

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

LINDSEY JOHNSON
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. 16-60574

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- 1) Whether the district court erred by barring the defense from entering Facebook postings from alleged victim Jeremy McNeal's Facebook page.
- 2) Whether the district court erred by denying the defense's motion for mistrial after the prosecutor improperly elicited information regarding Mr. Johnson's prior convictions.
- 3) Whether the district court erred by adding two points to Mr. Johnson's Sentencing Guidelines offense level for "obstruction of justice" because he exercised the right to testify on his own behalf at trial.
- 4) Whether the district court erred by denying the defense's *ore tenus* motion to set aside the count 3 conviction for brandishing a firearm during a crime of violence.

PARTIES TO THE PROCEEDING

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

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I. OPINIONS BELOW

Petitioner Lindsey Johnson was indicted on March 10, 2016, by a Federal Grand Jury for the Southern District of Mississippi. The charges were:

count 1: Carjacking, in violation of 18 U.S.C. § 2119.

count 2: Felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

count 3: Brandishing a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

The district court case number is 3:16cr14-WHB-LRA.

Trial of this case began on May 17 and ended on May 19, 2016. The jury returned a verdicts of guilty on the three counts alleged in the Indictment. The district court conducted a sentencing hearing on August 2, 2016. It sentenced Mr. Johnson to serve a total of 221 months in federal prison, to run consecutive to a Mississippi state court sentence in another case. It also ordered him to pay a \$1,500 fine and serve three years of supervised release following the prison term.

The court entered a judgment reflecting the above sentence on August 16, 2016. However, pursuant to a post-sentencing motion filed by the defense, the court entered an Amended Judgment on August 25, 2016, which reduced the prison sentence from a total of 221 months to a total of 180 months. The fine and the terms of supervised release remained the same in the Amended Judgment

(\$1,500 fine and three years of supervised release). Then on February 22, 2018, another Amended Judgment was filed to correct a clerical error in the initial Amended Judgment. A copy of the district court's final Amended Judgment is attached hereto as Appendix 1.

Mr. Johnson appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit case number is 16-60574. In the appeal, Mr. Johnson argued four of the five same issues that are presented to this Court for review. The Fifth Circuit affirmed the conviction and sentence on January 23, 2018. It filed both an Opinion and a Judgment on that day, both of which are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion was published at 880 F.3d 226. A copy of the published Opinion is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on January 23, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

Other than the issue based on misapplication of the Sentencing Guidelines (issue 3), all of Mr. Johnson's issues are grounded in the Due Process Clause of the Fifth Amendment to the United States Constitution. 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 three federal criminal charges levied against Mr. Johnson for carjacking (count 1), felon in possession of a firearm (count 2) and brandishing a firearm in relation to a crime of violence (count 3). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Johnson arose from the laws of the United States of America.

B. Statement of material facts.

1. Trial testimony relating to the alleged carjacking.

This case arises out of an incident that occurred at the Northwoods Village apartment complex (hereinafter “apartment complex”) in Jackson, Mississippi on August 2, 2015. At around 2:30 or 3:00 on that afternoon, it is undisputed that Mr. Johnson and alleged victim Jeremy McNeal encountered one another at the apartment complex. What actually happened during their meeting was hotly contested at trial.

a. Mr. Johnson’s rendition of events.

Mr. Johnson testified on his own behalf at trial. He testified that the night before, he was assaulted at a nightclub. Mr. Johnson went to the apartment

complex where Mr. McNeal was visiting on August 2 to try to find out who assaulted him at the night club. After discussing that issue, they began negotiating a drug deal. That is, Mr. McNeal was going to sell drugs to Mr. Johnson. Mr. McNeal told Mr. Johnson to get into his car, a Lexus, to discuss the deal. After getting into the Lexus, Mr. McNeal told him to put whatever amount of money he had to spend on drugs in the center armrest.

