No. _____

In the

Supreme Court of the United States

MATTHEW LLOYD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented For Review

Lloyd pleaded guilty to carjacking, armed bank robbery and unlawfully brandishing a firearm during a bank robbery in violation of 18 U.S.C. § 924(c). He filed a motion to correct the sentence under 28 U.S.C. § 2255 in which he argued that after *United States v. Johnson*, 135 S.Ct. 2551 (2015), his § 924(c) conviction for brandishing a firearm during a crime of violence is longer enforceable. The district court denied his motion and the Tenth Circuit Court of Appeals affirmed that decision. Lloyd presents the following issues to this Court:

I. Is federal bank robbery in violation of 18 U.S.C. § 2113, which can be accomplished by "intimidation" or "extortion" a crime of violence as defined in the force clause of 18 U.S.C. § 924(c)(3)(A), if federal appellate courts have specifically held that intimidation can be implied and extortion can be carried out without the threat of violence?

II. What amount of force satisfies this Court's definition of "physical force", that is, force capable of causing physical pain or injury to another person as described in *Johnson v. United States*, 559 U.S. 133, 140 (2010)?

III. Did the Tenth Circuit incorrectly conclude that the element 'use of a dangerous weapon' in federal bank robbery always involves the threatened use of violent force when other circuits have found displaying, much less brandishing, a weapon is not necessary to commit the offense?

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MATTHEW LLOYD, Petitioner

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Petition for Writ of Certiorari

Matthew Lloyd petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Matthew Lloyd*, Case No. 16-2219, affirming the district court's denial of Lloyd's 28 U.S.C. § 2255 motion challenging his 18 U.S.C. § 924(c) conviction and sentence, was not published.[1] The district court's memorandum opinion denying the motion was not published.[2]

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[1] App. 1a-5a. "App." refers to the attached appendix. "Vol." refers to the record on appeal which is contained in three volumes. Lloyd refers to the documents and pleadings in those volumes as Vol. I-III followed by the page number found on the bottom right of the page (e.g. Vol. III at 89). 'PSR' refers to the presentence report found in Volume III of the record on appeal.

[2] App. 6a-17a.

Jurisdiction

On July 9, 2018, the Tenth Circuit affirmed the district court's decision to deny Lloyd's § 2255 motion challenging his 18 U.S.C. § 924(c) conviction and sentence.[3] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pertinent Constitutional and Statutory Provisions

U.S. CONSTITUTION, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 924(c)(1)(A) & § 924(c)(3)

The federal statutory provisions involved in this case are 18 U.S.C. § 924(c)(1)(A) and § 924(c)(3), which provide 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–

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

* * * * *

[3] App. 1a-5a.

(c) (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.

Statement of the Case

In the district court, Lloyd negotiated a plea agreement with the government. The agreement invoked Fed.R.Crim.P. 11(c)(1)(C): if the court adopted the imprisonment term of twenty-seven years, it was bound to impose that term. Vol. II at 15. In February 2009, pursuant to that agreement, Lloyd pleaded guilty to carjacking, two counts of armed bank robbery and using and brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 2199, 18 U.S.C. § 2113(a) and (d), and 18 U.S.C. § 924(c)(1)(A)(ii). Id. at 22. The "crime of violence" referred to in the § 924(c) charge was armed bank robbery. Id. at 10-11.

At the sentencing hearing in May 2009, the district court imposed the stipulated 27 year prison term. Id. at 37. Lloyd is currently serving that sentence.

A. 28 U.S.C. § 2255 Motion

According to 18 U.S.C. § 924(c)(1)(A)(ii), anyone who "during and in relation to any crime of violence" brandishes a firearm will be sentenced to an imprisonment term of not less than 7 years. A "crime of violence" is a felony offense that:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [the force clause], 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 [the residual clause].

18 U.S.C. § 924(c)(3).

On June 26, 2015, this Court struck down the residual clause of the Armed Career Criminal Act (ACCA) as being unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson II*). Lloyd filed a pro se motion to vacate his § 924(c) conviction and sentence. His motion was amended by counsel, in which he argued that the residual clause of § 924(c) was no longer valid after *Johnson II* and that without this clause, armed bank robbery did not qualify as a crime of violence under § 924(c). Vol. I at 6-16. The court denied Lloyd's motion. Id. at 30. It said that *Johnson II* did not invalidate § 924(c)'s residual clause. App. 10a-13a. It also recited why it believed armed bank robbery is a crime of violence as defined by § 924(c)'s force clause. App. 13a-16a.

Before deciding Lloyd's appeal, the Tenth Circuit Court of Appeals held in *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018), that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. Still, thereafter, the court affirmed Lloyd's § 924(c) conviction and sentence. It ruled that federal armed bank robbery is a crime of violence as described in § 924(c)(3)(A)'s force clause. Relying on an earlier decision and cases from other circuits, it rejected Lloyd's arguments that federal bank robbery by intimidation could be committed without any threatened use of violent physical force against another person. It said that federal bank robbery categorically is a crime of violence because when perpetrated through intimidation it "requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury". App. 4a.

