

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JASON DENNIS McGUIRE — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Eleventh Circuit.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jason D. McGuire-27737-018
(Your Name)

F.C.I Jesup, 2680 U.S. HWY 301 S.
(Address)

Jesup Ga. 31599
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I.

Does **Johnson v. United States**, 135 S.Ct 2551 (2015)'s Holding Extend To Or Invalidate The Risk-Of Force Clause Of The Definition Of The Phrase "**Crime Of Violence**" In 18 U.S.C. §924(c)(1)(A)?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION.....	2

INDEX TO APPENDICES

APPENDIX A The Eleventh Circuit Court Of Appeals Decision

APPENDIX B The District Court Decision

APPENDIX C The Eleventh Circuit Court of Appeals Denial of Rehearing.

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

1) <u>Descamps v. United States</u> , 570 U.S. 133 S.Ct 2276(2013).....	5
2) <u>Dimaya v. Lynch</u> , 803 F.3d 1110 (9th Cir.2015).....	21
3) <u>James v. United States</u> , 550 U.S. 192 (2009).....	20
4) <u>Johnson v. United States</u> , 135 S.Ct. 2551 (2015).....	Passim
5) <u>Lynch v. Dimaya</u> 137 S.Ct. 31 (2016).....	9
6) <u>Mays v. United States</u> 817 F.3d 728 (11th Cir.2016).....	5
7) <u>Ovalles v. United States</u> , 861 F.3d 1257 (11th Cir. 2017).....	Passim
8) <u>Sessions v. Dimaya</u> , U.S., No.15-1498 (2017).....	21
9) <u>Sykes v. United States</u> ,131 S.Ct. 2267 (2011).....	20
10) <u>United States v. Cardena</u> , 842 F.3d 959(7th Cir. 2016).....	11,19,20,21
11) <u>United States v. Jenkins</u> , -17-97 (2017).....	21
12) <u>United States v. McGuire</u> , 706 F.3d 1333 (11th Cir. 2013).....	5
13) <u>United States v. Vivas-Ceja</u> , 808 F.3d 719 (11th Cir. 2015).....	18,19,20,21
14) <u>Welch v. United States</u> , 193 L.Ed 2d 782 (2016).....	5,7,10

STATUTE AND RULES

8 U.S.C. §1326	19
18 U.S.C §16(b)	19
18 U.S.C. :32 (a)(1) & (a)(8)	Passim
18 U.S.C. §922(g).....	Passim
18 U.S.C. §924(a)(2).....	Passim
18 U.S.C. §(24(c)(1)(A)	Passim
18 U.S.C. §924(c)(3)(A)	Passim
18 U.S.C. §924(c)(3)(B).....	Passim
18 U.S.C. §924(e)	Passim
18 U.S.C § 924(e)(2)(B)(ii)	Passim
28 U.S.C. §1915	9
28 U.S.C. §2255	5,7
28 U.S.C. §2255(f)(3)	5,7

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 9, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 5, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment-Due Process

-

2. 18 U.S.C. §924(c)(3)(B)- "that by its nature, involves a subsatntial risk that physical force against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B).

STATEMENT OF THE CASE

On July 21, 2010, a federal grand jury sitting in the Middle District of Florida, returned an indictment charging Petitioner with three counts:

(1) Attempting to damage, destroy, disable, and wreck a helicopter within the special jurisdiction of the United States in violation of 18 U.S.C. §32(a)(1) and (a)(8)(2010); (2) Use and carrying a firearm during and in relation to, and did knowingly possess a firearm in furtherance of, a crime of violence for which he may be prosecuted in a court of the United States, that is attempted destruction of an aircraft, as charged in Count One of this indictment in violation of 18 U.S.C. §924(c)(1)(A) and (c)(3).

(3) Possession of a firearm after being convicted of a crime punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. §§922(g), 924(a)(2). See Cr. Doc. #1.

The record shows Petitioner pled guilty to Count Three(3). Doc. # 82. But he then proceeded to trial on Counts One and Two. The jury returned verdicts of guilty on both counts. Doc. # 121.