When Mr. Johnson opened the armrest, he saw a silver revolver. Mr. McNeal attempted to grab the revolver, which made Mr. Johnson fear for his life. So Mr. Johnson pushed his hand away. Mr. McNeal let go of the revolver and stated “I’m going to get you[.]” The revolver then fell out of Mr. McNeal’s hand but remained in the Lexus. Mr. McNeal got out of the Lexus and Mr. Johnson left in it.

After leaving the apartment complex in Mr. McNeal’s Lexus, Mr. Johnson’s cousin, who was a friend of Mr. McNeal’s, called Mr. Johnson within a very few minutes. Apparently the cousin had already heard about the incident. After receiving the call, Mr. Johnson picked up a lady named Luanna. He and Luanna were going to meet Mr. Johnson’s cousin. Mr. Johnson was going to get into the car with his cousin, and Luanna was going to return Mr. McNeal’s car to him.

Before Mr. Johnson met his cousin, the police spotted the Lexus and began pursuit. Mr. Johnson stopped the Lexus in front of a relative’s house and

voluntarily got out of the car. Mr. Johnson did not stop until he was in front of the relative's house because he believed he would be safe from police brutality if he got out of the car there. He immediately dropped to the ground after getting out of the Lexus. Nevertheless, the police assaulted Mr. Johnson. He was arrested and the subject charges followed.

b. Mr. McNeal's rendition of events and other related evidence at trial.

Mr. McNeal alleged that as he was leaving the apartment complex, he stopped to talk to a friend named Jaron Thompson. Then Mr. Johnson walked up to the Lexus, pulled out a gun, and ordered Mr. McNeal out of the car. Mr. Johnson then left in the car.

Except for Mr. McNeal's testimony, all witnesses and the photographic evidence presented at trial was that the gun used in the purported carjacking was silver. Mr. McNeal, on the other hand, told investigation police officer that the gun was black. For reasons that become apparent below, it is also important to note that Mr. McNeal stated the he never in his life owned a gun and that he is not a drug dealer.

The prosecution called Mr. Thompson at trial to support Mr. McNeal's story. Mr. Thompson testified that after Mr. Johnson left in the Lexus, Mr. McNeal asked him to call a friend named BJ, rather than calling the police. Mr.

McNeal wanted him to call BJ so that he (BJ) could give him a ride away from the apartment complex.

Mr. McNeal did in fact call the police after calling BJ. However, his testimony conflicted with that of Mr. Thompson in that Mr. McNeal denied ever asking Mr. Thompson to call BJ to give him a ride. Further clouding this line of evidence is the fact that Jamia Harney, a resident of the apartment complex who witnessed the incident and testified at trial, offered no testimony to the effect that anyone was present around the Lexus other than Mr. McNeal and Mr. Johnson. That is, she provided no testimony that Mr. Thompson was even at the apartment complex. Ms. Harney's testimony, or lack thereof, is consistent with Mr. Johnson's testimony that Mr. Thompson was not present during the alleged carjacking.

2. Relevant evidence uncovered after Mr. Johnson's arrest.

After Mr. Johnson's arrest, the police searched the Lexus. The silver Rossi handgun described above and a Smith & Wesson .40 caliber handgun were found. The Rossi was under the driver's seat and the Smith & Wesson was under the passenger's seat. No fingerprints were found on either gun.

In addition to the handguns, a small quantity of marijuana was found in the Lexus. Because this marijuana was found in the car, a drug detecting K-9 unit was called to the scene. The K-9 uncovered a large quantity of drugs in a hidden

compartment within the Lexus. The hidden compartment containing the large quantity of illegal drugs was behind a panel under the Lexus' gearshift. As officer Kenneth Short testified at trial, a casual passenger would not have known that the drugs were in the hidden compartment. As the entire incident, beginning when Mr. Johnson left in the Lexus until the time he was apprehended, lasted only about six minutes, it would have been impossible for Mr. Johnson to have placed the drugs in the hidden compartment. In fact, Mr. Johnson was not charged in relation to the marijuana recovered from the Lexus.

