

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GABRIEL CABELLO — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel Cabello
(Your Name)
Reg. No. 71704-279
Federal Correctional Institution
P.O. Box 1000

(Address)

Otisville, NY 10963-1000
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

Is the residual clause in 18 U.S.C. § 924(c)(B)(3) unconstitutional and void for vagueness?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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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

☒ For cases from **federal courts**:

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 1, 2018.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 924(c)(3)(B)

(3) For purposes of this subsection the term "crime of violence means an offense that is a felony and --

. . . .

(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.

STATEMENT OF THE CASE

Petitioner, Gabriel Cabello ("Cabello"), pleaded guilty to two counts of aggravated bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), and to one count of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The Court imposed a sentence of 25 years imprisonment, which included a mandatory consecutive term of 84 months on the § 924(c) firearm charge. The judgment was entered on January 11, 2012. Cabello did not appeal.

On June 9, 2016, Cabello filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 seeking to have his firearm conviction under 18 U.S.C. § 924(c) vacated, based on Johnson v. United States, 135 S.Ct. 2551 (2015). Although Johnson held the "residual clause" definition of "crime of violence" in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e) to be unconstitutionally vague, Cabello argued that the reasoning of the decision extended to the residual clause found at 18 U.S.C. § 924(c)(3)(B). As such, his convictions for bank robbery no longer qualify as crimes of violence, and the § 924(c) conviction must be vacated.

On February 16, 2017, the district court dismissed Cabello's motion as untimely and lacking merit under Fifth Circuit precedent. In particular, the Fifth Circuit sitting en banc had ruled the residual clause in 18 U.S.C. § 16(b), which is identical to the residual clause in § 924(c), is not unconstitutionally vague. See United States v. Gonzalez-Longoria,

831 F.3d 670, 672 (5th Cir. 2016) (en banc). The district court stated, "Based on Gonzalez-Longoria, Johnson provides no basis for authorizing an untimely § 2255 motion challenging a § 924(c) conviction." See Appendix B (Order at 3).

Cabello filed a notice of appeal and request for a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253 (c)(2). He argued his motion was timely under 28 U.S.C. § 2255(f) (3) because it was filed within one year of this Court's decision in Johnson. Further, his conviction under 18 U.S.C. § 924(c) should be vacated because the definition of crime of violence in § 924(c)(3)(B) is unconstitutionally vague. Cabello acknowledged his arguments were foreclosed within the Fifth Circuit by Gonzalez-Longoria, but he nevertheless raised his claims to preserve them for further review. Cabello also suggested his appeal should be held in abeyance pending this Court's decision in Sessions v. Dimaya, No. 15-1498.

On February 1, 2018, a single Circuit Judge denied Cabello's application for a COA and request to stay his appeal. See Appendix A. Cabello now files this timely petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This case presents a question of national importance common to innumerable cases now pending in the federal courts. That is, whether the residual clause found at 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

On April 17, 2018, this Court ruled in Sessions v. Dimaya, No. 15-1498, that the residual clause in 18 U.S.C. § 16(b) defining a "crime of violence" as "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" is unconstitutionally vague. The decision was based on the same reasoning as the Court's earlier decision in Johnson v. United States, 135 S.Ct. 2551 (2015), which invalidated a similar, but not identical, residual clause of the Armed Career Criminal Act, ("ACCA"), 18 U.S.C. § 924(e).

In the instant case, Cabello was convicted of violating 18 U.S.C. § 924(c) by using a firearm in the commission of a crime of violence. The underlying offense was aggravated bank robbery. Cabello argues that aggravated bank robbery could only be deemed a crime of violence under § 924(c)'s residual clause, the wording of which is identical to the § 16(b) residual clause that Dimaya held invalid. Thus, Dimaya extends to render § 924(c)(3)(B) unconstitutional. Cabello's conviction and sentence under that statute violates the Fifth Amendment's Due Process clause. See U.S. Const., Amend. V.

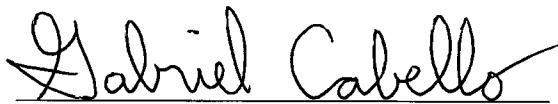
After this Court decided Johnson, Cabello filed a motion under 28 U.S.C. § 2255 in the district court seeking to have his § 924(c) conviction and sentence vacated. Cabello argued the reasoning of Johnson extends to render the residual clause in 18 U.S.C. § 924(c)(B)(3) void for vagueness. The district court, however, ruled the claim was foreclosed by United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc) and dismissed the petition. The court of appeals later declined to issue a certificate of appealability on the same basis.

Dimaya establishes Cabello's § 2255 motion should not have been dismissed. The motion was timely because it was filed within one year of Johnson, the reasoning of which Cabello's claim relied upon. In Dimaya, this Court indicated the reasoning of Johnson applied to invalidate the residual clause in 18 U.S.C. § 16(b), which is identical to the residual clause in § 924(c). It logically follows that the § 924(c) residual clause is also void for vagueness. The Fifth Circuit precedent upon which the courts below dismissed Cabello's request for relief, Gonzalez-Longoria, was explicitly overruled in Dimaya. Thus, Cabello's claim that his § 924(c) conviction is constitutionally infirm has potential merit and should be permitted to proceed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink that reads "Gabriel Cabello". The signature is written in a cursive style with a long horizontal stroke at the end.

Gabriel Cabello
Petitioner, pro se

Date: April 23, 2018