No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

THOMAS CURETON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED

Whether Mr. Cureton's § 924(c) conviction for brandishing a firearm during a crime of violence must be vacated because the Interstate Communication of Ransom Request offense underlying the § 924(c) conviction categorically fails to qualify as a crime of violence within the meaning of § 924(c)(3)(A) and the residual clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson v. United States,* 135 S. Ct. 2551 (2015)?

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Petitioner, THOMAS CURETON, respectfully prays that a writ of certiorari issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on April 10, 2018, affirming the Petitioner's convictions and sentences.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit after remand from the Supreme Court appears in the Appendix to this Petition at page 1. The decision of the district court after limited remand from the Seventh Circuit appears in the Appendix to this Petition at page 5. The decision of the United States Court of Appeals for the Seventh Circuit after limited remand to the district court appears in the Appendix to this Petition at page 9.

JURISDICTION

1. The Southern District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

3. Petitioner seeks review in this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his sentence pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 United States Code § 875(a):

> Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or

reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

Title 18 United States Code § 924(c)(3):

> For purposes of this subsection the term "crime of violence" means a 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.

STATEMENT OF THE CASE

I. Factual Background and Preliminary Proceedings.

In late December of 2009 and early January of 2010, a confidential informant purchased crack cocaine from Petitioner Thomas Cureton. *United States v. Cureton*, 739 F.3d 1032, 1035 (7th Cir. 2014) ("*Cureton I*"). Based on the controlled buys and Mr. Cureton's possession of the firearms after sustaining a felony conviction, he was charged by second superseding indictment with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 1); and four counts of distributing crack cocaine within 1,000 feet of an elementary school in violation of 21 U.S.C. § § 841(a)(1) and (b)(1)(C) and 860 (Counts 2-5). (106 R. at 42.)[1] This case was assigned district court

[1] Citations in this petition are as follows: District Court Docket: "[case number] R. at __;" Transcripts: "[date] Tr. at __;" Presentence Investigation Reports: "[date] PSR at __;" Court of Appeals Docket: "[case number] R. at __;" Supreme Court Docket: "16-8644 S. Ct. R.;" and Appendix to this Petition: "App. at __."

number 10 CR 30106 and Mr. Cureton was arrested in late June of 2010.

Prior to his arrest, Mr. Cureton sold crack cocaine to an individual named Eddie Sakosko on June 12, 2010. *Cureton I*, 739 F.3d at 1035. After selling Sakosko and his friends crack, Mr. Cureton pulled out a gun and demanded money from Sakosko. *Id.* at 1036. Sakosko had approximately $9,800 in cash on him from the recent sale of his home. *Id.* The firearm discharged when Sakosko tried to get it away from Mr. Cureton but no one was injured. *Id.* Mr. Cureton left with approximately $9,500. *Id.* Sakosko reported the robbery to the police. *Id.*

On June 14, 2010, Mr. Cureton and his wife, LaQuita, left the apartment they shared with Demetrius Anderson, LaQuita's brother, and Anderson's girlfriend, Ashley Lawrence. *Id.* Shortly after they left, the police came looking for Mr. Cureton and Anderson told LaQuita over the phone that the police had been there. *Id.* LaQuita told Anderson that they wanted the cash hidden in the freezer and their puppy brought to them and they decided Lawrence should meet LaQuita somewhere to give her the cash and puppy because the police would not recognize Lawrence. *Id.* Lawrence placed $9,000 in cash in a newspaper, put the newspaper in a bag, and carried the bag and the puppy to a nearby park. *Id.*

At some point during her walk, Lawrence claimed she dropped the cash

and called LaQuita as soon as she noticed it was gone. *Id.* Lawrence was retracing her steps to find the money and Mr. Cureton arrived, demanding to know where the money was. *Id.* He ordered Lawrence to get in his car and drove to a friend's house where he put her in the basement, punched her, threatened her, and questioned her about the money. *Id.* Mr. Cureton eventually allowed Lawrence to return to the park to look for the lost money but the money could not be located. *Id.* They then returned to the house where Mr. Cureton again punched Lawrence, broke her nose, kicked her, choked her, and tied her up. *Id.*

At some point, Mr. Cureton made a phone call and told someone to bring him "that thing" and his brother arrived with a firearm. *Id.* Mr. Cureton put the firearm to Lawrence's head and told her it was her last chance. *Id.* LaQuita intervened and they instructed Lawrence to start making phone calls to her family saying she needed money to get out of a problem. *Id.* After several phone calls, Lawrence's grandfather spoke with Mr. Cureton and agreed to wire $4,500 to Cureton. *Id.* When the Curetons returned to their house, police were waiting for them and they were arrested. *Id.*

This conduct resulted in a second case being filed in federal court charging Mr. Cureton in case number 10 CR 30200 with interstate communication of a ransom request in violation of 18 U.S.C. §§ 2 and 875(a) (Count 1), possession of a firearm in furtherance of a crime of violence, specifically the interstate

communication of a ransom request as alleged in Count 1, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A) (Count 2), attempted extortion in violation of 18 U.S.C. §§ 2 and 1951(a) (Count 3), and possession of a firearm in furtherance of a crime of violence, specifically the attempted extortion alleged in Count 3, in violation of 18 U.S.C. §§ 2 and 924(c)(1)(A) (Count 4).[2] (200 R. at 31.) The two cases were ultimately ordered to be tried together before the same jury. (5/8/11 Tr. at 3; 7/25/11 Tr. at 4.)

II. Jury Trial.

A jury trial was held from August 15, 2011, until August 18, 2011. (106 R. at 113, 115, 117, 118; 200 R. at 66, 71, 74, 75.) The jury returned guilty verdicts on all counts except for Count 5 in case number 106, the drug case. (106 R. at 125, 127, 129, 131, 133; 200 R. at 79, 81, 83, 85.)

III. The First Presentence Investigation Report.

Utilizing the 2010 version of the sentencing guidelines, the probation officer prepared the first Presentence Investigation Report in this case. (2010 PSR at 13.) The resulting guidelines range was 360 months to life in prison, but because of the various statutory maximums and minimums, the effective range was much more complicated. (2010 PSR at 26.) For case number 106, the

[2] This count was ultimately vacated by the Seventh Circuit Court of Appeals on Mr. Cureton's first appeal.

guidelines range for Count 1 was 120 months, the statutory maximum. The guidelines range for Counts 2 through 4 was 360 to 720 months on each count because those counts had statutory maximums of 60 years. For case number 200, the guidelines range for Counts 1 and 3 was 240 months, the statutory maximum for each count. The guidelines range for Count 2, a § 924(c) count, was 84 months, consecutive to all other sentences. The guidelines range for Count 4, the second § 924(c) count, was 300 months, consecutive to all other sentences. The effective guidelines range was 744 months (360 months plus 84 months plus 300 months.) (2010 PSR at 26.)

IV. The First Sentencing Hearing.

The district court held the first sentencing hearing on January 30, 2012. (106 R. at 152; 200 R. at 102.) Government counsel recommended a total sentence of 744 months and defense counsel recommended a total sentence of 320 months. (1/30/12 Tr. at 11, 25.) The district court ultimately imposed a total sentence of 744 months which consisted of 120 months on Count 1 of case number 106, 360 months on Counts 2, 3, and 4 of case number 106, all running concurrently to each other. (106 R. at 154.) In case number 200, the court imposed 240 months on both Count 1 and Count 3, running concurrently to each other and concurrently to the sentences imposed in case number 106. (200 R. at 104.) For Count 2 of case number 200, the court imposed a consecutive sentence of 84

months and for Count 4 of case number 200, the court imposed a consecutive sentence of 300 months. (200 R. at 104.) Mr. Cureton filed timely notices of appeal on January 30, 2012. (106 R. at 156; 200 R. at 106.)

V. The First Appeal.

The Seventh Circuit Court of Appeals heard Mr. Cureton's first appeal in case numbers 12-1250 and 12-1251. *Cureton I*, 739 F.3d at 1034. In that appeal, Mr. Cureton challenged the admission of prior bad acts under Federal Rule of Evidence 404(b), the conviction of two § 924(c) offenses where there was only a single use of a firearm, and whether his convictions and sentences violated *Alleyne v. United States*, 570 U.S. 99 (2013). *Cureton I*, 739 F.3d at 1037.

The Seventh Circuit rejected Mr. Cureton's 404(b) argument and his *Alleyne* argument. *Cureton I*, 739 F.3d at 1045. However, the Court reversed Mr. Cureton's second § 924(c) conviction (Count 4 in case number 200) because he only used a firearm once in the simultaneous commission of two predicate offenses and he could only be convicted of one violation of § 924(c). *Cureton I*, 739 F.3d at 1043. The Court declined the relief Mr. Cureton requested, which was to remand with instructions to simply subtract the 300 months imposed on the second § 924(c) count from the total sentence. *Cureton I*, 739 F.3d at 1045. Instead, the Court agreed with the government's position that the case should be remanded for resentencing. *Id.* The Court stated:

> We cannot be assured that had the district court known Cureton could be convicted of only one § 924(c)(1) count, its consideration of the sentence it thought appropriate and that met the requirements of 18 U.S.C. § 3553(a) would have meant a sentence of 744 months minus twenty-five years. As a result, we vacate Cureton's sentence and remand for resentencing, and we decline to restrict the court's consideration on resentencing to simply excising the twenty-five year sentence as Cureton seeks.

Cureton I, 739 F.3d at 1045.

VI. The Second Presentence Investigation Report.

The probation officer prepared a revised PSR on April 14, 2014. (2014 PSR at 13.) The guideline calculations were identical to the first version of the guidelines. (2014 PSR at 14-20.) The primary difference was that Count 4 of the 200 case and the associated 300 month mandatory consecutive sentence for the conviction on Count 4 was removed. The effective guidelines range was 444 months (360 months plus 84 months).

VII. The Second Sentencing Hearing.

The district court held a resentencing hearing on July 16, 2014. (7/16/14 Tr. at 2.) The government recommended a total sentence of 444 months and defense counsel recommended a total sentence of 300 months in prison. (7/16/14 Tr. at 24; 27.) The court considered various aggravating and mitigating factors pursuant to § 3553(a) and determined the appropriate sentence was 444 months, or 37 years, in prison. (7/16/14 Tr. at 34-39.)

VIII. The Second Appeal.

On April 1, 2015, Mr. Cureton filed an opening brief raising one issue: "Whether . . . the district court erred by failing to consider the particular circumstances of this case Mr. Cureton's characteristics when imposing conditions of supervised release and failed to define such conditions in a way that put Mr. Cureton on notice of proscribed behavior?" (14-2576 R. at 19.) On May 1, 2015, the government filed a brief conceding the conditions of supervised release must be vacated and remanded for resentencing. (14-2576 R. at 21.) On June 30, 2015, this Court reversed and remanded for resentencing, holding:

> On appeal from the resentencing, Mr. Cureton challenges only the imposition of certain standard release conditions. The district court read the conditions into the record, but it did not make findings as to why each one was necessary. The district court must consider the sentencing factors set forth in 18 U.S.C. § 3583(d) and state its reasons for imposing particular conditions. *United States v. Thompson,* 777 F.3d 368, 382 (7th Cir. 2015). The government agrees that remand is appropriate but suggests that this court should vacate only the conditions of supervised release, not the entire sentence. *See United States v. Sewell*, 780 F.3d 839, 852 (7th Cir. 2015). Because there might be an interplay between prison time and the term and conditions of supervised release, we vacate Mr. Cureton's sentence in its entirety. *United States v. Kappes,* 782 F.3d 828 (7th Cir. 2015).
>
> The case is REMANDED to the district court for resentencing in light of *Thompson*. *See also United States v. Downs,* 784 F.3d 1180 (7th Cir. 2015); *United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015).

(14-2576 R. at 27.)

IX. The Third Sentencing Hearing.

The district court held the third sentencing hearing in this case on

November 3, 2015. (11/13/15 Tr. at 1.) The court considered Mr. Cureton's arguments for a lower sentence but ultimately imposed the same sentence as in the second sentencing hearing. (11/13/15 Tr. at 25.) The total sentence was 444 months in prison, consisting of 120 months on Count 1 of case number 106, 360 months on Counts 2, 3, and 4 of case number 106, all running concurrently to each other. (106 R. at 247.) In case number 200, the court imposed 240 months on both Count 1 and Count 3, running concurrently to each other and concurrently to the sentences imposed in case number 106. (200 R. at 201.) For Count 2 of case number 200, the court imposed a consecutive sentence of 84 months. (200 R. at 201.) Mr. Cureton filed timely notices of appeals in both cases on November 16, 2015. (106 R. at 249; 200 R. at 203.)

X. The Third Appeal.

On June 7, 2016, Mr. Cureton filed an opening brief in case numbers 15-3575 and 15-3581 and challenged the determination that his conviction for communication of a ransom demand under § 875(a) was a crime of violence under § 924(c)(3). On January 5, 2017, the Seventh Circuit first held that the residual clause contained in § 924(c)(3)(B) was unconstitutionally vague following this Court's decision in *Johnson,* 135 S. Ct. at 2551, stating:

> We recently adopted the position that Cureton advances. In *United States v. Cardena,* 842 F.3d 959, 995-96 (7th Cir. 2016), we described § 924(c)'s residual clause as "virtually indistinguishable from the clause in *Johnson* that was found to be unconstitutionally

> vague." We also explained that our decision in *United States v. Vivas-Ceja*, 808 F.3d 719, 721 (7th Cir. 2015), invalided the residual clause found in 18 U.S.C. § 16(b), which is identical to the clause in § 924(c)(3)(B). Accordingly we concluded that § 924(c)(3)(B) suffers from the same constitutional infirmities that invalidated the residual clauses in *Johnson* and *Vivas-Ceja. Cardena,* 842 F.3d at 996.

United States v. Cureton, 845 F.3d 323, 325 (7th Cir. 2017) ("*Cureton II*"). The Court then turned to whether § 875(a) was a crime of violence under the elements clause, § 924(c)(3)(A). After noting the government had conceded a conviction under § 875(a) did not contain the threat of force as an element, *Cureton II,* 845 F.3d at 326, the Court held:

> [A] demand for ransom necessarily includes at least an implied threat that the kidnapper will use force against the captive if the demand is not satisfied. The content of the implied threat "Or else!" in a ransom demand is understood as a threat of violence. Otherwise a kidnapper's demand or request for a "ransom" would be meaningless.

Id.

XI. Prior Proceedings in the Supreme Court.

On April 4, 2017, Mr. Cureton filed a petition for writ of certiorari with the Supreme Court. (16-8644 S. Ct. R.) He raised two issues in the petition: (1) whether this Court should remand this matter for consideration of *Dean v. United States*, 137 S. Ct. 1170 (2017), which directly overruled existing Seventh Circuit precedent regarding the district court's ability to consider the sentence on the § 924(c) conviction in conjunction with the sentence on the underlying offense and

(2) whether Mr. Cureton's § 924(c) conviction for brandishing a firearm during a crime of violence must be vacated because the Interstate Communication of Ransom Request offense underlying the § 924(c) conviction categorically fails to qualify as a crime of violence within the meaning of § 924(c)(3)(A) and the residual clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson*? (16-8644 S. Ct. R.)

On August 7, 2017, the Solicitor General filed a Memorandum and agreed that the matter should be remanded to the Seventh Circuit on the *Dean* issue: "Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Dean*." (16-8644 S. Ct. R.) Regarding the § 924(c)(3) arguments, the Solicitor General stated "Petitioner may review his crime-of-violence contentions following a remand, including by petitioning for a writ of certiorari after the court of appeals has entered its judgment." (16-8644 S. Ct. R.)

On October 2, 2017, the Supreme Court granted the petition for writ of certiorari, vacated the judgment, and remanded for further consideration in light of *Dean*. (15-3575 R. at 51.)

XII. Proceedings on Remand to the Seventh Circuit.

On February 16, 2018, the Seventh Circuit issued a limited remand to the district court "so that the district court can determined whether it would have

imposed the same sentence on Cureton, knowing that in light of *Dean*, it may consider the mandatory sentence under § 924(c) when deciding the sentences for other crimes, or whether the court wishes to have a new opportunity to exercise its discretion and judgment in a complete resentencing." (App. at 4.) The Seventh Circuit retained jurisdiction over the appeals pending the district court's response. (App. at 4.)

On the limited the remand, the district court declined to exercise its discretion and determined that the sentence it had previously given Mr. Cureton was still sufficient after *Dean.* (App. at 8.) The Seventh Circuit affirmed the decision on April 10, 2018. (App. at 10.)

REASONS FOR GRANTING THE WRIT

Mr. Cureton's § 924(c) conviction for brandishing a firearm during a crime of violence must be vacated because the Interstate Communication of Ransom Request offense underlying the § 924(c) charge categorically fails to qualify as a crime of violence within the meaning of § 924(c)(3)(A) and the residual clause of § 924(c)(3)(B) is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Although these cases have a long and complicated history, this appeal involves only two of Mr. Cureton's convictions - Counts 1 and 2 of case number 10 CR 30200. The superseding indictment in this case number charged Mr. Cureton as follows:

COUNT 1

INTERSTATE COMMUNICATION OF RANSOM REQUEST

On or about June 14, 2010, in Saint Clair County, Illinois, in the Southern District of Illinois, and elsewhere,

THOMAS CURETON

defendant herein, did transmit in interstate commerce a communication to G.N., and others, containing a demand and request for a ransom and reward for the release of a kidnapped person.

All in violation of Title 18, United States Code, Sections 2 and 875(a).

COUNT 2

POSSESSION OF FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE

On or about June 14, 2010, in Saint Clair County, Illinois, in the Southern District of Illinois, and elsewhere,

> defendant herein, during and in relation to a crime of violence for which a person may be prosecuted in a court of the United States, namely, Interstate Communication of a Ransom Request as charged in Count 1, did knowingly use and carry a firearm and did possess a firearm in furtherance of such crime.
>
> All in violation of Title 18, United States Code, Sections 2 and 924(c).

(200 R. at 31.) In other words, the government alleged the underlying "crime of violence" for the § 924(c) count charged in Count 2 is the "Interstate Communication of a Ransom Request" in violation of 18 U.S.C. § 875(a). However, the government conceded it could not meet the elements of the § 924(c) charge in this case because Interstate Communication of a Ransom Request categorically fails to qualify as a crime of violence. The Seventh Circuit disagreed and held that an "implied threat" is enough to render a § 875(a) offense a crime of violence.

Section 875(a) states that "whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 875(a). Section 924(c), as charged here, provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device)

> for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -
>
> . . . .
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years . . . .

18 U.S.C. § 924(c)(1)(A)(ii). Section 924(c) goes on to define a crime of violence as an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 924(c)(3)(A)-(B).

Mr. Cureton's conviction on Count 2, the § 924(c) violation, must be vacated because the predicate offense of communicating a ransom request under § 875(a) does not qualify as a "crime of violence" as a matter of law. First, this Court has previously held that a § 875(a) conviction would not qualify as a crime of violence. Second, the conviction fails to qualify as a crime of violence under the "elements clause" of § 924(c)(3) because the offense does not have as an element the use or threat of use of violent physical force against persons or property and does not require the intentional threat of the same. Third, § 924(c)(3)'s residual clause is constitutionally incapable of supporting the conviction due to its vagueness.

1. This Court previously held that a conviction under § 875(a) does not qualify as a crime of violence.

In *Torres v. Lynch,* the Supreme Court considered whether a state offense qualifies as an aggravated felony under the Immigration and Nationality Act ("INA") when it has all of the elements of a listed federal crime except one requiring a connection to interstate commerce. *Torres v. Lynch,* 136 S. Ct. 1619, 1624 (2016). The petitioner argued that many of the crimes that would be excluded because of a non-matching interstate commerce clause would be counted under the crime of violence provision of the INA instead. *Id.* at 1629.

One of the crimes that would have been excluded based on the lack of an interstate commerce element was the state equivalent of communication of a ransom demand, a federal crime under 18 U.S.C. § 875(a). *See Torres,* 136 S. Ct. at 1628. The petitioner argued such a state crime would be included under 8 U.S.C. § 1101(a)(43)(F) as a crime of violence described in 18 U.S.C. § 16. *Torres,* 136 S. Ct. at 1629. As discussed further below, § 16 has the same definition of a crime of violence as § 924(c)(3). The Supreme Court disagreed with petitioner's argument stating, "The 'crime of violence' provision [in § 16] would not pick up demanding a ransom for kidnapping. *See* 18 U.S.C. § 875(a) (defining the crime without any reference to physical force.)" *Torres,* 136 S. Ct. at 1629.

The Seventh Circuit failed to address *Torres* in its decision despite the fact that it was binding precedent. Because the Supreme Court has held a conviction

under § 875(a) would not qualify as a crime of violence under § 16 and § 16 contains the exact same definition of a crime of violence as § 924(c)(3), this Court should grant the petition for writ of certiorari and reverse the Seventh Circuit.

2. Communication of a ransom request under § 875(a) does not qualify as a crime of violence under § 924(c)(3)'s "elements clause."

To determine whether a predicate offense qualifies as a crime of violence under § 924(c), courts use the categorical approach. *Descamps v. United States,* 133 S. Ct. 2276, 2283 (2013); *United States v. Rogers,* 804 F.3d 1233, 1236 (7th Cir. 2015). 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; *United States v. Taylor,* 630 F.3d 629, 632-33 (7th Cir. 2010). In addition, under the categorical approach, a prior offense can only qualify as a crime of violence if all 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). If the most innocent conduct penalized by a statute does not constituted a crime of violence, then the statute categorically fails to qualify as a crime of violence.

As a result, for communication of a ransom demand under § 875(a) to qualify as a crime of violence under § 924(c)(3)'s elements clause, the offense must have an element of physical force, which 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 in original). Communication of a ransom demand, as defined by § 875(a), does not meet this requirement because it can be accomplished without the use, attempted use, or threatened use of violent force. In fact, § 875(a) can be committed without a threat of any kind.

The elements of a § 875(a) offense are: (1) the defendant knowingly and intentionally communicated a request or demand for a ransom or reward for the release of a kidnapped person and (2) the communication was transmitted in interstate commerce. (200 R. at 78, p. 33.) While all of the other subsections of § 875 contain threats as elements, subsection (a) does not. *See* 18 U.S.C. § 875(b) (requiring a threat to kidnap or injure a person with the intent to extort); 18 U.S.C. § 875(c) (requiring a threat to kidnap or injure a person); 18 U.S.C. § 875(d) (requiring a threat to injury property or reputation or to accuse a person of a crime with the intent to extort).

The Seventh Circuit held that the element of kidnapping should be read into the elements of § 875(a) because it requires the request for ransom is for the

release of a kidnapped person. The jury instructions in this case defined a "kidnapped person" as a person who has been "seized, confined, kidnapped, abducted, or carried away and held for ransom or reward." (200 R. at 78, p. 34.)[3] This definition does not follow the statute which defines a kidnapped person as someone who has been seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away. *See* 18 U.S.C. § 1201(a). While some of these methods of kidnapping might involve the use of force or a threat of force, not all of them do.

Specifically, "decoy" means "to inveigle, entice, tempt, or lure . . . the word implies enticement or luring by means of some fraud, trick, or temptation, but excludes the idea of force." http://thelawdictionary.org/decoy/ (last visited March 31, 2017). The other non-forceful type of kidnapping is by inveiglement. "Inveigle" means "to blind in mind or judgment; to beguile, deceive, cajole; to gain over or take captive by deceitful allurement; to entice, allure, seduce." http://www.oed.com/view/Entry/98950?redirectedFrom=inveigle#eid (last visited March 31, 2017). The holding or restraint involved in a kidnapping offense can be achieved by mental as well as by physical means. *United States v. McGrady,* 191 F.2d 829, 830 (7th Cir. 1951); *citing Chatwin v. United States,* 326 U.S.

[3] As the jury instruction notes, this definition follows language approved in *United States v. Sandoval,* 347 F.3d 627, 633 (7th Cir. 2003). However, the language in *Sandoval* was taken out of the indictment in that case, not directly from the statute itself.

455, 460 (1946). Therefore, even if the fact that a kidnapped person is part of the § 875(a) offense, kidnapping can be accomplished without the use or threat of force and cannot qualify a § 875(a) offense as a crime of violence.

Furthermore, there are cases in which a defendant could be convicted under § 875(a) without being criminally responsible for the kidnapping offense itself. *United States v. Brika,* 487 F.3d 450, 455 (6th Cir. 2007). For example, an opportunist, knowing of a kidnapping victim, could solicit ransom from the victim's close friends and relatives, and would be guilty under § 875(a) but would not be guilty of the kidnapping. *Id.* A defendant might be responsible for the holding of the victim, but not the seizure of the victim. *Id.* A defendant might also be hired by kidnappers after a seizure in order to secure the ransom. *Id.* at 455-56.

The Sixth Circuit has held that Congress intended that § 875(a) contain the criminal intent element of intent to extort. *United States v. Heller,* 579 F.2d 990, 995 (6th Cir. 1978). However, the Sixth Circuit later held that the knowing intent to transmit a communication in § 875(a), even if the communication contained a threat, is not a knowing intent to threaten. *United States v. DeAndino,* 958 F.2d 146, 149 (6th Cir. 1992). In so holding, the Sixth Circuit specifically rejected the attempt to extend *Heller* to hold § 875(a) contained a specific intent to threaten. *DeAndino*, 958 F.3d at 149; *see also United States v. Lin,* 139 F.3d 1303, 1307 (9th Cir.

1998) (agreeing with *Heller* that § 875(a) is a specific intent offense but not agreeing that that intent is to extort and noting *Heller* did not specifically address the intent to threaten).

In conclusion, § 875(a) cannot qualify as a crime of violence under § 924(c)(3)(A) because it does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. In a pre-*Johnson* world, this analysis would shift to the residual clause contained in § 924(c)(3)(B) which was intended to sweep in convictions that did not meet subsection (c)(3)(A). However, post-*Johnson*, the residual clause is unconstitutional, as discussed below.

3. Section 924(c)(3)'s residual clause is unconstitutionally vague following *Johnson v. United States* and cannot support a conviction in this case.

The Seventh Circuit determined the residual clause of § 924(c)(3) is unconstitutionally vague in the present case. However, based on the circuit split on this issue, Mr. Cureton is including the argument that this Court should decide the issue and adopt the Seventh Circuit's reasoning. This case, among others currently pending before this Court, presents the need to address the circuit split regarding whether *Johnson,* 135 S. Ct. at 2551, also invalidated the residual clause of 18 U.S.C. § 924(c)(3)(B). The Second, Sixth, and Eighth Circuits have ruled that the *Johnson* holding does not invalidate the residual clause of §

924(c). By contrast, the Seventh Circuit determined that § 924(c)(3)(B) is unconstitutionally vague. *Cardena,* 842 F.3d at 959. Further, the Supreme Court recently held that § 16(b) is unconstitutionally vague. *Dimaya v. Sessions,* 138 S. Ct. 1204, 1215 (2018). The language of § 16(b) is identical to § 924(c)(3) and § 924(c)(3)(B) should suffer the same fate as § 16(b). *See Cardena,* 842 F.3d at 995-96.

Review of this case would allow the Court to address a circuit split and determine whether the holding of *Johnson* extends to the residual clause of § 924(c)(3). This case provides an example of the extensive harm that can be inflicted upon an individual when he is convicted a § 924(c) charge under a provision of that statute that offends the Due Process Clause.

The conflicting decisions in the circuit courts of appeal reveal the precise bounds of *Johnson* are far from clear. This lack of clarity has led to substantial confusion in the lower courts. In addition, to the *Prickett* decision in the Eighth Circuit, the Second and Sixth Circuits have also misapplied the *Johnson* holding and concluded that § 924(c)(3)(B), which contains substantially similar language to the ACCA's residual clause, survives *Johnson*. *See United States v. Prickett,* 839 F.3d 697 (8th Cir. 2016); *United States v. Hill*, 832 F.3d 135, 149-50 (2d Cir. 2016) (holding § 924(c)(3)(B) is not unconstitutionally vague); *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016) (same).

This Court should grant review to determine and clarify the extent of

Johnson's holding to a "crime of violence" under § 924(c)(3)(B), as the circuit split causes a disparity in sentencing when defendants receive different sentences depending on the circuit in which he or she is convicted and sentenced. Moreover, conviction under an unconstitutionally vague statute violates the Fifth Amendment right to due process of law. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." This guarantee is violated by taking away an individual's liberty under a "criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson,* 135 S. Ct. at 2556; *citing Kolender v. Lawson,* 461 U.S. 352, 357-58 (1983).

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. 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 at 723 (same); *United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (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*, 133 S. Ct. at 2285.

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 immaterial insofar as the reasoning in *Johnson* is concerned.

The definition of a crime of violence in § 924(c)(3)(B) is unconstitutionally vague 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 includes conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(c)(3)(B). Section 924(c)(3)(B) substitutes the ACCA's residual clause's "serious" with the word "substantial" and "potential risk" with "risk."

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. *Johnson,* 135 S. Ct. at 2557-58. Indeed, there are many different conceptions of what the ordinary case of a crime entails. *Id.* For example, "does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence?" *Id.* at 2557. Thus, "[t]he residual clause offers no reliable way to choose between . . . competing accounts of what [an] 'ordinary' [case] involves." *Id.* at 2558. 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.* ("[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.") *See also 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 (2007), which addressed the operation of the categorical approach in the related ACCA residual clause context." *Baptiste v. Attorney General*, 841 F.3d 601, 608 (3d Cir. 2016). "[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 208. 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.*

The ordinary case inquiry is the correct analytical approach in the § 924(c)(3)(B) context, as it is identical to § 16(b). Title 18 U.S.C. § 16(b) defines "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." 18 U.S.C. § 16(b). In other words, § 16(b) defines "crime of violence" using exactly the same language as § 924(c)(3)'s residual clause. "[I]n *Leocal v. Ashcroft* . . . 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.") 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. 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 ACCA's residual clause context.

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 [§ 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.

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 [section924(c)(3)] residual clause from impermissible vagueness." *United States v. Edmundson*, 153 F. Supp. 3d 857, 862 (D. Md. 2015), *as amended* (Dec. 30, 2015). In fact, the lack of examples in § 924(c)(3)(B), makes the text more vague than the residual clause. The enumerated examples provide at least some guidance as to the sort of offenses Congress intended for the [residual clause] to cover. 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. Because § 924(c)(3)(B)'s residual clause requires the same categorical approach as § 16(b), and consists of the same language, the same analysis applies here.

Should it reach the question, Mr. Cureton asks this Court to adopt the reasoning and conclusion of the Seventh Circuit, which is supported by the *Dimaya* decision, as well as Third, Sixth, Seventh, Ninth, and Tenth Circuits decisions regarding the identically worded text found in § 16(b). A grant of Mr. Cureton's petition for writ of certiorari is necessary because only this Court can finally clarify whether § 924(c)(3)(B) is unconstitutionally vague.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the United States Court of Appeals for the Seventh Circuit's opinion affirming Mr. Cureton's convictions and sentences.

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