3. Facts pertaining to admission of postings on Mr. McNeal's Facebook page.

On cross examination, Mr. McNeal denied that he has ever owned a gun. After making this denial, the defense showed him Facebook postings consisting of a photograph of a gun, photos of Mr. McNeal holding large sums of cash, a photo of a young child holding large sums of cash, more photos of piles of large sums of cash, and a photo of marijuana. It was undisputed that the subject postings were on Mr. McNeal's Facebook page. Even though he admitted that his only employment resulted in earning \$250 a week, Mr. McNeal denied that he sold drugs, that the cash was related to selling drugs, or that the handgun on his own Facebook posting belonged to him.

Based on the inconsistencies between Mr. McNeal's trial testimony and what was apparent from his own Facebook postings, the defense sought admission

of the postings into evidence. In addition to the photographic evidence, defense counsel argued:

Here's what's most important, your honor, the text message. And what it says is, "AT&T Lines Up Fed Drug Bust." It says, "The Feds have partnered with AT&T to reach out and touch alleged drug dealers. The phone company has been helping Drug Enforcement's Administration's Hemisphere Project by providing easy access to its massive database which contains 26 years of information and tracks 4 billion calls a day, records show." Jeremy McNeal's comment was, "If you with AT&T, don't call me #realshit."

The defense argued that Mr. McNeal's Facebook postings were admissible because "this goes to the credibility of this witness. He's a drug dealer. Drugs were found in the car in a hidden compartment is what we believe and what we've been - - believe has happened. And so this goes directly to this - - the credibility of this witness." The prosecution objected to its admission. After relatively lengthy arguments on the issue outside the presence of the jury, the court sustained the prosecution's objection and denied admission of the Mr. McNeal's incriminating Facebook postings. The postings were admitted for identification purposes only as trial exhibit D-1.

4. Facts pertaining to the mistrial issue.

Count 2 of the Indictment alleged felon in possession of a firearm. Of course, to be convicted of this crime a defendant must have a felony conviction that predates possession of the gun at issue in the charge. See 18 U.S.C. §§ 922 and 924. Case law discussed in the "Arguments" section of this Brief allows a

defendant to stipulate to the prior felony conviction rather than being prejudiced at trial by having the prosecution enter into evidence details about the prior crime(s) of conviction or the number of prior crimes of conviction.

That is the procedure that the defense unsuccessfully attempted to follow at Mr. Johnson's trial. Pursuant to an agreement between the prosecution and the defense, the district court read the following stipulation to the jury:

The defendant and the government stipulate that the defendant had been convicted in a court of - - in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense, on or before August 2, 2015.

Notwithstanding the agreement not to mention anything to the jury about Mr. Johnson's prior felony convictions, the prosecutor improperly made reference to Mr. Johnson's three prior convictions before the jury. The defense objected and moved for a mistrial. The court denied the *ore tenus* motion.

Even though the court denied the motion, it appeared to recognize that the prosecution's actions were completely improper. This is apparent because the court stated that it would declare a mistrial if the prosecutor brought up the prior convictions again.

5. Facts pertaining to the sentencing issues on appeal.

The sentencing issue pertains to increasing Mr. Johnson's offense level by two points because he purportedly obstructed justice by testifying on his own behalf at trial. The district court overruled the defense's objection on this issue,

even though it affirmatively voiced “the court’s disagreement with this guideline enhancement and with the law supporting it[.]”

6. Facts pertaining to the count 3 conviction for brandishing a firearm in relation to a crime of violence.

The conviction under count 3 was for brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). By its terms, a conviction for this crime requires that Mr. Johnson brandished a firearm during a “crime of violence.” The purported crime of violence relied on to support count 3 was the carjacking offense alleged in count 1.

At the sentencing hearing, the defense moved to vacate the count 3 conviction for brandishing a firearm during a crime of violence. Through this *ore tenus* motion, the defense argued that the count 1 conviction (carjacking) on which the count 3 conviction (brandishing a firearm) was based is not a “crime of violence” under the law. This district court disagreed and denied the motion.

V. ARGUMENTS

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

Supreme Court Rule 10 states, “[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.” One example of a “compelling reason” to grant certiorari is when “a United States Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]” Sup. Ct. R. 10(a).

