NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

Benjamin Joseph Langford - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Nova D. Janssen
Assistant Federal Public Defender
400 Locust Street, Suite 340
Des Moines, IA 50309
TELEPHONE: 515-309-9610
FAX: 515-309-9625

ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

(1) Whether Mr. Langford was improperly denied 28 U.S.C. § 2255 relief from his "three strikes" mandatory life sentence, pursuant to *United States v. Johnson*, 135 S. Ct. 2551 (2015), where his determinative predicate conviction was pursuant to Iowa's 1975 robbery with aggravation statute, which is indivisible, and which has never qualified as a "serious violent felony" under § 3559(c) in the absence of the residual clause, because conviction can be based on threats of non-physical harm to property.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases:

Federal Statutes:

Other:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

Benjamin Joseph Langford - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

The petitioner, Benjamin Joseph Langford, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 19-3541, entered on April 7, 2021. Mr. Langford' petition for panel and en banc rehearing was denied on August 3, 2021.

OPINION BELOW

Within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Langford sought 28 U.S.C. § 2255 relief from his 18 U.S.C. § 3559(c) "three strikes" mandatory life sentence, and from his concurrent 18 U.S.C. § 924(e) Armed Career Criminal sentence. The district court granted relief

on the Armed Career Criminal sentence, but denied relief on the three strikes sentence. On April 7, 2021, a panel of the Eighth Circuit Court of Appeals affirmed.

JURISDICTION

The United States District Court for the Southern District of Iowa had original jurisdiction over Mr. Langford's case under 18 U.S.C. § 3231. Within one year of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Langford challenged his ACCA and 18 U.S.C. § 3559(c) sentencing enhancements by filing a 28 U.S.C. § 2255 petition. The district court granted relief on the ACCA enhancement, but denied relief as to the § 3559(c) "three strikes" enhancement. (App. A). The Eighth Circuit affirmed the district court's partial denial of § 2255 relief on April 7, 2021 (App. B), and denied Mr. Langford's petition for panel or en banc rehearing on August 3, 2021 (App. C). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255:

> (a) 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.

18 U.S.C. § 3559(c) **Imprisonment of certain violent felons**.—

> (1) **Mandatory life imprisonment**.—Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—
>
> (A) the person has been convicted (and those convictions have

become final) on separate prior occasions in a court of the United States or of a State of–(i) 2 or more serious violent felonies; or (ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) **Definitions**.---For purposes of this subsection . . . (F) the term "serious violent felony" means–

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118) ["enumerated offense clause"] . . . and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another ["force clause"] or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense ["residual clause"].

Iowa Code § 711 (1975):

711.1 Definition–punishment. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in sections 711.2 and 711.3.

711.2 Robbery with aggravation. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term of twenty-five years.

STATEMENT OF THE CASE

In 2004, Mr. Langford was convicted by a jury of violating 18 U.S.C. § 2113(a) and (d) (Count Three); possession of a firearm in relation to bank robbery, in violation of 18 U.S.C. § 924(c) (Count Four); and felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count Five). (Crim. Doc. 15).[1] Prior to trial, the government notified Mr. Langford that he was subject to an increased sentence of mandatory life imprisonment on Count Three by reason of two prior serious violent felony convictions, namely: (1) a 1975 Iowa conviction for robbery with aggravation; and (2) a 1989 Iowa conviction for first degree robbery. (Crim. Doc. 17); 18 U.S.C. § 3559(c).

On January 7, 2005, the district court found that Mr. Langford was subject to the § 3559(c) three-strikes enhancement and to a § 924(e) Armed Career Criminal enhancement; it sentenced him to mandatory life imprisonment on Count Three, a concurrent term of life imprisonment on Count Five, and a consecutive seven-year term of imprisonment on Count Four. (Crim. Doc. 83, p. 2). Mr. Langford's convictions and sentences were affirmed on appeal. *See United States v. Langford*, 155 F. App'x 936 (8th Cir. 2005) (per curiam).

---

[1] References to documents from Mr. Langford's criminal court case, S.D. Iowa Case No. 3:04-cr-91, are referred to as "Crim. Doc.," followed by the district court's docket entry number. References to the § 2255 proceedings underlying the present appeal, S.D. Iowa Case No. 4:16-cv-132, are referred to as "Civ. Doc.," followed by the district court's docket entry number. The district court order granting in part and denying in part § 2255 relief, however, is included with the instant petition for certiorari as Appendix A.

In 2015, the United States Supreme Court held that "imposing an increased sentence under the residual clause [18 U.S.C. § 924(e)(2)(B)(ii)] of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); *see also Welch v. United States*, 136 S. Ct. 1257 (2016) (holding *Johnson* is retroactive on collateral review). On April 26, 2016, Mr. Langford timely filed a 28 U.S.C. § 2255 petition, arguing that *both* his ACCA and three-strikes sentence enhancements were unconstitutional in light of *Johnson*. The district court granted Mr. Langford relief from the ACCA enhancement, but denied relief from the mandatory life three-strikes enhancement. (*See* App. A). The district court found that both of Mr. Langford's prior robbery convictions qualify as serious violent felonies under § 3559(c)'s enumerated offense clause, and his 1975 conviction also qualifies under the statute's force clause. (*Id.*). On appeal, a three-judge panel of the Eighth Circuit issued a published decision affirming the district court's partial denial, concluding that Mr. Langford "cannot show that at the time of sentencing, the district court necessarily relied on section 3559's residual clause in ruling that the [1975] conviction was a serious violent felony." (App. B at 44; *Langford v. United States*, 993 F.3d 633, 639 (8th Cir. 2021)).

REASONS FOR GRANTING THE WRIT

Mr. Langford's 1975 Iowa robbery with aggravation conviction is pursuant to an indivisible statute that is, and always has been, categorically overbroad as a § 3559(c) "serious violent felony" under the statute's enumerated or force clauses, because the plain language of the Iowa statute shows a conviction could be had thereunder for making threats of non-physical harm to property. A grant of certiorari is necessary because the panel decision conflicts with Supreme Court authority requiring an appropriate categorical analysis, such as *Mathis v. United States,* 136 S. Ct. 2243, 2256 (2016) and *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The panel decision also conflicts with Supreme Court authority acknowledging that serious recidivist sentencing enhancements like § 3559(c) are meant to apply to violent, active, intentional crimes involving significant physical force directed toward other persons. *See Borden v. United States*, 141 S. Ct. 1817 (2021); *see also United States v. Dobbs*, 449 F.3d 904, 913 (8th Cir. 2006). The issue raised in this appeal is one of exceptional importance, given that it implicates the second harshest sentence authorized by law—mandatory life imprisonment. Since Mr. Langford is not, in fact, a three strikes offender within the meaning of 18 U.S.C. § 3559(c), a writ of certiorari is necessary to prevent him from being forced to serve a sentence vastly greater than the finite maximum statutory term applicable to his § 2113 conviction.

I. PETITIONER AFFIRMATIVELY PROVED THAT HIS 1975 IOWA CONVICTION HAS ONLY EVER QUALIFIED AS A "SERIOUS VIOLENT FELONY" PURSUANT TO 18 U.S.C. § 3559(c)'S UNCONSTITUTIONALLY VAGUE RESIDUAL CLAUSE.

In *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), the Eighth Circuit held that a § 2255 claimant "bears the burden of showing that he is entitled to relief under § 2255." This requires the claimant to do more than point to the "mere possibility that the sentencing court relied on the residual clause." *Id.*; *see Golinveaux v. United States*, 915 F.3d 564, 567 (8th Cir. 2019). Instead, he must "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the ACCA enhancement." *Walker*, 900 F.3d at 1015. Here, Mr. Langford satisfied the requisite standard by demonstrating that his 1975 Iowa robbery conviction was pursuant to a categorically overbroad and indivisible statute, which both at the time of sentencing and today, only qualified as a predicate under § 3559(c)(2)(F)(ii)'s unconstitutionally vague residual clause.

To determine whether a prior conviction qualifies as a predicate under an enhancement statute, sentencing courts apply the categorical approach, looking "only to the statutory definitions – *i.e.*, the elements – of a defendant's [offense] and *not* to the particular facts underlying [the offense]" to determine whether it qualifies as a "[serious] violent felony." *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (quotation marks and citation omitted); *United States v. Swopes*, 886 F.3d 668, 670 (8th Cir. 2018) (en banc). In cases involving a statute with alternative ways of committing an offense, a court first must determine whether its listed

mechanisms are elements or means. *Descamps*, 133 S. Ct. at 2281–82. If they are means, "the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis v. United States,* 136 S. Ct. 2243, 2256 (2016). "Given [the categorical approach's] indifference to how a defendant actually committed a prior offense," the court may ask only whether the elements of the state crime necessarily satisfy the force clause, or are the equivalent of the relevant federal counterpart. *Id*.

Here, the enhancing statute was 18 U.S.C. § 3559(c), which provides for a mandatory sentence of life imprisonment when a person receives a third conviction – or "strike" – for a "serious violent felony," defined by the statute as follows:

> (i) a Federal or State offense, by whatever designation and wherever committed, consisting of . . . robbery (as described in section 2111, 2113, or 2118) ["enumerated offense clause"] . . . and
>
> (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another ["force clause"] or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense ["residual clause"].

18 U.S.C. § 3559(c)(F). The contested predicate "strike" under the statute is Mr. Langford's 1975 conviction for Iowa robbery with aggravation. The statute under which he was convicted provided:

> 711.1 Definition–punishment. If any person, with force or violence, or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery, and shall be punished according to the aggravation of the offense, as is provided in sections 711.2 and 711.3.

> 711.2 Robbery with aggravation. If such offender at the time of such robbery is armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or if being so armed, he wound or strike the person robbed; or if he has any confederate aiding or abetting him in such robbery, present and so armed, he shall be imprisoned in the penitentiary for a term of twenty-five years.

Iowa Code (1975).

The pertinent question in this appeal was whether Mr. Langford's 1975 Iowa robbery with aggravation conviction was properly deemed one of his three strikes, in the absence of the unconstitutionally vague residual clause.[2] The Eighth Circuit panel decision does not directly address the question of whether Mr. Langford's Iowa robbery conviction counts as a "strike" under § 3559(c)'s force clause, deciding the appeal instead on the basis of the enumerated offense clause. In particular, it concludes that, given language in Iowa case law indicating that force or violence or "putting in fear" is essential to simple Iowa robbery (§ 711.1), Mr. Langford failed to carry his burden under *Walker v. United States*, 900 F.3d 1012, 1015 (8th Cir. 2018), to "show by a preponderance of the evidence that the residual clause led the sentencing court to apply the [three-strikes] enhancement." App. B. at 39.

Because the term robbery, as used in § 3559(c)(2)(F)(i) is clearly "exemplified by the three statutes listed" therein, the Eighth Circuit panel determined that the common illustrative theme of §§ 2111, 2113, and 2118, is that each must be

[2] Although this Court has not yet explicitly extended *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), to § 3559(c), the district court, parties, and Eighth Circuit panel all agreed that *Johnson* renders § 3559(c)(2)(F)(ii)'s virtually identical residual clause unconstitutionally vague.

committed "by force and violence, or by intimidation," which "means the threat of force." *See* App. B at 40; *United States v. Wicks*, 132 F.3d 383, 387 (7th Cir. 1997). The panel found this phraseology equivalent to the element in Iowa Code § 711.1 requiring a robbery be "with force or violence, *or by putting in fear*," citing several cases that refer to variations of the textual language. *Id.*

Because the terms "force and violence" are routinely interpreted as "entail[ing] the use of physical force," and because "intimidation" is interpreted as "involv[ing] the threat to use such force," it is clear that a state robbery offense must necessarily contain an element that *also* satisfies the force clause, i.e., the offense *must* involve the actual, attempted, or threatened use of physical force. *See Estell v. United States*, 924 F.3d 1291, 1293 (8th Cir. 2019); *United States v. McNeal*, 818 F.3d 141, 152–53 (4th Cir. 2016). In fact, this Court recently affirmed in *Borden v. United States*, that the term "*violent* felony" in the ACCA implicates "violent, active crimes" that are "best understood to involve not only a substantial degree of force, but also a . . . a deliberate choice of wreaking harm *on another*, rather than mere indifference to risk." 141 S. Ct. 1817 (2021) (emphasis added) (also reiterating that the categorical approach requires that if "even the least culpable" of acts criminalized by a statute does not match the federal standard, it cannot serve as a basis for enhancement).

Unlike the ACCA predicate offenses analyzed in *Borden*, which only need to be "violent felonies" (18 U.S.C. § 924(e)(1), § 3559(c) predicates must be "serious

violent felonies." Congress's decision to add the term "serious" to the phrase "violent felony," indicates that it was intended to be a significant modifier. The term "serious" implies that qualifying felonies under § 3559(c) must involve some unspecified magnitude of greater severity and violence than offenses which qualify as "crimes of violence" under the guidelines, or as "violent felonies" under the ACCA. This premise is consistent with *United States v. Dobbs*, 449 F.3d 904, 913 (8th Cir. 2006), where the Eighth Circuit recognized a continuum of seriousness with respect to USSG § 4B1.2, § 924(e)(2), and § 3559(c), and that § 3559(c) requires that the convictions used to impose the drastic mandatory penalty of life in prison must be at the highest end of that continuum. Placed in perspective, then, the "as described in section 2111, 2113, or 2118" language in the statute clearly demonstrates that when it comes to robbery offenses, not just any robbery will suffice. The robbery necessarily must implicate at least some minimal level of actual physical violence directed toward another person. The Iowa statute lacks these features, and is thus categorically overbroad. *See Borden*, 141 S. Ct. at 1832 (observing that reliance on the "*least* serious conduct" as determinative of whether a prior conviction qualifies is "under-inclusive by design: It *expects* that some violent acts . . . will not trigger enhanced sentences" in the interests of ensuring that only the most serious conduct does).

Respectfully, the Eighth Circuit's analysis errs by simply equating the indivisible, generic federal element of "force or violence or intimidation" with

§ 711.1's indivisible element of "force or violence or by putting in fear." Both the plain text of the 1975 Iowa statute, and Iowa law in effect at the time of Mr. Langford's sentencing clearly demonstrate that he *could have* been convicted under Iowa's 1975 robbery statute for making threats of non-physical harm to property. "Intimidation," as the panel recognizes, "means the threat of force." App. B. at 40 (quoting *United States v. Harper*, 869 F.3d 624, 626 (8th Cir. 2017)). "Putting in fear," by contrast, is not specifically defined by Iowa law, but has long been treated as the equivalent of coercion. Even giving the term its plain and typical meaning, it encompasses a far broader range of conduct than intimidation, including conduct that is *neither*: (1) *physical*; nor (2) directed against the *person* of another. Under Iowa law in existence at the time of Mr. Langford's sentencing, one could wrongly take another's property by "put[ting its owner] in fear by means of threats of arresting him and unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage and prudence, and to deprive the party . . . of free will in making" his decision to part with it." *Kennedy v. Roberts*, 75 N.W. 363, 365 (Iowa 1898) (arising in the context of duress in the making of a contract); *see also Gray v. Shell Petroleum Corp*., 237 N.W. 460, 462 (Iowa 1931) (duress in making a contract can arise by "putting another in fear" by way of making "threats regarding [another's] personal safety or liberty, or that of his property, or of a member of his family, as to deprive him of the free exercise of his will"). So too, the plain text of the statute encompasses a

situation where a person escapes with his victim's property by threatening to reveal confidential information, or by threatening harm to a beloved pet or piece of property. *See id.* Under the Court recent decision in *Borden*, the 1975 Iowa robbery statute is overbroad because it could have been violated by merely coercive conduct involving nonphysical threats to property; this is not an offense that can qualify as a "serious violent felony," triggering one of the most serious penalties allowable by law.

CONCLUSION

For the foregoing reasons, Mr. Langford respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Nova D. Janssen

Nova D. Janssen
Assistant Federal Defender
400 Locust Street, Suite 340
Des Moines, IA 50309
TELEPHONE: 515-309-9610
FAX: 515-309-9625

ATTORNEY FOR PETITIONER