

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Verod Woodard PETITIONER
(Your Name)

VS.

United States of America RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Northern District of Texas
Fifth Circuit Court of Appeals

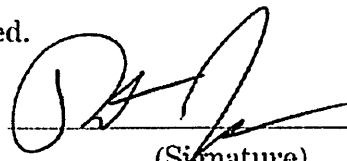
☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

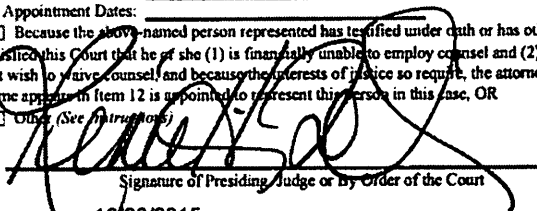
☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☒ a copy of the order of appointment is appended.


(Signature)

CJA 20 APPOINTMENT OF AND AUTHORITY TO PAY COURT-APPOINTED COUNSEL (Rev. 12/03)

1. CIR./DIST./DIV. CODE TXN3		2. PERSON REPRESENTED Verod Woodard		VOUCHER NUMBER	
3. MAG. DKT./DEF. NUMBER		4. DIST. DKT./DEF. NUMBER 3:15-cr-00412-M		5. APPEALS DKT./DEF. NUMBER	
7. IN CASE/MATTER OF (Case Name) USA v Woodard		8. PAYMENT CATEGORY ☒ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal		9. TYPE PERSON REPRESENTED ☒ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	
10. REPRESENTATION TYPE (See Instructions) CC					
11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) <i>If more than one offense, list (up to five) major offenses charged, according to severity of offense.</i> 18:2119 Carjacking					
12. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix), AND MAILING ADDRESS Preston Lee Jones 6060 N. Central Expressway Suite 500 Dallas, TX 75206 Telephone Number : 972/528-0455			13. COURT ORDER ☒ O Appointing Counsel ☐ C Co-Counsel ☐ F Subs For Federal Defender ☐ R Subs For Retained Attorney ☐ P Subs For Panel Attorney ☐ Y Standby Counsel Prior Attorney's Name: _____ Appointment Dates: _____ ☐ Because the above-named person represented has testified under oath or has otherwise sworn to this Court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 12 is appointed to represent this person in this case, OR ☐ Other (See Instructions) _____  10/30/2015 Date of Order Nunc Pro Tunc Date Repayment or partial repayment ordered from the person represented for this service at time appointment ☐ YES ☐ NO		
14. NAME AND MAILING ADDRESS OF LAW FIRM (Only provide per instructions) U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED OCT 30 2015					
CLAIMS FOR SERVICES AND EXPENSES					
By _____		HOURS CLAIMED		TOTAL AMOUNT CLAIMED	
CATEGORIES (Attach itemization of services with dates)				MATH/TECH. ADJUSTED HOURS	
				MATH/TECH. ADJUSTED AMOUNT	
				ADDITIONAL REVIEW	
In Court	15. a. Arraignment and/or Plea				
	b. Bail and Detention Hearings				
	c. Motion Hearings				
	d. Trial				
	e. Sentencing Hearings				
	f. Revocation Hearings				
	g. Appeals Court				
	h. Other (Specify on additional sheets)				
(RATE PER HOUR = \$) TOTALS:					
Out of Court	16. a. Interviews and Conferences				
	b. Obtaining and reviewing records				
	c. Legal research and brief writing				
	d. Travel time				
	e. Investigative and other work (Specify on additional sheets)				
(RATE PER HOUR = \$) TOTALS:					
17. Travel Expenses (lodging, parking, meals, mileage, etc.)					
18. Other Expenses (other than expert, transcripts, etc.)					
GRAND TOTALS (CLAIMED AND ADJUSTED):					
19. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE FROM: _____ TO: _____				20. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION	
21. CASE DISPOSITION					
22. CLAIM STATUS ☐ Final Payment ☐ Interim Payment Number _____ ☐ Supplemental Payment					
Have you previously applied to the court for compensation and/or reimbursement for this representation? ☐ YES ☐ NO If yes, were you paid? ☐ YES ☐ NO Other than from the Court, have you, or to your knowledge has anyone else, received payment (compensation or anything of value) from any other source in connection with this representation? ☐ YES ☐ NO If yes, give details on additional sheets. I swear or affirm the truth or correctness of the above statements. Signature of Attorney _____ Date _____					
APPROVED FOR PAYMENT — COURT USE ONLY					
23. IN COURT COMP.		24. OUT OF COURT COMP.		25. TRAVEL EXPENSES	
				26. OTHER EXPENSES	
28. SIGNATURE OF THE PRESIDING JUDGE		DATE:		27. TOTAL AMT. APPR./CERT. 0	
29. IN COURT COMP.		30. OUT OF COURT COMP.		31. TRAVEL EXPENSES	
				32. OTHER EXPENSES	
34. SIGNATURE OF CHIEF JUDGE, COURT OF APPEALS (OR DELEGATE) <i>Payment approved in excess of the statutory threshold amount.</i>		DATE:		33. TOTAL AMT. APPROVED 0	
				34a. JUDGE CODE	

