No.

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

BRANNON TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

I. Should a certificate of appealability be granted to resolve a circuit split regarding whether the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutional because it is void for vagueness?

Lynch v. Dimaya, *cert. granted*, 137 S. Ct. 31 (September 29, 2016).

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Petitioner, Brannon Taylor, respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 28, 2017, denying a certificate of appealability.

OPINION BELOW

The Eighth Circuit's judgement denying a certificate of appealability is included in Appendix A.

JURISDICTION

On February 28, 2017, the decision of the Court of Appeals denied a certificate of appealability, dismissing his appeal. In accordance with Supreme

Court Rule 13.3, this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

The Fifth Amendment to the United States Constitution states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."."

STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 28 U.S.C. § 2255.

Mr. Taylor sought a certificate of appealability from the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291 and 28 U.S.C. § 2253.

B. Facts and Proceedings Below

Brannon Taylor pled guilty to carjacking in violation of 18 U.S.C. § 2119, and possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). (Case No. 08-194-01-CR-W-NKL). On July 31, 2009, Mr. Taylor was sentenced to 125 months imprisonment on Count I, and a consecutive sentence of 84 months imprisonment on Count II. This resulted in a total sentence of 209 months imprisonment.

On June 26, 2015, the Supreme Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), in which the Court held that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), violates due process because the residual clause is void for vagueness.

Mr. Taylor filed a motion pursuant to 28 U.S.C. § 2255 on June 6, 2016, which was subsequently amended on July 6, 2016. In the motion, Mr. Taylor sought sentencing relief in light of the Supreme Court's aforementioned decision in *Johnson.*

Specifically, Mr. Taylor alleged that in light of *Johnson* and its retroactive application to his case on collateral review, he was actually innocent of the § 924(c) offense because his conviction under Count II was predicated on the erroneous assumption that his conviction for carjacking in Count I constituted a "crime of violence."[1]

The district court denied Mr. Taylor's § 2255 motion, finding that his conviction of the § 924(c) offense was proper because his carjacking offense was a "crime of violence" because it concluded that § 924(c)(B) was immune from a vagueness challenge. Specifically, the district court predicated its order solely on the Eighth Circuit's opinion in *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016), which is part of significant circuit court split on this very legal issue that will be highlighted below. The district court also denied a certificate of appealability, finding that Mr. Taylor had not made a substantial showing of the denial of a constitutional right.

Mr. Taylor sought an application for a certificate of appealability before the Eighth Circuit, but it issued its Judgment denying the certificate of appealability, and dismissed the appeal. *See* February 28, 2017 Judgment (Appendix A).

[1] The relevant portion of § 924(c) defining a "crime of violence" has two clauses. The first clause – § 924(c)(3)(A) – is commonly referred to as the force clause. The other – § 924(c)(3)(B) – is commonly referred to as the residual clause. As will be illustrated below, the § 924(c) residual clause is materially indistinguishable from the ACCA residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) that the Supreme Court in *Johnson* struck down as unconstitutionally vague.

ARGUMENT

Mr. Taylor should have been granted a certificate of appealability ("COA") because, at minimum, it is debatable whether the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutional because it is void for vagueness in violation of the Due Process Clause.

A COA must issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, 136 S. Ct. 1257, 1263–64, 194 L. Ed. 2d 387 (2016)(quoting *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). 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." *Id.* at 1263-64 (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)).

As this Court has already determined by granting certiorari in *Lynch v. Dimaya*, whether *Johnson* applies to similar residual clauses like 18 U.S.C. § 924(c)(3)(B) is a question of exceptional importance and is one that has divided the Courts of Appeals. *Lynch v. Dimaya*, 137 S.Ct. 31 (September 29, 2016). In *Lynch v. Dimaya,* the Supreme Court recently heard oral argument to resolve a circuit split regarding whether the residual clause in 18 U.S.C. § 16(b) is void for vagueness. *Id*. Because the residual clause in § 16(b) is identical to the residual clause in 18 U.S.C.

