NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT JAMES EIZEMBER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

I. Whether the Eighth Circuit's denial of Petitioner's request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c) was unreasonable and conflicts with the standards for a certificate of appealability to issue as set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), where Petitioner demonstrated a substantial showing of the denial of a constitutional right regarding whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague following this Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The district court denied Scott James Eizember's habeas petition under 28 U.S.C. § 2255 and further denied him a certificate of appealability, finding that the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), did not invalidate the residual clause of 18 U.S.C. § 924(c)(3)(B). On June 27, 2017, the Eighth Circuit Court of Appeals issued its judgment denying Mr. Eizember's application for a certificate of appealability. *See United States v. Eizember*, No. 17-1406, 2017 WL 3658867 (8th Cir. June 27, 2017), Appendix ("App.") A. Therefore, it affirmed the district court's order denying Mr. Eizember's motion to vacate based upon *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), *petition for cert. filed*, (Dec. 28, 2016) (16-7373), which ruled that *Johnson* did not invalidate § 924(c)(3)(B). A copy of the district court's order is attached at App. B.

JURISDICTION

The Eighth Circuit Court of Appeals' denial of Mr. Eizember's application for a certificate of appealability was entered on June 27, 2017. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 16. Crime of violence defined.

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1201(a)(1). Kidnapping.

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary if the person was alive when the transportation began . . . .

18 U.S.C. § 924. Penalties.

(c). . . .

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

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

(e). . . .

(2) As used in this subsection—

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

STATEMENT OF THE CASE

1. Scott James Eizember was named in a four-count indictment in the Western District of Arkansas on January 7, 2004. Add. C, p. 4a. Mr. Eizember was charged in all counts. He was charged in counts one and two with kidnapping in violation of 18 U.S.C. § 1201; in count three with using, carrying, and brandishing a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c); and in count four with carjacking in violation of 18 U.S.C. § 2119. *Id.* The § 924(c) violation was predicated upon the crime of violence charged in counts one and two. On December 7, 2005, after a three-day jury trial, the jury returned a verdict finding Mr. Eizember guilty on all four counts.

2. On July 27, 2006, the district court sentenced Mr. Eizember to 216 months' imprisonment on counts one and two, with terms to run concurrently; 180 months' imprisonment on count four, to run concurrently; and 84 months' imprisonment on count three, to run consecutively to the other counts. *Id.* at 4a-5a. Mr. Eizember appealed to the Eighth Circuit Court of Appeals and the district court's decision was affirmed. He also filed a petition for a writ of certiorari with this Court, which was denied on October 29, 2007.

3. On June 10, 2016, Mr. Eizember filed a motion pursuant to 28 U.S.C. § 2255, arguing that the sentence imposed by the district court in connection with his conviction on count three should be vacated because the residual clause of 18 U.S.C. § 924(c)(3)(B) is now void for vagueness pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). Add. B, p. 2a. On December 27, 2016, the district court entered its

order and judgment adopting the magistrate's report and recommendation in its entirety, denying and dismissing Mr. Eizember's § 2255 motion with prejudice and declining to issue a certificate of appealability. *Id.* Mr. Eizember's application for a COA on the issue of whether the residual clause of § 924(c) is unconstitutional after *Johnson* was subsequently denied by the Eighth Circuit on June 27, 2017. Add. A.

4. In his application for a certificate of appealability to the Eighth Circuit, Mr. Eizember argued that the Seventh Circuit recently held § 924(c)(3)(B) to be void for vagueness in light of *Johnson* and that several district courts in other circuits have reached the same conclusion. *See United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016); *United States v. Bundy*, No. 2:16-cr-46-GMN-PAL, 2017 WL 449593 (D. Nev. Feb. 2, 2017); *United States v. Bell*, 158 F. Supp. 3d 906 (N.D. Cal. 2016); *United States v. Lattanaphom*, 159 F. Supp. 3d 1157 (E.D. Cal. 2016); *United States v. Edmundson*, 153 F. Supp. 3d 857 (D. Md. 2015). Therefore, Mr. Eizember submits that he has made a substantial showing of the denial of a constitutional right, as a split among the circuits clearly demonstrates that the issue of the constitutionality of § 924(c)(3)(B) is debatable among reasonable jurists and he seeks to pursue his claim before this Court. *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

5. Both the district court and the appellate court based the dismissal of Mr. Eizember's case and the denial of a COA on the Eighth Circuit's holding in *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), *petition for cert. filed*, (Dec. 28, 2016) (16-7373), which is pending before this Court pursuant to a petition for a writ of certiorari. This Court has recently granted certiorari in a

