

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

NO. \_\_\_\_\_

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STACY WINTERS,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

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

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**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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## **PETITION FOR A WRIT OF CERTIORARI**

Stacy Winters 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The opinion of the United States Court of Appeals for the Eighth Circuit is unpublished. It is available at 2017 WL 2644335 and reprinted in Appendix A. The unpublished order of the district court is available at 2016 WL 4703651 and reprinted in Appendix B.

## **JURISDICTION**

The district court entered judgment denying Winters' motion to vacate under 28 U.S.C. § 2255 on 08 September 2016. The court of appeals entered judgment affirming the district court on 20 June 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. Winters pled guilty to voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1153 and use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) on 08 June 2004. He was sentenced to consecutive terms of 120 months on each count on 31 August 2004.
2. Winters' § 924(c) conviction was based on his use of a firearm in connection with voluntary manslaughter. This offense was a "crime of violence" solely as that term is defined by the residual clause of 18 U.S.C. § 924(c)(3)(B).
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 15 June 2016 Winters filed a motion under 28 U.S.C. § 2255 arguing *Johnson* equally invalidated the residual clause of § 924(c). Winters 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 08 September 2016 explaining it was bound by the Eighth Circuit decision *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016). The district court granted a certificate of appealability.

6. On 20 June 2017, the United States Court of Appeals for the Eighth Circuit summarily affirmed, citing *Prickett*. 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.**

Winters' 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 Winters 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). Winters 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*. Winters' 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 Winters' 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 Winters 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

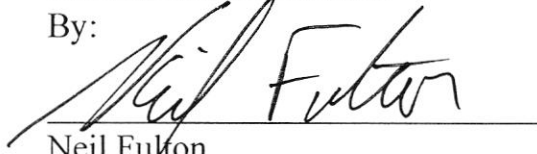
Winters' conviction rests on the § 924(c) residual clause, which is essentially identical to the ACCA residual clause that this Court struck down as void for vagueness. This case raises important issues of constitutional law implicating the fundamental protections of the Due Process Clause. This case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

Alternatively, Winters' 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 2nd day of August, 2017.

Respectfully submitted,

NEIL FULTON  
Federal Public Defender  
By:

A handwritten signature in black ink, appearing to read "Neil Fulton", is written over a horizontal line.

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**United States Court of Appeals**  
**For the Eighth Circuit**

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No. 16-3902

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Stacy Winters

*Petitioner - Appellant*

v.

United States of America

*Respondent - Appellee*

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Appeal from United States District Court  
for the District of South Dakota - Rapid City

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Submitted: June 15, 2017

Filed: June 20, 2017

[Unpublished]

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Before BENTON, BOWMAN, and SHEPHERD, Circuit Judges.

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PER CURIAM.

Having received a certificate of appealability from the district court, federal prisoner Stacy Winters directly appeals the district court's<sup>1</sup> denial of his 28 U.S.C.

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<sup>1</sup>The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota.

**APPENDIX A**

§ 2255 motion to vacate his conviction under 18 U.S.C. § 924(c). His motion was based on Johnson v. United States, 135 S. Ct. 2551 (2015). After carefully reviewing the record, as well as the parties' arguments and suggestions on appeal, we affirm. See United States v. Prickett, 839 F.3d 697 (8th Cir. 2016) (per curiam), petition for cert. filed (U.S. Dec. 28, 2016); see also 8th Cir. R. 47B.

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UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

SEP 08 2016

  
CLERK

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STACY WINTERS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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CIV. 16-5052  
CR 03-50003

MEMORANDUM OPINION AND  
ORDER DENYING MOTION

\*\*\*\*\*

Stacy Winters has filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. (Doc. 1.) The United States responded with a Motion to Dismiss. (Doc. 11.) For the following reasons, the Motion to Vacate will be denied.

**BACKGROUND**

Winters pled guilty to voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1153 (count 1), and use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (count 2). On November 1, 2004, Winters was sentenced to consecutive sentences of 120 months on each count. In his § 2255 motion filed on June 15, 2016, Winters claims that his conviction on count 2 for use of a firearm during a crime of violence is invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

**DISCUSSION**

In *Johnson*, the Supreme Court held that the residual clause of the Armed Career Criminal Act (ACCA) is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson*, 135 S.Ct. at 2557–58. The ACCA, 18 U.S.C. § 924(e), defines the term “violent felony” as any crime

APPENDIX B

punishable by a term of imprisonment exceeding one year 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. 18 U.S.C. § 924(e)(2)(B). The first prong of this definition is sometimes referred to as the “elements clause,” while the second prong contains the “enumerated crimes” and, finally, what is commonly called the “residual clause” (the “ACCA residual clause”). The ACCA residual clause covers “conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court in *Johnson* made clear that its holding that the ACCA residual clause is void did not invalidate the elements clause or the enumerated crimes. 135 S. Ct. at 2563.

Post-*Johnson*, federal prisoners who were sentenced in reliance on the ACCA’s now-void residual clause in 18 U.S.C. § 924(e) are entitled to file a § 2255 motion in district court because *Johnson* announced a new rule of constitutional law made retroactively applicable to ACCA cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1264-65 (2016).

Winters, however, was not sentenced under the ACCA found in 18 U.S.C. § 924(e). Rather, as explained above, Winters was sentenced for the use of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Section 924(c) provides, in relevant part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime ... 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 –

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years....

18 U.S.C. § 924(c)(1)(A). Under § 924(c), “crime of violence” is defined 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.

18 U.S.C. §§ 924(c)(3)(A) and (B). The clause in subsection A is referred to herein as the “elements” clause. The government does not argue that Winters’ conviction for voluntary manslaughter is a crime of violence within the meaning of the elements clause in § 924(c)(3)(A). The latter clause in subsection B, referred to as the “§ 924(c) residual clause,” contains language that is similar, but not identical, to the language of the ACCA residual clause invalidated by the Supreme Court in *Johnson*.

Winters cites a number of district court cases holding the § 924(c) residual clause void for vagueness in light of *Johnson*, and he also cites appellate court opinions authorizing successive § 2255 motions in § 924(c) cases, finding that the movant made a prima facie showing that *Johnson* invalidated the § 924(c) residual clause.<sup>1</sup> (Doc. 13 at 9-10.) *But see United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016) (holding that 18 U.S.C. § 924(c)(3)(B) is not unconstitutionally vague); *In re Fields*, No. 16-50521, 2016 WL 3383460 (5th Cir. June 17, 2016) (refusing to authorize successive § 2255 based on argument that *Johnson* applies to § 924(c)(3)(B) residual clause).

After Winters filed this § 2255 motion, the Eighth Circuit held that *Johnson* does not apply to the residual clause of 18 U.S.C. § 924(c). *See United States v. Prickett*, No. 15-3486, 2016 WL 4010515 (8th Cir. July 27, 2016). In light of *Prickett*, the government moved to dismiss Winters’ § 2255. Although Winters recognizes this authority, he nevertheless maintains his request that this Court strike down the § 924(c) residual clause as unconstitutionally vague under *Johnson* and vacate his § 924(c) conviction.<sup>2</sup>

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<sup>1</sup>The Sixth, Seventh and Ninth Circuits have held that identically worded language in 18 U.S.C. § 16(b) is unconstitutionally vague. *See Shuti v. Lynch*, 2016 WL 3632539 (6th Cir. July 7, 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015). A panel of the Fifth Circuit also held that *Johnson* renders § 16(b) unconstitutionally vague. *See United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016), *reh’g en banc ordered*, 815 F.3d 189 (5th Cir. 2016). On rehearing en banc, the Fifth Circuit reversed, holding that § 16(b) is not unconstitutionally vague. *See United States v. Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127 (5th Cir. Aug. 5, 2016) (en banc).

<sup>2</sup>Without citing any authority, Winters asserts that his predicate offense for voluntary manslaughter in violation of 18 U.S.C. §§ 1112 and 1153 does not meet the requirement for a crime

This Court is bound by Eighth Circuit precedent. See *N.M. ex rel L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 459 (8th Cir. 2008) (holding that Eighth Circuit precedent “is controlling until overruled by our court en banc, by the Supreme Court, or by Congress.”). In *Prickett*, the Eighth Circuit refused to apply *Johnson* to § 924(c).<sup>3</sup> Applying Eighth Circuit law as it stands now, the Court must find that Winters’ challenge to § 924(c)(3)(B) as unconstitutionally vague under *Johnson* fails.

Finally, Winters requests a certificate of appealability in order to seek review of this Order and to specifically call for reversal of *Prickett*. A habeas petitioner may not appeal a final order in a proceeding under 28 U.S.C. § 2255 without first securing a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). A district court cannot grant a certificate of appealability unless the movant “has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2); accord *Williams v. United States*, 452 F.3d 1009, 1014 (8th Cir. 2006). A certificate of appealability will not be granted simply because an appeal is pursued in good faith and raises a non-frivolous issue. See *Kramer v. Kemna*, 21 F.3d 305, 307 (8th Cir. 1994) (“Good faith and lack of frivolousness, without more, do not serve as a sufficient bases for issuance of a certificate under 28 U.S.C. § 2253.”). Rather, the movant must satisfy a higher standard; he must show that the issues to be raised on appeal are “debatable among reasonable jurists,” that different courts “could resolve the issues differently,” or that the issues otherwise “deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); accord *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994).

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of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A). The government does not argue otherwise. If the predicate crime is not a crime of violence under the elements clause, in the absence of the § 924(c) residual clause there would not be an underlying violent crime to sustain the § 924(c) conviction for use of a firearm during and in relation to a crime of violence.

<sup>3</sup>Winters points out that the government has asked for an extension of time to file a petition for rehearing in *Prickett*. In that motion the government still maintains that the § 924(c) residual clause is not unconstitutionally vague under *Johnson*. The motion for rehearing presumably will be based on tension between the *Prickett* panel’s method for determining if a crime is one of violence and the method used by the Eighth Circuit in previous opinions. The tension relates to whether the categorical approach applies when classifying a crime of violence under § 924(c)(3)(B).




The Court concludes that a certificate of appealability is appropriate here even under this high standard because the cases demonstrate that Winters' claim that the rule announced in *Johnson* invalidates § 924(c)(3)(B) is "debatable among reasonable jurists." *Cox*, 133 F.3d at 568. He has cited a number of district court cases applying *Johnson* to § 924(c)(3)(B) and finding it unconstitutionally vague. And though the Sixth Circuit has held that § 924(c)(3)(B) is not unconstitutionally vague, *see Taylor*, 814 F.3d at 379, the Sixth, Seventh and Ninth Circuits have held that the identically worded language in 18 U.S.C. § 16(b) is unconstitutionally vague. *See Shuti*, 2016 WL 3632539, at \*9; *Vivas-Ceja*, 808 F.3d at 723; *Dimaya*, 803 F.3d at 1120. Moreover, a number of appellate courts have granted movants permission to file a successive § 2255 motion based on the argument that *Johnson* applies to § 924(c)(3)(B). In addition, under both § 924(c) and § 924(e) (the ACCA), most circuit courts use the categorical approach to decide whether an offense is a "crime of violence," and that appeared to be the approach in the Eighth Circuit prior to the *Prickett* decision. Because of the tension between Eighth Circuit precedent using the categorical approach to classify a crime of violence and the *Prickett* decision indicating the categorical approach does not apply under § 924(c)(3)(B), the government has asked for an extension of time to file a petition for rehearing in *Prickett*, and the appellant in *Prickett* already has filed a petition for rehearing en banc. Due to the generally unsettled nature of the law on whether the rule announced in *Johnson* invalidates the residual clause of § 924(c), and the possibility that the United States Supreme Court someday might resolve the circuit splits that are developing in this area of the law, Winters is entitled to a certificate of appealability in this case. Accordingly,

IT IS ORDERED:

- (1) That Stacy Winters' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (doc. 1) is denied;
- (2) That a certificate of appealability is granted to Stacy Winters on the issue whether the rule in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies to the residual clause of 18 U.S.C. § 924(c) such that Winters' § 924(c) conviction should be vacated; and
- (3) That the United States of America's Motion to Dismiss, doc. 11, is denied as moot.

Dated this 8<sup>th</sup> day of September, 2016.

BY THE COURT:

  
Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

BY: 

DEPUTY

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

SEP 08 2016

*[Signature]*  
CLERK

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STACY WINTERS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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CIV. 16-5052  
CR 03-50003

JUDGMENT

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In accordance with the Memorandum Opinion and Order filed on this date with the Clerk,

IT IS ORDERED, ADJUDGED and DECREED that the Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 is denied.

Dated this 8<sup>th</sup> day of September, 2016.

BY THE COURT:

*[Signature: Lawrence L. Piersol]*  
Lawrence L. Piersol  
United States District Judge

ATTEST:  
JOSEPH HAAS, CLERK

BY: *[Signature: Joseph Haas]*  
DEPUTY

APPENDIX C