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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. DAVID LEE FRY, Defendant.	Case No. 3:16-CR-00051-13-BR MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT 3 OF THE SUPERSEDING INDICTMENT

Defendant, David Lee Fry, through his attorney, Per C. Olson, hereby submits this Memorandum in Support of Defendant's Motion to Dismiss Count 3 of the Superseding Indictment. Count 3 alleges that defendants violated 18 U.S.C. § 924(c) by using and carrying firearms in relation to a "crime of violence," specifically, 18 U.S.C. § 372. However, as discussed below, Section 372 categorically is not a "crime of violence." Therefore, Count 3 must be dismissed for failing to allege an offense. Fed. R. Crim. P. 12(b)(3)(B)(v).

1. The Categorical Approach

To determine whether an offense qualifies as a "crime of violence" under section 18 U.S.C. 924(c)(3), the court must apply the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See United States v. Piccolo*, 441 F.3d 1084, 1086–87 (9th Cir. 2006) ("In the context of crime-of-violence determinations under section 924(c), our categorical approach applies regardless of whether we review a current or prior crime.") (citing *United States v. Amparo*, 68 F.3d 1222, 1224-26 (9th Cir. 1995)). The categorical

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approach directs the court to "determine whether the [offense] is categorically a 'crime of violence' by comparing the elements of the [offense] with the generic federal definition"—here, the definition of "crime of violence" set forth in Section 924(c)(3). *United States v. Sahagun–Gallegos*, 782 F.3d 1094, 1098 (9th Cir.2015).

The categorical approach requires the court to "look to the elements of the offense rather than the particular facts underlying the defendant's own [case]." *United States v. Dominguez–Maroyoqui*, 748 F.3d 918, 920 (9th Cir. 2014). Because the categorical approach is concerned only with what conduct the offense necessarily involves, the court must presume that the offense rests upon nothing more than the least of the acts criminalized, and then determine whether those acts are encompassed by the generic federal offense. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). If the elements of the offense "criminalize a broader swath of conduct" than the conduct covered by the generic federal definition, the offense cannot qualify as a crime of violence, even if the particular facts underlying the defendant's own case might satisfy that definition. *Dominguez–Maroyoqui*, 748 F.3d at 920 (citation and internal quotation marks omitted).

In ascertaining the scope of conduct criminalized by the elements of an offense, the court considers not only the statutory language, "but also the interpretation of that language in judicial opinions." *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1054 (9th Cir. 2011) (internal quotation marks omitted). To find an offense overbroad, there must be a "realistic probability, not a theoretical possibility," that the statute would be applied to conduct not encompassed by the generic federal definition. *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007).

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2. The "Force" Clause

The first alternative definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(A) describes it as 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." This definition of "crime of violence" appears in several places throughout the code and the sentencing guidelines, and is generally known as the "force" clause. Critically, "physical force" does not embrace *de minimis* or insignificant force. Rather, the phrase connotes serious and violent force.

The lead case is *Johnson v. United States*, 559 U.S. 133 (2010), in which the Supreme Court held that the defendant's prior battery conviction under Florida law was not a "violent felony" under the Armed Career Criminal Act (ACCA). The definition of "violent felony" in the ACCA includes materially the same "force clause" as the one at issue in the present case.[1] The Florida battery statute, as interpreted by the Florida Supreme Court, could be violated with any intentional physical contact, "no matter how slight." The government in *Johnson* asked the Court to adopt a common law concept of "force" that would have brought offenses involving offensive touching into the realm of violent felonies. The Court rejected that appr

oach on the ground that such a watered down concept of "force" was at odds with the

[1] The force clause in the ACCA definition of "violent felony" is different from the force clause in Section 924(c)(3)(A) in that the force in the ACCA context can only be directed at the "person of another," and not the "person *or property* of another." However, the addition of "property of another" in the Section 924(c) force clause does not change the result here, because Section 372 does not have an element regarding the use of force against property. Also, both "force" clauses require the same degree of violent force. *See United States v. Lawrence*, 627 F.3d 1281, 1284 n.3 (9th Cir. 2010) (finding the force clauses in the ACCA definition of violent felony and in the definitions of "crime of violence" in 18 U.S.C. § 16(a) and in U.S.S.G. § 2L1.2 to all be "materially identical," and holding that a previous case interpreting the clause in one context was applicable to another context).

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very term it was meant to define – "*violent* felony." The Court held:

> We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force – that is, force capable of causing physical pain or injury to another person. . . . When the adjective 'violent' is attached to the noun "felony," its connotation of strong physical force is even clearer.

Johnson, 559 US at 140 (emphasis in original; citations omitted).

The Ninth Circuit in *Dominguez-Maroyoqui*, 748 F.3d 918, applied the *Johnson* holding as to the "force" clause to determine whether the defendant's prior conviction for assaulting a federal officer was a "crime of violence" requiring an enhancement to defendant's sentence under U.S.S.G. § 2L1.2. The statute defining the prior conviction stated that anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal employee or officer] while engaged in or on account of the performance of official duties," commits a felony if the offense involved something more than a "simple assault." 18 USC § 111(a). To resolve whether Section 111(a) was a crime of violence, the Court followed the categorical approach described above. "Under the categorical approach, the crime-of-violence determination function[s] as an on-off switch: An offense qualifies as a crime of violence in all cases or in none." *Id.* at 920 (citation and internal quotation marks omitted).

The Court examined its previous decisions defining the scope of the offense of assaulting a federal officer and determined that the degree of force necessary for a conviction fell well short of the *Johnson* standard of violent force. "[A] defendant may be convicted of violating section 111 if he or she uses *any force whatsoever* against a federal officer designated in 18 U.S.C. § 1114." *Id.* at 921 (citation and internal quotation marks omitted; emphasis added by *Dominguez-Maroyoqui* court).

Thus, because Section 111(a) criminalized a "broader swath" of conduct than the

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conduct covered by the definition of "crime of violence," the Court held that the defendant's prior conviction for assaulting a federal officer categorically was not a crime of violence. *Id.* Also, the Court held that the "modified categorical approach" discussed in *Descamps v. United States*, 133 S. Ct. 2276 (2013), was not applicable because, even if the statute were viewed as divisible, none of the alternative ways of committing the crime (including "resists," "opposes," and "intimidates") required proof of the degree of force necessary to constitute a crime of violence under the *Johnson* formula. "Without at least one such match, the modified categorical approach has no role to play here." *Dominguez-Maroyoqui*, 748 F.3d at 921-22 (*citing Descamps*, 133 S. Ct. at 2285).

The Ninth Circuit recently held in *United States v. Parnell*, ___ F.3d ___, 2016 WL U.S. App. LEXIS 6629 at *13 (9th Cir., April 12, 2016), that the defendant's prior Massachusetts conviction for Armed Robbery was not a predicate "violent felony" under the "force" clause for purposes of ACCA sentencing, because the robbery could be committed with any degree of force as long as the victim is aware of it. Thus, it did not reach the level of force required by *Johnson* – force capable of causing physical pain or injury to another person. *See also United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016) (conviction under Washington's riot statute is not a violent felony because "it defines force more broadly than physical force as defined by *Johnson."*); *United States v. Dunlap*, 2016 WL 591757 (D. Or., Feb. 12, 2016) (No. 1:14-cr-00406-AA) (Oregon conviction for Robbery in the Third Degree was not a "violent felony" because it requires only minimal force).

3. Section 372 Does Not Require Force Capable of Causing Physical Pain or Injury to Another Person

If the crimes of battery (*Johnson*), assaulting a federal officer (*Dominguez-Maroyoqui*), armed robbery (*Parnell*), riot (Werle), and robbery in the third degree (*Dunlap*)

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are not crimes of violence under the "force" clause, the government will be hard pressed to explain how a Conspiracy to Impede Officers of the United States, 18 U.S.C. § 372, is a crime of violence.

