NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PRICKETT, JR.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, John Prickett, Jr., pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. The Federal Public Defender's Office was appointed to represent Mr. Prickett in the United States District Court for the Western District of Arkansas and the United States Court of Appeals for the Eighth Circuit pursuant to an appointment under the Criminal Justice Act of 1964, as amended.

Dated this 28th day of December, 2016.

Respectfully submitted,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

Anna M. Williams

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Assistant Federal Public Defender
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PRICKETT, JR.,
Petitioner,
v.
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

Respectfully submitted,

BRUCE D. EDDY
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Western District of Arkansas

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QUESTION PRESENTED FOR REVIEW

I. Whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague following the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

LIST OF PARTIES

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

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

After granting John Prickett Jr. and the Government's separate petitions for rehearing, the Eighth Circuit Court of Appeals issued its opinion and judgment on October 5, 2016, affirming the district court's order denying Mr. Prickett's motion to dismiss count two of his indictment. *See United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016), Appendix ("App.") A. The court found that the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) did not invalidate the residual clause of 18 U.S.C. § 924(c)(3)(B) and determined Mr. Prickett's conviction for assault with intent to commit murder to be a crime of violence under § 924(c)(3)(B). A copy of the district court's order is attached at App. B.

JURISDICTION

The judgment of the court of appeals upon granting a rehearing was entered on October 5, 2016. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

U.S. CONST. amend. 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. § 16. Crime of violence defined.

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(b) 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.

18 U.S.C. § 113(a)(1). Assaults within maritime and territorial jurisdiction.

(c) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder or a violation of section 2241 or 2242, but a fine under this title, imprisonment for not more than 20 years, or both. . . .

18 U.S.C. § 924. Penalties.

(c) . . . .

(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. . . .

(e) . . . .

(2) As used in this subsection—

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any at of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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. . . .

STATEMENT OF THE CASE

1. John Prickett, Jr. was named in a two-count indictment and forfeiture allegation in the Western District of Arkansas on November 19, 2014. Mr. Prickett was charged in both counts. Count one alleged that on or about September 8, 2014, Mr. Prickett, in the Buffalo National River Park, assaulted his wife, Tommie Prickett, with the intent to commit murder in violation of 18 U.S.C. § 113(a)(1). Count two alleged that on that same date, during and in relation to a crime of violence, Mr. Prickett knowingly used and discharged a firearm in violation of 18 U.S.C. § 924(c)(1)(A)(iii). On May 12, 2015, Mr. Prickett pled guilty to both counts of the indictment.

2. On October 5, 2015, Mr. Prickett filed a motion to dismiss count two of the indictment. He contended that assault with the intent to commit murder charged in count one—the underlying offense for the 18 U.S.C. § 924(c) charge— categorically fails to qualify as a crime of violence within the meaning of § 924(c)(3)(A), and the residual clause of § 924(c)(3)(B) is unconstitutionally vague pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). Because there was no predicate felony, Mr. Prickett requested to withdraw his guilty plea as to count two only. The district court denied Mr. Prickett's motion in a written order, filed on October 8, 2015, App. B, finding that § 924(c)(3)(B), unlike the residual clause of the Armed Career Criminal Act ("ACCA"), was not unconstitutionally vague and that "it is clear that the offense in this case involved a 'substantial risk that physical force against the

person or property of another may be used in the course of committing the offense.'" *Id.* at 7a (quoting 18 U.S.C. § 924(c)(3)(B)). The district court did not address whether the assault fell under § 924(c)(3)(A)—the force clause. *Id.* at 5a. The district court reasoned that rather than look to past convictions as required under the ACCA, the court could look at the factual basis in the plea agreement in the instant case and that such conduct was sufficient to meet the elements of the offenses charged in both counts of the indictment. *Id.* at 6a. On that same date, the district court sentenced Mr. Prickett to 97 months' imprisonment on count one and 120 months' imprisonment on count two, with terms to run consecutively. Mr. Prickett maintains that absent the application of § 924(c)(3)(B), his total offense level would have been 28, with a criminal history category of I, and therefore his guideline range should have been 78 to 97 months.

3. On appeal, Mr. Prickett challenged his conviction as to count two and maintained that § 924(c)(3)(B) suffers from the same indeterminacy as the ACCA's residual clause, and therefore offends due process. The Eighth Circuit Court of Appeals erroneously affirmed the district court's finding that his conviction for assault with intent to commit murder met the definition of a "crime of violence" under § 924(c)(3)(B).

