

No. _____

IN THE
Supreme Court of the United States

THOMAS BOAZ,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Dan Goldberg*
Counsel of Record
818 Grand, Suite 300
Kansas City, Missouri 64106
Tel: (816) 471-8282
Dan_Goldberg@fd.org

QUESTIONS PRESENTED

I. Should a certificate of appealability be issued to determine whether an Arizona burglary conviction is a “violent felony” because the U.S. Attorney’s Office in Arizona has conceded that Arizona third-degree burglary “is likely not categorically a predicate felony”, and also because case law from both the Eighth and Ninth Circuits support this concession?

II. Should this Court resolve a circuit split as to whether Mr. Boaz’s Arkansas conviction for terroristic threatening satisfies the force clause of the Armed Career Criminal Act?

III. Whether Mr. Boaz was improperly sentenced under the Armed Career Criminal Act, because his conviction for Arizona exhibiting a weapon does not qualify as a predicate offense without reliance on the now void residual clause?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Boaz respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 13, 2018.

OPINION BELOW

The Eighth Circuit's judgement denying the appeal is reported at 884 F.3d 808, and is included in Appendix A. The limited certificate of appealability is included in Appendix B. A copy of the order denying rehearing is included in Appendix C. The district court's order denying a certificate of appealability is included in Appendix D.

JURISDICTION

On May 5, 2017, the Court of Appeals granted a limited certificate of appealability. Subsequently, on March 13, 2018, the Court of Appeals denied the appeal, and ultimately denied the timely petition for rehearing on April 23, 2018. In accordance with Supreme Court Rule 13.3, this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

The Fifth Amendment to the United States Constitution states: "No person shall .be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Trial and Sentencing

Thomas Boaz was found guilty in 2006 of two counts of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The presentence report was subsequently ordered, and eventually recommended that Mr. Boaz was subject to an enhanced penalty range under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), specifically a fifteen year minimum prison sentence. Mr. Boaz was ultimately sentenced to 190 months' imprisonment on both counts, to run concurrently.

The Post-Conviction Relief Motion

Mr. Boaz filed a motion pursuant to 28 U.S.C. § 2255 on June 21, 2016, seeking sentencing relief in light of the Supreme Court's decision *Johnson v. United States*, 135 S.Ct. 2551 (2015). Mr. Boaz alleged that in light of *Johnson* and its retroactive application to his case on collateral review, he would no longer be subject to the enhanced penalty provision of the ACCA and, therefore, the sentence he is now serving is an illegal sentence predicated upon an unconstitutionally vague, and now invalidated, clause of that statute.

Mr. Boaz argued that he no longer had three "violent felony" convictions after *Johnson* because his following convictions no longer qualify as predicate offenses under the ACCA: (1) third degree burglary under Arizona law - Ariz. Rev. Stat. Ann. §13-1506(A)(1); (2) terroristic threatening under Arkansas law - Ark. Rev. Stat. Ann. §5-13-301; and (3) exhibiting a weapon other than in self-defense under Arizona law - Ariz. Rev. Stat. Ann. §13-916. The district court denied Mr. Boaz's motion, finding

summarily that “the Court rejects the Movant’s arguments.” (DCD 9, pg. 1; *see* Appendix D). The district court also denied a certificate of appealability, finding that Mr. Boaz had not made a substantial showing of the denial of a constitutional right.

Appeal to the Eighth Circuit

On appeal before the Eighth Circuit, Mr. Boaz sought a certificate of appealability (“COA”), which the court granted only in part. Specifically, Mr. Boaz sought to challenge all three of his aforementioned “violent felony” convictions. *See* COA application, filed November 7, 2016. However, the Court of Appeals did not issue him a COA to challenge whether his Arizona third-degree burglary conviction, or his Arkansas terroristic threatening conviction, remained a violent felony without the void residual clause. *See* Eighth Circuit’s Order of May 5, 2017. Mr. Boaz further challenged the scope of the COA order in his petition for rehearing on March 23, 2018, but his petition was denied on April 23, 2018.