Ninth Circuit case in which that court held the residual clause of 18 U.S.C. § 16(b), which is virtually identical to § 924(c)(3)(B), to be unconstitutional. *Dimaya v. Sessions*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (mem.), 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498). Mr. Eizember contends that this Court's decision in *Dimaya*, and potentially later in *Prickett*, may warrant reversal of the district court's decision in his case.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's denial of Mr. Eizember's request for a certificate of appealability ("COA") was unreasonable and conflicts with this Court's decision in *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003), because Mr. Eizember made the requisite showing for a COA to issue. Mr. Eizember challenges the district court's denial of his petition for habeas corpus on his claim that his prior conviction for federal kidnapping no longer qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(B) after this Court held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), was unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Eighth Circuit's refusal to issue Mr. Eizember a COA, although he clearly met the standards set forth by this Court, is a compelling reason to grant his petition or to summarily reverse.

The Eighth Circuit improperly denied Mr. Eizember a COA pursuant to 28 U.S.C. § 2253(c). Under 28 U.S.C. § 2253(c)(1)(B), in order for Mr. Eizember to appeal the district court's dismissal of a petition for writ of habeas corpus, a circuit justice or judge must first issue a COA. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA, a movant must demonstrate that an issue is debatable among jurists of reason or that the question deserves encouragement to proceed further. *Miller-El,* 537 U.S. at 327. This Court has held that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

Id. at 338. The claims sought to be appealed must be "debatable among jurists of reason," or different courts must be able to resolve the claims "in a different manner." *Id.* at 336 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)). The determination as to whether to issue a COA should be a threshold inquiry into whether the district court's decision was debatable and does not require a decision on the merits. *Id.* at 342. Therefore, a movant does not have to demonstrate that the appeal would succeed to obtain a COA. *Id.* at 337 ("Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate entitlement to relief.").

Mr. Eizember has made a substantial showing of a denial of his constitutional rights because his conviction under § 924(c) was based upon an improper determination that federal kidnapping remains a crime of violence post-*Johnson*. Such an issue is debatable among jurists of reason and meets the standards for a COA. Clearly, federal kidnapping is considered a crime of violence under the residual clause of § 924(c), which should be declared unconstitutional after this Court's decision in *Johnson*. *See United States v. Green*, 521 F.3d 929, 932-33 (8th Cir. 2008) (finding federal kidnapping was a "crime of violence" under the residual clause); *Delgado –Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012) ("The federal kidnapping statute has no force requirement. . . .").

The lower courts' determination that *Johnson* did not extend to § 924(c) erroneously subjects Mr. Eizember to a mandatory consecutive sentence. Accordingly, this Court should grant Mr. Eizember's petition for certiorari or

summarily reverse. However, because Mr. Eizember recognizes that this Court is deciding similar issues in other cases, he asks the Court to hold this petition in abeyance pending this Court's decisions in *Sessions v. Dimaya*, 137 S. Ct. 31 (mem.), 2016 WL 3232911 (Sept. 29, 2016) (No. 15-1498) (requesting that the Court reverse the Ninth Circuit's finding that §16(b) is unconstitutionally vague) and *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), *petition for cert. filed*, (Dec. 28, 2016) (16-7373) (requesting that the Court find § 924(c)(3)(B) to be unconstitutionally vague post-*Johnson*). *See also United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016) (No. 16-6392) (petition for certiorari filed for consideration on whether § 924(c)(3)(B) is void for vagueness).

I. A certificate of appealability is warranted so that this Court may ultimately consider whether this Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) renders 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague.

The issue Mr. Eizember sought to appeal plainly met the standards announced in *Miller-El* for the issuance of a COA under § 2253(c). Because the Eighth Circuit had already determined that § 924(c)(3)(B) was not subject to the same vagueness challenge as the ACCA's residual clause under *Johnson*, it refused to issue a COA. *See Prickett*, 839 F.3d 697. However, Mr. Eizember should be allowed to appeal his habeas claim as this case presents the need to address the circuit split regarding whether *Johnson* also invalidated the residual clause of § 924(c)(3)(B). The Second, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have ruled that the *Johnson* holding does not invalidate the residual clause of § 924(c). *See Ovalles v. United States*, 861 F.3d 1257, 1259 (11th Cir. 2017); *Prickett*, 839 F.3d at 699-700; *United*

States v. Hill, 832 F.3d 135, 145–50 (2d Cir. 2016); *Taylor*, 814 F.3d at 375–79; *see also United States v. Davis*, 677 F. App'x. 933, 936-38 (5th Cir. 2017) (per curiam) (unpublished); *United States v. Graham*, 824 F.3d 421, 424 n.1 (4th Cir. 2016) (en banc) (rejecting vagueness challenge under plain error review).

