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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
LONG HOAH THANH,  
Defendant.

Case No. 98-CR-20060-LHK-6  
Case No. 16-CV-03542-LHK

**ORDER GRANTING MOTION TO  
VACATE, SET ASIDE, OR CORRECT  
SENTENCE PURSUANT TO 28 U.S.C. §  
2255**

Re: Dkt. No. 1162 (98-CR-20060-LHK-6)<sup>1</sup>  
Re: Dkt. No. 1 (16-CV-03542-LHK)

Before the Court is a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 filed by Defendant Long Hoah Thanh (“Defendant”). Having considered the parties’ briefing, the record in this case, and the relevant law, the Court GRANTS Defendant’s § 2255 motion.

**I. BACKGROUND**

The instant criminal case was initially assigned to U.S. District Judge James Ware. On May 1, 2001, after a six-week jury trial, Defendant was convicted of (1) conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371 by conspiring to transport stolen

<sup>1</sup> All docket entries in this Order are to Case No. 98-CR-20060 unless otherwise noted.

1 goods in violation of 18 U.S.C. § 2314 (Count One of the Superseding Indictment); (2) conspiracy  
2 to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count Two of the Superseding  
3 Indictment); and (3) using a firearm in relation to a crime of violence in violation of 18 U.S.C. §  
4 924(c) (Count Three of the Superseding Indictment). ECF No. 621; *see* ECF No. 537  
5 (Superseding Indictment). Defendant’s § 924(c) conviction under Count Three was premised on  
6 the theory that (1) Defendant’s conspiracy to commit Hobbs Act robbery offense (under Count  
7 Two) constitutes a “crime of violence” within the meaning of § 924(c); and therefore (2)  
8 Defendant’s use of a firearm in relation to that crime of violence violated § 924(c). *See* ECF No.  
9 537 at 7. On June 24, 2002, Judge Ware sentenced Defendant to 60 months of imprisonment on  
10 Count One and 188 months of imprisonment on Count Two, to run concurrently, and 60 months of  
11 imprisonment on Count Three to run “consecutively to the total term imposed on [C]ounts 1 and  
12 2,” for a total prison sentence of 248 months. ECF No. 763. Judge Ware also sentenced  
13 Defendant to three years of supervised release following his term of imprisonment. *Id.*

14 Defendant appealed his conviction and sentence on a number of grounds. ECF No. 770;  
15 *see United States v. Thanh*, 100 F. App’x 697 (9th Cir. 2005). On July 15, 2005, the Ninth Circuit  
16 issued an unpublished memorandum disposition affirming Defendant’s conviction but remanding  
17 his sentence in accordance with *United States v. Ameline*, 409 F.ed 1073 (9th Cir. 2005) (en banc).  
18 *See Thanh*, 100 F. App’x at 702.

19 Judge Ware resentenced Defendant on November 14, 2005. *See* ECF No. 1047. At  
20 resentencing, Defendant was sentenced to 60 months of imprisonment on Count One and 151  
21 months of imprisonment on Count Two, to run concurrently, and 60 months of imprisonment on  
22 Count Three to run consecutive to the total term imposed on Counts One and Two, for a total  
23 prison sentence of 211 months. *See id.*; ECF Nos. 1052–53. Judge Ware once again sentenced  
24 Defendant to three years of supervised release following his term of imprisonment. *Id.*

25 On June 24, 2016, Defendant filed the instant motion to vacate pursuant to § 2255. ECF  
26 No. 1162 (“Mot.”). In his motion, Defendant argues that in light of the U.S. Supreme Court’s

1 decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Defendant’s conviction under Count  
 2 Three for violation of 18 U.S.C. § 924(c) was invalid, and thus Defendant’s sentence must be  
 3 vacated and Defendant must be resentenced. *See id.* at 1. Because Judge Ware had retired in  
 4 2012, the instant case was reassigned to the undersigned judge. ECF No. 1160. The government  
 5 opposed Defendant’s § 2255 motion on September 12, 2016, ECF No. 1178 (“Opp.”), and  
 6 Defendant filed a reply on October 25, 2016. ECF No. 1189 (“Reply”).

7 On April 17, 2018, the Court ordered the parties to file supplemental briefing regarding the  
 8 impact, if any, of the U.S. Supreme Court’s April 17, 2018 decision in *Sessions v. Dimaya*, 584  
 9 U.S. 1204 (2018), on the validity of Defendant’s conviction under Count Three for violation of 18  
 10 U.S.C. § 924(c). ECF No. 1205. On May 8, 2018, Defendant filed a supplemental brief. ECF  
 11 No. 1207 (“Suppl.”). The government filed a supplemental opposition brief on May 29, 2018,  
 12 ECF No. 1211 (“Suppl. Opp.”), and Defendant filed a supplemental reply brief on June 12, 2018.  
 13 ECF No. 1216 (“Suppl. Reply”).

14 **II. DISCUSSION**

15 Defendant moves to vacate his sentence on the ground that, based on the U.S. Supreme  
 16 Court’s decision in *Johnson*, Defendant’s conviction under Count Three for violation of 18 U.S.C.  
 17 § 924(c) was invalid. Mot. at 1. Section 924(c) operates to increase the sentence for a defendant  
 18 who uses, carries, or possesses a firearm in the commission of certain underlying crimes—  
 19 specifically, “crimes of violence” or drug trafficking crimes. 18 U.S.C. § 924(c)(1)(A). As  
 20 discussed above, Defendant’s § 924(c) conviction under Count Three was premised on the theory  
 21 that Defendant’s conspiracy to commit Hobbs Act robbery conviction (under Count Two)  
 22 qualifies as a “crime of violence” within the meaning of § 924(c), and thus Defendant’s use of a  
 23 firearm in relation to that crime of violence violated § 924(c). *See* ECF No. 537 at 7. As a result,  
 24 the key question here is whether Defendant’s conviction under Count Two for conspiracy to  
 25 commit Hobbs Act robbery qualifies as a “crime of violence.” Section 924(c)(3) provides the  
 26 definition:

1 [T]he term “crime of violence” means an offense that is a felony and—

2 (A) has as an element the use, attempted use, or threatened use of physical force  
3 against the person or property of another, or

4 (B) that by its nature, involves a substantial risk that physical force against the  
5 person or property of another may be used in the course of committing the  
6 offense.

7 18 U.S.C. § 924(c)(3). Subsection (A) is commonly referred to as the “elements clause,” and  
8 subsection (B) is known as the “residual clause.” The Court employs that terminology here.

9 Defendant argues that his conspiracy to commit Hobbs Act robbery conviction under  
10 Count Two is not a “crime of violence,” for the following two reasons. First, Defendant contends  
11 that his conspiracy to commit Hobbs Act robbery conviction does not satisfy the elements clause.  
12 Mot. at 8–9; Suppl. at 4–5. Next, Defendant contends that even if his conspiracy to commit Hobbs  
13 Act robbery conviction satisfies the residual clause, *Johnson* (and now *Dimaya*) make clear that  
14 the residual clause is unconstitutionally vague. Mot. at 4–8; Suppl. at 3–4. The government  
15 disagrees with both of Defendant’s arguments, and also asserts that Defendant “is procedurally  
16 barred” from raising a *Johnson*-based void-for-vagueness challenge to § 924(c)’s residual clause  
17 in his § 2255 motion “because he failed to raise it on direct appeal.” Opp. at 3–6.

18 Because certain aspects of the government’s procedural bar argument turn on or are  
19 informed by the merits issues raised in Defendant’s § 2255 motion, the Court will address the  
20 merits first. *See Bolar v. United States*, 2017 WL 1543166, at \*1 (W.D. Wash. Apr. 28, 2017)  
21 (addressing the merits of a *Johnson*-based § 2255 motion before addressing the government’s  
22 procedural default argument “[b]ecause certain procedural aspects of [the § 2255] motion turn on  
23 resolution of the motion’s merits”). Specifically, the Court will first address whether Defendant’s  
24 conspiracy to commit Hobbs Act robbery conviction under Count Two satisfies § 924(c)’s  
25 elements clause. Then, the Court discusses whether, in light of *Johnson* and *Dimaya*, § 924(c)’s  
26 residual clause is unconstitutionally vague. Finally, the Court addresses the government’s  
27 procedural bar argument.

**A. Elements Clause**

Defendant argues that his conviction under Count Two for conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) does not satisfy the elements clause of § 924(c). In deciding whether this offense is a “crime of violence” under the elements clause, the Court employs an analytical method called the categorical approach. *See United States v. Piccolo*, 441 F.3d 1084, 1086–87 (9th Cir. 2006) (“[I]n the context of crime-of-violence determinations under § 924(c), our categorical approach applies regardless of whether we review a current or prior crime.”); *see also Taylor v. United States*, 495 U.S. 575, 600–02 (1990). Under the categorical approach, the particular facts of the defendant’s case do not matter; instead, the Court examines the elements of the offense. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014). Specifically, the Court compares the elements of the offense with the generic federal definition—here, the definition of “crime of violence” set forth in the elements clause. *See United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015). The offense is a categorical match if its elements are “the same as, or narrower than, those of” the elements clause. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). In contrast, if the offense covers a “broader swath of conduct than” the elements clause, there is no categorical match. *See id.*<sup>2</sup>

As noted above, the elements clause covers any felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.” Neither party disputes that the Court should employ the definition of “physical force” that the U.S. Supreme Court assigned to the same phrase in the Armed Career Criminal Act. Thus, for present purposes, “physical force” means “violent force—i.e., force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 134 (2010) (“*Curtis Johnson*”). Additionally, the use of force must be intentional, rather than reckless or negligent. *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015).

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<sup>2</sup> For statutes with multiple alternative elements, the U.S. Supreme Court has approved the use of what has been termed the modified categorical approach. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). This Court need not resort to that approach here, as the parties do not dispute that 18 U.S.C. § 1951 is divisible into constituent elements.

