No. --

IN THE

SUPREME COURT OF THE UNITED STATES

MARK D. WHITFIELD,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

KEVIN JOEL PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTION PRESENTED FOR REVIEW

Whether jurists of reason could debate whether robbery under the Hobbs Act possesses the use, attempted use, or threatened use of force against the person or property of another as an element?

PARTIES

Mark D. Whitfield is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mark D. Whitfield, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Whitfield ,* No. 17-11208 (5th Cir. June 5, 2018) (not electronically reported), and is provided in the Appendix to the Petition. [Appendix A]. The unpublished judgment of the district court denying relief under 28 U.S.C. §2255 and denying a certificate of appealability was issued August 10, 2017, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The Fifth Circuit's order denying a certificate of appealability was entered on June 5, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, SENTENCING GUIDELINES AND RULES INVOLVED

Section 924(c) of Title 18 provides in part:

> (c)(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any 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–
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment

of not less than 7 years;

***

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

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

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

Section 1951 of Title 18 provides in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Section 2253 of Title 28 provides in part:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals

from–

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

A. Conviction, Sentence and Appeal

Petitioner Mark D. Whitfield pleaded guilty to a conspiracy to interfere with commerce by robbery, 18 U.S.C. § 1951, and possessing a firearm in furtherance of one such robbery, 18 U.S.C. § 924(c).

According to his plea papers. Mr. Whitfield aided and abetted his co-defendant in an armed robbery of Marquise Jewelers in Dallas's Valley View Mall. On October 18, 2013, Mr. Whitfield distracted the victim, P.T.S., until the co-defendant "came around the counter and threatened P.T.S. with violence and death by holding a firearm to her head and threatening to kill her" so that the defendants could "steal jewelry from the store."

The district court sentenced Mr. Whitfield to serve 225 months on Count 1, a mandatory consecutive term of 84 months on Count 4, for an aggregate sentence of 309 months. The maximum punishment on Count 1 alone would be 240 months in prison.

The district court entered written judgment on June 5, 2015. Mr. Whitfield did not file a direct appeal, so his conviction became "final" when the deadline to file an appeal expired 14 days later, on June 19, 2015.

B. District Court Proceedings pursuant to 28 U.S.C. §2255

Seven days after the deadline to file a direct appeal – on June 26, 2015 – this Court issued its watershed decision in *Johnson v. United States*, 135 S.Ct. 2251 (2015). This Court held the residual clause of the Armed Career Criminal Act was unconstitutionally vague, for two reasons:

> Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave un-certainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements.

Johnson, 135 S. Ct. at 2557 (2015). The new constitutional rule in *Johnson* was made retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016).

On June 16, 2016, the district court appointed the Federal Public Defender's office "to investigate whether [Mr. Whitfield] is entitled to post-conviction relief under *Johnson* . . . and to pursue such relief through any appropriate proceedings, including appeal." Mr. Whitfield filed his motion to vacate on Saturday, June 25, 2016, less than one year after *Johnson* was decided.

The district court initially ordered Mr. Whitfield to explain why the case was not barred by the one-year statute of limitations in 28 U.S.C. §2255(f)(1). Mr. Whitfield gave three reasons: (1) the government had not formally invoked the limitations defense, and the defense could be waived; (2) the motion to vacate was timely under 28 U.S.C. §2255(f)(3); and (3) if the motion was untimely, Mr. Whitfield could avoid the defense because he was actually innocent of 18 U.S.C. § 924(c) once that statute is stricken of its unconstitutionally vague residual clause. The Government later filed an answer asserting the limitations defense as well as arguments regarding procedural

default and the merits.

A U.S. Magistrate Judge recommended that the case be dismissed as untimely. Mr. Whitfield objected and urged the district court to await the outcome of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). The district court overruled the objections and dismissed the case "with prejudice as barred by the one-year statute of limitations" on August 10, 2017.

C. Motion for Certificate of Appealability

Petitioner then sought a certificate of appealability, arguing that reasonable jurists could disagree about whether *Johnson* invalidated §924(c) convictions premised on Hobbs Act robberies. And, he contended, if jurists of reason could debate that question, they could debate both whether the §2255 motion was timely, and whether it should be granted on the merits.