The district court sentenced Petitioner to 150 months imprisonment---30 months for §32(a)(1)(Ct.1); 120 Months for §924(c)(1)(A)(Ct.2); 30 Months for §922(g)(Ct. 3). An appeal was filed raising two issues:

I.

Under 18 U.S.C. §924(c)(2001), Is Attempting To Damage, Destroy, or Wreck An Aircraft Within The

Special Jurisdiction Of The United States A Crime
Of Violence Within The Meaning Of 18 U.S.C. §924(c)?

II.

Under 18 U.S.C. §32(a)(1), Did The Government Establish A Prima Facie Case of Attempting To Damage, Destroy, Disable, or Wreck An Aircraft Within The Special Jurisdiction Of The United States?

In a published opinion issued on January 30, 2013, a panel of the Eleventh Circuit Court of Appeals "determined that there was sufficient evidence to convict [Mr. McGuire] of attempting to damage or disable an aircraft in flight under 18 U.S.C. § 32(a)(1), and this is categorically a crime of violence. His conviction and Sentence are AFFIRMED." See United States v. McGuire, 706 F.3d 1333 (11th Cir. 2013).

On June 16, 2016, Petitioner filed a first 28 U.S.C §2255, under §2255 (f)(3), based on Johnson v. United States, 135 S.Ct.2551 (2015)'s new right that was ruled retroactively applicable by the Supreme Court in Welch v. United States, 193 L.Ed. 2d 782(2016). Petitioner, also relied on the court's holding in Mays v. United States, 817 F. 3d 728 (11th Cir. 2016), that Johnson, supra., and Descamp v. United States, 570 U.S. 133 S.Ct.2276 (2013), are both retroactively applicable in a first §2255 post conviction context. Accordingly, Petitioner relied on Johnson; Welch and Descamps, to raise two constitutional violations:

I.

18 U.S.C. §924(c)'s Residual Clause Is

Unconstitutionally Vague Based On **Johnson v. United States**, 135 S.Ct. 2551(2015) And McGuire's §924(c)(1)(1)(A) and (c)(3)'s Conviction And Sentence Is Unlawful And Void.

II.

18 U.S.C. §32(a)(1)-(a)(8) (2010) Is A Divisible Statute And The Enhanced Sentence Under 18 U.S.C. §924(c) Based On The Court's Application Of The Categorical Approach Is Illegal. See **Cv. Doc.# 1**.

The Government, first filed a motion to dismiss. **Cv.Doc.#7**. Upon considering Government's motion to dismiss, the district court first stated that "[since] Petitioner is appearing pro se, he is advised out of an abundance of caution that the denial of the Motion to Vacate at this stage would represent of a final adjudication of the case which may foreclose subsequent litigation on the matter." The Court then Ordered:

- 1) The Government's Motion to Dismiss is Denied without prejudice only in that the Court will construe the motion as a Response to the Motion to Vacate, which was the manner in which the Government was directed to present the pleading. The Court will consider the Government's arguments upon review of the case.

- 2) Petitioner shall have sixty days from the date of this order to file a reply to the Response. Thereafter, the Motion to Vacate, the Response, and the reply will be taken under advisement by the Court, and an Order will be entered without further notice." **Cv. Doc. 9 at 1-2**.

On December 28, 2016, Petitioner filed a "Reply To The United States' Motion To Dismiss 28 U.S.C. §2255 Motion As