The court also dismissed Lloyd's argument that when committed by extortion, bank robbery will not always involve the use or threatened use of violent physical force. It agreed that bank robbery can be perpetrated by extortion "without the threat of violence."

App. 5a. However, because Lloyd was convicted of armed bank robbery, "which involves the use of a dangerous weapon or device," the court found that "[e]mploying such a weapon or device 'necessarily threatens the use of' violent force" in every case. *Id.* (quoting *United States v. Maldonado-Palma*, 839 F.3d 1244, 1250 (10th Cir. 2016).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Tenth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

Reasons for Granting the Writ

I. This Court should hold Lloyd's petition pending its resolution of *Stokeling v. United States*.

A. Introduction

This case raises issues similar to those in *Stokeling v. United States*, *cert. granted*, 138 S.Ct. 1438 (April 2, 2018) (No. 17-5554). In *Stokeling*, this Court will decide whether a "state robbery offense that includes as an element the common law requirement of overcoming victim resistance is categorically a violent felony. . . if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance." As in *Stokeling*, this case raises the issue of whether a robbery statute has as an element the use or threatened use of "physical force" sufficient to satisfy this Court's definition of "physical force" in § 924(c)'s force clause, which this Court has described as "*violent force* – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Johnson I*) (emphasis in original). As in *Stokeling*, the circuit court here, took an expansive view of what constitutes "physical force" under *Johnson I.*

This Court's decision in *Stokeling* will necessarily resolve how much force is "physical force." Consequently, if this Court rules in Stokeling's favor, it is reasonably probable that the Tenth Circuit would be forced to reject its broad interpretation of *Johnson I* force that was the basis for its decision against Lloyd and rule that Lloyd is

entitled to relief. It would then be an appropriate use of this Court's discretion to grant certiorari, vacate the Tenth Circuit's judgment, and remand for reconsideration (GVR) in light of *Stokeling*. Accordingly, this Court should hold this petition pending resolution of *Stokeling*.

B. "Physical force" for purposes of § 924(c)(3)(A)'s force clause means violent physical force and not the mere threat of some force that might cause bodily harm.

Shorn of its unconstitutional residual clause, § 924(c) defines a "crime of violence" as a felony that "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(c)(3)(A). The issue presented here is whether federal bank robbery in violation of 18 U.S.C. § 2113(a) contains "an element of the use, attempted use, or threatened use of physical force against the person of another" so that it is a crime of violence following abrogation of the residual clause. This clause is not intended to punish non-violent offenders, because before concluding that an offense qualifies as a "crime of violence," a court must find that every person who commits the underlying offense "necessarily" used, attempted to use, or threatened to use violent physical force. *United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016); *United States v. Hood*, 774 F.3d 638, 645 (10th Cir. 2014) (reviewing ACCA's force clause in 18 U.S.C. § 924(e)(2)(B)(i)), *overruling on other grounds recognized by United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017). An analysis of armed bank robbery's elements and cases interpreting those elements demonstrate that a conviction under 18 U.S.C. § 2113(a), (d) is not a 'crime of violence,' because the range of conduct it criminalizes encompasses non-violent means.

To determine whether federal bank robbery satisfies this use of force clause, the Court must apply the categorical approach and examine only the elements of the offense, without regard to a defendant's specific conduct. *Descamps v. United States*, 570 U.S. 254, 260-61 (2013). Under that approach, only the elements matter. *Mathis v. United*

States, 136 S.Ct. 2243, 2249 (2016). And sentencing courts must presume the conviction "'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)(quoting *Johnson I*, 559 U.S. at 137) (brackets supplied in *Moncrieffe*).

In *Johnson I*, the Court explained the statutory definition of 'violent felony' gave the phrase 'physical force' its context. 559 U.S. at 140. The statute's emphasis on 'violent' led the Court to conclude that 'physical force' meant "violent force." *Id.* It also said that "violent" in § 924(e)(2)(B) "connotes a substantial degree of force." *Id.* "When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer," the Court explained. *Id.* It added that *Black's Law Dictionary*'s defined "violent felony" as "[a] crime characterized by extreme physical force." *Id.* at 140-41. And it cited to a definition of "violent" as "[c]haracterized by the exertion of great physical force or strength." *Id.* (quoting 19 *Oxford English Dictionary* 656 (2d ed. 1989).

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court again discussed the significance of characterizing a felony as 'violent.' It said that certain conduct, although forceful would not be violent: "Minor uses of force," like "pushing, grabbing, shoving, slapping and hitting" may "not constitute 'violence' in the generic sense." *Id.* at 164-66. Noting that *Johnson I* cited *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), with approval, the Court observed that it was "'hard to describe . . . as 'violence' 'a squeeze of the arm [that] causes a bruise.'" *Castleman*, 572 U.S. at 166 (quoting *Flores*, 350 F.3d at 670). Consequently, the use of 'physical force' must involve more than conduct capable of causing minor pain or injury. *See United States v. Walton*, 881 F.3d 768, 773 (9th Cir. 2018) ("mere potential for some trivial pain or slight injury will not suffice" as "physical force"). It must earn the "violent" designation.

