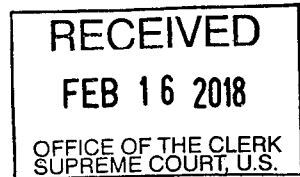


No. _____



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

Erick Manners – PETITIONER

vs.

United States of America – RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

A handwritten signature in cursive script, appearing to read "Erick Manners".

2/9/18

Erick Manners, PRO SE

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QUESTION PRESENTED

This Honorable Court decided in 2015 in *Johnson v. United States*, 135 S.Ct. 2551 (2015), that the Residual Clause of the Armed Career Criminal Act was unconstitutionally vague. Since that time, the different courts of appeals are in conflict as to whether that same unconstitutionality and vagueness applies to 18 U.S.C. § 924(c), which is analogous and has the same wording as the Armed Career Criminal Act.

Since the Residual Clause of 18 U.S.C. § 924(c) is virtually identical to that of the Residual Clause of the ACCA, should the Residual Clause of § 924(c) also be found unconstitutionally vague given that there is a circuit split on this question with six circuit courts of appeals saying it is unconstitutionally vague and four saying it is constitutional, when the only tie in is via something non-violent as in this case?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	10

INDEX TO APPENDICES

APPENDIX A--Opinion of the United States Court of Appeals for the Sixth Circuit
APPENDIX B--Petition for Rehearing
APPENDIX C--Order Denying Rehearing
APPENDIX D--Original Petition to the Court of Appeals for the Sixth Circuit

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Baptiste v. AG United States</i> , LEXIS 20140 (3rd Cir. April 5, 2016).....	9
<i>Berry v. United States</i> , No. 16-71332 (9th Cir. June 2, 2016).....	8
<i>Dimaya v. Lynch</i> , 803 F.3d 1110 (9th Cir. 2015).....	8
<i>Dodd v. United States</i> , 545 U.S. 353, 357 (2005).....	4
<i>Freeman v. United States</i> , No. 15-3687 (2nd Cir., Jan. 26, 2016).....	8
<i>Golicov v. Lynch</i> , 2016 WL 4988012 (10th Cir. 2016).....	8
<i>In re Chance</i> , 831 F.3d 1335 (11th Cir. 2016).....	8
<i>In re Chapman</i> , No. 16-246 (4th Cir., May 3, 2016).....	9
<i>In re Fields</i> , 826 F.3d 785 (5th Cir. 2016).....	8,9
<i>In re Hubbard</i> , 825 F.3d 225 (4th Cir.2016).....	8
<i>In re Pinder</i> , 824 F.3d 977 (11th Cir., 2016).....	8
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015).....	3,4,5,7,8,9,10
<i>Ray v. United States</i> , LEXIS 13854 (7th Cir. July 19, 2016).....	8
<i>Rosemond v. United States</i> , 134 S.Ct. 1240 (2014).....	3,7,8
<i>Ruiz v. United States</i> , No. 16-1193 (7th Cir., Feb. 19, 2016).....	8
<i>Shuti v. Lynch</i> , 828 F.3d 440 (6th Cir., 2016).....	4,9
<i>Turner v. United States</i> , No. 16-1145 (1st Cir. May 4, 2016).....	8
<i>United States v. Gonzalez-Longeria</i> , 813 F.3d 225 (5th Cir. 2016).....	9
<i>United States v. Prickett</i> , 830 F.3d 760 (8th Cir. 2016).....	8
<i>United States v. Taylor</i> , 814 F.3d 340 (6th Cir. 2016).....	8
<i>United States v. Vivas-Ceja</i> , 808 F.3d 719 (7th Cir. 2015).....	8
<i>Welch v. United States</i> , No. 15-6418 (April 18, 2016).....	3

TABLE OF AUTHORITIES CITED (cont.)

STATUTES AND RULES	PAGE NUMBER
18 U.S.C. § 2.....	3,4,7
18 U.S.C. § 16(b)	4,5,6,7,8,9
18 U.S.C. § 924(c).....	3,4,5,6,7,8,9,10
18 U.S.C. § 924(e)(2)(B).....	3,6,7,8,10
28 U.S.C. § 2255.....	3,4

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

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

The date on which the United States Court of Appeals decided my case was

August 21, 2017.

A timely petition for rehearing was submitted on August 27, 2017, and appears at Appendix B to the petition.

The petition for rehearing was denied by the United States Court of Appeals on November 16, 2017 and a copy of the order denying rehearing appears at Appendix C.

A copy of the original petition to the court of appeals appears at Appendix D.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 16(b) Crime of Violence defined

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(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.

18 U.S.C. § 924(e)(2)(B) [Armed Career Criminal Act]

"violent felony" is:

[A]ny crime punishable by imprisonment for a term exceeding one year...that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

1. Original Sentencing

Manners was originally sentenced to a total of 18 months for his 18 U.S.C. § 1959(a)(3) charge [Assault with a Dangerous Weapon in Aid of Racketeering], plus one consecutive 10 year (120 month) sentence for his single 18 U.S.C. §924(c) charge [Use of a Firearm During and Relation to a Crime of Violence]. Manners charges and sentences came from his firing two shots into the ceiling in the Wheat & Rye Restaurant in Allen Park, Michigan to break up a barroom brawl. Manners pled guilty to both charges via a plea agreement. Manners also has supervised release of 3 years after he is released from prison.

2. Post-Sentencing Proceedings

Manners has never filed any post-sentencing proceedings until now because he was foreclosed by the prevailing law at the time. In Section 7 of his plea agreement, Manners waived any appeal rights. However, in the case of a conviction or sentence becoming unconstitutional [such as the Residual Clause of §924(c) being unconstitutional], this waiver does not hold up. *United States v. Andia*, 333 F.3d 886, 891 (8th Cir. 2003), that "An illegal sentence constitutes a miscarriage of justice and is always appealable."

Since Manners signed his plea agreement and the district court sentenced him, the Supreme Court issued its decision in *Johnson v. United States*, 135 S. Ct. 2251 (2015), which said that the Residual Clause of the Armed Career Criminal Act (which is virtually identical to the wording in 18 U.S.C. §924(c)) is unconstitutional. Ten months later, the Supreme Court ruled that *Johnson* is retroactively applicable to cases on collateral review in *Welch v. United States*, No. 15-6418 (April 18, 2016). Claims against the unconstitutional Residual Clause must be filed by June 26, 2016, one year from the Supreme Court's ruling on *Johnson*, per *Dodd v. United States*, 545 U.S. 353, 357 (2005).

Manners mailed his petition, pursuant to 28 U.S.C. § 2255(f)(3), on June 25, 2016, asserting his claim that his portion of the conviction and sentence for his § 924(c) charge is unconstitutional because he was convicted and sentenced under the Residual Clause.

At the time of Manners' § 2255, there was one unpublished case by the Sixth Circuit Court of Appeals, *United States v. Taylor*, 2016 Fed. Appx. 0036P (6th Cir. Feb. 11, 2016), which said that the Residual Clause of § 924(c) was not unconstitutional when there was violence and the element of force involved such as the carjacking, kidnapping, and murder in the *Taylor* case. This case was later changed to a published opinion, which was relied upon by the district court in denying Manners' § 2255 petition.

After Manners filed his § 2255 petition, the Sixth Circuit Court of Appeals decided the case of *Shuti v. Lynch*, No. 15-3835 (6th Cir. July 7, 2016), where Chief Judge Cole stated that the wording of 18 U.S.C. § 16(b) is identical to that of the Residual Clause of 18 U.S.C. § 924(C), the Residual Clause of § 924(c) would have to be considered unconstitutionally vague also. Manners brought up this very issue in his Rebuttal to the Government's response, and also showed how his case was differentiated from *Taylor's* because he did not have the element of violence and force.

On September 14, 2016, the district court denied Manners' § 2255 *States v. Taylor*, 814 F.3d 340 (6th Cir. 2016). The district court did note that most other circuit courts of appeals had ruled that the Residual Clause of § 924(c) was unconstitutional in conflict with the Sixth Circuit Court's ruling in *Taylor*.

On September 21, 2016, Manners filed a motion under Rule 59(e) to Alter/Amend Judgement, based on the *Shuti* decision and the fact that his case was more similar to *Shuti* and differentiated from *Taylor*.

On October 27, 2016, the district court denied Manners' Rule 59(e) motion still basing its denial on the Sixth Circuit Court's decision in Taylor.

On November 6, 2016, Manners filed a Request for Certificate of Appealability to the district court on the issue of whether the district court relied upon the wrong caselaw in making its judgment order and as a result, incorrectly denied his petition under § 2255. Manners request was predicated by Chief Judge Cole's words in Shutti, where he said "the government's reading of Taylor has been undercut by the Supreme Court's intervening decision in Welch", Shutti, at page 14.

On December 20, 2016, the district court granted Manners a Certificate of Appealability stating that "petitioner has made a substantial showing of the denial of a constitutional right with respect to whether Johnson v. United States invalidates the residual clause under 18 U.S.C. § 924(c)."

On August 21, 2017, the Sixth Circuit Court of Appeals denied Manner's appeal, stating their reliance on Taylor, but clearly acknowledging a circuit split on whether the Residual Clause of § 924(c) is unconstitutional.

On August 27, 2017, Manners submitted a request for rehearing/suggestion for rehearing en banc.

On November 16, 2017, the United States Court of Appeals for the Sixth Circuit denied his request.

In December, 2017, the Supreme Court re-heard the case of Dimaya v. Sessions (Lynch), which deals with the unconstitutionality of 18 U.S.C. § 16(b)'s Residual Clause (which is worded identically to § 924(c)'s Residual Clause).

This petition for writ of certiorari follows.

REASONS FOR GRANTING THIS PETITION

This petition should be granted to resolve the circuit split as to the issue of whether the Residual Clause of 18 U.S.C. § 924(c), is unconstitutional and vague since its wording is virtually identical to the Residual Clause of the Armed Career Criminal Act [18 U.S.C. § 924(e)(2)(B)], which this Honorable Court found unconstitutionally vague in *Johnson v. United States*, 135 S.Ct. 2551 (2015). Currently, six circuit courts of appeal are in agreement that the Residual Clause of 18 U.S.C. § 924(c), is unconstitutional in accordance with this Court's ruling in *Johnson*, Id. However, four other circuit courts of appeal follow the converse in ruling that *Johnson*'s unconstitutionality has no impact on the Residual Clause of 18 U.S.C. § 924(c) even though most of those same four in opposition agree that the Residual Clause of 18 U.S.C. § 16(b) is unconstitutional.

This Court, in *Johnson* held that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process". *Id.* at 2563.

The Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), defines a "violent felony" as:

[A]ny crime punishable by imprisonment for a term exceeding one year...that--

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another ["Use of force clause"]; or
- (ii) is burglary, arson, extortion, involves use of explosives ["enumerated offense clause"], or otherwise involves conduct that presents a serious potential risk of physical injury to another ["Residual Clause"].

18 U.S.C. § 16(b) defines a "crime of violence"

The term "crime of violence" means--

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a

substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3) For purposes of this subsection

the term "crime of violence" means an 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.

The wording of **18 U.S.C. § 16(b)** and **18 U.S.C. § 924(c)(3)** is identical in defining a "crime of violence", and are virtually identical to the wording of **18 U.S.C. § 924(e)(2)(B)**. The same rationale should apply to the Residual Clause of both **18 U.S.C. §§ 16(b) and 924(c)**. It suffers from the same pair of infirmities that rendered the residual clause of the Armed Career Criminal Act unconstitutional.

First, it requires courts to use a categorical approach, "looking into the language of the statute, rather than the particular facts" of a case to determine whether an offense constitutes a "crime of violence", thereby tying the judicial assessment of risk to a judicially-imagined 'ordinary case' of a crime.

Second, it requires courts to apply an imprecise "substantial risk" standard to this "judge-imagined abstraction." *Johnson* at 2558.

Six circuit courts of appeal have agreed that the identical language of **18 U.S.C. §§ 16(b) and 924(c)** requires the conviction and sentence to be set aside as unconstitutional per *Johnson*. See, *Freeman v. United States*, No. 15-3687 (2nd Cir., Jan. 26, 2016); *In re Chapman*, No. 16-246 (4th Cir., May 3, 2016); *In re Hubbard*, 825 F.3d 225 (4th Cir. June 8, 2016) ("the language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other"); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Ray v. United States*, LEXIS 13854 (7th Cir. 2016) ("We assume for purposes of this order that *Johnson* also invalidates the residual clause in **18 § 924(c)(3)(B)**."); *Ruiz v. United States*, No. 16-1193 (7th Cir., Feb. 19, 2016) (rejecting the argument "that § 924(c)(3)(B) differs enough from [§ 924(e)(2)(B)(ii)] a residual clause that it was not invalidated by *Johnson*"); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) (holding **18 U.S.C. § 16(b)** unconstitutionally vague in light of

Johnson); *Berry v. United States*, No. 16-71332 (9th Cir. June 2, 2016) (holding 18 § 924(c)(3)(B) unconstitutionally vague); *Golicov v. Lynch*, 2016 WL 4988012 (10th Cir. 2016) (holding 18 U.S.C. § 16(b) unconstitutionally vague in light of *Johnson*); *In re Pinder*, 824 F.3d 977 (11th Cir., 2016); and *In re Chance*, 831 F.3d 1335 (11th Cir. 2016).

Four circuit court of appeals believe that the language of 18 § 924(c)(3)(B) is different from that of 18 U.S.C. § 924(e)(2)(B)(ii), and thus, the Residual Clause of 18 U.S.C. § 924(c) is not unconstitutional or vague, *Turner v. United States*, No. 16-1145 (1st Cir. May 4, 2016); *In re Fields*, 826 F.3d 785 (5th Cir., 2016); *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016); and *United States v. Prickett*, LEXIS 18032 (8th Cir. 2016). It is noteworthy that virtually all of these four circuit court of appeals who do not believe the residual clause of 18 § 924(c)(3)(B) is unconstitutional believe that the identically worded residual clause of 18 U.S.C. § 16(b) is unconstitutional.

While the Court of Appeals for the Sixth Circuit in *Martinez*' case used *Taylor* to state that *Johnson* did not invalidate the definition of crime of violence of the Residual Clause of § 924(c), it does state a few months later after *Taylor* that *Johnson* invalidates the identically worded Residual Clause of 18 U.S.C. § 16(b). *Shuti v. Lynch*, 828 F.3d 440 (6th Cir., 2016). If the Residual Clause of 18 U.S.C. § 16(b) is unconstitutional, it stands to reason that the identically worded Residual Clause of 18 U.S.C. § 924(c) is also unconstitutional when the only tie in is via a non-violent event such as Aiding and Abetting.

There is a similar situation in the Court of Appeals for the Fifth Circuit: one panel in the Fifth Circuit--*United States v. Gonzalez-Longeria*, 813 F.3d 225 (5th Cir. 2016) (holding 18 U.S.C. § 16(b) unconstitutionally vague in light of *Johnson*) while another panel--*In re Fields* ruled that the identically worded Residual Clause of 18 U.S.C. § 924(c) was not unconstitutional.

The United States Court of Appeals for the Third Circuit, *Baptiste v. AG United States*, LEXIS 20140 (3rd Cir. April 5, 2016), stated that *Johnson* invalidates the identically worded Residual Clause of 18 U.S.C. § 16(b), but has not yet addressed the issue of whether or not the Residual Clause of 18 U.S.C. § 924(c) is unconstitutionally vague.

So, there is a huge circuit split amongst the circuit court of appeals as to whether *Johnson* invalidates the similarly worded Residual Clause of 18 U.S.C. § 16(b), or the Residual Clause of 18 U.S.C. § 924(c). From the above, it is readily

seen that there is even internal conflict within various panels of the circuit courts of appeals as shown by the actions of the Fifth and Sixth Circuit Courts of Appeals.

~~Manners~~ believes that the majority of the circuit courts of appeals have it right when they say that the Residual Clause of 18 U.S.C. § 924(c) is unconstitutionally vague after *Johnson*, and urges this Honorable Court to give the circuit courts of appeals guidance and direction on the same.

In litigating *Johnson*, the government, through the Solicitor General, agreed that the phrases at issue in *Johnson*, and here pose the same problem. In noting that the definitions of a crime of violence in both § 924(c)(3)(B) and §16(b) are identical, the Solicitor General stated:

Although §16(b) refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, §16 requires 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 v. United States, Supplemental Brief of Respondent United States at 22-23 (available at 2015 WL 1284964 at *22-*23). The Solicitor General was right. § 924(c)(3)(B) and § 924(e) are equally vague.

The Residual Clause of 18 U.S.C. § 924(c) suffers from the same fatal flaw that the residual clause in *Johnson* suffered from. If anything, the absence of enumerated, comparable crimes in 18 U.S.C. § 924(c)(3)(B) means this statute provides even less direction than the one in the Armed Career Criminal statute. As in the residual clause in *Johnson*, § 924(c)(3)(B) "offers no reliable way to choose between these competing accounts." *Johnson*, 135 S.Ct. at 2558.

The Solicitor General said it best that the Residual Clause of 18 U.S.C. § 924(c) would be unconstitutional too because of the same flaws. Therefore, the Residual Clause of 18 U.S.C. § 924(c), like the ACCA residual clause, employs the "ordinary case" analysis to assess the risk in a predicate offense. Since this is the identical step that brought down the ACCA residual clause, § 924(c)(3)(B) cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*.

In a case such as ~~Manners~~, where he is only tied into 18 U.S.C. § 924(c)(3)(B) via ~~only the Residual Clause~~, his conviction and sentences under the Residual Clause of § 924(c)(3)(B) must be unconstitutionally vague, since the conviction and sentences cannot stand without the Residual Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted



Erick Manners

Date: February 9, 2018