

NO .

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN WILLIAM JOHNSON,

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 FOR REVIEW

18 U.S.C. § 924(c) criminalizes using a firearm during and in relation to a crime of violence. A first conviction 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 *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to a 28 U.S.C. § 2255 motion attacking a conviction and sentence imposed under 18 U.S.C. § 924(c)(3) so that such a 28 U.S.C. § 2255 motion filed within a year of the *Johnson* decision is timely?
- II. Whether the residual clause of 18 U.S.C. § 924(c)(3) is unconstitutionally vague pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015), and thus, whether appellant, Mr. John W. Johnson, is actually innocent of his conviction and sentence imposed pursuant to 18 U.S.C. § 924(c)?¹
- III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA)?

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).

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Mr. John W. Johnson respectfully petitions the Supreme Court of the United States 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 17-14026 in that court on January 3, 2018, *Johnson v. United States*, which denied a certificate of appealability necessary to appeal the judgment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied a certificate of appealability to appeal the judgment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

The United States District Court had jurisdiction over this case under 28 U.S.C. § 2255. The United States Court of Appeals had jurisdiction under 28 U.S.C. § 1291. 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 decision of the court of appeals was entered on January 3, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V.:

No person shall . . . be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 924(c):

(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 a 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:

(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.

28 U.S.C. § 2244(b)(3):

- (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
- (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
- (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
- (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
- (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2253(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—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (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.

STATEMENT OF THE CASE

BACKGROUND

Mr. John W. Johnson is a thirty-year old native of Delaware. PSR ¶ 32. Prior to the underlying offense, his only prior conviction was a misdemeanor conviction for simple possession of a small amount of marijuana. PSR ¶ 26.

In the underlying case, a federal grand jury charged Mr. Johnson and a co-defendant in a two-count indictment with one count of a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), (b) (Count One), and one count of carrying, using and brandishing a firearm during and relation to a crime of violence (the Hobbs Act robbery charged in Count One) and possessing a firearm in furtherance of that crime, all in violation of 18 U.S.C. § 924(c). Mr. Johnson did not exercise his right to go to trial and, instead, entered a plea of guilty to the two counts in the indictment. DE # 40. Count One carried a statutory sentence of zero to twenty years' imprisonment. Count Two required a mandatory minimum and mandatory consecutive sentence of seven years.

Prior to sentencing, the probation office prepared a presentence report (PSR). In the report, the probation office calculated Mr. Johnson's sentence as to count one as follows:

¶ 15	Base Offense Level – USSG § 2B3.1(a)	<u>20</u>
¶¶ 22, 23	Acceptance of Responsibility - § 3E1.1	<u>(-3)</u>
¶ 24	Total Offense Level	<u>17</u>

Mr. Johnson's criminal history category was a category I. Mr. Johnson only had one prior offense, possession of marijuana. An offense level of 17 and a criminal history category of I yields an advisory sentencing range of 24-30 months. Again, Count Two required a mandatory minimum and mandatory consecutive sentence of 7 years. The District Court in fact sentenced Mr. Johnson to a 24-month term of imprisonment as to Count One and a consecutive 84-month (7 year) term of imprisonment as to Count Two.

Mr. John W. Johnson subsequently filed a motion to vacate, correct, or set aside sentence pursuant to 28 U.S.C. § 2255. The petitioner argued that following this Court's decision in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), Hobbs Act robbery does not categorically qualify as a crime of violence as required by 18 U.S.C. § 924(c)(1)(A) and thus, that he was actually innocent of Count Two of the indictment. The district court held that *Samuel Johnson v. United States* did not apply to 18 U.S.C. § 924(c). The district court dismissed Mr. John W. Johnson's 28 U.S.C. § 2255 motion as untimely, finding that it was filed more than a year after petitioner's conviction and sentence became final even though it had been filed within a year of *United States v. Samuel Johnson*. The district court also denied a request for a certificate of appealability.

Mr. John W. Johnson filed a timely notice of appeal. He requested a certificate of appealability from the Eleventh Circuit Court of Appeals. However, the court of appeals denied the request.

REASONS FOR GRANTING THE WRIT

I. REASONABLE JURISTS COULD 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). 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 is 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. Johnson respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Johnson'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.

In *Samuel Johnson*, this Court held the *residual* clause in 18 U.S.C. § 924(e)(2)(B)(ii) (“otherwise involves conduct that presents a serious risk of physical injury to another”) to be unconstitutionally vague because the “indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by Judges.” 135 S. Ct. at 2557. In this Court’s view, the process espoused by *James v. United States*, 550 U.S. 192 (2007), of determining what is embodied in the “ordinary case” of an offense, and then of quantifying the “risk” posed by that ordinary case, was constitutionally problematic: “[t]he residual clause offers no reliable way to choose between ... competing accounts of what ‘ordinary’ ... involves.” *Johnson* at 2558. As a result, “[g]rave uncertainty” as to how to determine the risk posed by the “judicially imagined ordinary case” led the Court to conclude that the residual clause was void for vagueness. *Id.* at 2557.