1 As a result, conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a)  
2 qualifies as a “crime of violence” under § 924(c)’s elements clause only if it “has as an element  
3 the use, attempted use, or threatened use” of “violent force—i.e., force capable of causing physical  
4 pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 134. This Court has previously  
5 concluded that conspiracy to commit Hobbs Act robbery does *not* qualify as a crime of violence  
6 under the elements clause. Specifically, in *United States v. Chavez*, 2018 WL 339140 (N.D. Cal.  
7 Jan. 9, 2018) (“*Chavez I*”), this Court first noted that “[t]o establish a conspiracy to commit Hobbs  
8 Act robbery, ‘the government must show that (1) two or more people agreed to commit a robbery  
9 or extortion of the type discussed in the Hobbs Act; (2) the defendant had knowledge of the  
10 conspiratorial goal; and (3) the defendant voluntarily participated in trying to accomplish the  
11 conspiratorial goal.’” *Id.* at \*8 (quoting *United States v. Si*, 343 F.3d 1116, 1123–24 (9th Cir.  
12 2003)). This Court then stated that conspiracy to commit Hobbs Act robbery “encompass[es]  
13 situations where a defendant agrees to commit a robbery in the future,” and that “[a] defendant can  
14 enter such an agreement without using, attempting to use, or threatening to use physical force.”  
15 *Id.* at \*9. This Court gave the following example:

16 [A] defendant could be convicted [of conspiracy to commit Hobbs Act robbery]  
17 based on an agreement to commit an armed bank robbery and the subsequent  
18 obtaining of a blueprint of the bank for the commission of the robbery. By entering  
19 that agreement and securing the blueprint, the defendant would be guilty of  
20 conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act  
robbery. However, the defendant did not use, attempt to use, or threaten to use  
force against any person or property.

21 *Id.* Based on this analysis, this Court found that “conspiracy to commit Hobbs Act robbery  
22 cover[s] more conduct than the elements clause,” and therefore does not “qualif[y] as a ‘crime of  
23 violence’ under the elements clause.” *Id.*

24 This Court further noted textual clues supporting this result. In particular, the elements  
25 clause embraces an offense that “has as an element the use, *attempted* use, or *threatened* use of  
26 physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A) (emphases

1 added). Noticeably absent from the list is an entry for “conspiracy to use” physical force. *Chavez*  
 2 *I*, 2018 WL 339140 at \*9. This Court also explained that the government could not shoehorn  
 3 conspiracy to use physical force into “attempted use . . . of physical force because” conspiracy and  
 4 attempt are “distinct crimes” whose scopes are not wholly overlapping. *Id.* While both require an  
 5 overt act, the overt act to establish conspiracy need not be as substantial as the overt act to  
 6 establish attempt. *See id.* at \*9 n.4, \*12–13. This is significant because, as explained in the  
 7 example presented above, the overt act requirement for establishing conspiracy to commit Hobbs  
 8 Act robbery can be met by merely obtaining a blueprint of the location to be robbed, and such an  
 9 overt act need not involve the use of any force. *See id.* at \*9 n.4.

10 Moreover, this Court noted that although “[t]he Ninth Circuit has not addressed whether . . .  
 11 . conspiracy to commit Hobbs Act robbery falls under the elements clause . . . the ‘overwhelming  
 12 weight’ of recent district court authority holds that conspiracy to commit Hobbs Act robbery is not  
 13 a ‘crime of violence’” under the elements clause. *Id.* at \*9 (quoting *United States v. Pullia*, 2017  
 14 WL 5171218, at \*4 (N.D. Ill. Nov. 8, 2017), and citing *United States v. Luong*, 2016 WL  
 15 1588495, at \*3 (E.D. Cal. Apr. 20, 2016), *Hargrove v. United States*, 2017 WL 4150718, at \*3  
 16 (N.D. Ill. Sept. 19, 2017), *United States v. Bonaparte*, 2017 WL 3159984, at \*5 (D. Nev. July 25,  
 17 2017), *United States v. Hernandez*, 228 F. Supp. 3d 128, 138 (D. Me. 2017), and *United States v.*  
 18 *Baires-Reyes*, 191 F. Supp. 3d 1046, 1050–51 (N.D. Cal. 2016)).

19 For the reasons summarized above, the Court agrees with Defendant that Defendant’s  
 20 conviction under Count Two for conspiracy to commit Hobbs Act robbery does not qualify as a  
 21 crime of violence under § 924(c)’s elements clause. The government appears to argue that  
 22 because attempted Hobbs Act robbery is a crime of violence under the elements clause, it  
 23 necessarily follows that conspiracy to commit Hobbs Act robbery is also a crime of violence under  
 24 the elements clause. *See Opp.* at 19–22. The government’s argument is not well-taken. As the  
 25 Court explained above and in *Chavez I*, while both conspiracy and attempt require an overt act,  
 26 conspiracy and attempt are “distinct crimes” in part because the overt act necessary to establish a

1 conspiracy need not be as substantial as the overt act necessary to establish attempt. 2018 WL  
2 339140 at \*9 n.4, 12–13. Consequently, as demonstrated by the blueprint example above, the  
3 overt act necessary to support a conviction for conspiracy to commit Hobbs Act robbery need not  
4 involve “the use, attempted use, or threatened use” of any force, let alone the “violent force”  
5 required by § 924(c)’s elements clause. *Curtis Johnson*, 559 U.S. at 134. As a result, the Court  
6 concludes that Defendant’s conviction under Count Two for conspiracy to commit Hobbs Act  
7 robbery does not qualify as a crime of violence under the elements clause of § 924(c).

8 **B. Residual Clause**

9 As discussed above, the residual clause of § 924(c) covers any felony offense that “by its  
10 nature, involves a substantial risk that physical force against the person or property of another may  
11 be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3)(B). Defendant does not  
12 contest that conspiracy to commit Hobbs Act robbery is an offense “that by its nature, involves a  
13 substantial risk that physical force against the person or property of another may be used in the  
14 course of committing the offense.” *Id.* Instead, Defendant asserts in the instant § 2255 motion  
15 that § 924(c)’s residual clause is unconstitutionally vague for the same reasons that the U.S.  
16 Supreme Court in *Johnson* declared unconstitutional the similarly worded residual clause in the  
17 Armed Career Criminal Act (“ACCA”). Mot. at 4–8.

18 Further, after Defendant filed the instant § 2255 motion, the U.S. Supreme Court held in  
19 *Dimaya* that the residual clause of 18 U.S.C. § 16(b)—which has identical language to § 924(c)’s  
20 residual clause—is also unconstitutionally vague. 138 S. Ct. at 1210. The Court therefore ordered  
21 supplemental briefing regarding the impact of *Dimaya* on the question of whether § 924(c)’s  
22 residual clause is unconstitutionally vague. *See* ECF No. 1204. In his supplemental briefing,  
23 Defendant argues that *Dimaya* further confirms that the residual clause of § 924(c) is  
24 unconstitutionally vague. Suppl. at 3–4. On the other hand, the government asserts that (1) the  
25 Court should stay consideration of the instant § 2255 motion until the Ninth Circuit rules on this  
26



1 particular issue in *United States v. Dominguez*, No. 14-10268,<sup>3</sup> Suppl. Opp. at 1–2; and (2) in any  
2 event, § 924(c)’s residual clause is not unconstitutionally vague. *Id.* at 3–9.

3 The Court finds it appropriate to proceed to address Defendant’s constitutional challenge at  
4 this juncture. Indeed, this Court has already ruled in another case that, in light of *Johnson* and  
5 *Dimaya*, § 924(c)’s residual clause is unconstitutionally vague. Specifically, in *United States v.*  
6 *Chavez*, 2018 WL 3609083 (N.D. Cal. July 27, 2018) (“*Chavez II*”), this Court concluded that “the  
7 current state of Ninth Circuit and U.S. Supreme Court law dictates” that the residual clause is void  
8 for vagueness. *Id.* at \*5. Further, the government acknowledges that its argument depends on its  
9 disagreement with binding Ninth Circuit authority that has not been overruled by the Ninth Circuit  
10 en banc or by the U.S. Supreme Court. *See* Suppl. Opp. at 4 (stating that the government  
11 “believes that the Ninth Circuit’s current precedent was wrongly decided”). Beyond that, as this  
12 Court stated in *Chavez II*, “the time until the Ninth Circuit issues a ruling could be lengthy  
13 (especially if en banc proceedings are initiated).” 2018 WL 3609083 at \*6. For these reasons, the  
14 Court will not stay resolution of Defendant’s § 2255 motion pending any Ninth Circuit decisions.

15 Again, the operative question is whether § 924’s residual clause—which is contained in §  
16 924(c)(3)(B)—is unconstitutionally vague. The government offers substantially the same  
17 arguments in favor of the constitutional validity of § 924(c)(3)(B) as the government offered in  
18 *Chavez II*. As a result, and for the sake of thoroughness, the Court largely reproduces its analysis  
19 of this particular issue from *Chavez II*. The Court first discusses *Johnson* and *Dimaya*, wherein  
20 the U.S. Supreme Court held that provisions similar to § 924(c)’s residual clause were void for  
21 vagueness. Specifically, in *Johnson*, the U.S. Supreme Court held that another provision of §  
22 924—the residual clause of the ACCA, § 924(e)(2)(B)(ii)—is unconstitutionally vague. Further,  
23 in *Dimaya*, the U.S. Supreme Court held that 18 U.S.C. § 16(b)—which has identical language to  
24 § 924(c)’s residual clause—is unconstitutionally vague. After providing an overview of *Johnson*

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26 <sup>3</sup> The Court notes that it appears that another Ninth Circuit case presenting the same issue—*United*  
27 *States v. Begay*, No. 14-10080—is earlier in the queue.

1 and *Dimaya*, this Court turns to an application of the principles in those cases to the provision at  
2 issue in the instant case, § 924(c)(3)(B).

