No. _____

IN THE
Supreme Court of the United States

_____

KEISHAN HERBERT ENIX,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence. A first conviction carries a seven-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. This petition presents the following questions:

I. Whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).[1]

II. Whether conspiracy to commit Hobbs Act robbery, which may be committed by a verbal or written agreement to commit Hobbs Act robbery, has as an element "the use . . . of physical force against the person or property of another," under 18 U.S.C. § 924(c)(3)(A).

III. Whether the Eleventh Circuit's rule that reasonable jurists could not debate an issue foreclosed by binding circuit precedent, even where a judge on the panel issuing the binding precedent subsequently states the panel's decision may be erroneous, misapplies the standard articulated by this Court in *Miller-El v. Cockrell*, 537 U.S. 322, 336–38 (2003), and more recently in *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017), for determining whether a movant has made the threshold showing necessary to obtain a certificate of appealability (COA).

[1] The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016).

LIST OF PARTIES

Petitioner, Keishan Herbert Enix, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constituional Provisions

PETITION FOR A WRIT OF CERTIORARI

Keishan Herbert Enix respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA) on the issue of whether his § 924(c) conviction is unconstitutional in light of this Court's decision in *Samuel Johnson*.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Enix's application for a COA in Appeal No. 17-11716 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Enix's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Enix's § 2255 motion on February 21, 2017. Mr. Enix subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on July 12, 2017. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

18 U.S.C. § 924(c) provides in pertinent part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a

firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

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

. . .

(3) For purposes of this subsection the term "crime of violence" means 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. § 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

28 U.S.C. § 2253(c) provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Mr. Enix pled guilty to conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (count one), and brandishing a firearm during a crime of violence, in violation of § 924(c)(1)(A)(ii) (count three). The district court sentenced Mr. Enix to 84 months on each count, to run consecutively. He did not appeal his conviction or sentence.

On August 4, 2014, Mr. Enix filed his first § 2255 motion, arguing that his guilty plea was invalid because it was inconsistent with the charges dismissed by the Court. On August 13, 2014, the district court denied the motion.

On May 31, 2016, Mr. Enix filed an application with the Eleventh Circuit, seeking authorization to file a second or successive § 2255 motion based on *Samuel Johnson*. Specifically, Mr. Enix claimed that: (1) increasing his sentence under the "substantial risk" clause of § 924(c) violated due process; and (2) increasing his sentence under the career offender residual clause violated due process. On June 28, 2016, the Eleventh Circuit granted Mr. Enix authorization to file a second or successive § 2255 motion, finding that he made a *prima facie* showing "that his proposed § 2255 motion contains a new rule of constitutional law that has been made retroactive by the Supreme Court."

On June 24, 2016, Mr. Enix filed his § 2255 motion, raising the same two claims he raised in his application with the Eleventh Circuit. The district court denied the motion on the merits. With respect to his § 924(c) claim, the district court stated:

> Conspiracy to commit Hobbs Act robbery, unlike a Hobbs Act robbery which has been found to qualify as a crime of violence . . . does not qualify as a crime of violence under the use of force clause of §924(c)(3)(A). Conspiracy to commit Hobbs Act robbery does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another as required by § 924(c)(3)(A) (the use of force clause). Therefore, it must be considered under the residual clause of § 924(c)(3)(B) if it is found to be a crime of violence. If the residual clause of § 924(c)(3)(B) is unconstitutionally vague, Petitioner's conviction on count three should be vacated. However, neither the United States Supreme Court nor the Eleventh Circuit has found § 924(c)(3)(B) to be unconstitutionally vague. Other Courts of Appeal that have addressed the unconstitutionality of § 924(c)(3)(B) have come to inconsistent conclusions (Second, Sixth and Eighth Circuits rejecting unconstitutionality and Seventh Circuit holding the residual clause in 924(c)(3)(B) unconstitutionally vague). Petitioner's motion must be denied as to ground one. This Court will not get ahead of the Supreme Court and the Eleventh Circuit by "invalidating duly enacted and longstanding legislation by implication."

This district court also denied Mr. Enix's career-offender claim, as well as a COA.

On April 28, 2017, Mr. Enix filed an application for a COA with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) conviction is unconstitutional in light of *Samuel Johnson*. In his application, Mr. Enix argued that reasonable jurists could debate whether *Samuel Johnson* invalidated § 924(c)'s residual clause and whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause.[2]

After Mr. Enix filed his motion for a COA, the Eleventh Circuit decided *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), holding that the rule announced in *Samuel Johnson* does not apply to § 924(c)'s residual clause. On July 12, 2017, the Eleventh Circuit denied Mr. Enix's

[2] In light of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), holding that *Samuel Johnson* does not apply to the advisory sentencing guidelines, Mr. Enix did not seek a COA on the issue of whether his career offender sentence was unconstitutional.

application for a COA. The Court, citing *Hamilton v. Sec'y Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), stated that a COA may not issue where a claim is foreclosed by binding circuit precedent "because reasonable jurists will follow controlling law." Thus, because *Ovalles* was binding precedent, the Court denied Mr. Enix a COA.

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague.

