No. _____

IN THE
Supreme Court of the United States

_____

BRANNON TAYLOR,
Petitioner,
v.

UNITED STATES,
Respondent.

_____

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Dan Goldberg
Assistant Federal Public Defender
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Tel: (816) 471-8282
Dan_Goldberg@fd.org

QUESTION PRESENTED

Whether, in applying the categorical approach to the elements clause of 18 U.S.C. § 924(c)(3)(A), courts must analyze the least of the acts historically criminalized under the predicate crime, or whether a contemporary interpretation of the predicate crime suffices to satisfy the "crime of violence" definition?

TABLE OF CONTENTS

INDEX TO APPENDIX

Table of Authorities

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brannon Taylor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is unpublished at 773 Fed.Appx. 346 (8th Cir. 2019). The order of the United States District Court for the Western District of Missouri (Pet. App. B) is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 17, 2019. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOKED

18 U.S.C. § 924(c)(3).

[T]he 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.

INTRODUCTION

The question presented was not an important question for this Court prior to *United States v. Davis,* 139 S.Ct. 2319 (2019), when the residual clause of 18 U.S.C. § 924(c)(3)(B) existed as a catchall provision for federal predicate crimes to satisfy that statute's "crime of violence" definition. Indeed, this Court recognized in *Davis* that its holding would require a re-examination of which predicate crimes satisfy the elements clause, because while 18 U.S.C. § 924(c) punishes using a firearm "in connection with certain other federal crimes", it remains uncertain under the statute *"which* other federal crimes?" *Davis*, 139 S.Ct. at 2323. Yet, this Court's opinion left open the important question of how courts are to conduct the categorical analysis of the elements clause of 18 U.S.C. § 924(c)(3)(A) after *Davis*.

The bulk of the circuit courts have already held that the elements clause of § 924(c)(3)(A), should be analyzed like the similarly worded elements clause of the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(i). Unlike the Eighth Circuit, they have carefully re-examined whether a threatened use of physical force has been historically required based on the minimum conduct necessary for a conviction, as mandated by this Court's precedents. *See Stokeling v. United States*, 139 S.Ct. 544 (2019); *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013).

In contrast, the Eighth Circuit has not employed a "least of the acts criminalized" standard in determining whether the federal predicate offense satisfies the elements clause of § 924(c)(3)(A). By omitting the "least of the acts criminalized" test in its analysis, the Eighth Circuit is refusing to conduct the categorical analysis in the way this Court has always mandated — a historical inquiry into how courts have interpreted the predicate offense in affirming convictions under the statute. Rather, the Eighth Circuit's test is an academic, revisionist analysis, allowing sentencing courts to determine in the first instance whether it believes the predicate crime satisfies the elements clause, while disregarding how courts have criminalized the predicate crime in the past.

In 2017, Mr. Taylor raised a similar argument before this Court in a petition for certiorari. Despite the Solicitor General arguing that "no reason exists to consider whether the offense would also qualify under § 924(c)(3)(A) or to hold this petition for *Dimaya*", (Pet. App. D), this Court disagreed. It granted the petition for certiorari, and remanded to the Eighth Circuit for further consideration. *Taylor v. United States*, 138 S.Ct. 1979 (2018).

Mr. Taylor's petition for certiorari should, again, be granted. In failing to conduct the "least of the acts criminalized" test after both *Dimaya* and *Davis* were handed down by this Court, the Eighth Circuit has left open —

and therefore failed to answer — the dispositive question that was remanded by this Court for further consideration in 2018. The categorical analysis of the elements clause of § 924(c)(3)(A) mandates the application of the "least of the acts criminalized" test. When one properly employs that test it is revealed that many federal predicate crimes — including the unique way the Eighth Circuit interprets the "intimidation" element of carjacking under 18 U.S.C. § 2199 — does not require violent force, and therefore it is not a "crime of violence."

STATEMENT OF THE CASE

1. In 2009, Petitioner Brannon Taylor pled guilty to carjacking in violation of 18 U.S.C. § 2119, and possession of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). Mr. Taylor was sentenced to 125 months' imprisonment on Count I, and a consecutive sentence of 84 months' imprisonment on Count II. This resulted in a total sentence of 209 months' imprisonment.