Whether Mr. Johnson’s conviction and sentence for possession of a firearm in relation to a crime of violence must be vacated (issue 4) hinges in part on a finding by this Court that the crime of violence definition in § 924(c)(3)(B) is unconstitutionally vague. In turn, whether that definition is unconstitutionally vague hinges on a finding that the holdings in *Johnson v. United States*, 135 S.Ct. 2551 (2015) apply to § 924(c). Both the district court and the Fifth Circuit took the position that *Johnson* does not apply to § 924(c). Accordingly, the lower courts rejected Mr. Johnson’s arguments.

We have a circuit split on the issue of whether the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague. In *United States v. Jackson*, 865 F.3d 946, 954 (7th Cir. 2017), the Seventh Circuit held that the definition is unconstitutionally vague. The Second, Fifth, Sixth, Eighth and

Eleventh Circuits hold that it is not. *United States v. Hill*, 832 F.3d 135, 145–49 (2d Cir. 2016); *United States v. Jones*, 854 F.3d 737 (5th Cir. 2017); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).

Petitions for Writs of Certiorari are pending in *Taylor* and *Prickett*. *Taylor* is assigned case number 16-6392, and was distributed for conference on September 25, 2017. *Prickett* is assigned case number 16-7373, and was distributed for conference on May 11, 2017.

In addition to the cases that have directly ruled on whether the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague, the Ninth Circuit has ruled on whether the identically worded “crime of violence” definition in 18 U.S.C. § 16(b) is unconstitutionally vague.¹ *Dimaya v. Lynch*, 803 F.3d 1110 (2015). Applying the holdings in *Johnson*, the Ninth Circuit held that § 16(b)’s definition is unconstitutionally vague. This is consistent with the Second Circuit’s holding in *Jackson* that the residual clause of § 924(c)(3)(B) is unconstitutionally vague.

¹ Section 16(b) defines “crime of violence” to include “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,” which is the exact same verbiage contained in the § 924(c)(3)(B) definition of “crime of violence.”

This Court granted certiorari in *Dimaya*.² On April 17, 2018, the affirmed the Ninth Circuit’s ruling. *Sessions v. Dimaya*, __ S.Ct. __, 2018 WL 1800371 at *16 (2018). Specifically, the Court held that “like ACCA’s residual clause, § 16(b) ‘produces more unpredictability and arbitrariness than the Due Process Clause tolerates.’ We accordingly affirm the judgment of the Court of Appeals.” *Id.* (internal citation omitted).

The circuit split on the subject issue is creating a scenario where defendants who engage in the exact same conduct can be convicted of a crime in the Second, Fifth, Sixth, Eighth and Eleventh Circuits, but not in the Seventh and Ninth Circuits. Granting certiorari in this case will provide balance among the circuits on this important due process issue. Also, granting certiorari will provide consistency with this Court’s decision in *Dimaya*.

For these reasons, Mr. Johnson prays for this Court to grant his Petition for Writ of Certiorari on issue number four – whether his conviction and sentence for possession of a firearm in relation to a crime of violence must be vacated. Mr. Johnson’s first three issues also present important federal questions of law for which certiorari should be granted.

² The case is now captioned *Sessions v. Dimaya*.

B. The district court erred by barring the defense from entering Facebook postings from alleged victim Jeremy McNeal's Facebook page.

Jeremy McNeal, the alleged victim in this case, was arguably the prosecution's most important witnesses at trial. This is true because his testimony identified Mr. Johnson as the perpetrator of the alleged carjacking.

On cross examination, Mr. McNeal unequivocally stated that he never owned a gun and that he was not a drug dealer. As contradiction impeachment evidence to these assertions, defense counsel showed Mr. McNeal a number of postings on his own Facebook page.³ These Facebook postings were marked for identification purposes as exhibit D-1.

The Facebook postings consist of a photograph of a gun, photos of Mr. McNeal holding large sums of cash, a photo of a young child holding large sums of cash, more photos of stacks of large sums of cash, and a photo of marijuana. Notwithstanding the fact that he admitted that his job paid only \$250 a week, Mr. McNeal continued to deny that the drugs, gun and money clearly pictured on his own Facebook postings were in fact his.

At this point in the trial, the defense moved to admit the Facebook posting into evidence to impeach Mr. McNeal's credibility. The prosecution objected and a bench conference on the issue followed.

³ It is undisputed that the Facebook postings came from Mr. McNeal's Facebook page.

During the bench conference, the prosecutor argued that the evidence is not admissible under Rule 608(b) of the Federal Rules of Evidence. Rule 608 is titled “A Witness’s Character for Truthfulness or Untruthfulness” and subsection (b) is titled “Specific Instances of Conduct.” Rule 608(b) states in relevant part:

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

(Emphasis added).

The defense countered the prosecutions argument by stating that the Facebook postings were not being offered to prove or disprove Mr. McNeal’s “character for truthfulness,” thus Rule 608 was inapplicable. Instead, the evidence was offered to impeach actual representations made by Mr. McNeal on the witness stand.

Citing Rule 608(b), the court sustained the prosecution’s objection and did not allow Mr. McNeal’s Facebook postings into evidence. However, it is important to note that court recognized that the Facebook postings indicate that Mr. McNeal is either a drug dealer or should be suspected as a drug dealer. The court also stated:

And [defense counsel] Scott says that this evidence that he has lied, that - - and I would guess that this is evidence that he has lied - - and I would guess that this is pretty good evidence that he's lied. You've got a picture of somebody smoking something, which you would - - could conclude would be pot smoke. You've got pictures of marijuana.

You've got pictures of money that would be questionable in the amount that he would have. And he has testified that he does not m- - this is all in regard to the gun, as far as the gun is concerned. He's testified that he has - - doesn't have a gun. And so the jury is naturally going to say, Well, what's - - Whose gun is that?

It is obvious from the above comments that district court believed that the Facebook postings contradicted Mr. McNeal's trial testimony. That is, the court believed that the evidence was in the form of contradiction impeachment evidence. Based on the following law, however, the district court incorrectly applied Rule 608 to resolve whether the evidence should be admitted.

As defense counsel pointed out at trial, the scope of Rule 608's application is limited to evidence pertaining to "character for truthfulness," and does not extend to "specifically attacking misrepresentations that have been made in this courtroom today." In support of this argument, defense counsel cited the 2003 Amendments section of the Advisory Committee Notes to Rule 608.

Rule 608 was amended in year 2003. The Advisory Committee Note explaining the 2003 amendment states in part: "By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as **contradiction**, prior inconsistent statement, bias and mental capacity) to Rules

402 and 403.” Fed. R. Evid. 608, Advisory Committee Notes, 2003 Amendments (emphasis added). In other words, the 2003 amendment to Rule 608 made it clear that the rule is inapplicable to evidence presented to contradict testimony given by a witness at trial. *See United States v. Watts*, No. 10-CR-627(KAM), 2013 WL 2020178 at *2 (E.D. N.Y. May 14, 2013) (holding that “Rule 608 was amended in 2003 ‘to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness’ character for truthfulness,’ and not ‘to bar extrinsic evidence for bias, competency and contradiction impeachment.’”); *United States v. Harmon*, 871 F.Supp.2d 1125, 1155-56 (D. N.M. 2002) (holding the same as *Watts*).

In Mr. Johnson’s case, the district court clearly believed that the Facebook pages at issue attacked the credibility of statements made by Mr. McNeal on the witness stand. However, based on the law presented above, the court incorrectly found that the evidence should be barred under Rule 608, which we know is inapplicable to impeachment credibility evidence. Rather, the issue should have been analyzed under Rules 402 and 403 of the Federal Rules of Evidence. *See* Fed. R. Evid. 608, Advisory Committee Notes, 2003 Amendments. Rules 402 and 403, of course, require a balancing probative value versus undue prejudice. Clearly, the probative value of the subject contradiction evidence outweighed any prejudicial effect.

This error by the district court represents an abuse of discretion. Further, since Mr. McNeal was a primary prosecution witness at trial, barring the defense from attacking his credibility was not harmless error by the district court.

Application of the law to the facts of this issue requires this Court to vacate the judgment of conviction and remand the case to district court for a new trial.

C. The district court erred by denying the defense's motion for mistrial after the prosecutor improperly elicited information regarding Mr. Johnson's prior convictions.

One of the counts of conviction against Mr. Johnson is felon in possession of a firearm. One of the elements of proof required for a felon in possession conviction is that the defendant has a prior felony conviction. See 18 U.S.C. §§ 922 and 924. In order to keep the jury from knowing the nature of the prior conviction(s) or the number of prior conviction(s), the prosecution and the defense will often stipulate that the defendant has one or more prior felony convictions. See *Old Chief v. United States*, 519 U.S. 172 (1997). When such a stipulation is entered, the prosecution is barred from eliciting evidence about the nature of the prior conviction(s). *Id.* at 191.

In Mr. Johnson's case, the prosecution and the defense entered the type of stipulation outlined by the Supreme Court in *Old Chief*. The stipulation, which was read to the jury, stated:

The defendant and the government stipulate that the defendant had been convicted in a court of - - in a court of a crime punishable by imprisonment

for a term in excess of one year, that is, a felony offense, on or before August 2, 2015.

Even though the prosecution entered into the above stipulation, it improperly referred to Mr. Johnson's three prior felony convictions before the jury.

Specifically, the first words out of the prosecutor's mouth on cross-examination were: "Mr. Johnson, you've been convicted of three prior felonies, have you not?" Before defense counsel had a chance to object, Mr. Johnson responded, "[y]es, sir." The then prosecutor stated, "[n]ame them."

At this point, defense counsel objected and moved for a mistrial outside the presence of the jury. The court denied the motion for mistrial, but admonished the prosecutor that a mistrial would be declared "if you elicit anything else about the nature of these convictions[.]"

In *United States v. Rodriguez-Lopez*, 756 F.3d 422, 433 (5th Cir. 2014), the Fifth Circuit set forth the two-part test to analyze the issue of when a prosecutor makes improper prejudicial remarks in front of the jury. "First, we assess whether the prosecutor made an improper remark." *Id.* If that test is met, "we determine whether the defendant was prejudiced[.]" *Id.* (citation omitted). "The prejudice prong turns on whether the prosecutor's remarks 'cast serious doubt on the correctness of the jury's verdict.'" *Id.* (citation omitted) "We look to three factors in deciding whether the improper remarks 'cast serious doubt': '(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any

cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction.”” *Id.* (citation omitted).

In Mr. Johnson’s case the first test – whether the prosecutor made an improper remark – is clearly met. This is apparent by the district court’s admonition that a mistrial would be declared if the prosecutor brought up Mr. Johnson’s prior convictions again.

We now move to the prejudice prong of the analysis. First considered is the magnitude of the prejudicial effect of the prosecutor’s improper remarks.

Rodriguez-Lopez, 756 F.3d at 433. Mr. Johnson did not have one or two prior felony convictions – he had three. This was extremely prejudicial evidence that the jury should not have heard.

A relevant case on the magnitude of prejudice sub-issue is *Coleman v. Ohio Adult Patrol*, 118 Fed. App’x 949 (6th Cir. 2004). *Coleman* was a habeas corpus ineffective assistance of counsel case in which the defendant had been convicted in state court for “aggravated trafficking of cocaine, with a prior aggravated trafficking specification.” *Id.* at 950. As in Mr. Johnson’s case, the defendant stipulated to the requisite prior felony conviction. *Id.* As in Mr. Johnson’s case, the prosecutor made improper comments referring to the defendant’s prior conviction. *Id.* Defense counsel failed to object to the improper comments. *Id.*

On appeal, the Sixth Circuit affirmed the district court’s finding that the prosecutor’s references to the defendant’s prior conviction “were so prejudicial as to deprive him of a fair trial.” *Coleman*, 118 Fed. App’x at 951. Further, the Sixth Circuit held that “any minimally competent attorney would have objected to the prejudicial remarks.” *Id.* at 952. Reaching these conclusions, the *Coleman* court noted that “the prosecution’s remarks constituted an introduction of evidence ‘so extremely unfair that [it] violates fundamental conceptions of justice[.]’” *Id.* (citation omitted).

