No. 16-8996

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

BRANNON TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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Summary

The core issue in this case is still currently being debated by this Court. Last term, this Court heard oral argument in *Sessions v. Dimaya*, 137 S.Ct. 31, to resolve a circuit split regarding whether the residual clause in 18 U.S.C. § 16(b) is void for vagueness. On June 26, 2017, the Court ordered that "[t]his case is restored to the calendar for reargument", to be heard on October 2, 2017.

With this as backdrop, it is remarkable that the government maintains that "no reason exists to consider" in this case whether Section 924(c)(3)(B) is unconstitutional. Solicitor's br., pg. 3. That was the sole issue ruled on by the district court in denying Mr. Taylor a COA, and that is the issue that will likely be decided by *Sessions v. Dimaya*. A COA should be issued by this Court to Mr. Taylor, because the void for vagueness issue of §924(c)(3)(B) is debatable amongst reasonable jurists in light of the on-going debate on this issue before this Court.[1]

The government attempts to avoid this core constitutional issue, based on its argument that Mr. Taylor's conviction for carjacking instead satisfies the force clause of § 924(c)(3)(A), and therefore is a "crime of violence." Mr. Taylor has highlighted in his petition for certiorari why the act of "intimidation", "conduct reasonably calculated to put another in fear", does not satisfy the force clause. *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003). While the government

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[1] As an alternative to granting his petition, Mr. Taylor asks this Court to hold this petition until *Sessions v. Dimaya* is decided. If *Sessions v. Dimaya* holds that the reasoning of *Johnson* is applicable to 18 U.S.C. § 924(c)(3)(B), this Court should grant certiorari, for all the reasons explained below.

maintains circuit court case law is dispositive of this issue, *the government is incorrect because its cases actually highlight a circuit split* where "intimidation" is interpreted differently, with other circuits requiring "the threat of the use of *force.*" The Eighth Circuit (and other circuits) have no force requirement in its definition of "intimidation", and this fact is devastating to the government's position before this Court. This circuit split helps to highlight why Mr. Taylor is entitled to a COA, because under the lesser standard (employed by the Eighth Circuit and other circuits), his conviction for carjacking does not satisfy the force clause.

I. The government concedes that the issues raised in Mr. Taylor's petition for certiorari are nearly identical to the ones raised in another currently pending petition for certiorari, thereby highlighting that this is an important and re-occurring issue.

In responding to Mr. Taylor's petition for certiorari, the government expressly incorporates the bulk of its response in another *pending* petition for certiorari that raises an almost identical legal issue, *Charles Johnson v. United States*, No. 16-8415. *See* Solicitor's brief, pg. 3. Two things are notable about the government's approach, intertwining Brannon Taylor's and Charles Johnson's pending petitions for certiorari.

First, it rebuts the notion that the substantive issue is merely an "abstract question of law" (Solicitor's brief, pg. 3), because the petitions present an important and re-occurring legal issue of national importance, involving whether "intimidation" in a carjacking crime satisfies the force clause.

Second, in Mr. Johnson's reply brief in No. 16-8415, he outlined the existence of a circuit split on the issue regarding the meaning of the term "intimidation" in the context of carjacking/bank robbery. In its current brief, the government has not taken the opportunity to dispute that such a split exists based on the detailed arguments made by Mr. Johnson (which are set forth below on behalf of Mr. Taylor). Instead, the government has merely repeated its flawed argument that "the courts of appeals have uniformly held that 'intimidation' . . . requires at least the 'threatened use of physical force under Section 924(c)(3)(A).'" Solicitor's br., pg. 3 (quoting its brief in *Johnson*, 16-8415). This assertion is demonstrably incorrect, as will be highlighted in detail below.

II. Reasonable jurists should debate whether carjacking satisfies the force clause of §924(c)(3)(A) because "conduct reasonably calculated to put another in *fear*", does not satisfy the force clause.

The government disputes Mr. Taylor's arguments that carjacking does not satisfy the force clause of §924(c)(3)(A); however, the parties agree that the key issue boils down to whether "intimidation" in the carjacking statute (and in the analogous federal bank robbery statute) categorically satisfies the force clause. It does not, for a host of reasons.

The government does not dispute that the cases relied on by the government below do not answer this critical issue:

> [The Eighth Circuit's decisions in] *Jones, Mathijssen,* and *Hicks* have no sway in the instant analysis because they all preceded the Supreme Court's holding in "*Johnson* [that] elevated the necessary quantum of force from *de minimis* to violent." *Eason*, at 641. The court in *Jones* decided, "without discussion", that a carjacking conviction under §

> 2119 qualified as a crime of violence for purposes of § 924(c)(3)(A). In fact, none of these dated Eighth Circuit cases have any analysis of what "intimidation" means under § 2119, which renders their conclusory analysis unhelpful pursuant to the categorical analysis mandated by the Supreme Court.

Taylor, Petition for Certiorari, pg. 15.

In contending that carjacking "intimidation" categorically satisfies the force clause, the government's analysis is supported by one new case, *United States v. McNeal*, 818 F.3d 141, 154 (4th Cir. 2016). Solicitor's br., pg. 3 (citing Solicitor's br. in *Johnson*, 16-8415, pg. 11).

In *McNeal*, the Fourth Circuit rejected the defendant's argument that bank robbery does not categorically satisfy the force clause. *Id.* While *McNeal* concluded that "intimidation" inherently satisfies the force clause, its analysis does not answer the question within the Eighth Circuit (and other circuits like the First, Tenth, and Eleventh Circuits outlined below) that employ a different legal standard as it applies to what "intimidation" means as a matter of law in the context of the carjacking statute. *McNeal* concluded that "the term 'intimidation' in § 2113(a) simply means 'the threat of the use of *force*." 818 F.3d at 154.

"Intimidation" means something entirely different in this same context in the Eighth Circuit: "'Intimidation is conduct reasonably calculated to put another in *fear*.'" *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (quoting *United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992); *see also Manual of Model Criminal Jury Instructions for the Eighth Circuit*, 6.18.2119A, Committee Comments pg. 591 (case citations omitted).

Thus, a circuit split exists on this issue regarding the meaning of the term "intimidation" in the context of carjacking/bank robbery. Other circuits have employed a similar standard as the Eighth Circuit in this context. *See, for example, United States v. Henson*, 945 F.2d 430, 439 (1st Cir. 1991)(holding that intimidation is conduct reasonably calculated to produce fear); *see also United States v. Lajoie*, 942 F.2d 699, 701, fn 5 (10th Cir. 1991) (quoting *United States v. Graham,* 931 F.2d 1442, 1443 (11th Cir. 1991)(intimidation in the context of 18 U.S.C. § 2113(a) is defined as an act by defendant "reasonably calculated to put another in fear"). *There is no mention of force in any of the above cases as it pertains to intimidation.*

In contrast, as highlighted by the government, other circuits have held that "intimidation" means the threat of force. *McNeal*, 818 F.3d at 154; *see also United States v. Jones*, 854 F.3d 737, 741 (5th Cir. 2017)("The kind of 'intimidation' that suffices to put a victim in fear of bodily injury during the course of a bank robbery, and which would in turn allow a defendant to complete such a robbery, is the very sort of threat of immediate, destructive, and violent force required to satisfy the 'crime of violence' definition").

This circuit split need not be exhaustively outlined, because it is one that this Court need not resolve in this case. Rather, it is only helps to highlight why Mr. Taylor is entitled to a COA because under the lesser standard (employed by the Eighth Circuit), his conviction for carjacking does not satisfy the force clause.

For these reasons, the government has failed to rebut Mr. Taylor's core argument that "intimidation" does not categorically satisfy the force clause in the

Eighth Circuit (and in other circuits). For whatever reason, the government does not even mention (let alone analyze) the Eighth Circuit's holding in *Yockel*, 320 F.3d 818 (8th Cir. 2010). *Yockel* illustrates that conduct reasonably calculated to put another in fear simply does *not require violent force*, as mandated by this Court in *Johnson I*, which is "characterized by the exertion of great physical force or strength." 559 U.S. 133, 140 141 (2010).

In *Yockel*, the Eighth Circuit affirmed defendant's conviction for bank robbery when it was not disputed that the defendant "did not, at any time, make any sort of physical movement toward the teller", and also "never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon." *Id.* To find an objective reason to be intimidated under these undisputed facts, the Eighth Circuit relied, in part, on the defendant's *appearance* when requesting money because the defendant "appeared dirty and had unkempt hair, and eyes that were blackened, as if he had been beaten." *Yockel,* 320 F.3d at 824. But it is respectfully submitted that one's appearance, while perhaps relevant to determine whether the government met the standard of "intimidation" in the Eighth Circuit, cannot satisfy the *Johnson I* force clause standard. This issue regarding the meaning of "intimidation" entitles Mr. Taylor to a COA.

Thus, *Yockel* (and other cases like it) flatly contradict the government's argument that "the courts of appeals have uniformly held that 'intimidation' . . . requires at least the 'threatened use of physical force under Section 924(c)(3)(A)." Solicitor's br, pg. 3 (quoting its brief in *Johnson*, 16-8415).

