No. _____

IN THE
Supreme Court of the United States

_____

LEON ESCOURSE WESTBROOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
Aimee Ferrer
ASSISTANT FEDERAL PUBLIC DEFENDER
FLA BAR NO. 17827
Attorneys for Appellant
150 West Flagler Street, Suite 1700
Miami, FL 33130
305-530-7000
Email: Aimee_Ferrer@fd.org

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. This petition presents the following questions:

Whether the Eleventh Circuit's denial of a certificate of appealability is in conflict with this Court's precedent when reasonable jurists are currently debating 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]?

[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).

INTERESTED PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

No:

LEON ESCOURSE WESTBROOK,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Leon Escourse Westbrook respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12040 in that court on July 18, 2017.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Escourse's application for a COA in Appeal No. 17-12040 is provided in Appendix A-1. The district court's order declining to adopt the recommendations of the magistrate judge and denying a certificate of appealability is reproduced in Appendix A-2. The report and recommendation of the magistrate judge recommending granting of the § 2255 petition is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2255. The decision of the court of appeals was entered on July 18, 2017. This petition is timely filed under Supreme Court Rule 13.1.

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. Escourse 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. Escourse to a term of imprisonment of 114 months: 30 months on the count of conspiracy to commit Hobbs act robbery and a consecutive term of 84 months on Count 3, the § 924(c) Count. He did not appeal his conviction or sentence. On June 24, 2016, Mr. Escourse filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to 18 U.S.C. § 2255. The motion was referred to a magistrate judge for a report and recommendation.

On November 14, 2016, United States Magistrate Judge McAliley issued her Report and Recommendation that the district court *grant* Mr. Escourse's petition, finding that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) and that the residual clause in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague after *Johnson*.

The district court did not adopt the Report and Recommendation, but rather denied Mr. Escourse's petition after finding that *Johnson* does not render Section 924(c)'s residual unconstitutionally vague, which was in direct opposition to the findings in the Report and Recommendation. Moreover, even after acknowledging that "[t]he Court of Appeals for the Eleventh Circuit has yet to decide the precise question presently before the Court, that is, whether the residual clause of 924(c) is unconstitutionally vague," the district court denied Mr. Escourse a certificate of appealability. This district court's denial of the COA was without explanation and after declining to adopt the recommendations of the magistrate judge that the petition should be granted.

On May 12, 2017, Mr. Escourse 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. Escourse noted that reasonable jurists were actually debating (i) whether *Samuel Johnson* invalidated § 924(c)'s residual clause, as evidenced by the conflicting decisions of the magistrate judge and district court judge in his case; as well as conflicting decisions among district court judges in the Southern District of Florida and a split among the Circuits and (ii) whether conspiracy to commit Hobbs Act robbery qualifies as a "crime of violence" under § 924(c)'s use-of-force or elements clause. Mr. Escourse's motion argued that pursuant to *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000), a certificate of appealabilty should issue when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

Specifically, Mr. Escourse pointed to existing split among the Circuits on the precise issue of whether *Samuel Johnson* invalidates § 924(c)'s residual clause.[2] Mr. Escourse also cited a number of decisions from other district courts within the Southern District of Florida and in other districts that have held *Samuel Johnson* invalidated § 924(c)'s residual clause and that conspiracy to commit Hobbs Act robbery does not qualify as a "crime of violence" under § 924(c)'s force clause. Thus, he argued, reasonable jurists were presently debating the precise issues for which he sought the COA and therefore a COA should issue.

[2] After Mr. Escourse 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. As discussed below, there remains a Circuit split on this issue.

On July 18, 2017, a single Eleventh Circuit judge denied a COA in an order that stated in summary fashion that Mr. Escourse had failed to make a substantial showing of denial of a constitutional right.

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists are currently debating whether § 924(c)'s residual clause is unconstitutionally vague.

The circuits are 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). Moreover, 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). The residual clauses in § 16(b) and § 924(c) are identically worded.

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. Escourse respectfully moves for a certificate of appealabilty. The single judge order denying the Motion for COA conflicts with this Court's precedent and Mr. Escourse merely asks for the ability to appeal an issue that is currently being debated by reasonable jurists across the country.

The standard for granting a Motion for COA is simply that the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve

encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000) (internal quotation marks omitted).

As this Court has previously emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1039 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court has explained, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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." *Id.*, 537 U.S. at 338, 123 S. Ct at 1040. Because Mr. Escourse's petition revolves entirely around two issues that reasonable jurists are currently debating, he should be permitted to proceed in his appeal on the merits.

The Eleventh Circuit's single judge order failed to follow the actual mandate of this Court's precedent regarding when a COA should issue. In that order, there is no reasoning or other explanation for why the motion for COA was denied when at all levels of decision making there are conflicting decisions on this issue. In this very case, the magistrate judge recommended granting the petition because *Samuel Johnson* renders the residual clause of §924(c) void for vagueness, the district court declined to adopt that decision, demonstrating that reasonable jurists were disagreeing. App. A-2 and A-3. Next, within the same district, there are conflicting decisions on that issue, with at least two other judges in the Southern District of Florida fining that *Samuel Johnson* does invalidate the residual clause of §924(c), and the district court judge in this case deciding the opposite. *See, Duhart v. United States*, Case No. 16-61499-cv-Marra, 2016 W L 4720424 (S.D. Fla. Sept. 9, 2016) and *Hernandez v. United States*, Case No. 16-cv-22657-Huck,

2016 WL 321545 (S.D. Fla. Sept. 26, 2016). Further, there is currently a Circuit split between the appellate courts on precisely the same issue. *Compare Cardena*, 842 F.3d at 996 with *Ovalles*, 861 F.3d 1259. Moreover, should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision may support Mr. Escourse's position that § 924(c)'s residual clause is unconstitutionally vague. At a minimum, these splits show that reasonable jurists are debating whether § 924(c)'s residual clause is unconstitutionally vague.

Given the differing opinions and decisions at every level of jurisprudence on this issue, it is clear that "reasonable jurists would find debatable" the merits of the petitioner's underlying claim such that a certificate of appealability is warranted. *Slack v. McDaniel*, 529 U.S. at 478. Here, the Court of Appeals single judge order failed to follow the requirements of *Slack v. McDaniel* in assessing whether the issue that Mr. Escourse seeks to appeal is debatable. The Court should therefore grant the petition to issue a COA to ensure that Mr. Escourse is not serving a sentence that includes a consecutive five years term of imprisonment that is unwarranted.

II. Section 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Samuel Johnson*.

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.

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

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

> "*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.

III. 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. Escourse'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 magistrate judge 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.

CONCLUSION

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

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By:_____

Aimee A. Ferrer
Assistant Federal Public Defender
Counsel for Petitioner
150 West Flagler Street, Suite 1700
Miami, Florida 33130
Telephone: (305) 530-7000

Miami, Florida
October 13, 2017

APPENDIX