The sole issue addressed by the Eighth Circuit was whether Mr. Boaz’s Arizona conviction for exhibiting a deadly weapon remains a “violent felony”, without reliance on the now-invalidated residual clause. 884 F.3d at 811. In denying the appeal, a panel of the Eighth Circuit concluded that a conviction under the Arizona exhibiting a deadly weapon statute remains a “violent felony” because it satisfies the ACCA’s force clause, 18 U.S.C. § 924(e)(2)(B)(i). *Id.* Because it did not issue a COA on the other two predicate convictions, this conclusion was dispositive to its holding that Mr. Boaz had at least three prior “violent felony” predicate convictions, and therefore he was properly sentenced as an ACCA offender.

REASONS FOR GRANTING THE WRIT

I. A COA should have been issued because Mr. Boaz’s conviction for Arizona third degree burglary, Ariz. Rev. Stat. Ann. §13-1506(A)(1), is not a “violent felony.” The U.S. Attorney’s Office in Arizona has conceded that Arizona third-degree burglary “is likely not categorically a predicate felony”, and for good reason because case law from both the Eighth and Ninth Circuits mandates the concession.

A. Legal standards for a COA.

A certificate of appealability (“COA”) must issue “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “That standard is met when reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.” *Welch v. United States*, 136 S.Ct. 1257, 1263–64 (2016). Obtaining a certificate of appealability “does not require a showing that the appeal will succeed,” and “a court of appeals should not decline the application merely because it believes the applicant will not demonstrate an entitlement to relief.” *Id.* at 1263-64.

B. Mr. Boaz should have been issued a COA on this issue because a litany of reasonable jurists and litigants have *agreed* that Arizona third degree burglary is not generic burglary, and therefore is not “violent felony.”

The constitutional issue presented on appeal is whether Mr. Boaz’s ACCA sentence is unconstitutional based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), because he no longer has three qualifying “violent felony” convictions. Below, the government conceded that Mr. Boaz had only three convictions that could possibly qualify as a “violent felony.” Thus, if any one of the three predicate convictions is not a “violent felony”, it necessarily follows that Mr. Boaz is entitled to post-conviction relief. *See Johnson v. United States*, 135 S.Ct. 2551, 2560

(2015)(emphasis added) (holding that an improper ACCA sentence was unconstitutional because “*condemn[ing] someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.*”).¹

Here, Mr. Boaz convincingly makes the showing that he is entitled to a COA. The U.S. Attorney’s Office in Arizona has conceded that Arizona third-degree burglary, Ariz. Rev. Stat. Ann. §13-1506(A)(1), “is likely not categorically a predicate felony.” See DCD 4, pg. 9 (emphasis added) in *United States v. Rady*, 2017 WL 75836, at *2 (D. Ariz. Jan. 9, 2017) (“the parties agree . . . that the conviction for Arizona third-degree burglary does not qualify as a ‘violent felony’”) (reversed by Ninth Circuit, *granting* habeas relief on other grounds). Critically, Mr. Boaz’s case analyzes the identical statute, Ariz. Rev. Stat. Ann. §13-1506(A)(1).

Section 13-1506(A)(1) provides the following:

- A. A person commits burglary in the third degree by:
 - 1. Entering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft or any felony therein.

¹ In its opinion, the Eighth Circuit noted that the government argued below that even if Mr. Boaz was without three “violent felony” convictions, “his sentence remained valid because the district court had authority to sentence him to 190 months’ imprisonment without the ACCA enhancement.” *Boaz*, 884 F.3d at 809. The court further noted that this argument was grounded in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011 (en banc), and *Olten v. United States*, 565 Fed.Appx. 558 (8th Cir. 2014). *Id.* at fn 1.

However, the same panel of the Eighth Circuit that decided *Boaz* subsequently rejected the government’s nearly identical argument in *Harlow v. United States*, __ Fed.Appx. __, 2018 WL 1989945 (April 27, 2018), in remanding the case for a re-sentencing. Notably, the *Harlow* and *Boaz* cases were consolidated by the Eighth Circuit for oral argument, which evidences a substantial likelihood that this argument would be resolved in the same fashion if remanded.

Id.

Under § 924(e) of the ACCA, a prior offense qualifies as a “violent felony” if it satisfies the following definition:

(B) The term “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . . 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*.

18 U.S.C. § 924(e)(2) (emphasis added).

The above italicized portion of the statute—known as the residual clause or “otherwise clause”—was found to be unconstitutionally vague in *Johnson v. United States*, 135 S.Ct. 2551 (2015). This Court made this new substantive rule announced in *Johnson* retroactive to cases on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). Thus, the sole issue presented is whether §13-1506 (A)(1) is a enumerated offense because it is “generic burglary.” Because the statute is broader than generic burglary, it is categorically not a “violent felony.”

In addition to the government’s concession in *Rady*, a panel of the Eighth Circuit concluded long ago that because §13-1506 encompasses “burglary of a ‘yard’”, it “expanded burglary beyond the generic definition in *Taylor*.” *United States v. Wallis*, 100 F.3d 960, *1 (8th Cir. 1996) (analyzing “brute facts” of the conviction to determine that defendant’s “conduct” met the generic burglary definition prior to *Mathis*.). The Ninth Circuit also concluded that “[b]oth paragraphs 1 and 2 of

Section 13–1506(A) are categorically overbroad, as they criminalize conduct not within the federal definition of burglary.” *Chalup-Higuera v. Holder*, 510 F. App'x 529, 530 (9th Cir. 2013).²

A district court in the Eighth Circuit concluded that Mr. Boaz’s conviction under §13-1506 (A)(1) is overbroad because §13-1506 (A)(1) criminalizes “[e]ntering or remaining unlawfully in or on a nonresidential structure or in a fenced commercial or residential yard with the intent to commit any theft”, and “[t]he possibility of burglarizing a ‘fenced commercial or residential yard’ means that the Arizona offense is broader than generic burglary.” *United States v. Villa*, 2016 WL 6126308, at *3 (D. Neb. Oct. 20, 2016). “And the Court may not resort to underlying documentation and consider what the defendant actually burglarized, because burglary of a ‘nonresidential structure’ and ‘fenced commercial and residential yard’ are alternative means of committing one offense, not different crimes.” *Id.*

Finally, the Solicitor General has recently highlighted in a petition for certiorari that the majority of the nation’s state statutes are not considered generic burglary by federal courts, seeking this Court’s intervention in *United States v. Victor Stitt*, 17-1765. And while this Court will hear the merits of *Stitt* next term, even the government has conceded that if it ultimately wins the issue, the Arizona

² Several Ninth Circuit cases have analyzed why Arizona burglary is broader than generic burglary. See, e.g., *United States v. Navarro*, 584 F. App'x 624, 625 (9th Cir. 2014); *United States v. Terrell*, 593 F.3d 1084, 1092 (9th Cir. 2010); *United States v. Bonat*, 106 F.3d 1472, 1475-76 (9th Cir. 1997); *United States v. Sandon*, 302 F. App'x. 719, 720-21 (9th Cir. 2008). Thus, this issue is settled in the Ninth Circuit, which just further highlights why a COA should be issued by this Court resolve this issue.

burglary statute will not likely be impacted by this Court’s decision. *See* Solicitor’s Reply Brief in *Stitt*, fn 3 (highlighting twenty different states with burglary statutes that it argues might be impacted by this Court’s holding in *Stitt*, with Arizona conspicuously absent from this list).

For all of the aforementioned reasons, the issue is, *at a minimum*, debatable amongst reasonable jurists, entitling Mr. Boaz to a COA.

II. A COA should have been issued because Mr. Boaz’s conviction for Arkansas terroristic threatening, Ark. Stat. Ann. § 5-13-301, does not satisfy the ACCA’s force clause. Specifically, a COA should have been issued because there is a specific circuit split over whether Ark. Stat. Ann. § 5-13-301 satisfies the force clause.

