

No. ____-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JOEL CADENA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

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QUESTION PRESENTED FOR REVIEW

Whether this Court should hold the instant Petition until the resolution of *Stokeling v. United States*, 138 S.Ct. 1438 (April 2, 2018), and/or *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*)?

PARTIES

Joel Cadena is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.....	ii
Parties.....	iii
Table of Contents.....	iv
Index to Appendices.....	v
Table of Authorities.....	vi
Opinion Below.....	1
Jurisdictional Statement.....	1
Statutory Provisions.....	1
Statement of the Case.....	3
Reasons for Granting the Writ.....	4
I. This Court should hold the instant Petition until the resolution of <i>Stokeling v. United States</i> , 138 S.Ct. 1438 (April 2, 2018), and/or <i>United States v. Reyes-Contreras</i> , 892 F.3d 800 (5 th Cir. June 15, 2018)(<i>en banc</i>).	4
Conclusion.....	7

INDEX TO APPENDICES

Appendix A Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit
Affirming the Conviction and Sentence

Appendix B Judgment of Conviction and Sentence of the United States District Court for the
Northern District of Texas

TABLE OF AUTHORITIES

CASES

<i>Carter v. United States</i> , 530 U.S. 255 (2000)	4, 5
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	5
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	7
<i>Sessions v. Dimaya</i> , 138 S.Ct. 1204 (April 17, 2018)	3, 4
<i>Stokeling v. United States</i> , 138 S. Ct. 1438 (Apr. 2, 2018)	ii, 4, 6, 7
<i>United States v. Brewer</i> , 848 F.3d 711 (5th Cir. 2017)	3, 4, 6
<i>United States v. Cadena</i> , 728 F. App'x 381 (5th Cir. June 22, 2018)	1
<i>United States v. Castro-Vazquez</i> , 802 F.3d 28 (1st Cir. 2015)	5
<i>United States v. Cruz-Rodriguez</i> , 625 F.3d 274 (5th Cir. 2010)	5
<i>United States v. Davis</i> , __ F. 3d __, 2018 U.S. App. LEXIS 25486 (5th Cir. Sept. 7, 2018) ..	3, 4
<i>United States v. De La Rosa-Hernandez</i> , 264 F. App'x 446 (5th Cir. 2008)	6
<i>United States v. Dunlap</i> , 162 F. Supp. 3d 1106 (D. Or. 2016)	5
<i>United States v. Farmer</i> , 73 F.3d 836 (8th Cir. 1996)	5
<i>United States v. Gardner</i> , 823 F.3d 793 (4th Cir. 2016)	5
<i>United States v. Gonzalez-Longoria</i> , 831 F.3d 670 (5th Cir. 2016)	3
<i>United States v. Johnson</i> , 286 F. App'x 155 (5th Cir. 2008)	6
<i>United States v. Kornegay</i> , 641 F. App'x 79 (2d Cir. 2016)	5
<i>United States v. Martinez-Mata</i> , 393 F.3d 625 (5th Cir. 2004)	6
<i>United States v. Nedley</i> , 255 F.2d 350 (3d Cir. 1958)	5
<i>United States v. Parnell</i> , 818 F.3d 974 (9th Cir. 2016)	5
<i>United States v. Peterson</i> , 236 F.3d 848 (7th Cir. 2001)	5
<i>United States v. Reyes-Contreras</i> , 882 F.3d 113 (5th Cir. Feb. 6, 2018)	6
<i>United States v. Reyes-Contreras</i> , 892 F.3d 800 (5th Cir. June 15, 2018)	ii, 4, 6, 7
<i>United States v. Rico-Mejia</i> , 859 F.3d 318 (5th Cir. 2017)	5

<i>United States v. Vargas-Duran</i> , 356 F.3d 598 (5th Cir. 2004)	5
<i>United States v. Villegas-Hernandez</i> , 468 F.3d 874 (5th Cir. 2006)	5
<i>United States v. Winston</i> , 850 F.3d 677 (4th Cir. 2017)	5

STATUTES

18 U.S.C. § 924(c)	1, 3
18 U.S.C. § 924(c)(1)(A)(ii)	4
18 U.S.C. § 924(c)(3)	3, 4
18 U.S.C. § 924(c)(3)(A)	3
18 U.S.C. § 924(c)(3)(B)	3, 4, 5
18 U.S.C. § 924(e)	5
18 U.S.C. § 924(e)(2)(B)(i)	6
18 U.S.C. § 2113(a)	2, 4
28 U.S.C. § 1254(1)	1

MISCELLANEOUS

77 C.J.S. Robbery § 23 (2016)	5
Petition for Certiorari in <i>Stokeling v. United States</i> , No. 17-5554, 2017 WL 8686116 (Aug. 4, 2017), <i>certiorari granted</i> 138 S.Ct. 1438 (April 2, 2018)	6

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joel Cadena, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the conviction and sentence is captioned as *United States v. Cadena*, 728 Fed. Appx. 381 (5th Cir. June 22, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence of the United States District Court for the Northern District of Texas was issued April 18, 2017, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were filed on June 22, 2018. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 924(c) of Title 18 provides in part:

(c)(1)(A) 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 (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(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.

Section 2113(a) of Title 18 provides:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion 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; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

A. Proceedings in District Court

Petitioner Joel Cadena pleaded guilty to one count of federal bank robbery, admitting that he took money or property from a bank teller by force, violence, and intimidation. *See* (ROA.41-43).¹ He also pleaded guilty to one count of brandishing a firearm during this offense, a violation of 18 U.S.C. §924(c). *See* (ROA.41-43). The plea agreement in the case required him to waive his right of appeal, save for certain exceptions, which include an involuntary plea and a sentence in excess of the statutory maximum. *See* (ROA.91). The district court imposed a sentence of 36 months for the bank robbery and 84 months for the violation of 18 U.S.C. §924(c), the terms to run consecutively. *See* (ROA.74).

B. Proceedings in the Court of Appeals

On appeal, Petitioner argued that federal bank robbery is not a “crime of violence” under 18 U.S.C. §924(c)(3). To this end, he maintained that it could be committed without the use of physical force against the person of another, and accordingly falls outside 18 U.S.C. §924(c)(3)(A). He further argued that 18 U.S.C. §924(c)(3)(B) is unconstitutionally vague. But he conceded that these arguments were foreclosed by *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017), which held that federal bank robbery has force or threatened force as an element, and *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016)(*en banc*), which held that a provision worded identically to §924(c)(3)(B) is not unconstitutionally vague.

The court of appeals affirmed, relying exclusively on *Brewer*. *See* [Appx. A]. About a month and a half after the opinion, the court held that §924(c)(3)(B) is in fact unconstitutionally vague, in light of *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (April 17, 2018). *See United States v. Davis*, ___ F.3d ___, 2018 U.S. App. LEXIS 25486 (5th Cir. 7, 2018).

¹Citations to the Fifth Circuit record are included in hopes they are of use to the government in answering the Petition or the Court in evaluating it.

REASON FOR GRANTING THE PETITION

I. **This Court should hold the instant Petition until the resolution of *Stokeling v. United States*, 138 S.Ct. 1438 (April 2, 2018), and/or *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*).**

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code makes it a crime to brandish a firearm in connection with a “crime of violence.” The term “crime of violence” is defined as any felony that:

(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). A provision bearing wording identical to Subsection (B) of this statute has been held unconstitutionally vague. *See Sessions v. Dimaya*, __U.S.__, 138 S.Ct. 1204 (2018). As noted, the court below has applied *Dimaya* to §924(c)(3)(B). *See United States v. Davis*, __F.3d__, 2018 U.S. App. LEXIS 25486 (5th Cir. 7, 2018).

Petitioner was convicted of brandishing a firearm in connection with a robbery under 18 U.S.C. §2113(a). This statute requires that the defendant act “by force and violence, or by intimidation.” 18 U.S.C. §2113(a). The court below has defined “intimidation” to mean that “an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant’s acts.” *United States v. Brewer*, 848 F.3d 711, 715 (5th Cir. 2017). And it therefore believes that the offense possesses the use, attempted use, or threatened use of force against the person of another as an element. *See Brewer*, 848 F.3d at 715.

Two factors cast doubt on that proposition. First, this Court has likened federal bank robbery to common-law robbery. *See Carter v. United States*, 530 U.S. 255, 264 (2000)(“While we (and the Government) agree that ***the statutory crimes at issue here bear a close resemblance to the common-law crimes of robbery and larceny*** ... that observation is beside the point.”)(emphasis added). In this respect, it is similar to other federal robbery statutes defining “robbery” in similar

terms. *See United States v. Farmer*, 73 F.3d 836, 842 (8th Cir. 1996); *United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958); *United States v. Peterson*, 236 F.3d 848, 851 (7th Cir. 2001). As such, the federal bank robbery statute requires only slight or minimal force: just enough to overcome resistance from the victim. *See* 77 C.J.S. Robbery § 23 (2016) (“The amount or degree of force requisite to robbery is such force as is actually sufficient to overcome the victim’s resistance. If the force used is sufficient to overcome resistance, the particular degree of violence employed is immaterial as an element of the crime.... Thus, it has been said that any force, no matter how slight, which induces the victim to part with his or her property is sufficient to sustain a robbery conviction.”). Indeed, a bank robbery defendant has been convicted for pushing a customer into a bank and leaping the counter, a showing well short of injurious violence. *See Carter*, 530 U.S. at 259-260. Similarly, another federal robbery defendant (Hobbs Act) has been convicted for pushing a door open while the victim tried to block it. *See United States v. Kornegay*, 641 Fed. Appx. 79 (2d Cir. 2016)(unpublished).

This Court, however, has held that minimal or slight force is not “force” as used in 18 U.S.C. § 924(e), a statute worded similarly to §924(c)(3)(B). *See Johnson v. United States*, 559 U.S. 133, 138-145 (2010). Some common-law robbery statutes – those requiring only enough force to overcome the victim’s resistance – have been held to lack “force” as an element within the meaning of 18 U.S.C. §924(e). *See United States v. Winston*, 850 F.3d 677, 682-686 (4th Cir. 2017); *United States v. Gardner*, 823 F.3d 793, 801-804 (4th Cir. 2016); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Castro-Vazquez*, 802 F.3d 28, 37 (1st Cir. 2015); *United States v. Dunlap*, 162 F. Supp. 3d 1106, 1114 (D. Or. 2016). Accordingly, it is questionable whether federal bank robbery can be said to require the use or threatened use of force as an element.

Second, the court below has long distinguished between offenses that require the use or threat of force and those that require mere bodily injury. *See United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017), *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004)(*en banc*); *United States v. Cruz-Rodriguez*, 625

F.3d 274, 276-277 (5th Cir. 2010); *United States v. Martinez-Mata*, 393 F.3d 625, 629 (5th Cir. 2003); *United States v. De La Rosa-Hernandez*, 264 Fed. Appx. 446, 449 (5th Cir. 2008)(unpublished); *United States v. Johnson*, 286 Fed. Appx. 155, 157 (5th Cir. 2008)(unpublished). Yet federal bank robbery has been held violated when the defendant inflicts a reasonable fear of “bodily injury.” *See Brewer*, 848 F.3d at 715. For this reason, too, it is questionable whether federal bank robbery can be said to require the use or threatened use of force as an element.

Two pending authorities may shed additional light on these two questions – this Court should await those decisions before disposing of the instant Petition. First, this Petition should be held pending the resolution of *Stokeling v. United States*, 138 S.Ct. 1438 (April 2, 2018). In that case, this Court will decide whether:

a state robbery offense that includes “as an element” the common law requirement of overcoming “victim resistance” categorically a “violent felony” under the only remaining definition of that term in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i)(an offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another”), if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?

Petition for Certiorari in *Stokeling v. United States*, No. 17-5554, 2017 WL 8686116 (filed August 4, 2017), *certiorari granted* 138 S.Ct. 1438 (April. 2, 2018). Because federal bank robbery likely requires no more force than common-law robbery, a victory for the defendant in *Stokeling* will likely resolve the question in Petitioner’s favor.

Alternatively, the Petition should be held pending the court below’s *en banc* decision in *United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*). In *United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. February 6, 2018), *rehearing en banc granted* by 892 F.3d 800 (5th Cir. June 15, 2018), a panel of the Fifth Circuit held that the Missouri offense of Voluntary Manslaughter lacks force as an element, precisely because injury is not always force. The government has successfully petitioned for *en banc* review. *See United States v. Reyes-Contreras*, 892 F.3d 800 (5th Cir. June 15, 2018)(*en banc*). In the event the defendant prevails in *Reyes-*

Contreras en banc, a uniform rule distinguishing force and injury will necessarily prevail in the Fifth Circuit. It is difficult to see how one could distinguish force and injury, and yet hold that federal bank robbery always requires threatened force.

The pending decisions in *Stokeling* and *Reyes-Contreras* represent sources of controlling legal authority that would call for a different outcome than the decision below. In these circumstances, it is appropriate to hold the instant Petition until the resolution of those cases and to grant *certiorari*, vacate the judgment below, and remand for reconsideration in the event that it produces an opinion favorable to Petitioner's claim here. *See Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

CONCLUSION

Petitioner respectfully submits that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 19th day of September, 2018.

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