§ 924(c)(3)(B), it goes without saying that the Supreme Court's resolution of *Lynch v. Dimaya* will also likely decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague.[2] *Lynch v. Dimaya* highlights why the certificate of appealability should be issued by this Court, because it cannot be disputed that the void for vagueness issue of § 924(c)(3)(B) is debatable amongst reasonable jurists in light of the extensive circuit court split over this issue. *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Thus, Mr. Taylor is entitled to a COA.[3]

If remanded, the constitutional issue which will be presented on appeal is whether the sentence movant is currently serving is unconstitutional and illegal because he is actually innocent of his conviction pursuant to 18 U.S.C. § 924(c)(1)(A), possession of a firearm during and in relation to a "crime of violence", namely federal carjacking (18 U.S.C. § 2119). Specifically, federal carjacking categorically fails to qualify as a "crime of violence" under the force clause (§ 924(c)(3)(A)) because carjacking does not have as an element the use, attempted

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[2] In recently concluding that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, the Seventh Circuit held that its prior conclusion that 18 U.S.C. § 16(b) was unconstitutionally vague was dispositive of its analysis. *United States v. Cardenda*, 842 F.3d 959, 996 (7th Cir. 2016)("The clause invalidated in *Vivas-Cejas* is the same residual clause contained in the provision at issue, 18 U.S.C. § 924(c)(3)(B). Accordingly, we hold that the residual clause in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague.").

[3] As an alternative to granting his petition, Mr. Taylor asks this Court to hold this petition until *Lynch v. Dimaya* is decided. If *Lynch 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.

use, or threatened use of violent physical force. Nor does federal carjacking satisfy the residual clause of § 924(c)(3)(B) in light of the fact that the residual clause must be deemed to be unconstitutional after *Johnson v. United States*, 135 S. Ct. 2551 (2015). Therefore, Mr. Taylor's conviction under § 924(c) cannot be constitutionally sustained.

I. The circuits are divided on whether the residual clause of § 924(c)(3)(B) is void for vagueness in violation of the Due Process Clause, and the Eighth Circuit is debatably on the wrong side of the circuit court split.

The Eighth Circuit recently held that this Court's due process analysis in "*Johnson* does not render § 924(c)(3)(B) unconstitutionally vague." *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016). While the Eighth Circuit did not elaborate on its reasoning for refusing to grant Mr. Taylor's COA, its decision in *Prickett* is a likely basis because that is precisely what the district court relied on in denying a COA. But the circuit split over the Eighth Circuit's analysis in *Prickett*, outlined below, simply highlights why the Eighth Circuit should have issued Mr. Taylor a COA. The existence of a circuit split means that reasonable *are* debating this issue.

Several circuit courts have held that either the residual clause of § 924(c)(3) or § 16(b) (the statute at issue in *Dimaya*) is void for vagueness. *See, e.g., Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), pet. cert. granted, 137 S. Ct. 31 (2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 721-23 (7th Cir. 2015); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir

2016); *Baptiste v. Attorney Gen.*, 841 F.3d 601 (3rd Cir. 2016); *United States v. Cardenda*, 842 F.3d 959 (7th Cir. 2016)(holding that § 924(c)(3)(B) is unconstitutionally vague).

Other circuits, like the Eight Circuit in *Prickett*, have reached the contrary conclusion. *See, e.g., United States v. Hill*, 832 F.3d 135 (2d Cir. 2016) (§924(c)(3)(B)); *United States v. Gonzalez–Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc) (§ 16(b)); *see also United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016).