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 Eleventh Circuit Court of Appeals issued a published decision holding as a matter of first impression that *Johnson’s* determination that the ACCA’s residual clause was unconstitutionally vague “does not apply to or invalidate” the similar residual clause in 18 U.S.C. § 924(c)(3)(B). *Ovalles v. United States*, 861 F.3d 1257, 1265 (11th Cir. 2017).³ However, the correctness of the

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

³ The Eleventh Circuit Court of Appeals agreed with the decisions of the Second, Sixth, and Eighth Circuits. *Id.*

Ovalles panel's reasoning can be – and is being – debated among reasonable jurists across the country at this time.

Notably, because § 16(b) is perfectly identical to § 924(c)(3)(B), a favorable decision in *Dimaya* could itself abrogate *Ovalles*. Notably, *Ovalles* made no mention of *Dimaya*, even though the government in *Dimaya* is seeking to distinguish § 16(b) from the ACCA's residual clause on the same bases that the *Ovalles* panel distinguished § 924(c)(3)(B).

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities. Although the risk at issue in the ACCA is a risk of injury, and the risk at issue in both § 16(b) and § 924(c) is a risk that force will be used against person or property, this difference is immaterial to the due process problem and has no impact on the applicability of *Johnson* to this case. This is because this Court's holding in *Samuel Johnson* did not turn on the type of risk, but rather how a court assesses and quantifies the risk. In fact, the Solicitor General has candidly conceded that § 16(b) is "equally susceptible to ... the central objection" in *Johnson*—namely, that they both "require[d] 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*, U.S. Supp. Br., 2015 WL 1284964, at 22-23.

The two-step process is the same under the ACCA and § 924(c) (a twin to § 16(b)). All three statutes require courts first to picture the "ordinary case" embodied by a felony, and then decide if it qualifies as a crime of violence by assessing the

quantum of risk posed by the “ordinary case.” The *Ovalles* panel unfairly ignored this *material identity* in the way predicate crimes have always been analyzed under these statutes – not only in other circuits, but in our circuit. There is no acknowledgement of *McGuire*, or the dictates of the categorical approach in the panel’s entire discussion of § 924(c)’s residual clause.

As other courts have rightly explained, the “§ 924(c) residual clause suffers from exactly the same double indeterminacy as the ACCA residual clause.” *United States v. Edmundson*, 153 F. Supp. 3d 857, 862 (D. Maryland 2015). Moreover, the Ninth and Seventh Circuits have recognized the same in invalidating § 16(b), the identical twin to § 924(c)(3)(B), as void for vagueness under *Johnson*. See *Vivas-Ceja*, 808 F.3d at 722.

Section 924(c)’s residual clause, like the ACCA residual clause, similarly requires the “ordinary case” analysis to assess the risk involved in a predicate offense, and how risky that ordinary case is – the identical analytical steps that brought down the ACCA residual clause – and thus § 924(c)’s residual clause cannot survive constitutional scrutiny under the due process principles reaffirmed in *Johnson*. As a consequence, the residual clause cannot be used to support a conviction under § 924(c).

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. *Id.* 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. *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 common sense 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.” *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. THE ELEVENTH CIRCUIT’S RULE THAT A COA MAY NOT BE GRANTED WHERE BINDING CIRCUIT PRECEDENT FORECLOSES A CLAIM MISAPPLIES THE COA STANDARD ARTICULATED BY THIS COURT IN *MILLER-EL* AND *BUCK*.

To obtain a certificate of appealability (“COA”), a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). “At the COA stage, the only question is whether the applicant has shown that ‘jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the

actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton v. Sec’y Dep’t of Corr.*, 796 F.3d 1261 (11th Cir. 2015) (“[R]easonable jurists will follow controlling law.”); *see also Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller-El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” 537 U.S. at

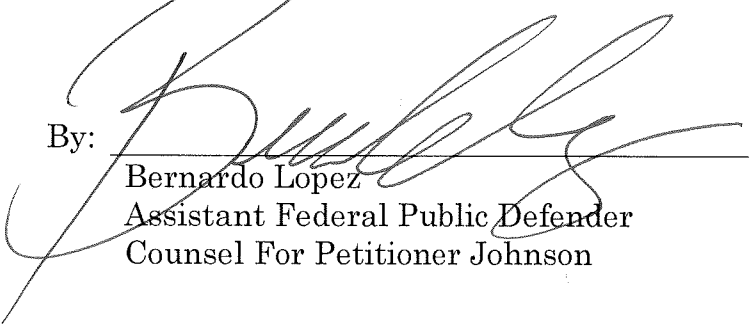
338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Johnson respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

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

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