untimely Cv. Doc. 10

on February 14, 2017, the district court issued an Order that denied Petitioner's §2255 motion to vacate, set aside, or correct an illegal sentence. In that Order, the court ruled that: "Petitioner argues that the Motion to vacate is timely because Johnson applies to §924 (c)(3)(b)'s residual clause [and] §924(c)(3)(B)'s residual clause is identical to the ACCA's residual clause. In Johnson v. United States, 135 S.Ct. 2551(2015), the Supreme Court held that the residual clause of the Armed Career Criminal Act's ("ACCA"), 18 U.S.C. §924(e) is unconstitutionally vague. The Johnson decision was made retroactive on collateral review by the Supreme Court in Welch v. United States, 136 S.Ct. 1257 (2016). According to Petitioner, the decision in Johnson 'invalidates section 924(c)(3)(B)." The decision in Johnson affords Petitioner no collateral relief with regard to his §924(c) conviction. The Johnson decision did not address the statute under which Petitioner was convicted. Instead, Johnson ruled on the constitutionality of the residual clause of the ACCA, §924(e)(2)(B)(ii). Neither the Supreme Court nor the Eleventh Circuit Court of Appeals 'has extended Johnson's §924(e)residual clause ruling to conclude that the §924(c)(3)(B)residual clause is unconstitutionally vague'. Consequently, the Motion to Vacate was untimely, and Petitioner is unable to satisfy the exception to the one-year period of limitation in 28 U.S.C. §2255(f)(3). As a result, the Motion to Vacate is denied." Cv. Doc. #11 at 2-3. (internal citations omitted)).

In addition, the court ruled that "Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this [c]ourt's procedural ruling debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability." **Cv. Doc. at 4.**

The Court, then concluded that (1) "The Motion to Vacate, Set Aside, or correct Sentence is denied."; (2) "This case is Dismissed with prejudice."; (3) "Petitioner is Denied a certificate of appealability."; (4) "the Clerk of the Court is directed to enter judgment in favor of Respondent and to close this case. A copy of this Order and the Judgment shall also be filled in criminal case number 6:10-cr-193-Orl-31-DCI"; (5) "the Clerk of the Court is directed to terminate the section 2255 motion filed in criminal case number 6:10-cr-193-Orl-31-DCI." **Doc. # 11 at 4.** Ultimately, the court entered "Judgement in a civil case" denying "Jason Dennis McGuire" §2255 "motion to vacate, set aside, or correct sentence" and "dismiss with prejudice." And "denied the certificate of appealability." **Doc. 12.**

On March 15, 2017, the district court denied Petitioner 's Motion for Leave to Proceed In Forma Pauperis on Appeal. In denying Petitioner's motion, the court ruled that "[a]ny appeal by the Petitioner would not be taken in good faith under Federal rule of Appellate Procedure 24(a) because Petitioner

has failed to make a substantial showing of the deprivation of any federal constitution right. Thus, Petitioner is not entitled to appeal as a pauper and shall pay the appellate filing fee as required by 28 U.S.C. §1915." **Doc.16.**

On May 31, 2017, the Petitioner filed an application for issuance of Certificate of Appealability "**COA**" raising two issues:

I.

A COA Should Be Issued Because The Court Erred In Denying And Dismissing With Prejudice Mr. McGuire's §2255 Without Holding An Evidentiary Hearing In Relation To His Claim That 18 U.S.C. §924(c)'s Residual Clause Is Unconstitutionally Vague and his §924(c)(1)(A)-(c)(3)'s Conviction And Sentence Is Unlawful And Void In Light Of **Johnson v. U.S.**, 135 S.Ct. 2551 (2015)); **U.S. v. Cardena**, 842 F. 3d 959(7th Cir. 2016); **Lynch v. Dimaya**, 137 S.Ct. 31 (2016)(Petition for Writ of Cert. granted)).

II.

A COA Should Be Issued Because The Court Erred In Denying And Dismissing With Prejudice Mr. McGuire's §2255 Motion Without Holding An **Evidentiary Hearing** In Relation To His Claim That 18 U.S.C. §32(a)(1)--(a)(8) Is A Divisible Statute And The Enhanced Sentence Under 18 U.S.C. §924(c) Based On The Categorical Approach Is Illegal In Light Of **Descamps v. United States**, 133 S.Ct. 2276 (2013).

On August 9, 2017, The Eleventh Circuit issued an order that denied a "**COA**". In that Order, the court ruled that "Johnson's holding does not apply to or invalidate the risk-of-force clause of the definition of the phrase "crime of violence" in §924 (c). Consequently, [Petitioner's] §2255 motion was untimely. "See **Appendix A** at 2.

