IN THE
SUPREME COURT OF THE UNITED STATES

No.:

CARL LEE WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Carl Lee Williams pleaded guilty to (1) federal carjacking in violation of 18 U.S.C. § 2119 and (2) unlawfully brandishing a firearm during the commission of a "crime of violence" (in relation to the federal carjacking conviction) in violation of 18 U.S.C. § 924(c). Mr. Williams later filed a motion to vacate his brandishing sentence under 28 U.S.C. § 2255, arguing that, in light of *United States v. Johnson*, 135 S.Ct. 2551 (2015) ("*Samuel Johnson*"), his § 924(c) conviction was longer enforceable. The district court denied his motion and the Eleventh Circuit affirmed that decision. Petitioner Williams now presents the following questions:

1. Is federal carjacking *by way of intimidation* a crime of violence as defined in 18 U.S.C. § 924(c)(3)(A)'s force clause?
2. In light of this Court's recent decision in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (finding that 18 U.S.C. § 16's residual clause could only be applied and interpreted using the "categorical approach" and that the clause was therefore unconstitutionally vague), is 18 U.S.C. § 924(c)(3)(B)'s identically-worded residual clause also unconstitutional?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases:

Cases (Continued):

Cases (Continued):

Cases (Continued):

Cases (Continued):

Statutory Provisions and Sentencing Guidelines:

Statutes and Guidelines (Continued):

Other Sources:

PETITION FOR WRIT OF CERTIORARI

Carl Lee Williams respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 17-13817 on October 26, 2018, affirming the judgment entered by the district court for the Southern District of Florida.

OPINION BELOW

An unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *Williams v. United States*, 740 Fed. Appx 707, 2018 WL 5309885 (11th Cir. 2018), was issued on October 26, 2018 and is attached as **Appendix A** to this Petition.[1]

STATEMENT OF JURISDICTION

The district court entered a final judgment denying a motion to vacate a judgment and sentence that was filed pursuant to 28 U.S.C. §

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[1] The Eleventh Circuit affirmed a district court order, which adopted a magistrate's report recommending that Petitioner Williams 28 U.S.C. § 2255's motion be denied, and separately issuing a certificate of appealability. *Williams v. United States*, No. 1:16-cv-22802-RLR (S.D. Fla., July 19, 2017). A copy of this order is attached as **Appendix B** to this Petition. A copy of the magistrate's report and recommendation ("R&R"), dated June 9, 2017), is attached as **Appendix C** to this Petition.

2255. The district court issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2) on the issue of whether, in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Samuel Johnson*"), Mr. Williams's federal carjacking conviction (under 18 U.S.C. § 2119) still qualified as a predicate "crime of violence" under the federal brandishing statute, 18 U.S.C. § 924(c). An appeal was timely filed, and the Eleventh Circuit Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The federal carjacking statute reads as follows:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--
>
> > **(1)** be fined under this title or imprisoned not more than 15 years, or both,
> >
> > **(2)** if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section

> 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> **(3)** if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119.

The federal brandishing statute reads, in relevant parts, as follows:

> (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–
>
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
> >
> > * * *
>
> (c)(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.

18 U.S.C. § 924(c)(1)(A)&(c)(3).

STATEMENT OF THE CASE

On April 8, 2015, Williams pled guilty to one count of carjacking, 18 U.S.C. § 2119, and one count of brandishing a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c). [CR D.E. 92].[2] Both charges stem from a nighttime incident during which Williams and his co-defendant rushed victim "N.C." and forcibly took her 2014 Chevrolet Traverse and other property valued at over $10,000 [CR D.E. 95]. During the carjacking, "N.C." was physically restrained and a firearm was used to repeatedly strike her several times "causing N.C. to lose teeth, suffer a fractured foot, several cuts and bruises, blood loss, and concussion." *Id.*

[2] The record on appeal contains trial-level docket entries from this civil habeas case, No. 1:16-cv-22802-RLR (S.D. Fla.), as well as trial-level docket entries from the underlying criminal case, No. 1:14-cr-20465-RLR-2 (S.D. Fla.). For ease of reference, citations to the trial-level filings in the civil case will be labelled as "CV D.E.," followed by the docket entry number. Likewise, citations to the trial-level filings in the underlying criminal case will be similarly labeled as "CR D.E."

On June 22, 2015, Williams was sentenced to a total of 15 years (180 months) in prison, as follows: 96 months as to the carjacking count and 84 months as to the brandishing count, to be served consecutively [CR D.E. 118, CR D.E. 122].

On June 26, 2015, this Court decided *Samuel Johnson*, in which it found the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), to be void for vagueness and a violation of the Constitution's guarantee of due process. *Samuel Johnson*, 135 S. Ct. at 2563. On April 18, 2016, this Court decided *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), which held that *Samuel Johnson* is retroactive for cases on collateral review.

On June 24, 2016, Mr. Williams filed a motion under 28 U.S.C. § 2255 seeking to have his § 924(c) conviction and sentence vacated in light of *Johnson* and *Welch* [CV D.E. 1]. Mr. Williams's § 2255 Motion specifically argued that, as a category, federal carjacking – in part because it can be committed through mere "intimidation" – cannot count as a violent felony under either of § 924(c)'s "residual" or "force" clauses [CV D.E. 1].

On June 9, 2017, a magistrate issued a report ("R&R") [CV D.E. 19] recommending that Williams's 2255 motion be denied, but that a certificate of appealability should issue. The R&R was based on then-current authority that held that carjacking with serious bodily injury should count as a violent felony predicate under either of 924(c)'s residual or force clauses [CV D.E. 19]. On July 19, 2017, the district court adopted the magistrate's report in full, denying the 2255 motion but granting Mr. Williams a certificate of appealability [CV D.E. 27].

On October 26, 2018, the Eleventh Circuit issued an unpublished opinion affirming the district court's decision as to both the force and residual clauses of § 924(c). The panel specifically noted that prior circuit precedent "foreclose[d] both of Williams' arguments." *Williams v. United States*, 2018 WL 5309885, at *1 (11th Cir., Oct. 26, 2018) (following *In re Smith*, 829 F.3d 1276, 1280-1281 (11th Cir. 2016) (holding that federal carjacking categorically qualifies as a crime of violence under § 924(c)(3)'s force clause), and *Ovalles v. United States*, 905 F.3d 1231 (11th Cir., Oct. 4, 2018) (en banc) ("*Ovalles II*") (holding that, despite this Court's recent decision in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) (finding an identically worded residual clause to be

unconstitutionally vague), because § 924(c)(3)'s residual clause can plausibly be applied and interpreted using a "conduct" or fact-based approach instead of the traditional "categorical approach", this residual clause is not unconstitutionally vague)).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT BECAUSE:

1. **FEDERAL CARJACKING, WHEN COMMITTED BY WAY OF "INTIMIDATION," DOES NOT REQUIRE ANY PARTICULAR QUANTUM OF ACTUAL OR THREATENED PHYSICAL FORCE UNDER 18 U.S.C. § 924(C)(3)(A)'S FORCE CLAUSE, AND THIS PETITION SHOULD BE STAYED PENDING THIS COURT'S RESOLUTION OF *STOKELING V. UNITED STATES* (NO. 17-5554), WHICH COULD RESOLVE WHAT LEVEL OF PHYSICAL FORCE RISES TO THE LEVEL OF VIOLENT FORCE UNDER § 924(C)(3)(A)'S FORCE CLAUSE .**

2. **18 U.S.C. § 924(C)(3)(B)'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE IN LIGHT OF THIS COURT'S RECENT DECISION IN *SESSIONS V. DIMAYA* (FINDING THAT 18 U.S.C. § 16'S SIMILARLY WORDED RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE), AND THIS PETITION SHOULD BE STAYED PENDING THIS COURT'S DECISION IN *UNITED STATES V. DAVIS* (NO. 18-434), WHICH WILL FULLY RESOLVE THIS QUESTION.**

I.
FEDERAL CARJACKING DOES NOT CATEGORICALLY QUALIFY AS A VIOLENT FELONY UNDER 18 U.S.C. § 924(C)(3)(A)'S FORCE CLAUSE

A. This Court should stay Mr. Williams's petition pending this Court's resolution of *Stokeling v. United States*.

1. Generally

Petitioner Williams understands that if federal carjacking could only be committed "by force and violence," it would obviously qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s force clause. But, because the offense can also be committed by "intimidation," Mr. Williams argues that such intimidation does not categorically require the use, attempted use, or threatened use of violent physical force and therefore cannot qualify under the same force clause.

Because the federal bank robbery statute has very similar "intimidation" language,[3] and because this Court is now considering a

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[3] Relevant portions of the federal bank robbery statute, 18 U.S.C. § 2113(a), read as follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association ... [s]hall be fined under this title or imprisoned not more than twenty years, or both.

(emphasis supplied).

petition for certiorari in a similar federal bank robbery case, *Matthew Lloyd v. United States*, No. 18-6269 (cert. petition filed on October 4, 2018), in which petitioner Lloyd is requesting that his petition be held pending this Court's decision in *Stokeling v. United States*, No. 17-5554 (cert. granted April 2, 2018), Petitioner Williams now also asks that his petition be similarly held pending the final decision in *Stokeling*.[4]

In *Stokeling*, this Court will decide whether a "state robbery offense that includes as an element the common law requirement of overcoming victim resistance is categorically a violent felony. . . if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance." As in *Stokeling*, the instant case addresses whether a robbery-type statute has as an element the use or threatened use of "physical force" sufficient to satisfy this Court's definition of "physical force" in § 924(c)(3)(A)'s force clause, which this Court has described as "*violent force* – that is, force capable of causing physical pain or injury to another person." *(Curtis) Johnson*

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[4] *See United States v. Gutierrez*, 876 F.3d 1254, 1256 (9th Cir. 2017) (noting that "[two] of the circuits to [conclude] after [*Samuel*]*Johnson* … that carjacking [by way of intimidation] qualifies as a crime of violence … relied on … prior decisions construing the federal bank robbery statute, which, like the carjacking statute, proscribes robbery 'by force and violence, or by intimidation.' " (quoting 18 U.S.C. § 2113(a))).

v. United States, 130 S.Ct. 1265, 1271 (2010) (emphasis in original). As in *Stokeling*, the Eleventh Circuit, here, also took a very broad view of what constitutes "physical force" under *Curtis Johnson*.

This Court's decision in *Stokeling* will necessarily resolve how much force is required to constitute "physical force." Consequently, if the Court rules in petitioner Stokeling's favor, it is reasonably probable that the Eleventh Circuit would be forced to reject its broad interpretation of the "*Curtis Johnson* force" that was the basis for its decision against Williams and rule that Williams is entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari here, vacate the Eleventh Circuit's judgment, and remand for reconsideration ("GVR") in light of *Stokeling*. Accordingly, this Court should hold Mr. Williams's petition, pending resolution of *Stokeling*.

2. "Physical force" for purposes of § 924(c)(3)(A)'s force clause means violent physical force and not the mere threat of bodily harm such as "intimidation," which is enough to commit federal carjacking.

Section 924(c)(3)(A)'s force clause defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The

issue presented here is whether federal carjacking, when committed by way of intimidation, necessarily contains "an element of the use, attempted use, or threatened use of physical force against the person of another," so that it would qualify as a crime of violence when § 924(c)(3)(B)'s residual clause is not considered.[5]

The plain language of § 924(c)(3)(A)'s force clause indicates that it is not intended to punish non-violent offenders, because before concluding that an offense qualifies as a "crime of violence," a court must find that every person who commits the underlying offense "necessarily" used, attempted to use, or threatened to use violent physical force. *See United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016).

To determine whether federal carjacking satisfies § 924(c)(3)(A)'s force clause, the Court must apply the categorical approach and examine only the elements of the offense, without regard to a defendant's specific conduct. *Descamps v. United States*, 570 U.S.

[5] In Part II, infra, Petitioner Williams argues that § 924(c)(3)(B)'s residual clause is unconstitutionally vague.

254, 260-61 (2013). Under that approach, only the elements matter, *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016), and courts must presume the conviction "'rest[s] upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Curtis Johnson*, 559 U.S. at 137) (brackets supplied in *Moncrieffe*).

In *Curtis Johnson*, the Court explained the statutory definition of 'violent felony' gave the phrase 'physical force' its context. 559 U.S. at 140. The statute's emphasis on 'violent' led the Court to conclude that 'physical force' meant "violent force." *Id.* It also said that "violent" in § 924(e)(2)(B) "connotes a substantial degree of force." *Id.* "When the adjective 'violent' is attached to the noun 'felony,' it's connotation of strong physical force is even clearer," the Court explained. *Id.* It added that *Black's Law Dictionary*'s defined "violent felony" as "[a] crime characterized by extreme physical force." *Id.* at 140-141. And it cited to a definition of "violent" as "[c]haracterized by the exertion of great physical force or strength." *Id.* (quoting 19 *Oxford English Dictionary* 656 (2d ed. 1989)).

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court again discussed the significance of characterizing a felony as "violent," observing that certain conduct, while forceful, is not necessarily violent: "Minor uses of force," like "pushing, grabbing, shoving, slapping and hitting" may "not constitute 'violence' in the generic sense." *Id.* at 164-166. Noting that *Curtis Johnson* cited *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), with approval, the Court observed that it was "'hard to describe . . . as 'violence' 'a squeeze of the arm [that] causes a bruise.'" *Castleman*, 572 U.S. at 166 (quoting *Flores*, 350 F.3d at 670).

Consequently, the use of 'physical force' must involve more than conduct capable of causing minor pain or injury. *See, e.g., United States v. Walton*, 881 F.3d 768, 773 (9th Cir. 2018) ("mere potential for some trivial pain or slight injury will not suffice" as "physical force"). It must therefore earn the "violent" designation.

3. A decision by this Court in favor of the petitioner in *Stokeling* will probably affect the outcome in the instant case.

In *Stokeling,* this Court granted certiorari on whether " a state robbery offense that includes 'as an element' the common law requirement of overcoming 'victim resistance' [is] categorically a 'violent

felony' under the only remaining definition of that term in § 924(e)(2)(B)(i) (hereinafter sometimes "ACCA") (defining a violent felony as 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." *Stokeling*, Petition for Writ of Certiorari at ii (Aug. 4, 2017). Petitioner Stokeling pointed out that Florida robbery can be committed by any degree of force, however slight, that overcomes the victim's resistance. *Id.* at 14-19, 23-26; *Stokeling*, Reply to the Brief in Opposition at 1 (Dec. 27, 2017); *Stokeling*, Petitioner's Brief at 13-14, 26-37 (June 11, 2018).

Petitioner Stokeling noted many states have a similar robbery element and argued a decision in his case would have ramifications for the ACCA's application with respect to robbery convictions throughout the country. *Id.*, Petition for Writ of Certiorari at 14; Reply to the Brief in Opposition at 8-10. Stokeling argued that the Eleventh Circuit had erroneously ruled Florida robbery has as an element the use of enough force to constitute "physical force" under *Curtis Johnson* simply because Florida robbery requires enough force to overcome resistance. *Stokeling*,

Petition for Writ of Certiorari at 11-12, 23; *Id*., Reply to the Brief in Opposition 12-15; Petitioner's Brief at 32-33.