As it relates to this prosecution, Section 372 prohibits two or more persons from conspiring "to prevent, by force, intimidation, or threat, any person…from discharging any duties [of his or her office]." Notably, the central act targeted by the offense is a conspiracy "to prevent" officials from discharging their duties. "Force, intimidation, and threats," are simply three ways the defendant can conspire to carry out the main goal of preventing the officials from performing their duties. "Force" is the only term that arguably comes close to the idea of using violence to carry out such a conspiracy. But the word "force" is not qualified by the word "physical" or any other adjective that would give it the necessary connotation of sufficient force "capable of causing physical pain or injury to another person." *See Johnson*, 559 U.S. at 134. One can use force without using or threatening to use the sort of physical violence contemplated by *Johnson*. Simply put, if "forcibly assaulting" a federal officer is not a crime of violence (*Dominguez-Maroyoqui*), then *a fortiori*, conspiring "to prevent by force" also is not a crime of violence.

The terms "intimidation" and "threat" also fall short of requiring the use, attempted use, or threatened use of violent physical force. In fact, the act of "forcibly … intimidat[ing]" a federal officer is one way of violating Section 111(a) that the *Dominguez-Maroyoqui* Court held would not constitute a crime of violence. *Dominguez-Maroyoqui,* 748 F.3d at 921. The term "threat" is insufficient as well, because it is not limited to the "threatened *use of physical force* against the person or property of another." A "threat" under Section 372 does not have to be a threat of violence, and therefore, it is insufficient to meet the definition of crime of violence. *See Parnell*, 2016 U.S. App. LEXIS 6629, *9. (defining "threatened use of physical

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force" under the "force clause" as requiring "some outward expression or indication of an intention to inflict pain, harm or punishment.")

The case law applying and interpreting Section 372 further demonstrates that it is not a crime of violence. For example, in *United States v. Fulbright*, 105 F.3d 443 (9th Cir. 1997), the defendant's conviction under Section 372 was upheld based on evidence that he harassed a bankruptcy judge by mailing him bogus legal documents including a "Notice and Demand for Declaration of Judge's Impartiality" and a "Citizens' Arrest Warrant for Citizens' Arrest" calling for the judge's arrest. The letters were described as "intimidating" or "threatening," but there is no indication that they contained any threats of physical force against the judge.

The defendants in *Finn v. United States*, 219 F2d 894 (9th Cir. 1955), were convicted of Section 372 for performing a citizen's arrest on a federal prosecutor and attempting to have him booked into a local police station. No "force" was used beyond that necessary to place the compliant prosecutor into handcuffs; *i.e.*, there was no physical violence or threats thereof. The convictions were affirmed. *See also United States v. Hall*, 342 F.2d 849 (4th Cir. 1965) (evidence of a conspiracy to arrest an undercover officer, with no other evidence of a plan for violence, was sufficient to affirm a conviction under Section 372).

The final point with regard to Section 372 is that it does not attach the required *mens rea* to the element of "force, intimidation or threats." This is yet another reason why Section 372 fails to meet the definition of a crime of violence. *See United States v. Lawrence*, 627 F.3d 1281, 1284 (9th Cir. 2010) ("[T]o qualify as defining a violent felony, a state statute must require that the physical force be inflicted intentionally, as opposed to recklessly or negligently."); *see also Begay v. United States*, 553 U.S. 137, 144-45 (2008) (the ACCA's definition of violent felony refers to crimes that involve purposeful, violent, and aggressive

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conduct).

In sum, Section 372 categorically is not a crime of violence, as it does not contain the necessary element of the "use, attempted use, or threatened use of physical force against the person or property of another."

4. The Modified Categorical Approach Does Not Apply

The modified categorical approach may be used to determine whether one variant of a "divisible" statute could be considered a crime of violence. Here, the modified categorical approach cannot assist the government because Section 372 is not divisible, and, even if it were, none of the arguably alternative ways of violating Section 372 would constitute a crime of violence.

A divisible statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Descamps*, 133 S. Ct. at 2285 (*quoting Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). A statute is "indivisible" if it does not contain alternative elements but instead "criminalizes a broader swath of conduct than the relevant generic offense." *Id.* at 2281. "The critical distinction is that while indivisible statutes may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes." *Rendon v. Holder*, 764 F.3d 1077, 1084-85 (9th Cir. 2014); *see also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1137 n.16 (9th Cir. 2014) ("[U]nder *Descamps*, what must be divisible are the elements of the crime, not the mode or means of proving an element."). An offense has alternative elements, as opposed to means, if the necessary factor must be alleged in the indictment and found by the jury. *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2015) (en banc).

Section 372 is indivisible with regard to the phrase "force, intimidation, or threat," because these words simply refer to three "means" of committing the one crime of conspiring

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to prevent a federal official from discharging his duties. The words do not each represent alternative elements of the offense. The government would have to agree with this point, as it has alleged a single conspiracy to prevent "by force, intimidation and threats" federal officers from discharging their duties. *See* Dkt. 250.

Further, even if Section 372 were deemed "divisible," that characterization would not help the government. As discussed above, none of the alternative ways of preventing an officer from discharging his duties would constitute a crime of violence.

5. The Residual Clause of Section 924(c)(3)(B) is Void for Vagueness

Section 924(c)(3)(B) provides an alternative definition of crime of violence as an offense "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." The United States Supreme Court struck down a materially similar "residual clause" defining "violent felony" in the ACCA because it was unconstitutionally vague. *Johnson v. United States*, 135 S Ct 2551 (2015). Pursuant to the *Johnson* ruling, Section 372 cannot qualify as a crime of violence under the equally vague residual clause in Section 924(c)(3)(B).

The difference in language between the residual clause struck down by *Johnson* and Section 924(c)(3)(B) does not lead to a different result, as the Ninth Circuit recognized in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). *Dimaya* involved the definition of crime of violence in 18 USC § 16(b), which is virtually identical to Section 924(c)(3)(B).[2] The Court held after a "careful analysis" of Section 16(b) and the ACCA residual clause at issue in *Johnson*, "they are subject to the same constitutional defects and . . . *Johnson* dictates that

[2] The § 16(b) residual clause defines crime of violence as "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."

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§ 16(b) be held void for vagueness." *Dimaya*, 803 F.3d at 1115.

Because Section 924(c)(3)(B) is identical to Section 16(b), which in turn has been held to be just as unconstitutionally vague as the ACCA residual clause struck down in *Johnson*, the government cannot rely on Section 924(c)(3)(B) to establish that Section 372 is a crime of violence. *See United States v. Bell*, 2016 WL 344749 (N.D. Cal. 2016) (No. 15-cr-00258-WHO) (holding that, pursuant to *Dimaya*, the Section 924(c)(3) residual clause may not be used to establish that a robbery is a crime of violence); *see also United States v. Benavides*, 617 Fed. Appx. 790 (9th Cir. 2015) (the government conceded that the *Johnson* holding applied to nullify the residual clause in the "crime of violence" definition in U.S.S.G. § 4B1.2).

6. Dismissal is the Only Proper Remedy

Count Three of the Superseding Indictment fails to state an offense, because the alleged "crime of violence" – a Conspiracy to Impede Officers of the United States – is not, as a matter of law, a crime of violence. The necessary element of "crime of violence" can never be proven, because, under the categorical approach discussed above, the facts are irrelevant. The court alone decides whether Section 372 is a crime of violence based solely on the elements. *See* Model Crim. Jury Instr. 9th Cir. 8.72 (2010) regarding 18 U.S.C. § 924(c) (in which the jury is instructed that the underlying offense is a crime of violence); *see also Amparo*, 68 F.3d at 1226 (court determines as a matter of law whether underlying offense is a crime of violence). Because Section 372 is not a crime of violence, Count Three fails to state an offense, and it must be dismissed.

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