A. The holding of *Johnson* renders § 924(c)(3)(B) unconstitutional.

Mr. Taylor's carjacking offense cannot qualify as a "crime of violence" under § 924(c)(3)(B)'s residual clause because the clause is void for vagueness under *Johnson*. In *Johnson*, the Supreme Court ruled that the ACCA's residual clause is unconstitutionally vague. The decision equally applies to the "crime of violence" definition in § 924(c)(3)(B)'s residual clause because its language is substantially similar to the ACCA residual clause. Using § 924(c)(3)(B) to categorize a predicate conviction as a "crime of violence," therefore, violates due process just like in *Johnson.* Section 924(c)(3)(B) is substantially similar to the ACCA residual clause of § 924(e). The ACCA residual clause defines a "violent felony" as an offense that "otherwise involves conduct that presents a **serious potential risk of physical injury** to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Section 924(c)(3)(B), in turn, defines a crime of violence as one that "by its nature, involves a **substantial risk that physical force** against the person or property of another may be used in the course of committing the offense." *Id.* (emphasis added).

In *Johnson*, the Supreme Court held that "[t]wo features of the residual clause . . . conspire to make it unconstitutionally vague." 135 S.Ct. at 2557. First, the residual clause "leaves grave uncertainty about how to estimate the risk posed by a crime" because, under the required categorical approach, "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558. The Supreme Court therefore was "convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendant and invites arbitrary enforcement by judges," such that it was void for vagueness under the Due Process Clause. *Id.* at 2557.

The reasoning and holding of *Johnson* are directly applicable here, because both of the flawed aspects of the ACCA residual clause are equally present under § 924(c)(3)(B). First, just as with the ACCA residual clause, in determining whether a predicate offense is a "crime of violence", § 924(c)(3)(B) requires courts to consider the crime "in the abstract," untethered from the actual conduct of a defendant on a particular occasion. 135 S.Ct. at 2557-8. Second, § 924(c)(3)(B), like the ACCA residual clause, "require[s] courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Id.*

B. *Prickett* was wrongly decided in light of *Welch* and *Johnson*, and therefore should be vacated.

In concluding that § 924(c)(3)(B) was not unconstitutionally vague, a panel of the Eighth Circuit held in *Prickett* that "several factors distinguish the ACCA residual clause from § 924(c)(3)(B)." 839 F.3d at 699. But before reviewing those allegedly distinguishing factors, it must first be noted that *Prickett* concluded that there was a critical similarity between these two residual clauses because they both require applying a categorical analysis. *Id.* at 698. (quoting *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994)). The categorical analysis is critical to understanding why the residual clause of § 924(c)(3)(B) is also unconstitutional, precisely because the Supreme Court said so in *Welch v. United States*, 136 S.Ct. 1257, 1262 (2016). "The vagueness of the residual clause rests in large part on its operation under the categorical approach." *Id*.

Welch was handed down by the Supreme Court several months before *Prickett*. Accordingly, the glaring absence in *Prickett* is that the Eighth Circuit failed to even mention *Welch* in its analysis, and this is troubling because no other authority could be more compelling to interpret the meaning of *Johnson I* than the Supreme Court's own holding in *Welch*.

In outlining the alleged distinctions between the ACCA and § 924(c)(3)(B) to reach its conclusion that *Johnson* had no application to § 924(c)(3)(B), *Prickett* essentially adopted the Sixth Circuit's analysis in *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016), by string citing to *Taylor*. *Prickett*, 839 F.3d at 699-700.

Prickett's heavy reliance on *Taylor* is problematic for a number of reasons, especially because *Taylor* has already has been seriously called into question *by the Sixth Circuit itself* after the Supreme Court's recent holding in *Welch*.

In *Taylor*, the Sixth Circuit concluded that § 924(c)(3)(B) is not void for vagueness. 814 F.3d at 376. Another panel of the Sixth Circuit has subsequently taken dead aim at *Taylor* in *Shuti v. Lynch*, 828 F.3d 440, 441 (6th Cir. 2016).

In *Shuti*, the Sixth Circuit held that the INA's residual clause (cross-referencing 18 U.S.C. § 16(b)), which uses identical language as § 924(c)(3)(B), was unconstitutionally vague in violation of due process. *Id*. To reach that conclusion, *Shuti* not only relied on *Johnson II,* but also just as importantly *Welch*. *Id*. at 444. Specifically, *Shuti* noted how "the government's reading of *Taylor* has been undercut by the Supreme Court's intervening decision in *Welch*." *Id.* at 450. "As the [Supreme] Court made clear this term, the ACCA's vagueness 'rests in large part on its operation under the categorical approach.'" *Id.* (quoting *Welch*, 136 S.Ct. at 1262). Accordingly, the Sixth Circuit held that the "residual clause [of the ACCA] did not fail for the reasons latched onto by the government." *Id*. (citing *See Taylor*, 814 F.3d at 376–78). "Rather, it failed 'because applying [the serious potential risk] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.'" *Id.* (quoting *Welch*, 136 S.Ct. at 1262). "*Taylor* did not have the benefit of the Court's guidance in this regard", and therefore "[a]ny dictum in that decision . . . is simply that." *Id*.

It is respectfully submitted that the failure of *Prickett* to analyze *Welch*, or

circuit court cases that have analyzed this issue based on the guidance of *Welch*,[4] renders *Prickett* a suspect opinion. This is because *Prickett* fails to analyze this issue based on the most recent Supreme Court guidance in *Welch*.

Based on this backdrop, Mr. Taylor should have been issued a COA to appeal this constitutional issue because, at minimum, it is debatable whether the residual clause of 18 U.S.C. § 924(c)(3)(B) is unconstitutional because it is void for vagueness in violation the Due Process Clause. Thus, this Court should grant certiorari, directing it to issue the COA.

II. Mr. Taylor is otherwise entitled to a COA.

Because the Eighth Circuit did not elaborate on its reasoning for denying Mr. Taylor's application for a COA, it should be highlighted that there are no other meritorious grounds to deny the COA. In denying Mr. Taylor's § 2255 motion and application for COA, the district court held that *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016), disposed of the issue that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague, and therefore concluded that it "need not address Taylor's force clause argument."

Thus, the district court did not reach the merits of whether the § 924(c) offense convictions was proper because Mr. Taylor's carjacking offense was a "crime

[4] In its analysis, *Prickett* also relied on *United States v. Hill*, 832 F.3d 135 (2nd Cir. 2016). But the Second Circuit made this same mistake in failing to analyze the categorical analysis in *Welch* prior to concluding that § 924(c)(3)(B) is not void for vagueness.

of violence" because it satisfied the force clause of § 924(c)(3)(A). Had the Court reached that issue, it would have concluded that, at a minimum, Mr. Taylor was entitled to a COA on this issue.

To understand why this is the case, one needs only to turn to the flawed analysis set forth by the government before the district court arguing that carjacking is a "crime of violence" under the force clause of § 924(c)(3)(A). (DCD 6, pg. 15-21). The government's analysis was flawed because it relied on improper and dated Eighth Circuit case law, and as highlighted below more recent and probative Eighth Circuit case law illustrates that the proper resolution of this issue is that carjacking does not satisfy the force clause of § 924(c)(3)(A).

In determining whether an offense qualifies as a "crime of violence" under the "force" clause, sentencing courts must employ the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). This approach requires that courts "look only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S. Ct. at 2283 (citation omitted). In addition, under the categorical approach, an offense can only qualify as a "crime of violence" if all of the criminal conduct covered by a statute – "including the most innocent conduct" – matches or is narrower than the "crime of violence" definition. *United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012); *see also United States v. Sonnenberg*, 556 F.3d 667 (8th Cir. 2009). If the most innocent

conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as a "crime of violence."

As a result, for an offense to qualify as a "crime of violence" under the "force clause", the offense must have as an element the use, attempted use, or threatened use of "physical force" against another person or property. 18 U.S.C. § 924(c)(3)(A). And "physical force" means *violent* force – that is "strong physical force," which is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis added)(hereinafter *Johnson I*).