During the certiorari process, the government maintained the Eleventh Circuit's decision was correct, but it did not challenge Stokeling's description of Florida law. The parties disagreed about what amount of force satisfies the *Curtis Johnson* "physical force" standard, including whether that standard is met in a purse tug-of-war or by bumping a victim.

Petitioner Stokeling argued that Florida robberies do not necessarily involve the use of *Curtis Johnson* force, and the government disagreed. *Stokeling*, Petition for Writ of Certiorari at 24-26; United States' Brief in Opposition at 9, 12-13; Petitioner's Reply to the Brief in Opposition at 2, 9-10, 14. In Stokeling's opening brief, he suggested "physical force" is force "reasonably expected to cause pain or injury," Petitioner's Brief at 23-24, 43, and stressed the violent nature of *Curtis Johnson*'s definition, which does not include minor uses of force. *Id.* at 3-5, 11-15, 18-21, 25-26.

Stokeling criticized the government's interpretation of physical force because it unduly relied on the phrase "capable of causing physical

pain." Accepting the government's view, he argued, would mean that virtually any force constitutes "physical force." *Id.* at 12, 22-25.

Like the Eleventh Circuit did in Stokeling's case, the same court rejected Petitioner Williams's argument that mere intimidation cannot constitute a threat of violent force – by employing an expansive view of what constitutes "physical force." Relying on its earlier decisions in *In re Smith*, 829 F.3d at 1280-1281 (holding that federal carjacking categorically qualifies as a crime of violence under § 924(c)(3)(A)'s force clause), and *Ovalles v. United States*, 905 F.3d 1300, 1304 (11th Cir. 2018) ("*Ovalles III*") (reaffirming *In re Smith*'s holding), the Eleventh Circuit held that federal carjacking, even when committed by way of "intimidation," categorically involves a threat of physical force. *See Williams*, 2018 WL 5309885 at *1.

This expansive view of what constitutes "physical force" is based on a pre-existing doctrine, from a 2005 federal bank robbery case that also involved "intimidation," that a carjacker's "intimidating conduct must be to say or do something that makes an ordinary person in the victim's position fear serious bodily injury or death." *Ovalles III*, 905 F.3d at 1304 (following *United States v. Kelley*, 412 F.3d 1240, 1244

(11th Cir. 2005) (examining the meaning of "intimidation" in the federal bank robbery statute)).

Perhaps without realizing it, the Eleventh Circuit – in espousing this objective standard – implicitly (and paradoxically) concedes that federal carjacking does not actually require the intentional use or threatened use of violent physical force. This is because, as a matter of basic logic, a victim can be put in fear of being seriously injured or killed in a non-forceful manner (i.e. via poisoning or placing a barrier in front of a moving vehicle).

This case and Stokeling's both turn on the assessment of what amount of force satisfies the force clause (for *Stokeling*, in the context of a robbery-type offense that appellate courts have held requires the use of no more force than necessary to separate the thing of value from the victim). Thus, if this Court rules in *Stokeling* that Florida robbery does not have as an element the use of sufficient force to constitute "physical force," a good chance exists that that ruling would undermine the basis of the Eleventh Circuit's decision in Petitioner Williams's case: in other words, if slight force to overcome resistance is not violent physical force

under *Curtis Johnson*, then neither is the "intimidation" that establishes a federal carjacking.

"Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Should this Court issue a decision in favor of petitioner Stokeling in Case No. 17-5554, such a ruling would satisfy the GVR standard – since it would call into doubt the Eleventh Circuit's broad understanding of "physical force" that allowed it to hold that federal carjacking qualifies as a crime of violence under § 924(c)(3)(A)'s force clause.

Overruling that view would leave the Eleventh Circuit with no choice but to grant Mr. Williams's § 2255 motion, vacate his § 924(c) conviction and sentence and remand for resentencing without that conviction. No procedural issues would stand in the way of that outcome.

It follows that this Court should hold this petition pending its resolution in *Stokeling*. If this Court rules in the petitioner's favor in *Stokeling*, this Court should grant certiorari in this case, vacate the Eleventh Circuit's judgment and remand to the Eleventh Circuit for reconsideration in light of the *Stokeling* decision.

B. Notwithstanding this Court's ultimate decision in *Stokeling*, this case presents an important question of federal law which is what amount of force satisfies *Curtis Johnson*'s definition of "physical force."

1. Introduction

If the Court finds that the *Stokeling* decision does not justify a GVR, Petitioner Williams asks the Court to grant certiorari in his case to answer what amount of force satisfies *Curtis Johnson*'s definition of "physical force."

2. The Eleventh Circuit's decision that federal carjacking is categorically a crime of violence is incorrect because carjacking by "intimidation" may be committed without resorting to the use or threatened use of physical force.

A robbery statute that requires proof of *de minimis,* or even no physical force, is not a crime of violence. Federal carjacking by way of "intimidation" does not require that any particular quantum of force be used, attempted or threatened. Categorically labeling this offense a

crime of violence, as the Eleventh Circuit does, when the offense can be committed with less than an intentional use or threatened use of force violates the "bedrock principle" of *Leocal v. Ashcroft*, 543 U.S. 111 (2004): "an offense must involve the intentional use of force against the person or property," otherwise, it is not a crime of violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1131 (9th Cir. 2006).

a. Because it can be committed by way of "intimidation," federal carjacking does not categorically require a threat of violent physical force.

Carjacking, as defined by § 2119, does not meet § 924(c)(3)(A)'s "use or threatened use of force" requirement because it can be accomplished by "intimidation," which does not require the use, attempted use, or threatened use of "violent force."

The act of placing another in fear of bodily harm, at best, constitutes a threat of physical injury to another, which does not necessarily require the use or threatened use of "violent force." *See generally Curtis Johnson*. For example, a defendant can place another in fear of bodily harm by threatening to poison that person if he does not turn over his car to the defendant, to release hazardous chemicals into the car, to place a barrier in front of the car of the person attempts

to drive off, or to lock the person up in the car on a hot day – some of the very examples that circuit courts have relied upon in explaining that placing someone in fear of bodily injury does not necessarily have to involve the use of "violent force." *See, e.g., United States v. Perez-Vargas*, 414 F.3d 1282 (9th Cir. 2005); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003).

Also, the Ninth Circuit has specifically held that causing serious bodily injury does not necessarily require the use of violence. *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1178 (9th Cir. 2012); *see also United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (holding that the California statute criminalizing "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement ... is to be taken as a threat," does not have as an element the threatened use of physical force against the person of another). This is because the Fourth Circuit, like the Ninth and Fifth Circuits, recognizes that "a crime may result in death or serious bodily injury

without involving use of physical force." *Torres-Miguel*, 701 F.3d at 168.[6]

This is because, as a matter of basic logic, the causation of injury is not the same as, and does not require, the use of physical force. *See, e.g., United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (observing that a defendant could cause injury by "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim"). None of the examples mentioned in *Villegas-Hernandez* involve "use of force," and a crime which can be committed in any of those ways cannot be said to categorically include the use of force as an element. *See also United States v. Herrera-Alvarez*, 753 F.3d 132, 139 (5th Cir. 2014) ("Under the reasoning of *Villegas-Hernandez*,

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[6] While portions of *Torres-Miguel* were abrogated by *United States v. Castleman*, 572 U.S. 157, 134 S.Ct. 1405 (2014), it is important to note that:

> "*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* that 'a crime may result in death or serious injury without involving the use of physical force.' " *United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) (quoting *Torres-Miguel*, 701 F.3d at 168).

United States v. Middleton, 883 F.3d 485, 491 (4th Cir. 2018).

the harmful effect of the poison itself is not sufficient to furnish the destructive or violent physical force that the 'use of force' prong of [USSG] § 2L1.2 demands.").

Just as "[t]here is a difference between the use of force and the causation of injury," *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (*en banc*), the same distinction can be made – as between threatened harm and threatened use of force. Thus, the Fifth Circuit held that the California offense of "criminal threat" and the Pennsylvania crime of terroristic threatening do not have "threatened use of force" as an element, even though both statutes involve defendants who made threats to cause harm. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-277 (5th Cir. 2010); *United States v. Ortiz-Gomez*, 562 F.3d 683, 687 (5th Cir. 2009).

b. "Intimidation" in the similarly-worded federal bank robbery statute does not require a threat of physical force.

The Eleventh Circuit overlooks cases in which convictions for violating the similar federal bank robbery statute have been upheld where no force or violence was used or even explicitly threatened. These cases demonstrate that "intimidation" can be proven through inferences

extrapolated from knowing – but not intentionally threatening – behavior.

For example, in *United States v. Slater*, 692 F.2d 107, 109 (10th Cir. 1982), the Tenth Circuit affirmed a federal bank robbery conviction although the accused did not use or threaten to use any physical force. There, the accused walked into a bank, went behind the counter and took money from the tellers' drawers. *Id.* at 107-08. He did not speak to or interact with anyone. He did not touch or threaten anyone. On appeal he argued that, because he did not brandish a weapon or make verbal threats, the government had not satisfied the intimidation element. The court disagreed, explaining that the act of entering the tellers' area was objectively "forceful and purposeful." *Id.* at 109. Even without threatening the use of violence, a jury could infer Slater "intended and relied on the surprise and fear of the bank personnel . . . to carry out the crime." *Id.* Although he did not have a weapon or intimate he was carrying one, the Court said a jury still "could find that an expectation of injury was reasonable [in a crime] where a weapon and a willingness to use it are not uncommon." *Id.*