The reason why a COA should have been issued for Mr. Boaz to appeal whether his conviction under Ark. Stat. Ann. § 5-13-301 is a “violent felony” under the ACCA’s force clause is straightforward: the Fifth Circuit has repeatedly, and recently, concluded that §5-13-301 is categorically not a qualifying predicate felony “because it lacks physical force as an element.” *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017) (citing *United States v. Johnson*, 286 Fed.Appx. 155, 157 (5th Cir. 2008) (reaching same conclusion regarding §5-13-301). The Fifth Circuit is correct in its analysis. In any event, this case law illustrates why a COA should be issued to resolve this circuit split of authority because a COA should be issued “when reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.” *Welch*, 136 S.Ct. at 1263–64.

Arkansas law decrees, in relevant part, that a person is guilty of first-degree terroristic threatening if “[w]ith the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person.” Ark. Stat. Ann. § 5–13–301. The sole argument raised by the government before the district court as to why Ark. Stat. Ann. § 5-13-301 is a violent felony was “the law of the case doctrine.” (DCD 5, pg. 10). This argument fails for a number of reasons. While it is true that a panel of the Eighth Circuit concluded that in Mr. Boaz’s direct appeal that Ark. Stat. Ann. § 5-13-301 satisfied the force clause in *United States v. Boaz*, 558 F.3d 800, 807 (8th Cir. 2009), this is not dispositive as it pertains to whether Mr. Boaz is entitled to a COA (almost ten years later).

The law of the case doctrine is inapplicable if there is “an intervening change in controlling authority,” *Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008), or from correcting an erroneous decision to prevent a manifest injustice. *United States v. Serpa*, 930 F.2d 639, 640 (8th Cir. 1991). Both exceptions apply to Mr. Boaz’s case. Specifically, Mr. Boaz’s case was heard by the Eighth Circuit before *Johnson v. United States*, 559 U.S. 133 (2010), wherein the Court noted that the force required in 18 U.S.C. § 924(e) is characterized by extreme physical force against a person. *Id.* Arkansas terroristic threatening does not require violent force, for the reasons highlighted in detail by the Fifth Circuit:

[E]ven though the conduct in that case involved a threat to kill, a person could cause physical injury without using physical force. *United States v. Johnson*, 286 Fed.Appx. 155, 157 (5th Cir. 2008); *see also United States v. Villegas–Hernandez*, 468 F.3d 874, 879 (5th Cir.

2006) (“There is ... a difference between a defendant's causation of injury and the ... use of force.”); *United States v. De La Rosa–Hernandez*, 264 Fed.Appx. 446 (5th Cir. 2008) (per curiam) (“As in *Villegas*, a defendant could violate [the California Terroristic Threats law], for example, by threatening either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve ‘force’, as that term is defined by our court.”).

Rico-Mejia, 859 F.3d at 321.

In *Rico-Mejia*, the Fifth Circuit squarely rejected the government’s argument that *United States v. Castleman*, 134 S.Ct. 1405 (2014), mandated a different result. “By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which ‘suggests a category of violent, active crimes’ that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context.” *Rico-Mejia*, 859 F.3d at 322 (quoting *Castleman*, 134 S.Ct. at 1411 n.4).

The question that the Court reserved in *United States v. Castleman*, 134 S.Ct. 1405 (2014), is one of exceptional importance, and is one that has deeply divided the courts of appeals. Specifically, that question is “[w]hether or not the causation of bodily injury necessarily entails violent force” within the context of the force clause of the ACCA. *Id.* at 1413. *Castleman* analyzed the term “force” within the distinct statutory provision of a “misdemeanor crime of domestic violence” pursuant to 18 U.S.C. § 921(a)(33)(A). This Court has concluded that these facially similar terms defining “force” in § 921(a)(33)(A), and in § 924(e) of the ACCA, have different meanings.

Specifically, in *Johnson I*, the Supreme Court held that the term “physical

force” as it is used in the ACCA, means “violent force,” because it is describing a *violent* felony. 559 U.S. 133, 140 (2010)(“[e]ven by itself, the word ‘violent’ . . . connotes a substantial degree of force.”). However, in *Castleman*, the Court refused to extend that definition to the Misdemeanor Domestic Violence Act in §921(a)(33)(A), determining that in that Act, the term “physical force” includes “any offensive touching, no matter how slight.” 134 S.Ct. at 1417. This Court subsequently re-embraced the distinctions in these two provisions: “Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility . . .” *Voisine v. United States*, 136 S.Ct. 2272, 2280 n.4 (2016).

The Eighth Circuit has held in a cursory fashion that any “indirect means” of causing injury inherently satisfies the force clause of the ACCA. *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016). While it did not elaborate on its reasoning for refusing to grant Mr. Boaz’s COA on this issue, the Eighth Circuit’s decision in *Rice* is a likely basis. However, the circuit split over this issue, outlined below, simply highlights why the Eighth Circuit should have issued Mr. Boaz a COA. The existence of a circuit split means that reasonable jurists are currently debating this issue.

The First, Second, Fourth, and Fifth Circuits agree that the causation of bodily injury does not necessarily entail violent force and, thus, does not render an offense a “crime of violence” or “violent felony.” *See United States v. Rico-Mejia*, 859 F.3d at 321; *Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015); *Chrzanoski v.*

Ashcroft, 327 F.3d 188, 194-96 (2d Cir. 2003). Thus, these courts have held that an offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the definition of a violent felony. *Id.*³

Taking the opposite view, the Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have held that the causation of bodily injury necessarily entails violent force and, thus, by itself, necessarily qualifies an offense as a “crime of violence” or “violent felony.” *United States v. Anderson*, 695 F.3d 390, 400-01 (6th Cir. 2012); *United States v. Waters*, 823 F.3d 1062, 1064-66 (7th Cir. 2016); *Rice*, 813 F.3d at 706; *United States v. Villavicencio-Burrue*, 608 F.3d 556, 562 (9th Cir. 2010); *United States v. McCranie*, No. 17-1058, 2018 WL 2050093, at *3 (10th Cir. May 3, 2018). Both the Eighth and Sixth Circuits have adopted this position over separate opinions rejecting it. *See Rice*, 813 F.3d at 706-08 (Kelly, J., dissenting); *Anderson*, 695 F.3d at 403-06 (White, J., concurring in the judgment).

The fatal flaw in the Eighth Circuit’s reasoning in *Rice* (and other circuits that have employed similar reasoning) is its conclusion that *Castleman* disposes of the central issue here within the distinct context of an ACCA “violent felony.” “We believe that *Castleman* resolves the question before our court, however, because there the Court . . . held ‘that [whether] the harm occurs indirectly, rather than

³ The Fourth Circuit may have recently changed its position on this issue, but making such a determination now is likely premature in light of conflicting panel opinions. Compare *In re Irby*, 858 F.3d 231 (4th Cir. 2017), with *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012).

directly (as with a kick or punch), does not matter.” *Rice*, 813 F.3d at 706 (quoting *Castleman*, 134 S.Ct. at 1415).

But of course this distinction regarding force matters, as it pertains to the plain language of the ACCA in using the phrase “violent felony”, because “[i]t is unlikely that Congress would select as a term of art defining ‘violent felony’ a phrase that the common law gave peculiar meaning only in its definition of a *misdemeanor*.” *Johnson*, 559 U.S. at 141 (emphasis added). “When the adjective ‘violent’ is attached to the noun ‘felony,’ its connotation of strong physical force is even clearer.” *Id.*; see also *Castleman*, 134 S. Ct. at 1410 (“We declined to read the common-law meaning of ‘force’ into ACCA’s definition of a ‘violent felony,’ because we found it a ‘comical misfit with the defined term [in *Johnson*].”).

Castleman sensibly concluded in the misdemeanor context that “the common-law concept of ‘force’ encompasses even its indirect application.” 134 S.Ct. at 1414 (emphasis added). The Court reasoned that “[f]orce’ in this sense describes one of the elements of the common-law crime of battery, and the force used in battery need not be applied directly to the body of the victim.” *Id.* (citations omitted). This is because a common law “battery may be committed by administering a poison or by infecting with a disease, or even by resort to some intangible substance, such as a laser beam.” *Id.* at 1414-15. So, it was only logical to conclude in that common-law, misdemeanor context that “[i]t is impossible to cause bodily injury without applying force in the common-law sense.” *Id.* at 1415.