By contrast, the Seventh Circuit determined that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). Importantly, the Third, Sixth, Seventh, Ninth, and Tenth Circuits have concluded that *Johnson* renders the identically worded text in 18 U.S.C. § 16(b) void for vagueness.[1] *See Baptiste v. Attorney Gen.*, 841 F.3d 601, 608 (3d Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016); *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016); *United States v. Vivas–Ceja*, 808 F.3d 719, 723 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31, 195 (U.S. Sept. 29, 2016). Thus, this split reveals that the issue is debatable among jurists of reason and the case is worthy of further proceedings.

Review of this case would allow this Court to address a circuit split and determine whether the holding in *Johnson* extends to § 924(c). This case exemplifies the irreversible harm that can be inflicted upon an individual when the appellate courts do not fulfill their duty to review a habeas petition where an individual's constitutional rights are at issue. Mr. Eizember's prison sentence was increased substantially through a mandatory consecutive sentence due to the lower court's

[1] However, the Fifth Circuit found that § 16(b) is not unconstitutionally vague. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016).

finding that the residual clause of § 924(c) was not subject to the same unconstitutional vagueness challenge as the residual clause of the ACCA under § 924(e). At minimum, the Eighth Circuit should have issued a COA to allow Mr. Eizember to preserve his argument for this Court's review.

A. This Court should hold this case in abeyance pending its decisions in *Dimaya* and *Prickett*, which will determine whether 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B) are unconstitutionally vague.

Mr. Eizember recognizes that a decision in his case is contingent upon decisions made in other cases before this Court and asks the Court to hold his case in abeyance pending the outcome of those cases. This Court will hear re-argument in *Dimaya* on October 2, 2017, which presents the question of "[w]hether 18 U.S.C. § 16(b) . . . is unconstitutionally vague." Petition for Writ of Certiorari, at I, *Sessions v. Dimaya*, 137 S. Ct. 31 (2016) (No. 15-1498), 2016 WL 3254180. Section 16(b) defines a "crime of violence" as a felony offense "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." Section 16(b) defines a "crime of violence" using exactly the same language as § 924(c)(3)'s residual clause. Further, this Court has neither denied nor granted certiorari in *Prickett*, the case the Eighth Circuit relied upon in denying Mr. Eizember a COA. *See United States v. Prickett*, No. 16-7373 (arguing that § 924(c)(3)'s residual clause is unconstitutionally vague). *See also United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), *petition for cert. filed*, (Oct. 6, 2016) (No. 16-6392).

When this Court decides *Dimaya*, it will review the Ninth Circuit's decision invalidating § 16(b)'s residual clause. *See Dimaya*, 803 F.3d at 1115. In its reply in *Prickett*, the Government conceded that § 16(b) is identical to § 924(c)(3)(B), and that the Court's decision in *Dimaya* will "resolve any doubt concerning the constitutionality of Section 924(c)(3)(B)." *See* Brief for Respondent at 10, *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (per curiam) (No. 16-7373). Indeed, § 924(c)(3)(B) operates like § 16(b) by using the categorical approach to identify an offense's ordinary case to determine if it qualifies as a crime of violence.

If this Court affirms the Ninth Circuit's ruling that § 16(b) is unconstitutionally vague, such a decision would make it appropriate to grant certiorari in this case and allow Mr. Eizember's case to proceed on review, in which it will ultimately be ripe for reconsideration (GVR). It would therefore constitute an "'intervening development[]' giving rise to a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). Accordingly, the Court should hold petitioner's case in abeyance pending its decision in *Dimaya* since that decision may ultimately make a GVR appropriate in the instant case. In addition, because the Eighth Circuit relied on *Prickett* in denying the COA, this Court's decision in *Prickett* will directly impact the instant case.

B. Conflicting decisions among the circuits reveal that the precise bounds of *Johnson* are far from clear and make this case ripe for review.

Alternatively, if this Court does not hold this case in abeyance pending its decision in *Dimaya* and *Prickett*, this Court should grant review and order a COA be issued so that Mr. Eizember can seek resolution to the conflict among lower courts to determine whether § 924(c)(3)(B) is unconstitutional in light of this Court's holding in *Johnson*. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (granting certiorari in light of a circuit split on whether a 42 U.S.C. § 1983 excessive force claim must satisfy the subjective or objective standard).

Conflicting decisions in multiple circuits reveal the precise bounds of *Johnson* are far from clear. This lack of clarity has led to substantial confusion in lower courts. Although there is no meaningful distinction between § 16(b) and § 924(c)(3)(B), some courts, such as the Sixth Circuit, have found that § 16(b) is unconstitutionally vague while finding that § 924(c)(3)(B) is not. *Compare Taylor*, 814 F.3d at 375-79 (finding the *Johnson* holding does not invalidate § 924(c)(3)(B)), *with Shuti*, 828 F.3d at 446 (invalidating § 16(b) as void for vagueness).