3 **1. *Johnson*—§ 924(e)(2)(B)(ii)**

4 In *Johnson*, the U.S. Supreme Court addressed the issue of whether a portion of the  
5 ACCA—namely, the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii)—is unconstitutionally vague.  
6 135 S. Ct. at 2555. The U.S. Supreme Court began by summarizing the principles underpinning  
7 the Constitution’s prohibition of vague criminal laws. Under the Fifth Amendment, “[n]o person  
8 shall ... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend.  
9 V. Precedent of the U.S. Supreme Court has held that “a criminal law so vague that it fails to give  
10 ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary  
11 enforcement” violates the Fifth Amendment’s guarantee of due process. *Johnson*, 135 S. Ct. at  
12 2556. This principle is applicable to “statutes defining elements of crimes” as well as “statutes  
13 fixing sentences.” *Id.* at 2557. The relevant question in *Johnson* was whether the residual clause  
14 of § 924(e)(2)(B)(ii), which increases the sentences of felons in possession of firearms, is  
15 unconstitutionally vague. 135 S. Ct. at 2557.

16 The relevant portion of § 924(e)(2)(B)(ii) provides a definition of the term “violent  
17 felony.” The text reads: “[T]he term ‘violent felony’ means any crime punishable by  
18 imprisonment for a term exceeding one year . . . that is burglary, arson, or extortion, involves use  
19 of explosives, or *otherwise involves conduct that presents a serious potential risk of physical*  
20 *injury to another.*” 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized phrase is the  
21 residual clause that was challenged in *Johnson* as unconstitutionally vague.

22 The U.S. Supreme Court held that “[t]wo features of the residual clause conspire to make it  
23 unconstitutionally vague.” *Johnson*, 135 S. Ct. at 2557. First, the U.S. Supreme Court explained  
24 that binding Supreme Court authority “requires courts to use . . . the categorical approach when  
25 deciding whether an offense” falls within the residual clause. *Id.*<sup>4</sup> That approach poses issues, the

26 \_\_\_\_\_  
27 <sup>4</sup> The form of the categorical approach used for the residual clause differs slightly from the form

1 U.S. Supreme Court said, because “the judicial assessment of risk” is tied to “a judicially  
2 imagined ‘ordinary case’ of a crime, not to real-world facts or statutory elements.” *Id.* Moreover,  
3 there is no settled way to “go about deciding what kind of conduct the ‘ordinary case’ of a crime  
4 involves.” *Id.* The U.S. Supreme Court took attempted burglary as an example and pointed out  
5 that judges could disagree about whether the “ordinary case” involves a violent confrontation or  
6 no confrontation at all. *Id.* at 2558. Ultimately, “[t]he residual clause offers no reliable way to  
7 choose between these competing accounts of what ‘ordinary’ attempted burglary involves.” *Id.*

8         Second, the U.S. Supreme Court stated that “the residual clause leaves uncertainty about  
9 how much risk it takes for a crime to qualify as a violent felony.” *Id.* Specifically, the U.S.  
10 Supreme Court focused on the residual clause’s “imprecise ‘serious potential risk’ standard.” *Id.*  
11 Even if that standard could be reliably applied to “real-world facts,” the task becomes significantly  
12 more indeterminate when applied to “a judge-imagined abstraction.” *Id.* Adding to the confusion,  
13 the residual clause lists four crimes (burglary, arson, extortion, and crimes involving the use of  
14 explosives) with no clear connection “in respect to the degree of risk each poses.” *Id.* (quoting  
15 *Begay v. United States*, 553 U.S. 137, 143 (2008)). The U.S. Supreme Court did not cast doubt on  
16 statutes that use expansive standards like “serious potential risk.” *Id.* at 2561. Instead, the U.S.  
17 Supreme Court focused on the unique difficulties attendant to applying “the ‘serious potential risk’  
18 standard to an idealized ordinary case of the crime.” *Id.* Such an “abstract inquiry offers  
19 significantly less predictability” than one that applies a standard to actual, rather than imagined,  
20 facts. *Id.*

21         In sum, “[b]y combining indeterminacy about how to measure the risk posed by a crime  
22 with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the  
23 residual clause produces more unpredictability and arbitrariness than the Due Process Clause  
24 tolerates.” *Id.* at 2558. The U.S. Supreme Court added that this conclusion was reinforced by

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26 used for the elements clause because in the context of the residual clause, courts examine the  
27 ordinary case, rather than the elements of a given crime. *See Dimaya*, 138 S. Ct. at 1211.

1 courts’ persistent failure to establish a workable, predictable standard. *Id.* at 2558–60; *see also id.*  
 2 at 2560 (“Nine years’ experience trying to derive meaning from the residual clause convinces us  
 3 that we have embarked upon a failed enterprise.”). In conclusion, the U.S. Supreme Court  
 4 explained that “[e]ach of the uncertainties in the residual clause may be tolerable in isolation, but  
 5 ‘their sum makes a task for us which at best could be only guesswork.’” *Id.* (quoting *United*  
 6 *States v. Evans*, 333 U.S. 483, 495 (1948)). Thus, the U.S. Supreme Court held that the residual  
 7 clause in § 924(e)(2)(B)(ii) “does not comport with the Constitution’s guarantee of due process.”  
 8 *Johnson*, 135 S. Ct. at 2560.

9 In a final section of the opinion, the U.S. Supreme Court declined the dissent’s invitation  
 10 to rescue the residual clause from vagueness by “jettison[ing] . . . the categorical approach.” *Id.* at  
 11 2562. The U.S. Supreme Court first noted that the government had not requested “abandon[ing]  
 12 the categorical approach in residual-clause cases.” *Id.* Regardless, the U.S. Supreme Court  
 13 articulated that it had previously adopted the categorical approach for “good reasons.” *Id.* In  
 14 particular, the text of § 924(e)(2)(B)(ii) provided an indication that “Congress intended the  
 15 sentencing court to look only to the fact that the defendant had been convicted of crimes falling  
 16 within certain categories, and not to the facts underlying the prior convictions.” *Id.* (quoting  
 17 *Taylor*, 495 U.S. at 600). Additionally, there was “the utter impracticability of requiring a  
 18 sentencing court to reconstruct, long after the original conviction, the conduct underlying that  
 19 conviction.” *Id.* Therefore, “[t]he only plausible interpretation’ of the law . . . requires use of the  
 20 categorical approach.” *Id.* (quoting *Taylor*, 495 U.S. at 602). Accordingly, the U.S. Supreme  
 21 Court held that “imposing an increased sentence under the residual clause of the Armed Career  
 22 Criminal Act violates the Constitution’s guarantee of due process.” *Id.* at 2563.

23 **2. *Dimaya*—§ 16(b)**

24 In *Dimaya*, the U.S. Supreme Court confronted a similar vagueness issue in the context of  
 25 immigration. 138 S. Ct. at 1210. Specifically, the U.S. Supreme Court was asked to determine  
 26 whether 18 U.S.C. § 16(b), which is included on a list of aggravated felonies that can result in an

1 alien’s removal, is unconstitutional under the reasoning of *Johnson*. *Dimaya*, 138 S. Ct. at 1210–  
 2 12. Like § 924(e)(2)(B)(ii), § 16(b) is a definitional provision. Section 16(b) defines “crime of  
 3 violence” in terms close to those in the Armed Career Criminal Act’s residual clause: “The term  
 4 ‘crime of violence’ means any other offense that is a felony and that, by its nature, involves a  
 5 substantial risk that physical force against the person or property of another may be used in the  
 6 course of committing the offense.” 18 U.S.C. § 16(b). The government argued that § 16(b) is  
 7 “materially clearer” than the residual clause counterpart in § 924(e)(2)(B)(ii) that was invalidated  
 8 by the U.S. Supreme Court in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The U.S. Supreme Court  
 9 disagreed. *Id.*

10 The U.S. Supreme Court described *Johnson* as “a straightforward decision, with equally  
 11 straightforward application” to § 16(b). *Dimaya*, 138 S. Ct. at 1213. In particular, the U.S.  
 12 Supreme Court reasoned that § 16(b) contains the same two features that, in combination, rendered  
 13 § 924(e)(2)(B)(ii)’s residual clause unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1216. First,  
 14 like the residual clause in § 924(e)(2)(B)(ii), § 16(b) has been construed to require application of  
 15 the categorical approach. *Dimaya*, 138 S. Ct. at 1215. The U.S. Supreme Court explained that  
 16 because “§ 16(b) also calls for a court to identify a crime’s ‘ordinary case’ in order to measure the  
 17 crime’s risk” and “[n]othing in § 16(b) helps courts to perform that task, just as nothing in [§  
 18 924(e)(2)(B)(ii) ] did,” the analysis from *Johnson* applies with full force. *Id.* “Once again, the  
 19 questions [raised in *Johnson*] have no good answers; the ‘ordinary case’ remains, as *Johnson*  
 20 described it, an excessively ‘speculative,’ essentially inscrutable thing.” *Id.* (quoting *Johnson*, 135  
 21 S. Ct. at 2558).

22 Additionally, “§ 16(b) also possesses the second fatal feature of [§ 924(e)(2)(B)(ii)]’s  
 23 residual clause: uncertainty about the level of risk that makes a crime ‘violent.’” *Id.* The U.S.  
 24 Supreme Court saw no difference between the threshold in § 924(e)(2)(B)(ii) (“serious potential  
 25 risk”) and the threshold in § 16(b) (“substantial risk”). *Dimaya*, 138 S. Ct. at 1215. In fact,  
 26 “*Johnson* as much as equated the two phrases.” *Id.* The U.S. Supreme Court made clear that

1 “such a non-numeric standard is [not] alone problematic” because courts frequently apply hazy  
 2 standards to real-world conduct. *Id.* Rather, “[t]he difficulty comes, in § 16’s residual clause just  
 3 as in [§ 924(e)(2)(B)(ii)]’s, from applying such a standard to ‘a judge-imagined abstraction’—i.e.,  
 4 ‘an idealized ordinary case of the crime.’” *Id.* at 1215–16. In combination with the categorical  
 5 approach, “the [‘substantial risk’] standard ceases to work in a way consistent with due process.”  
 6 *Id.* at 1216.

7 The U.S. Supreme Court was not persuaded by any of the government’s identified “textual  
 8 discrepancies” between § 16(b) and § 924(e)(2)(B)(ii). *Dimaya*, 138 S. Ct. at 1218. For example,  
 9 unlike § 924(e)(2)(B)(ii), § 16(b) includes a requirement that the risk arise from acts taken “in the  
 10 course of committing the offense.” However, the U.S. Supreme Court explained that the temporal  
 11 limitation “does little to narrow or focus the statutory inquiry” because “[i]n the ordinary case, the  
 12 riskiness of a crime arises from events occurring during its commission, not events occurring  
 13 later.” *Dimaya*, 138 S. Ct. at 1219. Likewise, while § 924(e)(2)(B)(ii) recites a risk of “physical  
 14 injury” and § 16(b) recites a risk of “physical force,” “evaluating the risk of ‘physical force’ itself  
 15 entails considering the risk of ‘physical injury.’” *Dimaya*, 138 S. Ct. at 1220–21. Finally, the  
 16 absence of enumerated crimes in § 16(b) did not matter because *Johnson*’s analysis “demonstrates  
 17 that the list of crimes was not the culprit.” *Dimaya*, 138 S. Ct. at 1221. In the end, none of the  
 18 textual differences related “to the pair of features—the ordinary-case inquiry and a hazy risk  
 19 threshold—that *Johnson* found to produce impermissible vagueness” or otherwise affected “the  
 20 determinacy of the statutory inquiry.” *Id.* at 1218.

21 In a portion of the opinion joined by only four Justices, the plurality addressed the issue of  
 22 retaining the categorical approach for § 16(b). *See Dimaya*, 138 S. Ct. at 1216–18 (plurality  
 23 opinion). The plurality detailed a number of reasons why that approach was appropriate. First, as  
 24 in *Johnson*, the government conceded that the appropriate construction of the statute required  
 25 applying the categorical approach. *Id.* at 1217. Second, the plurality concluded that abandoning  
 26 the categorical approach would raise Sixth Amendment concerns about judges making findings of

1 fact that properly belong to juries. Third, the plurality reasoned that § 16(b)’s text “demands a  
2 categorical approach.” *Id.* In particular, the plurality noted that the inquiry under § 16(b) calls on  
3 a court to examine an “offense” that “by its nature” involves a requisite risk of force. *Id.* As the  
4 plurality explained, “[t]he upshot of all th[e] textual evidence is that § 16’s residual clause—like  
5 [§ 924(e)(2)(B)(ii)]’s, except still more plainly—has no ‘plausible’ fact-based reading.” *Id.* at  
6 1218. Finally, “the ‘utter impracticability’—and associated inequities—of such [a non-  
7 categorical] interpretation is as great” as in *Johnson*. *Id.* Therefore, the plurality concluded, there  
8 is “no ground for discovering a novel interpretation of § 16(b) that would remove us from the  
9 dictates of *Johnson*.” *Id.*

10 Justice Gorsuch concurred in part and concurred in the judgment. *Id.* at 1234 (Gorsuch, J.,  
11 concurring in part and concurring in the judgment). As to the question about the categorical  
12 approach, he leaned more heavily on the government’s concession that the statute compels a  
13 categorical approach. *See id.* at 1232 (noting that “no party before us has argued for a different  
14 way to read these statutes in combination,” “our precedent seemingly requires this approach,” and  
15 “the government itself has conceded (repeatedly) that the law compels it”). Nevertheless, he did  
16 note some force in the textual arguments supporting an approach that asks whether the crime of  
17 conviction ordinarily or always carries a risk of physical force. *Id.* at 1233. He emphasized the  
18 phrase “by its nature” and stated that “[p]lausibly, anyway, the word ‘nature’ might refer to an  
19 inevitable characteristic of the offense; one that would present itself automatically, whenever the  
20 statute is violated.” *Id.* (citing 10 Oxford English Dictionary 247 (2d ed. 1989)). Ultimately,  
21 though, Justice Gorsuch would await another case to address these interpretative issues. *Id.* Still,  
22 he joined the majority in concluding that § 16(b) is “so vague that reasonable people cannot  
23 understand its terms and judges do not know where to begin in applying it.” *Dimaya*, 138 S. Ct. at  
24 1233 (Gorsuch, J., concurring in part and concurring in the judgment).

25 **3. Application of *Johnson* and *Dimaya* to the Instant Case—§ 924(c)(3)(B)**

26 With the principles of *Johnson* and *Dimaya* in mind, this Court now turns to Defendant’s

1 contention that § 924(c)(3)(B) is unconstitutionally vague. Defendant argues that *Johnson* and  
2 *Dimaya* are dispositive as to the question whether § 924(c)(3)(B) is void for vagueness. *See*  
3 *Suppl.* at 2–4. The government disagrees and asserts that the provision at issue here is  
4 distinguishable from the provisions at issue in *Johnson* and *Dimaya*. *Suppl. Opp.* at 3–9. The  
5 bulk of the government’s argument is foreclosed by Ninth Circuit precedent.

6 This Court begins with a few observations about the scope of the constitutional challenge  
7 in the instant case. Crucially, the language of § 16(b) at issue in *Dimaya* is virtually identical to  
8 the language of § 924(c)(3)(B) at issue here. Specifically, § 16(b) provides:

9 The term “crime of violence” means any other offense that is a felony and that, by  
10 its nature, involves a substantial risk that physical force against the person or  
11 property of another may be used in the course of committing the offense.

12 Section 924(c)(3)(B) provides in relevant part:

13 [T]he term “crime of violence” means an offense that is a felony and that by its  
14 nature, involves a substantial risk that physical force against the person or property  
15 of another may be used in the course of committing the offense.

16 The sole distinguishing features between these two provisions are: (1) that § 16(b) refers to “any  
17 other offense” while § 924(c)(3)(B) refers to “an offense,” and (2) that § 16(b) includes an extra  
18 comma before the phrase “by its nature.” The government does not argue that those minor  
19 differences have any bearing on the vagueness analysis. Indeed, the Ninth Circuit has recognized  
20 that “because the wording of [§ 16 and § 924(c)(3)] is virtually identical, [courts] interpret their  
21 plain language in the same manner.” *United States v. Benally*, 843 F.3d 350, 354 (9th Cir. 2016)  
22 (footnote omitted); *see also Park v. I.N.S.*, 252 F.3d 1018, 1022 (9th Cir. 2001) (importing a  
23 holding regarding § 924(c)(3)(B) into the context of § 16(b) based on “the identical definitions in  
24 the two statutory schemes”), *overruled on other grounds by Fernandez-Ruiz v. Gonzales*, 466 F.3d  
25 1121 (9th Cir. 2006). Other circuits have similarly treated case law regarding either § 16(b) or §  
26 924(c)(3)(B) as guiding analysis of the other. *United States v. Salas*, 889 F.3d 681, 685 (10th Cir.  
27 2018); *In re Hubbard*, 825 F.3d 225, 231 (4th Cir. 2016).



1           Unable to rely on any variance in wording, the government instead focuses on one of the  
2 two premises underlying the *Johnson* and *Dimaya* decisions. As the U.S. Supreme Court in  
3 *Dimaya* recognized, the provisions at issue in that case and in *Johnson* had two features that, in  
4 combination, render the provisions unconstitutionally vague: (1) both mandate a categorical  
5 approach under which courts must disregard real-world conduct in favor of attempting to identify  
6 the “ordinary case,” and (2) both do not sufficiently define the requisite threshold level of risk. *Id.*  
7 at 1216. The U.S. Supreme Court emphasized that the level-of-risk issue would not be “alone  
8 problematic,” but instead that the constitutional problem resulted from “layering such a[n]  
9 [imprecise] standard on top of the requisite ‘ordinary case’ inquiry.” *Id.* at 1214–15. Drawing on  
10 this distinction, the government argues that § 924(c)(3)(B) is not constitutionally infirm because  
11 that statutory subsection does not require application of the categorical approach. Suppl. Opp. at  
12 3–9. The government is incorrect.

13           As a preliminary matter, it is important to recognize that the government seeks to treat as  
14 different two statutory provisions—§ 16(b) and § 924(c)(3)(B)—that are materially  
15 indistinguishable in text. Courts typically reject such efforts because “the same words or phrases  
16 are presumed to have the same meaning when used in different parts of a statute.” *Prieto-Romero*  
17 *v. Clark*, 534 F.3d 1053, 1061 (9th Cir. 2008) (quoting *United States v. Various Slot Machines on*  
18 *Guam*, 658 F.2d 697, 704 n.11 (9th Cir. 1981)). To be sure, both the plurality and the concurrence  
19 in *Dimaya* relied on the government’s concession that the categorical approach applies to § 16(b).  
20 *See Dimaya*, 138 S. Ct. at 1217 (plurality opinion); *id.* at 1232–33 (Gorsuch, J., concurring in part  
21 and concurring in the judgment). However, the government made the same concession earlier in  
22 this case. Specifically, in its opposition to Defendant’s § 2255 motion, the government admitted  
23 that § 924(c)(3)(B)’s language “triggers application of the categorical approach, which looks at  
24 offense elements.” Opp. at 16. As a general matter, the law disfavors parties taking contrary  
25 positions at different points in the litigation. *See* 18B Charles Alan Wright et al., *Federal Practice*  
26 *and Procedure* § 4477 (“Absent any good explanation, a party should not be allowed to gain an

1 advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an  
2 incompatible theory.”).

3 In any event, the government’s argument is foreclosed by Ninth Circuit precedent. Since  
4 at least 1995, the Ninth Circuit repeatedly has made clear that the categorical approach applies to §  
5 924(c)(3), including the residual clause in § 924(c)(3)(B). *See Benally*, 843 F.3d at 352–53  
6 (applying the categorical approach for a conviction under § 924(c)); *Piccolo*, 441 F.3d at 1086–87  
7 (“[I]n the context of crime-of-violence determinations under § 924(c), our categorical approach  
8 applies regardless of whether we review a current or prior crime.”); *United States v. Amparo*, 68  
9 F.3d 1222, 1224 (9th Cir. 1995) (explaining that “this circuit has adopted a categorical approach to  
10 determining which offenses are included under section 924(c) as ‘crimes of violence’”). The  
11 government does not identify any subsequent developments in U.S. Supreme Court or Ninth  
12 Circuit law that call these precedents into doubt. Instead, the government simply notes its  
13 “belie[f] that the Ninth Circuit’s current precedent was wrongly decided.” *Suppl. Opp.* at 4.  
14 However, a Ninth Circuit decision remains binding authority unless its “reasoning or theory . . . is  
15 clearly irreconcilable with the reasoning or theory of intervening higher authority.” *United States*  
16 *v. Slade*, 873 F.3d 712, 715 (9th Cir. 2017) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th  
17 Cir. 2003) (en banc)).

18 Moreover, the Ninth Circuit’s holding that the categorical approach applies to the residual  
19 clause in § 924(c)(3)(B) is firmly rooted in the statutory text and case law. Section 924(c)(3)(B)  
20 defines “crime of violence” as “an offense that is a felony and that by its nature, involves a  
21 substantial risk that physical force against the person or property of another may be used in the  
22 course of committing the offense.” That definition begins by referring to an “offense that is a  
23 felony.” As the U.S. Supreme Court has stated, statutory references to a “felony” or “offense” are  
24 “read naturally” to “refer to a generic crime as *generally* committed.” *Nijhawan v. Holder*, 557  
25 U.S. 29, 33–34 (2009); *see also Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (noting that § 16 “directs  
26 our focus to the ‘offense’ of conviction . . . rather than to the particular facts”). In other words,

1 such statutory references often call for an application of the categorical approach. *See Nijhawan*,  
 2 557 U.S. at 34. Although the same words may “sometimes refer to the specific acts in which an  
 3 offender engaged on a specific occasion,” *id.* at 33–34, the statute usually contains some  
 4 affirmative indication that Congress intended courts to examine the defendant’s actual conduct.  
 5 *See Descamps*, 570 U.S. at 267–68 (“If Congress had wanted to increase a sentence based on the  
 6 facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak  
 7 in just that way.”). For example, in *United States v. Hayes*, the U.S. Supreme Court concluded  
 8 that a categorical approach was inappropriate for a statute referring to prior offenses “committed  
 9 by” specified persons. 555 U.S. 415, 421 (2009). Likewise, in *Nijhawan*, the U.S. Supreme Court  
 10 adopted a non-categorical approach for a statute describing an offense “in which the loss to the  
 11 victim or victims exceeds \$10,000.” 557 U.S. at 34, 36. In contrast, § 924(c)(3)(B) contains no  
 12 similar allusions to individualized facts about the circumstances or commission of a crime.

13 The government’s argument immediately skips from § 924(c)(3)(B)’s opening language  
 14 (“offense that is a felony”) to the closing language and reads the last three words (“committing the  
 15 offense”) out of context to argue for a contrary result. *Suppl. Opp.* at 4–5. The problem for the  
 16 government is that the relevant phrase—“committing the offense”—does not instruct courts to  
 17 apply a fact-based approach but is instead linked to a court’s evaluation of substantial risk. In the  
 18 statute’s words, the court’s task is to determine whether the offense poses “a substantial risk that  
 19 physical force . . . may be used in the course of *committing the offense*.” 18 U.S.C. § 924(c)(3)(B)  
 20 (emphasis added). In this way, the phrase “committing the offense,” which appears as part of the  
 21 larger phrase “in the course of committing the offense,” operates as a temporal limit on a court’s  
 22 assessment of risk. *See Dimaya*, 138 S. Ct. at 1219 (“All that the phrase excludes is a court’s  
 23 ability to consider the risk that force will be used after the crime has entirely concluded . . .”).  
 24 This Court fails to see how that phrase, which serves only to restrict the temporal scope of a  
 25 court’s consideration of the requisite level of risk, informs the question whether the statute is  
 26 subject to the categorical approach.

1 More fundamentally, § 924(c)(3)(B)'s use of "by its nature" creates a clear directive that  
2 the categorical approach is proper. Turning back to the statutory language, § 924(c)(3)(B) tells  
3 courts to consider whether "an offense . . . *by its nature*, involves" the requisite risk of force. The  
4 phrase "by its nature" modifies the word "offense." In *Dimaya*, a plurality of the U.S. Supreme  
5 Court explained that the phrase "by its nature" in § 16(b) makes clear that the statute "tells courts  
6 to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur  
7 on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion); *see also United States v.*  
8 *David H.*, 29 F.3d 489, 494 (9th Cir. 1994) ("[T]he 'by its nature' language . . . 'implies that the  
9 generic, rather than the particular, nature of the predicate offense is determinative in defining a  
10 crime of violence.'" (citation omitted)). In his concurrence in *Dimaya*, Justice Gorsuch envisions  
11 an interpretative option that goes even farther than the "ordinary case" approach and asks  
12 "whether the defendant's crime of conviction *always* [involves a risk of physical force]." 138 S.  
13 Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment). Although the  
14 definition of "by its nature" could support Justice Gorsuch's interpretation, this Court need not  
15 reach this question because neither party makes this argument.

16 The U.S. Supreme Court's analysis is supported by common usage and legal parlance,  
17 which define an offense's "nature" by its "normal and characteristic quality." Webster's Third  
18 New International Dictionary 1507 (2002); *see also* Black's Law Dictionary 1127 (9th ed. 2009)  
19 (defining "nature" as "[a] fundamental quality that distinguishes one thing from another; the  
20 essence of something"). This focus on ordinary or usual qualities demands the categorical  
21 approach. That command becomes even stronger in light of the fact that the statute does not  
22 merely reference the offense's "nature," but instead focuses on whether the offense "by its nature"  
23 has a particular quality. The phrase "by its nature" is regularly understood to mean that "things of  
24 that type always have that characteristic." *By its nature*, Collins English Dictionary,  
25 <https://www.collinsdictionary.com/us/dictionary/english/by-its-nature> (last visited August 20,  
26 2018). Again, this attention on definitional characterizations calls for application of the categorical

1 approach.

2 The government attempts to show that the word “nature” is sometimes used to denote a  
3 fact-based inquiry. For example, the government points to 18 U.S.C. § 3553(a)(1), in which (the  
4 government says) “Congress has . . . instructed sentencing courts to consider ‘the nature and  
5 circumstances of the offense’—naturally understood as the defendant’s own conduct—in  
6 determining the appropriate sentence in a federal criminal case.” Suppl. Opp. at 5. This Court  
7 questions whether the word “nature” in § 3553(a)(1) actually does the work that the government  
8 suggests; one plausible interpretation is that “nature . . . of the offense” refers to inherent  
9 characteristics while “circumstances of the offense” refers to the defendant’s particular situation.  
10 In any event, even if the government is correct that “nature” can sometimes bear a circumstance-  
11 specific meaning, it cannot do so in the context of § 924(c)(3)(B) for multiple reasons. First,  
12 under the government’s interpretation of “nature,” the phrase “by its nature” appears to play no  
13 role in the statute. That is, Congress could have achieved the same result by writing a statute  
14 covering any “offense . . . that involves a substantial risk.” As the Ninth Circuit has observed,  
15 “had Congress intended a case-by-case inquiry into whether the felony as committed constituted a  
16 crime of violence, there would have been no need for the phrase ‘by its nature.’” *David H.*, 29  
17 F.3d at 494 (alteration and citation omitted). Courts generally avoid interpretations that render  
18 statutory language meaningless. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185  
19 (2011).

20 Second, and relatedly, the government’s interpretation of “nature” fails to take into account  
21 the entirety of the phrase “by its nature.” As noted above, that phrase implicates inherent qualities  
22 or characteristics. The government nowhere offers a competing interpretation or otherwise  
23 explains why that accepted meaning does not apply in this context. Tellingly, neither 18 U.S.C. §  
24 3553(a)(1) nor any of the other examples cited in the government’s opposition use the phrase “by  
25 its nature.” *See* Suppl. Opp. at 5. Even more telling, in the instant case, the government itself  
26 recognized the intuitive force behind the notion that the phrase “by its nature” triggers the

1 categorical approach. Pre-*Dimaya*, the government wrote that “[t]he phrase ‘by its nature’ in  
2 Section 924(c)(3)(B) simply triggers application of the categorical approach, which looks at  
3 offense elements.” Opp. at 16. Post-*Dimaya*, the government has changed its position. However,  
4 this Court agrees with the government’s earlier logic—namely, that § 924(c)(3)(B)’s use of “by its  
5 nature” plainly invokes the categorical approach.