The court of appeals denied the certificate in an unreported order. It said that "[a]lthough Whitfield has shown that reasonable jurists would debate the correctness of the district court's time-bar determination, he has not shown that reasonable jurists would debate whether his motion stated a valid claim of the denial of a constitutional right." [Appx. A]. The court cited *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017), for the proposition that Hobbs Act is a "crime of violence" under 18 U.S.C. §924(c).

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided as to whether a certificate of appealability should issue on the question of whether the Hobbs Act robbery satisfies 18 U.S.C. §924(c)(3)(A).

Section 2255 of Title 28 permits prisoners to seek relief from a conviction or sentence imposed in violation of the law or constitution of the United States. *See* 28 U.S.C. §2255. While most such motions must be brought within a year of a conviction becoming final, the period of limitations is reset when a right is "initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review ." 28 U.S.C. 2255(f)(3). They are entitled to appellate review when such motions are denied, but they must first obtain a certificate of appealability. *See* 28 U.S.C. §2253. A certificate should be granted when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in [any] procedural ruling" dismissing a §2255 action on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code makes it a crime to brandish a firearm in connection with a "crime of violence." The term "crime of violence" is defined as any felony that:

> (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 provision bearing wording identical to Subsection (B) of this statute has been held unconstitutionally vague. *See Sessions v. Dimaya*, __U.S.__, 138

S.Ct. 1204 (2018).

Petitioner was convicted of brandishing a firearm in connection a "robbery" under 18 U.S.C. §1951(a). This statute – "the Hobbs Act" – defines "robbery" to encompass the taking of property "by means of actual or ***threatened force***, or violence, ***or fear of injury***..." 18 U.S.C. §1951(b)(1)(emphasis added). The court below has held that threatened force is always present in Hobbs Act robbery, and that the offense therefore possesses the use, attempted use, or threatened use of force against the person or property of another as an element within the meaning of 18 U.S.C. §924(c)(3)(A). *See United States v. Buck*, 847 F.3d 267 (5th Cir. 2017). Below, it further held that such conclusion is not even debatable among jurists of reason, and that a certificate of appealability is not appropriate where a prisoner challenges his or her §924(c) conviction in a proceeding under 28 U.S.C. §2255. *See* [Appx. A].

This overlooks at least four factors that make the question debatable, at the very least. First, the plain language of the statute sets forth three means of committing the robbery offense: actual or threatened force, violence, or fear of injury. The canon against surplusage plainly implies that neither violence nor threatened force is necessary to commit the offense. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011).

Second, Hobbs Act robbery has been described as equivalent to common-law robbery. *See United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996); *United States v. Nedley* , 255 F.2d 350, 357 (3d Cir. 1958); *United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001). As such, it requires only slight or minimal force: just enough to overcome resistance from the victim. *See* 77 C.J.S. Robbery § 23 (2016) ("The amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance. If the force used is sufficient to overcome resistance, the particular degree of violence employed is immaterial as an element of the crime....

Thus, it has been said that any force, no matter how slight, which induces the victim to part with his or her property is sufficient to sustain a robbery conviction."). Indeed, a defendant has been convicted for pushing a door open while the victim tried to block it – that was enough force in *United States v. Kornegay*, 641 Fed. Appx. 79 (2d Cir. 2016)(unpublished).

This Court, however, has held that minimal or slight force is not "force" as used in 18 U.S.C. § 924(e), a very similarly worded statute. *See Johnson v. United States*, 559 U.S. 133, 138-145 (2010). For this reason, some common-law robbery statutes – those requiring only enough force to overcome the victim's resistance – have been held to lack "force" as an element within the meaning of 18 U.S.C. §924(e). *See United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Castro-Vazquez*, 802 F.3d 28, 37 (1st Cir. 2015); *United States v. Dunlap*, 162 F. Supp. 3d 1106, 1114 (D. Or. 2016).

Third, by its terms, Hobbs Act robbery may be committed by instilling all manner of fear of injury to property, whether "immediate or future," whether the property is "in [the victim's] custody or possession," and whether it is that "of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(a)(1). Indeed, the offense may even be accomplished by threats to intangible assets. *See United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 n.8 (2003)(""[t]he concept of 'property' under the Hobbs Act is an expansive one," which "includes intangible assets such as rights to solicit customers and to conduct a lawful business."). A threat to damage the intangible assets of the victim's family at some time in the unspecified future is, at least debatably, something other than the "threatened use of force."

Fourth, the court below has long distinguished between offenses that require the use or threat of force and those that require mere bodily injury. *See United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017), *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5th Cir. 2010); *United States v. Martinez-Mata*, 393 F.3d 625, 629 (5th Cir. 2003); *United States v. De La Rosa-Hernandez*, 264 Fed. Appx. 446, 449 (5th Cir. 2008)(unpublished); *United States v. Johnson*, 286 Fed. Appx. 155, 157 (5th Cir. 2008)(unpublished). Yet the Hobbs Act expressly defines "robbery" to include the "fear of injury." 18 U.S.C. §1951(a). It is at least debatable, therefore, that Hobbs Act may be accomplished without threatened use of force.

Given these issues, it is unsurprising that at least one other court has found it reasonably debatable whether Hobbs Act robbery has the use, attempted use, or threatened use of physical force as an element. *See United States v. Beaver*, No. 17-15108, Dkt. 3 (Ninth Cir., June 16, 2017); *United States v. Hayes*, No. 17-15048, Dkt. 4, (Ninth Cir., May 4, 2017); *United States v. Williams*, No. 16-56640, Dkt. 3 (Ninth Cir., March 16, 2017).The present case thus displays a direct contradiction between the courts of appeals on the same matter. A plenary grant of certiorari would be appropriate on this ground. *See* Sup. Ct. R. 10.

II. If this Court is not inclined to issue a plenary grant certiorari to resolve this question, it should hold the instant Petition until the resolution of *Stokeling v. United States*, 138 S.Ct. 1438 (April 2, 2018), and *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*).

Alternatively, the Petition should be held pending the resolution of *Stokeling v. United States*, 138 S.Ct. 1438 (April 2, 2018). In that case, this Court will decide whether:

a state robbery offense that includes "as an element" the common law

> requirement of overcoming "victim resistance" categorically a "violent felony" under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

Petition for Certiorari in *Stokeling v. United States*, No. 17-5554, 2017 WL 8686116 (filed August 4, 2017), *certiorari granted* 138 S.Ct. 1438 (April. 2, 2018). Because Hobbs Act robbery has been held to require no more force than common-law robbery, a victory for the defendant in *Stokeling* will certainly make the merits question here debatable. Indeed, it will probably resolve the question in Petitioner's favor.

At a minimum, the Petition should be held pending the court below's en banc decision in *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*). In *United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. February 6, 2018), *rehearing en banc granted by* 892 F.3d 800 (5th Cir. June 15, 2018), a panel of the Fifth Circuit held that the Missouri offense of Voluntary Manslaughter lacks force as an element, precisely because injury is not always force. The government has successfully petitioned for *en banc* review. *See United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*). In the event the defendant prevails in *Reyes-Contreras* en banc, a uniform rule distinguishing force and injury will necessarily prevail in the Fifth Circuit. It is difficult to see how one could distinguish force and injury, and yet hold that Hobbs Act robbery always requires threatened force.

The pending decisions in *Stokeling* and *Reyes-Contreras* represent sources of controlling legal authority that would call for a different outcome than the decision below. In these circumstances, it is appropriate to hold the instant Petition until the resolution of those case and to grant *certiorari*, vacate the judgment below, and remand for reconsideration in the event that it produces an opinion favorable to Petitioner's claim here. *See Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

It is true that the district court also denied relief on the ground that the Petition was untimely. In its view, *Johnson v. United States,* 135 S.Ct. 2551 (2015), which held the "residual clause" of 18 U.S.C. §924(e) unconstitutionally vague, did not apply to the similarly worded 18 U.S.C. §924(c)(3)(B). According to the district court, then, Petitioner's §2255 deadline had not been reset by a relevant "right ... newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. §2255(f)(3). But since then, this Court has invalidated 18 U.S.C. §16(b) based on the reasoning of *Johnson*, and §16(b) is perfectly identical to 18 U.S.C. §924(c)(3)(B). Further, the court below expressly held that the district court's timeliness decision was in fact reasonably debatable. *See* [Appx. A]. The opinions of the courts of appeals on that question confirm that conclusion. *See United States v. Nguyen*, 733 Fed. Appx. 451 (10th Cir. July 31, 2018)(unpublished)(concluding that 2255 action challenging 924(c) conviction was timely if filed within a year of *Johnson*); *United States v. Carreon*, No. 16-11239 (5th Cir. August 24, 2018)(not electronically reported)(granting a certificate of appealability on timeliness of §2255 *Johnson* challenge to §924(c)); *but see United States v. Williams*, 897 F.3d 660 (July 30, 3018)(denying certificate of appealability on timeliness issue in §2255 challenge to a §924(c) conviction, because *Johnson* has not yet been applied to §924(c)). Accordingly, if this Court answers the question presented here – whether it is reasonably debatable that Hobbs Act robbery possesses force or threatened force as an element – issuance of a certificate of appealability will be appropriate. Similarly, if *Stokeling* or *Reyes-Contreras* render the "force" question reasonably debatable, a certificate of appealability will likely issue on remand.

CONCLUSION

Petitioner respectfully submits that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 4th day of September, 2018.

/s/ Kevin J. Page
KEVIN J. PAGE
COUNSEL OF RECORD
ASSISTANT FEDERAL PUBLIC DEFENDER
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARK D. WHITFIELD,	**§**	
Petitioner,	**§**	
	§	
v.	**§**	**Civil No. 3:16-CV-1781-D**
	§	**(Criminal No. 3:14-CR-238-D-02)**
UNITED STATES OF AMERICA,	**§**	
Respondent.	**§**	

ORDER

After making an independent review of the pleadings, files, and records in this case, and the findings, conclusions, and recommendation of the magistrate judge, the court concludes that the findings and conclusions are correct. It is therefore ordered that the findings, conclusions, and recommendation of the magistrate judge are adopted, and petitioner's petition for habeas corpus filed pursuant to 28 U.S.C. § 2255 is dismissed with prejudice as barred by the one-year statute of limitations. *See* 28 U.S.C. § 2255(f).

Considering the record in this case and pursuant to Fed. R. App. P. 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), the court denies a certificate of appealability. The court adopts and incorporates by reference the magistrate judge's findings, conclusions, and recommendation filed in this case in support of its finding that the petitioner has failed to show (1) that reasonable jurists would find this court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S.473, 484 (2000).

If petitioner files a notice of appeal,

( ) petitioner may proceed *in forma pauperis* on appeal.

(**X**) petitioner must pay the $505.00 appellate filing fee or submit a motion to proceed *in forma pauperis*.

SO ORDERED.

August 10, 2017.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11208

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARK D. WHITFIELD,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Mark D. Whitfield was convicted of conspiracy to commit robbery, in violation of 18 U.S.C. § 1951, and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1). He was sentenced to 225 months of imprisonment on the former conviction and to a consecutive term of 84 months of imprisonment on the § 924(c)(1) conviction. Whitfield now seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion, in which he challenged his conviction and sentence under § 924(c)(1) based on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, a district court has dismissed a claim on procedural grounds, the movant must

show "that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Whitfield asserts that, because his § 2255 motion was filed within one year of the decision in *Johnson*, the motion was timely under § 2255(f)(3). He claims that the definition of "crime of violence" in the residual clause of § 924(c)(3)(B) is unconstitutionally vague under the reasoning of *Johnson*. Whitfield also contends that reasonable jurists would debate the correctness of the district court's determination that a Hobbs Act robbery offense satisfies the separate definition of "crime of violence" in § 924(c)(3)(A).

Although Whitfield has shown that reasonable jurists would debate the correctness of the district court's time-bar determination, he has not shown that reasonable jurists would debate whether his motion stated a valid claim of the denial of a constitutional right. *See United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017) (relying on § 924(c)(3)(A) to hold, "[i]t was not error—plain or otherwise—for the district court to classify a Hobbs Act robbery as a crime of violence").

Accordingly, the motion for a COA is DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Jun 05, 2018

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit