

No. _____

IN THE
Supreme Court of the United States

ABDUL FARID NAIM MUHAMMAD,
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

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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes discharging a firearm in furtherance of a “crime of violence.” A first conviction carries a ten-year mandatory minimum penalty. This petition presents the following questions:

I. Whether it is debatable among jurists that § 924(c)’s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutional after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).¹

II. Whether it is debatable among jurists that Hobbs Act robbery (18 U.S.C. § 1951) qualifies as a “crime of violence” under § 924(c)’s force clause, 18 U.S.C. § 924(c)(3)(A).

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). Reargument was held on October 2, 2017.

LIST OF PARTIES

Petitioner, Abdul Faird Naim Muhammad, 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	iv
Petition for a Writ of Certiorari	1
Opinion and Order Below	1
Jurisdiction.....	1
Relevant Constitutional and Statutory Provisions	1
Statement of the Case.....	3
Reasons for Granting the Writ.....	3
I. Reasonable jurists can debate whether § 924(c)'s residual clause is unconstitutionally vague	3
II. Reasonable jurists can debate whether Hobbs Act robbery has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”.....	7
Conclusion	9
Appendix	
Decision of the Court of Appeals for the Eleventh Circuit <i>Muhammad v. United States</i> , 17-13144.....	A-1
Order Denying Motion to Vacate <i>Muhammad v. United States</i> , 8:17-cv-955-T-27AEP	A-2

TABLE OF AUTHORITIES

Cases

<i>Davenport v. United States</i> , No. 16-15939, (11th Cir. March 28, 2017).....	8
<i>Golicov v. Lynch</i> , 837 F.3d 1065, 1072 (10th Cir. 2016)	4
<i>In re Garcia</i> , No. 16-14320 (11th Cir. July 27, 2016).....	8
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015) (<i>Samuel Johnson</i>).....	<i>passim</i>
<i>Johnson v. United States</i> , 559 U.S. 133 (2010) (<i>Curtis Johnson</i>)	7
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	7
<i>Moncrieffe v. Holder</i> , 133 S. Ct. 1678 (2013)	7
<i>Ovalles v. United States</i> , 861 F.3d 1257 (11th Cir. 2017).....	4
<i>Richardson v. United States</i> , 526 U.S. 813 (1999)	7
<i>Sessions v. Dimaya</i> , 137 S. Ct. 31 (2016).....	i, 3, 4
<i>Shuti v. Lynch</i> , 828 F.3d 440 (6th Cir. 2016).....	3
<i>United States v. Cardena</i> , 842 F.3d 959 (7th Cir. 2016)	4
<i>United States v. Gonzalez-Longoria</i> , 831 F.3d 670 (5th Cir. 2016)	4
<i>United States v. Hill</i> , 832 F.3d 135 (2d Cir. 2016)	4
<i>United States v. Local 560 of the Int’l Bhd. of Teamsters</i> , 780 F.2d 267 (3d Cir. 1986)	8
<i>United States v. McGuire</i> , 706 F.3d 1333 (11th Cir. 2013).....	5, 7
<i>United States v. Taylor</i> , 814 F.3d 340 (6th Cir. 2016).....	4
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	5, 6
<i>Wilkes v. United States</i> , No. 16-17658 (11th Cir. May 4, 2017)	8

Statutes

18 U.S.C. § 16(b)	i, 3, 4
-------------------------	---------

18 U.S.C. § 1951.....	<i>passim</i>
18 U.S.C. § 3231.....	1
18 U.S.C. § 924(c).....	<i>passim</i>
18 U.S.C. § 924(e).....	4, 5
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 2253(c).....	3
28 U.S.C. § 2255.....	1, 3

Other Authorities

3d Cir. Pattern Jury Instructions 6.18.1951-4.....	8
10th Cir. Pattern Jury Instructions 2.70.....	8
11th Cir. Pattern Jury Instructions 70.3.....	8

PETITION FOR A WRIT OF CERTIORARI

Abdul Faird Naim Muhammad 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) conviction is unconstitutional in light of *Samuel Johnson*.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Muhammad's application for a COA in Appeal No. 17-13144 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Muhammad's 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. Muhammad's § 2255 motion and a COA on May 16, 2017. Mr. Muhammad subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on November 27, 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. § 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

STATEMENT OF THE CASE

Mr. Muhammad pled guilty to Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count one), and discharging a firearm in furtherance of a “crime of violence,” in violation of 18 U.S.C. § 924(c) (count two), and on February 11, 2016, he was sentenced to 46 months’ imprisonment on count one and 120 months’ on count two, to run consecutively. Mr. Muhammad did not file an appeal.

On April 21, 2017, Mr. Muhammad moved to vacate his sentence under 28 U.S.C. § 2255, stating that, in light of *Samuel Johnson*, his § 924(c) conviction was imposed in violation of due process. On May 16, 2017, the district court denied the motion, stating that neither the Eleventh Circuit nor the Supreme Court has held that *Samuel Johnson* applies § 924(c)’s residual clause, and even if *Johnson* did extend to § 924(c)’s residual clause, Hobbs Act robbery still qualifies as a “crime of violence” under § 924(c)’s force clause. The district court also denied Mr. Muhammad a COA.

On November 27, 2017, the Eleventh Circuit denied Mr. Muhammad’s application in a three-sentence order, stating:

Abdul Farid Naim Muhammad moved for a [COA] in order to appeal to denial of his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. His motion is DENIED because he failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c). His motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists can 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). Not only are the residual clauses in § 16(b) and § 924(c) identically-worded, but the circuits are also divided on whether § 924(c)'s residual clause is unconstitutionally vague in light of *Samuel 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 *Ovalles v. United States*, 861 F.3d 1257, 1266–67 (11th Cir. 2017) (holding that § 924(c)'s residual clause is constitutional), *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (same), 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. Muhammad respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Muhammad's position that § 924(c)'s residual clause is unconstitutionally vague, or, at a minimum, that reasonable jurists can debate the issue.

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 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

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

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, reasonable jurists can debate whether § 924(c)(3)(B), like the ACCA’s residual clause, is unconstitutionally vague.

II. Reasonable jurists can debate whether Hobbs Act robbery has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Mr. Muhammad additionally seeks this Court’s review because reasonable jurists may debate whether Hobbs Act robbery 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 Hobbs Act 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, if Hobbs Act 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*). Because Hobbs Act robbery may be committed without the use of “physical force,” it does not qualify as a “crime of violence” under § 924(c)’s force clause.

Hobbs Act robbery may be committed “by *means* of actual or threatened force, or violence, or fear of injury.” 18 U.S.C. § 1951(b)(1) (emphasis added). Because the statute lists alternative means, and not alternative elements, this Court has no occasion to decide which statutory alternative was at issue, and must presume Mr. Muhammad was convicted of the least culpable act. *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).

The pattern jury instruction for Hobbs Act robbery in a number of circuits define the term “fear of injury” to include the fear of financial or economic loss. 11th Cir. Pattern Jury Instructions 70.3; 10th Cir. Pattern Jury Instructions 2.70; 3d Cir. Pattern Jury Instructions 6.18.1951-4; *see also United States v. Local 560 of the Int’l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that “other circuits which have considered this question are unanimous in extending Hobbs Act to protect intangible property”). Thus, under the least-culpable-act rule, the Court must presume Mr. Muhammad’s underlying robbery offense occurred by causing a victim to fear financial loss. Because a Hobbs Act robbery committed by causing a victim to fear financial loss does not necessarily have as an element “the use, attempted use or threatened use” of violent physical force against the person or property of another, Hobbs Act robbery does not categorically qualify as a “crime of violence” under § 924(c)’s force clause.

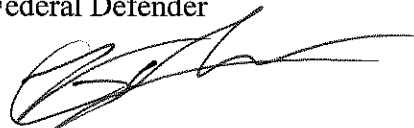
Based on the foregoing, Mr. Muhammad respectfully submits that, at a minimum, reasonable jurists may debate whether Hobbs Act robbery categorically qualifies as a “crime of violence” under § 924(c)’s force clause. Indeed, some reasonable jurists have said as much. *See Davenport v. United States*, No. 16-15939, Order at 5–8 (11th Cir. March 28, 2017) (“[R]easonable jurists could debate whether Hobbs Act robbery is a crime of violence for the purposes of § 924(c)”; *In re Garcia*, No. 16-14320, Order at 13–16 (11th Cir. July 27, 2016) (Martin, J., concurring) (“Though I joined the court’s unanimous decision [holding Hobbs Act robbery qualifies under the force clause], I may have been mistaken in doing so.”); *see also Wilkes v. United States*, No. 16-17658, Order at 7–10 (11th Cir. May 4, 2017). Given the important and recurring nature of this issue, Mr. Muhammad respectfully seeks this Court’s review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender

A handwritten signature in black ink, appearing to read 'Conrad Kahn', is written over a horizontal line.

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APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit

Muhammad v. United States, 17-13144 A-1

Order Denying Motion to Vacate

Muhammad v. United States, 8:17-cv-955-T-27AEP A-2

Appendix A-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13144-K

ABDUL FARID NAIM MUHAMMAD,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Abdul Farid Naim Muhammad moves for a certificate of appealability in order to appeal the denial of his motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. His motion is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for leave to proceed on appeal *in forma pauperis* is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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November 27, 2017

Elizabeth Warren
U.S. District Court
801 N FLORIDA AVE
TAMPA, FL 33602-3849

Appeal Number: 17-13144-K
Case Style: Abdul Muhammad v. USA
District Court Docket No: 8:17-cv-00955-JDW-AEP
Secondary Case Number: 8:15-cr-00309-JDW-AEP-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

All pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Beth Johnson-Kellmayer, K
Phone #: (404) 335-6172

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

Appendix A-2

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ABDUL FARID NAIM MUHAMMAD,

Petitioner,

v.

CASE NO. 8:17-cv-955-T-27AEP

CRIM. CASE NO. 8:15-cr-309-T-27AEP

UNITED STATES OF AMERICA,

Respondent.

ORDER

BEFORE THE COURT is Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (cv Dkt. 1). The motion is DENIED.¹

Petitioner pleaded guilty to Hobbs Act Robbery in violation of 18 U.S.C. § 1951(a) (Count One), and discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Two) (cr Dkts. 10, 22). He was sentenced to 166 months (46 months as to Count One and 120 months as to Count Two (consecutive to Count One)), followed by supervised release (cr Dkt. 40).

DISCUSSION

Petitioner contends that his conviction for discharging a firearm during a crime of violence (Count Two) should be vacated because it was based on the "residual clause" in § 924(c)(3)(B), which he contends is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* invalidated as unconstitutionally vague the "residual clause" of the Armed Career

¹ See Rule 4(b) of the Rules Governing § 2255 Cases ("If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.").

Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). Petitioner was not sentenced under the ACCA, however. Notwithstanding, Petitioner suggests that *Johnson* should be extended to his conviction because § 924(c) has “a similarly-worded residual clause that is also unconstitutionally vague.” (cv Dkt. 1, p. 4).

Section 924(c)(1)(A) provides for a ten-year consecutive term of imprisonment for discharging a firearm in furtherance of a “crime of violence.” See 18 U.S.C. § 924(c)(1)(A)(iii).² A “crime of violence” is as an offense that is a felony and:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3)(A)-(B).

Neither the Supreme Court nor the Eleventh Circuit Court of Appeals has extended *Johnson* to § 924(c). See, e.g., *United States v. Rosales-Acosta*, 2017 U.S. App. LEXIS 2473, at *8 (11th Cir. Feb. 13, 2017) (“Neither we nor the Supreme Court have yet decided whether [*Johnson*] renders § 924(c)(3)(B) unconstitutionally vague.”). Even if *Johnson* extends to the “residual clause” in § 924(c)(3)(B), Petitioner would not benefit because his conviction on Count Two for discharging a firearm during and in relation to a crime of violence under 18 U.S.C. § 1951(a) constitutes a “crime of violence” under § 924(c)(3)(A). See *In re Colon*, 826 F.3d 1301 (11th Cir. June 24, 2016) (unpublished)(“a companion substantive Hobbs Act robbery [18 U.S.C. § 1951(a)] conviction qualifies as a ‘crime of violence’ under the use-of-force clause in § 924(c)(3)(A).”) (citing *In re St. Fleur*, 824 F.3d 1337, 1341-42 (11th Cir. 2016)) (offense of discharging a firearm during Hobbs Act

²The Indictment indicated that Petitioner discharged a firearm during the robbery (cv Dkt. 10, p. 2).

robbery meets the use-of-force clause of the definition of a crime of violence under § 924(c)(3)(A)).

Accordingly, Petitioner's motion to vacate (cv Dkt. 1) is **DENIED**. The Clerk is directed to enter judgment against Petitioner and close this case.

Certificate of Appealability ("COA")

Petitioner is not entitled to a COA on whether § 924(c)(3)(B) is unconstitutional vague under *Johnson v. United States, supra*. Petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Drake*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Petitioner cannot make this showing because reasonable jurists would not debate whether his offense of conviction was a "crime of violence" under § 924(c)(1)(A). Accordingly, he is not entitled to appeal *in forma pauperis*.³

DONE AND ORDERED on May 15th, 2017.


JAMES D. WHITTEMORE
United States District Judge

Copies to: Petitioner, Counsel of Record

³ Although in *Gibson v. United States*, 2017 U.S. App. LEXIS 5737 (11th Cir. March 8, 2017), a COA was issued on whether reasonable jurists could debate whether bank robbery under 8 U.S.C. § 2113(a) was a crime of violence under § 924(c), *Gibson* is distinguishable.