REASONS FOR GRANTING THE PETITION

I.

The Eleventh Circuit's Holding That Johnson's Holding Does Not Apply To Invalidate The Risk-of Force Clause of The Definition of The Phrase "Crime Of Violence "In §924(c), Conflicts With The Seventh Circuit's Holding In An Identical Context.

Petitioner asserts, the Eleventh Circuit Court of Appeals relied on its holding in Ovalles v. United States, 861 F.3d 1257,1265-67 (11th Cir. 2017), to find that Petitioner's §2255 motion was untimely and denied a "COA".

In Ovalles, the court first acknowledge this Court's holding in Johnson, supra., that the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks of physical injury posed by a prior criminal conviction and how much risk it takes to qualify as a violent felony. See Ovalles, 861 F.3d at 1262. Further the court reiterated this Court's clarification that, in holding that the residual clause is void, it did not call into question the application of the elements clause and enumerated crimes of the ACCA's definition of a violent felony. Also in Welch v. United States, this Court held that Johnson announced a new substantive rule that applies retroactively to cases on collateral review. Id.

But when the Ovalles court reviewed section 924(c), it found that " distinct from the provision in §924(e), §924(c) provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during a crime of violence or a drug-

trafficking crime. For the purposes of §924(c); crime of violence' means a offense that is a felony and (A) has 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. **Ovalles**, 861 F.3d at 1263. The Court then referred to §924(c)(3)(A), as the "use-of-force" clause and §924(c)(3)(B), as the "risk-of-force" clause. The court explained that "[a]t times the "risk-of-force" clause in §924(c)(3)(B) has been called a residual clause too. But the more appropriate name for §924(c)(3)(B) is "risk-of-force" clause because its text is materially different from the residual clause in the ACCA's §924 (e)(2)(B). See Id.

Importantly, the **Ovalles** court focused on three Circuits- the Eighth, Second, and Sixth- that have described §924(c)(3)(B) as a "risk-of-force" clause and held that the void-for-vagueness holding in **Johnson** does not apply to or invalidate §924(c)(3)(B). See Id.

Conflicting, the **Ovalles** court, on the other hand found that the Seven Circuit has concluded that **Johnson** does apply to §924(c)(3)(B). See Id. (citing **United States v. Cardena**, 842 F.3d 959, 995-99 (7th Cir. 2016)) (stating that **Johnson** applies but that the underlying Illinois kidnapping convictions qualified as crimes of violence under the "use-of-force" clause in §924(c)(3)(A)).

The **Ovalles** court explained that "[i]n concluding that **Johnson** does not apply to or invalidate §924(c)(3)(B), the

Eighth, Second, and Sixth Circuits have found and analyzed significant textual differences between the definition of 'crime of violence' in §924(c)(3)(B)(a contemporaneous felony 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') 'and the definition of 'violent felony' in the ACCA's §924(e)(2)(B)(a prior remote felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another")). Id.

The **Ovalles** court, then reiterated the Sixth Circuit explanation for why the significant difference in the text matters, stating:

There are significant differences making the definition of "crime of violence" in §924(c)(3)(B) narrower than the definition of "violent felony" in the ACCA residual clause. Whereas the ACCA residual clause merely requires conduct "that presents a serious potential risk of physical injury to another, "§924(c)(3)(B) requires the risk "that physical force against the person or property of another may be used in the course of committing the offense." Risk of physical force against a victim is much more definite than risk of physical injury to a victim. Further, by requiring that the risk of physical force arise "in the course of" committing the offense, the language of §924(c)(3)(B) effectively requires that the person who may potentially use physical force be the offender. Moreover, §924(c)(3)(B) requires that the felony be one which "by its nature" involves the risk that the offender will use physical force. None of the narrowing aspects is present in the ACCA residual clause.

See Ovalles, 861 F.3d at 1264 (quoting **Taylor**, 814 F.3d 340, 376-77 (6th Cir. 2016)).

The **Ovalles** court further explained that the Sixth Circuit also found that "[a] nother independently compelling difference

between the language in §924(c)(3)(B) and the ACCA residual clause is the textual link in the [ACCA] clause by the word "otherwise" to four enumerated by diverse crimes" of burglary, arson, extortion or crimes that involves the use of explosives. The Sixth Circuit emphasized why this textual difference is important stating:

The Johnson Court explained that by using the word "otherwise", "the [ACCA] 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." The Court further explained the gauging the level of risk required was difficult because the four listed crimes "are 'far from clear in respect to the degree of risk each poses'". Unlike the ACCA, §924(c)(3)(B) does not complicate the level-of-risk inquiry by linking the "substantial risk" standard, through the word otherwise," to a confusing list of examples." As a result, §924 (c)(3)(B) does not require analogizing the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosive.

See Ovalles, 861 F.3d at 1264 (internal citations omitted)).

Furthermore, the Ovalles court reiterated-as the Sixth Circuit explained, the federal courts in ACCA cases are considering prior crimes (more often state convictions from state courts) remote from, and wholly unconnected to, the instant federal firearm-possession offense that is before the federal court.(Stating that "unlike the ACCA residual clause §924(c)(3)(B) does not allow courts to consider "physical injury [that] is remote from the criminal act'". In contrast, in §924(c)(3)(B) cases, federal courts are generally considering contemporaneous predicate federal crimes, often charged in the same federal indictment, where the force must

occur "in the course of committing the offense." That is, of course, the precise situation here, where Ovalles's attempted-carjacking crime in Count four and her §924(c) firearm crime in Count Five were companion and contemporaneous crimes charged in the same federal information. The Second Circuit and the Eighth Circuit have agreed with the Sixth Circuit's analysis in Taylor and held Johnson does not apply to the "risk-of-force" clause in §924(c)(3)(B) given the material differences in the text of the ACCA and §924(c)(3)(B). See Ovalles, 861 F.3d at 1264.

Finally, the Eleventh Circuit agreed with the decision by the Second, Sixth and Eighth Circuits and hold that Johnson's void-for-vagueness ruling does not apply to or invalidate the "risk-of-force" clause in §924(c)(3)(B). They agreed with the reasoning of the circuits, and add these observations:

Notably, § 924(c) has a very different function than the ACCA. The ACCA identifies "previous convictions" for the purpose of applying a recidivist sentencing enhancement to a defendant felon who later possesses a firearm in violation of 18 U.S.C. §922(g). See 18 U.S.C. §924(e)(1). There is no required nexus between the conduct in the felon's prior violent felony conviction and the felon's instant firearm-possession offense. Id. §§922(g), 924(e)(1). On the other hand, §924(c) creates a new and distinct offense for a person who, "during and in the relation to any crime of violence or drug trafficking crime...for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who,

in furtherance of such crime, possesses a firearm." Id. §924(c)(1)(A). Section 924(c)(1)(A) narrows the type of federal felony offenses that might serve as underlying predicate offenses to ones where the instant firearm was used or carried or where the firearm was possessed in furtherance of that underlying predicate crime. Section 924(c) is not concerned with recidivism, but rather with whether the instant firearm was used "during and in relation to" the predicate crime of violence (or drug trafficking offense) or possessed in furtherance of such predicate offenses. See id. §924(c)(1)(A)(ii)-(iii). The required "nexus" between the §924(c) firearm offense and the predicate crime of violence determination more precise and more predictable.

Further, in its conclusion that the ACCA's residual clause "prodeuce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates" the Supreme Court in Johnson emphasizes its own "repeated" inability ☐ to craft a principled and objective standard" for analyzing the ACCA's residual clause. Johnson 576 U.S. at ___, 135 S.Ct at 2558-59 (noting that Johnson was the Supreme Court's "fifth [case] about the meaning of the residual clause" and opened yet another "front of uncertainty"). That factor is missing here.

