NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

MARCUS KALANI WATSON & ROGUSSIA EDDIE ALLEN DANIELSON
Petitioners

- vs -

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' JOINT MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

&

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stokeling v. United States*, No. 17-5554, this Court has granted certiorari to resolve whether a state robbery offense that requires a purposeful use, attempted use, or threatened use of only slight force is picked up by the force clause of the Armed Career Criminal Act, 18 U.S.C. §924(e)(2)(B)(i). This case provides an excellent companion case for resolving whether federal bank robbery—which similarly requires a purposeful use, attempted use, or threatened use of only slight force in both its simple and strong-arm variants—is picked up by 18 U.S.C. §924(c)(3)(A)'s nearly identical force clause.

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JOINT PETITION FOR WRIT OF CERTIORARI

Petitioners Marcus Kalani Watson and Rogussia Eddie Allen Danielson respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. This matter was consolidated below in the Ninth Circuit and the district court.

OPINIONS BELOW

The Ninth Circuit's panel opinion is published as *United States v. Watson*, 881 F.3d 782 (CA9 2018), and is included in the Appendix at A2. The Ninth Circuit's unpublished summary order denying rehearing en banc is included in the Appendix at A1. The district court's unreported written order denying the petitioners' 18 U.S.C. §2255 motions is included in the Appendix at A7 and can be found at 2016 WL 866298 (D. Haw. Mar. 2, 2016).

JURISDICTION

The Ninth Circuit published its opinion on February 1, 2018 (App. at A2), and denied the petitioners' timely joint motion for rehearing en banc on March 29, 2018 (App. at A1). This joint petition is timely under this Court's Rule 13.3, having been filed within 90 days of the Ninth Circuit's order denying rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §924(c)(3)(A):

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and … has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]

18 U.S.C. §924(e)(2)(B)(i):

> As used in this subsection … the term "violent felony" mean any crime punishable by imprisonment for a term exceeding one year …that … has as an element the use, attempted use, or threatened use of physical force against the person of another.

18 U.S.C. §2113:

> (a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another … any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association …
>
> [s]hall be fined under this title or imprisonment not more than twenty years, or both.
>
> ….
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.
>
> ….

Fla. Stat. §812.13 (1997):

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. ….

CASE STATEMENT

Pertinent facts are uncontested and briefly stated. By way of guilty pleas, the government convicted the petitioners of, among other things, armed bank robbery, in violation of 18 U.S.C. §2113(a) and (d), and for using a firearm during that

robbery, in violation of 18 U.S.C. §924(c) (App. at A7). The district court sentenced petitioner Danielson on April 7, 2015, and petitioner Watson on May 27, 2015 (App. at A8), both receiving 84-month sentences on their respective §924(c) counts, to run consecutively to the concurrent sentences imposed on other counts (App. at A8). Neither petitioner took a direct appeal (App. at A4).

On June 26, 2015, this Court decided *Samuel James Johnson v. United States*, 135 S.Ct. 2551 (2015), holding the ACCA's residual clause, 18 U.S.C. §924(e)(2)(B)(ii), was unconstitutional. Within a year of their judgments becoming final, the petitioner's filed 28 U.S.C. §2255 motions attacking their §924(c) convictions and sentences (App. at A4). They argued *Samuel James Johnson* applied to and voided §924(c)((3)(B)'s similarly-worded residual clause, and that §924(c)(3)(A)'s force clause did not categorically pick up their armed bank robbery convictions (App. at A9). On the latter point, their argument was that caselaw affirmed convictions for bank robbery under §2113(a) and armed bank robbery under §§2113(a) and (d) on evidence that the defendant purposefully used, attempted to use, or threatened to use only slight force, not the violent physical force the force clause required for a match (App. at A9, A11). The district and circuit courts rejected that argument on the ground that circuit precedent—holding that the legal definition of intimidation established that bank robbery, in either flavor, required a purposeful threat of violent physical force—foreclosed it and, as the force clause thus captured bank robbery, both simple and strong-arm, there was no need to reach the residual clause issue. (App. at A4–A5 (circuit court); App. at A11–A12 (district court)).