Mr. Eizember asks this Court to adopt the reasoning and conclusion of the Seventh Circuit that § 924(c)(3)(B) is void for vagueness. *Compare, e.g., Hill*, 832 F.3d at 149-50 (holding § 924(c)(3)(B) not unconstitutionally vague), and *Taylor*, 814 F.3d 340 at 375-76 (same), with *Cardena*, 842 F.3d at 996 (finding the residual clause in § 924(c) to be unconstitutionally vague). Not only is the Eighth Circuit's decision in conflict with the Seventh Circuit, it also conflicts with the holdings in the Second, Third, Sixth, Ninth, and Tenth Circuits, which held the identically worded § 16(b) to

be unconstitutionally vague. *See Baptiste*, 841 F.3d at 608; *Shuti*, 828 F.3d 440; *United States v. Vivas–Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya*, 803 F.3d 1110; *Golicov*, 837 F.3d 1065. *But see Gonzalez-Longoria*, 831 F.3d at 678-79 (finding § 16(b) is not unconstitutionally vague after *Johnson*).

To determine whether an offense qualifies as a "crime of violence" under § 924(c)(3), courts apply the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994), *abrogated on other grounds by United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007). *See also United States v. Piccolo*, 441 F.3d 1084, 1086–87 (9th Cir. 2006) ("In the context of crime of violence determinations under section 924(c), our categorical approach applies regardless of whether we review a current or prior crime."); *Vivas–Ceja*, 808 F.3d 719 (same). This process requires the Court to look to the elements of the offense rather than the particular facts underlying the defendant's case. *Descamps v. United States*, 133 S. Ct. 2276, 2285, *reh'g denied*, 134 S. Ct. 41 (2013).

Mr. Eizember maintains that the definition of a "crime of violence" in § 924(c)(3)(B) is unconstitutionally vague after *Johnson* because "[s]ubsection (B) is virtually indistinguishable from the clause in Johnson that was found to be unconstitutionally vague." *Cardena*, 842 F.3d at 996. Whereas § 924(c)(3)(B) defines a "crime of violence" as a felony "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," the ACCA's residual clause defines a "violent felony" as one

that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). Section 16(b) defines a "crime of violence" using exactly the same language as § 924(c)(3)(B).

This Court in *Johnson* recognized that two aspects of the ACCA's residual clause "conspire[d] to make it unconstitutionally vague"—the ordinary case inquiry and the serious potential risk inquiry. 135 S. Ct. at 2557–58. Indeed, there are many different conceptions of what the ordinary case of a crime involves and "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what [an] 'ordinary' [case] involves." *Id.* Second, the clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* Thus, the combination of "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony . . . produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* *Johnson*, 135 S. Ct. at 2558 ("[T]he 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."); *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.").

"The ordinary case inquiry finds its roots in the Supreme Court's opinion in *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L.Ed.2d 532 (2007), which addressed the operation of the categorical approach in the related ACCA residual clause context." *Baptiste*, 841 F.3d at 608. "[E]very conceivable factual offense covered by a statute" need not "necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James*, 550 U.S. at 1586. Rather, the "proper inquiry" under the categorical approach is "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* (emphasis added).

The Third Circuit recognized that "[g]iven that the ordinary case inquiry, as used in the § 16(b) context, is derived from the residual clause context, we can be certain that the ordinary case inquiry is identical in both contexts." *Baptiste*, 841 F.3d at 617. Section 16(b)'s text is identical to § 924(c)(3)(B). Thus, in the context of § 924(c)(3)(B), a court must ask "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a [substantial risk of the intentional use of force]." *James*, 550 U.S. at 208 (emphasis added). "Because [§ 924(c)(3)(B), like § 16(b),] 'offers no reliable way to choose between . . . competing accounts of what' that 'judge-imagined abstraction' of the crime involves, . . . the ordinary case inquiry is as indeterminate in the § 16(b) [and § 924(c)(3)(B)] context as it was in the residual clause context." *Baptiste*, 841 F.3d at 617 (citing *Golicov*, 837 F.3d at 1072–73; *Shuti*, 828 F.3d at 447; *Vivas-Ceja*, 808 F.3d at 722–23; *Dimaya*, 803 F.3d at 1115–16).