2. On June 26, 2015, the Supreme Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), in which the Court held that increasing a defendant's sentence under the residual clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), violates due process because the residual clause was void for vagueness.

Mr. Taylor filed a motion pursuant to 28 U.S.C. § 2255 on June 6, 2016, seeking sentencing relief based on *Johnson*. Specifically, Mr. Taylor alleged that in light of *Johnson* and its retroactive application to his case on collateral review, he was actually innocent of the § 924(c) offense because his conviction under that count was predicated on the erroneous assumption that his conviction for carjacking, pursuant to 18 U.S.C. § 2119, constituted a "crime of violence."

The district court denied Mr. Taylor's § 2255 motion, concluding that his carjacking conviction was a "crime of violence" because the residual clause of § 924(c)(B) was immune from a vagueness challenge. (Pet. App. B). Specifically, the district court predicated its order solely on the Eighth Circuit's opinion in *United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016), which held that the residual clause of 18 U.S.C. § 924(c)(1)(A was not void-for-vagueness after *Johnson*. The district court also denied a certificate of appealability, finding that Mr. Taylor had not made a substantial showing of the denial of a constitutional right.

3. Mr. Taylor sought an application for a certificate of appealability before the Eighth Circuit, but that court issued its Judgment denying a certificate of appealability, and dismissed the appeal. *See* February 28, 2017 Judgment of the Eighth Circuit.

4. In May 2017, Mr. Taylor filed his petition for certiorari before this Court, arguing that the lower courts erred in denying him § 2255 relief, because the sentence he is currently serving is unconstitutional and illegal. (Pet. App. C). Specifically, Mr. Taylor argued that he was actually innocent of possessing a firearm during and in relation to a "crime of violence", pursuant to 18 U.S.C. § 924(c)(1)(A). This was because his predicate offense of federal carjacking, 18 U.S.C. § 2119, no longer was a "crime of violence." Mr. Taylor argued that carjacking cannot fall under the residual clause of § 924(c)(3)(B), because that residual clause should be found unconstitutional after *Johnson*. Furthermore, he argued that his carjacking conviction did not satisfy the elements clause of § 924(c)(3)(A) either, because carjacking does not have as an element the use, attempted use, or threatened use of violent physical force. Therefore, Mr. Taylor argued that his conviction under § 924(c) could not be constitutionally sustained, and his case must be reversed and remanded.

After this matter was fully briefed by the parties — including the Solicitor General filing its brief in opposition (Pet. App. D) — this Court granted Mr. Taylor's petition for certiorari on May 14, 2018. *Taylor v. United States*, 138 S.Ct. 1979, 201 L. Ed. 2d 240 (2018). This Court ordered the "case remanded to the United States Court of Appeals for the Eighth Circuit for

further consideration in light of *Sessions v. Dimaya,* 584 U.S. ——, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018)." *Id*.

5. On remand from this Court, the Eighth Circuit ordered that the parties file supplemental briefing. Subsequently, the Eighth Circuit issued its order, granting Mr. Taylor a certificate of appealability on two issues:

> 1. Whether the residual-clause definition of a "crime of violence" in 18 U.S.C. Sec. 924(c)(3)(B) is void for vagueness in light of *Session v. Dimaya*, 138 S.Ct. 1204 (2018); and
>
> 2. Whether Taylor's conviction for carjacking under 18 U.S.C. Sec. 2119 is a crime of violence under the force clause of 18 U.S.C. Sec. 924(c)(3)(A).

6. The parties submitted plenary briefing before the Eighth Circuit on these two issues, and oral argument was scheduled for April 16, 2019. However, after this Court granted certiorari in *United States v. Davis,* to determine whether the residual clause of § 924(c)(3)(B) was void for vagueness, the Eighth Circuit stayed this appeal.

7. On June 24, 2019, this Court issued its opinion in *United States v. Davis*, 139 S.Ct. 2319, which concluded that the residual clause of 18 U.S.C. § 924(c)(3)(B) was void for vagueness.