This Court granted certiorari in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)'s residual clause is unconstitutionally vague in light of *Samuel Johnson*. *Compare Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)'s residual clause is unconstitutional), *and Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), *with United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)'s residual clause is constitutional). Not only are the residual clauses in § 16(b) and § 924(c) are identically worded, but the circuits are also divided on whether § 924(c)'s residual clause in unconstitutionally vague in light of *Samuel Johnson*. *Compare United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)'s residual clause is unconstitutionally vague), *with Ovalles*, 861 F.3d at 1266–67 (holding that § 924(c)'s residual clause is constitutional), *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (same), *and United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same).

Based on this Court's consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)'s residual clause, Mr. Enix respectfully seeks this Court's review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. Enix's position that § 924(c)'s residual clause is

unconstitutionally vague. At a minimum, these splits show that reasonable jurists may debate whether § 924(c)'s residual clause is unconstitutionally vague.

Section 924(c)'s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Samuel Johnson*, this Court determined that "[t]wo features of the [ACCA's] residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime," because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime" rather than "to real-world facts or statutory elements." *Id*. Second, the ACCA's residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," stating "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558.

Like the ACCA's residual clause, § 924(c)(3)(B) requires an analysis of an "ordinary case" and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (applying categorical approach to § 924(c)(3)(B)).[3] Section 924(c)(3)(B) therefore fails, like the ACCA's residual clause, because it requires "courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the "vagueness of the residual clause rests in large part on its operation under the categorical approach." *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

[3] Retired Supreme Court Justice O'Connor authored *McGuire*.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA's enumerated offenses were not necessary to this Court's vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA's residual clause left too much uncertainty about "how much risk it takes for a crime to qualify as a violent felony," but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses."

Id. (emphasis in underline added). The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as "substantial risk." *Id.* at 2561. After noting that "[a]lmost none" of these laws included "a confusing list of examples," the Court stated:

> More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct . . . . The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime.

Id. (emphasis in underline added). *Samuel Johnson* thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a "crime of violence." For example, the Court acknowledged that a commonsense approach had not provided "a consistent conception of the degree of risk posed by each of the four enumerated crimes"; it therefore doubted it would "fare any better with respect to thousands of unenumerated crimes." *Samuel Johnson*, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA's residual clause, is unconstitutionally vague. At a minimum, reasonable jurists may debate the issue.

II. Reasonable jurists could debate whether conspiracy to commit Hobbs Act robbery, which may be committed by a verbal or written agreement to commit Hobbs Act robbery, has as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

Whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013). Pursuant to this categorical approach, if conspiracy to commit Hobbs Act robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s force clause. The term "physical force" under the elements clause "connotes a substantial degree of force." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). It means "violent force . . . force that is capable of causing physical pain or injury to another person." *Id.* Conspiracy to commit Hobbs Act robbery may be committed without the

use of violent "physical force." Therefore, it does not qualify as a "crime of violence" under § 924(c)'s force clause.

"To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal." *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) (quoting *United States v. Pringle*, 350 F.3d 1172, 1176 (11th Cir. 2003)). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959–60 (11th Cir. 1999). Nor is there any requirement that the defendant was "even capable of committing" the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, "[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it." *Id.* (emphasis omitted).

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

Several courts around the country have agreed, including the district court in this case. *See, e.g.*, *United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. 2015) ("The parties have

not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another."); *Duhart v. United States*, No. 08-60309-CR, 2016 WL 4720424, at *6 (S.D. Fla. Sept. 9, 2016) ("[C]onspiracy to commit Hobbs Act robbery . . . cannot be a 'crime of violence' under the elements clause of § 924(c)."); *United States v. Baires-Reyes*, 191 F. Supp. 3d 1046, 1049 (N.D. Cal. 2016) ("[C]onspiracy to commit Hobbs Act robbery is not a crime of violence as defined by the force clause."); *United States v. Ledbetter*, No. 2:14-CR-127, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) ("[T]his Court agrees" that conspiracy to commit Hobbs Act robbery "qualifie[d] *only* under the 'residual clause' from § 924(c)(3)(B)"); *United States v. Luong*, No. CR 2:99-00433 WBS, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) ("The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause.").

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

III. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck*, 137 S. Ct. 759, 773 (2017) (citing *Miller-*

El, 537 U.S. 322, 336 (2003)). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit's rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton*, 793 F.3d 1261 ("[R]easonable jurists will follow controlling law."); *see also Tompkins v. Sec'y, Dep't of Corr.,* 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Enix's case using the proper terms—that reasonable jurists would not debate whether Mr. Enix is entitled to relief—but reached its conclusion by essentially deciding the case on the merits, that he would be unsuccessful on appeal because *Ovalles* is binding circuit precedent. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit's rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

> [W]hen a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts

> the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, in *Miller-El*, this Court stated that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." 537 U.S. at 338. A COA should be denied only where the district court's conclusion is "beyond all debate." *Welch*, 136 S. Ct. at 1264. Here, we know that is not the case, particularly because these issues are currently being debated by circuit and district judges across the nation, many coming to differing conclusions. Because the Eleventh Circuit's rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Enix respectfully requests that this Court grant this petition to review the Eleventh Circuit's erroneous application of the COA standard.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX