18-7292

IN THE

SUPREME COURT OF THE UNITED STATES

MARCO WHITLEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

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

MARCO WHITLEY, SR., respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Eighth Circuit.

MARCO WHITLEY, SR.
Pro se Petitioner

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QUESTIONS PRESENTED

☐ Did the Eighth Circuit err by holding Missouri's Second Degree Robbery is always considered to necessarily be a crime of violence?

☐ Did the Eighth Circuit err in failing to articulate whether intentional and unjustified intrusions upon the attorney-client relationship can violate the Sixth Amendment absent proof of prejudice?

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OPINION BELOW

The United States Court of Appeals for the Eighth Circuit's judgment was filed on July 12, 2018. There is no opinion attached to the judgment. See Petitioner's Appendix ("Pet. App.") A. The order from the District Court for the Western District of Missouri is unpublished but is attached hereto at Pet. App. B.

STATEMENT OF JURISDICTION

The Untied States Court of Appeals for the Eighth Circuit entered its judgment denying rehearing en banc on September 17, 2018. This petition is timely filed within ninety days of the date the appellate court entered its judgment.

This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 2253(c)	Certificate of Appealability
28 U.S.C. § 2255	Writ of Habeas Corpus

STATEMENT OF THE CASE

I. Material Facts

On June 23, 2015, Petitioner was charged in a four-count superseding indictment. On July 27, 2015, Petitioner filed a pro se request to the District Court seeking appointment of new counsel. Petitioner informed the court that there was a breakdown in communication between him and counsel. Petitioner also alerted the court that the two disagreed on nearly every trial strategy available to the defense.

Finally, Petitioner alerted the Court of a possible conflict of interest with counsel because he filed a lawsuit naming counsel as a defendant. A hearing was held on the issues and the magistrate denied appointment of counsel. Based on the previous conversations with counsel, Petitioner felt it was not within his best interest to proceed to trial for the sole purpose of challenging a single element of the offense. As a result, Petitioner pleaded guilty to being a felon in possession of a firearm.

On November 13, 2015, a presentence investigation report (PSR) was issued setting forth an incorrect account of the offense conduct. The PSR found PEtitioner's prior Missouri conviction for attempted robbery qualified as a crime of violence conviction. Based on this finding the PSR applied two separate enhancements which were predicated on its crime of violence finding for the Missouri attempted robbery conviction. After having been requested to object by Petitioner, counsel instead remained silent. Petitioner filed his own objections to the PSR's findings on a number of issues including its crime of violence finding for the Missouri robbery conviction. Prior to sentencing counsel failed to make any of her own objections. Instead, counsel decided to halfheartedly argue Petitioner's pro se objections. At

sentencing counsel objected to some of Petitioner's objections and counsel also flat out conceded to others. Agreeing with Counsel's concessions, the court held the prior attempted robbery to be a crime of violence conviction pursuant to § 4B1.1. The District Court sentenced Petitioner to eighty-five (85) months in prison . This was actually an upward departure from the advisory guideline range of 57-71 months. Without applying the crime of violence enhancements Petitioner's advisory guideline range would have been 24-30 months.

On June 14, 2017, Petitioner filed a motion to set aside his sentence arguing among other things that his trial counsel was ineffective for failing to challenge his Missouri attempted robbery failed to meet the violent force as required under Johnson v. United States, 559 US 133 (2010), to qualify as a crime of violence enhancement under the Sentencing Guidelines. Petitioner also raised a claim of prosecutorial misconduct factually stating by way of sworn affidavit that the Corrections Corporation of America ("CCA") violated his Sixth Amendment right to counsel by recording phone calls and visitation room meetings between him and his counsel. The only thing unclear was whether CCA turned the recorded calls and video visits over to the United States Marshal's like it had done in a number of other cases.

The District Court denied the ineffective claim without even addressing whether Missouri's attempted robbery qualified as a crime of violence under the Guidelines. Instead the District Court simply held, "Counsel's performance was not deficient and Petitioner failed to establish prejudice. Petitioner filed a request for COA to the Eighth Circuit Court of Appeals. He argued that the record clearly established both deficient performance by counsel and prejudice resulted from such deficient performance. Petitioner

also informed the Eighth Circuit that the District Court failed to allow Petitioner access to evidence which could be used to prove the Government possessed his confidential communications with his attorney. The Eighth Circuit denied the request in a judgment which stated, "the Court has carefully reviewed the original file of the District Court and application for appealability is denied." Petitioned filed en banc which was likewise denied without explanation. The petition followed.

II. Reasons For Granting The Petition For Writ

In Petitioner's request for COA he simply presented claims that he had shown that a jurist of reason could disagree with the District Court's resolution of the constitutional claims. See Buck v. Davis, 137 S. Ct. 759, 733 (2017). This Court's pending opinion in Stokeling v. United States, ____ US ____ (2018), proves that Petitioner's issue of whether his prior attempted robbery qualified as a crime of violence is clearly debatable amongst jurist of reason. The Missouri robbery statute in question contains the same "overcome resistance" language which the Justices recently debated in Stokeling. Based on this fact alone, it is clear the Eighth Circuit's failure to allow Petitioner's request for COA to proceed to an appeal in the first instance violated the rule in Buck v. Davis.

In the lower court, Petitioner proved by way of sworn affidavit that the government had recorded attorney-client communications while he was in pre-trail detention in CCA. The Eighth Circuit denied the Sixth Amendment claim without even acknowledging this court's opinion in Weatherford v. Bursey, 429 US 545, 551 (1977). In Weatherford this Court left open whether intentional and unjustified intrusions upon attorney-client relationship may violate the Sixth Amendment absent proof of prejudice. The circuit courts

are split on this issue. The fact of the matter is that facts from the District of Kansas has proved that inmates housed in the CCA have had recorded calls accessed since January 1, 2010 though August 1, 2017. There are 1,615 names of CCA inmates whose calls have been accessed. Of hose inmates, 892 of those calls were no District of Kansas inmates. CCA primarily house Missouri and Kansas inmates. Since Petitioner presented the Eighth Circuit with a sworn affidavit that he was housed in CCA Leavenworth and used CCA's phone system to discuss trial strategies this Court must exercise its authority and address this split in the lower circuits which was left open in Weatherford.

For both of the reasons previously addressed, the Eighth Circuit failed to use the proper standard for the COA process. This petition presents two issues of national importance which deserves this Court's attention. This court should grant the writ.

III. The Eighth Circuit Violated The Principles Of Law Regarding A Grant Of Certificate Of Appealability

A habeas litigant, like Mr. Whitley, must be granted a certificate of appealability upon each and every issue raised by him for which it is found that he has made a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2) and (3). A substantial showing "is not coextensive with a merits analysis;" in fact, this is a matter to be decided without full consideration of factual or legal bases adduced in support of the claims"; all a COA-seeking habeas litigant need to show is "that his petition involves issues which are debatable among jurist of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." See Miller-el v. Cockrell, 537 U.S. 322, 327 (2003); Buck v. Davis, 137 S. Ct. 759, 773 (2017). Petitioner will show, based on the current state of both issues, the Eighth Circuit violated the principles established by this Court.

IV. The Eighth Circuit Committed Error By Holding Missouri's Second Degree Robbery Is Always Considered To Necessarily Be A Crime Of Violence

The Eighth Circuit, while Petitioner's COA was pending, held Missouri's second degree robbery always is a crime of violence. See United States v. Swope, 850 F.3d 979, 981 (8th Cir. 2017). There are two reasons in particular that this Court must overturn the Eighth Circuit's en banc decision. First Swopes concluded that Missouri second degree robbery requires the use or threatened use of force. The Court held Bell erroneously relied on dicta from a single case to conclude that the Missouri statute failed to require force capable of causing physical pain or injury to another person. See Swopes at 671.

The Court next focused on the holding of the state case in question and found that the actual offense in that case was violent within the meaning of Johnson v. United States, 559 US 133, 143 (2010). In that case the Defendant bumped the victim from behind, momentarily struggled with her, and then yanked the purse out of her hands. The en banc court found this blind-side bump, brief struggle, and yank to be analogous to the slap in the face posited by Johnson. Id Swopes at 671. Regardless of whether the Swopes court was correct on that specific case, there is another state case out of Missouri which clearly takes the robbery statute outside of Johnson's violent force definition. The case in question better represents the minimum culpable conduct required to sustain a conviction under the statute. When construing the minimum culpable conduct that could sustain a conviction under particular statute, this court recently noted that we must consider whether there is a "realistic probability" that such conduct would satisfy the offense. See Moncrieffe v. Holder, 569 US 184 (2013). We examine what the state conviction necessarily involved, not the facts underlying the case, we

must presume that the conviction rested on nothing more than the least of acts criminalized, and then determine whether even those would constitute violent felonies. See Johnson, 559 US at 138.

The **Swopes** Court was wrong because it did not have in front of them the least culpable conduct the state of Missouri criminalizes under second degree robbery. In State v. Coleman, 463 SW 3d 353 (Mo. banc 2015), the defendant argued he did not make any threatening physical gestures or raise his voice in a threatening manner when he robbed the bank. Id. at 354-55. Instead, he insited he walked into the bank, asked for the money, and left once the teller handed over the money bag. Id. at 355. The Court found this distinction to be without a difference because determining the existence of a threat is an objective test that depends on whether a reasonable person would believe the defendant's conduct was a threat of the immediate use of force. Id. A demand for money in that context is an implicit threat of the use of force in and of itself. See Coleman, 463 SW 3d at 355. There can be no doubt that Coleman represents the least culpable conduct needed to be convicted under the Missouri second degree robbery statute. It is clear that this conduct fails to rise to the level required in Johnson (2010), to be considered a crime of violence. Therefore, the Eighth Circuit's holding in United States v. Swopes, 886 F.3d 668, 671 (8th Cir. 2018), must be overruled as it violates this Court's prior precedents.

Finally, this Court is set to address an issue which has the potential to be dispositive to the outcome in this case. The question of "Is a state robbery offense that includes as an element the common law requirement of overcoming victim resistance" categorically a "violent felony" under [the

ACCA force clause], if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance? Argument was held on October 9, 2018. The controversy in Stokeling demonstrates, at the very least, that reasonable judicial minds are in disagreement upon this subject. At the very least the Eighth Circuit violated "Buck" ben it denied COA and failed to allow Petitioner the opportunity to proceed with his appeal. This Court must exercise its authority and order the Eighth Circuit to comply with "Buck," "Moncrieffe," and "Johnson" (2010). In the alternative, the court should stay this case pending the outcome in Stokeling.

V. Did The Eight Circuit Err In Failing To Articulate Whether Intentional And Unjustified Intrusions Upon The Attorney-Client Relationship Can Violate The Sixth Amendment Absent Proof Of Prejudice?

Petitioner raised a habeas claim that prosecutorial misconduct infected his right to the Sixth Amendment of counsel. Petitioner presented the Eighth Circuit with a sworn affidavit swearing that while in pre-trial custody at Leavenworth Corrections Corporation of American ("CCA"), staff members violated his rights under the Sixth Amendment by recording phone calls and visitation room meetings between counsel and Petitioner. Petitioner could prove the government had obtained a number or pre-trial detainees' privileged communications. However based on the fact that the Federal Public Defender's Office was only interested in violations of Kansas defendants, Petitioner could not prove whether the government obtained his communications prior to his trial date. The Eighth Circuit used this fact to deny Petitioner's claim without even allowing for an evidentiary hearing. This was done in error.

First, Petitioner proved he placed calls to the Government upon request. See Appx. D at pg. 7 (Federal Public Defender explaining it has come to

light that the government intentionally procured numerous phone calls that took place between Kansas defendant and his counsel). A view of the executive summary made by the federal defenders clearly explains why it is essential for this Court to address this issue which has been left open by Weatherford v. Bursey, 429 US 545 (1977). What is a court to do when intentional and unjustified intrusions upon the attorney-client relationship violate the Sixth Amendment absent proof of prejudice?

The Third Circuit has adopted the rule that intentional intrusions by the prosecution constitute per se violations of the Sixth Amendment. See United States v. Costanzo, 740 F.2d 251, 254 (3rd Cir. 1984). On the other hand, the Second and District Columbia Circuits have recognized that prejudice may not be required when an intrusion is intentional, but have not expressly decided. See Briggs v. Goodwin, 225 US App. D.C. 320, 698 F.2d 486, 493 n.22 D.C. Cir.) (noting that a deliberate attempt by the Government to obtain defense strategy information or to otherwise interfere with attorney-defendant relationship may constitute a per se violation of the Sixth Amendment); see also United States v. Morales, 635 F.2d 177, 179 (2d Cir. 1980) (Because the...evidence...does not disclose an intentional, governmentally instigated intrusion upon confidential discussions between appellants and their attorneys, the evidence does not support appellant's claim of a per se violation of their right to counsel). But the First, Sixth, and Ninth Circuits have held that something beyond intentional intrusion itself is required to rise to the level of a Sixth Amendment violation. See United States v. Mastroianni, 749 F.2d 900, 907 (1st Cir. 1984) (even in the context of an intentional intrusion lacking justification a Sixth Amendment violation cannot be established without a showing that there is a realistic

possibility of injury to defendants); See United States v. Steele, 727 F.2d 580, 586 (6th Cir. 1984) (where there is intentional intrusion by the Government into attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted); see United States v. Glover, 596 F.2d 857, 863-64 (9th Cir.) same.

Given this split authority, this court must fashion a rule that best accounts for competing interest at stake. The purposeful intrusion on the attorney-client relationship strikes at the center of the protections afforded by the Sixth Amendment. This Court has recognized the right to counsel in order to secure the fundamental right to a fair trial guaranteed by the Due Process clause of the Fourteenth Amendment. See Strickland v. Washington, 466 US 668, 684-85 (1984).

In certain, Sixth Amendment contexts, prejudice is presumed. See Strickland, 466 US at 692. This is particularly true with regard to various kinds of state interference with counsel's assistance. Id. This Court has expressly noted that direct governmental interference with the right to counsel is a different with regard to whether prejudice must be shown. See Perry v. Leeke, 488 US 272, 279-80 (1989). This Court should hold when the government becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. No other standard can adequately deter this sort of misconduct.

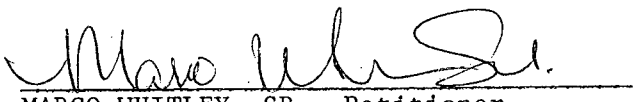
CONCLUSION

For the reasons above, MARCO WHITLEY, SR., submits that the Eighth Circuit's judgment is contrary to the decisions of this court and other

courts of appeals. Accordingly, Mr. Whitley respectfully prays that this Court grant his petition for writ of certiorari and grant, vacate, and remand back to the Eighth Circuit for further proceedings. In the alternative, Mr. Whitley respectfully request this Court stay the proceedings in light of Stokeling.

Dated: December 12, 2018.

Respectfully submitted,



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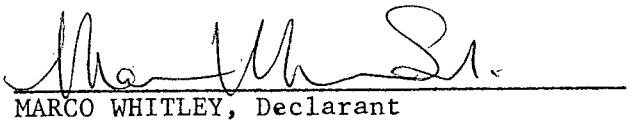
UNSWORN DECLARATION OF MARCO WHITLEY, SR.

I, the undersigned, certify and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that this document is true and correct, it is filed in good faith and not for unnecessary delay, and I have personal knowledge of the facts herein.

Date: December 12, 2018.



MARCO WHITLEY, Declarant

CERTIFICATE OF SERVICE

A copy of this document has been mailed to the Clerk of this Court to be filed upon receipt, featuring my original signature and mailed in a prepaid postage envelope, on this day.

Dated: December 12, 2018.

Marco Whitley Sr.

MARCO WHITLEY, Petitioner