4. The Eighth Circuit joined the Second and Sixth Circuit Courts of Appeal in determining that several factors distinguished § 924(c)(3)(B) from the ACCA's residual clause. App. A, 2a-3a. First, it found the statutory language was narrower

in that it addressed physical force rather than physical injury. *Id.* at 2a. Second, the ACCA's residual clause is linked to a confusing set of examples that are absent in § 924(c)(3)(B). *Id.* at 3a. Third, it determined that this Court reached the void for vagueness conclusion after struggling for years on interpreting the clause, while no such history exists with respect to § 924(c)(3)(B). *Id.* And finally, this Court limited its holding to a particular set of circumstances. *Id.* Thus, the Eighth Circuit found that the district court correctly concluded that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague. *Id.*

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This case presents the need to address the circuit split regarding whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), also invalidated the residual clause of 18 U.S.C. § 924(c)(3)(B). The Second, Sixth, and Eighth Circuits have ruled that the *Johnson* holding does not invalidate the residual clause of § 924(c). By contrast, the Seventh Circuit determined that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Cardena*, No. 12-3680, 2016 WL 6819696 (7th Cir. Nov. 18, 2016). Further, the Third, Sixth, Seventh, Ninth, and Tenth Circuits have concluded that *Johnson* does render the identically worded text in 18 U.S.C. § 16(b) void for vagueness, while the Fifth Circuit found that § 16(b) is not unconstitutionally vague.

Review of this case would allow this Court to address a circuit split and determine whether the holding in *Johnson* extends to § 924(c). This case exemplifies the irreversible harm that can be inflicted upon an individual when he is convicted under a provision of a statute that offends the Due Process Clause. Mr. Prickett's prison sentence was increased substantially due to the lower court's finding that the residual clause of § 924(c) was not subject to the same unconstitutional vagueness as the residual clause of the Armed Career Criminal Act ("ACCA").

I. Whether the Eighth Circuit erroneously held, in conflict with the Seventh Circuit that *Johnson v. United States*, 135 S. Ct. 2551 (2015) does not render 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague?

This Court should grant review to resolve an important issue of federal law in which there is a conflict among lower courts: whether § 924(c)(3)(B) is also held

unconstitutional by this Court's holding in *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).

Conflicting decisions in the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits reveal the precise bounds of *Johnson* are far from clear. This lack of clarity has led to substantial confusion in lower courts. In addition to the *Prickett* decision by the Eighth Circuit, the subject of this petition, the Second and Sixth Circuits have also misapplied the *Johnson* holding and concluded that § 924(c)(3)(B), which contains substantially similar language to the ACCA's residual clause, survives *Johnson*. *Compare e.g.*, *United States v. Hill*, 832 F.3d 135, 149-50 (2nd Cir. 2016) (holding § 924(c)(3)(B) not unconstitutionally vague) and *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016) (same), *with Cardena*, 2016 WL 6819696 (finding the residual clause in § 924(c) to be unconstitutionally vague) and *In re Pinder*, 824 F.3d 977 (11th Cir. 2016) (allowing petitioner to file a successive 28 U.S.C. § 2255 motion given the similarity between § 924(c) and § 924(e), and where petitioner made a prima facie showing his motion contains a new rule of constitutional law made retroactive to cases on collateral review). The Eighth Circuit's decision in this case is in conflict with the Seventh Circuit, and even in conflict with the holdings in the Third, Sixth, Seventh, Ninth, and Tenth Circuits, which held the identically worded §16(b) to be unconstitutionally vague. *See*

Baptiste v. Attorney Gen., 841 F.3d 601, 608 (3d Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas–Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir.), *cert. granted*, 137 S. Ct. 31, 195 (U.S. Sept. 29, 2016); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016). By contrast, the Fifth Circuit has concluded that § 16(b) is not unconstitutionally vague after *Johnson*. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 678-79 (5th Cir. 2016). This Court should grant review to determine and clarify the extent of *Johnson*'s holding to a "crime of violence" under § 924(c), as this causes a disparity in sentencing as defendants will obtain different results depending upon the circuit in which he or she is convicted. Moreover, conviction under an unconstitutionally vague statute violates the Fifth Amendment right to due process of law. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." This guarantee is violated by taking away an individual's liberty 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*, 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)).

To determine whether an offense qualifies as a "crime of violence" under § 924(c)(3), courts apply the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Piccolo*, 441 F.3d 1084, 1086–87 (9th Cir. 2006) ("In the context of crime of violence determinations under section 924(c), our categorical approach applies regardless of whether we review a current or

prior crime."); *Vivas–Ceja*, 808 F.3d 719 (same); *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (same). This process requires the Court to look to the elements of the offense rather than the particular facts underlying the defendant's case. *Descamps v. United States*, 133 S. Ct. 2276, 2285, *reh'g denied*, 134 S. Ct. 41 (2013).