The elements of the federal crime of carjacking are not in dispute. "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) (emphasis added).

In its response, the government pointed out below that a judge in the Western District of Missouri found carjacking to be a force clause offense in *Charles Johnson v. United States*, 16-CV-141 (WDMO June 8, 2016). (DCD 6, pg. 20). In that case, the district court relied heavily on *United States v. Jones*, 34 F.3d 596 (8th Cir. 1994), *United States v. Mathijssen*, 406 F.3d 496 (8th Cir. 2005), and *United States v. Hicks*, 374 Fed. Appx. 673 (8th Cir. 2010).

But the Eighth Circuit has highlighted that it is reversible error to rely on dated case law (like *Jones, Mathijssen* and *Hicks*) that analyzed the force clause prior to *Johnson I* in cases like *United States v. Eason*, 829 F.3d 633, 640-41 (8th Cir. 2016).

In *Eason*, the Eighth Circuit held that a prior conviction for Arkansas robbery was not a violent felony conviction under the ACCA because it did not fall within the "force clause." *Id*. *Eason* further held that "*Johnson* elevated the necessary quantum of force from *de minimis* to violent", thereby overruling "the reasoning of some pre-*Johnson* holdings" from the Eighth Circuit because earlier panel decisions are not binding when "cast into doubt by an intervening Supreme Court decision." *Id.* at 641; *see also United States v. Bell*, 840 F.3d 963, 966 (8th Cir. 2016)(holding that "a second-degree robbery under Missouri law does not necessarily require use of the type of violent force described by the Supreme Court in *Johnson*", and thus was not a crime of violence)).

It is respectfully submitted that *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.

The government, perhaps recognizing that reliance on outdated cases is perilous, argued below that *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016) supports its position. (DCD 6, pg. 19). *Rice* concluded that second degree battery under Arkansas law constituted a crime of violence under U.S.S.G. § 4B1.2(a)(1), holding that the battery conviction satisfied the force clause because it involved "intentionally or knowingly causing physical injury to another person." *Id*. at 706. But second degree battery and federal carjacking are not analogous crimes because carjacking does *not* require physical injury. To repeat, one needs only to cause "intimidation", which is a distinction with a difference.[5]

It is respectfully submitted that the Eighth Circuit's recent holdings in *Eason* and *Bell* are much more on point than *Rice,* because *Eason* and *Bell* analyzed second degree *robbery* statutes. Ultimately, the Eighth Circuit concluded that the respective robbery statutes in question in *Eason* and in *Bell* were not a "crime of violence" because "the degree of physical force required to commit robbery" was not "violent physical force." *Eason*. 829 F.3d at 640-41; *see also Bell*, 840 F.3d at 966. Specifically, to reach this conclusion, the Eighth Circuit analyzed Arkansas and Missouri cases that have held that the degree of force used was sufficient to support

[5] Below, the government erred in focusing on the degree of force applied in *Rice* and also in the Supreme Court's holding in *United States v. Castleman*, 134 S.Ct. 1405 (2014), because no "actual bodily injury" needs to be established to prove "intimidation." *Eason*, 829 F.3d at 642, fn. 7 (citing *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011)).

a robbery conviction even where there was no threat of force and no actual injury befell the victim. *Id.*

Accordingly, like in *Eason* and like in *Bell*, this Court should analyze applicable case law that highlights that "intimidation" (within the context of the applicable federal robbery statute), does not satisfy the force clause of § 924(c)(3)(A). Eighth Circuit case law highlights that "intimidation" within the context of federal robbery (which it was undisputed applied below) does not require the type of violent force, or even a threat of violent force, to satisfy the force clause as a matter of law. According to the Supreme Court, physical force is "extreme," "severe," "characterized by the exertion of great physical force or strength," and akin to "murder, forcible rape, and assault and battery with a dangerous weapon." *Johnson I* at 140-1. Physical force means "*violent* force" — that is "strong physical force," which is "capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original).

In contrast, "intimidation" under the federal bank robbery statute, can be accomplished without any threat of *violent* physical force. "Intimidation" under the federal bank robbery statute occurs whenever an ordinary person in the victim's position reasonably could *infer* a threat from the defendant's acts. *United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010); *see also United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003). But the unintentional act of placing another in fear of bodily harm does not qualify as a "crime of violence" under the force clause of § 924(c)(3)(A) because it does not require the use or threatened use of "*violent* force" against another.

In *United States v. Yockel*, 320 F.3d 818 (8th Cir. 2003), the Eighth Circuit affirmed defendant's conviction for bank robbery. But at trial, it was not disputed that the defendant "did not, at any time, make any sort of physical movement toward the teller and never presented her with a note demanding money", and defendant 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", cannot satisfy the force clause. The same is true of the defendant's statement to the teller in *Yockel* that "[i]f you want to go to heaven, you'll give me the money", which may not be construed a threat of *violent force* after *Johnson I. Id.*

As analyzed above at length, the Eighth Circuit in *Eason* and *Bell* recently hammered home that, after *Johnson I*, to conclude otherwise would be to err as a matter of law. *Eason*, at 829 F.3d at 641 (highlighting that there was "no threat of force and no actual injury" to the victim where defendant "jerk[ed] the door from a victim, cornering her in the back hallway and grabbing her dress lightly."); *see also Bell*, 840 F.3d at 965 (holding that "a second-degree robbery under Missouri law

does not necessarily require use of the type of violent force described by the Supreme Court in *Johnson*.").[6]

For all of the aforementioned reasons, Mr. Taylor's conviction for carjacking fails to qualify as a "crime of violence" under the § 924(c)(3)(A) force clause.

III. This Court should issue a Certificate of Appealability.

A certificate of appealability should be granted in this matter because Mr. Taylor has made a substantial showing of the denial of a constitutional right. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000) (citations omitted). That is, Mr. Taylor has demonstrated that the issues are debatable among reasonable jurists, a court could resolve the issues differently, and/or that the issues deserve further proceedings. *Id*. Accordingly, this Court should grant a certificate of appealability ("COA").

With regard to the first part of the COA standard, there is no question that Mr. Taylor's claim involves a denial of his constitutional right to due process. This issue presented herein is an important question because Mr. Taylor is actually innocent of his conviction pursuant to 18 U.S.C. § 924(c)(1)(A), possession of a firearm during and in relation to a "crime of violence", namely federal carjacking

[6] It should be noted that the Fourth Circuit recently concluded that it was "not aware of any case in which a court has interpreted the term "intimidation" in the carjacking statute as meaning anything other than a threat of violent force. *United States v. Evans*, 848 F.3d 242, 247 (4th Cir. 2017). But a COA should still issue because reasonable jurists could and should debate this issue, for all of the aforementioned reasons.

(18 U.S.C. § 2119). It follows then that this sentence was imposed in violation of the Constitution, and without the COA Mr. Taylor is without any recourse to appeal that unconstitutional sentence.

With regard to the second part of the COA standard, the substance of Mr. Taylor's claim is debatable among reasonable jurists, for the reasons highlighted above in detail. Accordingly, the Court should issue a certificate of appealability to allow further proceedings in compliance with 28 U.S.C. § 2253(c)(1) and Federal Rule of Appellate Procedure 22(b).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Taylor respectfully requests that the Court grant his petition for certiorari. Mr. Taylor further asks that the Court reverse the Eighth Circuit's opinion that refused to grant a certificate of appealability, vacate the judgment, and remand to the United States Court of Appeals for the Eighth Circuit to issue the certificate of appealability.

Respectfully submitted,

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APPENDIX

Appendix A – Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order Denying Certificate of Appealability