

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

DAVID LAMONT LIDDELL
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60361

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, under the law established by this Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015), Mr. Liddell should be resentenced without applying the armed career criminal provisions of the Armed Career Criminal Act.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED FOR REVIEW	ii
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT	3
III. CONSTITUTIONAL PROVISIONS INVOLVED	4
IV. STATEMENT OF THE CASE	5
A. Basis for federal jurisdiction in the court of first instance	5
B. Statement of material facts	5
V. ARGUMENT	8
A. Review on certiorari should be granted in this case	8
B. Section 2255 standard	9
C. The holdings in Johnson (2015)	9
D. Mr. Liddell’s prior armed robbery conviction under Mississippi state law is not a “violent felony” under the ACCA	13
E. Mr. Liddell’s prior aggravated assault conviction under Mississippi state law is not a “violent felony” under the ACCA	17

VI. CONCLUSION.....	20
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CERTIFICATE OF SERVICE	21
------------------------------	----

(Appendices 1, 2 and 3)

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases:</u>	
<i>James v. United States</i> , 550 U.S. 192, 180 L.Ed.2d 60 (2007).....	11
<i>Johnson v. United States</i> , 559 U.S. 133 (2010).....	1, 13, 14, 15, 18
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015).....	<i>passim</i>
<i>Stokeling v. United States</i> , 139 S.Ct. 544 (2019).....	8, 14
<i>Sykes v. United States</i> , — U.S. —, 131 S.Ct. 2267 (2011).....	11
<i>United States v. Calderon-Pena</i> , 383 F.3d 254 (5th Cir. 2004) (<i>en banc</i>)	17
<i>United States v. Reyes-Contreras</i> , 910 F.3d 169 (5th Cir. 2018) (<i>en banc</i>)	15
<i>United States v. Villegas-Hernandez</i> , 468 F.3d 874 (5th Cir. 2006)	15, 16, 17, 18
<i>United States v. Welch</i> , 136 S.Ct. 1257 (2016)	9
<u>Statutes:</u>	
Armed Career Criminal Act.....	<i>passim</i>
18 U.S.C. § 16.....	15, 16
18 U.S.C. § 922.....	1, 6, 10, 11

18 U.S.C. § 924	<i>passim</i>
18 U.S.C. § 3231	5
18 U.S.C. § 3581	6
18 U.S.C. § 3583	6
28 U.S.C. § 1254	3
28 U.S.C. § 2255	1, 2, 5, 9
Miss. Code Ann. § 97-3-7	17, 18, 19
Miss. Code Ann. § 97-3-79	13, 14, 17
Minn. Stat. § 609.67 (2006)	11
Texas Penal Code § 1.07	16
Texas Penal Code § 22.01	15, 16
<u>Rules:</u>	
Rule 10, Supreme Court Rules	8
Rule 13.1, Supreme Court Rule	3
Rule 29.5, Supreme Court Rules	21
<u>Provisions of the United States Constitution:</u>	
Fifth Amendment to the United States Constitution	4
<u>Provisions of the United States Sentencing Guidelines:</u>	
U.S.S.G. § 2L1.2	15

I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner David Liddell on August 18, 2010.¹ The conviction was for felon in possession of a firearm in violation of 18 U.S.C. § 922(g). His sentence was enhanced under the provisions of 18 U.S.C. § 924(e), the Armed Career Criminal Act (hereinafter “ACCA”). The district court case number is 3:09cr112-WHB-FKB. The subject § 2255 Petition arose out of the sentence ordered for the felon in possession conviction.

In 2015, after Mr. Liddell’s conviction and sentence, this Court ruled that the “residual clause” portion of the “violent felony” definition in the ACCA is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).² Invoking the holdings in *Johnson* (2015), Mr. Liddell filed the subject § 2255 Petition to Vacate Sentence on June 21, 2016. In the Petition, Mr. Liddell argued that he should be resentenced without application of the sentence enhancement provisions of the ACCA.

¹ The district court’s Judgment is attached hereto as Appendix 1.

² This Petition cites two important Supreme Court cases captioned “*Johnson v. United States*.” One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the parameters of the phrase “physical force” in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as “*Johnson* (2015),” and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as “*Johnson* (2010).”

The district court entered an Order denying the relief sought in the § 2255 Petition on May 1, 2017. The final page of the Order states that a Certificate of Appealability is denied in this case. The court filed a Final Judgment on the same day.³

Mr. Liddell appealed the case to the United States Court of Appeals for the Fifth Circuit on May 4, 2017. The Fifth Circuit case number is 17-60361. The Fifth Circuit entered an Order affirming the district court's rulings on September 4, 2019. It entered a Final Judgment on the same day.⁴ This Petition for Writ of Certiorari followed.

³ The district court's Order and its Final Judgment are attached hereto as composite Appendix 2. The denial of a COA is stated on page 7 of the Order.

⁴ The Fifth Circuit's Order and its Judgment are attached hereto as composite Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on September 4, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

In *Johnson* (2015), the case that Mr. Liddell's argument is based on, this Court found that the "residual clause" portion of ACCA's definition of "violent felony" is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: "No person shall ... be deprived of life, liberty, or property, without due process of law[.]"

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Liddell sought to be resentenced without application of the ACCA's sentencing provisions. The § 2255 Petition concerns an underlying conviction and sentence filed in the United States District Court for the Southern District of Mississippi for a felon in possession of a firearm. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the felon in possession conviction arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue in this Petition pertain solely to sentencing. Specifically, the facts focus on the district court's application of the "violent felony" provisions of the ACCA and the "residual clause" portion of the "violent felony" definition.

The district court deemed Mr. Liddell an armed career criminal under § 924(e)(1) of the ACCA because he purportedly had three prior qualifying convictions for violent felonies. The relevant priors were burglary of a dwelling, armed robbery and aggravated assault with a weapon. Because of the downward departure ordered by the district court, Mr. Liddell's prison sentence was not under

the ACCA. The supervised release sentence, however, was ordered under the provisions of the ACCA.

We know that the district court ordered a five-year supervised release sentence pursuant to the ACCA because the maximum term of supervised release that could have been ordered outside of the ACCA was only three years. This is true because Mr. Liddell's conviction under 18 U.S.C. § 922(g)(1) was statutorily capped at a ten-year prison term. 18 U.S.C. § 924(a)(2). With a ten-year statutory maximum prison term, felon in possession of a firearm is a Class C felony. 18 U.S.C. § 3581(b)(3). The statutory maximum term of supervised release for a Class C felony is three years. 18 U.S.C. § 3583(b)(2). So Mr. Liddell's supervised release sentence must have been under the ACCA because it would have been capped at three years otherwise.

Under the ACCA, Mr. Liddell's felon in possession conviction is a Class A felony because the statutory sentencing range is 15 years to life imprisonment under 18 U.S.C. § 924(c)(5)(A). 18 U.S.C. § 3581(b)(1) (stating that a Class A felony is any crime for which the prison term is "the duration of a defendant's life or any period of time[.]). Under 18 U.S.C. § 3583(b)(2), the statutory maximum term of supervised release for a Class A felony is five years, which is the term that the district court ordered Mr. Liddell to serve. Based on this law, Mr. Liddell's five-year supervised release sentence had to be under the ACCA.

Mr. Liddell is not contesting his guilt in regard to the instant felon in possession conviction. His supervised release sentence is the contested issue. Based on the arguments presented below, neither Mr. Liddell's armed robbery conviction nor his aggravated assault conviction is a violent felony post-*Johnson* (2015). Since Mr. Liddell's burglary conviction is the only conviction that arguably qualifies as a violent felony, he is no longer an armed career criminal under the ACCA. See § 924(e)(1) (stating that three prior qualifying convictions are required to trigger the armed career criminal enhancements).

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”

Federal district and appeal courts are flush with cases arising from this Court’s rulings in *Johnson* (2015). As with Mr. Liddell’s case, many of the issues focus in part on defining action that constitutes “physical force against the person of another.” The “physical force” requirement must be met for a prior conviction to count as a “violent felony” under the force clause of the ACCA, which is contained in 18 U.S.C. § 924(e)(2)(B)(i). This Court provided a level of guidance on the “physical force” requirement in *Johnson* (2010),⁵ and *Stokeling v. United States*, 139 S.Ct. 544 (2019).

Notwithstanding the holdings in *Johnson* (2010) and *Stokeling*, lower courts still struggle with determining what types of actions constitute “physical force” under § 924(e)(2)(B)(i). Granting certiorari in this case will give the Court an opportunity to clarify the definition of “physical force” in the context of the ACCA. Therefore, the Court should grant Mr. Liddell’s Petition for Writ of Certiorari.

⁵ See *supra*, footnote 2.

B. Section 2255 standard.

Mr. Liddell's Petition is filed under the provisions of 28 U.S.C. § 2255.

Section 2255(a) states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(Emphasis added).

Mr. Liddell contends that his sentence “was imposed in violation of the Constitution.” His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to case on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

C. The holdings in *Johnson* (2015).

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a “violent felony,” a term defined to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion focuses on a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

(e)(1) In the case of a person who violates section 922(g)[⁶] of this title and has three previous convictions by any court referred to in section 922(g)(1)[⁷] of this title for a *violent felony* or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and *imprisoned not less than fifteen years*, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

Johnson (2015) pertains to the “violent felony” language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

(e)(2) As used in this subsection –

* * * * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]

(Emphasis added).

⁶ 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.

⁷ 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]”

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of “violent felony” includes any act that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” This language is commonly referred to as the ACCA’s “residual clause.” See *Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court’s framing of the issue in light of the case-specific facts:

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson’s previous offenses – including unlawful possession of a short-barreled shotgun, see Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota’s offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution’s prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in *James*^[8] and *Sykes*^[9] are overruled. Today’s decision does not call into question application of the Act to the four

⁸ The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).

⁹ The full cite for *Sykes* is *Sykes v. United States*, — U.S. —, 131 S.Ct. 2267 (2011).

enumerated offenses, or the remainder of the Act’s definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

Under the above holdings in *Johnson* (2015), it is unconstitutional to increase a defendant’s sentence under § 924(e)(1) because he has any prior “violent felonies,” as defined under the residual clause of § 924(e)(2)(B)(ii). This ruling does not apply to the enumerated “violent felonies” stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a “violent felony” under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

- (1) have “as an element the use, attempted use, or threatened use of physical force against the person of another” (§ 924(e)(2)(B)(i)); or
- (2) be “burglary, arson, or extortion” or “involve[] use of explosives” (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent felony. Under the residual clause, a prior conviction is deemed a violent felony if it “otherwise involve[ed] conduct that present[ed] a serious potential risk of injury

to another[.]” *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

D. Mr. Liddell’s prior armed robbery conviction under Mississippi state law is not a “violent felony” under the ACCA.

One of Mr. Liddell’s prior convictions that triggered the ACCA was armed robbery under Mississippi law. This conviction was under § 97-3-79 of the Mississippi Code, titled “Robbery using a deadly weapon, punishment.” Post-*Johnson* (2015), armed robbery under § 97-3-79 is no longer a violent felony under the ACCA.

A prior conviction is considered a “violent felony” under § 924(e)(2)(B)(i) if it has “as an element the use, attempted use, or threatened use of physical force against the person of another[.]”¹⁰ (Emphasis added). In *Johnson* (2010), this Court defined the level of force required to meet the “physical force” requirement of § 924(e)(2)(B)(i). “[T]he phrase ‘physical force’ means violent force – that is, force capable of causing physical pain or injury to another person.” *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). “It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138.

¹⁰ Robbery is not an enumerated offense under the ACCA. So the only option that it can be considered a violent felony is under the physical force clause.

In 2019, this Court again analyzed the force requirement. In *Stokeling v. United States*, 139 S.Ct. 544 (2019), the Court held that a crime satisfies the “physical force” aspect of the elements clause if the force required for a conviction “is sufficient to overcome a victim’s resistance.” *Id.* at 554. But *Stokeling* does not overturn the *Johnson* (2010) Court’s ruling that the force at issue must be physical force.

Under this definition of physical force, we must analyze § 97-3-79 of the Mississippi Code. This code section states:

§ 97-3-79. Robbery using deadly weapon; punishment

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

(Emphasis added).

Section 97-3-79 does not meet the “physical force” clause of the ACCA because it can be violated “by putting [the victim] in fear[.]” Under *Johnson* (2010), putting a person in fear does not meet the requirement of “violent force – that is, force capable of causing physical pain or injury to another person” which is required to meet the physical force clause. *See Johnson* (2010), 599 U.S. at 141.

For this reason alone, Mr. Liddell’s prior armed robbery conviction cannot count as a crime of violence under the ACCA.

We also look to the Fifth Circuit’s rulings in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018) (*en banc*)¹¹ to determine whether Mississippi’s armed robbery statute meets the “violent force” requirement defined in *Johnson* (2010). In that case, the defendant was convicted of illegally reentering the United States after being deported following a state court assault conviction. *Id.* at 876-77. At issue was whether defendant’s assault conviction was an “aggravated felony” under U.S.S.G. § 2L1.2(b)(1)(C).).¹² *Id.* at 877. The district court found that it was, and the defendant appealed. *Id.* at 877-78.

In *Villegas-Hernandez*, both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a

¹¹ In candor to the Court, the defense acknowledges that the Fifth Circuit overruled *Villegas-Hernandez* via its opinion in *Reyes-Contreras*, which was decided on November 30, 2018. Thus the argument asserted by the defense is against Fifth Circuit precedent. The defense, however, contends that the holdings in *Reyes-Contreras* are at odds with this Court’s holdings in *Johnson* (2010) and *Stokeling*.

¹² For purposes relevant to the appeal, § 2L1.2’s definition of “aggravated felony” is found in 18 U.S.C. § 16(a)’s definition of “crime of violence.” *See Villegas-Hernandez*, 468 F.3d at 877. Section 16(a) states:

The term “crime of violence” means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

This language is functionally identical to the language of 18 U.S.C. § 924(e)(2)(B)(i) that is at issue in the subject case. *See Johnson* (2010), 559 U.S. at 140 (stating that the definitions of “crime of violence” in § 16 and § 924 are “very similar”).

person guilty of the offense if it is proven that he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” *Villegas-Hernandez*, 468 F.3d at 878. “The government contend[ed] that 22.01(a)(1)’s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that Villegas-Hernandez’s prior assault conviction satisfies 16(a)’s definition of crime of violence.” *Id.* at 878-79. The Fifth Circuit disagreed. *Id.* at 879.

Supporting its conclusion, the Fifth Circuit held “an assault offense under section 22.01(a)(1) satisfies subsection 16(a)’s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use of ‘destructive or violent’ force.” *Villegas-Hernandez*, 468 F.3d at 879. Then the court provided examples of how a violation of the subject assault statute could be committed without the use of physical force:

The bodily injury required by section 22.01(a)(1) is “physical pain, illness, or any impairment of physical condition.” Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of “destructive or violent force”, 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. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)’s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879 (emphasis added).

Just like the statute in *Villegas-Hernandez*, a conviction under Mississippi’s armed robbery statute “could result from any of a number of acts, without use of ‘destructive or violent force[.]’” For example, the “deadly weapon” factor in § 97-3-79 could be met by displaying or threatening to use poisonous gas, which the *Villegas-Hernandez* court recognized as a means of harm that does not result from use of “destructive or violent force[.]”¹³ 468 F.3d at 879. For this additional reason, Mr. Liddell’s Mississippi armed robbery conviction does not qualify as a “violent felony” under the ACCA.

E. Mr. Liddell’s prior aggravated assault conviction under Mississippi state law is not a “violent felony” under the ACCA.

Aggravated assault is not an enumerated crime under § 924(e)(2)(B)(ii) and the residual clause is now unconstitutional, so the only possible option under which the prior aggravated assault conviction can be deemed a “violent felony” is § 924(e)(2)(B)(i). As analyzed in detail above, a prior conviction is considered a “violent felony” under § 924(e)(2)(B)(i) if it has “as an element the use, attempted use, or threatened use of *physical force* against the person of another[.]”

The charging statute for Mr. Liddell’s aggravated assault conviction is Mississippi Code § 97-3-7(2)(a). This code section states:

¹³ We “look to the *elements* of the crime, not to the defendant’s actual conduct in committing it” when we perform the violent felony analysis. *United States v. Calderon-Pena*, 383 F.3d 254, 257 (5th Cir. 2004) (*en banc*) (emphasis in original).

A person is guilty of aggravated assault if he (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615[.]

Id. (emphasis added). There is no evidence before the Court that a child was harmed, so the emphasized language of § 97-3-7(2)(a) is the subject of our analysis.

All of the analyses regarding *Johnson* (2010) and *Villegas-Hernandez* presented in the preceding subsection of this Brief also apply to Mr. Liddell's aggravated assault conviction. Just like the statute in *Villegas-Hernandez*, a conviction under Mississippi's aggravated assault statute "could result from any of a number of acts, without use of 'destructive or violent force[.]'" For example, the "deadly weapon" used to commit aggravated assault could be poison, which the *Villegas-Hernandez* court recognized as a means of harm that does not result from use of "destructive or violent force[.]" 468 F.3d at 879. For these reasons, Mr. Liddell's Mississippi aggravated assault conviction does not qualify as "violent felony" under the ACCA.

Also, Mr. Liddell notes that this Court recently granted certiorari on an issue that affects the subject argument. The case for which the Court granted certiorari is *James Walker v. United States*, Supreme Court number 19-373, which came to

this Court from the United States Court of Appeals for the Sixth Circuit. As stated in the Petition for Writ of Certiorari, the issue in *Walker* is “[w]hether a criminal offense that can be committed with a *mens rea* of recklessness can qualify as a ‘violent felony’ under the Armed Career Criminal Act[.]” Walker filed his Petition on September 19, 2019, and the Court granted certiorari on November 15, 2019.

Just as in *Walker*, Mr. Liddell’s aggravated assault offense can be committed with a *mens rea* of recklessness. *See* Miss. Code Ann. § 97-3-7(2)(a)(i). Because the Court granted certiorari in *Walker* to address this issue, the Court should also grant certiorari in Mr. Liddell’s case to address the issue.

VI. CONCLUSION

Based on the arguments presented above, Mr. Liddell asks the Court to grant his Petition for Writ of Certiorari in this case.

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