Thus, the ordinary case inquiry is the correct analytical approach in the § 924(c)(3)(B) context, as it is identical to §16(b). "Section 16(b) requires courts to ask whether a crime 'by its nature' presents a substantial risk of the use of force. Accordingly, in *Leocal v. Ashcroft*—the Court's only § 16(b) case—the Court stated that § 16(b) 'covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.'" *Baptiste*, 841 F.3d at 609 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)) (emphasis added)). "[A]sking whether the least culpable conduct sufficient to support a conviction for a crime presents a certain risk is inconsistent with asking whether that crime 'by its nature' or 'naturally' presents that risk." *Id.* at 609-10 (citing *Perez-Munoz v. Keisler*, 507 F.3d 357, 364 (5th Cir. 2007) (noting that every violation of a state criminal statute "need not be violent" for the crime "to be a crime of violence *by its nature*" (emphasis added)); *United States v. Lucio-Lucio*, 347 F.3d 1202, 1204 n.2 (10th Cir. 2003) ("We do not take the phrase 'by its nature' as an invitation to search for exceptional cases.")).

As to the risk inquiry, while the ACCA's residual clause asks how much risk it takes for a crime to present a "serious potential risk" of physical injury, § 924(c)(3)(B) asks how much risk it takes for a crime to present a "substantial risk" of the intentional use of force. Section 924(c)(3)(B) replaces the ACCA's residual clause's "serious" with the word "substantial" and "potential risk" with "risk." However, a "serious risk" is equally as vague as a "substantial risk." *See Baptiste*, 841 F.3d at 617. Although a "potential risk" encompasses more conduct than a simple "risk," "this

minor linguistic distinction is insufficient to bring § 16(b) [and §924(c)(3)(B)] outside of the reasoning of *Johnson*." *Id.* (citing *James*, 550 U.S. at 207–08 ("[T]he combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk.'")). "The critical feature of the 'serious potential risk' inquiry that rendered it indeterminate in *Johnson* was not that the risk was 'potential,' but that the residual clause required the use of a vague 'serious risk' inquiry." *Id.* Importantly, this Court did not draw any vagueness distinction between the phrases based on the word "potential." *See Johnson*, 135 S. Ct. at 2561.

The categorical approach applied in the § 924(c)(3) context is analogous to the categorical approach applied in the ACCA, which requires a court to "assess[ ] whether a crime qualifies as a violent felony in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Johnson*, 135 S. Ct. at 2557 (quotations omitted). The differences in the language used in the ACCA's residual clause versus § 924(c)(3)'s residual clause are not material insofar as the reasoning in *Johnson* is concerned. *See Dimaya*, 803 F.3d at 1117 ("Section 16(b) gives judges no more guidance than does the ACCA [residual clause] as to what constitutes a substantial enough risk of force to satisfy the statute."); *Vivas–Ceja*, 808 F.3d at 722 ("Just like the [ACCA] residual clause, § 16(b) offers courts no guidance to determine when the risk involved in the ordinary case of a crime qualifies as 'substantial.'").

The Ninth Circuit in *Dimaya* explained that the flaws in comparing the enumerated offenses to the ordinary case are not the only objectionable issue with the ACCA's residual clause:

> It is true that, after the Court set forth its holding in *Johnson*, it cited [18 U.S.C. § 924(e)(2)(B)(ii)'s] four enumerated offenses in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term "serious potential risk." In doing so, however, it stated that while the listed offenses added to the uncertainty, the fundamental reason for the Court's holding was the residual clause's application of the "serious potential risk" standard to an idealized ordinary case of the crime. In short, this response clearly reiterated that what distinguishes ACCA's residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the "ordinary case" analysis. *Johnson* therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses.

803 F.3d at 1117–18 (internal citations and footnotes omitted). Thus, *Dimaya* held that the identically worded residual clause of § 16(b) is unconstitutionally vague because, like the ACCA residual clause, it "requires courts to (1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real-world facts or statutory elements and (2) determine by vague and uncertain standards when a risk is sufficiently substantial." 803 F.3d at 1120 (internal quotation marks omitted). The Seventh Circuit in *Vivas-Ceja* reached the same conclusion:

> The government insists that *Johnson* doesn't compel this conclusion because the Court placed special emphasis on the confusion created by the list of enumerated crimes preceding the residual clause, a feature not present in § 16(b). The government overreads this part of the Court's analysis. As we've explained, the heart of the Court's opinion demonstrates why the two aspects of the residual clause's categorical approach—the ordinary-case determination and the risk assessment—"conspire" to make the clause unconstitutionally vague. Only later did

> the Court observe that the residual clause also "forces courts to interpret serious potential risk in light of the four enumerated crimes," which are "far from clear in respect to the degree of risk each poses." In other words, the enumeration of specific crimes did nothing to clarify the quality or quantity of risk necessary to classify offenses under the statute. The list itself wasn't one of the "two features" that combined to make the clause unconstitutionally vague.