The categorical approach applied in the § 924(c)(3) context is analogous to the categorical approach applied in the ACCA, which requires a court to "assess[ ] whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Johnson*, 135 S. Ct. at 2557 (quotations omitted). The differences in the language used in the ACCA's residual clause versus § 924(c)(3)'s residual clause are immaterial insofar as the reasoning in *Johnson* is concerned. *Baptiste*, 841 F.3d at 617. *See also Dimaya*, 803 F.3d at 1117 ("Section 16(b) gives judges no more guidance than does the ACCA [residual clause] as to what constitutes a substantial enough risk of force to satisfy the statute."); *Vivas–Ceja*, 808 F.3d at 722 ("Just like the [ACCA] residual clause, § 16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'").

The definition of a crime of violence in § 924(c)(3)(B) is unconstitutionally vague because "[s]ubsection (B) is virtually indistinguishable from the clause in *Johnson* that was found to be unconstitutionally vague." *Cardena*, 2016 WL 6819696 at *24. Whereas § 924(c)(3)(B) defines a "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," the ACCA's residual clause defines a "violent felony" as one that "otherwise includes conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(c)(3)(B). Section 924(c)(3)(B) substitutes the ACCA's residual clause's "serious" with the word "substantial" and "potential risk" with "risk."

This Court in *Johnson* recognized that two aspects of the ACCA's residual clause "conspire[d] to make it unconstitutionally vague"—the ordinary case inquiry and the serious potential risk inquiry. 135 S. Ct. at 2557–58. Indeed, there are many different conceptions of what the ordinary case of a crime entails. *Id.* For example, "does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence?" *Id.* at 2557. Thus, "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what [an] 'ordinary' [case] involves." *Id.* at 2558. Second, the clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* Thus, the combination of "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 . . . produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* ("[T]he 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."). *See also Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.").

"The ordinary case inquiry finds its roots in the Supreme Court's opinion in *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L.Ed.2d 532 (2007), which addressed the operation of the categorical approach in the related ACCA residual clause context." *Baptiste*, 841 F.3d at 608. "[E]very conceivable factual offense covered by a statute" need not "necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James,* 550 U.S. at 1586. Rather, the "proper inquiry" under the categorical approach is "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.*

The ordinary case inquiry is the correct analytical approach in the § 924(c)(3)(B) context, as it is identical to §16(b). 18 U.S.C. § 16(b) defines "crime of violence" as a felony offense "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 § 16(b). In other words, § 16(b) defines "crime of violence" using exactly the same language as § 924(c)(3)'s residual clause. "[I]n *Leocal v. Ashcroft* . . . the Court stated that § 16(b) 'covers offenses that *naturally*

involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.'" *Baptiste,* 841 F.3d at 609 (citing *Leocal v. Ashcroft,* 543 U.S. 1, 10 (2004)) (emphasis added)). "[A]sking whether the *least culpable* conduct sufficient to support a conviction for a crime presents a certain risk is inconsistent with asking whether that crime 'by its nature' or 'naturally' presents that risk." *Id.* at 609-10 (citing *Perez–Munoz v. Keisler*, 507 F.3d 357, 364 (5th Cir. 2007) (noting that every violation of a state criminal statute "need not be violent" for the crime "to be a crime of violence *by its nature*" (emphasis added)); *United States v. Lucio–Lucio*, 347 F.3d 1202, 1204 n.2 (10th Cir. 2003) ("We do not take the phrase 'by its nature' as an invitation to search for exceptional cases.")). Thus, in the context of § 924(c)(3)(B), a court must ask whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a substantial risk of the intentional use of force. *James*, 550 U.S. at 208. "Because [§ 924(c)(3)(B), like § 16(b),] 'offers no reliable way to choose between . . . competing accounts of what' that 'judge-imagined abstraction' of the crime involves, *Johnson*, 135 S. Ct. at 2558, the ordinary case inquiry is as indeterminate in the § 16(b) [and § 924(c)(3)(B)] context as it was in [ACCA's] residual clause context." *Baptiste*, 841 F.3d at 617 (citing *Golicov*, 837 F.3d at 1072–73; *Shuti*, 828 F.3d at 447; *Vivas–Ceja*, 808 F.3d at 722–23; *Dimaya*, 803 F.3d at 1115–16).

As to the risk inquiry, while the ACCA's residual clause asks how much risk it takes for a crime to present a "serious potential risk" of physical injury, § 924(c)(3)(B)

asks how much risk it takes for a crime to present a "substantial risk" of the intentional use of force. Section 924(c)(3)(B) replaces the ACCA's residual clause's "serious" with the word "substantial" and "potential risk" with "risk." However, a "serious risk" is equally as vague as a "substantial risk." *See Baptiste*, 841 F.3d at 617. Although a "potential risk" encompasses more conduct than a simple "risk," "this minor linguistic distinction is insufficient to bring [§924(c)(3)(B)] outside of the reasoning of *Johnson*." *Id.* (citing *James*, 550 U.S. at 207–08) ("[T]he combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk.'")). "The critical feature of the 'serious potential risk' inquiry that rendered it indeterminate in *Johnson* was not that the risk was 'potential,' but that the residual clause required the use of a vague 'serious risk' inquiry." *Id.* Importantly, this Court did not draw any vagueness distinction between the phrases based on the word "potential." *See Johnson*, 135 S. Ct. at 2561.

The Third Circuit in *Baptiste*, the Ninth Circuit in *Dimaya*, and the Seventh Circuit in *Vivas–Ceja* relied on *Johnson* to find that the identically worded residual clause of § 16(b) is unconstitutionally vague.[1] *See Baptiste*, 841 F.3d at 604; *Dimaya*, 803 F.3d at 1120; *Vivas–Ceja*, 808 F.3d at 721–23. The Ninth Circuit in

[1]However, the Sixth Circuit has found that there is a substantial difference between the language of the ACCA's residual clause and the language of § 924(c)(3)(B), inconsistently finding that § 924(c)(3)(B) is constitutional on its face, *Taylor*, 814 F.3d at 375-79, while finding that the identical text found in §16(b) is unconstitutionally vague in *Shuti*, 828 F.3d at 451.

Dimaya explained that the flaws in comparing the enumerated offenses to the ordinary case are not the only objectionable issue with the ACCA's residual clause:

> It is true that, after the Court set forth its holding in *Johnson*, it cited [18 U.S.C. § 924(e)(2)(B)(ii)'s] four enumerated offenses in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term 'serious potential risk.' In doing so, however, it stated that while the listed offenses added to the uncertainty, the fundamental reason for the Court's holding was the residual clause's application of the 'serious potential risk' standard to an idealized ordinary case of the crime. In short, this response clearly reiterated that what distinguishes ACCA's residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the 'ordinary case' analysis. *Johnson* therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses.

803 F.3d at 1117–18 (internal citations and footnotes omitted). Thus, *Dimaya* held that the identically worded residual clause of § 16(b) is unconstitutionally vague because, like the ACCA residual clause, it "requires courts to 1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real-world facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial." 803 F.3d at 1120 (internal quotation marks omitted). The Seventh Circuit in *Vivas–Ceja* reached the same conclusion:

> The government insists that *Johnson* doesn't compel this conclusion because the Court placed special emphasis on the confusion created by the list of enumerated crimes preceding the residual clause, a feature not present in § 16(b). The government overreads this part of the Court's analysis. As we've explained, the heart of the Court's opinion demonstrates why the two aspects of the residual clause's categorical approach—the ordinary-case determination and the risk assessment—'conspire' to make the clause unconstitutionally vague. Only later did

> the Court observe that the residual clause also 'forces courts to interpret serious potential risk in light of the four enumerated crimes,' which are 'far from clear in respect to the degree of risk each poses.' In other words, the enumeration of specific crimes did nothing to clarify the quality or quantity of risk necessary to classify offenses under the statute. The list itself wasn't one of the 'two features' that combined to make the clause unconstitutionally vague.

808 F.3d at 723. Indeed, the Third Circuit adeptly reasoned that:

> the confusing list of examples preceding the [ACCA's] residual clause only added to the residual clause's already-existing vagueness. Indeed, the language in *Johnson* by no means suggests that the list of examples was an integral component of the Court's finding that the residual clause was unconstitutionally vague. . . . Rather, as the Supreme Court made clear, the vagueness was the product of '[t]wo features of the residual clause'—the ordinary case inquiry and the risk inquiry—which . . . are present in the § 16(b) analysis as well. *Johnson*, 135 S. Ct. at 2557.

Baptiste, 841 F.3d at 620.

Simply put, "[t]he fact that the language in the [ACCA residual clause] was made even worse by the additional presence of the four listed crimes does not save the [section 924(c)(3)] residual clause from impermissible vagueness." *United States v. Edmundson*, 153 F. Supp. 3d 857, 862 (D. Md. 2015), *as amended* (Dec. 30, 2015). In fact, the lack of examples in § 924(c)(3)(B), makes the text "more vague than the residual clause." *Dimaya*, 803 F.3d at 1118 n.13. The enumerated examples "provide at least *some* guidance as to the sort of offenses Congress intended for the [residual clause] to cover." *Id.* Such guidance is absent from § 924(c)(3)(B), which contains no example offenses. Thus, "courts are left to undertake the [§ 924(c)(3)(B)] analysis guided by nothing more than other judicial decisions that can lay no better

claim to making sense of the indeterminacy of the analysis in a principled way than we have today." *Baptiste*, 841 F.3d at 620. Because § 924(c)(3)'s residual clause requires the same categorical approach as § 16(b), and consists of the same language, the same analysis applies here.

The district court readily acknowledged that it was not required to employ a categorical approach and it relied heavily upon "the underlying offense conduct in applying § 924(c)(3)(B). App. B, 6a. The district court concluded that this Court in *Johnson* found there was not a "risk that statutes other than the ACCA residual clause would be affected[,]" as it did not "doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.* (citing *Johnson*, 135 S. Ct. at 2561). The Eighth Circuit relied on cases from the Second and Sixth Circuits in deciding that *Johnson*'s holding did not apply to § 924(c)(3)(B). App. A, 2a-3a. However, the Seventh Circuit in *Cardena* correctly concluded 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." 2016 WL 6819696 at *24.

The Eighth Circuit erred in affirming the district court's order denying Mr. Prickett's motion to dismiss count two of the indictment. Mr. Prickett asks 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).

Based on conflicting Eighth Circuit and Seventh Circuit precedent, Mr. Prickett's conviction under § 924(c)(3)(B) is erroneous, and therefore the judgment must be vacated and the matter remanded for resentencing. A grant of Mr. Prickett's petition for writ of certiorari is necessary because only this Court can finally clarify whether § 924(c)(3)(B) is unconstitutionally vague.

CONCLUSION

For all of the foregoing reasons, Petitioner John Prickett, Jr. respectfully requests that this Court grant the petition for writ of certiorari and accept this case for review.

DATED: this 28th day of December, 2016.

Respectfully submitted,

BRUCE D. EDDY
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Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

NO._____

JOHN PRICKETT, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I, Anna M. Williams, do swear or declare that on this date, December 28, 2016, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Ian Heath Gershengorn
Acting Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(and via electronic mail to SupremeCtBriefs@USDOJ.gov)

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 28, 2016.

Anna M. Williams

Anna M. Williams
Court-Appointed Counsel for Petitioner

APPENDIX A

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Baptiste v. Attorney General, 3rd Cir., November 8, 2016

839 F.3d 697
United States Court of Appeals,
Eighth Circuit.

United States of America, Plaintiff–Appellee,
v.
John **Prickett**, Jr., Defendant–Appellant.

No. 15-3486
|
Submitted: September 12, 2016
|
Filed: October 5, 2016

Synopsis

Background: Defendant was charged with assault with intent to commit murder and use of a firearm during a crime of violence. The United States District Court for the Western District of Arkansas, Paul K. Holmes, III, Chief Judge, 2015 WL 5884904, denied defendant's motion to dismiss the indictment and defendant conditionally pled guilty. Defendant appealed. The Court of Appeals for the Eighth Circuit, 830 F.3d 760, affirmed. Defendant moved for rehearing.

[Holding:] The Court of Appeals held that statute providing specified mandatory minimum sentences for persons convicted of using a firearm in furtherance of a crime of violence was not unconstitutionally vague with respect to the definition of "crime of violence."

Affirmed.

West Headnotes (2)

[1] Weapons
Crimes of violence

A court's determination of the nature of a crime, for purpose of determining whether it constitute a "crime of violence" within the meaning of the statute providing specified mandatory minimum sentences for persons convicted of using or carrying a firearm in furtherance of a crime of violence, requires an examination of the elements which compose it; this is the categorical approach. 18 U.S.C.A. § 924(c)(3)(B).

4 Cases that cite this headnote

[2] Constitutional Law
Weapons and explosives
Weapons
Violation of other rights or provisions

Statute providing specified mandatory minimum sentences for persons convicted of using or carrying a firearm in furtherance of a crime of violence was not unconstitutionally vague with respect to the definition of "crime of violence," as it required proof that the risk of physical force was an element of the offense or arose in the course of committing the offense and required that the felony be one which, by its nature, involved the risk of the use of physical force. 18 U.S.C.A. § 924(c)(3)(B).

10 Cases that cite this headnote

***698** Appeal from United States District Court for the Western District of Arkansas—Harrison

Attorneys and Law Firms

Counsel who represented the appellant was Anna Marie Williams, AFPD, of Fayetteville, AR.

Counsel who represented the appellee was David R. Ferguson, AUSA, of Fort Smith, AR.

Before LOKEN, BEAM, and SMITH, Circuit Judges.

Opinion

PER CURIAM.

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John **Prickett**, Jr. shot his wife multiple times while camping in Buffalo River National Park. Fortunately, she survived. He conditionally pleaded guilty to assault with intent to commit murder, a violation of 18 U.S.C. § 113(a)(1) ("Count I"), and use of a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c)(1)(A)(iii) ("Count II"). **Prickett** moved to dismiss Count II of the indictment, but the district court[1] denied his motion. We affirm.

The district court found that **Prickett's** conviction for assault with intent to commit murder met the definition of a "crime of violence" under § 924(c)(3)(B). **Prickett** argues that the Supreme Court's holding in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), extends to invalidate § 924(c)(3)(B) as unconstitutionally vague. If § 924(c)(3)(B) is unconstitutional, **Prickett** seeks dismissal of Count II. We review the constitutionality of § 924(c)(3)(B) de novo. *See United States v. Seay*, 620 F.3d 919, 923 (8th Cir. 2010).

Section 924(c)(1)(A) provides specified mandatory minimum sentences for persons convicted of a "crime of violence" who use or carry a firearm in furtherance of that crime. Section 924(c)(3) defines "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.

[1]"Section 924(c)(3)(B) defines a crime as a crime of violence if '*by its nature* it involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' " *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (quoting 18 U.S.C. § 924(c)(3)(B)). A court's determination of "the nature of a crime requires an examination of the elements which compose it." *Id.* "This is the categorical approach." *Id.*; *see also Omar v. I.N.S.*, 298 F.3d 710, 714 (8th Cir. 2002) (recognizing that a categorical approach applies to § 924(c)(3)(B)).

Prickett does not contest that assault with intent to murder under § 113(a)(1) "by its nature" comes within the reach of § 924(c)(3)(B). *See United States v. Mills*, 835 F.2d 1262, 1264 (8th Cir. 1987) ("Furthermore, the legislative history is clear that the Congress amended section 924(c) with the express purpose of authorizing an additional sentence to that imposed for the ***699** underlying felony, specifically including section 113." (citation omitted)). Instead, **Prickett** argues that § 924(c)(3)(B) is invalid under *Johnson*. "Because § 924(c)(3)(B) is considerably narrower than the statute invalidated by the Court in *Johnson*, and because much of *Johnson*' s analysis does not apply to § 924(c)(3)(B), [**Prickett's**] argument in this regard is without merit." *United States v. Taylor*, 814 F.3d 340, 375–76 (6th Cir. 2016).

In *Johnson*, the Supreme Court held that the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S.Ct. at 2557. The portion of the ACCA that the Court found unconstitutionally vague defined "violent felony" to include an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2555–56 (emphasis omitted) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

[2]"[B]ecause several factors distinguish the ACCA residual clause from § 924(c)(3)(B)," *Taylor*, 814 F.3d at 376, we join the Second and Sixth Circuits in upholding § 924(c)(3)(B) against a vagueness challenge. *See id.* at 375–79; *United States v. Hill*, No. 14–3872–CR, 832 F.3d 135, 144–50, 2016 WL 4120667, at *7–12 (2d Cir. Aug. 3, 2016). "First, the statutory language of § 924(c)(3)(B) is distinctly narrower, especially in that it deals with physical force rather than physical injury." *Taylor*, 814 F.3d at 376. The "[r]isk of physical force against a victim" that § 924(c)(3)(B) requires "is much more definite than [the] risk of physical injury to a victim" that the ACCA residual clause required. *Id.* at 376–77. Section 924(c)(3)(B) also contains the "narrowing aspects" of "requiring that the risk of physical force arise 'in the course of' committing the offense" and "requir [ing] that the felony be one which 'by its nature' involves the risk that the offender will use physical force." *Id.* at 377 (quoting 18 U.S.C. § 924(c)(3)(B)). Unlike "the wide judicial latitude permitted by the ACCA's coverage of crimes that 'involve[ ] conduct' presenting a serious risk of injury," § 924(c)(3)(B) does not permit "a court to consider risk-related conduct beyond that which is an element of the predicate crime since the provision covers offenses that 'by [their] nature' involve a substantial risk that force may be used." *Id.* (alterations in original). Nor does § "924(c)(3)(B)'s requirement that physical force 'be used *in the course* of committing the offense' permit[ ] ... inquiry into conduct following the completion of the offense." *Id.* Instead, "the force must be used and the risk

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must arise in order to effectuate the crime. Thus, unlike the ACCA residual clause, § 924(c)(3)(B) does not allow courts to consider 'physical injury [that] is remote from the criminal act,' a consideration that supported the Court's vagueness analysis in *Johnson*." *Id.* (alteration in original) (quoting *Johnson*, 135 S.Ct. at 2559).

"Second, the ACCA residual clause is linked to a confusing set of examples that plagued the Supreme Court in coming up with a coherent way to apply the clause, whereas there is no such weakness in § 924(c)(3)(B)." *Id.* at 376. The ACCA residual clause contains a "textual link ... by the word 'otherwise' to four enumerated but diverse crimes." *Id.* at 377 (citing *Johnson*, 135 S.Ct. at 2558). The ACCA residual clause's use of the word "otherwise" "force [d] courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives.' " *Id.* (quoting *Johnson*, 135 S.Ct. at 2558). But § 924(c)(3)(B) does not "link[ ] the 'substantial risk' standard, through the word otherwise, 'to a confusing list of examples.' *700 " *Id.* (quoting *Johnson*, 135 S.Ct. at 2561). Therefore, courts need not "analogiz[e] the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives." *Id.*

"Third, the Supreme Court reached its void-for-vagueness conclusion only after struggling mightily for nine years to come up with a coherent interpretation of the clause, whereas no such history has occurred with respect to § 924(c)(3)(B)." *Id.* at 376. Section 924(c)(3)(B) does not have a similar history, as "the Supreme Court has not unsuccessfully attempted on multiple occasions to articulate the standard applicable to the § 924(c)(3)(B) analysis." *Id.* at 378. Nor can we transfer "the confusion about the ACCA in pre-*Johnson* Supreme Court decisions ... to § 924(c)(3)(B), because much of the confusion in the ACCA cases concerned the four enumerated crimes that were linked to the residual clause." *Id.* (citing *Johnson*, 135 S.Ct. at 2558–59).

"Finally, the Supreme Court was clear in limiting its holding to the particular set of circumstances applying to the ACCA residual clause, and only some of those circumstances apply to § 924(c)(3)(B)." *Id.* at 376. The Court dismissed the concern that its holding "would place in doubt 'dozens of federal and state criminal laws[, like § 924(c)(3)(B), that] use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk.' " *Id.* at 378 (alteration in original) (quoting *Johnson*, 135 S.Ct. at 2561). "The Court gave two reasons why that was not the case, and one of them directly distinguishes § 924(c)(3)(B)": it does not "link[ ] a phrase such as 'substantial risk' to a confusing list of examples." *Id.* (quoting *Johnson*, 135 S.Ct. at 2561).

In summary, "*Johnson* did not invalidate the ACCA residual clause because the clause employed an ordinary case analysis[, the categorical approach,] but rather because of a greater sum of several uncertainties." *Id.* The Court invalidated it because it contained a

> double-layered uncertainty ... which required courts employing the categorical approach first to estimate the potential risk of physical injury posed by "a judicially imagined 'ordinary case' of [the] crime" at issue, and then to consider how this risk of injury compared to the risk posed by the four enumerated crimes, which are themselves, the Court noted, "far from clear in respect to the degree of risk each poses." *Id.* at 2557–58 (quoting *Begay v. United States*, 553 U.S. 137, 143, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008)). It was these twin ambiguities—"*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"—that offended the Constitution. *Id.* at 2558 (emphasis added); *see also id.* at 2560 (observing that "[e]ach of the uncertainties in the residual clause may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guesswork' " (quoting *United States v. Evans*, 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948))).

Hill, 832 F.3d at 145–46, 2016 WL 4120667, at *8 (second and third alterations in original) (footnote omitted).

We therefore conclude that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague. As a result, we hold that the district court did not err in denying **Prickett's** motion to dismiss Count II.

All Citations

839 F.3d 697

Footnotes

1 The Honorable Paul K. Holmes, III, Chief Judge, United States District Court for the Western District of Arkansas

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. Case No. 3:14-CR-30018

JOHN PRICKETT, JR. DEFENDANT

OPINION AND ORDER

Before the Court are Defendant John Prickett, Jr.'s motion to dismiss Count 2 of the Indictment (Doc. 34),[1] the Government's response (Doc. 35), and Prickett's reply (Doc. 37). For the following reasons, the Court finds that Prickett's motion should be DENIED.