No. 17-_____

In the Supreme Court of the United States

Verod Woodard

v.

United States of America,

Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Preston Jones
Counsel of Record
6060 N. Central Expy, #500
Dallas, TX 75206
(972) 528-0455
prestondefense@gmail.com

Questions Presented

- I. Whether the enactment of 18 U.S.C. § 2119 exceeded Congress's authority under the Commerce Clause.
- II. Whether carjacking qualifies as a “crime of violence” under 18 U.S.C. § 924(c)(3), and 18 U.S.C. §16(b).

Parties

Verod Woodard is the petitioner; he was the defendant-appellant below.
The United States of America is the respondent; it was the plaintiff-appellee below.

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Petition for Writ of Certiorari

Petitioner Verod Woodard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit was filed on August 28, 2017, is an unpublished opinion and is provided as an Appendix to the Petition [Appx. A].

Jurisdictional Statement

The instant petition is filed within 90 days of an opinion affirming the judgment, which was issued on August 28, 2017. See Sup. Ct. R. 13.1 This Court's jurisdiction to grant certiorari is invoked under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 3 of the United States Constitution provides:

The United States Congress shall have power: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 924(c)(3) provides:

(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. §16(b) provides:

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, or

(b) any other offense that is a felony and 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. § 2119 provides:

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--

be fined under this title or imprisoned not more than 15 years, or both, 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

if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

Statement of the Case

A. Facts and Proceedings in District Court

On September 23, 2015, the Petitioner, Verod Woodard, was named in a five-count indictment. On April 7, 2016 the Petitioner filed a motion to dismiss the indictment against him based on the same two issues in this Writ. On April 19, 2016 the District Court dismissed the Petitioner's motion to dismiss. On May 2, 2016 the Court issued an opinion regarding the denial of the motion to dismiss. On May 2, 2016, the defendant pleaded guilty to Count 4 of the Indictment. Count 4 charged the defendant Using, Carrying, and Brandishing a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1)(C)(i), specifically, with respect to the carjacking charged in Count 3.

Pursuant to the written Plea Agreement, the defendant and government agreed the appropriate term of imprisonment in this case is 300 months or 25 years imprisonment pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Sentencing was held on 11 January, 2017. Counts 1, 2, 3, and 5 were dismissed on government's motion. Petitioner was sentenced to 283 months, and 3 years supervised release with a \$100 Mandatory Special Assessment, and restitution in the amount of \$2,800. Petitioner received 17 months credit for time served in state custody on the same charges prior to

being places in federal custody. On 24, January 2017 Petitioner filed his Notice of Appeal to the Fifth Circuit Court of Appeals.

B. Appellate Proceedings

On May 22, 2017 the Petitioner filed a letter brief acknowledging that both of the issues to be advanced for Mr. Woodard are foreclosed by Fifth Circuit precedent and requesting that the Court summarily dispose of the case so that he might pursue further appellate review.

On August 28, 2017 the Fifth Circuit Court of Appeals issued an order granting Petitioner's motion for summary affirmance.

Reasons for Granting the Writ

I. This Court should grant certiorari, vacate the judgment below, and remand the case in light of Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) and Johnson v. United States, 135 S. Ct. 2551 (2015). The Court should grant certiorari to determine whether 18 U.S.C. § 2119 exceeded Congress's authority under the Commerce Clause and whether carjacking qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3) and 18 U.S.C. §16(b).

This Court may grant certiorari when a United States court of appeals has decided an important question of federal law that has not been, but

should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.¹

The decision of the Fifth Circuit Court of appeals in this matter has decided two important questions of federal law that have not been, but should be, settled by this Court in a way that conflicts with relevant decisions of this Court.

First, the Fifth Circuit has held that 18 U.S.C. § 2119 does not exceed Congress's power to regulate interstate commerce. See *United States v. Coleman*, 78 F.2d 154, 158 (5th Cir. 1996). But the opinions of five Justices in *Nat'l Fed'n of Indep. Bus. v. Sebelius* casts serious doubt on that conclusion. Five Justices in that case concluded that the power to regulate commerce does not include the power to compel commerce. See *id.* at. 2586 (Roberts, C.J.) (plurality op.); *id.* at. 2642(Scalia, .J., dissenting). The inescapable conclusion is that to fall within the commerce power, federal action must not merely affect commerce, it must act directly on a commercial activity. After all, the failure of individuals to purchase health insurance – at issue in NFIB – surely affected interstate commerce. See *id.* at. 2642 (Scalia, .J., dissenting) (“Failure to act does result in an effect on commerce . . .”) But because inaction was not a commercial act, it was beyond the power of Congress to prohibit. Similarly, taking possession of a vehicle that may have crossed state lines years ago is not

¹ Sup. Ct. R. 10

a commercial act. It does not involve the purchase or sale of any commodity. Certainly, taking a vehicle that may have crossed state lines years ago does not amount to an act directly affecting interstate commerce.

Second, the Fifth Circuit has explicitly held that a court must use the same unpredictable “ordinary case” inquiry under § 924(c)(3) and 16(b) rejected by the Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015)²:

We use the so-called categorical approach when applying these definitions to the predicate offense statute. “The proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence [.]” *United States v. Chapa–Garza*, 243 F.3d 921, 924 (5th Cir.2001) (applying 18 U.S.C. § 16(b)). We do not consider the facts underlying Williams’s conviction; his actual conduct is immaterial. Instead, we examine only the statutory text of § 242 to determine whether it satisfies the definition of § 924(c)(3). *United States v. Williams*, 343 F.3d 423, 431 (5th Cir. 2003) (emphasis added).

Johnson concluded that the process of determining what is embodied in the “ordinary case” rather than “real-world facts” is fatally flawed, rendering ACCA unconstitutionally vague. “Grave uncertainty” surrounds the method of

² 18 U.S.C. §16(b) is currently under Supreme Court review for vagueness in case 15-1498, *Sessions v. Dimaya*.

“determin[ing] the risk posed by the “judicially imagined ‘ordinary case.’”

Johnson, 135 S. Ct. at 2557. “The residual clause offers no reliable way to choose between . . . competing accounts of what ‘ordinary’ . . . involves.” Id.

This flaw alone establishes the residual clause’s unconstitutional vagueness. The Court, however, explained that a closely related flaw exacerbates the problem. The residual clause also “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” Id. at 2558. Although the level of risk required under the residual clause must be similar to the enumerated offenses (burglary, arson, extortion, or crimes involving use of explosives), Johnson rejected the notion that comparing a felony’s “ordinary case” to the risk posed by certain enumerated offenses cures the constitutional problem.

Thus, Johnson not only invalidated the ACCA residual clause, but it invalidated the “ordinary case” analysis and statutory provisions that compel such an analytical framework. In other words, the only way to apply the residual clause is to use the “ordinary case” analysis, and the “ordinary case” analysis is impossible to apply in a constitutional manner.

Section 924(c) and 16(b)’s residual clauses have the same flaws that rendered ACCA’s residual clause unconstitutionally vague. The statutory phrases are not identical, but the differences have no impact on the constitutional analysis.

Although the risk at issue in ACCA is a risk of injury, and the risk at issue in Section 924(c) is a risk that force will be used, this difference is immaterial to

the due process problem and has no impact on the Johnson decision. The Court's holding did not turn on the type of risk, but rather how a court assesses and quantifies the risk.³ That inquiry is the same under both the ACCA and § 924(c). Both statutes require courts first to picture the “ordinary case” embodied by a felony, and then to decide if it qualifies as a crime of violence by assessing the risk posed by the “ordinary case.”

In litigating Johnson, the government itself, through the Solicitor General, agreed that the phrases at issue in Johnson and here pose the same problem. First noting that the definitions of a crime of violence in both § 924(c)(3)(B) and § 16(b) are identical, the Solicitor General stated, “Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters.” *Johnson v. United States*, S. Ct. No. 13-7120, Supplemental Brief of Respondent United States at 22–23 (available at 2015 WL 1284964 at *22-*23). The Solicitor General was right.

³ Of course, many federal and state criminal laws include “risk” standards that employ adjectives similar to those in the ACCA and § 924(c), such as “substantial,” “grave,” and “unreasonable.” And the Supreme Court in Johnson said it did not mean to call most of these into question. But, as Justice Scalia's majority opinion observed, that is because the vast majority of such statutes “require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion”; in other words, applying such a standard to real-world conduct. By contrast, ACCA's residual clause (and § 924(c)'s) require application to “an idealized ordinary case of the crime,” an “abstract inquiry” that “offers significantly less predictability.” *Johnson*, 135 S. Ct. at 2561.

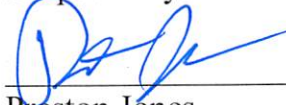
Section 924(c)(3)(B) and the ACCA are essentially the same and contain the same flaws. This Court should hold the government to that concession.

Section 924(c)(3)(B) also presents the second flaw evident in ACCA. In addition to identifying the abstract “ordinary case” of a federal offense, the court must also decide how much risk of intentional use of force is enough to bring the offense within § 924(c)(3)(B). Section 924(c) does not provide sufficient guidance, and that clause is unconstitutionally vague.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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972-528-0455
Fax: 972-692-0522
prestondefense@gmail.com

Date 11/20/2017

No. 17-_____

In the Supreme Court of the United States

Verod Woodard

v.

United States of America,

PROOF OF SERVICE

I, Preston Jones , do swear or declare that on this date, November 20, 2017 , as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Verod Woodard: TCDJ ID 02018735, 1391 FM 3328, Tennessee Colony, TX 75880

Wes Hendrix: 1100 Commerce St Ste 300, Dallas, TX 75242-1074

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 20, 2017



Preston Jones

Appendix A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-10097
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED
August 28, 2017

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VEROD WOODARD,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:15-CR-412-1

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Verod Woodard pleaded guilty to one count of using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1), and received a sentence of 283 months in prison, to be followed by a three-year term of supervised release. The underlying “crime of violence” was carjacking, in violation of 18 U.S.C. § 2119. On appeal, Woodard contends that the enactment of § 2119 exceeded Congress’s authority under

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 17-10097

the Commerce Clause. In *United States v. Coleman*, 78 F.3d 154, 158-59 (5th Cir. 1996), this court rejected a Commerce Clause challenge to the carjacking statute. Woodard concedes that his argument is foreclosed by *Coleman*, although he contends that the holding has been called into question by the Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). As that case did not address the constitutionality of § 2119, we are bound by our decision in *Coleman*. See *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013).

In addition, Woodard asserts that the firearm conviction was invalid because carjacking no longer qualifies as a "crime of violence" in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). As he concedes, his argument that the ruling in *Johnson* renders § 924(c)(3)(B) unconstitutionally vague is foreclosed by our decision in *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), *petition for cert. filed* (Sept. 29, 2016) (No. 16-6259). See *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017), *petition for cert. filed* (July 17, 2017) (No. 17-5285). Although in *Lynch v. Dimaya*, 137 S. Ct. 31 (2016), the Supreme Court granted certiorari on the question whether 18 U.S.C. § 16(b) is unconstitutional in light of *Johnson*, we are bound by our own precedent unless and until that precedent is altered by a decision of the Supreme Court. See *Wicker v. McCotter*, 798 F.2d 155, 157-58 (5th Cir. 1986).

Accordingly, Woodard's unopposed motion for summary disposition is GRANTED. The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 28, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 17-10097 USA v. Verod Woodard
USDC No. 3:15-CR-412-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

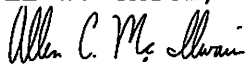
Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Allen C. McIlwain".

By: _____
Allen C. McIlwain, Deputy Clerk

Enclosure(s)

Mr. James Wesley Hendrix
Mr. Preston Lee Jones

Appendix B

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,	§	
	§	
v.	§	Case No. 3:15-CR-412-M
	§	
VEROD WOODARD,	§	
	§	
Defendant.	§	

ORDER

Before the Court is a Motion to Dismiss the Indictment [Docket Entry #23] filed by Defendant Verod Woodard. The Indictment in this case charges Defendant with two counts of carjacking, in violation of 18 U.S.C. § 2119 (Counts One and Three), two counts of using, carrying, and brandishing a firearm during and in relation to those “crimes of violence,” in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts Two and Four), and one count of being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 5). *See* Indictment [Docket Entry #1] at 1-4. Defendant moves to dismiss Counts One and Three of the Indictment on grounds that (1) these counts fail to allege all the necessary elements of federal carjacking, or (2) the federal carjacking statute is unconstitutional. Defendant further moves to dismiss Counts Two and Four of the Indictment on the ground that federal carjacking is not a “crime of violence” after the United States Supreme Court’s recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the following reasons, Defendant’s Motion is DENIED.

The Motion is denied as to Counts One and Three because, as Defendant acknowledges, his arguments are foreclosed by Fifth Circuit precedent recognizing the federal carjacking statute as a valid exercise of congressional authority under the commerce clause. *See United States v. Coleman*, 78 F.3d 154, 158 (5th Cir. 1996).

The Motion is denied as to Counts Two and Four because carjacking, as alleged in the Indictment, constitutes a crime of violence under of 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3) provides additional periods of imprisonment when a defendant uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of a “crime of violence.” For purposes of the statute, a 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)(3). Defendant challenges the second prong, or so-called “residual clause,” of § 924(c)(3) as unconstitutional in view of the Supreme Court’s ruling in *Johnson*.

In *Johnson*, the Supreme Court invalidated the residual clause of the Armed Career Criminal Act (“ACCA”) as unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The ACCA’s residual clause is part of the statute’s definition of “violent felony,” which includes “any crime punishable by imprisonment for a term exceeding one year ... that ... is burglary, arson, extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*” 18 U.S.C. § 924(e)(2)(B). Defendant argues that the residual clause of Section 924(c)(3) is likewise unconstitutionally vague. Def. Mot. at 4, 6.

In this case, however, the residual clause of Section 924(c)(3) is not at issue. Rather, Defendant is charged under the first prong, or “force clause,” with a felony offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See* 18 U.S.C. § 924(c)(3)(A). Defendant is charged with carjacking under 18 U.S.C. § 2119, which prohibits the taking of 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.” Specifically, the Indictment alleges that, on or about May 15, 2015, Defendant brandished a pistol during the carjacking of a 2006 Chrysler Sebring sedan from a person, by force and violence and by intimidation. *See* Counts I & II, Indictment [Docket Entry #1] at 1, 2. The Indictment further alleges that, on or about May 16, 2015, Defendant brandished a pistol during the carjacking of a 2007 Ford F-250 from a person, by force and violence and by intimidation. *See* Counts III & IV, Indictment [Docket Entry #1] at 3, 4. Carjacking, as alleged in the Indictment, has as an element the threatened use of physical force against the person of another, and thus constitutes a crime of violence, as that term is defined in 18 U.S.C. § 924(c)(3)(A). *See United States v. Moore*, 43 F.3d 568, 572-73 (11th Cir. 1994) (holding the term “crime of violence” as defined by § 924(c)(3) clearly includes carjacking, in that “tak[ing] or attempt[ing] to take by force and violence or by intimidation,” as used in 18 U.S.C. § 2119, encompasses “the use, attempted use, or threatened use of physical force,” as used in 18 U.S.C. § 924(c)(3)(A)); *see also United States v. Singleton*, 16 F.3d 1419, 1423 (5th Cir. 1994) (“Carjacking is always and without exception a ‘crime of violence’ as that term is defined in 18 U.S.C. § 924(c)(3).”). The Supreme Court’s ruling in *Johnson* does not affect the constitutionality of Section 924(c)(3)(A).

To the extent Defendant argues that carjacking is not a crime of violence under Section 924(c)(3)(A) because carjacking could conceivably be committed without the use of force or threatened force, that argument is inapposite in view of the crimes charged in the Indictment. The Indictment alleges that Defendant brandished a pistol during each of the two carjackings charged. Such conduct encompasses the threatened use of physical force.

Defendant’s Motion to Dismiss the Indictment is DENIED.

SO ORDERED.

May 2, 2016.


BARBARA M. G. LYNN
CHIEF JUDGE