8. On July 17, 2019, the Eighth Circuit issued its per curiam opinion, denying Mr. Taylor's appeal. In doing so, the Eighth Circuit acknowledged this Court's holding in *Davis*, that the residual clause of § 924(c)(3)(B) is

unconstitutionally vague, but still denied Mr. Taylor's appeal. 773 Fed.Appx. at 347. "Notwithstanding the holding in Davis, we deny Taylor's request for relief under § 2255 because his carjacking conviction qualifies as a crime of violence under the force clause of § 924(c)(3)(A)." *Id*. In reaching this conclusion, the Eighth Circuit did not turn to the merits of Mr. Taylor's arguments that he raised in his petition for certiorari before this Court — or the arguments raised on remand before the Eighth Circuit — but instead merely held that another panel opinion of the Eighth Circuit disposed of the issue. *Id*, citing to *Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019).

REASONS FOR GRANTING CERTIORARI

I. The lower courts are in conflict over the question presented.

1. The vast majority of circuits have held that, in determining whether a federal predicate crime satisfies the elements clause of § 924(c)(3)(A), one must "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by [§ 924(c)(3)'s elements clause]." *United States v. Bowen*, 936 F.3d 1091, 1099 (10th Cir. 2019), quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013); *see also United States v. Fultz*, 923 F.3d 1192, 1194–95 (9th Cir. 2019) (employing "least of the acts criminalized" test to determine whether maritime robbery statute satisfied § 924(c)(3)(A)); *see*

also United States v. St. Hubert, 909 F.3d 335, 349 (11th Cir. 2018) (employing "least of the acts criminalized" test to determine whether Hobbs Act robbery statute satisfied § 924(c)(3)(A)); *see also United States v. Brazier*, 933 F.3d 796, 801 (7th Cir. 2019) (employing "least culpable conduct" categorical analysis to determine that federal kidnapping did not satisfy § 924(c)(3)(A)); *see also United States v. Reece,* No. 17-11078, 2019 WL 4252238, at *4 (5th Cir. Sept. 9, 2019) (employing the "least culpable conduct" test to conclude that conspiracy to commit bank robbery is not a crime of violence under § 924(c)(3)(A)); *see also United States v. Johnson*, 899 F.3d 191, 203 (3d Cir. 2018) (determining a predicate crime is only a "crime of violence" if "the least culpable conduct" satisfies the definition of § 924(c)(3)(A)).

2. In contrast, the Eighth Circuit has not employed a "least of the acts criminalized" standard in determining whether the federal predicate offense satisfies the elements clause of § 924(c)(3)(A). In omitting the "least of the acts criminalized" test in its analysis, the Eighth Circuit (and other circuits like it) are refusing to conduct the categorical analysis in the way this Court has always intended – a historical inquiry into how courts have interpreted the predicate offense in affirming convictions under the statute.

3. This Court has made it unambiguous that there must be "a realistic

probability, not a theoretical possibility," that the statute at issue has been or could be applied to conduct that does not constitute a "crime of violence." *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To conduct this analysis, courts must turn to prior case law in determining how the statute has been historically interpreted when affirming convictions. *See Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (concluding that ambiguity in the law demonstrates that the predicate conviction did not necessarily involve conduct that was an aggravated felony, after analyzing cases from 1987 and 2003); *see also Johnson v. United States*, 559 U.S. 133, 137 (2010) (predicate offense not a violent felony "[s]ince nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts"). Indeed, in *Mathis*, the categorical analysis was resolved by one case that "definitively answer[ed] the question", because this Court concluded that the lower court "only needs to follow what it says." *Mathis*, 136 S.Ct. at 2256, citing *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981).

4. In affirming the denial of Mr. Taylor's § 2255, the Eighth Circuit concluded that his carjacking predicate conviction, pursuant to 18 U.S.C. § 2119, satisfied the elements clause of § 924(c)(3)(A), without determining the "least of the acts criminalized." *Taylor*, 773 Fed.Appx. at 347, citing to

Estell v. United States, 924 F.3d 1291, 1293 (8th Cir. 2019). The Eighth Circuit in *Estell* — which *Taylor* relied on wholesale "for the same reasons expressed therein", *Taylor*, 773 Fed.Appx. at 347 — also did not inquire as to the "least of the acts criminalized" like the majority of circuits do in conducting the categorical analysis.

The Eighth Circuit instead looked to how the term "threat" in the carjacking statute is "commonly defined." *Estell*, 924 F.3d at 1293, citing *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017). But none of this analysis by the Eighth Circuit in *Taylor*, *Estell* or *Harper* looked to the details of prior, real-world carjacking convictions, in order to determine "the least culpable conduct" actually criminalized under the statute. *See Allen v. United States*, 836 F.3d 894, 896 (8th Cir. 2016) (Melloy, J., dissenting in denial of authorization to file successive § 2255, and noting in the Eighth Circuit "the mens rea for the federal bank robbery offense, § 2113(a) does not attach to the use of violence or intimidation.").

Thus, the Eighth Circuit's test is an academic, revisionist analysis, allowing sentencing courts to determine in the first instance whether it believes the predicate crime satisfies the elements clause, while disregarding how courts have criminalized the predicate crime in the past. Stated another way, in the Eighth Circuit, lower courts may place dispositive reliance on its

contemporary interpretation of the statute, at the expense of determining how the statute has been interpreted by courts when the defendant was convicted of the predicate crime. Thus, a defendant in the Eighth Circuit could be convicted of a § 924(c) crime in 2009, but the sentencing court will disregard "the least of the acts criminalized" during that relevant time period, in favor of the lower court's own novel analysis.[1]

II. The Eighth Circuit's ruling is incorrect.

1. While this Court has repeatedly held that applying the proper test is critical to reaching the right outcome in the categorical analysis, *see Descamps v. United States*, 570 U.S. 254, 266 (2013); *Mathis*, 136 S.Ct. at 2256, the Eighth Circuit continues to fail to employ the proper categorical analysis to § 924(c)(3)(A). Had the Eighth Circuit employed the "least of the acts criminalized" test in determining whether Mr. Taylor's carjacking

[1] Furthermore, the government conceded below that the Eighth Circuit has not decided whether the word "force" as used in § 924(c)(3)(A) means "violent force" — as the Court held in *Johnson v. United States*, 559 U.S. 133, 144 (2010), with regard to § 924(e)(2)(B)(i). *See* government's brief, filed 11/2/18, pg. 41. In contrast, the Tenth Circuit has expressly held that § 924(c)(3)(A) requires "violent force." *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1064 (10th Cir. 2018). This is another reason why this Court should grant the petition for certiorari, to provide the lower courts guidance on this issue that is currently being extensively litigated after *Davis*.

conviction was a "crime of violence" under § 924(c)(3)(A), it would have reached the contrary result that it did not satisfy the definition.

2. Mr. Taylor's indictment alleged that he carjacked, in violation of 18 U.S.C. § 2119, "by means of force and violence *or* by intimidation." As charged in the indictment — and pursuant to the elements of the statute — Mr. Taylor could have been convicted of carjacking, solely by means of "intimidation." *United States v. Casteel*, 663 F.3d 1013, 1019 (8th Cir. 2011).

The Eighth Circuit has defined "intimidation" as "conduct reasonably calculated to put another in fear." *United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992); *see also* Eighth Circuit Model Jury Instruction 6.18.2119A (using the same language in defining the term "intimidation" in carjacking instruction).[2] But the key question in the categorical analysis is a fear of what? Noticeably absent in this definition of "intimidation" is a fear of *bodily harm* requirement. Critically, when analyzing the least of the acts criminalized under the statute, *Moncrieffe,* 569 U.S. 184, 190–91, the intimidation element of § 2119 can be accomplished without any threat of *violent physical* force as required by § 924(c)(3)(A).

[2] There is no dispute that the term "intimidation" as used in the federal bank robbery statute in 18 U.S.C. § 2119 is identical to how the carjacking statute, 18 U.S.C. § 2119, uses that same term. *See Estell*, 924 F.3d at 1293 (treating the term "intimidation" interchangeably for the two statutes).

In *United States v. Smith*, the Eighth Circuit affirmed a bank robbery conviction pursuant to 18 U.S.C. § 2113(a), even though the government satisfied the "intimidation" element of the crime, without proving the defendant made a threat of violent force. 973 F.2d 603, 604 (8th Cir. 1992) Specifically, the government's evidence in *Smith* was that the defendant wore a "fanny pack" during a bank robbery, which was found threatening based on a teller's mere speculation that it "may contain a weapon." 973 F.2d at 604. To find "intimidation" that caused "fear", the Eighth Circuit in *Smith* also relied on the fact that defendant stated he wanted to make a withdrawal, acted "real fidgety", and at one point put his elbows up on the window and leaned very close to the teller. *Id.* at 603-04.

Smith thus highlights a "realistic probability, not a theoretical possibility" that in the Eighth Circuit "fear" *alone* is sufficient for a carjacking conviction. *Moncrieffe*, 569 U.S. at 191. Based on this simplistic definition of "fear" in the carjacking context, any fear is sufficient to satisfy this element, even fear that does not involve a threat of violent force.

What is more, "the mens rea for the federal bank robbery offense, § 2113(a) does not attach to the use of violence or intimidation." *Allen*, 836 F.3d at 896 (Melloy, J., dissenting in denial of authorization to file successive § 2255). "Evidence showing the [victim] was intimidated *subjectively* is

probative" of whether the government proved the "intimidation" prong. *United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010). "[T]he intimidation element of section 2113(a) is satisfied if the victim could *infer* a threat of bodily harm from the [defendant's] acts, whether or not the [defendant] actually intended the intimidation." *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (emphasis added).

However, the unintentional act of placing another in fear of bodily harm does not qualify as a "crime of violence" under the force clause of § 924(c)(3)(A). In *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2014), this Court held that the elements clause of 18 U.S.C. § 16(a) — which is identical to the § 924(c) force clause — requires "a higher mens rea than [] merely accidental or negligent conduct." *Id*. This Court held that this is so, even though the statute required "serious bodily injury", because the elements clause does not "encompass all negligent misconduct." *Id.* at 10.

In *Yockel*, the Eighth Circuit affirmed the defendant's conviction for bank robbery, even though at trial it was not disputed that the defendant "did not, at any time, make any sort of physical movement toward the teller and never presented her with a note demanding money [and] never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon." 320 F.3d at 821. To find the element of

intimidation, the Eighth Circuit relied, in part, on the defendant's *appearance* when requesting money because the defendant "appeared dirty and had unkempt hair, and eyes that were blackened, as if he had been beaten." 320 F.3d at 824. But it is respectfully submitted that one's appearance, while perhaps relevant to determine whether the government met the statute's standard of "intimidation", cannot satisfy the elements clause of § 924(c)(3)(A).

The same is true of the defendant's statement to the teller in *Yockel* that "[i]f you want to go to heaven, you'll give me the money", which is not a *communicated* threat of *force. Id.* Critically, in *Yockel*, the panel concluded, "whether or not Yockel intended to intimidate the teller is irrelevant in determining his guilt" pursuant to § 2113(a). *Id*. However, this is problematic when applying this conviction to the elements clause that requires the defendant have a *mens rea* when making the threat of force. *See Leocal*, 543 U.S. at 11; *Stokeling v. United States*, 139 S.Ct. at 554 (force used must "potentially" cause physical pain or injury).

In determining whether Mr. Taylor's carjacking conviction satisfied the elements clause of § 924(c)(3)(A), the Eighth Circuit did not turn to the "least culpable conduct" highlighted above in *Smith* and *Yockel*. Rather, the Eighth Circuit simply concluded that "if the government establishes that a defendant

committed bank robbery by intimidation, it follows that the defendant threatened a use of force causing bodily harm", "because 'threat' as commonly defined, speaks to what the statement conveys – not the mental state of the author." *Estell*, 924 F.3d at 1293, *citing Harper*, 869 F.3d at 626, quoting *Elonis v. United States*, 135 S.Ct. 2001, 2008 (2015).

The Eighth Circuit's analysis is too abstract, which reflects that it is not grounded in what the categorical analysis turns on, "a realistic probability, not a theoretical possibility." *Gonzales*, 549 U.S. at 193. Stated another way, it ignores entirely the least culpable conduct in the real world convictions of *Smith* and *Yockel*. The Eighth Circuit's analysis also forgoes that the "fear" in the intimidation element may be a fear of "some other form of deprivation", i.e. economic deprivation, as conceded by the government below. *See* Government's br, pg. 45, filed on 11/2/18.

This Court's holding in *Elonis* — far from supporting the Eighth Circuit's analysis in *Estell* — cuts against it because this Court concluded that the term "threat would require that Elonis know the threatening nature of his communication." *Elonis*, 135 S.Ct. at 2012. But the Eighth Circuit has not mandated a *mens rea* requirement for the "intimidation" element, as highlighted above. *See Yockel*, 320 F.3d at 824. At least one circuit has recently questioned whether *Yockel* remains good law based on this, which

just further highlights why Mr. Taylor's carjacking conviction cannot satisfy the elements clause of § 924(c)(3)(A). *See United States v. Ellison*, 866 F.3d 32, 39 (1st Cir. 2017) (concluding that court did "not see how *Yockel* can be squared" with *United States v. Carter*, 530 U.S. 255 (2000), based on the *mens rea* element of the offense).

Thus, after this case was remanded by this Court for further consideration in light of *Dimaya*, the Eighth Circuit has simply failed to acknowledge that there is no mention of force in the above cases as it pertains to the intimidation element, and troublingly the term "fear" is sufficient even when there is no discussion of fear of bodily harm. Under this standard, even a mere purse snatching would warrant some *de minimus* fear, and there can be no doubt that such a snatching does not satisfy the elements clause of § 924(c)(3)(A). *See Stokeling*, 139 S.Ct. at 555.

3. In this appeal, the government has repeatedly attempted to expand the force element of the carjacking offense, by taking two distinct elements and combining them into one, arguing that the statute requires "intimidation 'with intent to cause death or seriously bodily harm.'" (*See* Pet. App. D, Solicitor General's Brief in Opposition to Brannon Taylor's 2017 Petition for Certiorari, pg. 2-3).

The government's "conditional intent" elements clause argument is flawed because this Court has held that the "intimidation" prong of the test, alone, analyzes the *actus reus* force to commit carjacking. *See Holloway v. United States*, 526 U.S. 1, 8 (1999) (distinguishing between *actus reus* component of crime, with *mens rea* element). Stated another way, the conditional *mens rea* (intent to cause death or seriously bodily harm) is only "if necessary", i.e. *if* the "driver resisted." *Id*. The *mens rea* requires no threat of force, because by definition it is merely "conditional." *Id.*

Therefore, the "intimidation" prong of the statute, analyzed above, is dispositive of the elements clause analysis of § 924(c)(3)(A). The second element of the crime — the defendant's intent to cause death or serious bodily harm — is irrelevant to the elements clause because it requires a "conditional intent" that need not be communicated to the victim, and is based only on conditional thoughts, i.e. "if that action had been necessary to complete the taking of the car." *Holloway*, 526 U.S. at 11. Stripped of this conditional intent, the government cannot demonstrate that carjacking, § 2119, categorically satisfies the elements clause of § 924(c)(3)(A).

4. The government has also repeatedly attempted to rely on other Circuits' case law, other than the Eighth Circuit, to demonstrate why carjacking satisfies the elements clause of § 924(c)(3)(A). But once again, this

loses sight of the least culpable conduct test in *the Eighth Circuit,* which is dispositive of the categorical analysis. Specifically, Mr. Taylor has repeatedly demonstrated that the term "intimidation" has a unique meaning in the Eighth Circuit. Thus, how other circuits have ruled on this issue is not dispositive, because there was historically a circuit split in the requirement of force, as it pertains to the least culpable conduct.

Specifically, in *United States v. McNeal*, the Fourth Circuit rejected the defendant's argument that bank robbery does not categorically satisfy the elements clause, because "the term 'intimidation' in § 2113(a) simply means '**the threat of the use of *force***." 818 F.3d 141, 154 (4th Cir. 2016) (emphasis added). While *McNeal* concluded that "intimidation" inherently satisfies the elements clause, its analysis does not answer the question within the Eighth Circuit, because the Eighth Circuit employed a different legal standard as to what "intimidation" means, i.e. "conduct reasonably calculated to put another in fear." *Smith*, 973 F.2d at 604; *see also United States v. Jones*, 854 F.3d 737, 741 (5th Cir. 2017). ("The kind of 'intimidation' that suffices to put a victim in fear of bodily injury during the course of a bank robbery, and which would in turn allow a defendant to complete such a robbery, is the very sort of threat of immediate, destructive, and violent force required to satisfy the 'crime of violence' definition").

The Eighth Circuit's finding, that carjacking satisfies the elements clause, is incorrect because the categorical analysis of § 924(c)(3)(A) mandates the application of the "least of the acts criminalized" test. When one properly employs that test it is revealed that many federal predicate crimes — including the unique way the Eighth Circuit interprets the "intimidation" element of carjacking under 18 U.S.C. § 2199 — does not require violent force, and therefore is not a "crime of violence."

III. The case is an excellent vehicle to resolve this extremely important question presented.

1. This case is an ideal vehicle for resolving this question presented, in order to provide lower courts guidance with how to determine if a predicate crime requires sufficient force to satisfy the elements clause of § 924(c)(3)(A). The only basis to affirm Mr. Taylor's conviction and sentence under § 924(c) is to conclude that his carjacking conviction satisfies the elements clause of § 924(c)(3)(A), because the residual clause of § 924(c)(3)(B) has been declared unconstitutionally void for vagueness in *Davis*. Thus, there are no other procedural hurdles that would prevent this Court from ruling on that issue.

Furthermore, Mr. Johnson's case is an ideal vehicle to resolve this issue because the district court, in denying his § 2255, relied solely on the fact that "Taylor's sentence may be upheld under § 924(c)(3)(B)", based on the

misunderstanding that the residual clause was still a valid catch all provision as it pertains to a "crime of violence." *See* Appendix B. Accordingly, Mr. Taylor's conviction and sentence rests upon the void residual clause, because the district court, in denying relief in October 2016, made that unambiguous. *Id*.

2. Furthermore, the question presented is one of exceptional importance, after this Court's recent holding in *United States v. Davis*, 139 S.Ct. 2319 (2019), which voided the residual clause of 18 U.S.C. § 924(c)(3)(B). In the wake of *Davis*, there is currently substantial litigation in the lower courts as to which defendants' § 924(c) convictions may be sustained under a virtually identically worded elements clause in 18 U.S.C. § 924(c)(3)(B).

Indeed, post-*Davis*, circuit courts are discovering that many predicate crimes that were always considered a "crime of violence" are not anymore. For example, circuit courts across the country have recently concluded post-*Davis* that federal second degree murder, federal kidnapping, and federal witness retaliation do not satisfy the elements clause of § 924(c)(3)(A), when employing the proper categorical analysis. *United States v. Begay*, 934 F.3d 1033 (9th 2019); *see also United States v. Brazier*, 933 F.3d 796 (7th Cir. 2019) (federal kidnapping, 18 U.S.C. § 1201, does not satisfy the elements

clause of § 924(c)(3)(A); *Bowen*, 936 F.3d at 1099 (witness retaliation in violation of 18 U.S.C. § 1513(b)(2) does not satisfy the elements clause of § 924(c)(3)(A)).

In *Davis,* this Court recognized that its holding would require a re-examination of which federal predicate crimes satisfy the elements clause of § 924(c)(3)(A), because while 18 U.S.C. § 924(c) punishes using a firearm "in connection with certain federal crimes", it remains uncertain under the statute "*which* other federal crimes?" *Davis*, 139 S.Ct. at 2323. But if courts, like the Eighth Circuit, are not employing the correct "least culpable conduct" test in conducting the categorical analysis, it goes without saying they cannot reach the proper conclusion as it pertains to a myriad of other federal predicate crimes, including federal carjacking and bank robbery.

Indeed, as evidenced by Mr. Taylor's case, without proper guidance from this Court, lower courts will reach haphazard and improper results in their erroneous application of the categorical test to the elements clause of § 924(c)(3)(A). Waiting for these results to trickle in from the Eighth Circuit (and other circuits) will cause irreparable harm to countless defendants serving unconstitutional sentences, because time is about to run out to obtain *Davis* relief for many of them. That is especially true for § 2255 litigants, like Mr. Taylor, who have been litigating their claims for years after this Court

struck down the ACCA's residual clause in *Johnson* in 2015, but still have not had the proper categorical analysis applied to their case to determine whether they are currently serving a valid and constitutional sentence. Once that work is done by this Court, it will be revealed that Mr. Taylor's sentence is predicated on the void residual clause of § 924(c)(3)(B) after *Davis*, and the law will be set straight for all of the others also in petitioner's position.

CONCLUSION

For the forgoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Dan Goldberg

Dan Goldberg
818 Grand, Suite 300
Kansas City, Missouri 64106
Attorney for Petitioner

APPENDIX

Appendix A – Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order of the District Court, 2016

Appendix C – Brannon Taylor's 2017 Petition for Certiorari

Appendix D – Solicitor General's BIO to Brannon Taylor's 2017 Petition for Certiorari