

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JOE JR DESILIEN,

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

MICHAEL CARUSO
Federal Public Defender

Panayotta Augustin-Birch
Assistant Federal Public Defender
Counsel for Petitioner Desilien
109 North 2nd Street
Fort Pierce, Florida 34950
Telephone No. (772) 489-2123
E-mail: panayotta_augustin-birch@fd.org

QUESTIONS PRESENTED FOR REVIEW

Title 18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence. A first conviction carries a seven-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*).

II. Whether conspiracy to commit Hobbs Act robbery, which may be committed by a verbal or written agreement to commit Hobbs Act robbery, 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).

III. 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).

IV. 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*, 580 U.S.

___, 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).

INTERESTED PARTIES

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

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW	i
INTERESTED PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES.....	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	2
STATEMENT OF JURISDICTION.....	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
1. REASONABLE JURISTS COULD DEBATE WHETHER 18 U.S.C. § 924(c)'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.....	7
2. REASONABLE JURISTS COULD DEBATE WHETHER CONSPIRACY TO COMMIT HOBBS ACT ROBBERY, WHICH MAY BE COMMITTED BY A VERBAL OR WRITTEN AGREEMENT TO COMMIT HOBBS ACT ROBBERY, HAS AS AN ELEMENT THE “USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER.”	14

3.	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.”	17
4.	THE ELEVENTH CIRCUIT’S RULE THAT A COA MAY NOT BE GRANTED WHERE BINDING CIRCUIT PRECEDENT FORECLOSES A CLAIM ERRONEOUSLY APPLIES THE COA STANDARD ARTICULATED BY THIS COURT IN <i>MILLER-EL AND BUCK</i>	19
CONCLUSION		21
APPENDIX		
	Order of the Court of Appeals for the Eleventh Circuit, Denying Motion for Certificate of Appealability, <i>Joe JR Desilien v. United States</i> , No. 17-15600-BB (3/15/18).....	A-1
	District Court’s Order Adopting Magistrate Judge’s Report and Recommendation and Denying Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (10/20/17)	A-2
	Government’s Response In Opposition to Petitioner’s Objection To Magistrate’s Report and Recommendation (8/28/17).....	A-3
	Petitioner’s Objections to Magistrate Judge’s Report and Recommendation (8/23/17)	A-6
	Magistrate Judge’s Report and Recommendation To Deny Petitioner’s Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (8/9/17)	A-9

TABLE OF AUTHORITIES

CASES:

Buck v. Davis,

580 U.S. ___, 137 S. Ct. 759 (2017) i, 19-20

Chambers v. United States,

555 U.S. 122 (2009).....10

Davenport v. United States,

No. 16-15939 (11th Cir. March 28, 2017)18

Duhart v. United States,

2016 WL 4720424 (S.D. Fla. Sept. 9, 2016)16

Evans v. Zych,

644 F.3d 447 (6th Cir. 2011)11

Gordon v. Sec’y, Dep’t of Corr.,

479 F.3d 1299 (11th Cir. 2007).....20

Hamilton v. Sec’y,

793 F.3d 1261 (11th Cir. 2015).....20

In re Garcia,

No. 16-14320 (11th Cir. July 27, 2016).....19, 21

In re Saint Fleur,

824 F.3d 1337 (11th Cir. 2016)..... 6, 19-21

<i>James v. United States</i> ,	
550 U.S. 192 (2007).....	9, 11
<i>Johnson v. United States ("Curtis Johnson")</i> ,	
559 U.S. 133 (2010).....	14, 16-17
<i>Johnson v. United States ("Samuel Johnson")</i> ,	
135 S. Ct. 2551 (2015).....	<i>passim</i>
<i>Lawrence v. Florida</i> ,	
421 F.3d 1221 (11th Cir. 2005).....	20
<i>Mathis v. United States</i> ,	
136 S. Ct. 2243 (2016).....	18
<i>Miller-El v. Cockrell</i> ,	
537 U.S. 322 (2003).....	i, 19-21
<i>Moncrieffe v. Holder</i> ,	
133 S. Ct. 1678 (2013).....	15, 18
<i>Ocasio v. United States</i> ,	
136 S. Ct. 1423 (2016).....	15
<i>Ovalles v. United States</i> ,	
861 F.3d 1257 (11th Cir. 2017), <i>rehg. en banc granted</i> ,	
889 F.3d 1259 (11th Cir. 2018).....	8
<i>Richardson v. United States</i> ,	
526 U.S. 813 (1999).....	18

