

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

JASON LEE PYLES,

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

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PETITION FOR A WRIT OF CERTIORARI

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Respectfully submitted,

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## QUESTIONS PRESENTED FOR REVIEW

- I. Whether the United States Court of Appeals for the Eighth Circuit erroneously held that Arkansas aggravated assault on a family or household member qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i), and whether the statute can be violated without the requisite violent physical force under *Johnson v. United States*, 559 U.S. 133 (2010).
- II. Whether the Eighth Circuit erroneously analyzed the Arkansas statute under the ordinary-case analysis determined to be unconstitutional in this Court's holdings in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

## **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

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### OPINION BELOW

On May 3, 2018, the United States Court of Appeals for the Eighth Circuit issued its judgment affirming the district court's opinion finding Jason Lee Pyles to be an armed career criminal under 18 U.S.C. § 924(e). *See United States v. Pyles*, 888 F.3d 1320 (8th Cir. 2018). Therefore, it affirmed the district court's determination that Mr. Pyles's prior Arkansas conviction for aggravated assault on a family or household member qualified as a predicate felony for purposes of the armed career criminal statute. A copy of the opinion is attached at Appendix ("App.") A.

### JURISDICTION

The Eighth Circuit's judgment was entered on May 3, 2018. Neither the Petitioner nor the Government sought rehearing. 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. § 924(e)(2)(B). Violent felony defined.

(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. . . .<sup>1</sup>

### Ark. Code Ann. § 5-26-306. Aggravated assault on a family or household member.

(a) A person commits aggravated assault on a family or household member if, under circumstances manifesting extreme indifference to the value of human life, the person purposely:

- (1) Engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member;
- (2) Displays a firearm in a manner that creates a substantial danger of death or serious physical injury to a family or household member; or

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<sup>1</sup> The residual clause of this statute has been ruled unconstitutional by this Court’s holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015).



(3) Impedes or prevents the respiration of a family or household member or the circulation of a family or household member's blood by applying pressure on the throat or neck or by blocking the nose or mouth of a family or household member.

(b) Aggravated assault on a family or household member is a class D felony.

## STATEMENT OF THE CASE

Jason Lee Pyles was sentenced as a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) on May 10, 2017. The presentence investigation report suggested an advisory guideline sentencing range of 188 to 235 months imprisonment based on a total offense level of 31 and a criminal history category of VI. The total offense level included an enhancement for being an armed career criminal under 18 U.S.C. § 924(e) based upon two previous convictions for serious drug offenses and one conviction for Arkansas aggravated assault on a family or household member. Over Mr. Pyles's objection, the district court determined that his conviction for aggravated assault was a predicate felony for purposes of the Armed Career Criminal Act ("ACCA").

Mr. Pyles objected to being classified as an armed career criminal, arguing that the underlying aggravated assault offense was not a violent felony because it could be based on reckless rather than intentional conduct. Mr. Pyles also argued the statute could be violated without the requisite violent physical force because any *de minimis* amount of force would suffice. Because his aggravated assault conviction could require only a reckless mental state and could be conducted without violent physical force, the ACCA enhancement was improper. Mr. Pyles maintains that absent the ACCA enhancement, his total offense level would have been 25, with a criminal history category of VI, and therefore his guideline range should have been between 110 and 120 months imprisonment rather than 188 to 235 months. The district court overruled Mr. Pyles's objection, applied the ACCA enhancement, and

sentenced him to a term of 180 months. The conviction for aggravated assault on a family or household member was determined to be a violent felony pursuant to § 924(e)(2)(B)(i).

On appeal, Mr. Pyles challenged the application of the ACCA enhancement and maintained his argument that the district court procedurally erred in calculating his sentence by classifying him as an armed career criminal based, in part, on his aggravated assault conviction, which could be sustained with a reckless *mens rea*. Even if the statute was violated with an intentional mental state, he argued that Arkansas aggravated assault did not have as an element “the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). *See e.g., Johnson v. United States*, 559 U.S. 133 (2010). In a published decision, the Eighth Circuit affirmed the imposed sentence. (App. A.).

The Eighth Circuit determined that the “proper inquiry” in analyzing whether a prior conviction is a qualifying felony “is whether the conduct encompassed by the elements of the offense, in the ordinary case, involves the use, attempted use, or threatened use of physical force against the person of another.” *United States v. Pyles*, 888 F.3d 1320, 1322 (8th Cir. 2018); App. A, 2a. It concluded that a violation of the Arkansas statute “necessarily requires the use of violent force” because there must be a realistic probability that the statute encompasses conduct that does not involve use or threatened use of violent force. *Id.* In affirming the district court’s sentence, the Eighth Circuit determined that the Arkansas statute required that a defendant acted “purposely,” which the Supreme Court of Arkansas defined as a

“culpable mental state . . . which requires deliberate conduct with a knowledge or awareness that one’s actions are practically certain to bring about the prohibited result.” *Id.* (citing *Bell v. State*, 259 S.W.3d 472, 476-77 (Ark. App. 2007); *McCoy v. State*, 69 S.W.3d 430, 435-37 (Ark. 2002)). The Eighth Circuit recognized that in some circumstances it had found that a crime involving a *mens rea* of recklessness did not satisfy the force clause. *Id.* at 1322; App. A, 3a.

Thus, the Eighth Circuit concluded that it is not probable that a defendant could inflict serious physical injury by means of impeding the respiration or blood circulation by applying pressure on the throat or neck or by blocking the nose or mouth without employing violent physical force and affirmed the district court’s sentence. *Id.*; App. A, 3a.

This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE PETITION

This case presents two important issues. First, whether aggravated assault on a family or household member under Ark. Code Ann. § 5-26-306(a)(3) qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i), and specifically whether this conduct can be violated without the requisite violent physical force under *Johnson v United States*, 559 U.S. 133 (2010). Second, whether the United States Court of Appeals for the Eighth Circuit erroneously analyzed the Arkansas statute under the now unconstitutional ordinary-case analysis. In this case, the Eighth Circuit gave an unwarranted construction of the Arkansas statute and the Armed Career Criminal Act (“ACCA”).

Review of this case would allow this Court to determine whether a conviction under § 5-26-306(a)(3) has both the requisite mental state and violent physical force necessary to qualify as a violent felony. This case exemplifies the irreversible harm that can be inflicted upon a defendant when the appellate courts do not fulfill their duty to review a sentence in accordance with this Court’s mandate and circuit precedent to ensure no procedural errors occurred. Mr. Pyles’s prison sentence was increased substantially due to an aggravated assault offense that can be committed with a merely reckless mental state and without employing violent physical force. Moreover, the Eighth Circuit has erroneously used the ordinary-case inquiry in conducting an analysis of the elements of Mr. Pyles’s prior offense—an inquiry this Court determined to be inherently flawed when analyzing the ACCA’s residual

clause. As applied to Mr. Pyles, the decision to classify him as an armed career criminal violates his right to due process under the Constitution.

The lower courts' determination that the Arkansas statute could not be performed with *de minimis* force, after analyzing the crime within the framework of the ordinary case, erroneously subjects Mr. Pyles to a mandatory minimum sentence of 15 years rather than a maximum sentence of 10 years. Accordingly, this Court should grant Mr. Pyles's petition for certiorari or summarily reverse.

- I. Whether the United States Court of Appeals for the Eighth Circuit erroneously held that Arkansas aggravated assault on a family or household member qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(i), and whether the statute can be violated without the requisite violent physical force under *Johnson v. United States*, 559 U.S. 133 (2010).

This Court should grant review to resolve an important issue of federal law by determining whether Arkansas aggravated assault on a family or household member under § 5-26-306(a)(3) requires the use, attempted use, or threatened use of violent force as required by *Johnson*, 559 U.S. 133, and to clarify the violent physical force necessary to be considered a violent felony. The Eighth Circuit's decision undermines the purpose of classifying convictions as violent felonies and encompasses conduct that does not necessarily include violent physical force. To be a violent felony, there must not only be intentional, knowing conduct, but such conduct must involve the requisite physical force.

The Arkansas statute for aggravated assault on a family or household member reads in relevant part as follows:

- (a) A person commits aggravated assault on a family or household member if, **under circumstances manifesting extreme indifference to the value of human life, the person purposely:**
  - (3) Impedes or prevents the respiration of a family or household member or the circulation of a family or household member's blood by applying pressure on the throat or neck or by blocking the nose or mouth of a family or household member.

Ark. Code Ann. § 5-26-306 (emphasis added).

The Eighth Circuit affirmed the district court's finding that Mr. Pyles's prior aggravated assault conviction qualified as an ACCA predicate. The ACCA provides an increased penalty for a defendant if: (1) the instant offense of conviction falls under 18 U.S.C. § 922(g); and (2) the defendant has at least three prior felony convictions of either a violent felony or a serious drug offense. *See* 18 U.S.C. § 924(e). Only the second condition, which requires Mr. Pyles to have at least three prior felony convictions of either a violent felony or a serious drug offense, is at issue here. Mr. Pyles maintains that he has only two predicate felonies—possession with intent to distribute methamphetamine and possession of methamphetamine with purpose to deliver—and therefore he does not qualify as an armed career criminal. Therefore, reversal is required to correct the court's erroneous application of the ACCA under § 924(e).

The relevant portion of § 924(e)(2)(B) defining a "violent felony" has two clauses: § 924(e)(2)(B)(i), the "force" clause; and § 924(e)(2)(B)(ii), the "enumerated" clause, as the "residual" clause is now unconstitutional after the United States Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"). In order to qualify as a violent felony, aggravated assault on a family

or household member must have “as an element the use, attempted use, or threatened use of physical force against the person of another,” § 924(e)(2)(B)(i), or be one of the enumerated offenses such as “burglary of a dwelling, arson, or extortion, [or] involve[] use of explosives,” § 924(e)(2)(B)(ii). Specifically, for a felony to qualify as a “violent felony” under § 924(e)(2)(B)’s force clause, the offense must have an element of “physical force.” “Physical force” means “*violent* force”—that is “strong physical force,” which is “capable of causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140 (emphasis in the original). The force clause requires the use of force, not merely the causation of physical injury. Thus, even offenses with elements requiring serious physical injury, or even death, do not always involve “violent force.”

To determine whether a prior conviction was for a violent felony, this Court applies a categorical approach, looking to the elements of the offense as defined in the statute of conviction rather than to the facts underlying the defendant’s prior conviction. *Johnson II*, 135 S. Ct. at 2557. The categorical approach “focus[es] on the elements, rather than the facts, of a crime.” *Descamps v. United States*, 133 S. Ct. 2276, 2285. “Distinguishing between elements and facts is therefore central to ACCA’s operation. ‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (citing Black’s Law Dictionary 634 (10th ed. 2014)). By contrast, facts “are mere real-world things—extraneous to the crime’s



legal requirements. . . . And ACCA, as we have always understood it, cares not a whit about them.” *Id.* (internal citations omitted).

If the statute of conviction is divisible in that it encompasses multiple crimes, some of which are violent felonies and some of which are not, this Court applies a modified categorical approach. *Id.* at 2249. The modified categorical approach, like the categorical approach, is not concerned with the specific details of how a defendant committed his prior offense. *Id.* at 2253. The analysis is concerned only with the fact of the conviction and identifying the particular subpart of a statute that the defendant violated. *Id.* at 2253-54. Moreover, even under the modified categorical approach, the court is “generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16 (2005).

The way a defendant perpetrates a crime on a given occasion, referred to as the “underlying brute facts or means,” makes no difference. *Mathis*, 136 S. Ct. at 2251 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Further, an itemized construction within the statute does not give a sentencing court a “special warrant to explore the facts of an offense.” *Id.* In sum, courts must consider prior *convictions* rather than *conduct*. Because courts must examine what elements the prior conviction necessarily involved, not the facts underlying the case, they must determine whether the least of the acts criminalized by a relevant statute requires “the use, attempted use, or threatened use of physical force against the person of

another.” 18 U.S.C. § 924(e)(2)(B)(i); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).<sup>2</sup> Thus, if the most innocent conduct penalized by a statute does not constitute a violent felony, then the statute categorically fails to qualify as a violent felony.

Although the judgment of conviction in his state case points to subsection (a)(3) of the Arkansas statute, Mr. Pyles maintains that the use of violent physical force is not an element of the offense. In *Garcia v. Gonzales*, the Court of Appeals for the Fourth Circuit recognized that an offense could only constitute a crime of violence under the force clause if it has an element that requires an “*intentional* employment of *physical force* [or threat of physical force].” 455 F.3d 465, 468 (4th Cir. 2006) (emphasis added). Because this particular statute may be violated by a reckless *mens rea* by committing the offense “under circumstances manifesting extreme indifference to the value of human life,” Mr. Pyles’s conviction cannot qualify as a violent felony for ACCA purposes.

This Court in *Begay v. United States* suggested that ACCA predicates required more than negligent or reckless conduct. 553 U.S. 137, 144-45 (2008), *abrogated by Johnson II*, 135 S. Ct. 2551 (“In our view, DUI differs from the example crimes—burglary, arson, extortion, and crime involving use of explosives—in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive conduct.’”). Because it is possible to commit Arkansas

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<sup>2</sup> This Court did make a qualification here. When a statute addresses several crimes, Shepard documents may be used to determine the defendant’s particular offense.

aggravated assault on a family or household member with a merely reckless *mens rea*, it does not qualify under the force clause of § 924(e)(2)(B)(i).

Nevertheless, even if this Court finds that the statute's inclusion of both purposeful and reckless language in subsection (a) indeed points to intentional conduct, the focus then becomes whether impeding the respiration or circulation of a person by blocking the nose or mouth necessarily involves "the use, threatened use, or attempted use of [*violent*] physical force" by the defendant. 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

Mr. Pyles submits that this crime could be committed with *de minimis* force, such as a fleeting touch, and does not necessarily involve violent force as dictated by *Johnson*, 559 U.S. 133. The force clause requires the use of force, not merely the causation of physical injury. Even if the actual conduct described in the criminal information may have involved the use of physical force against the person of another, it is irrelevant for purposes of this case. The inquiry looks to the elements of the offense, not to the facts of the defendant's conduct. *Mathis*, 136 S. Ct. at 2251.

Thus, even offenses with elements requiring serious physical injury, or even death, do not always require violent force. The level of force required for blocking the mouth or nose is not sufficiently violent as to qualify under the ACCA. Either of those actions must simply impede the normal breathing of the victim, but do not necessarily stop the breathing. For instance, an individual may only block the nose or mouth. Therefore, the statute can be violated by a fleeting touch or a slight pressure that momentarily obstructs the breathing of the victim. Based on a literal reading of the

statute, the statute could be violated by plugging someone's nose or pressing on someone's neck for a brief moment. For example, one might briefly place a hand over the victim's nose and mouth to momentarily prevent them from yelling. Such a gesture could be done with slight, minimal pressure, but temporarily impede normal breathing. Another example may include removing a person's medically necessary sleep apnea breathing machine by removing the mask from the person's face, which would impede that person's normal breathing pattern. Notably, no cases were found in Arkansas that describe the sufficiency of the evidence required to sustain the elements or proof needed for a conviction under this subsection of the statute, as the statute was changed to include subsection (a)(3) in late 2013.

Whether, in fact, the offense actually entailed the use, attempted use, or threatened use of physical force against a person is irrelevant. Instead, either the categorical or the modified categorical approach focuses on whether, in every case, a conviction under the statute necessarily involves proof of the element. In cases where the statute is divisible, the Court need not apply the modified categorical approach if none of the alternatives would qualify as a violent felony. Even so, the Court cannot consider the underlying conduct. *Descamps*, 133 S. Ct. at 2285.

"[A] crime may result in death or serious injury without involving the use of physical force." *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (internal citation omitted). It makes no difference that the possibility of violating the statute without using violent physical force may be slim. Because the possibility

exists, this Court cannot legally find that this aggravated assault conviction is a violent felony.

In any event, the lower court found that aggravated assault under subsection (a)(3) involved force because it was done purposefully. App. A, 3a. However, even if done purposefully, aggravated assault on a family or household member can be performed with merely *de minimis* force. Thus, Mr. Pyles maintains this conviction cannot be used as a predicate felony for the ACCA enhancement and he was erroneously sentenced to 180 months imprisonment.

**II. Whether the Eighth Circuit erroneously analyzed the Arkansas statute under the ordinary-case analysis determined to be unconstitutional in this Court's holdings in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018)?**

The Eighth Circuit erroneously denied Mr. Pyles's appeal based upon the ordinary-case analysis deemed to be unconstitutional by this Court's rulings in *Johnson II* and *Dimaya*, 138 S. Ct. 1204 (2018). The Eighth Circuit reasoned that the "proper inquiry" when analyzing the Arkansas statute "is whether the conduct encompassed by the elements of the offense, in the *ordinary case*, involves the use, attempted use, or threatened use of physical force against the person of another." *Pyles*, 888 F.3d at 1322 (quoting *United States v. Forrest*, 611 F.3d 908, 910 (8th Cir. 2010) (emphasis added). The ordinary-case analysis is conducted when courts considered the residual clause of the ACCA or other similar statutes, rather than the force clause. The Eighth Circuit is importing the ordinary-case analysis into the force clause. Essentially, the lower court is asking the appropriate force-clause question regarding whether Mr. Pyles's prior offense has an element of the use, attempted use,

or threatened use of physical force, but improperly modifying this question with the ordinary-case analysis reserved for the now-void residual clause. Notably, the case cited by the Eighth Circuit in support of its opinion for the ordinary-case analysis was filed prior to this Court's ruling in *Johnson II*. Thus, Mr. Pyles contends that the Eighth Circuit's holding is based upon the discredited ordinary-case analysis ruled unconstitutional by *Johnson II*. As applied, this analysis is unconstitutional.

**A. Applying the ordinary-case analysis to determine whether someone is an armed career criminal violates the Due Process Clause because the required analysis is unconstitutionally vague.**

This Court in *Johnson II* made it clear that the residual clause was unconstitutional for two reasons. 135 S. Ct. at 2557. First, there was grave uncertainty about how to estimate the risk posed by a crime in the ordinary case. *Id.* Second, the residual clause left unclear what threshold level of risk made a given crime a “violent felony.” *Id.* at 2558. This Court recognized the inherent problems of making decisions based upon the so-called “ordinary case” because it leads to a judicially imagined ordinary case of a crime, rather than an analysis of real-world facts and statutory elements. *Id.* at 2557. As this Court reasoned, there is inherent difficulty in determining what constitutes an ordinary case. *Id.* For example, should the court seek its reasoning through “[a] statistical analysis of a state reporter? A survey? Expert evidence? Google? Gut instinct?” *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009)).

This Court pointed out that its reasoning in “*James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining

why attempted burglary poses a serious potential risk of physical injury, the Court said: ‘An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue.’” *Id.* (citing *James v. United States*, 550 U.S. 192, 211 (2007)).

The ordinary-case analysis casts uncertainty in the second feature that made the ACCA’s residual clause unconstitutionally vague—“uncertainty about how much risk it takes for a crime to qualify as a violent felony.” *Id.* at 2558. The Court reasoned that “[i]t 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 [i.e., the ordinary case].” *Id.* And it was the ordinary-case conundrum that rendered the exemplar crimes in the enumerated-offense clause—burglary, arson, extortion, and crimes involving the use of explosives—more of a hindrance than a help when it came to interpreting the phrase “serious potential risk.” *Id.* “Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?” *Id.* The Eighth Circuit opinion, as applied to Mr. Pyles, uses the ordinary case to modify the force clause analysis. In so doing, both features that this Court determined made the residual clause unconstitutionally vague are now being used to make this application unconstitutionally vague as to Mr. Pyles. In essence, the lower court has applied the ordinary-case analysis to determine what it takes for a crime to qualify

as a violent felony. This inquiry has the same flawed judicial assessment of the ordinary case found in *Johnson II*. In sum, the Court found that the ordinary-case analysis “deni[ed] fair notice to defendants and invite[d] arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denie[d] due process of the law.” *Johnson II*, 135 S. Ct. at 2557.

The Court in *Dimaya* further clarified this Court’s analysis by repeating the difficulties involved with requiring courts to define the ordinary case. 138 S. Ct. at 1215. “[T]he ‘ordinary case’ remains, as *Johnson* described it, an excessively ‘speculative,’ essentially inscrutable thing.” *Id.* (citing *Johnson*, 135 S. Ct. at 2558; accord *post*, at 1256 (Thomas, J., dissenting)). Indeed, the recognition of the problems inherent with using the ordinary-case analysis was a “core insight” of *Johnson*. *Id.* at 1215, n.4; *see id.* at 1231 (Gorsuch, J., concurring) (arguing that 18 U.S.C. §16(b) runs afoul of *Johnson II* “to the extent [§ 16(b)] requires an ‘ordinary case’ analysis”).

*Dimaya* also recognized that there are “distinctive form[s]” of the categorical approach. *Id.* at 1211 n.1. When analyzing the residual clause, courts ask whether the ordinary case of the offense poses the requisite risk. *Id.* at 1211 (citing *James*, 550 U.S. at 208). However, when evaluating whether a prior conviction fits within an enumerated offense, “courts ask what the elements of a given crime always require—in effect, what is legally necessary for a conviction.” *Id.* at 1211 n.1. Only the elements-focused inquiry passes constitutional muster. *Dimaya* recognized that the ordinary-case analysis is a failed attempt to craft an objective standard, which



necessarily “devolve[ed] into guesswork and intuition.” *Id.* at 1223 (citing *Johnson II*, 135 S. Ct. at 2559).

The constitutional infirmity in employing the ordinary-case analysis is not lessened when used in conjunction with the ACCA’s force clause. While the force clause does not speak directly in terms of risk, as does the ACCA’s residual clause and 18 U.S.C. § 16(b), the inquiry depends entirely on what a judge determines the ordinary case of a crime to be. That inquiry—unbounded by standards, bereft of guidance—remains as inscrutable as ever.

For example, “[d]oes a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers.” *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). Moreover, the answers to them dictate whether the crime fits within the force clause. Offering a witness a bribe does not have as an element the use, attempted use, or threatened use of physical force; however, threatening to break a witness’s kneecaps obviously does. As to kidnapping, throwing someone into a car truck involves force, but a noncustodial parent picking up their child does not. That the answers to these questions dictate whether a person serves a minimum of 15 years or a maximum of 10 years in federal prison illustrates why the vagueness holdings of both *Dimaya* and *Johnson II* apply to Mr. Pyles’s situation. A defendant faced with a legal analysis guided by the ordinary-case

scenario would be uncertain as to whether the punishment would be a maximum sentence of 10 years or a sentence between 15 years and life.

Despite this Court's holding that the ordinary-case analysis produces more unpredictability and arbitrariness than the Due Process Clause tolerates, the Eighth Circuit used the ordinary-case analysis to consign Mr. Pyles to 15 years in federal prison. The Eighth Circuit determined that the proper analysis of whether a conviction is a violent felony under the ACCA's force clause "is whether the conduct encompassed by the elements of the offense, in the *ordinary case*, involves the use, attempted use, or threatened use of physical force against the person of another." *Pyles*, 888 F.3d at 1321 (emphasis added).

By employing the discredited ordinary-case analysis to the ACCA's force clause, the Eighth Circuit runs afoul of the clear teachings of *Dimaya* and *Johnson II*. As applied to Mr. Pyles, the decision to classify him as an armed career criminal violates his right to due process under the Constitution. This Court should not countenance such a result and should therefore grant certiorari to determine whether the force clause of the ACCA, as applied to Mr. Pyles is unconstitutional.

## CONCLUSION

Therefore, based on the Eighth Circuit's erroneous precedent, Mr. Pyles's aggravated assault conviction is not a violent felony under § 924(e)(2)(B)(i), and therefore the judgment must be vacated and the matter remanded for resentencing. A grant of Mr. Pyles's petition for writ of certiorari is necessary because only this Court can finally clarify whether Arkansas aggravated assault on a family or

household member satisfies both the requisite mental state and force dictated under the statute and ensure that courts of appeal carry out their obligations in reviewing federal sentencing proceedings. Further, the Eighth Circuit erroneously analyzed whether Mr. Pyles's prior aggravated assault conviction was a violent felony under the unconstitutional ordinary-case analysis, which violates his right to due process under the Constitution.

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

DATED: this 31st day of July, 2018.

Respectfully submitted,

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