Although the *Castleman* Court concluded that “force” in the common-law context encompasses its indirect application, it made no such assumption in regards to “force” in the violent felony context. In fact, the *Castleman* Court explicitly declined to address the issue of whether the mere “causation of bodily injury necessarily entails violent force.” See *id.* at 1413. By its express terms, *Castleman's* analysis is not applicable to the physical force requirement for a violent felony, which “suggests a category of violent, active crimes” that have as an element a heightened form of physical force that is narrower in scope than that applicable in the misdemeanor domestic violence context. *Rico-Mejia*, 859 F.3d at 321.

Stated another way, the force clause of the ACCA is necessarily focused on the means to commit the crime, not the end result of the crime. *Johnson* highlighted that the term “force” has a number of meanings”, but held that after analyzing various definitions they all “suggest a degree of power” used in committing the crime. *Id.* at 138-39. The flaw of the Eighth Circuit’s reasoning in *Rice* is that it turns that analysis on its head in the ACCA, concluding that as long as there is injury (the ends), the amount of force (the means) is irrelevant.

And this is precisely why the COA should be issued by this Court to Mr. Boaz, because it is debatable amongst reasonable jurists whether the ACCA’s force clause may be satisfied by his conviction under Ark. Stat. Ann. § 5–13–301, which lacks a requirement of violent physical force. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). This Court can and should resolve the split of authority on this issue, by granting Mr. Boaz’s petition for certiorari.

III. Both the Eighth and Ninth Circuits have relied on the void residual clause in the past to conclude that Mr. Boaz’s conviction for Arizona exhibiting a deadly weapon, Ariz. Stat. Ann. §13-916, is a “violent felony” under the ACCA, because this offense does not satisfy the force clause. This highlights that Mr. Boaz’s ACCA sentence is infected by the void residual clause, and that therefore he is serving an unconstitutional and illegal sentence.

Both the Eighth and Ninth Circuits have relied on the void residual clause to conclude that Mr. Boaz’s conviction for Arizona exhibiting a deadly weapon, Ariz. Stat. Ann. § 13-916, is a “violent felony” under the ACCA, precisely because this offense does not satisfy the force clause. This highlights that Mr. Boaz’s ACCA sentence is infected by the void residual clause, and therefore he is serving an unconstitutional and illegal sentence.

Exhibiting a weapon is not an enumerated offense in § 924(e). Therefore, because *Johnson v. United States*, 135 S.Ct. 2551 (2015), invalidated the residual clause of 18 U.S.C. § 924(e), an Arizona exhibiting a weapon conviction under Ariz. Stat. Ann. § 13-916 may only be a violent felony if it has, as an element, the use, threatened use, or attempted use of physical force against the person of another. 18 U.S.C. § 924(e)(2)(B)(i).

In concluding that Mr. Boaz’s conviction for Arizona exhibiting a weapon is a “violent felony”, a panel of the Eighth Circuit recently agreed with the government that Mr. Boaz’s direct appeal decision provided the blue print as to why his current appeal should be denied, even though “our prior *Boaz* decision predates *Johnson*’s invalidation of the residual clause.” *Boaz v. United States*, 884 F.3d 808 (8th Cir. 2018), citing *United States v. Boaz*, 558 F.3d 800, 807 (8th Cir. 2009).

Almost ten years later, the Eighth Circuit failed to see two major flaws in its original opinion, flaws that require this Court to reverse the denial of the instant appeal. *First*, in its 2018 opinion, the Eighth Circuit failed to recognize the full extent that the Eighth and Ninth Circuit case law had relied on the void residual clause to conclude that Ariz. Stat. Ann. §13-916 was a “violent felony.” *Boaz*, 884 F.3d at 809. Simply put, the 2018 *Boaz* opinion failed to acknowledge that the 2009 *Boaz* opinion relied on *United States v. Jackson*, 462 F.3d 899, 901 (8th Cir. 2006), to reach its decision. *See Boaz*, 558 F.3d at 808. In fact, *Jackson* undercuts both the 2009 and 2018 *Boaz* opinions, because *Jackson* expressly concluded that the unlawful use of a weapon offense was a violent felony based on the now void residual clause because it presented a “serious potential risk of physical injury to another.” *Jackson*, 462 F.3d at 901. While the government maintained below that “*Johnson* does not in any way impact the finding that exhibiting a weapon other than self-defense is a violent felony” (DCD 5, pg. 9), the contrary is true because *Johnson* undercuts the very core of the Eighth Circuit’s 2009 holding in *Boaz* in relying, by proxy, on the void residual clause.