That the crime-of-violence definition in §924(c)(3)(B) ~~has~~ has not produced interpretive challenges (at least not before Johnson's arrival) is no accident. It is the direct product not only of the nexus between the §924(c) firearm offense and the predicate crime of violence, but also of the distinctive

textual feature of §924(c)(3)(B) that sharpen its focus and make its application more predictable. Three textual features of §924(c) make the analysis substantially more precise, predictable, and judicially administrable. First, Congress tailored the statutory standard to the risk that "physical force" against person or property will be "used" in the course of committing the offense, which describes more concrete conduct than the ACCA's reference to any offense conduct that could present a "potential" risk of "physical injury". See 18 U.S.C. §924(c)(3)(B) (emphasis added). The "use" of "physical force" against the person or property of another is a significantly more specific and focused requirement than the ACCA's general risk-of-injury requirement. Section 924(c) trains solely on whether the defendant herself might engage in a certain type behavior-using or threatening physical force-in the course of committing the offense, not whether her actions may produce a potential risk of physical injury in a more tangential or attenuated way.

Second, §924(c)(3)(B) requires the risk to arise in "the course of committing the offense" and therefore excludes risks arising after the offense is completed-the aspect of the residual clause's risk analysis that **Johnson** characterized as "[c]ritical[]" to its vagueness holding. 576 U.S. at ___, 135 S.Ct. at 2557. The Textural limitation serves in part as temporal restriction on the scope of the risk analysis.

Third, Congress did not include a confusing list of exemplar crimes, and so freed courts from having to conduct

the analysis by reconciling the different risks entailed in the listed offenses. Section 924(c)(3)(B) is not plagued by the same contradictory and opaque indications as the ACCA's residual clause on "how much risk" is necessary to satisfy the statute, because the phrase "substantial risk" is not preceded by a "confusing list of examples." Id. at ___, 135 S.Ct. at 2558, 2561. Combined with the textual distinctions discussed by the other circuits, these distinctive features of §924(c)(3)(B) further make it materially different from the residual clause in §924(e).

The Eleventh Circuit then agreed with the Second, Sixth and Eighth Circuits decisions and hold that Johnson does not apply to, or invalidate, the "risk-of-force" clause in §924(c)(3)(B). Before concluding the court explained why it does not find the Seventh Circuits decision in United States v. Cardena persuasive. 842 F.3d 959(7th Cir.2017).

First, in Cardena, the Seventh circuit summarily concluded that Johnson applied to §924(c)(3)(B) because "[s]ubsection (B) is virtually indistinguishable from the clause in Johnson that was found to be unconstitutionally vague. " 842 F. 3d at 996. But, as recounted above, there are material textual differences between the residual clause in §924(e) invalidated in Johnson and the risk-of-force clause in §924(c)(3)(B), and the Seventh Circuit's decision did not acknowledge or take the textual differences into account.

Second, the Seventh Circuit did not examine §924(c)(3)(B) anew, but simply cited its United States v. Vivas-Ceja decision, where it concluded that Johnson invalidated the

residual clause in 18 U.S.C. §16(b). 808 F. 3d 719 (7th Cir. 2015). But, the task in §16(b) cases is not as precise and predictable as in §924(c)(3)(B) cases. A §16(b) determination involves a recidivist statute and whether a defendant, convicted of illegal reentry after removal under 8 U.S.C. §1326, has a prior , wholly unrelated felony conviction that qualifies as an "aggravated felony" Section 16(b) requires the federal court to look at prior criminal history and evaluate, often under divergent state laws, whether a prior conviction was an aggravated felony. For an illegal-reentry-after-removal crime, a defendant with a prior aggravated felony conviction can be imprisoned for up to twenty years, rather than up to two years with no criminal history. See 8 U.S.C. §1326(a)-(b).

In contrast, as outlined above, in §924(c)(3)(B) cases, the required substantial nexus between the §924(c) firearm offense and the contemporaneous federal predicate crime of violence makes the crime of violence determination more precise, predictable, and judicially administrable. Section 924(c)(3)(B) determinations simply do not suffer from the uncertainties found by the Supreme Court in §924(e) cases in Johnson. Because Cardena relied on the §16(b) Viva-Ceja case Cardena does not convince us about §924(c)(3)(B) cases. See Ovalles, 861 F.3d at 1265-67.

To the contrary, of the Ovalles court, Petitioner argues it was undisputed, that Petitioner's conviction and sentence for 18 U.S.C. §924(c)(1)(A)-(c)(3) violation was forged under §924(c)(3)(B)'s residual clause-that also happens to be identical to the ACCA's residual clause . Thus, his

§924(c)(1)(A)-(c)(3) conviction and enhancement sentence--120 months is void and he was entitled to an **evidentiary hearing** on his constitutional allegation made in his "2255 motion. Importantly, Petitioner's sentence--120 months for 18 U.S.C. §924(c)(1)(A), was based upon his conviction for a violation of 18 U.S.C. §32(a)(1), that was deemed a "crime of violence" under the residual clause of 18 U.S.C. §924(c)(3)(B). Subsequently, in Johnson, *supra*, this Court declared that identical residual clause of ACCA (18 U.S.C. §924(2)(B)(ii), to be "unconstitutionally vague" because the "indeterminacy of the wideranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. " See Johnson, 135 S.Ct at 2557. Thus, "[i]ncreasing a defendant's sentence under the clause denies due process of law." Id. This Court held the residual clause "vague in all its applications. " Id. at 2561, and overruled its contrary decisions in James v. United States, 550 U.S. 192 (2007), and Sykes v. United States, 131 S.Ct. 2267 (2011).

Obviously, Johnson ruling applies to § 924(c)(3)(B)'s residual clause, where it is absolute §924(c)(3)(B)'s residual clause is identical to the ACCA's residual clause.

The Seventh Circuit in United States v. Cardena, 842 F. 3d 959, 995-96 (7th Cir. 2016), found that the term "crime of violence" in § 924(c)(3)(B), is "virtually indistinguishable from the clause in Johnson that was found to be unconstitutionally vague." Cardena, 842 F. 3d at 996. The court further explained that in United States v. Vivas-Ceja, 808 F.3d 719, 721 (7th Cir. 2015), it applied Johnson and found that it

invalidated the residual clause in 18 U.S.C. §16(b), and the clause invalidated in Vivas-Ceja is the same residual clause contained in the provision at issue, 18 U.S.C. §924(c)(3)(B). Cardena, 842 F.3d at 996.

Like wise, in Dimaya v. Lynch, 803 F.3d 1110 (9th Cir, 2015), the Ninth Circuit relied on Johnson's rationale and held 18 U.S.C. §16(b)--the exact same definition of a "crime of violence" as §924(c)(3)(B)--was void for vagueness. See Dimaya, 803 F.3d 1115.

To note, this Court has granted review and oral arguments was conducted in Sessions v. Dimaya, U.S., No. 15-14-98, on October 2, 2017, on the question of whether §16(b)'s definition of crime of violence, as incorporated in the Immigration and Nationality Act, is unconstitutionally vague. In addition, the Government has filed a Petition for certiorari in 17-97 United States v. Jenkins, on the question presented: is the definition of the term "crime of violence" in 18 U.S.C. §924(c)(3)(B) unconstitutionally vague. Therefore, this Court's most anticipated decisions will have an impact on Petitioner's case because of the definition of a "crime of violence" in §16(b), is exactly the same definition of a "crime of violence" in §924(c)(3)(B).

Accordingly, based on the above, this Honorable Court should grant Petitioner's certiorari because it's Petitioner's belief he was denied Due Process based on the Seventh Circuit's decision in United States v. Cardena, 842 F.3d 959,995-99(7th Cir. 2016), where the court concluded that

27

Johnson does not apply to §924(c)(3)(B). Thus, in essence making Petitioner's conviction under §924(c)(1)(A)-(c)(3) and enhancement sentence-120 months imposed by the court void. As such this Court should grant review of Petitioner's case to settle this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. D. [unclear]", written over a horizontal line.

Date: JAN 3, 2018