The government is also quick to dismiss, in a footnote, Eighth Circuit case law (*Bell* and *Eason*) that analyzed state robbery statutes that required the use of only minimal force because it argues that "no court has adopted a similar construction of the federal carjacking statute." Solicitor's br., pg. 3 (citing Solicitor's br. in *Johnson*, 16-8415, pg. 12, fn 3). However, again, this argument ignores *Yockel*, and other Eighth Circuit case law like it, that the government concedes is directly applicable to the federal carjacking statute. *See United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992). Interestingly, the state robbery crimes that were found by the Eighth Circuit not to satisfy the force clause required at least minimal force, where here *no force* was required in *Yockel* but instead only "conduct reasonably calculated to put another in fear." *Id.*

The government attempts to ameliorate this problem by taking two distinct elements of carjacking, and combining them into one. Specifically, the government argues that the carjacking statute requires "intimidation 'with intent to cause death or seriously bodily harm.'" Solicitor's br., pg. 3 (citing Solicitor's br. in *Johnson*, 16-8415, pg. 11). The government's argument is unsupported by any authorities, and misconstrues the plain language of § 2119.

"To obtain a conviction under [18 U.S.C. § 2119], the government must prove three basic elements: (1) the defendant took or attempted to take a motor vehicle from the person or presence of another by force and violence or by intimidation; (2) the defendant acted with the intent to cause death or serious bodily harm; and (3)

the motor vehicle involved has been transported, shipped, or received in interstate or foreign commerce. *United States v. Casteel*, 663 F.3d 1013, 1019 (8th Cir. 2011).

As highlighted in Mr. Taylor's petition for certiorari, the first prong of the test above analyzes the *force* necessary to commit carjacking which includes mere "intimidation", and therefore it is this prong or portion of the statute that is relevant to this Court's analysis of the *force* clause. Additionally, the defendant's intent to cause death or serious bodily harm, the second prong of the test, bears no meaning as it pertains to the *force* clause because this Court has held that it is merely a "conditional intent." *United States v. Fekete,* 535 F.3d 471, 476-77 (6th Cir. 2008) (citing *Holloway v. United States*, 526 U.S. 1, 11–12 (1999)). The government does not cite any authority that a defendant's "*conditional* intent" may satisfy the force clause under the *Johnson I* standard, and for good reason because it does not.

III. Circuit case law has failed to address Mr. Taylor's specific arguments, and therefore a COA should be issued by this Court.

For three interrelated reasons, the government overstates the significance of prior circuit court case precedent that has analyzed whether carjacking satisfies the force clause of §924(c)(3)(A), in determining whether this Court should issue a COA to Mr. Taylor.

First, instead of specifically addressing Mr. Taylor's arguments raised in his petition for certiorari, the government attempts to rely on case law that has analyzed related issues, but ultimately failed to reach the merits of Mr. Taylor's unique and distinct arguments. That is, whether a carjacking/robbery conviction

satisfies the force clause, when all that is required is "[i]ntimidation is conduct reasonably calculated to put another in *fear*." *Yockel*, 320 F.3d at 824. While the government maintains that "[e]very court of appeals that has considered the question has held that federal carjacking qualifies as a 'crime of violence'", none of the case law cited addressed that specific issue regarding the Eighth Circuit's standard (intimidation is conduct reasonably calculated to put another in *fear*), and therefore this case law is of limited or no value to this Court. Solicitor's br., pg. 2-3.

Second, none of the case law relied on by the government analyzes the issue within the relevant legal framework, i.e. the issuance of a COA. The government ignores that obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "*a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief.*" *Welch v. United States*, 136 S. Ct. 1257, 1263–64, (2016)(emphasis added).

Third, at least some of the case law relied on by the government is flawed altogether, because it relies on the antiquated carjacking statute. Solicitor's br., pg. 3 (citing Solicitor's br. in *Johnson*, 16-8415, pg. 8). *See, for example, United States v. Mohammed*, 27 F.3d 815, 819 (2d Cir. 1994)("It is clear that a violation of section 2119, the carjacking statute, is a crime of violence within the meaning of section 924(c) and that both statutes require the presence of a firearm during the offense."). The current day statute that Mr. Taylor was convicted of does not require the presence of a firearm, and therefore case law like *Mohammed*, relied on by the government, should be disregarded altogether by this Court.

Taken as a whole, the government's position is that because some circuits have rejected a related (but ultimately distinct) argument on the merits, all further debate on this issue should be terminated by courts in the future by denying a COA. However, this is not the touchstone is determining whether to issue a COA, and the government's position would stifle and terminate reasonable debate that should occur in the appellate courts.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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