In its 2018 opinion, the Eighth Circuit was more probing of Ninth Circuit case law, which concluded that the Arizona exhibiting a weapon crime, § 13-916, **“lacks the element of ‘use, attempted use, or threatened use of physical force against the person of another.’”** *United States v. Long*, 62 F.3d 1426 (9th Cir. 1995)(quoting § 924(e)(2)(B) (emphasis added). To attempt to ameliorate this situation of creating a direct circuit split on this issue, the 2018 *Boaz* opinion

concluded that this passage in *Long* was either: 1) “mere description”; 2) “dicta”; or 3) in any event “[w]e are not bound by it.” *Boaz*, 884 F.3d at 810-11. However, the lengths to which *Boaz* attempts to distance itself from *Long* just highlights that *Long* reveals a real problem: § 13-916 does not satisfy the force clause. Thus, the 2009 *Boaz* opinion is no longer on solid footing after this Court voided the residual clause in *Johnson*.

And this dovetails with the *second* flaw in the 2018 and 2009 *Boaz* opinions: they both relied heavily on alleged parallels between Missouri unlawful use of a weapon crime and the Arizona exhibiting a weapon crime. But this reasoning fails to take into account the unique nature of the Arizona statute that does not have as an element the use, threatened use, or attempted use of physical force against the person of another, as required by the force clause.

Specifically, the Arizona exhibiting statute is materially distinct from the Missouri statute because § 13-916 prohibits exhibiting the weapon “. . . in *any manner* . . . in a fight or a quarrel.” § 13-916 (emphasis added). In contrast, the Missouri statute, § 571.030.1(4), requires that the exhibition of the weapon must be done in an “angry and threatening manner.” The “any manner” language in § 13-916 presupposes that the mere existence of a gun in any “fight or quarrel” is sufficient to convict under the Arizona statute. However, this is insufficient to satisfy the force clause of the ACCA.

Arizona state case law interpreting § 13-916 also supports this conclusion. The 2018 *Boaz* opinion disagreed, finding that *State v. Pearce* only described “the

statute’s purpose”, and “does not indicate that the statute criminalizes any conduct ‘likely to endanger others.’” *Boaz*, 884 F.3d at 811 (quoting *State v. Pearce*, 527 P.2d 297 (Ariz. Ct. App. 1974)). However, the statute’s purpose *is* to criminalize conduct, i.e. “to make *punishable* acts which endanger or are *likely to endanger* other persons without any specific intent to do so.” *See also State v. Montijo*, 574 P.2d 466, 468 (Ct. App. 1977) (citing *Pearce*, 527 P.2d at 300) (emphasis added). However, conduct that is merely “likely” to endanger others requires no force whatsoever. It goes without saying that the Eighth Circuit was required to defer to this Arizona state case law that interpreted § 13-916, which highlights that there is a “reasonable probability” that Arizona could apply its statute (or already has) to conduct falling short of violent force. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013).

For all of these reasons, the Eighth Circuit erred in concluding that Arizona exhibiting a weapon is a “violent felony.”

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Boaz’s respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

/s/ Dan Goldberg
DAN GOLDBERG
Counsel of Record
Federal Public Defender’s Office
Western District of Missouri
818 Grand, Suite 300
Kansas City, Missouri 64106
Dan_Goldberg@fd.org

APPENDIX

Appendix A - Judgement of the Eighth Circuit Court of Appeals

Appendix B – Limited Certificate of Appealability from Eighth Circuit

Appendix C – Order denying rehearing by the Eighth Circuit Court of Appeals

Appendix D – District Court’s Order Denying Certificate of Appealability