6 The government’s argument regarding § 924(c)(3)(B)’s use of the word “involves” is  
7 equally unavailing. The government cites to provisions reciting the term “involving” that were  
8 adopted as part of the Comprehensive Crime Control Act of 1984, a bill in which § 924(c) was  
9 amended. See, e.g., Pub. L. No. 98-473, § 4243(d), 98 Stat. 1837, 2059 (1984) (“an offense  
10 involving bodily injury to, or serious damage to the property of, another person, or involving a  
11 substantial risk of such injury or damage”); *id.* § 502, 98 Stat. 2068 (drug offenses “involving”  
12 specific quantities and types of drugs); *id.* § 1952B, 98 Stat. 2137 (“crime involving maiming,  
13 assault with a dangerous weapon, or assault resulting in serious bodily injury”). The government  
14 argues that because all of these provisions require courts to consider a defendant’s underlying  
15 conduct, § 924(c)(3)(B) should be construed in the same manner. Suppl. Opp. at 5. The  
16 government’s argument on this score merely compounds the above-identified errors. In particular,  
17 none of the provisions that the government mentions use the phrase “by its nature.” That absence  
18 underscores why it is proper to treat § 924(c)(3)(B) differently than the government’s identified  
19 provisions. Importantly, the government does not contend that § 924(c)(3)(B)’s use of the word  
20 “involves” precludes applying the categorical approach. Nor could the government make that  
21 argument, given that the now-void residual clause contained in § 924(e)(2)(B)(ii) identically uses  
22 the word “involves” and also has been held to require the categorical approach. See *Johnson*, 135  
23 S. Ct. at 2562 (noting that the categorical approach was “adopted in [the U.S. Supreme Court’s  
24 decision in] *Taylor*” and “reaffirmed in each of [the U.S. Supreme Court’s] four residual-clause  
25 cases”).<sup>5</sup>

26 \_\_\_\_\_  
27 <sup>5</sup> The government incorrectly suggests that the U.S. Supreme Court’s decision in *Taylor* “relied on  
28 22

1 Faced with the multiple clear commands in § 924(c)(3)(B)’s text for the categorical  
2 approach, the government turns to contextual considerations. The government first looks to §  
3 924(c)(3)(B)’s neighboring provision, § 924(c)(3)(A). As discussed above, § 924(c)(3)(A) defines  
4 “crime of violence” as “an offense that . . . has as an element the use, attempted use, or threatened  
5 use of physical force against the person or property of another.” The government suggests that a  
6 comparison of § 924(c)(3)(A) and § 924(c)(3)(B) raises two issues, but neither is persuasive.

7 First, the government contrasts § 924(c)(3)(A)’s explicit reference to “elements” with §  
8 924(c)(3)(B)’s omission of a comparable word. Suppl. Opp. at 6. The government suggests that  
9 this distinction makes § 924(c)(3)(A) a better candidate for the categorical approach. Suppl. Opp.  
10 at 9. However, the government fails to acknowledge that the form of the categorical approach  
11 under § 924(c)(3)(A) is different than the form under § 924(c)(3)(B), as the former focuses on  
12 elements while the latter focuses on the ordinary case. *Dimaya*, 138 S. Ct. at 1211 n.1. Moreover,  
13 this Court has already laid out the various reasons requiring adoption of the categorical approach  
14 for the residual clause in § 924(c)(3)(B). That § 924(c)(3)(A) and § 924(c)(3)(B) employ differing  
15 language to mandate similar categorical approaches is not problematic. *See Kirtsaeng v. John*  
16 *Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013) (“We are not aware, however, of any canon of  
17 interpretation that forbids interpreting different words used in different parts of the same statute to  
18 mean roughly the same thing.”).

19 Second, the government implies that if § 924(c)(3)(A) and § 924(c)(3)(B) both require a  
20 categorical approach, then § 924(c)(3)(B) would be wholly redundant of § 924(c)(3)(A). Suppl.  
21 Opp. at 6. This Court disagrees. It is true that, where possible, courts should not read statutes “so  
22 as to render superfluous other provisions in the same enactment.” *Freytag v. C.I.R.*, 501 U.S. 868,  
23

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24 the absence of the word ‘involves’ as indicating that a categorical approach is required.” Suppl.  
25 Opp. at 5. That is not what the U.S. Supreme Court did in *Taylor*. Instead, the U.S. Supreme  
26 Court contrasted statutory language that asks whether a crime has as an element the use of force  
with hypothetical language that asks whether a crime, “*in a particular case*, involves” the use of  
force. *Taylor*, 495 U.S. at 600 (emphasis added). The U.S. Supreme Court nowhere suggested  
that the word “involves” necessarily specifies that a categorical approach is appropriate.

1 877 (1991) (quoting *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).  
 2 However, the U.S. Supreme Court has recognized that “[s]ome overlap in criminal provisions is,  
 3 of course, inevitable.” *Marinello v. United States*, 138 S. Ct. 1101, 1107 (2018). Here, there is no  
 4 doubt that some offenses would qualify as “crimes of violence” under both the elements clause, §  
 5 924(c)(3)(A), and the residual clause, § 924(c)(3)(B). Nevertheless, each of these two statutory  
 6 provisions covers conduct that the other does not. This is because (1) the forms of the categorical  
 7 approach applicable to these provisions are different; and (2) the provisions contain distinct  
 8 substantive standards. As a result, the Court concludes that there is no redundancy in adopting the  
 9 categorical approach for the residual clause in § 924(c)(3)(B).

10 The government next draws on a higher-level distinction between § 924(c)(3)(B), the  
 11 provision at issue here, and § 924(e)(2)(B)(ii) and § 16(b), the provisions at issue in *Johnson* and  
 12 *Dimaya*, respectively. The government notes that unlike § 924(e)(2)(B)(ii) and § 16(b), which  
 13 “require the classification of prior convictions,” § 924(c)(3)(B) “applies only to conduct giving  
 14 rise to the current prosecution.” *Suppl. Opp.* at 7. In the government’s view, this distinction  
 15 significantly weakens the case for applying the categorical approach in the context of §  
 16 924(c)(3)(B). *Suppl. Opp.* at 7–8. The government’s argument, though, is expressly foreclosed  
 17 by Ninth Circuit precedent. In *Piccolo*, the Ninth Circuit unequivocally stated that “in the context  
 18 of crime-of-violence determinations under § 924(c), our categorical approach applies regardless of  
 19 whether we review a current or prior crime.” 441 F.3d at 1086–87. Declining to distinguish  
 20 between current and prior crimes advances the “general commitment to deciding rules of law on  
 21 categorical grounds.” *Id.* at 1087. It is also reflective of the fact that the statutory text provides no  
 22 basis for drawing such a line between current and prior crimes. *See id.*; *see also United States v.*  
 23 *Johnson*, 953 F.2d 110, 114 (4th Cir. 1991) (explaining that the “distinction between prior  
 24 offenses and the instant offense” is “unsupported by the language of the [provision]”). In the  
 25 instant case, the government does not attempt to ground its rejection of the categorical approach  
 26 for § 924(c)(3)(B) but not for § 924(e)(2)(B)(ii) and § 16(b) in any textual difference between the



1 three statutes.

2 The government rightly notes that some of the principles animating adoption of the  
3 categorical approach are inapplicable or less forceful when examining current offenses. Suppl.  
4 Opp. at 8–9. In *Taylor*, the U.S. Supreme Court offered two additional grounds beyond the  
5 general support in the textual language that tipped the scales in favor of the categorical approach:  
6 (1) the categorical approach avoids Sixth Amendment concerns that would arise from courts  
7 making findings of fact that enhance sentences, and (2) the categorical approach averts “the  
8 practical difficulties and potential unfairness of a factual approach.” 495 U.S. at 601–02; *see also*  
9 *Descamps*, 570 U.S. at 267 (listing the justifications in *Taylor*). The Third Circuit has stated that  
10 these two rationales are not implicated “[w]hen the predicate offense . . . and the § 924(c) offense  
11 are contemporaneous and tried to the same jury” because the court may “determine the basis for a  
12 defendant’s predicate conviction” without “finding any new facts which are not of record in the  
13 case before it.” *United States v. Robinson*, 844 F.3d 137, 141, 143 (3d Cir. 2016), *cert. denied*,  
14 138 S. Ct. 215 (2017). The Third Circuit’s statements do not change the analysis here. Notably,  
15 the Third Circuit case dealt with the elements clause and did not address the residual clause. *Id.* at  
16 141 (“[W]e will not address Robinson’s challenge to the residual clause.”). Moreover, the Ninth  
17 Circuit has recognized that the absence of the workability issues identified in *Taylor* does not  
18 preclude adoption of the categorical approach. *Piccolo*, 441 F.3d at 1087; *Amparo*, 68 F.3d at  
19 1225. At bottom, policy considerations (or lack thereof) cannot overcome § 924(c)(3)(B)’s textual  
20 instruction to use the categorical approach.

21 The government also urges this Court to apply the canon of constitutional avoidance.  
22 Suppl. Opp. at 9. That canon provides that “when the constitutionality of a statute is assailed, if  
23 the statute be reasonably susceptible of two interpretations, by one of which it would be  
24 unconstitutional and by the other valid, it is [a court’s] plain duty to adopt that construction which  
25 will save the statute from constitutional infirmity.” *United States ex rel. Attorney Gen. v. Del. &*  
26 *Hudson Co.*, 213 U.S. 366, 407 (1909); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001)

1 (espousing a court’s obligation to adopt a reasonable alternative interpretation “if an otherwise  
2 acceptable construction of a statute would raise serious constitutional problems”). In the instant  
3 case, this Court has no occasion to apply the constitutional avoidance canon because the statutory  
4 text is not “susceptible of more than one construction.” *Jennings v. Rodriguez*, 138 S. Ct. 830,  
5 842 (2018) (quoting *Clark v. Martinez*, 543 U.S. 371, 385 (2005)). For the reasons previously  
6 discussed, the text of § 924(c)(3)(B) requires a categorical approach, not a fact-based approach. A  
7 plurality of the U.S. Supreme Court has already concluded that § 16(b)’s nearly identical residual  
8 clause “has no ‘plausible’ fact-based reading.” *Dimaya*, 138 S. Ct. at 1218 (plurality opinion).  
9 The same holds true here. “In the absence of more than one plausible construction, the canon [of  
10 constitutional avoidance] simply ‘has no application.’” *Jennings*, 138 S. Ct. at 842 (quoting  
11 *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014)). Therefore, this Court rejects the government’s  
12 constitutional avoidance argument.

13           Once it is accepted that the categorical approach applies, the residual clause in §  
14 924(c)(3)(B) must be deemed unconstitutionally vague. Section 924(c)(3)(B) suffers from the  
15 same two features that rendered the provisions at issue in *Johnson* and *Dimaya* unconstitutionally  
16 vague. First, § 924(c)(3)(B) creates “‘grave uncertainty about how to estimate the risk posed by a  
17 crime’ because it ‘tie[s] the judicial assessment of risk’ to a hypothesis about the crime’s ‘ordinary  
18 case.’” *Dimaya*, 138 S. Ct. at 1213 (quoting *Johnson*, 135 S. Ct. at 2557). Second, § 924(c)(3)(B)  
19 “le[aves] unclear what threshold level of risk [makes] any given crime” a crime of violence.  
20 *Dimaya*, 138 S. Ct. at 1214 (citing *Johnson*, 135 S. Ct. at 2558). “By combining indeterminacy  
21 about how to measure the risk posed by a crime with indeterminacy about how much risk it takes  
22 for the crime to qualify as a” crime of violence, the residual clause in § 924(c)(3)(B) violates the  
23 guarantee of due process. *Johnson*, 135 S. Ct. at 2558; *see also Dimaya*, 138 S. Ct. at 1223  
24 (“Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it  
25 necessarily ‘devolv[ed] into guesswork and intuition,’ invited arbitrary enforcement, and failed to  
26 provide fair notice.” (quoting *Johnson*, 135 S. Ct. at 2559)).

1           Only one circuit—the Tenth Circuit—has addressed the constitutionality of the residual  
 2 clause in § 924(c)(3)(B) since the issuance of *Dimaya*. In that case, the Tenth Circuit concluded  
 3 that § 924(c)(3)(B) “is likewise unconstitutionally vague.” *United States v. Salas*, 889 F.3d 681,  
 4 686 (10th Cir. 2018). The Tenth Circuit explained that whether a crime constitutes a “crime of  
 5 violence” under § 924(c)(3)(B) is a legal question subject to the categorical approach. *Salas*, 889  
 6 F.3d at 686. Thus, the Tenth Circuit reasoned that “§ 924(c)(3)(B) possesses the same features as  
 7 [§ 924(e)(2)(B)(ii)’s] residual clause and § 16(b) that combine to produce ‘more unpredictability  
 8 and arbitrariness than the Due Process Clause tolerates.’” *Id.* (quoting *Dimaya*, 138 S. Ct. at 1223  
 9 (quoting *Johnson*, 135 S. Ct. at 2558)). Accordingly, “*Dimaya*’s reasoning for invalidating §  
 10 16(b) applies equally to § 924(c)(3)(B).” *Id.*

11           Another circuit—the Seventh Circuit—reached the same result before *Dimaya*. In *United*  
 12 *States v. Cardena*, the Seventh Circuit confronted the issue whether the residual clause in §  
 13 924(c)(3)(B) is unconstitutionally vague. 842 F.3d 959, 995–96 (7th Cir. 2016), *cert. denied*, 138  
 14 S. Ct. 247 (2017). In an earlier case, the Seventh Circuit had ruled that § 16(b) is  
 15 unconstitutionally vague under *Johnson*. *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir.  
 16 2015). In light of that holding, the Seventh Circuit easily concluded that § 924(c)(3)(B) is also  
 17 unconstitutionally vague. *Cardena*, 842 F.3d at 996. As the Seventh Circuit put it, because “[t]he  
 18 clause invalidated in *Vivas–Ceja* [§ 16(b)] is the same residual clause contained in the provision at  
 19 issue, 18 U.S.C. § 924(c)(3)(B),” “the residual clause in 18 U.S.C. § 924(c)(3)(B) is also  
 20 unconstitutionally vague.” *Id.* That holding remains intact after *Dimaya*.

21           Multiple other circuits had upheld § 924(c)(3)(B)’s constitutionality before *Dimaya*. *See*  
 22 *United States v. Garcia*, 857 F.3d 708, 711 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 641 (2018);  
 23 *United States v. Eshetu*, 863 F.3d 946, 955 (D.C. Cir. 2017); *Ovalles v. United States*, 861 F.3d  
 24 1257, 1265 (11th Cir. 2017), *reh’g en banc granted, opinion vacated*, 889 F.3d 1259 (11th Cir.  
 25 2018); *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016), *cert. denied*, 138 S. Ct. 1976  
 26 (2018); *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016), *amended and superseded by*

1 *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018); *United States v. Taylor*, 814 F.3d 340, 379 (6th  
2 Cir. 2016), *cert. denied*, 138 S. Ct. 1975 (2018). However, none of those circuits was faced with  
3 binding authority holding § 16(b) unconstitutional (and many had found § 16(b) constitutional).  
4 For the most part, the decisions relied on distinctions between § 924(e)(2)(B)(ii) and § 16(b) that  
5 were rejected in *Dimaya*. Thus, their reasoning likely does not remain valid in the wake of  
6 *Dimaya*.

7 The one circuit that has disagreed is the Sixth Circuit. Before the U.S. Supreme Court’s  
8 decision in *Dimaya*, the Sixth Circuit concluded in *Taylor* that § 924(c)(3)(B) is constitutional.  
9 814 F.3d at 375–76. However, most of the analysis in *Taylor* raises the same textual distinctions  
10 that were later rejected by the U.S. Supreme Court in *Dimaya*. *See id.* at 376–78.

11 Further, after deciding *Taylor*, but before the U.S. Supreme Court’s *Dimaya* decision, the  
12 Sixth Circuit held in *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016), that § 16(b) is  
13 unconstitutionally vague despite having identical language to § 924(c)(3)(B). *Id.* at 446. The  
14 *Shuti* panel’s central justification for these seemingly inconsistent positions was that unlike §  
15 924(e)(2)(B)(ii) and § 16(b), “which require a categorical approach to stale predicate convictions,”  
16 § 924(c) “is a criminal offense that requires an ultimate determination of guilt beyond a reasonable  
17 doubt—by a jury, in the same proceeding.” *Shuti*, 828 F.3d at 449. It is unclear whether the Sixth  
18 Circuit’s earlier decision in *Taylor* actually placed any weight on the distinction between current  
19 and prior offenses. In any event, this Court finds the distinction between current and prior  
20 offenses unavailing because the Sixth Circuit has recognized that § 924(c)(3)(B), and particularly  
21 its use of the phrase “by its nature,” compels a categorical approach. *Taylor*, 814 F.3d at 377  
22 (“The phrase ‘by its nature’ indicates that a court’s analysis of whether there is a risk of force is  
23 confined to the offense itself.”). This Court agrees with the Tenth Circuit that the Sixth Circuit’s  
24 ground for distinguishing § 16(b) and § 924(c) “is a distinction without a difference . . . and is  
25 incorrect to the extent it suggests that whether an offense is a crime of violence depends on the  
26 defendant’s specific conduct.” *See Salas*, 889 F.3d at 686. That conclusion is especially powerful

1 when read in light of § 924(c)(3)(B)'s textual commitment to applying the categorical approach.

2 The majority of district courts in this circuit have held that § 924(c)(3)(B) is  
 3 unconstitutionally vague, both before and after the U.S. Supreme Court's decision in *Dimaya*.  
 4 *See, e.g., United States v. Sangalang*, 2018 WL 2670412, at \*4 (D. Nev. June 4, 2018); *United*  
 5 *States v. Bell*, 158 F. Supp. 3d 906, 921 (N.D. Cal. 2016); *United States v. Baires-Reyes*, 191 F.  
 6 Supp. 3d 1046, 1053 (N.D. Cal. 2016); *United States v. Lattanaphom*, 159 F. Supp. 3d 1157, 1164  
 7 (E.D. Cal. 2016); *United States v. Bustos*, 2016 WL 6821853, at \*5 (E.D. Cal. Nov. 17, 2016);  
 8 *United States v. Smith*, 215 F. Supp. 3d 1026, 1035 (D. Nev. 2016).

9 A cluster of district courts in the Southern District of California reached the opposite  
 10 conclusion before the U.S. Supreme Court's decision in *Dimaya*. *See, e.g., United States v.*  
 11 *Tavarez-Alvarez*, 2017 WL 2972460, at \*4 (S.D. Cal. July 11, 2017); *United States v. Lott*, 2017  
 12 WL 553467, at \*3 (S.D. Cal. Feb. 9, 2017); *Hernandez v. United States*, 2016 WL 7250676, at \*3  
 13 (S.D. Cal. Nov. 8, 2016).

14 The picture of district courts outside this circuit before the U.S. Supreme Court's decision  
 15 in *Dimaya* is slightly more varied. *Compare, e.g., United States v. Herr*, 2016 WL 6090714, at \*3  
 16 (D. Mass. Oct. 18, 2016) (finding § 924(c)(3)(B) unconstitutionally vague), and *United States v.*  
 17 *Edmundson*, 153 F. Supp. 3d 857, 864 (D. Md. 2015) (same), with *United States v. Green*, 2016  
 18 WL 277982, at \*5 (D. Md. Jan. 22, 2016) (finding § 924(c)(3)(B) not unconstitutionally vague),  
 19 *aff'd*, 684 F. App'x 300 (4th Cir. 2017), and *United States v. Tsarnaev*, 157 F. Supp. 3d 57, 74 (D.  
 20 Mass. 2016) (same).

21 The government cites one district court case from this district issued before the U.S.  
 22 Supreme Court's *Dimaya* decision. Suppl. Opp. at 9. In that pre-*Dimaya* case, Judge Alsup  
 23 concluded that § 924(c)(3)(B) is not unconstitutionally vague. *See Order Denying Section 2255*  
 24 *Motion at 9, United States v. Carcamo*, No. 08-CV-00730-WHA (N.D. Cal. July 31, 2017), ECF  
 25 No. 6348. In particular, Judge Alsup relied on a distinction between § 924(c)(3)(B) and the  
 26 provisions at issue in *Johnson* and *Dimaya*:

1 In *Johnson* and *Dimaya*, the statutes under review required courts to consider, in the  
2 abstract, whether crimes carried a risk of the use of physical force. In contrast,  
3 Section 924(c)(3)(B) asks courts to consider only circumstances in which the  
4 defendant possessed a firearm “during and in relation to” or “in furtherance of” a  
5 crime, and to determine whether that crime involves “a substantial risk [of] physical  
6 force.” In other words, under Section 924(c)(3)(B), the definition of the crime is  
7 intertwined with the possession of a firearm, unlike the statutes at issue in *Johnson*  
8 and *Dimaya*.

9 *Id.* at 8. For this reason, Judge Alsup concluded that “[§ 924(c)(3)(B)] is not so vague that an  
10 ordinary citizen would have trouble understanding it, nor does it give enforcement authorities  
11 excessive discretion in how to apply the law.” *Id.* at 9; *see also Ovalles*, 861 F.3d at 1265–66  
12 (“The required ‘nexus’ between the § 924(c) firearm offense and the predicate crime of violence  
13 makes the crime of violence determination more precise and more predictable.”).

14 Although Judge Alsup pinpoints a distinction between § 924(c)(3)(B) and the provisions at  
15 issue in *Johnson* and *Dimaya*, that distinction does not cure any of § 924(c)(3)(B)’s indeterminacy  
16 problems. The Tenth Circuit addressed this precise argument, explaining that “th[e] firearm  
17 requirement simply means that the statute will apply in fewer instances, not that it is any less  
18 vague.” *Salas*, 889 F.3d at 685. Like the Tenth Circuit, this Court does not believe that requiring  
19 a sufficient nexus to a firearm remedies either of the two features that rendered the provisions at  
20 issue in *Johnson* and *Dimaya* unconstitutionally vague. *See id.* This Court respectfully disagrees  
21 with Judge Alsup’s decision and elects to follow the many district courts in this circuit that have  
22 determined that § 924(c)(3)(B) is unconstitutionally vague under the reasoning of *Johnson* and  
23 *Dimaya*.

### 24 **C. Procedural Default**

25 Finally, the government asserts that Defendant is procedurally barred from raising his  
26 *Johnson*-based void-for-vagueness attack on his conviction under 18 U.S.C. § 924(c) “because he  
27 failed to raise it on direct appeal.” *Opp.* at 3–6. For the reasons explained below, the Court  
28 disagrees with the government.

“The general rule in federal habeas cases is that a defendant who fails to raise a claim on

1 direct appeal is barred from raising the claim on collateral review.” *Sanchez-Llamas v. Oregon*,  
2 548 U.S. 331, 350–51 (2006). However, a defendant can overcome such a procedural default if he  
3 demonstrates both “cause” for not raising the argument at trial or on direct appeal and “prejudice”  
4 from not having done so. *Id.* at 351.

5 The “cause” prong requires a defendant “to show that some objective factor external to the  
6 defense impeded counsel’s efforts to raise the claim” on appeal. *McCleskey v. Zant*, 499 U.S. 467,  
7 493 (1991) (internal quotation marks omitted). In *Reed v. Ross*, 468 U.S. 1 (1984), the U.S.  
8 Supreme Court described one way in which a defendant can demonstrate sufficient cause to  
9 overcome a procedural default. Specifically, in *Reed*, the U.S. Supreme Court held that “where a  
10 constitutional claim is so novel that its legal basis is not reasonably available to counsel, a  
11 defendant has cause for his failure to raise the claim” at trial or on appeal. *Id.* at 16. Further, the  
12 *Reed* Court identified three situations in which a newly recognized constitutional rule is “so  
13 novel” that it can be considered “not reasonably available” to a defendant at the time of his trial or  
14 appeal: (1) when the U.S. Supreme Court “explicitly overrule[s] one of [its] precedents” in  
15 announcing its constitutional rule; (2) when the U.S. Supreme Court’s decision “overturn[s] a  
16 longstanding and widespread practice to which [it] has not spoken, but which a near-unanimous  
17 body of lower court authority has expressly approved”; and (3) when the U.S. Supreme Court  
18 “disapprove[s] a practice [it] arguably has sanctioned in prior cases.” *Id.* at 16–17.

19 In the instant case, Defendant argues that he can demonstrate cause under the second *Reed*  
20 criterion. *See* Reply at 3. The Court agrees with Defendant. In *United States v. Sorenson*, 914  
21 F.2d 173 (9th Cir. 1990), *cert denied*, 498 U.S. 1099 (1990)—which was decided well before  
22 Defendant’s sentencing and resentencing—the Ninth Circuit explicitly held that the ACCA’s  
23 residual clause “is not void for vagueness,” and the U.S. Supreme Court denied certiorari. *Id.* at  
24 175. Further, as another district court in this circuit has explained, “[a]t all times from the  
25 *Sorenson* decision in 1990 to” the U.S. Supreme Court’s *Johnson* decision in 2015, “the Ninth  
26 Circuit has consistently rejected vagueness claims to the residual clauses of the ACCA and the

1 Sentencing Guidelines as either meritless or foreclosed.” *McFarland v. United States*, 2017 WL  
 2 810267, at \*4 (C.D. Cal. Mar. 1, 2017) (citing *United States v. Martinez*, 771 F.3d 672, 678 (9th  
 3 Cir. 2014); *United States v. Spencer*, 724 F.3d 1133, 1145–46 (9th Cir. 2013), *amended by* 580 F.  
 4 App’x 619 (9th Cir. 2014); and *United States v. Argo*, 925 F.2d 1133, 1134–35 (9th Cir. 1991)).  
 5 Beyond that, “in the years following [Defendant’s direct appeals], a ‘solid wall of circuit  
 6 authority’ rejected void-for-vagueness challenges to the ACCA.” *Id.* (citing *United States v.*  
 7 *Martin*, 753 F.3d 485, 494 (4th Cir. 2014); *United States v. Phillips*, 752 F.3d 1047, 1051–52 (6th  
 8 Cir. 2014); *United States v. Van Mead*, 773 F.3d 429, 438 n.7 (2d Cir. 2014); *United States v.*  
 9 *Blair*, 734 F.3d 218, 223 n.5 (3d Cir. 2013); *United States v. Brown*, 734 F.3d 824, 827 (8th Cir.  
 10 2013); *United States v. Orona*, 724 F.3d 1297, 1310–11 (10th Cir. 2013); *United States v. Jones*,  
 11 689 F.3d 696, 704–05 (7th Cir. 2012); *United States v. Hart*, 674 F.3d 33, 41 n.3 (1st Cir. 2012);  
 12 *United States v. Jackson*, 250 F. App’x 926, 930 (11th Cir. 2007)). Thus, Defendant would have  
 13 been precluded by this “near-unanimous body of lower court authority” if he had raised a void-for-  
 14 vagueness challenge to § 924(c)’s residual clause in his direct appeal. *Reed*, 468 U.S. at 17. As a  
 15 result, Defendant’s void-for-vagueness challenge was not “reasonably available” to him until  
 16 *Johnson* was decided. *Id.* at 16. Consequently, Defendant has demonstrated cause for his failure  
 17 to assert a void-for-vagueness challenge to his § 924(c) conviction in his direct appeal.

18 The Court also finds that Defendant has sufficiently demonstrated prejudice. To establish  
 19 prejudice, a defendant must demonstrate “not merely that the errors at . . . trial created a *possibility*  
 20 of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire  
 21 trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982).  
 22 In other words, a defendant must show a “reasonable probability” that, without the error, the result  
 23 of his criminal proceedings would have been different. *Strickler v. Greene*, 527 U.S. 263, 289  
 24 (1999). In the instant case, as described in detail above, Defendant has shown that absent the  
 25 unconstitutionally vague definition for “crime of violence” in § 924(c)’s residual clause,  
 26 Defendant would not have been convicted under Count Three for violating § 924(c), and thus



1 would not have been sentenced to that provision’s five-year mandatory minimum term of  
2 imprisonment. *See* 18 U.S.C. § 924(c)(1)(A)(i). Put another way, there is a “reasonable  
3 probability” that Defendant’s sentence would have been different if Defendant had not been  
4 unconstitutionally convicted of violating § 924(c). The Court concludes that this is more than  
5 sufficient to demonstrate prejudice.

6 Accordingly, the Court finds that Defendant is not procedurally barred from asserting his  
7 void-for-vagueness challenge to his § 924(c) conviction under Count Three because he has  
8 sufficiently established cause and prejudice to overcome his procedural default.

9 **III. CONCLUSION**

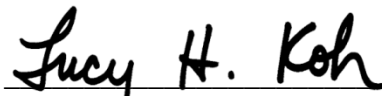
10 For the foregoing reasons, Defendant’s motion to vacate his sentence pursuant to 28 U.S.C.  
11 § 2255 is GRANTED. Defendant’s conviction and sentence pursuant to 18 U.S.C. § 924(c)  
12 (Count Three) are VACATED. Additionally, although the government asserts that the Court  
13 “should not resentence Defendant to a lesser sentence” in any event, Suppl. Opp. at 10, the Court  
14 finds it appropriate to defer resolution of this issue until resentencing, at which point both parties  
15 will have had an opportunity to more thoroughly address the issue. The Court further notes that a  
16 new presentence investigation report may be necessary for resentencing. Thus, the parties shall  
17 meet and confer and jointly file a proposed schedule for resentencing by August 28, 2018. The  
18 parties shall also indicate whether they believe a new presentence investigation report will be  
19 necessary for resentencing.

20 **IT IS SO ORDERED.**

21

22 Dated: August 20, 2018

23



24

LUCY H. KOH  
United States District Judge

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