NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

MIGUEL DELGADO,

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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QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carries a five-year mandatory minimum penalty, while a second conviction carries an additional 25–year mandatory minimum. This petition presents the following questions:

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

II. Whether Hobbs Act robbery (18 U.S.C. § 1951(a)), which may be committed by causing an individual to fear financial loss, has as an element "the use . . . of physical force against the person or property of another," under 18 U.S.C. § 924(c)(3)(A).

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[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 *Lynch v. Dimaya*, 137 S. Ct. 31 (2016).

INTERESTED PARTIES

There are no other parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Miguel Delgado respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-14418-K in that court on December 28, 2017.

OPINIONS BELOW

The decision of the court of appeals denying a certificate of appealability is unreported and reproduced in Appendix A-1. The district court's order denying Petitioner's 28 U.S.C. § 2255 motion to vacate sentence is unreported and reproduced in Appendix A-2. The district court's order denying Petitioner a certificate of appealability is unreported and reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2255. The jurisdiction of the court of appeals was invoked under 28 U.S.C. §§ 1291 and 2253(c). The decision of the court of appeals was entered on February 16, 2017. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 2255(a)

Subsection (a) of section 2255 of Title 28, United States Code states:

> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

28 U.S.C. § 2253(c)

Subsection (c) of Section 2253 of Title 28, United States Code states:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(B) the final order in a proceeding under Section 2255. . ..

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

(3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

18 U.S.C. § 924(e) (the "Armed Career Criminal Act," or "ACCA")

Title 18 U.S.C. § 924(e) provides, in pertinent part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2) As used in this subsection –

* * *

> (B) the term "violent felony" means any 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, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ...

18 U.S.C. § 924(c)

Title 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. § 16 ("Crime of violence defined")

Title 18 U.S.C. § 16 provides, in pertinent part:

The term "crime of violence" means—

* * *

(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. § 1951 (Hobbs Act Robbery)

Title 18 U.S.C. § 1951 provides, in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects interstate commerce or the movement of any article or commodity in commerce by robbery, or extortion, or attempts or conspires to do so, 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)(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

On August 19, 2010, Mr. Miguel Delgado was indicted by a grand jury for: Count 1-conspiracy to commit Hobbs Act robbery, in violation of Title18, United States Code, Section 1951 (a); Count 2- Hobbs Act robbery, in violation of Title 18, United States Code, Section 1951(a); Count 3- possession of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c)(10(A)(ii); Count 4- Hobbs Act robbery, in violation of Title 18, United States Code, Section 1951(a); Count 5- possession of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c)(10(A)(ii); Count 6- Hobbs Act robbery, in violation of Title 18, United States Code, Section 1951(a); and Count 7- possession of a firearm in furtherance of a crime of violence, in violation of Title 18, United States Code, Section 924(c)(10(A)(ii).

On September 30, 2010, Counts 1, 6, and 7 were dismissed by the district court. On October 22, 2010, Mr. Delgado plead guilty to Count 2 and 4, both charging the commission of Hobbs act robbery. On November 29, 2010, Mr. Delgado plead guilty to Count 3, possession of a firearm in furtherance of a crime of violence. On January 21, 2011, the last remaining count, Count 5, charging possession of a firearm in furtherance of a crime of violence was dismissed by the district court.

On January 21, 2011, the district court sentenced Mr. Delgado to be imprisoned for a term of 205 months. This term consisted of 121 months as to Count 2 and Count 4, to be served concurrently with each other, and 84 months as to

Count 3, to be served consecutively to the terms imposed as to Counts 2 and 4. Mr. Delgado did not appeal his sentence.

On June 24, 2016, Mr. Delgado filed his first motion to vacate sentence pursuant to 28 U.S.C. § 2255. In it, he argued that his conviction under 18 U.S.C. § 924(c) violated Due Process in light of this Court's decision in *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), which held that the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. Specifically, Mr. Delgado argued that in light of *Johnson*, the analogous residual clause in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague, and the Hobbs Act robbery offense underlying his § 924(c) conviction categorically failed to qualify as a "crime of violence" under the "force" clause found in 18 U.S.C. § 924(c)(3)(A). The district court adopted in part a Magistrate Judge's report and denied the motion to vacate, holding that Mr. Delgado was not entitled to relief because Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A). App. A-2; App. A-3. The district court also denied Mr. Delgado a certificate of appealability ("COA"). App. A-2.

Mr. Delgado moved the Eleventh Circuit for a COA, arguing that a COA was warranted because reasonable jurists could debate whether Hobbs Act robbery remained a violent felony for purposes of 18 U.S.C. § 924(c)'s "force" clause after *Johnson*. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

On December 28, 2017, Circuit Judge Gerald B. Tjoflat, denied a COA in an order that summarily stated that Mr. Delgado "failed to make the requisite showing" that reasonable jurists could debate both "(1) the merits of the underlying claim, and (2) the procedural issues that he seeks to raise." App A-1.

After denying Mr. Delgado a COA, Circuit Judge William H. Pryor, Jr., granted a COA on the very issue raised by Mr. Delgado in the analgous Hobbs Act robbery case of *Kenneth H. Burke, Jr., v. United States*, No. 16-16198-B (11th Cir. February 22, 2017) (granting a COA on the issue of "[w]hether Burke's § 924(c) conviction is now unconstitutional based on *Johnson v. United States*, 135 S.Ct. 2551 (2015)"). See App. A-4.

REASONS FOR GRANTING THE PETITION

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

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

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Delgado respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Delgado's position that § 924(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists may debate whether § 924(c)'s residual clause is unconstitutionally vague.

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

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

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[2] Retired Supreme Court Justice O'Connor authored *McGuire*.

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:

> <u>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</u>. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," <u>moreover</u>, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses."

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

> <u>More importantly</u>, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative

> standard such as "substantial risk" to real-world conduct . . . . The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime.

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

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a "crime of violence." For example, the Court acknowledged that a commonsense approach had not provided "a consistent conception of the degree of risk posed by each of the four enumerated crimes"; it therefore doubted it would "fare any better with respect to thousands of unenumerated crimes." *Samuel Johnson*, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA's residual clause, is unconstitutionally vague. At a minimum, reasonable jurists may debate the issue.

II. Reasonable jurists could debate whether Hobbs Act robbery, which may be committed by causing an individual to fear financial loss, has as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Mr. Delgado 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.

Significantly, 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. Delgado 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 that Mr. Delgado's 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, Hobbs Act robbery does not categorically qualify as a "crime of violence" under § 924(c)'s force clause.

Based on the foregoing, Mr. Delgado 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 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 in *Saint Fleur*, I may have been mistaken in doing so."). Given the important and recurring nature of this issue, Mr. Delgado respectfully seeks this Court's review. The Court should therefore grant the petition and issue a COA so as to ensure that Mr. Delgado is not in custody for a 924(c) offense he did not commit.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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