On November 19, 2014, Prickett was charged in a two-count indictment with one count of assault with intent to commit murder in violation of 18 U.S.C. § 113(a)(1), and one count of discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii).[2] On May 12, 2015, Prickett pleaded guilty to the two-count indictment pursuant to a plea agreement. In the plea agreement and at his change-of-plea hearing, Prickett admitted to getting into an argument with his wife, and eventually picking up a firearm and "shooting his wife multiple times at close range" resulting in his wife sustaining life-threatening injuries. (Doc. 20, ¶ 3(a)).

Prickett contends that Count 2 of the indictment should be dismissed as a matter of law because assault with intent to commit murder under 18 U.S.C. § 113(a)(1), as charged in Count 1, categorically fails to qualify as a crime of violence. "Crime of violence" under 18 U.S.C. § 924(c)(1)(A)(iii) is defined as:

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[1] Although styled only as a motion to dismiss, Prickett also seeks to withdraw his plea of guilty to Count 2 of the indictment should the motion be granted.
[2] The indictment also includes a forfeiture allegation.

> 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)(A)–(B). Prickett argues that Count 2 should be dismissed because he did not commit a crime of violence as a matter of law pursuant to either prong of 18 U.S.C. § 924(c)(3). The Court first notes that it need not address Prickett's arguments regarding § 924(c)(3)(A) because the Court finds that Prickett has committed a crime of violence pursuant to § 924(c)(3)(B), and declines to find that § 924(c)(3)(B) is unconstitutionally vague.

Prickett argues that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague for the same reasons the Supreme Court found 18 U.S.C. § 924(e)(2)(B) unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court analyzed the "residual clause" of the Armed Career Criminal Act ("ACCA"), which provides for increasing a defendant's punishment to not less than fifteen years if that defendant violates 18 U.S.C. § 922(g) and "has three previous convictions . . . for a violent felony or serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The definition of "violent felony" for purposes of the ACCA reads in relevant part:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--
>
> . . .
>
> > (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)(ii).

As explained in *Johnson*, the Court is required to utilize the categorical approach when determining if a past conviction is a predicate offense under the ACCA. Specifically,

> "the relevant part of the [ACCA] refers to a person who . . . has three previous convictions for—not a person who has committed—three previous violent felonies or drug offenses. This emphasis on convictions indicates that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to facts underlying the prior convictions. *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

Johnson, 135 S. Ct. at 2562 (citing *Taylor v. United States*, 495 U.S. 575, 599–602 (1990)) (internal quotations omitted).

None of the concerns that led the *Taylor* Court to utilize, and the *Johnson* Court to maintain, the categorical approach in analyzing the ACCA residual clause are present when analyzing § 924(c)(3)(B). Rather than looking to past convictions, the Court looks to the evidence in this case, i.e., the underlying offense conduct, in applying § 924(c)(3)(B). The conduct in this case—to which Prickett has admitted—is based upon the factual basis in his plea agreement and the Presentence Investigation Report. Those facts are sufficient to meet the elements of the offenses charged in counts 1 and 2 of the indictment. Therefore, the Court need not engage in a categorical analysis to ensure consistent application of § 924(c)(3)(B).

The Court's finding in this respect—that the *Johnson* analysis is inapplicable to this case—is buttressed by the *Johnson* Court's dismissal of the Government's concern that other criminal statutes that use terms such as "substantial risk" could also be placed in "constitutional doubt" if the Court were to find that the ACCA residual clause was unconstitutionally vague, as it ultimately did. *Johnson*, 135 S. Ct. at 2561. Specifically, the *Johnson* Court found that there was "[n]ot at

all" any risk that statutes other than the ACCA residual clause would be affected, because "[a]lmost none [of the statutes the Government cited to in voicing its concern] link[] a phrase such as "substantial risk" to a confusing list of examples. . . . More importantly, almost all of [those other statutes] require gauging the riskiness of conduct in which an individual engages *on a particular occasion*." *Id.* The Court further noted that, "[a]s 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 law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Id.* (internal quotations and citations omitted). That is exactly the nature of § 924(c)(3)(B). With that framework in mind, it is clear that the offense in this case involved 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).

The Court finds that § 924(c)(3)(B) is not unconstitutionally vague and that Prickett's conduct amounts to a crime of violence under § 924(c)(3)(B). Prickett's motion to dismiss (Doc. 34) is therefore DENIED. Accordingly, Prickett will not be permitted to withdraw his plea of guilty to Count 2, as he has not demonstrated any fair and just reason for withdrawal.

IT IS SO ORDERED this 8th day of October, 2015.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE