NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 2018

Anthony Curtis Flowers - 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 WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the district court deprived Flowers due process by denying his § 2255 petition challenging his sentences under *Johnson v. United States*, 135 S. Ct. 2551 (2015), without notice or an opportunity to be heard.

(2) Whether reasonable jurists could debate whether Flowers is entitled to relief under *Johnson* from his Armed Career Criminal Act sentence under 18 U.S.C. § 924(e)(2)(B)(ii), his 3 strikes sentence under 18 U.S.C. § 3559(c), and his career offender sentence under U.S. Sentencing Guidelines § 4B1.2(a)(2) (2000).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Anthony C. Flowers ("Flowers"), through counsel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 17-3484, denying his application for a certificate of appealability (COA), entered on March 19, 2018. Flowers' petition for rehearing by the panel was denied on May 22, 2018.

OPINION BELOW

The Eighth Circuit Court of Appeals' denial of Flowers' application for a COA in Case No. 17-3484 is provided in Appendix A. The Eighth Circuit Court of Appeals' denial of Flowers' petition for rehearing is provided in Appendix B. The order of the district court denying Flowers' § 2255 motion is provided in Appendix C.

JURISDICTION

The United States District Court for the Northern District of Iowa had original jurisdiction over Flowers' case under 18 U.S.C. § 3231. The district court denied Flowers' 28 U.S.C. § 2255 motion on September 15, 2017. Flowers timely filed a notice of appeal and application for a COA in the Eighth Circuit, which was denied on March 19, 2018. (Appendix A). Jordan filed a petition for rehearing by the panel, which was denied on May 22, 2018. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

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 offence 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 (2012). Penalties. Subsection (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 . . . .

18 U.S.C. § 3559. Sentencing classification of offenses.

(c) Imprisonment of certain violent felons.–

(1) Mandatory life imprisonment.–Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if–

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or a State of–

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) Definitions.–For purposes of this subsection . . .

(F) the term "serious violent felony" means–

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and ((a)(2));

kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense[.]

U.S. Sentencing Guideline § 4B1.2(a)(2) (2000).

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that– . . .

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

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

STATEMENT OF THE CASE

On April 4, 2003, Flowers pled guilty to bank robbery, in violation of 18 U.S.C. §§ 2113(a), (d), and 3559(c) (Count Two); use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(i)–(ii) (Count Three); and being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e) (Count Six). (Crim. Doc. 125).[1] Flowers was found to be a career offender based on: (1) a 1986 Iowa conviction for first degree robbery; and (2) a 1986 federal conviction for bank robbery and escape. (PSR ¶ 86). He was also found to be an Armed Career Criminal based on the same two 1986 robbery convictions, a 1964 juvenile adjudication, and a 1982 Nebraska conviction for escape. (PSR ¶ 90). Flowers' sentence range on Count Two was enhanced to life imprisonment under 18 U.S.C. § 3559(c), based on the Nebraska escape conviction and the two 1986 robbery convictions. (Crim. Doc. 71). Flowers additionally faced a mandatory consecutive term of seven years imprisonment on the § 924(c) offense. (PSR ¶ 143). The district court imposed sentences of life imprisonment on the bank robbery and felon in possession convictions to be served concurrently, and 84 months imprisonment, to be served consecutively, on § 924(c) count. (Crim. Docs. 146, 179).

[1] In this brief, "Crim. Doc." refers to the criminal docket in N.D. Iowa Case No. 1:00-cr-00055-LRR and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. References to the § 2255 petition underlying the instant petition for writ of certiorari, N.D. Iowa Case No. 1:16-cv-00106-LRR will be to "Civ. Doc.", followed by the docket entry number.

Flowers filed a 28 U.S.C. § 2255 (2012) petition on May 25, 2016, requesting relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Civ. Doc. 1). In addition to seeking relief from his Armed Career Criminal Act (ACCA) sentence, Flowers had viable *Johnson*-based claims arising from his status as a pre- *United States v. Booker*, 543 U.S. 220 (2005), career offender, and because he was subject to an 18 U.S.C. § 3559(c) sentencing enhancement. As in numerous other cases involving claims that would arguably be subject to the Supreme Court's then-pending decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), the parties jointly requested that full briefing and disposition of Flowers' claims be stayed pending further motion. (Civ. Doc. 1).

On September 15, 2017, the district court denied Flowers' § 2255 petition, finding that the concurrent sentencing doctrine precluded relief. (Appendix C). The district court did not analyze whether § 3559(c) was affected by *Johnson* and made no reference to Flowers' pre-*Booker* career offender status, other than stating in a footnote that Flowers is procedurally barred from advancing non-ACCA claims. (Appendix C). Importantly, the district court's order disposing of the case was entered without ever setting a briefing schedule and without actual briefing from either party.

Because the district court denied Flowers a COA, he filed an application for a COA in the Eight Circuit Court of Appeals. This application was denied on March

19, 2018. (Appendix A). Flowers filed a petition for rehearing by the panel, but this request was also denied (Appendix B).

The Order denying Flowers' Application for a Certificate of Appealability does not state any reasons for the panel's decision, so Flowers assumes that the panel relied upon the reasons given by the district court when it denied Flowers' 28 U.S.C. § 2255 motion seeking to vacate his sentences under the ACCA, the three strikes statute, 18 U.S.C. § 3559(c), and the pre-*Booker* career offender guideline, based upon *Johnson v. United States*, 135 S. Ct. 2551 (2015). (Appendix C).

REASONS FOR GRANTING THE WRIT

Before a petitioner can appeal to the Court of Appeals from an order denying a § 2255 motion, either the district court or the Court of Appeals must grant a COA. 28 U.S.C. § 2253(c)(1)(B). A COA may be issued if "the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(1)(B), and indicates "which specific issue or issues satisfy the [substantial] showing" requirement. *Id.* .

To satisfy the "substantial showing" requirement, the petitioner must demonstrate that a reasonable jurist would find the district court ruling on his constitutional claim debatable or wrong. *Winfield v. Roper*, 460 F.3d 1026, 1040 (8th Cir. 2006) (citing *Tennard v. Dretke*, 542 U.S. 274, 276 (2004)). The petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are

adequate to deserve encouragement to proceed further." *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.1 (1983)). A substantial showing must be made for each issue presented. *Parkus v. Bowersox*, 157 F.3d 1136, 1148 (8th Cir. 1998). The petitioner does not have to show that the appeal is certain to succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 336–37 (2003).

In the instant case, the district court summarily denied the petitioner's claim that he is entitled to relief under *Johnson* by invoking the concurrent sentence doctrine. (Appendix C, p. 1). Apparently, the district court assumed that the petitioner could not attack any sentences other than his Armed Career Criminal Act sentence because of "procedural obstacles." (Appendix C, p. 1). In its footnote, the district court relied upon a Sixth Circuit case to support the proposition that *Johnson* did not recognize a new "constitutional right not to be sentenced as a career offender under the residual clause of the mandatory sentencing guidelines" (Appendix C, p. 2, n. 1). The district court did not give Flowers the opportunity to demonstrate why his other sentences were also subject to attack under *Johnson*. Clearly, the question of whether *Johnson* applies to sentences imposed under the pre-*Booker* career offender guideline, and the three strikes statute, are debatable among jurists of reason.

I. THE LOWER COURTS DEPRIVED FLOWERS DUE PROCESS BY DENYING HIS § 2255 PETITION WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD.

Flowers filed his § 2255 petition on May 25, 2016, and the parties jointly agreed the case should be stayed "until further motion." (Civ. Doc. 1). No further relevant activity occurred in the case until September 15, 2017, when the district court, without advance notice, entered an order denying Flowers' § 2255 petition. (Appendix C). Flowers was never provided an opportunity to file a brief in support of his § 2255 motion before the district court denied it.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."). In this case, Flowers was deprived of due process when the district court denied his § 2255 petition without providing him any notice or opportunity to be heard on either the merits of his *Johnson* claims or on the applicability of the concurrent sentencing doctrine.

The origins of the concurrent sentencing doctrine are unclear. *See Benton v. Maryland*, 395 U.S. 784, 789 (1969). One thing that is clear about the concurrent sentencing doctrine is that it is not a jurisdictional rule. *See id.* at 790. Rather, it is a matter of discretion that "may have some continuing validity as a rule of judicial

convenience." *Id.* at 791; *see also United States v. Smith*, 601 F.2d 972, 973 (8th Cir. 1979) ("[A]n appellate court may, in its discretion, decline to review the validity of a defendant's conviction where (a) the defendant has received concurrent sentences on plural counts of an indictment, (b) a conviction on one or more of those counts is unchallenged or found to be valid, and (c) a ruling in the defendant's favor on the conviction at issue would not reduce the time he or she is required to serve under the sentence for the valid conviction[s]."). The concurrent sentencing doctrine should not be applied, however, if its application would be substantially prejudicial to a defendant or expose him to a substantial risk of adverse collateral consequences that might flow from an invalid or unreversed conviction. *Smith*, 601 F.2d at 973–74.

The district court did not give Flowers the opportunity to attack his concurrent sentence on the bank robbery charge. Nor did the district court give Flowers the opportunity to argue how the denial of relief on his ACCA claim is likely to cause him severe prejudice or adverse collateral consequences. Yet, application of the concurrent sentencing doctrine is likely to cause Flowers severe prejudice and adverse collateral consequences, regardless of whether *Johnson* is ultimately found applicable to § 3559(c). As discussed *infra*, there is significant ongoing litigation nationwide regarding *Johnson*'s applicability to statutory residual clauses that are similar to the ACCA residual clause. In light of the unsettled state of the law, it is entirely plausible that *Johnson* could be held

applicable to the three strikes statute in § 3559(c). Should this occur, petitioner could challenge whether the mandatory life sentencing enhancement in § 3559(c) applied to count 2, and if successful, be resentenced on count 2 to a finite term of incarceration. If the concurrent sentencing doctrine is invoked to deny petitioner ACCA relief in the present case, however, he would still be subject to life in prison on the felon in possession of a firearm charge in count 6, even though such sentence should be subject to a maximum statutory term of only 120 months. Clearly, this would constitute either significant prejudice or an adverse collateral consequence to petitioner because he would not again be permitted to challenge the ACCA sentence in such a scenario.

The Supreme Court has indicated a general willingness to "presume" that an unlawful conviction "has continuing collateral consequences." *Spencer v. Kemna*, 523 U.S. 1, 8 (1998). This court should presume that Flowers' unlawful sentence on count 6 will subject him to continuing collateral consequences. It cannot be said "that there is *no possibility* of undesirable collateral consequences" flowing from the district court's denial of ACCA relief. *United States v. Belt*, 516 F.2d 873, 876 (8th Cir. 1975) (emphasis added, citing *Benton v. Maryland*, 395 U.S. at 791), for the proposition that the concurrent sentencing doctrine should be applied where "adverse collateral consequences . . . *may* flow" from the unreviewed claim (emphasis added)).

II. FLOWERS IS ENTITLED TO ACCA RELIEF UNDER *JOHNSON*.

It is certainly debatable among reasonable jurists whether Flowers' ACCA sentence is invalid under *Johnson*. Flowers lacks three qualifying ACCA convictions because his Iowa robbery, federal escape, and Nebraska escape convictions do not qualify as ACCA predicate offenses in the absence of the residual clause.

A. Iowa first degree robbery

Under Iowa Code § 711.1 (1986), robbery can be committed by three alternative means: (1) committing an assault upon another; (2) threatening another with or purposefully putting another in fear of immediate serious injury; and (3) threatening to commit immediately any forcible felony. The Iowa Supreme Court has repeatedly recognized that these alternatives are *means* of committing Iowa robbery, meaning that the statute is indivisible. *State v. Heard*, 636 N.W.2d 227, 232 (Iowa 2001); *State v. Hickman*, 623 N.W.2d 847, 850–51 (Iowa 2001); *State v. Watkins*, 463 N.W.2d 15, 16 (Iowa 1990). Because the Iowa robbery statute is indivisible, the categorical approach – which looks "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions" – must be used to evaluate whether the conviction is a violent felony. *Taylor v. United States*, 495 U.S. 575, 600 (1990); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016).

One of the means of committing robbery is by "assault," which may be

committed in alternative ways, one of which is engaging in "insulting or offensive" touching, or merely placing someone in fear of an insulting or offensive touching. Iowa Code § 708.1. Iowa's assault statute is indivisible because Iowa does not require jury unanimity as to the particular manner in which an act violates the statute. *See State v. Beck*, 854 N.W.2d 56, 66 (Iowa Ct. App. 2014); *State v. Shiltz*, No. 02-1908, 2004 WL 136375, at *2 (Iowa Ct. App. 2004). Under Supreme Court and Eighth Circuit case law, insulting or offensive touching or placing someone in fear thereof, is insufficient to satisfy the force clause's requirement of "violent force." *See, e.g.*, *Curtis Johnson v. United States*, 559 U.S. 133, 140–42 (2010) (statute overbroad because it prohibits "actually and intentionally touching" another person, which could be achieved simply by an unwanted touching); *United States v. Ossana*, 638 F.3d 895, 900 (8th Cir. 2011) (statute overbroad because it could be violated "with any degree of contact"); *see also United States v. Jones*, No. 04-362, 2016 WL 4186929, at *4 (D. Minn. Aug. 8, 2016) (finding that Iowa simple assault lacks an element of use, attempted use, or threatened use of force).

In *United States v. Eason*, 829 F.3d 633, 640 (8th Cir. 2016), the Eighth Circuit held that Arkansas robbery did not satisfy the ACCA's force clause because a defendant could be convicted of the offense without requiring proof that the crime was committed by "violent force – that is, force capable of causing physical pain or injury to another person." (quoting *Curtis Johnson*, 559 U.S. at 140). Because Iowa courts have actually found assaults to be sufficient for a robbery conviction where

they do nothing more than place another person in fear of an insulting or offensive touching, there can be no question that Iowa robbery can be committed with only nominal force, or even with no force at all. *State v. Copenhaver*, 844 N.W.2d 442, 452 (Iowa 2014) (assault underlying robbery proven where defendant wore a mask, walked quickly to the victim and spoke to her forcefully, and also proven where defendant used a demanding voice, gestured to give him money, and "touched [the victim's] nose a couple times" with his gloved hand); *Heard*, 636 N.W.2d at 230–31 (assault underlying robbery sufficient where the defendant's use of a bag on his head and socks on his hands "signaled his intention to commit some unauthorized act, placing the clerk in fear that she would be harmed, injured or offended in some fashion if she failed to comply with his instructions to give him the money").

The fact that Flowers was convicted of first degree robbery does not, by itself, raise the level of force required to commit robbery to the violent force required under the force clause. Under Iowa Code § 711.2, an offense is elevated to first degree robbery if one or both of the following are proven: (1) the defendant must purposely inflict or attempt to inflict serious injury; or (2) he must be armed with a dangerous weapon. As the Iowa Supreme Court recognized in *State v. Hickman*, these two alternatives represent alternative means of committing the "first degree" element of robbery. *Hickman*, 623 N.W.2d at 850–51 (referring to § 711.2 as listing "alternative means for committing first degree robbery").

By its plain language, the second alternative under § 711.2 requires only that

the perpetrator "is armed with a dangerous weapon." The Iowa Supreme Court has made it clear that "a person who is armed" under the robbery statute does not necessarily commit an assault against the victim because there is no requirement that the defendant display, point, or otherwise employ the weapon in any way. *State v. Law*, 306 N.W.2d 756, 760 (Iowa 1981). Because the defendant does not need to display the weapon, there appears no requirement that the victim even be aware the defendant is armed. *See Id.; see also Jones*, 2016 WL 4186929, at *4 (reasoning that Jones could have been convicted of robbery by an assault involving de minimis force, and his robbery could have been elevated to first degree because he was "armed with a dangerous weapon, even if he never used, attempted to use, or threatened to use the weapon").

B. Federal escape

Case law at the time of Flowers' sentencing supported a belief that his escape conviction, pursuant to 18 U.S.C. § 751(a), was a violent felony under the residual clause. *See, e.g., United States v. Nation,* 243 F.3d 467, 472 (8th Cir. 2001) (holding that "every escape, even a so-called 'walkaway' escape, involves a potential risk of injury to others" and thus qualifies as a crime of violence under the residual clause), a*brogated by Chambers v. United States,* 555 U.S. 122 (2009).

Title 18, United States Code, § 751(a), makes it a crime to "escape[] or attempt[] to escape . . . from any custody under or by virtue of any process issued under the laws of the United States." Escape is not an enumerated offense under §

924(e)(2)(B)(ii). Accordingly, in the absence of the unconstitutionally vague residual clause, it can only constitute an ACCA predicate offense if it necessarily involves the use, attempted use, or threatened use of violent physical force against the person of another. 18 U.S.C. § 924(e)(2)(B)(i). Clearly, there is nothing in the statutory text of § 751(a) that in any way implicates the use, attempted use, or threatened use of physical force against the person of another.

C. Nebraska escape

Flowers was convicted of Escape in 1982, in violation of Nebraska Revised Statute § 28-912(1), which provided: "A person commits escape if he or she unlawfully removes himself or herself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." As with federal escape, Nebraska escape can only qualify as a predicate offense if it satisfies the force clause, because escape is not an enumerated offense under the ACCA[2].

The plain language of the Nebraska statute does not require the use, threatened use, or attempted use of *any* amount of physical force for its commission. Accordingly, Flowers' Nebraska escape conviction is clearly not a proper predicate offense for purpose of the ACCA. *See, e.g., United States v. Martinez,* 821 F.3d 984,

[2] Prior to *Johnson*, and well before the Supreme Court's *Mathis* decision, the Eighth Circuit held that Nebraska escape qualified as a crime of violence under the residual clause. *See United States v. Williams*, 627 F.3d 324, 328–29 (8th Cir. 2010).

988 (8th Cir. 2016) (escape convictions fall under the residual clause and could pose constitutional vagueness issues); *United States v. Levering*, No. 8:04-cr-178, 2016 WL 3003353, at *2 (D. Neb. May 13, 2016) ("This Court now concludes that a conviction for escape from official detention under Nebraska law is an offense falling within the scope of the residual clause of the ACCA . . . [which] cannot provide the basis for the Defendant's status as an Armed Career Criminal.").

III. THE RESIDUAL CLAUSES IN THE THREE STRIKES STATUTE AND THE PRE-*BOOKER* CAREER OFFENDER GUIDELINE ARE VOID FOR VAGUENESS UNDER *JOHNSON*.

This Court recently found that *Johnson*'s reasons for finding the ACCA residual clause void for vagueness apply with equal force to the substantially similar statutory residual clause in 18 U.S.C. § 16(b), rendering that provision unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (Apr. 17, 2018). In so holding, the Supreme Court explicitly rejected three arguments the government made in an attempt to distinguish § 16(b) from the ACCA's residual clause in § 924(e)(2)(B)(ii). First, the Court found that § 16(b)'s requirement that risk arise "in the course of committing the offense" does not significantly affect a court's obligation to assess the way in which a crime is "ordinarily" committed. *Id.* at 1219–20 ("In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later."). Second, the Court found that § 16(b)'s reference to "physical force" did not differentiate it from the ACCA's residual clause, which required "physical injury." *Id.* at 1220–21 ("[E]valuating the risk of

'physical force' itself entails considering the risk of 'physical injury.'"). Finally, the Court declined to find that § 16(b) was distinguishable from the ACCA's residual clause based on the fact that § 16(b) lacks a "confusing list of exemplar crimes." *Id.* at 1221 ("To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem.").

In light of *Dimaya*, it seems probable, if not certain, that the Supreme Court will find the substantially similar residual clauses in 18 U.S.C. § 924(c), 18 U.S.C. § 3559(c), and the pre-*Booker* mandatory career offender guideline to be unconstitutionally vague as well.[3] Indeed, there is no significant textual difference between the residual clauses found in § 924(e)(2)(B)(ii) and § 16(b), and those found in § 924(c)(3)(B), § 3559(c)(2)(F)(ii), and the pre-*Booker* version of USSG § 4B1.2(a)(2). *See United States v. Salas*, 889 F.3d 681, 687–88 (10th Cir. 2018) (noting that § 924(c)(3)(B) is identical to § 16(b); *Cross v. United States*, 892 F.3d 288, 291 (7th Cir. 2018) (finding the language in the pre-Booker career offender

[3] While Flowers was convicted of a § 924(c) offense, he only challenged his status as an Armed Career Criminal, three-strikes offender, and pre-*Booker* career offender in the present § 2255 action. Case law dealing with § 924(c), however, remains highly relevant to the analysis in this case because of the nearly identical language used in § 924(c), § 16(b) and § 3559(c). Flowers additionally notes that his status as a pre-*Booker* career offender only comes into play if his sentence pursuant to § 3559(c) is set aside. Nonetheless, in the interest of preserving all potential issues in this case, Flowers maintains and affirmatively argues herein that his career offender status is properly subject to attack under *Johnson*.

guideline identical to the ACCA residual clause language deemed unconstitutional in Johnson); *Haynes v. United States*, 237 F. Supp. 3d 816, 823 (C.D. Ill. 2017) (noting that the government conceded that the language of § 3559(c)(2)(F)(ii) is "almost identical to the language in the residual clauses that have been found unconstitutionally vague and that the Court is bound by circuit precedent").

Prior to *Dimaya*, only one Court of Appeals had held that § 924(c) – which contains a residual clause identical to that in § 16(b) and virtually identical to the residual clause in § 3559(c)[4] – was unconstitutionally vague under the reasoning in *Johnson*. *See United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). By contrast, the Eighth Circuit had rejected a void for vagueness challenge to § 924(c). *United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (noting that the Second and Sixth Circuits had also found *Johnson* inapplicable to § 924(c)). *Prickett* and other pre-*Dimaya* decisions finding § 924(c) constitutional, however, have almost certainly been abrogated by *Dimaya*. Indeed, since *Dimaya* was decided in April 2018, the D.C. Circuit and the Tenth Circuit have both determined that § 924(c) is unconstitutionally vague for precisely the reasons set forth in *Johnson* and *Dimaya*. *See Salas*, 889 F.3d at 687–88; *United States v. Eshetu*, No. 15-3010, 2018 WL

[4] Title 18, United States Code, § 3559(c)(2)(F)(ii)'s residual clause considers whether an offense "by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense," whereas the residual clause in 18 U.S.C. § 16(b) considers whether an offense "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." (emphasis added).

367907, at *1–2 (D.C. Cir. Aug. 3, 2018). Likewise, at least one Court of Appeals has held post-*Dimaya* that the pre-*Booker* career offender guideline residual clause – which is identical to the ACCA residual clause struck down in *Johnson* – is unconstitutionally void for vagueness. *See Cross*, 892 F.3d at 300–03; *but see United States v. Green, 17-2906*, 2018 WL 3717064 (3d Cir. Aug. 6, 2018) (declining to find that Johnson opened a new one-year window to raise § 2255 challenges to the pre-Booker career offender guideline because the Supreme Court in Beckles expressly left that question open). There is little, if any, reason to think that the reasoning of *Johnson* and *Dimaya* do not also extend to render the residual clauses in § 3559(c) and the pre-*Booker* career offender guideline unconstitutionally vague.

Notably, the Supreme Court's decision in *Beckles* actually makes the case for applying *Johnson* to the pre-*Booker* career offender guideline and § 3559(c) even more compelling. *Beckles* did not hold that *Johnson* was inapplicable to the advisory career offender guideline because of any significant textual differences between the residual clauses of Iowa Code § 4B1.2(a)(2) and 18 U.S.C. § 924(e)(2)(B)(ii). Rather, *Beckles* held that the advisory guidelines are not subject to vagueness challenges because the "advisory Guidelines do not fix the permissible range of sentences." *Beckles*, 137 S. Ct. at 892. Importantly, the pre-*Booker* mandatory sentencing guidelines were not at issue in *Beckles*, leading Justice Sotomayor to acknowledge that the decision "at least leaves open the question of whether defendants sentenced to terms of imprisonment before our decision in

[*Booker*] . . . may mount vagueness attacks on their sentences." *Id.* at 903 n.4 (Sotomayor, J., concurring). Justice Sotomayor explicitly acknowledged, however, that defendants sentenced prior to *Booker* were sentenced "during the period in which the Guidelines *did* 'fix the permissible range of sentences.'" *Id.* For this reason alone, a "straightforward application" of *Johnson* would seem to dictate that the residual clause in the pre-*Booker* mandatory sentencing guidelines is unconstitutionally void for vagueness. *See Dimaya*, 138 S. Ct. at 1213.

The case for applying *Johnson* to the residual clause in § 3559(c) is equally strong, especially when viewed in light of *Dimaya*'s analysis of the virtually identical language in § 16(b). First, *Johnson* is applicable to § 3559(c) because § 3559(c) does more than "fix the permissible range of sentences"– it *mandates* a single specific sentence of life imprisonment. *See Beckles*, 137 S. Ct. at 892. Second, although the residual clause in § 3559(c) is contained in a separate subsection, it is textually linked to § 3559(c)(2)(F)(i), which provides an even lengthier and more "confusing set of examples [than those] that plagued the Supreme Court" in *Johnson*. *Prickett*, 839 F.3d at 699. Third, § 3559(c) requires sentencing courts to do exactly what they were required to do pursuant to both the ACCA and § 16(b) – examine an "ordinary case" to assess the level of risk of conduct that "is remote from the [present] criminal act." *Dimaya*, 138 S. Ct. at 1211; *Prickett*, 839 F.3d at 699 (quotation marks and citations omitted). Thus, even if pre-*Dimaya* decisions such as *Prickett* are correct that § 924(c)'s residual clause is distinguishable from the

ACCA's residual clause in that § 924(c) focuses only on a *contemporaneous offense*, § 3559(c) simply cannot be distinguished in this way. Finally, the residual clause in § 3559(c)(2)(F)(ii) suffers from the second defect that, combined with the "ordinary case" standard, rendered the ACCA and § 16(b) residual clauses unconstitutionally vague, i.e., it employs a "fuzzy risk standard" that "le[aves] unclear what threshold level of risk ma[kes] any crime a '[serious] violent felony.'" *Dimaya*, 138 S. Ct. at 1214. "In sum, [§ 3559(c)] has the same two features that conspired to make [ACCA's and 16(b)'s residual clauses] unconstitutionally vague. It too requires a court to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." *Id.* at 1216. "The result is that [§ 3559(c) produces, just as the ACCA's [and 16(b)'s] residual clause[s] did, more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

If *Johnson* is applied to § 3559(c), Flowers would be entitled to relief. First, his federal and Nebraska escapes could have only qualified as serious violent felonies under the residual clause of § 3559(c)(2)(F)(ii). Obviously, escape is not an enumerated offense under § 3559(c)(2)(F)(i). As discussed *supra*, neither federal nor Nebraska escape has, as an element, the use, attempted use, or threatened use of physical force against the person of another.

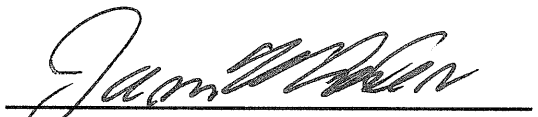
For the same reasons that Flowers' first degree robbery does not qualify under the force clause of the ACCA, it also cannot qualify under the substantially

identical force clause of § 3559(c)(2)(F)(ii). Flowers' Iowa robbery also fails to qualify under the enumerated clause, which provides that robberies "as described in section 2111, 2113, or 2118" qualify as strikes under the statute. The "common theme" in §§ 2111, 2113, and 2118, is that each requires proof that the robbery offense be committed by "force and violence, or by intimidation." *United States v. Wicks*, 132 F.3d 383, 387 (7th Cir. 1997). Because "force and violence" is routinely interpreted as "entail[ing] the use of physical force," and because "intimidation" is interpreted as "involv[ing] the threat to use such force," qualification of a prior offense as a predicate under the enumeration clause requires fundamentally the same proof required for qualification under the force clause, i.e., that the offense involve the actual, attempted, or threatened use of physical force. *United States v. McNeal*, 818 F.3d 141, 152–53 (4th Cir. 2016); *see also United States v. Wright*, 957 F.2d 520, 522 (8th Cir. 1992) ("Intimidation means the threat of force. Because use or threatened use of force is an element of [§ 2113(a)] robbery, a person convicted of robbery has been convicted of a crime of violence [under the force clause in USSG §4B1.2].") (quotation marks and citation omitted). And, under *Curtis Johnson*, the "physical force" required under the enumeration clause necessarily means "*violent* force – that is, force that is capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

CONCLUSION

For the foregoing reasons, Jordan respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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