

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK SALVADOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

VIRGINIA L. GRADY

Federal Public Defender

GRANT RUSSELL SMITH

Counsel of Record for Petitioner

Assistant Federal Public Defender

grant.smith@fd.org

633 17th Street, Suite 1000

Denver, Colorado 80202

Tel: (303) 294-7002

Fax: (303) 294-1192

QUESTION PRESENTED

1. Whether a vagueness challenge to the residual clause of 18 U.S.C. § 924(c)(3)(B) asserts a violation of the right recognized in *Johnson v. United States*, 135 S. Ct. 2551 (2015), such that it is timely under 28 U.S.C. § 2255(f)(3).

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
DECISION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING CERTIORARI	3
I. The decision below is wrong; application of the residual clause of § 924(c)(3)(B) violates the right recognized in <i>Johnson</i> for purposes of § 2255(f)(3)	4
II. The issue presented is one of exceptional importance	6
III. If this Court declines to grant plenary review, it should vacate and remand for further proceedings in light of <i>Sessions v. Dimaya</i>	8
CONCLUSION	8
APPENDICES	
Order Denying Certificate of Appealability, dated Feb. 21, 2018	A
Order Denying § 2255 Motion, dated Jan. 26, 2017	B
Final Judgment, dated Jan. 26, 2017	C

TABLE OF AUTHORITIES

PAGE

Cases

<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	<i>passim</i>
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)	<i>passim</i>
<i>Teague v. Lane</i> , 498 U.S. 288 (1989)	7
<i>United States v. Salvador</i> , 2018 WL 1001264 (10th Cir. 2018)	3, 4

Statutes and Rules

18 U.S.C. § 16(b)	5, 8
18 U.S.C. § 924(c)	<i>passim</i>
18 U.S.C. § 924(e)	2, 5
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2255	i, 1, 2, 3, 4, 6, 7
Rule 13.1	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Patrick Salvador, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

DECISION BELOW

The opinion of the court of appeal (App. A) is not reported but is available on electronic databases at 2018 WL 1001264 (10th Cir. 2018). The order and judgment of the district court denying Mr. Salvador's motion to vacate are unreported and unavailable in electronic databases, but the order and judgment are attached as App. B and App. C.

JURISDICTION

The Tenth Circuit entered judgment in this case on February 21, 2018. App. A. No petition for rehearing was filed. This petition is being filed within 90 days after entry of the judgment below, so it is timely under Rule 13.1 The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255(f):

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from . . .

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

18 U.S.C. § 924(c)(3):

(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.

STATEMENT OF THE CASE

In 2006, Mr. Salvador was convicted of two counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). Vol. 1 at 25.¹ The underlying predicate crime of violence was aiding and abetting a violation of the federal armed bank robbery statute. *Id.* at 26.

Less than one year after this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Salvador moved to vacate his sentence under 28 U.S.C. § 2255. *Id.* at 35. *Johnson* declared the residual clause of the Armed Career Criminal Act (“ACCA”) unconstitutionally vague. The provision invalidated in *Johnson* had defined the term “violent felony” as crimes that “involve[] conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). Mr. Salvador claimed that his sentence should be vacated under *Johnson* because it was imposed under the residual clause found in § 924(c)(3)(B). *Id.* at 43. Mr. Salvador argued that the statute at issue in *Johnson*

¹ Citations to the record are to the one-volume record on appeal filed in the Tenth Circuit Court of Appeals.

and the residual clause of § 924(c)(3)(B) were, in all material respects, identical. *Id.* at 43-46. Thus, *Johnson* dictated the unconstitutionality of § 924(c)(3)(B).

The district court denied Mr. Salvador's post-conviction motion, and the Tenth Circuit affirmed. *Id.* at 103; App. A. The parties had agreed that Mr. Salvador's vagueness challenge was untimely unless saved by 28 U.S.C. § 2255(f)(3). *Id.* at 50. Section 2255(f)(3) provides that a post-conviction motion is timely if filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The Tenth Circuit held that Mr. Salvador's motion could not proceed under § 2255(f)(3), and was thus untimely. The Court held that § 2255(f)(3) did not apply to Mr. Salvador because "a defendant cannot invoke *Johnson* to proceed under § 2255(f)(3) unless the defendant is challenging on vagueness ground the ACCA's residual clause." *United States v. Salvador*, 2018 WL 1001264, at *2 (10th Cir. 2018). In other words, the Tenth Circuit held that the right recognized in *Johnson* was strictly limited to the ACCA and did not directly apply to any other statute. *See id.* The Tenth Circuit denied Mr. Salvador's request for a Certificate of Appealability. *Id.*

This petition follows.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari because the Tenth Circuit's decision conflicts with this Court's precedents and because the lower courts' refusal to apply *Johnson* to § 924(c)(3)(B) constitutes an issue of exceptional importance.

- I. The decision below is wrong; application of the residual clause of § 924(c)(3)(B) violates the right recognized in *Johnson* for purposes of § 2255(f)(3).

The Tenth Circuit's decision misreads both § 2255(f)(3) and this Court's decision in *Johnson*.

First, the text of § 2255(f)(3), as relevant here, renders timely a post-conviction motion filed within one year of “the date on which *the right asserted* was initially recognized by the Supreme Court.” (Emphasis added). This text makes clear that the dispositive question is whether Mr. Salvador has “asserted” that his sentence violates *Johnson*, not whether *Johnson* ultimately applies to Mr. Salvador's sentence. Mr. Salvador's § 2255 motion unquestionably claimed, or “asserted,” that his sentence violates a right newly recognized by this Court, and whether that right in fact applies to the facts of his case is a separate, merits issue. The Tenth Circuit erred in holding otherwise.

Second, even allowing the Tenth Circuit its erroneous reading of § 2255(f)(3), it also erred by misapplying that reading of § 2255(f)(3) to Mr. Salvador's case. The Tenth Circuit held that § 2255(f)(3) does not apply because “the only right recognized by the Supreme Court in *Johnson* was a defendant's right not to have his sentence increased under the residual clause of the ACCA.” *United States v. Salvador*, 2018 WL 1001264, at *2 (10th Cir. 2018). This Court's recent decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) makes clear that the right recognized in *Johnson* applies to statutes other than the ACCA.

In *Johnson*, this Court invalidated as unconstitutionally vague the ACCA's residual clause, which defined “violent felony” to include offenses that “involve[] conduct that

presents a serious potential risk of physical injury to another.” 135 S. Ct. at 2558 (quoting 18 U.S.C. § 924(e)(2)(B)). In *Dimaya*, this Court invalidated an unrelated statute, 18 U.S.C. § 16(b), which defined a different term, “crime of violence,” using different words: a felony 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 Supreme Court reasoned that “*Johnson* is a straightforward decision, with equally straightforward application” to § 16(b). *Dimaya*, 138 S. Ct. at 1203. Indeed, it said that *Johnson* itself “effectively resolved” the question of whether § 16(b) was unconstitutionally vague. *Id.*

Dimaya clarifies that *Johnson* wasn’t a case about the ACCA exclusively but, rather, was a case about any statute that has a residual clause with “the same two features as the ACCA’s, combined in the same constitutionally problematic way.” *Id.* Under *Johnson*, as clarified by *Dimaya*, a statute is unconstitutional if it (1) “calls for a court to identify a crime’s ‘ordinary case’ in order to measure the crime’s risk” and (2) defines with “uncertainty . . . the level of risk that makes a crime ‘violent.’” *Id.* at 1212. In light of *Dimaya*, it is no longer tenable to hold that *Johnson* recognized only a right not to be subject to the ACCA’s residual clause. Rather, *Johnson* recognized a right at a broader level of generality—a right not to be subject to *any* statute that requires courts to assess whether the “ordinary case” of a crime meets an imprecisely defined threshold of risk.