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle for addressing in the context of a federal robbery offense the same question that this Court, in *Stokeling*, will decide in the context of a state robbery offense: whether slight-force robbery counts as an offense that has as an element the purposeful use, attempted use, or threatened use of violent physical force. The facts in this matter are uncontested and not complicated. The legal issue was cleanly presented in the lower courts and is not obstructed by any procedural impediment. And the circuits' positions on the question presented is uniform and entrenched among those that have addressed it. This Court should grant this petition in order to have a federal analogue companion case to go along with *Stokeling* or, alternatively, it should delay granting this petition until it has decided *Stokeling*, and then vacate and remand this matter for reconsideration in light of how *Stokeling* comes out.

1. This case presents a federal analogue to the question this Court will answer in *Stokeling* and should either be considered as a companion case or held to be GVR'd once this Court decides *Stokeling*.

Whether the force clauses of the ACCA and §924(c) pick up a robbery offense turns on whether the predicate robbery requires in every instance of its commission an active, purposeful use, attempted use, or threatened use of violent physical force. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *Curtis Darnell Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). In *Stokeling*, this Court has agreed to decide whether a state robbery offense does so, when state precedent makes it clear that slight force (purse-snatching and the like)

suffices to convict. *Sanders v. State*, 769 So.2d 506 (Fla. 5th DCA 2000) (snatching money from the victim's hand after peeling back the victim's fingers); *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2nd DCA 2011) (expressly rejecting claim that actual violence was necessary and affirming conviction predicated on a "tug-of-war" over a purse).

This case presents a federal analogue to the slight-force state robbery offense this Court will address in *Stokeling*. Section 2113(a) defines federal bank robbery by way of using force and violence or intimidation, among other things. No court has ever suggested that force, violence, and intimidation were separate elements of three separate bank robbery offenses; they are just alternative means of proving simple bank robbery. And in any event, the government here accused and convicted the petitioners of robbery by force and violence or intimidation (App. at A3).

Slight force has long been held sufficient to convict on simple bank robbery by intimidation. *United States v. Hopkins*, 703 F.2d 1102, 1103 (CA9 1983) ("[a]lthough the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons are not required for a conviction of bank robbery by intimidation," thus "the threats implicit in Hopkins' written and verbal demands for money provide sufficient evidence of intimidation" (citation and quotation marks omitted)); see also *United States v. Ketchum*, 550 F.3d 363, 367 (CA4 2008) ("display of a weapon, a threat to use a weapon, or even a verbal or nonverbal hint of a weapon is not a necessary ingredient of intimidation," nor are "express threats of bodily harm, threatening body motions, or the physical

possibility of a concealed weapon," because "intimidation generally may be established based on nothing more than a defendant's written or verbal demands to a teller"); *United States v. Higdon*, 832 F.2d 312, 314–315 (CA5 1987) (same); *United States v. Robinson*, 527 F.2d 1170 (CA6 1975) (same); *United States v. Hill*, 187 F.3d 698 (CA7 1999) (same); *United States v. Slater*, 692 F.2d 107 (CA10 1982) (same); accord *Torres v. Lynch*, 136 S.Ct. 1619, 1629 (2016) (recognizing a demand for money (ransom in a kidnapping case) is too slight to constitute a threat to use violent physical force).

Nor does §2113(d)'s armed element add *Curtis Darnell Johnson* force to the offense in every case. This is because nothing more than mere visual possession of an ersatz gun suffices to convict of armed bank robbery. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666–667 (CA9 1989) (defendant need "not make assaultive use" of a weapon, ersatz or real, nor "need [she] brandish [it] in a threatening manner," but must only visibly possess it, because "[s]ection 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon"); see also, e.g., *United States v. Hargrove*, 201 F.3d 966, 968 n. 2 (CA7 2000) (agreeing with and collecting display of fake weaponry cases); accord *Torres*, 136 S.Ct. at 1629–1630 (firearm possession does not, in every case, involve a purposeful use, attempted use, or threatened use of violent physical force). Other circuits set baseline sufficiency even lower: at mere possession of a concealed weapon. *United States v. Ray*, 21 F.3d 1134, 394 (CADC 1994); *United States v. Ferguson*, 211 F.3d 878, 883 (CA5 2000).

Intimidation bank robbery, be it simple or aggravated by the visual presence of a weapon, requires no more force than does Florida robbery. This case thus presents a federal analogue that would serve as a clean companion case to *Stokeling*, which taken together would allow this Court to definitively settle that, whatever the outcome, it should be the same as to both state and federal slight-force robbery offenses.

2. The tension between the circuits' recognition that the force clause does *not* pick up slight-force state robbery offenses and their insistence that the force clause *does* pick up slight-force federal robbery offenses is as untenable as it is entrenched.

The Ninth Circuit first held that the force clause picks up slight-force federal robbery offenses contemporaneously with this Court's first articulation of categorical analysis, some twenty-eight years ago now. *United States v. Selfa*, 918 F.2d 749 (CA9 1990); accord *Taylor v. United States*, 495 U.S. 575 (1990). Despite all the water under the bridge since then, the Ninth Circuit continues to maintain that federal intimidation robbery offenses count, as the circuit's decision in this matter attests. The Ninth Circuit's rationale, however, stops at asserting that the legal definition of "intimidation," as doing anything that puts an ordinary person in fear of bodily injury, always requires proof of a threat of *Curtis Darnell Johnson* force (App. at A4). And as the circuit panel noted, other circuits similarly so hold (App. at A5 (collecting cases)).

The flaw in such reasoning, however, is that it neglects to look at the right thing. Legal definitions are not what matter. What matters is what suffices to prove intimidation so defined. *Moncrieffe*, 569 U.S. at 191. The place to look, then, is not

Black's Law Dictionary, but sufficiency-of-the-evidence precedent, which the Ninth Circuit, for one, has yet to confront in any of its post-*Samuel James Johnson* cases addressing this issue. As noted above, the simple demand for money that suffices to prove intimidation is not a match for *Curtis Darnell Johnson* force.

While steadfastly, perhaps mulishly, insisting that federal intimidation robbery offenses remain force clause matches, the Ninth Circuit hasn't hesitated to hold that slight-force *state* robbery offenses (even strong-arm ones) are not. *United States v. Molinar*, 881 F.3d 1064 (CA9 2018); *United States v. Parnell*, 818 F.3d 974 (CA9 2016). Other circuits similarly hold various slight-force state robbery offenses are not picked up by the force clause. See, e.g., *United States v. Gardner*, 823 F.3d 793, 803–804 (CA4 2016); *United States v. Eason*, 829 F.2d 633, 640–642 (CA8 2016); *United States v. Nicholas*, 686 Fed.Appx. 570, 575–576 (CA10 April 24, 2017) (unpublished). And each of these circuits, including the Ninth, make the tension all the more taut by actually turning to sufficiency-of-the-evidence state cases (not just those legally defining the least forceful element of the offense) to discern what minimally forceful conduct has actually been held sufficient to sustain a conviction—the very thing the Ninth Circuit did *not* do in the petitioners' case or any other challenging a federal robbery predicate. There is no principled basis on which to draw the line the circuits are drawing, between slight-force state robbery offenses and slight-force federal robbery offenses. Either both count. Or both don't count. Who prosecuted a slight-force robbery predicate is not what should determine the outcome in these cases. But so far, it seems to be what is determinative.

3. This case is an ideal vehicle for answering the presented question.

There are no procedural impediments to reaching the question presented, which the lower courts addressed on its merits after the parties fully briefed the issue in both the district court and the circuit court. The issue is cleanly and directly presented on a factual record that is not complex. The olio the circuits are making, as they hold the force clause does not pick up slight-force state robbery offenses, but does pick up slight-force federal robbery offenses, is entrenched and shows no signs of reconciliation. This Court's review is therefore necessary to ensure that a principled basis, rather than the happenstance of what government prosecutes, determines whether slight-force robbery counts or does not count as a force clause crime of violence and violent felony.

CONCLUSION

This Court should grant this petition in order to have a federal analogue companion case to go along with its consideration of *Stokeling*. Alternatively, this Court should hold this matter to be GVR'd in light of *Stokeling* once this Court decides *Stokeling* next term.

DATED: Honolulu, Hawaii, June 25, 2018.

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