Just as in *Coleman*, the prosecution’s reference to Mr. Johnson’s three prior felony convictions severely prejudiced the defense. This supports a finding that the district court erred by denying the motion for mistrial.

Second considered under the prejudice prong of analysis is whether the district court gave a cautionary instruction on the issue. *Rodriguez-Lopez*, 756 F.3d at 433. It gave no such instruction after the prosecutor made its improper comments. This sub-factor weighs in Mr. Johnson’s favor.

The third and final consideration under the prejudice prong of the analysis is the strength of evidence supporting Mr. Johnson’s conviction. *Rodriguez-Lopez*, 756 F.3d at 433. The prosecution called three witnesses that were at the apartment complex on the day of the alleged carjacking – Jaron Thompson, Jeremy McNeal, and Jamia Harney. Jaron Thompson provided testimony that conflicted with Mr.

McNeal's testimony regarding what happened after the alleged carjacking.

Thompson testified that McNeal told him to call BJ so that BJ could give McNeal a ride away from the apartment complex. McNeal specifically denied that he instructed Thompson to call BJ. Jamia Harney provided few details regarding the alleged crime and Mr. McNeal's credibility was called into question by the Facebook postings that should have been introduced into evidence. In fact, the district court recognized that Mr. McNeal "had some questionable issues in his testimony[.]" Finally, Mr. Johnson testified as to a rendition of events that contradicted the trial testimony of all of the prosecution's witnesses.

Based on the conflicting trial testimony, the prosecution's evidence presented at trial was called into question. Accordingly, the third consideration under the prejudice prong of the analysis – strength of the evidence – supports a finding that the district court erred by denying the defense's motion for mistrial.

Based on the above stated law and application of the law to the facts of Mr. Johnson's case, the defense asks this Court to reverse the district court's denial of the motion for mistrial, and remand the case for retrial.

D. The district court erred by adding two points to Mr. Johnson's Sentencing Guidelines offense level for "obstruction of justice" because he exercised the right to testify on his own behalf at trial.

It is a fundamental principle that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution." *Rock v.*

Arkansas, 483 U.S. 44, 51 (1987). Mr. Johnson exercised that right. As a penalty for exercising this fundamental right, the district court enhanced his base offense level under the Sentencing Guidelines, which in turn increased his Guidelines sentencing range. The defense timely objected to this sentencing enhancement, and the objection was overruled.

The subject sentencing enhancement was for “Obstruction of Justice” under U.S.S.G. § 3C1.1. Specifically, the PSR states “[t]he defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice when the defendant took the stand in his defense during his criminal trial.” The PSR goes on to state “while under oath Johnson made materially false statements as evidenced by testimony presented by credible witnesses and the jury’s guilty verdict. As such, it appears the defendant committed perjury, and his offense level will be increased by two levels.” (Emphasis added).

A witness testifying under oath commits perjury “if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (citations omitted). “[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury.” *Id.* at 95. “Were that the case, a defendant’s constitutional right to testify on his own behalf could be undermined

by the prospect that he would be punished at sentencing for doing so.” *United States v. Kamper*, 748 F.3d 728, 747 (6th Cir. 2014) (citation omitted) (finding that the district court made insufficient factual findings to support the obstruction of justice sentencing enhancement).

As defense counsel pointed out at trial, testimony pertaining to what happened during the alleged carjacking was limited to three witnesses – Mr. Johnson, Mr. Thompson and Mr. McNeal.⁴ More important, the district court recognized at sentencing that “[t]he major eye witness [Mr. McNeal] had some questionable issues in his testimony and the other eyewitness [Mr. Thompson] did not see all of what happened in and around the automobile.” In this context, the district court expressed its “disagreement with this guideline enhancement and with the law supporting it[.]” Nevertheless, the court applied the enhancement.

Under this fact scenario, the court erred by applying the obstruction of justice sentencing enhancement under U.S.S.G. § 3C1.1. The trial testimony and the credibility issues attached to the prosecution’s witnesses cannot support a finding that Mr. Johnson lied under oath. So this enhancement should be vacated, and the case should be remanded to district court for resentencing.

⁴ Jamia Harney, another trial witness called by the prosecution, saw little of the alleged carjacking.

E. The district court erred by denying the defense’s *ore tenus* motion to set aside the count 3 conviction for brandishing a firearm during a crime of violence.

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

This argument is based on the holdings in *Johnson v. United States*, 135 S.Ct. 2551 (2015).⁵ 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 analyzes 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

⁵ For clarification purposes, this Brief 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 Brief, *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).”

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[.]”

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).

The holdings in *Johnson* (2015) focus on 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).

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 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 §

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).

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.

2. Mr. Johnson’s conviction for brandishing a firearm during a crime of violence must be vacated under the holdings in *Johnson* (2015).

a. Introduction.

Mr. Johnson’s convictions for brandishing a firearm during a crime of violence is premised on count 1 conviction for carjacking 18 U.S.C. § 2119 being a

“crime of violence” under § 924(c). Under the holdings in *Johnson* (2015), carjacking is not a crime of violence. Therefore, Mr. Johnson’s convictions and sentences for the brandishing count should be vacated, and his sentence should be reduced accordingly.

b. Analysis.

The brandishing convictions are under 18 U.S.C. § 924(c)(1)(A)(ii), which states:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any **crime of violence** or drug trafficking crime ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

* * * * *

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years[.]

(Emphasis added). The phrase “crime of violence” is defined as follows:

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of **physical force** against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3) (emphasis added). Subsection (3)(A) contains the physical force definition of crime of violence and subsection (3)(B) contains the residual clause definition.

The residual clause definition of crime of violence stated in § 924(c)(3)(B) is comparable to the language of the ACCA’s residual clause found unconstitutional in *Johnson* (2015). Even more important, the residual clause definition of crime of violence stated in § 924(c)(3)(B) is identical to the language of 18 U.S.C. § 16(b)’s residual clause found unconstitutional in *Dimaya*. Therefore, § 924(c)(3)(B) should be deemed unconstitutional as well.

This means the only option for determining whether carjacking counts as a crime of violence is the physical force clause of § 924(c)(3)(A). Under the physical force clause, we must analyze whether carjacking under 18 U.S.C. § 2119 “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). If it does not, then the convictions for brandishing a firearm during a crime of violence must be vacated.

A conviction is considered a “crime of violence” under § 924(c)(3)(A) if it has “as an element the use, attempted use, or threatened use of **physical force** against the person or property of another[.]” (Emphasis added). *Johnson* (2010)¹⁰ holds that “the 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

¹⁰ See *supra*, footnote 5.

and through concrete bodies – distinguishing physical force from, for example, **intellectual force or emotional force.**” *Id.* at 138 (emphasis added).

In the context of *Johnson* (2010), we must analyze the language of the of the federal carjacking statute, the purported “crime of violence” on which the § 924(c) conviction is based. The federal carjacking statute is 18 U.S.C. § 2119 titled “Motor vehicles.” In relevant part, this code section states:

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....

(Emphasis added).

Carjacking “by intimidation” is no different than carjacking by exerting “intellectual force or emotional force” which falls outside of the “physical force” definition established by the binding holdings in *Johnson* (2010). Therefore, Mr. Johnson’s federal carjacking conviction under count 1 is not a crime of violence under § 924(c). As such, his count 3 conviction for using a firearm during a crime of violence must be vacated.

VI. CONCLUSION

For all of the reasons stated above, Mr. Johnson asks this Court to grant his Petition for Writ of Certiorari.

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