

No. _____

SUPREME COURT OF THE UNITED STATES

ALFONSIYA JAMES WARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for a Writ of Certiorari

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Question Presented

In *Johnson v. United States*, the Court found that the residual definition of “violent felony” in the Armed Career Criminal Act—a crime that “involves conduct that presents a serious potential risk of physical injury to another”—is unconstitutionally vague under the Fifth Amendment’s Due Process Clause. 135 S. Ct. 2551 (2015), *construing* 18 U.S.C. § 924(e)(2)(B)(ii).

In light of *Johnson*, is the definition of “crime of violence” in 18 U.S.C. § 924(c)(3)(B)—a crime that, “by its nature, involves a substantial risk that physical force ... may be used”—unconstitutionally vague?

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Petition for a Writ of Certiorari

Alfonsiya James Ward petitions for a writ of certiorari to the Court of Appeals for the Fifth Circuit.

Opinions Below

The Fifth Circuit's unpublished opinion is *United States v. Ward*, 698 Fed. Appx. 178 (5th Cir. 2017). It is reproduced in the Appendix. Pet. Appx. 1a–3a.

Jurisdiction

The Court of Appeals entered its judgment on September 28, 2017. This petition was originally filed 90 days later on December 27, 2017. The Court has jurisdiction. 28 U.S.C. § 1254(1); S. Ct. R. 13.

Statutes Involved

U.S. Const. amend. V: No person shall ... be deprived of life, liberty, or property, without due process of law....

18 U.S.C. § 2(a) - Principals: Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 2113(a) - Bank robbery and incidental crimes: Whoever, by force and violence, or by intimidation, takes, or attempts to take ... 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.

18 U.S.C. § 924 - Penalties:

(c)(1)(A)(ii): ... any person who, during and in relation to any crime of violence or drug trafficking crime ... possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ... if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years....

(c)(3): For purposes of this subsection the term “crime of violence” means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Statement of the Case

Petitioner Alfonsiya James Ward was indicted in the Southern District of Texas for armed bank robbery and to possessing a firearm during the commission of that offense. *See* Pet. Appx. 4a–5a. He moved to dismiss the firearm count because “crime of violence,” as defined in 18 U.S.C. § 924(c)(3), doesn’t encompass bank robbery. *See* Pet. Appx. 4a. First, a crime is one of violence if it includes as an element the actual, attempted, or threatened use of force. 18 U.S.C. § 924(c)(3)(A). But bank robbery, if accomplished through intimidation, involves none of those. 18 U.S.C. § 2113(a) (bank robbery may be committed “by force and violence, or by intimidation”). Second, a crime is one of violence if, by its nature, there is a “substantial risk that physical force” will be used in the course of the crime. 18 U.S.C. § 924(c)(3)(B). But that definition parallels the definition of “crime of violence” that the Court struck down as unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The district court denied the motion. Pet. Appx. 4a–8a. Ward pleaded guilty to both counts of the indictment. *See* Pet. Appx. 1a–2a. His plea was subject to his

motion to dismiss, and he did not concede that the robbery had been accomplished through actual, attempted, or threatened force. Pet. Appx. 9a–12a. He was sentenced to 155 months’ imprisonment, 84 months of which were for the firearm charge. *See* Pet. Appx. 1a–2a.

On appeal, Ward raised the same arguments against the firearm count as he had raised in the district court. The Fifth Circuit concluded that two of its earlier decision foreclosed Ward’s arguments and summarily affirmed. Pet. Appx. 2a–3a, citing *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017), and *United States v. Gonzalez-Longoria*, 831 F.3d 670, 672 (5th Cir. 2016) (en banc), *pet. for cert. filed* (Sep. 29, 2016) (No. 16-6259). *Brewer* had held that bank robbery was a crime of violence under U.S.S.G. § 4B1.2(a)(1), which is worded identically to Section 924(c)(3)(A). *Gonzalez-Longoria* had held that 18 U.S.C. § 16(b), which is worded almost identically to Section 924(c)(3)(B), was not unconstitutionally vague under *Johnson*.

Ward now petitions for certiorari.

Reasons to Grant the Writ

The definition of “crime of violence” applicable to firearm crimes in 18 U.S.C. § 924 is functionally identical to the definition in the Armed Career Criminal Act that the Court analyzed in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Like the residual clause in *Johnson*, the residual definition here is unconstitutionally vague because it does not give fair notice of the conduct that it will punish—in *Johnson*, a crime that “otherwise ... presents a serious potential risk of physical injury to another;” here, a crime “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.” *Johnson*, 135 S. Ct. at 2555, citing 18 U.S.C. § 924(e)(2); 18 U.S.C. § 924(c)(3)(B).

The lower courts are split on the constitutionality of this language, and the Court has already granted review to resolve that split. *Lynch v. Dimaya*, 137 S. Ct. 31 (2016). Should the Court find this language unconstitutional in *Dimaya*, it should vacate the Fifth Circuit’s decision and remand for further proceedings. Should the Court not find the language unconstitutional in *Dimaya*

or a similar case, it should grant certiorari and do so here.

A. The question is important.

Indictments for carrying firearms during a “crime of violence” may cover more than 40,000 defendants per year. *See* Mark Motivans, “Federal Justice Statistics, 2014 - Statistical Tables,” U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics (March 2017), at Table 2.1 (sum of violent offenses, other property offenses, drug offenses, and weapons offenses). Like Ward, many of those defendants do not plead guilty to facts establishing that the offense involved the actual, attempted, or threatened use of force. Those defendants face sentencing under language identical to that the Court has found to be unconstitutionally vague, threatening potentially tens of thousands of individuals with years of unconstitutional imprisonment. *See* 18 U.S.C. § 924(c)(1)(A)(i) (minimum sentence of five years’ imprisonment for carrying firearm during “crime of violence”).

And the lower courts are split on whether that language is constitutional. The Court has already granted

review of a decision striking down that language as unconstitutionally vague. *Dimaya*, 137 S. Ct. 31, *granting review of Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). That is just one opinion of several disagreeing on whether the language comports with the Due Process Clause. *Compare Gonzalez-Longoria*, 831 F.3d at 675–676; *United States v. Hill*, 832 F.3d 135, 145–146 (2d Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); and *United States v. Taylor*, 814 F.3d 340, 376–378 (6th Cir. 2016) (each finding language constitutional), *with Golicov v. United States*, 837 F.3d 1065, 1073–1074 (10th Cir. 2017); *Baptiste v. Atty. Gen.*, 841 F.3d 601, 619–620 (3d Cir. 2016); and *United States v. Vivas-Ceja*, 808 F.3d 719, 722–723 (7th Cir. 2015) (Sykes, J.) (each finding language unconstitutional). Four of those circuits specifically analyzed the “crime of violence” language in Section 924(c)(3)(B), which is identical to that found at 18 U.S.C. § 16(b). *See* Pet. Appx. 2a–3a; *Hill*, 832 F.3d at 145–146; *Prickett*, 839 F.3d at 699–700; *Taylor*, 814 F.3d at 376–378. *Compare* 18 U.S.C. § 16(b) (crime that, “by its nature, involves a substantial risk that physical force against the person or property of another may be used”) with 18

U.S.C. § 924(c)(3)(B) (crime that, “by its nature, involves a substantial risk that physical force against the person or property of another may be used”).

The split in the circuits is deep, and the question is important. The Court should grant review.

B. The language is unconstitutional.

The Court recognized in *Johnson* that the “residual” definition of “crime of violence” in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), furnishes neither sufficient notice nor sufficient standards and that “imposing an increased sentence” through the use of that definition “violates the Constitution’s guarantee of due process.” 135 S. Ct. at 2563. Those due-process standards, the Court clarified, apply with just as much force to language defining punishments as they do to language defining liability. *Id.* at 2557, citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

Johnson rejected language that imposed harsher penalties if a previous crime “otherwise involve[d] conduct that presents a serious potential risk of physical injury to another.” 135 S. Ct. at 2556, citing 18 U.S.C.

§ 924(e)(2). Judges can't classify statutes under the residual clause without imagining what an "ordinary" violation of a criminal statute might involve. *Johnson*, 135 S. Ct. at 2557–58. Having imagined a violator and imagined a violation, judges must then speculate on the risk involved in the imagined violator's imagined conduct—does the very nature of those imaginary actions create a "substantial risk" that a person might be bodily harmed? To pass sentence on the actual persons before them, then, judges must ignore what those actual defendants actually did in favor of speculation about the risk that might attend the imagined crime that the judges have conjured. The residual clause furnishes no boundaries for the judges' imaginations; no defendant can have notice about the breadth that a judge's creativity might span. *Id.* at 2557–58.

The standards for determining whether a crime involves "involves a substantial risk that physical force" will be used under Section 924(c)(3)(B) are no more certain. The Court interprets the two statutes the same way. The Court requires the same test in making the "substantial risk" determination under Section 924(c)(3)(B): What are the elements and nature of the

offense of conviction, not the *particular facts* underlying the conviction? *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). The lack of notice and the lack of standards are just as pronounced in Section 924(c)(3)(B) as they were in *Johnson*. Applying the residual definition in Section 924(c)(3)(B) is just as unconstitutional a deprivation of due process as applying the residual clause in *Johnson*. The Court should hold that application unconstitutional under Section 924(c)(3)(B) just as it did in *Johnson*.

Indeed, this case demonstrates the ease with which Congress could fix the problem that Section 924(c)(3)(B)'s lack of clarity causes. Ward's underlying offense, bank robbery, imposes culpability for particular ends accomplished through particular actions, one of which is the use of "force and violence." 18 U.S.C. § 2113(a). Similarly, Subparagraph A of Section 924(c)(3) creates liability for a firearm crime if the threatened, attempted, or actual use of force is an element in the underlying crime. Rather than relying on judicial imagination to determine whether there is a "substantial risk" that violence will be used in an underlying crime, Subparagraph B could just as simply impose liability based upon the defendant's actual actions

in the course of the actual underlying crime—imposing liability if the defendant actually threatened to, attempted to, or used force in the course of the underlying crime. That is, the unconstitutionality could be fixed through the simple expedient of “gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*” rather than attempting to gauge the riskiness of “an imaginary condition other than the facts.” *Johnson*, 135 S. Ct. at 2561, quoting *Intl. Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1914) (emphasis in original).

Conclusion

The Court has recognized the dispute among the courts below. It should resolve that dispute by applying the same reasoning it employed in *Johnson* to the functionally identical language at issue here.

Ward prays that the Court grant the petition for a writ of certiorari, reverse the judgment of the Fifth Circuit, and remand to that court for further proceedings.

Respectfully submitted,
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As corrected January 15, 2018