

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

NO. _____

BRIAN GENE MCCOY,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the residual clause of 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague following the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and in light of the pending decision in *Sessions v. Dimaya* (Sup. Ct. No. 15-1498)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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- A. *Sessions v. Dimaya* will determine whether 18 U.S.C. § 16(b), a statute that is virtually identical to 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague. Holding the case in abeyance would be proper to consider the further guidance the opinion in that case will inevitably provide. 8
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PETITION FOR A WRIT OF CERTIORARI

Brian Gene McCoy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The unpublished judgment of the court of appeals denying a certificate of appealability and dismissing the appeal is reprinted in Appendix A to this Petition. The unpublished order and judgment of the district court are attached in Appendices B and C, respectively.

JURISDICTION

The district court entered judgment denying McCoy's motion to vacate under 28 U.S.C. § 2255 on 04 October 2016. The court of appeals denied McCoy's application for a certificate of appealability on 23 February 2017 and his petition for rehearing on 05 May 2017. This petition is timely submitted. This court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be . . . deprived of life [or] liberty . . . without due process of law.

U.S. Const. amend. V.

18 U.S.C. § 16(b) states that a “crime of violence” is one 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)(B) defines a “crime of violence” as one:

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(e)(2)(B)(ii) states a “violent felony” is one that:

. . . or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

STATEMENT OF THE CASE

1. McCoy was convicted at trial of voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1152(a) and use and carry of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) on 22 September 2006. He was sentenced to consecutive prison terms of 96 months for voluntary manslaughter and 120 months for the firearm offense on 21 December 2006.
2. McCoy's § 924(c) conviction was based on his use of a firearm in connection with voluntary manslaughter or involuntary manslaughter. Both are "crimes of violence" solely as that term is defined by the residual clause of 18 U.S.C. § 924(c)(3).
3. The residual clause of the Armed Career Criminal Act was invalidated as violating the Due Process Clause of the Constitution in *Johnson v. United States*, 135 S. Ct. 2551 (2015).
4. On 21 June 2016 McCoy filed a motion under 28 U.S.C. § 2255 arguing *Johnson* equally invalidated the residual clause of § 924(c). McCoy contended that after *Johnson*, his firearm offense was not in connection with a "crime of violence" under § 924(c).
5. The district court denied his § 2255 motion on 04 October 2016 explaining it was bound by the Eighth Circuit decision *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016).

6. McCoy filed an Application for Certificate of Appealability on 19 October 2016. The court of appeals denied that motion on 23 February 2017 without citing any reasons. McCoy filed a petition for rehearing *en banc* on 31 March 2017. That petition was denied on 05 May 2017, again without citing any reasons. The Eighth Circuit had jurisdiction under 28 U.S.C. § 1291. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on whether the residual clause in 18 U.S.C. § 924(c) is void for vagueness under *Johnson*, making this case ripe for review.

McCoy's conviction rested on the residual clause of 18 U.S.C. § 924(c)(3)(B). The question of whether this clause is void for vagueness in violation of the Due Process Clause is the subject of a circuit split.

The language of the § 924(c) residual clause is materially indistinguishable from the Armed Career Criminal Act's residual clause. Section 924(c)'s residual clause defines a "crime of violence" as one:

(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)(B). And ACCA's residual clause states that a "violent felony" is one that:

(ii) . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(ii). ACCA’s residual clause was struck down as unconstitutionally vague under the Due Process Clause of the Fifth Amendment in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The § 924(c) residual clause suffers from the same constitutional infirmities as the ACCA residual clause. In *Johnson*, this Court held that ACCA’s residual clause was unconstitutionally vague for two reasons. 135 S. Ct. at 2257. First, the residual clause left “grave uncertainty about how to estimate the risk posed by a crime” because it tied the assessment of risk to a judge-imagined “ordinary case” of a crime, “not to real-world facts or statutory elements.” *Id.* Second, the residual clause left uncertainty about how much risk it took for a crime to qualify as a violent felony. *Id.* at 2258. So “[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*

Both the ACCA residual clause and the § 924(c) residual clause involve the “ordinary case” analytical approach found impermissibly arbitrary in *Johnson*. In other words, both clauses require courts to discern the ordinary case of a crime by examining the elements using a categorical approach. *See United States v. Moore*,

38 F.3d 977, 979 (8th Cir. 1994). The textual differences between ACCA’s residual clause and § 924(c)(3)(B) do not change the basic fact that both clauses require courts to assess and quantify risk using an analytical approach riddled with a lack of clarity and predictability. It is this approach that renders both clauses unconstitutionally vague.

The Seventh Circuit agrees. It held that § 924(c)(3)(B) is unconstitutionally vague because it “is virtually indistinguishable from the clause in *Johnson* that was found to be unconstitutionally vague.” *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016).

But the Second, Fifth, Sixth, and Eighth Circuits have ruled that *Johnson* does not invalidate the residual clause of § 924(c). *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Davis*, 677 F. App’x 933 (5th Cir. 2017) (per curiam) (unpublished), *cert. filed* (U.S. Apr. 19, 2017) (No. 16-8997); *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (divided panel), *cert. filed* (U.S. Oct. 21, 2016) (No. 16-6392); *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (per curiam), *cert. filed* (U.S. Dec. 30, 2016) (No. 16-7373) (all holding § 924(c)’s residual clause is not void for vagueness).