Further, *Dimaya* makes clear that a challenge to § 924(c)’s residual clause asserts a violation of the *Johnson*-recognized right not to be subject to statutes that share the two problematic features of the ACCA’s residual clause. Although *Dimaya* addressed § 16(b),

rather than § 924(c)(3)(B), the language of those two statutes is literally identical. Both define “crime of violence” as a felony 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.” But, more importantly, both statutes require courts to assess whether the “ordinary case” of a crime meets an imprecisely defined threshold of risk, and that is enough to invoke the right recognized in *Johnson*. *Dimaya*, 138 S. Ct. at 1208. If there was any doubt before, *Dimaya* makes clear that *Johnson*’s holding extends to all mandatory laws that share the same constitutionally problematic features of the ACCA. This Court need not separately take up and explicitly strike down each and every statute that shares those features to make clear that none of them can stand.

For these reasons, this Court has recognized a right that invalidates the residual clause of § 924(c)(3)(B). It follows that Mr. Salvador’s post-conviction motion is timely under § 2255(f)(3). The Tenth Circuit contravened this Court’s precedent in finding otherwise.

II. The issue presented is one of exceptional importance.

The question presented is one of exceptional importance in that it has the potential to deny relief for scores of defendants even if it is openly acknowledged that they are serving illegal sentences.

Should the Tenth Circuit’s decision stand in this case it is likely that many defendants in the circuit will be unable to test the legality of a § 924(c) conviction even if this Court were to deem § 924(c)(3)(B) unconstitutional. As noted, § 2255(f)(3) requires

that for a petition to be timely it must be filed within one year from when “the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” As a result, defendants seeking to challenge their § 924(c) convictions filed § 2255 motions within one year of the *Johnson* decision. Like Mr. Salvador, these defendants argued that the right recognized in *Johnson* extended beyond the ACCA and applied to all statutes containing the same two layers of indeterminacy. *Dimaya* proves that this is the case.

Even if this Court holds that § 924(c)(3)(B) is unconstitutional, these same defendants will be likely barred from seeking relief. In order for a defendant to file a second or successive § 2255 motion, they must first seek approval from the appropriate court of appeals. 28 U.S.C. § 2255(h). The appellate court must certify that the motion contains “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.” *Id.* If this Court strikes down the residual clause of § 924(c)(3)(B) it will likely do so because such a result is dictated by *Johnson*. *C.f.* *Dimaya*, 138 S. Ct. at 1213 (“*Johnson* is a straightforward decision, with equally straightforward application here.”). Accordingly, the rule will not be new. *See Teague v. Lane*, 498 U.S. 288, 301 (1989) (“[A] case announces a new rule if the result was not dictated by precedent . . .”). Because *Dimaya* demonstrates that the “new” rule was the one recognized in *Johnson*, a second or successive petition will likely not be authorized should this Court apply *Johnson* to strike down the residual clause of § 924(c). Accordingly,

the decision in this case has the potential to countenance illegal sentences. As such, it is an issue of exceptional importance deserving of this Court's review.

III. If this Court declines to grant plenary review, it should vacate and remand for further proceedings in light of *Sessions v. Dimaya*.

The Tenth Circuit decided this case before this Court issued *Sessions v. Dimaya*. As explained above, *Dimaya*'s application of *Johnson* to § 16(b) makes untenable the Tenth Circuit's holding that *Johnson* is strictly limited to the ACCA. Accordingly, should this Court decline to grant plenary review, Mr. Salvador respectfully requests that this court grant certiorari, vacate the decision below, and remand for further proceedings in light of *Dimaya*.

CONCLUSION

Mr. Salvador respectfully requests that his petition for writ of certiorari be granted.

Date: May 22, 2018.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Grant Russell Smith
GRANT RUSSELL SMITH
Assistant Federal Public Defender
Counsel of Record for the Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002