808 F.3d at 723. Indeed, the Third Circuit astutely reasoned that the

> confusing list of examples preceding the [ACCA's] residual clause only added to the residual clause's already-existing vagueness. Indeed, the language in *Johnson* by no means suggests that the list of examples was an integral component of the Court's finding that the residual clause was unconstitutionally vague. . . . Rather, as the Supreme Court made clear, the vagueness was the product of "[t]wo features of the residual clause"—the ordinary case inquiry and the risk inquiry—which, as we explained above, are present in the § 16(b) analysis as well. *Johnson*, 135 S. Ct. at 2557.

Baptiste, 841 F.3d at 620. Because § 924(c)(3)'s residual clause requires the same categorical approach as § 16(b), and consists of the same language, this analysis applies here.

Simply put, "[t]he fact that the language in the [ACCA residual clause] was made even worse by the additional presence of the four listed crimes does not save the [section 924(c)(3)] residual clause from impermissible vagueness." *United States v. Edmundson*, 153 F. Supp. 3d 857, 862 (D. Md. 2015). In fact, the lack of examples in § 16(b), and by extension § 924(c)(3)(B), makes the text "more vague than the residual clause." *Dimaya*, 803 F.3d at 1118 n.13. The enumerated examples "provide at least some guidance as to the sort of offenses Congress intended for the [residual clause] to cover." *Id.* Such guidance is absent from § 924(c)(3)(B), which contains no example offenses. Thus, "courts are left to undertake the [§ 924(c)(3)(B)] analysis

guided by nothing more than other judicial decisions that can lay no better claim to making sense of the indeterminacy of the analysis in a principled way than we have today." *Baptiste*, 841 F.3d at 620.

Here, the district court and the Eighth Circuit denied a COA based upon the Eighth Circuit's erroneous decision in *Prickett*. The Seventh Circuit in *Cardena* concluded that the residual clause found in § 924(c)(3)(B) is unconstitutionally vague. Mr. Eizember maintains the same reasoning applies here and he encourages this Court to adopt the reasoning and conclusion of the Seventh Circuit, which is supported by the Third, Sixth, Seventh, Ninth, and Tenth Circuit's decisions regarding the identically worded text found in § 16(b). In doing so, Mr. Eizember's federal kidnapping conviction is no longer a crime of violence because it falls within the residual clause of § 924(c)(3)(B). In *Delgado-Hernandez*, the Ninth Circuit pointed out that "the Supreme Court has seen fit to assume, admittedly without deciding, that [federal kidnapping] constitutes a crime *that presents a substantial risk of force*." 697 F.3d at 1130 (emphasis added). This demonstrates that kidnapping has historically been considered to be a crime of violence under § 924(c)(3)(B) because it involves the risk that force will be used or that injury will result, and not because it has as an element the use or threatened use of force.

Based on conflicting Eighth Circuit and Seventh Circuit precedent, Mr. Eizember's conviction under § 924(c)(3)(B) is erroneous, and therefore he should be issued a COA so that he can proceed in this matter. A grant of Mr. Eizember's petition for a writ of certiorari is necessary to clarify whether *Johnson*'s holding extends to a

"crime of violence" under § 924(c), as this causes a disparity in sentencing as defendants will obtain different results depending upon the circuit in which they are convicted.

CONCLUSION

For all of the foregoing reasons, Petitioner Scott James Eizember respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 22nd day of September, 2017.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

NO._____

SCOTT JAMES EIZEMBER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I, Anna M. Williams, do swear or declare that on this date, September 22, 2017, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(and via electronic mail to SupremeCtBriefs@USDOJ.gov)

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 22, 2017.

Anna M. Williams
Court-Appointed Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1406

Scott James Eizember

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Ft. Smith
(2:16-cv-02129-PKH)

JUDGMENT

Before BENTON, ARNOLD and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

June 27, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA PLAINTIFF/RESPONDENT

v. No. 2:04-CR-20006

SCOTT JAMES EIZEMBER DEFENDANT/PETITIONER

ORDER

The Court has received a report and recommendations (Doc. 58) from United States Magistrate Judge James R. Marschewski. Petitioner Scott James Eizember has filed objections (Doc. 59). The Magistrate recommends that Petitioner's motion to vacate (Doc. 53) be denied. The Magistrate further recommends that no certificate of appealability issue. The fundamental question in this case—whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague—has been explicitly answered in the negative by the Eighth Circuit. *See United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) ("We therefore conclude that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague."). Petitioner objects to the Magistrate's recommendation that no certificate of appealability should issue because the *Prickett* decision is the subject of a pending petition for certiorari to the Supreme Court and because of a circuit split of authority on this fundamental issue.

No certificate of appealability should issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is, Petitioner must show that a reasonable jurist would find the Court's ruling debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner's objection argues that because there is a circuit split on the vagueness of § 924(c)(3)(B), because a petition for certiorari will be filed in *Prickett* seeking to overturn the Eighth Circuit's holding, and because other courts have found similar statutes vague,

it should be clear that reasonable jurists would find the Court's ruling debatable or wrong. Petitioner's argument is persuasive—except to district court judges in the Eighth Circuit. No reasonable jurist can find the Court's ruling debatable or wrong because that ruling is, as Petitioner concedes, the ruling required of this Court. A certificate of appealability may be had, if at all, from the Court of Appeals.

Upon due consideration, the Court finds that Petitioner's objections offer neither law nor fact requiring departure from the Magistrate's findings and recommendations, that the Magistrate's report does not otherwise contain clear error, and that the report (Doc. 58) should be, and hereby is, ADOPTED IN ITS ENTIRETY.

IT IS THEREFORE ORDERED that Petitioner's motion to vacate (Doc. 53) is DENIED and this case is DISMISSED WITH PREJUDICE. No certificate of appealability shall issue.

Judgment will be entered accordingly.

IT IS SO ORDERED this 27th day of December, 2016.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES PLAINTIFF/RESPONDENT

V. No. 04-20006
No. 16-02129

SCOTT JAMES EIZEMBER DEFENDANT/PETITIONER

REPORT and RECOMMENDATION

Before the court is the Petitioner's Motion to Vacate, Set Aside, or Correct a Sentence Pursuant to 28 U.S.C. Section 2255 (ECF No. 53) filed June 10, 2016. The United States of America filed a Response (ECF No. 57) on October 20, 2016. The Petitioner has not filed a Reply and the matter is ready for Report and Recommendation.

I. Background

On January 7, 2004, Scott James Eizember was named in a four count Indictment returned by the federal grand jury for the Western District of Arkansas. (Doc. 1). Counts One and Two charged Eizember with kidnapping, Count Three charged him with using, carrying, and brandishing a firearm during the kidnapping, and Count Four charged him with carjacking. On December 7, 2005, a jury found Eizember guilty on all four counts of the Indictment. (Doc. 36).

On July 28, 2006, the Court sentenced Eizember on Counts One and Two to 216 months imprisonment with term to run concurrently and 5 years supervised release with term to run concurrently. As to Count Three, the Court sentenced Eizember to 84 months imprisonment with the term to run consecutively and 5 years supervised release to run concurrently. The Court further sentenced Eizember on Count Four to 180 months imprisonment with the term to run

concurrently (and all terms to run consecutively to the undischarged term of his Oklahoma imprisonment) and 3 years of supervised release with the term to run concurrently. (Doc. 41). On June 10, 2016, Eizember filed the instant Motion for Relief Under 28 U.S.C. § 2255 (the § 2255 Motion) contending that the court's sentence in Count Three (carrying, and brandishing a firearm during the kidnapping) was unconstitutional in light of Johnson v. United States . (Doc. 53).

II. Discussion

A. Johnson v. United States

The Petitioner's case centers around the United States Supreme Court Case of Johnson v. United States which was decided in 2015. In the Johnson case the Supreme Court, Justice Scalia, held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process, overruling *James v. U.S.*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532, and *Sykes v. U.S.*,131 S.Ct. 2267, 180 L.Ed.2d 60, and abrogating *U.S. v. White*, 571 F.3d 365, *U.S. v. Daye*, 571 F.3d 225, and *U.S. v. Johnson*, 616 F.3d 85. *See Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. See § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. See § 924(a)(2). But if the violator has three or more earlier convictions for a **"serious drug offense"** or a **"violent felony,"** the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows:

"any crime punishable by imprisonment for a term exceeding one year ... that—

"(I) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
"(ii) is burglary, arson, or extortion, involves use of explosives, **or otherwise involves conduct that presents a serious potential risk of physical injury to another**." § 924(e)(2)(B) (emphasis added).

The emphasized text is referred to as the residual clause and it is this clause that the Supreme Court declared unconstitutional.

In 2016 the court determined *Welch v. United States*. The Supreme Court, Justice Kennedy, held that Supreme Court's Johnson decision, which held that the definition of prior "violent felony" in the residual clause of the ACCA was unconstitutionally vague under due process principles, announced a substantive rule that applied retroactively on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

Both Johnson and Welch delt with the ACCA and specifically with a determination of whether prior offenses constituted a "violent offense" under the residual clause. This case, by contrast, involves an attempt to infer that the statutory language of Section 924(c) is controlled by the decision of Johnson v. United States and is, therefore, unconstitutionally vague.

B. Section 924(c)(3)(B)

Section (c)(1)(A) provides in part that any person who, "during and in relation to any crime of violence...uses or carries a firearm, or who, in furtherance of any such crime possesses a firearm," shall be sentenced an additional punishment.

Section 924(c)(3)(B) defines a crime as a crime of violence if "by its nature it involves a substantial risk that **physical force** against the person or property of another may be used in the course of committing the offense." *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (quoting 18 U.S.C. § 924(c)(3)(B)). A court's determination of "the nature of a crime requires an

examination of the elements which compose it." Id. "This is the categorical approach." Id.; see *also Omar v. I.N.S.*, 298 F.3d 710, 714 (8th Cir. 2002) (recognizing that a categorical approach applies to § 924(c)(3)(B)).

The Eighth Circuit has specifically held that Johnson "does not render § 924(c)(3)(B) unconstitutionally vague." *See United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016). The Prikett decision noted " "First, the statutory language of § 924(c)(3)(B) is distinctly narrower, especially in that it deals with **physical force** rather than **physical injury**." *Taylor*, 814 F.3d at 376. The "[r]isk of physical force against a victim" that § 924(c)(3)(B) requires "is much more definite than [the] risk of physical injury to a victim" that the ACCA residual clause required. Id. at 376–77. Section 924(c)(3)(B) also contains the "narrowing aspects" of "requiring that the risk of physical force arise 'in the course of' committing the offense" and "requir [ing] that the felony be one which 'by its nature' involves the risk that the offender will use physical force." Id. at 377 (quoting 18 U.S.C. § 924(c)(3)(B)). Unlike "the wide judicial latitude permitted by the ACCA's coverage of crimes that 'involve[ ] conduct' presenting a serious risk of injury," § 924(c)(3)(B) does not permit "a court to consider risk-related conduct beyond that which is an element of the predicate crime since the provision covers offenses that 'by [their] nature' involve a substantial risk that force may be used." Id. (alterations in original). Nor does § "924(c)(3)(B)'s requirement that physical force 'be used in the course of committing the offense' permit[ ] ... inquiry into conduct following the completion of the offense." Id. Instead, "the force must be used and the risk must arise in order to effectuate the crime. Thus, unlike the ACCA residual clause, § 924(c)(3)(B) does not allow courts to consider 'physical injury [that] is remote from the criminal act,' a consideration that supported the Court's vagueness analysis in Johnson." Id.

The court also noted that "§ 924(c)(3)(B) does not "link[ ] the 'substantial risk' standard,

through the word otherwise, 'to a confusing list of examples.' *700 " Id. (quoting Johnson, 135 S.Ct. at 2561). Therefore, courts need not "analogiz[e] the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives." Id.

The Prickett rationale was recently affirmed in the Eighth Circuit in United States v. Pruitt where Pruitt had argued that his sentence was based on Section 924(c)(3). The court held that "Because Johnson does not apply to Pruitt's sentence, he cannot show prejudice. As a result, his claim is procedurally defaulted." *United States v. Pruitt*, No. CR13131DSDTNL, 2016 WL 6601642, at *2 (D. Minn. Nov. 7, 2016)

The Petitioner's argument that Section 924(c)(3)(B) is constitutionally vague is not supported in the Eighth Circuit.

C. Kidnapping

The Petitioner contends that the underlying statute that the Petitioner was convicted on (Kidnapping) is not a crime of violence because of Johnson v. United States. However, as noted above, the Johnson case does not apply to 18 U.S.C. §924(c). The Eighth Circuit has also held that "without question, kidnapping is a crime of violence for purposes of §924(c). *See United States v. Green*, 521 F.3d 929, 933 (8th Cir. 2008) citing *United States v. Wright*, 340 F.3d 724, 731-32 (8th Cir.2003).

D. Evidentiary Hearing

To warrant a certificate of appealability, a defendant must make a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). A "substantial showing" requires a petitioner to establish that "reasonable jurists" would find the court's assessment of the constitutional claims "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). The court is firmly convinced that Johnson does not apply to the Petitioner's

sentence and that reasonable jurists could not differ on the result.

III. Conclusion

Based upon the forgoing I recommend that the instant motion, filed under 28 U.S.C. §2255 be **DISMISSED with PREJUDICE**.

The parties have fourteen days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. Section 636(b)(1). The failure to file timely written objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger de novo review by the district court.

DATED December 2, 2016.

/s/ J. Marschewski
HONORABLE JAMES R. MARSCHEWSKI
UNITED STATES MAGISTRATE JUDGE