<i>Roberts v. Holder</i> ,	
745 F.3d 928 (8th Cir. 2014)	11
<i>Sessions v. Dimaya</i> ,	
584 U.S. ___, 138 S. Ct. 1204 (2018)	<i>passim</i>
<i>Slack v. McDaniel</i> ,	
529 U.S. 473 (2000).....	6
<i>Tompkins v. Sec’y, Dep’t of Corr.</i> ,	
557 F.3d 1257 (11th Cir. 2009).....	20
<i>United States v. Acosta</i> ,	
470 F.3d 132 (2d Cir. 2006)	12
<i>United States v. Amparo</i> ,	
68 F.3d 1222 (9th Cir. 1995)	12
<i>United States v. Aragon</i> ,	
983 F.2d 1306 (4th Cir. 1993).....	11
<i>United States v. Ayala</i> ,	
601 F.3d 256 (4th Cir. 2010)	11
<i>United States v. Baires-Reyes</i> ,	
191 F. Supp. 3d 1046 (N.D. Cal. 2016)	16
<i>United States v. Butler</i> ,	
496 F. App’x 158 (3d Cir. 2012).....	11
<i>United States v. Cardena</i> ,	
842 F.3d 959 (7th Cir. 2016)	7

<i>United States v. Edmundson,</i>	
153 F. Supp. 3d 857, 859 (D. Md. 2015).....	15
<i>United States v. Fuertes,</i>	
805 F.3d 485 (4th Cir. 2015)	11
<i>United States v. Green,</i>	
521 F.3d 929 (8th Cir. 2008)	12
<i>United States v. Hill,</i>	
832 F.3d 135 (2d Cir. 2016)	8
<i>United States v. Keelan,</i>	
786 F.3d 865 (11th Cir. 2015)	11
<i>United States v. Ledbetter,</i>	
2016 WL 3180872 (S.D. Ohio June 8, 2016).....	16
<i>United States v. Local 560 of the Int’l Bhd. of Teamsters,</i>	
780 F.2d 267 (3d Cir. 1986)	18
<i>United States v. Luong,</i>	
No. 2016 WL 1588495 (E.D. Cal. Apr. 20, 2016)	16
<i>United States v. McGuire,</i>	
706 F.3d 1333 (11th Cir. 2013).....	10, 14, 17
<i>United States v. Naughton,</i>	
621 F. App’x 170 (4th Cir. Sept. 2, 2015).....	11
<i>United States v. Pistone,</i>	
177 F.3d 957 (11th Cir. 1999)	15

<i>United States v. Pringle,</i>	
350 F.3d 1172 (11th Cir. 2003).....	15
<i>United States v. Ramos-Medina,</i>	
706 F.3d 932 (9th Cir. 2012)	11
<i>United States v. Ransfer,</i>	
749 F.3d 914 (11th Cir. 2014)	15
<i>United States v. Salas,</i>	
889 F. 3681 (10th Cir. 2018).....	7, 12
<i>United States v. Sanchez-Espinal,</i>	
762 F.3d 425 (5th Cir. 2014)	11
<i>United States v. Sanchez-Garcia,</i>	
501 F.3d 1208 (10th Cir. 2007).....	12
<i>United States v. Serafin,</i>	
562 F.3d 1104 (10th Cir. 2009).....	11
<i>United States v. Taylor,</i>	
814 F.3d 340 (6th Cir. 2016)	7
<i>United States v. Verbitskaya,</i>	
406 F.3d 1324 (11th Cir. 2005).....	15
<i>Van Don Nguyen v. Holder,</i>	
571 F.3d 524 (6th Cir. 2009)	11
<i>Welch v. United States,</i>	
578 U.C. ____, 136 S. Ct. 1257 (2016).....	10, 13, 21

STATUTORY AND OTHER AUTHORITY:

U.S. Const. amend V	2
18 U.S.C. § 924(c)	<i>passim</i>
18 U.S.C. § 924(c)(3)(A)	i, 14, 17
18 U.S.C. § 924(c)(3)(B)	<i>passim</i>
18 U.S.C. § 924(e)	<i>passim</i>
18 U.S.C. § 924(e)(2)(B)(ii)	8-9, 12
18 U.S.C. § 1951	<i>passim</i>
18 U.S.C. § 1951(a)	<i>passim</i>
18 U.S.C. § 1951(b)(1)	17
28 U.S.C § 1291	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253	2, 20
28 U.S.C. § 2253(c)	4
28 U.S.C. § 2253(c)(2)	6, 19
28 U.S.C. § 2255	2, 4-6
SUP. CT. R. 13.1	2
3d Cir. Pattern Jury Instructions 6.18.1951-4	18
10th Cir. Pattern Jury Instructions 2.70	18
11th Cir. Pattern Jury Instructions 70.3	18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No:

JOE JR DESILIEN,

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

Joe JR Desilien 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 17-15600-BB in that court on March 15, 2018.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit, denying a certificate of appealability under 28 U.S.C. § 2253, is unpublished and contained in Appendix A-1. The district court's order denying Mr. Desilien's 28 U.S.C. § 2255 motion is unpublished and reprinted in Appendix A-2.

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 March 15, 2018, when the Court of Appeals denied an application for a Certificate of Appealability. *See* Appendix A-1. This petition is timely filed under SUP. CT. R. 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

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 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 provides in pertinent part:

- (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. § 2253(c) provides in pertinent part:

- (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

On December 5, 2013, a federal Grand Jury, in the Southern District of Florida, charged Mr. Desilien in a third superseding indictment with conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) (Count One); Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) (Counts Four and Six); and possession of a firearm “brandished” in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts Five and Seven).

On May 27, 2014, Mr. Desilien entered a plea of guilty, pursuant to a plea agreement to conspiracy to commit Hobbs Act Robbery (Count One), Hobbs Act Robbery (Count Six) and possessing a firearm “brandished” in furtherance of a

crime of violence (Count Seven). When it came time to impose sentence, the district court imposed a sentence at the low end of the advisory guideline range at 194-months imprisonment which consisted of 110 months on Counts One and Six to be served concurrently with each other and 84 months for Count Seven to be run consecutively, followed by five years for supervised release. Mr. Desilien did not appeal his conviction or sentence.¹

On July 1, 2016 Mr. Desilien filed a *pro se* motion to vacate sentence under 28 U.S.C. § 2255. Counsel was appointed, and on August 22, 2016, an amended motion to vacate his sentence pursuant to 28 U.S.C. § 2255 was filed arguing that his § 924(c) conviction should be vacated because § 924(c)'s residual clause was unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), and Hobbs Act robbery was not categorically a crime of violence. On, October 20, 2017, the district court judge entered an order denying the § 2255 motion and a certificate of appealability.

On January 10, 2018, Mr. Desilien filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) convictions are unconstitutional in light of *Samuel Johnson*. In his application, Mr. Desilien argued that reasonable jurists could debate whether *Samuel Johnson* invalidated § 924(c)'s residual clause and whether Hobbs Act robbery qualifies as a “crime of violence” under § 924(c)'s force clause.

¹ Mr. Desilien's plea agreement contained an appellate waiver which precluded him from filing an appeal since the Court sentenced him to a sentence at the low end of the guideline range.

Mr. Desilien acknowledged that in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016), the Eleventh Circuit published an order denying an application to file a second or successive (“SOS”) § 2255 motion, holding that Hobbs Act robbery qualifies as a “crime of violence” under the force clause. However, Mr. Desilien argued that given the unique nature of how orders are resolved at the SOS stage, such orders are not binding outside that context. Mr. Desilien also argued that regardless of *In re Saint Fleur*’s precedential value, its reasoning was unpersuasive. Based on the foregoing, Mr. Desilien respectfully submitted that, at a minimum, he had made the threshold showing necessary to obtain a COA, because reasonable jurists could (and do) debate whether his § 924(c) convictions are unconstitutional in light of *Samuel Johnson*.

On March 15, 2018, the Eleventh Circuit denied Mr. Desilien’s application for a COA. The Court, citing 28 U.S.C. § 2253(c)(2) and *Slack v. McDaniel*, 529 U.S. 473, 478 (2000), stated that the COA failed to make a requisite showing that reasonable jurists would find debatable both the merits of the underlying claim and the procedural issues sought by Mr. Desilien.

REASONS FOR GRANTING THE WRIT

I. REASONABLE JURISTS COULD DEBATE WHETHER 18 U.S.C. § 924(c)'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE.

In *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), this Court declared unconstitutionally vague 18 U.S.C. § 16(b). That result was compelled by a “straightforward application” of the “straightforward decision” in *Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). *Id.* at 1213. The Court found § 16(b) indistinguishable from the residual clause struck down in *Samuel Johnson*. It emphasized that both provisions required courts to imagine an “ordinary case” and apply it against an uncertain level of risk. *Id.* at 1213-1216. And the Court rejected the government’s textual and experiential attempts to distinguish the clauses, finding each “to be the proverbial distinction without a difference.” *Id.* at 1218-1221.

Reasonable jurists could debate whether, in light of *Dimaya*, § 924(c)(3)(B) is also void for vagueness because the text of § 924(c)(3)(B) is perfectly identical to § 16(b). Not only are the residual clauses in § 16(b) and § 924(c) are identically worded, but the circuits are also divided on whether § 924(c)’s residual clause is unconstitutionally vague in light of *Samuel Johnson* and *Dimaya*. Compare *United States v. Salas*, 889 F. 3d 681, 683 (10th Cir. 2018) (holding § 924(c)(3)(B) void for vagueness under *Dimaya*), and *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)’s residual clause is unconstitutionally vague under *Samuel Johnson*), 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). Accordingly, reasonable jurists could debate whether § 924(c)(3)(B) is void for vagueness.

For these same reasons, reasonable jurists could debate whether *Dimaya* abrogates the Eleventh Circuit's contrary precedent. Before *Dimaya*, the precedent in the Eleventh Circuit held that the rule announced in *Samuel Johnson* does not apply to § 924(c)'s residual clause. *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *reh'g en banc granted, opinion vacated by Ovalles v. United States*, 889 F.3d 1259 (11th Cir. 2018). The Eleventh Circuit based its determination on differences in wording and function between § 924(c)(3)(B) and § 924(e)(2)(B)(ii). Less than one week after the Eleventh Circuit issued its opinion in *Ovalles*, however, the Court *sua sponte* withheld the mandate. And, on August 14, 2017, a petition for rehearing en banc was filed in the case. That petition remains pending before the Court. Notably, on April 17, 2018, the same day the Supreme Court issued its opinion in *Dimaya*, the Eleventh Circuit issued a *sua sponte* order directing the parties in *Ovalles* to submit supplemental briefing on what effect the decision in *Dimaya* has on the panel's holding in *Ovalles*, and determine it will rehear *Ovalles* en banc. Thus, reasonable jurists in the Eleventh Circuit are debating whether § 924(c)(3)(B) is unconstitutionally vague in light of *Dimaya* and *Samuel Johnson*.

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. Desilien respectfully seeks this Court's review. This Court has decided in *Dimaya* that § 16(b) is unconstitutionally vague, and that decision has confirmed Mr. Desilien'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. A COA is warranted.

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*, 578 U.C. ___, 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.

Federal courts have historically and regularly analyzed and imported decisions from one residual clause to another due to their substantial similarities.³

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

³ Though the comparison tends to mostly address 18 U.S.C. § 16(b), that provision is identical to § 924(c)(3)(B). *See, e.g., Chambers v. United States*, 555 U.S. 122, 133, n.2 (2009) (citing circuit splits on § 16(b) in the context of a residual clause case because § 16(b) “closely resembles ACCA’s residual clause”)(Alito, J., concurring).

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 the Court's holding in *Samuel Johnson* did not turn on the type of risk, but rather how a court assesses and quantifies the risk. See *Dimaya*, 138 S.Ct. at 1215.

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.”⁴ As other courts have

See also *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (relying on an ACCA case to interpret the definition of a crime of violence under § 924(c)(3)(B)); *United States v. Aragon*, 983 F.2d 1306, 1314 (4th Cir. 1993) (same); *Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (using both ACCA cases and § 16(b) cases to define the same “ordinary case” analysis); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014) (despite the fact that the ACCA talks of risk of injury and § 16(b) talks of risk of force, “we have previously looked to the ACCA in deciding whether offenses are crimes of violence under § 16(b)”).

⁴ The ACCA, § 924(c), and § 16(b) require courts to discern what the “ordinary case” of a crime is by using the categorical approach. Courts may not consider the factual means of committing any given offense, but must consider the nature of the offense in the “ordinary case,” regardless of whether the ACCA, § 924(c)(3)(B), or § 16(b) is at issue. See *United States v. Keelan*, 786 F.3d 865, 871 (11th Cir. 2015) (adopting “ordinary case” analysis for identical provision in § 16(b)); see also *United States v. Naughton*, 621 F. App'x 170, 178 (4th Cir. Sept. 2, 2015) (applying the ordinary case inquiry to the residual clause of § 924(c)); *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015); *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2012) (citing *James* as the source of the “ordinary case” analysis required by § 16(b)); *United States v. Butler*, 496 F. App'x 158, 161 n.4 (3d Cir. 2012); *Evans v. Zych*, 644 F.3d 447, 453 (6th Cir. 2011); *United States v. Serafin*, 562 F.3d 1104, 1108 (10th Cir. 2009); *Van Don Nguyen v. Holder*, 571 F.3d 524, 530 (6th Cir. 2009) (considering § 16(b) and concluding that “[t]he proper inquiry is one that contemplates the risk associated with the proscribed conduct in the mainstream of

rightly explained, the § 924(c) residual clause suffers from exactly the same double indeterminacy as the ACCA residual clause. *See Salas*, 889 F.3d at 686.

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 *Samuel 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. *See Dimaya*, 138 S.Ct. at 1221. True enough, the Court considered the enumerated offenses in concluding that the ACCAs 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:

prosecutions brought under the statute.”); *United States v. Green*, 521 F.3d 929, 932 (8th Cir. 2008); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007); *United States v. Acosta*, 470 F.3d 132, 134 (2d Cir. 2006); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995).

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. By asking whether the crime “*otherwise* involves conduct that presents a serious potential risk,” moreover, 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:

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. (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 Dimaya*, 138 S.Ct. at 1218-14; *Welch*, 136 S. Ct. at 1262.

It follows, then, that the absence of enumerated offenses in § 924(c)(3)(B) is irrelevant to whether it is void for vagueness under *Samuel Johnson*. *See Dimaya*, 138 S.Ct. at 128-24. 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 CONSPIRACY TO COMMIT HOBBS ACT ROBBERY, WHICH MAY BE COMMITTED BY A VERBAL OR WRITTEN AGREEMENT TO COMMIT HOBBS ACT ROBBERY, HAS AS AN ELEMENT THE “USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER.”

Whether conspiracy to commit Hobbs Act robbery qualifies as a “crime of violence” under § 924(c)’s force clause, 18 U.S.C. § 924(c)(3)(A), 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 conspiracy to commit 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. The term “physical force” under the elements clause “connotes a substantial degree of force.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). It means “violent force . . . force that is capable of causing physical pain or injury to another person.” *Id.* Conspiracy to commit Hobbs Act robbery may be committed without the use of violent “physical force.” Therefore, reasonable jurists could debate whether it qualifies as a “crime of violence” under § 924(c)’s force clause.

“To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated

in furthering that goal.” *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) (quoting *United States v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003)). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Nor is there any requirement that the defendant was “even capable of committing” the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, “[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it.” *Id.* (emphasis omitted).

Under the least-culpable act rule, this Court must presume that Mr. Desilien’s conspiracy offense was committed by a verbal or written agreement to commit Hobbs Act robbery. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *see, e.g., Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). Committing the offense in this way clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, reasonable jurists could debate whether conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a “crime of violence.”

Several courts around the country have agreed, including the district court in this case. *See, e.g., United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. 2015) (“The parties have not cited, nor has my own research revealed, any authority

that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another.”); *Duhart v. United States*, No. 08-60309-CR, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) (“[C]onspiracy to commit Hobbs Act robbery . . . cannot be a ‘crime of violence’ under the elements clause of § 924(c).”); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016) (“[C]onspiracy to commit Hobbs Act robbery is not a crime of violence as defined by the force clause.”); *United States v. Ledbetter*, No. 2:14-CR-127, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) (“[T]his Court agrees” that conspiracy to commit Hobbs Act robbery “qualifie[d] *only* under the ‘residual clause’ from § 924(c)(3)(B)”); *United States v. Luong*, No. CR 2:99-00433 WBS, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) (“The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause.”).

In sum, it appears that several courts that have addressed the issue after *Samuel Johnson* have concluded that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)’s force clause under *Curtis Johnson*. At a minimum, reasonable jurists can debate the issue.

III. 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. Desilien 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, § 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 Curtis Johnson*, 559 U.S. 133, 140 (2010). Because Hobbs Act robbery may be committed without the use of “physical force,” reasonable jurists could debate whether it qualifies 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. Desilien was convicted of the least culpable act. *See 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 Mr. Desilien’s robbery offenses 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. Desilien 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. Desilien respectfully seeks this Court’s review.

IV. THE ELEVENTH CIRCUIT’S RULE THAT A COA MAY NOT BE GRANTED WHERE BINDING CIRCUIT PRECEDENT FORECLOSES A CLAIM ERRONEOUSLY APPLIES THE COA STANDARD ARTICULATED BY THIS COURT IN *MILLER-EL* AND *BUCK*.

To obtain a 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 v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773 (2017), (citing *Miller-El*, 537 U.S. 322, 336 (2003)). “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*, 793 F.3d 1261, 1266 (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). To be sure, the Court phrased its decision in Mr. Desilien's case using the proper terms—that reasonable jurists would not debate whether Mr. Desilien is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Saint Fleur* is binding circuit precedent. *Buck*, 137 S. Ct. at 773. 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 justifi[es] 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. Here, we know that is not the case, particularly because a member of the *Saint Fleur* panel subsequently wrote that her decision in that case may have been erroneous. *In re Garcia*, No. 16-14320, Order at 13–16 (11th Cir. July 27, 2016) (Martin, J., concurring). 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. Desilien respectfully request that this Court grant this petition to review the Eleventh Circuit’s erroneous application of the COA standard.

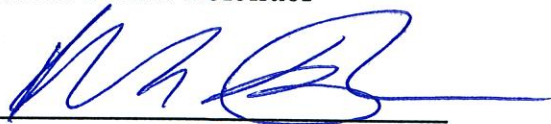
CONCLUSION

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

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By:



Panayotta Augustin-Birch
Assistant Federal Public Defender
Counsel for Petitioner

Fort Pierce, Florida
June 12th, 2018