The circuits are similarly split on whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague. Section 16(b) states that a “crime of violence” is one that,

(b) . . . 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. § 16(b). This provision is presently before the Court in *Sessions v. Dimaya* (Sup. Ct. No. 15-1498) on the same grounds McCoy raises here.

The Third, Sixth, Seventh, Ninth, and Tenth Circuits have found that the residual clause in § 16(b) is unconstitutionally vague. See *Baptiste v. Attorney Gen.*, 841 F.3d 601, 608 (3d Cir. 2016), *cert. filed* (U.S. Feb. 7, 2017) (No. 16-978); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), *cert. filed* (U.S. Feb. 3, 2017) (No. 16-966); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), *cert. filed* (U.S. Feb. 13, 2017) (No. 16-991); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, *Sessions v. Dimaya*, 137 S. Ct. 31 (U.S. Sept. 29, 2016). By contrast, the Fifth Circuit determined that § 16(b) is not unconstitutionally vague after *Johnson*. See *United States v. Gonzalez-Longoria*, 831 F.3d 670, 678-79 (5th Cir. 2016), *cert. filed* (U.S. Sept. 30, 2016) (No. 16-6259). These conflicting decisions among the circuits reveal that the precise bounds of *Johnson* are far from clear.

This Court should grant review to resolve the circuit split regarding whether the § 924(c) residual clause is unconstitutional in light of *Johnson*. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (granting certiorari in light of a circuit split on whether a 42 U.S.C. § 1983 excessive force claim must satisfy the

subjective or objective standard). McCoy encourages this Court to adopt the reasoning and conclusion of the Seventh Circuit, which is supported by the Third, Sixth, Seventh, Ninth, and Tenth Circuits' decisions regarding the identically worded text found in § 16(b), and hold that the § 924(c) residual clause is void for vagueness because it requires an analysis that is too unpredictable and arbitrary to comply with the Due Process Clause.

II. This case should be held in abeyance pending the Court's decision in *Sessions v. Dimaya*, *Davis v. United States*, *Prickett v. United States*, and *Taylor v. United States*, all of which raise the issue of whether the language of the § 924(c) residual clause is void for vagueness.

The issue of whether the language of the § 924(c) residual clause is void for vagueness is before the Court in *Sessions v. Dimaya* (via the residual clause in 18 U.S.C. § 16(b)), which is set for reargument next term, and the pending petitions for certiorari in *Davis v. United States*, *Prickett v. United States*, and *Taylor v. United States*. McCoy's petition should be held in abeyance pending action on these cases.

A. *Sessions v. Dimaya* will determine whether 18 U.S.C. § 16(b), a statute that is virtually identical to 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague. Holding the case in abeyance would be proper to consider the further guidance the opinion in that case will inevitably provide.

The language of 18 U.S.C. § 924(c)(3)(B), 18 U.S.C. § 924(e)(2)(b)(ii), and 18 U.S.C. § 16(b) is materially indistinguishable. If one of these provisions is

vague, they all are. The Seventh Circuit has agreed. *See Cardena*, 842 F.3d at 996. If the Court strikes the § 16(b) residual clause in *Dimaya*, the identical residual clause of § 924(c) should also be found unconstitutionally vague. This case should be held in abeyance to consider *Dimaya* when it is decided.

B. Several cert petitions are pending to determine whether § 924(c)'s residual clause is unconstitutional.

The Fifth, Sixth, and Eighth Circuits have found that § 924(c)'s residual clause is constitutional. *See Davis*, 677 F. App'x 933; *Taylor*, 814 F.3d 340; *Prickett*, 839 F.3d 697. The district court relied on *Prickett* to deny McCoy's relief. All three cases rely on minor textual differences between ACCA and § 924(c) to distinguish their residual clauses. *See Davis*, 677 F. App'x 933; *Taylor*, 814 F.3d 340; *Prickett*, 839 F.3d 697. This ignores that both statutes require courts to assess and quantify risk using an analytical approach lacking clarity and predictability. *See Johnson*, 135 S. Ct. at 2557. This renders both clauses unconstitutionally vague. Determining one to be unconstitutional while the other is not is a mistake of law.

Petitions for certiorari are pending in all three cases. *Davis v. United States* (Sup. Ct. No. 16-8997); *Taylor v. United States* (Sup. Ct. No. 16-6392); *Prickett v. United States* (Sup. Ct. No. 16-7373). *Prickett* was distributed for conference last term and remains pending. *Taylor* has been distributed for the conference of

September 25, 2017. The Department of Justice will respond to the petition in *Davis* later this summer. Because McCoy is challenging the same issue presented in *Davis*, *Taylor* and *Prickett*, this case should be held in abeyance should the Court grant cert in any of those cases.

CONCLUSION

McCoy's conviction rests on the § 924(c) residual clause, which is essentially identical to the ACCA residual clause that this Court struck down as void for vagueness. This case raises important issues of constitutional law implicating the fundamental protections of the Due Process Clause. This case also presents an opportunity for the Court to resolve the conflict among the circuits on the constitutionality of the § 924(c) residual clause. McCoy's petition for certiorari should be granted.

Alternatively, McCoy's petition should be held in abeyance pending the Court's decision on the merits in *Dimaya* and its ruling on the petitions for certiorari in *Davis*, *Prickett*, and *Taylor*.

Dated this 1st day of August, 2017.

Respectfully submitted,

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