martin, J., concurring). Given the important and recurring nature of this issue, Mr. Adams respectfully seeks this Court’s review.

III. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support

of the claims.” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton*, 793 F.3d 1261 (“[R]easonable jurists will follow controlling law.”); *see also Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Adams’ case using the proper terms—that reasonable jurists would not debate whether Mr. Adams is entitled to relief—but reached its conclusion by essentially deciding the case on the merits. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first

decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller-El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” 537 U.S. at 338. A COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly because a member of the Eleventh Circuit has written that the issue is debatable. *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016) (Martin, J. concurring); *In re Moore*, No. 16-14214, Order at 4–9 (11th Cir. July 27, 2016) (Martin, J., concurring). Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Adams respectfully requests that this Court grant this petition to review the Eleventh Circuit’s erroneous application of the COA standard.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Michael Caruso
Federal Public Defender

By: Robin C. Rosen-Evans
Robin C. Rosen-Evans
Assistant Federal Public Defender
Counsel for Petitioner

West Palm Beach, Florida
November 28, 2017