

No. 18-_____

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

MICHAEL JEROME HENRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Brandt, Esq.
ROBINSON & BRANDT, P.S.C.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
jmbrandt@robinsonbrandt.com
Counsel of Record for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether this Court’s opinions in *Johnson* and *Beckles*, the important distinction between advisory and mandatory sentencing schemes, and similarities between the residual clauses of the Armed Career Criminal Act (“ACCA”) and 18 U.S.C. § 924(c)(3)(B), mean the definition of “crime of violence” in § 924(c)(3)(B) is, like its ACCA counterpart, unconstitutionally vague.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Jerome Henry respectfully petitions the Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, affirming the convictions but remanding for the limited purpose of resentencing, is unpublished. *United States v. Michael Jerome Henry*, No. 16-2745 (6th Cir., Jan. 25, 2018). Pet. App. 1a.

STATEMENT OF THE BASIS FOR JURISDICTION

The district court had jurisdiction, as the United States charged Henry with violations of the U.S. criminal code, including robbery of a federally-insured financial institution in violation of 18 U.S.C. § 2113(a). The Sixth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), following the district court's final judgment order sentencing Henry to a term of 738 months of imprisonment. Pet. App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(1), as Henry is filing this petition within 90 days of that ruling. See Sup. Ct. R. 13.1, 13.3., 29.2.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

U.S. Const., amend. V.

The Armed Career Criminal Act of 1984 defines “violent felony” as follows:

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(e)(2)(B).

A “crime of violence,” an element required to prove guilt under 18 U.S.C. § 924(c), is a felony that either

has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or 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).

STATEMENT OF THE CASE

This case presents a question of whether the residual clause portion of the definition of “crime of violence” found in 18 U.S.C. § 924(c)(3)(B), a clause that is determinative of whether a person is guilty of using a firearm during a crime of violence, is unconstitutionally vague. This Court has ruled that a similar residual clause that was a part of the definition of “violent felony” found in 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague in violation of the Due Process Clause. *Johnson v. United States*, 135 S. Ct. 2551, 2557, 192 L. Ed. 2d 569 (2015). This

Court found that the same logic did not apply to the identically-worded residual clause portion of the definition of “crime of violence” found in U.S. Sentencing Guidelines § 4B1.2(a) because the Guidelines, unlike statutes, were not mandatory and not subject to vagueness challenges under the Due Process Clause. *Beckles v. United States*, 137 S. Ct. 886, 897, 197 L. Ed. 2d 145 (2017).

The Seventh Circuit, describing the residual clause invalidated in *Johnson* as “virtually indistinguishable” from § 924(e)(3)(B)’s residual clause at issue here, applied this Court’s logic and concluded that residual clause to be unconstitutionally vague. *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). Five circuits have reached the opposite conclusion in published cases, finding that § 924(c)(3)(B) remains constitutional. *United States v. Eshetu*, 863 F.3d 946, 953-55 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017); *United States v. Taylor*, 814 F.3d 340, 376-77 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016).¹

1. Henry was charged with three bank robberies in violation of 18 U.S.C. § 2113(a). For each bank robbery, he was with knowingly aiding and abetting another in using and carrying a firearm in relation to the robbery in violation of 18 U.S.C. § 924(c). A jury found him guilty on all six counts.

2. On appeal, the Sixth Circuit found that, under this Court’s decision in *Rosemond v. United States*, 134 S. Ct. 1240, 1251 (2014), issued after the jury trial but that nevertheless applied to the case, the jury instruction as to intent as to two of the firearm charges was wrong.

¹ The Fifth Circuit reached the same result in a non-published case. *United States v. Davis*, 677 Fed. Appx. 933, 2017 U.S. App. LEXIS 1740, 2017 WL 436037, at *2 (5th Cir. 2017) (unpublished).

The court of appeals reversed two of the § 924(c) convictions and remanded the matter to the district court.

3. The district court reopened the case, and the matter proceeded to a second trial on the two firearm charges. After deliberation, a second jury found Henry guilty of those two § 924(c) charges.

4. The district court imposed a sentence of 78 months of incarceration for each of the three bank robbery convictions, to run concurrently to one another. The district court imposed a sentence of 60 months for the first § 924(c) conviction, 300 months for the second, and 300 for the third, with each of those to run consecutively to each other and consecutively to the bank robbery sentences, for a total aggregate prison term of 738 months.

5. Henry appealed again, arguing, among other things, that the residual or “risk-of-force” clause of the definition of “crime of violence” found at § 924(c)(3)(B) was void for vagueness under the logic of *Johnson*. But following its precedent in *Taylor*, the Sixth Circuit rejected the argument. Pet. App. 5a-6a. In *Taylor*, the Sixth Circuit had focused on differences between the two clauses, finding that the definition in § 924(c)(3)(B) narrower than the residual clause in the ACCA. *Taylor*, 814 F.3d at 376. These differences included § 924(c)(3)(B)’s use of the phrase “by its nature,” which the Sixth Circuit interpreted as not permitting a court to consider risk-related conduct beyond elements of the predicate crime. *Id.* at 377. To the Sixth Circuit, such narrowness was sufficient to withstand Due Process Clause scrutiny for being unconstitutionally vague. *Taylor*, 814 F.3d at 378-79.

Henry remains in the custody of the U.S. Bureau of Prisons at USP Terre Haute in Terre Haute, Indiana under a term of 738 months of incarceration.

REASONS FOR GRANTING THE PETITION FOR WRIT

This case presents an important constitutional question, which is the subject of a circuit split, as to whether the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. The Court should grant certiorari in order to address the question and resolve the conflict on this important constitutional question for the lower courts. See Sup. Ct. R. 10(a), 10(c).

The Court has made clear that a similar residual clause that was a part of the definition of “violent felony” found in 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague. The question is whether the “virtually identical” clause is also unconstitutionally vague. While there may be differences between the ACCA’s now-defunct residual clause and the clause at issue here, those distinctions are not material to the question of vagueness and do not save the clause from the same fate that § 924(e) suffered. The Court should grant certiorari to resolve the circuit conflict and find subsection (c)(3)(B) is so vague that it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement.

I. The Court Should Grant Certiorari to Address and Resolve the Circuit Split on the Important Constitutional Question of whether the Definition of “Crime of Violence” in 18 U.S.C. § 924(c)(3)(B) is Unconstitutionally Vague.

A. The Due Process Clause and Unconstitutionally Vague Statutes

This Court has held that the Due Process Clause prohibits the government from “taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569, 577 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855 (1983)). The “void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that

ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender*, 461 U.S. at 357. “It is a fundamental tenet of due process that ‘[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.’” *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198 (1979) (citation omitted). This principle applies to both vague criminal statutes and vague sentencing provisions. *Id.* Applying this standard, the Court has invalidated two kinds of criminal laws as void for vagueness: laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses.

B. An Element of 18 U.S.C. § 924(c) is that the Firearm is Used or Carried During and in Relation to a “Crime of Violence.”

To sustain a conviction under 18 U.S.C. § 924(c), the government must prove that the defendant (1) used or carried a firearm and (2) did so during and in relation to a “crime of violence.” Section 924(c)(3) defines a “crime of violence” 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). Subsection (A) is referred to as the “force clause” or “use-of-force clause” while subsection (B) is called the “residual clause” or “risk-of-force clause.”

C. This Court has Struck Down a Residual Clause Nearly Identical to 18 U.S.C. § 924(c)(3)(B)’s Residual Clause as Unconstitutionally Vague.

In *Johnson*, the question before this Court was whether the residual clause found in the Armed Career Criminal Act (“ACCA”) was void for vagueness. The ACCA defined “violent felony” in a way that contained a residual clause catching offenses that did not meet certain

criteria but “otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B).

The *Johnson* Court condemned the “speculative” nature of the inquiry required to apply the ACCA’s residual clause. *Johnson*, 135 S. Ct. at 2557-58. The Court ruled that “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 2557. It also said the residual clause’s “hopeless indeterminacy” was demonstrated by the inability of its own cases to develop a “principled and objective standard” to use for when the clause applies. *Id.* at 2558. To illustrate its point, the Court cited cases in which the lower courts “pervasive[ly] disagree[d] about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider” in applying the residual clause. See *id.* at 2560. Thus, the Court concluded that the residual clause is “vague in all its applications,” *id.* at 2561, and struck the ACCA’s residual clause for being unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 2555-57. See *In re Hubbard*, 825 F.3d 225, 229 (4th Cir. 2016).

D. This Court has Applied *Johnson* to Find that the Residual Clause of 18 U.S.C. § 16(b) is Unconstitutional.

In the wake of *Johnson*, the Sixth, Seventh, and Ninth Circuits applied the same analysis and the void-for-vagueness doctrine to find that the language of 18 U.S.C. § 16(b), which is incorporated into 8 U.S.C. § 1101(a)(43)(F)’s definition of crime of violence, is unconstitutionally vague.

In *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), the Seventh Circuit noted that 18 U.S.C. § 16(b) was “materially indistinguishable” from the ACCA’s residual clause. *Id.* at

720. “Because § 16(b) requires the identical indeterminate two-step approach [reviewed in *Johnson* and found to be unconstitutionally vague], it too is unconstitutionally vague.” *Id.* at 723.

In *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), the Sixth Circuit followed that lead: “Like the Seventh and Ninth Circuits, we are convinced that *Johnson* is equally applicable to the INA’s residual definition of crime of violence.” *Id.* at 446 (citing 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b)). “The text of the immigration code at once compels a categorical approach to prior convictions and an imprecise analysis of possible risk.” *Id.* “This ‘wide-ranging inquiry,’ as with the similar statutory language in the ACCA and Sentencing Guidelines, ‘denies fair notice to defendants and invites arbitrary enforcement by judges.’” *Id.* (citing *Johnson*, 135 S.Ct. at 2557). “The consistent commingling of residual-clause precedents interpreting the INA, ACCA, and Guidelines shores up our conclusion.” *Id.* “Imposing the penalty of deportation under this nebulous provision, we conclude, denies due process of law.” *Id.*

In *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31, 195 L. Ed. 2d 902 (2016), the Ninth Circuit similarly recognized that “language similar to ACCA’s residual clause,” found in 18 U.S.C. § 16(b), and which “is incorporated into § 1101(a)(43)(F)’s definition of a crime of violence” “suffers from the same indeterminacy as ACCA’s residual clause.” *Id.* at 1111. As a result, the Ninth Circuit found that § 16(b) was void for vagueness.” *Id.* at 1111, 1120.

Just days ago, on April 17, 2018, this Court affirmed the Ninth Circuit’s decision in *Dimaya*, holding that the provision is unconstitutionally vague for the reasons identified in *Johnson*. *Sessions v. Dimaya*, No. 15-1498, 548 U.S. ___, slip opinion at 11 (“In sum, § 16(b)

has the same ‘[t]wo features’ that ‘conspire[d] to make [ACCA’s residual clause unconstitutionally vague.’”) (Apr. 17, 2018).

E. The Seventh Circuit has Held that Residual Clause in § 924(c)(3)(B) is Likewise Unconstitutionally Vague, Creating a Circuit Split.

The Seventh Circuit has noted that subsection (B) of § 924(c)(3), the residual clause of that statute, “is virtually indistinguishable from the clause” this Court in *Johnson* found to be unconstitutionally vague. *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). The Seventh Circuit also noted that it had already applied *Johnson* to invalidate the residual clause of 18 U.S.C. § 16(b), which is the exact same residual clause contained at § 924(c)(3)(B). *Id.* The *Cardena* court went on to subsection (B) is unconstitutionally vague. *Id.*

The Second, Sixth, Eighth, Eleventh and D.C. Circuits have held the opposite in published cases. *United States v. Eshetu*, 863 F.3d 946, 953-55 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d 1257, 1265 (11th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016); *United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016). The Fifth Circuit has done so in an unpublished case. *United States v. Davis*, 677 Fed. Appx. 933, 2017 U.S. App. LEXIS 1740, 2017 WL 436037, at *2 (5th Cir. 2017) (unpublished). District courts have been mixed, with at least two district courts taking the Seventh Circuit’s view that § 924(c)(3)(B) is void for vagueness following *Johnson*.²

² Based in part upon the Ninth Circuit’s decision in *Dimaya*, Judge Shubb in the Eastern District of California dismissed § 924(c) charges upon remand for a new trial on the grounds that § 924(c)(3)(B) is unconstitutionally vague. *United States v. Lattanaphom*, No. 99-cr-0433, 159 F. Supp. 3d 1157, 1164 (E.D. Cal., Feb. 16, 2016). See also *United States v. Edmundson*, No. 8:13-cr-00015 (D. Md., Dec. 23, 2015) (memorandum opinion ruling that the residual clause in § 924(c) is void for vagueness after *Johnson* and that conspiracy to commit Hobbs Act robbery

F. This Court Declined to Strike Down a Residual Clause Found in the U.S. Sentencing Guidelines that was Identical to 18 U.S.C. § 924(c)(3)(B)'s Residual Clause but did so on the Grounds that the Sentencing Guidelines, Unlike § 924(c), are Advisory and Not Subject to Vagueness Challenges.

This Court has not extended its holding in *Johnson* to a residual clause found in the U.S. Sentencing Guidelines that was identical to the unconstitutionally vague clause found in the ACCA. *Beckles v. United States*, 137 S. Ct. 886, 897, 197 L. Ed. 2d 145 (2017). At first blush, then, the *Beckles* decision may appear to be a set back to extension of *Johnson* to void other statutes or subsections of § 924 beyond the residual clause of the ACCA. But a closer look at the case shows that the decision was not based upon any differences in the language or a change of position as to the vagueness of the language found in residual clauses. Instead, the Court declined to declare U.S.S.G. § 4B1.2(a)'s unconstitutionally vague because the Sentencing Guidelines, as advisory, are not subject to vagueness challenges. *Beckles*, 137 S. Ct. at 890, 892, 895, 897.

G. The Seventh Circuit's View is the Better View, and in Light of *Dimaya*, the Court should Declare § 924(c)(3)(B) Unconstitutionally Vague.

The Seventh Circuit correctly held that this Court's reasoning in *Johnson* naturally led to the conclusion that § 924(c)(3)(B) was void for vagueness. *Cardena*, 842 F.3d at 996. Judicial criticism of the Seventh Circuit's decision includes that it summarily noted that § 924(c)(3)(B)'s residual clause was virtually indistinguishable from the ACCA's clause and that the appellate court did not engage in any explicit comparison or analyze the meaning of the language differences. See, e.g., *Ovalles*, 861 F.3d at 1266-67. But the *Cardena* court relied on its previous

does not qualify under the remaining force clause); *United States v. Baires-Reyes*, No. 15-cr-00122-EMC-2 (N.D. Cal., Jun. 7, 2016) (order granting defendant's motion to dismiss, ruling that the residual clause in § 924(c) is void for vagueness after *Johnson* and that conspiracy to commit Hobbs Act robbery does not qualify under the remaining force clause).

ruling in *Vivas-Cela*, which was a lengthy, thorough and reasoned review of the reasons that the identically-worded residual clause in 18 U.S.C. § 16(b) was unconstitutionally vague. *Cardena*, 842 F.3d at 996. And as noted above, the Seventh Circuit’s view in *Vivas-Cela* is supported by decisions in two circuits, including the Sixth Circuit (one of the circuit courts to reach the opposite conclusion as to § 924(c)(3)(B)). *Shuti*, 828 F.3d at 446; *Dimaya*, 803 F.3d at 1120. The Sixth Circuit’s opinion in *Shuti*, like the Seventh Circuit’s in *Vivas-Cela*, is thorough and well-reasoned.

In *Vivas-Ceja*, when questioning whether *Johnson* led to the conclusion that § 16(b) was unconstitutionally vague, the Seventh Circuit compared § 16(b) to § 924(e). In doing so, the court of appeals noted that, this “language, though not identical to the residual clause” of § 924(e), was “materially the same” and included the same two-step approach as was found in the now-defunct ACCA. *Vivas-Ceja*, 808 F.3d at 722.

As to the first step, the *Vivas-Ceja* court noted that § 16(b) substituted the phrase “by its nature” for the ACCA’s “otherwise involves conduct” phrase. *Id.* Turning to this Court’s case law, the Seventh Circuit noted that “these two phrases are synonymous.” *Id.* (citing *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004)). In particular, the *Vivas-Ceja* court noted that this Court’s opinion in *Leocal* noted that § 16(b) directed courts to consider whether an offense would “naturally involve a person acting in disregard of the risk that physical force might be used against another.” *Id.* This meant that courts had to evaluate “the elements of and the nature of the offense of conviction” and not just “the particular facts relating to” the defendant’s crime. *Id.* This was a familiar finding. To the Seventh Circuit, “*Leocal*’s interpretation of § 16(b) is indistinguishable from *Johnson*’s interpretation of the residual clause.” *Id.*

As to the second step, the *Vivas-Ceja* court noted that § 16(b) substitutes the phrase “substantial risk” for the ACCA’s phrase “serious potential risk.” Looking at the plain meaning of the phrases, the court of appeals saw no material distinction. “Any difference between these two phrases is superficial.” *Id.* Analyzing the phrase under the shadow of *Johnson*, the circuit court noted correctly that, “[j]ust like the residual clause [of the ACCA], § 16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as ‘substantial.’” *Id.* In that way, just like the residual clause at issue in *Johnson*, the indeterminacy of both parts of the clause rendered it unconstitutionally vague. *Id.* at 722-23.

In the end, the Seventh Circuit’s decision in *Cardena* may not have been long and explanatory. But it relied on a case that painstakingly demonstrated why the language at issue was unconstitutional under the same reasoning this Court had applied in *Leocal* and *Johnson*. Despite the views of other circuits, the *Cardena* decision was not wrong in adopting that same reasoning without repeating its logic. More importantly, these two mandatory statutes—16(b) and § 924(c)(3)(B)—which are both subject to vagueness challenges, are both so vague that they fail to give ordinary people fair notice of the conduct it punishes, or is so standardless that they invite arbitrary enforcement. See *Johnson*, 135 S. Ct. at 2554.

For these reasons, the Seventh Circuit did not err in finding that § 924(c)(3)(B), like its counterpart in § 924(e), is void for vagueness and unconstitutional. The Court should reject the mental gymnastics applied by the Second, Sixth, Eighth, Eleventh and D.C. Circuits to attempt justify the artificial (or immaterial) distinctions between the statutes to save § 924(c)(3)(B) from the same fate as the ACCA’s residual clause. Instead, following the its recent decision in *Dimaya*, the Court should grant the petition and find that § 924(c)(3)(B) void for vagueness.

CONCLUSION

Petitioner Michael Jerome Henry submits that his petition for writ of certiorari should be granted for the compelling reasons noted above. He asks the Court to grant his petition and grant full briefing in this important matter to address and resolve the circuit split as to whether the Court's decisions in *Johnson* and *Beckles*, and similarities between the residual clauses of the ACCA, § 16(b) and § 924(c)(3)(B), mean the definition of "crime of violence" in § 924(c)(3)(B) is, like its ACCA and § 16(b) counterparts, unconstitutionally vague.

Respectfully submitted,

ROBINSON & BRANDT, P.S.C.

Dated: 19 April 2018

by: /s/ Jeffrey M. Brandt
Jeffrey M. Brandt, Esq.
629 Main Street
Suite B
Covington, KY 41011
(859) 581-7777 voice
jmbrandt@robinsonbrandt.com
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing petition for writ of certiorari and the following appendix were served by U.S. Priority Mail on the date I reported below upon the Solicitor General's Office, Room 5614, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; and Assistant U.S. Attorney Kenneth Ray Chadwell, Jr., U.S. Attorney's Office, 11 W. Fort Street, Suite 2001, Detroit, MI 48226.

Dated: 19 April 2018

/s/ Jeffrey M. Brandt
Jeffrey M. Brandt

APPENDIX