This establishes that federal carjacking by way of "intimidation" does not necessarily require proof of the intentional use of force or intentional conduct coupled with actual knowledge that such conduct will be perceived as intimidating. *See also United States v. Mott*, 979 F.Supp. 1293, 1296 (D. Or. 1997) (finding that passing a note that said money should be put in bag on counter satisfied the "intimidation" element of federal bank robbery, even though a teller described the defendant as nice, polite and completely unthreatening); *Kelley*, 412 F.3d at 1244-1245 (finding the "intimidation" element of federal bank robbery to be satisfied, where the defendant "slammed the counter," even though "he did not possess a weapon, did not produce a demand note, did not speak to a teller, and physically took the money himself instead of requiring a bank teller to hand it over"); *United States v. McCarty*, 36 F.3d 1349, 1357 (5th Cir. 1994) (finding that robbery by intimidation did not require proof of express verbal threat or threatening display of weapon, or proof of actual fear); *see also United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008) (observing that the intimidation element of federal bank robbery is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily

harm from the defendant's acts, *whether or not the defendant actually intended the intimidation*") (emphasis supplied).

These expansive interpretations of intimidation illustrate that the threat of violent physical force is not a requisite element of the similarly-structured federal carjacking statute.

c. The proper definition of "intimidation" has plagued the lower courts.

The elements of carjacking "by way of intimidation" do not require direct application of destructive physical force. Construing an earlier (but substantially similar) version of the carjacking statute, the Fifth Circuit concluded that carjacking could occur without "actual violence." *See United States v. Singleton*, 16 F.3d 1419, 1424 (5th Cir. 1994) ("No actual violence need occur for a crime to be a 'crime of violence' under § 924(c)(3); it is enough that there is a 'substantial risk' of physical force being used against another's 'person or property.' Armed carjacking always presents a substantial risk of force being used against a victim reluctant to surrender his or her vehicle."). *Singleton* shows that, even under the predecessor law which required the presence of a gun to accomplish the taking, the court relied on the residual clause (which

does not even require a threat of force), and not on § 924(c)(3)(A)'s "threatened use of force" language.

The Fourth Circuit has agreed with this view, observing that offenses which can be accomplished by putting another in fear of physical injury do not require "violent force." *See Torres-Miguel, supra*, 701 F.3d at 168 (specifically concluding that threats of serious bodily injury or death do not equate with threats of violent force: "Of course, a crime may result in death or serious injury without involving the use of physical force.").

Finally, in the one case in which the Ninth Circuit specifically addressed whether causing injury is equivalent to the use of force, it also held that it is not. *See Gomez-Hernandez, supra*, 680 F.3d at 1178.

When this distinction between (a) merely causing injury and (b) actually using violent force is taken seriously, it becomes clear that offenses that merely involve putting someone in fear of injury do not qualify as crimes of violence under § 924(c)(3)(A)'s "threatened use of force" language. *See, e.g., Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (explaining that for an offense to have an element of violent

force it must require an "intentional employment [or threat] of physical force").

It follows that, because the intimidation element under § 2119 does not require intentionally placing a victim in fear of violent harm, federal carjacking does not categorically qualify as a crime of violence under § 924(c)(3)(A)'s force clause.

II.
18 U.S.C. § 924(C)(3)(A)'S RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE

A. In *Sessions v. Dimaya*, this Court invalidated an identically worded residual clause on vagueness grounds.

The "residual clause" at issue here defines the term "crime of violence" to mean a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B) (emphasis supplied). In *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), this Court invalidated an identically worded residual clause found in 18 U.S.C. § 16 on vagueness grounds. 138 S.Ct. at 1223. This Court should grant certiorari and do the same with 924(c)'s residual clause.

B. Circuit Split on Constitutionality of 924(c)'s Residual Clause

Just weeks before deciding Petitioner Williams's appeal, the Eleventh Circuit (sitting *en banc*) found, under the doctrine of constitutional avoidance, that because § 924(c)(3)(B)'s residual clause can plausibly be read to embody a "conduct-based approach," it therefore must be read that way. *Ovalles II*, 905 F.3d at 1234. Because "there is no reason to 'doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct,'" *Ovalles II*, 905 F.3d at 1240 (quoting *Samuel Johnson*, 135 S.Ct. at 2561), as opposed to conduct described as an abstract category against the same "substantial risk" standard,[7] the Eleventh Circuit concluded that § 924(c)(3)(B)'s residual clause is not unconstitutionally vague. *Ovalles II* at 1240.

At this time, the Eleventh Circuit is joined by the Second and First Circuits in allowing a "conduct-based approach" to § 924(c)(3)(B)'s

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[7] The *en banc* majority explained that this Court has already acknowledged that a "serious potential risk" or "substantial risk" standard does not, by itself, have to create a statutory vagueness problem, and that it was only because such a standard was "layered on top" of the categorical approach's "ordinary case inquiry" that the residual clauses in the ACCA and in 18 U.S.C. § 16 violated the void-for-vagueness doctrine. *Ovalles II*, 905 F.3d at 1240 (citing *Dimaya*, 138 S.Ct. at 1214, and *Samuel Johnson*, 135 S.Ct. at 2561).

residual clause and in thereby avoiding the finding of vagueness that rendered 18 U.S.C. § 16's identically-worded residual clause unconstitutional in *Dimaya*. *See United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) (finding that § 924(c)(3)(B)'s residual clause can be plausibly read to embody the conduct-based approach and therefore avoiding a finding that it is unconstitutional); *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018) (same).

In contrast, the D.C., Fifth and Tenth Circuits agree that only the categorical approach can be used to interpret and apply § 924(c)(3)(B)'s residual clause and that, in light of *Dimaya*, § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (per curiam) ("Whatever the clean-slate merits of the government's construction, we as a panel are not at liberty to adopt [a case-specific approach to § 924(c)(3)(B)]: circuit precedent demands a categorical approach...."); *United States v. Davis*, 903 F.3d 483, 485 (5th Cir. 2018) ("[T]he Government argues we can, and should, adopt a new 'case specific' method when applying the residual clause.... Regardless of whether *Dimaya* would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule

our prior precedent." (following *United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) ("We use the so-called categorical approach when applying [§ 924(c)(3)(B)] to the predicate offense statute[, so that] '[t]he proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence.'" (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001)))), *cert. granted* Jan. 4, 2019; *United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (employing the categorical approach to § 924(c)(3)(B), "meaning we determine whether an offense is a crime of violence 'without inquiring into the specific conduct of this particular offender,'" and thereby finding that § 924(c)(3)(B) is unconstitutionally vague in light of *Dimaya* (following *United States v. Serafin*, 562 F.3d 1105, 1108 (10th Cir. 2009) (requiring categorical approach "to analyze the text of § 924(c)(3)(B)"))).

C. This Petition should be stayed, pending this Court's resolution of *United States v. Davis* (No. 18-434).

This Court will soon clarify whether there are alternative interpretations of § 924(c)(3)(B) that (as opposed to the categorical approach) would allow the "fact-based approach" and invocation of the "constitutional doubt" rule that the Eleventh Circuit adopted in the *Ovalles II* decision that compelled its adverse decision in Petitioner

Williams's case herein. *See United States v. Davis*, No. 18-431 (cert. granted Jan. 4, 2018).

Because this Court's decision in *Davis* will completely decide the question presented herein as to whether § 924(c)(3)(B) is unconstitutionally vague in the wake of *Dimaya*, Petitioner Williams urges that a decision on this Petition be stayed pending this Court's resolution of *Davis*.

D. The categorical approach is the proper means of interpreting 924(c)'s residual clause because Congress's obvious and singular intent in the residual clause was that the phrase "by its nature" would mean "categorically" or "as a category."

1. Basic Standards for Constitutional Avoidance

"The starting point for [the] interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166 (1989). A court must first determine whether the language to be interpreted is "plain and unambiguous." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843 (1997). The statutory language is interpreted by reference "to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. The inquiry, however,

"must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* at 340 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030 (1989)).

Section 924(c)(3)'s parallel "elements" and "residual" clauses must normally be read *in pari materia*, in other words "in their context and with a view to their place in the overall statutory scheme," *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500 (1989), and as part of a "symmetrical and coherent" scheme, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291 (2000), where "[a]ll parts [are, where possible, fitted] into a harmonious whole." *Id.* (quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S.Ct. 818 (1959)).

When a statutory clause like § 924(c)(3)(B) may be read to have more than one plausible or "fairly possible" meaning, and when one interpretation would cause it to be upheld as constitutional while another would require it to be struck down, federal courts are "obligated to construe the statute" so as to uphold it. *I.N.S. v. St. Cyr.*, 533 U.S. 289, 300, 121 S.Ct. 2271 (2001). But "[i]n the absence of more than one

plausible construction, [this] canon [of constitutional avoidance] simply has no application." *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018) (internal quotation omitted). In other words, "what courts may not do is assign a law a strained or unreasonable reading to save it from being declared unconstitutional." *Ovalles II*, 905 F.3d at 1277 (Jill Pryor, C.J., dissenting).

2. A "factual or conduct-based approach" to interpreting 924(c)'s residual clause is unreasonable.

In agreement with Judge Jill Pryor's dissenting opinion in *Ovalles II*, Petitioner Williams argues that "a conduct-based approach [as an alternative way of reading § 924(c)(3)(B)] is simply not plausible when we remain faithful to the text of the statute." *Ovalles II*, 905 F.3d at 1278; *see also Rodriguez*, 138 S.Ct. at 843 ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to 'choos[e] between competing *plausible* interpretations of a statutory text.'" (quoting *Clark v. Martinez*, 543 U.S. 371, 381, 125 S.Ct. 716, 724 (2005) (emphasis added in *Rodriguez*))).

First, § 924(c)(3)(B) has a specific linguistic structure and legislative purpose, so that it is defined *with specific reference* to the scope of the parallel elements clause (§ 924(c)(3)(A)). In other words, § 924(c)(3)(B) "acts as a catchall for violent crimes that do not meet the elements clause definition, so long as those crimes satisfy the residual clause's [parallel contrasting] criteria." *Ovalles II*, 905 F.3d at 1280 (emphasis supplied). And here it is important to note that when Congress passed the Comprehensive Crime Control Act of 1984 ("CCCA"), "in which it revised § 924(c) to include a "crime of violence" definition …, it did so with the expressed intention to capture certain crimes – not conduct – as crimes of violence." *Ovalles II*, 905 F.3d at 1282 (citing *Taylor v. United States*, 495 U.S. 575, 581-590, 110 S.Ct. 2143 (1990)).

Specifically, the *Taylor* court addressed the fact that the parallel structure of the tandem clauses § 924(e)(2)(B)(i) and § 924(e)(2)(B)(ii), which have nearly the same parallelism as § 924(c)(3)(A) and § 924(c)(3)(B) where the phrase "by its nature" in the latter residual clause contrasts with the phrase "as an element" in the former elements clause, "generally supports the inference that Congress intended

[courts] to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600, 110 S.Ct. at 2159. This is because § 924(e)(2)(B)(i)'s similar elements clause defines "violent felony" as "any crime punishable by imprisonment for more than a year that 'has as an element' – not any crime that, in a particular case, involves – the use or threat of force," *Taylor*, 495 U.S. at 600, 110 S.Ct. at 2159, which led the *Taylor* court to infer that the phrase "is burglary" found in the subsequent parallel clause "most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct." *Id.* at 600-601. Following the same logic, and noting the same contrast between § 924(c)(3)(B) and the parallel elements clause found in § 924(c)(3)(A), which happens to contain exactly the same "as an element" language, it is only common sense to interpret the phrase "by its nature" in § 924(c)(3)(B) as meaning – roughly – "categorically" or "as a category."

Next, the *Taylor* court observed that "the legislative history of [§ 924(e), which is part of the same CCCA to which § 924(c) also belongs,] shows that Congress generally took a categorical approach to predicate

offenses." *Taylor*, 495 U.S. at 601, 110 S.Ct. at 2159 (noting that "[t]here was considerable debate over what kinds of offenses to include and how to define them, but no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case"). This utter silence on Congress's part simply does not support the plausibility of now allowing a "fact-based approach" only for the residual clause found in § 924(c)(3)(A) (in sharp tension with the common-sense meaning of "by its nature"), and only for the purpose of rescuing the clause from unconstitutionality.

Finally, the *Taylor* court's observation of the practical difficulties of applying a "fact-based approach" to the enumerated felonies clause of § 924(e)(2)(B)(ii) applies, in relevant part, to the practical application of the residual clause in § 924(c)(3)(B). As the *Taylor* court wisely pointed out: "[i]n cases where the defendant plead[s] guilty, … [e]ven if the Government [is] able to prove th[e facts underlying the predicate offense], if a guilty plea to a lesser… offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [an otherwise categorically violent felony]." In other words, once the door is opened to applying a "fact

based" approach, § 924(c)(3)(B)'s residual clause can then be used for any felony to be treated as a basis for a consecutive sentence under § 924(c).

A "fact-based approach" to save § 924(c)(3)(B)'s residual clause from being found unconstitutional is too much of a departure from its plain language and clear legislative purpose. Applying it when interpreting the residual clause is just too strained and impractical to be "plausible". Accordingly, the canon of constitutional avoidance cannot apply in this case. *Rodriguez*, 138 S.Ct. at 843

III.

IF THIS COURT DECIDES THE *STOKELING* AND/OR *DAVIS* DECISIONS DO NOT WARRANT A GVR, THE INSTANT CASE IS AN IDEAL VEHICLE FOR DEMONSTRATING (A) WHAT LEVEL OF THREATENED FORCE SATISFIES § 924(C)(3)(A)'S FORCE CLAUSE AND (B) WHETHER § 924(C)(3)(B)'S RESIDUAL CLAUSE IS UNCONSTITUTIONAL

Assuming § 924(c)(3)(B)'s residual clause is unconstitutional, federal carjacking can be a "crime of violence" only if "intimidation" falls within § 924(c)(3)(A)'s force clause – which requires at least a *Curtis Johnson* amount of "physical force." Because federal carjacking by way of "intimidation" does not require the threat of any particular quantum of physical force, and because no federal court has ever specified any particular minimum of threatened physical force that qualifies as

"intimidation" under the same statute, it is crucial then that this Court define the amount or level of threatened or suggested force needed to qualify under § 924(c)(3)(A)'s force clause, and – finally – whether the federal carjacking statute categorically falls within that definition.

As for the circuit split over the possible unconstitutionality of § 924(c)(3)(B)'s residual clause, this is a serious problem since it will result in similarly-situated defendants being sentenced to dramatically disparate terms of imprisonment – based only on the arbitrary factor of what circuit they were prosecuted in. This Court should also be very concerned about federal circuits giving district courts the green light to start applying CCCA statutes using a "fact-based" or "conduct-based" approach, which is a dramatic departure from the conventional "categorical approach" that appears to be mandated by the clear language and legislative history of these statutes.

This case provides an ideal vehicle for addressing the aforementioned questions, and there are no procedural obstacles present here. If federal carjacking is not a "crime of violence," then Petitioner Williams is entitled to the grant of his § 2255 motion and resentencing without the § 924(c) conviction. Accordingly, should a GVR

not be warranted after this Court's decisions in *Stokeling* and/or *Davis*, the Court should still grant certiorari in this case.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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s/ Deric Zacca

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