C. A decision by this Court in favor of the petitioner in *Stokeling* will probably affect the outcome in Lloyd's case.

In *Stokeling,* this Court granted certiorari on the question "[i]s 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 Writ of Certiorari at ii, *Stokeling* (Aug. 4, 2017). Stokeling pointed out that Florida robbery can be committed by any degree of force that overcomes the victim's resistance; the amount of the force is immaterial. *Id.* at 14-19, 23-26; Reply to the Brief in Opposition at 1, *Stokeling* (Dec. 27, 2017); Petitioner's Brief at 13-14, 26-37, *Stokeling* (June 11, 2018). Stokeling noted many states have a similar robbery element and argued a decision in his case would have ramifications for the ACCA's application with respect to robbery convictions throughout the country. Petition for Writ of Certiorari at 14; Reply to the Brief in Opposition at 8-10.

Stokeling argued that the Eleventh Circuit had erroneously ruled Florida robbery has as an element the use of enough force to constitute "physical force" under *Johnson I* simply because Florida robbery requires enough force to overcome resistance. Petition for Writ of Certiorari at 11-12, 23; Reply to the Brief in Opposition 12-15; Petitioner's Brief at 32-33. During the certiorari process, the government maintained the Eleventh Circuit's decision was correct. It did not challenge Stokeling's description of Florida law. The parties disagreed about what amount of force satisfies the *Johnson I* "physical force" standard, including whether that standard is met in a purse tug-of-war or by bumping a victim. Stokeling said Florida robberies do not necessarily involve the use of *Johnson I*

force. The government disagreed. Petition for Writ of Certiorari at 24-26, *Stokeling*; United States' Brief in Opposition at 9, 12-13, *Stokeling* (Dec. 13, 2018); Petitioner's Reply to the Brief in Opposition at 2, 9-10, 14.

In Stokeling's opening brief, he suggested "physical force" is force "reasonably expected to cause pain or injury." Petitioner's Brief at 23-24, 43. Stokeling stressed the violent nature of *Johnson I*'s definition which does not include minor uses of force, as Lloyd has pointed out under Section B above. *Id.* at 3-5, 11-15, 18-21, 25-26. Stokeling criticized the government's interpretation of physical force because it unduly relied on the phrase "capable of causing physical pain." Accepting the government's view, he argued, would mean that virtually any force constitutes "physical force." *Id.* at 12, 22-25. Stokeling concluded that, since the amount of force used to commit Florida robbery is immaterial, Florida robbery is not a "violent felony" under the ACCA's force clause. *Id.* at 26-44. Stokeling pointed to several examples of Florida robberies that he contended did not involve sufficiently violent force, including robberies involving a purse tug-of-war, pushing and bumping. *Id.* at 29-31, 33-41.

Similarly, Lloyd has consistently contended that federal bank robbery, even when committed "by force and violence, or by intimidation, or by extortion" does not qualify as a crime of violence because: 1) bank robbery can be committed with *de minimis* force or no force at all; 2) the term "intimidation" does not inherently require the threatened use of physical force but simply a threat of injury; and 3) the statute does not require that any use or threatened or attempted use of force be directed against the person of another because extortion can be committed by putting another person in fear of financial or reputational loss. Like the Eleventh Circuit in Stokeling's case, the Tenth Circuit rejected Lloyd's argument by employing an expansive view of what constitutes "physical force." Relying on its decision in *United States v. Deiter*, 890 F.3d 1203, 1213 (10th Cir. 2018), the court

concluded federal bank robbery involves a threat of physical force because proof is required that the accused "must have known his actions were objectively intimidating."

The Tenth Circuit's holding implicitly concedes that sections 2113(a) and (d) do not require the intentional use or threatened use of violent physical force. An accused may be convicted of federal armed bank robbery even if he did not specifically intend to put another person in fear of injury. *United States v. Slater*, 692 F.2d 107, 109 (10th Cir. 1982); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). The accused's subjective intentions are not at issue because a jury may infer from the circumstances that his behavior was objectively intimidating. *Id.* Thus, one can be convicted of bank robbery even if he did not intend to put another in fear of injury. That lack of intent is inconsistent with the requirement of the intentional use or threatened use of violent force.

This case and Stokeling's both turn on the assessment of what amount of force satisfies the force clause in the context of a robbery offense that appellate courts have held requires the use of no more force than necessary to separate the thing of value from the victim. Thus, if this Court rules in *Stokeling* that Florida robbery does not have as an element the use of sufficient force to constitute "physical force," a good chance exists that that ruling would undermine the basis of the Tenth Circuit's decision in Lloyd's case: if only slight force to overcome resistance is not violent physical force then neither is the "objectively intimidating" behavior that establishes a federal bank robbery.

D. It is reasonably probable that the Court's resolution of *Stokeling* will impact the Tenth Circuit's decision against Lloyd.

"Where intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *see also Tyler v. Cain*, 533 U.S. 656, 666 n. 6 (2001)

(noting the *Lawrence* standard). This Court's decision in the petitioner's favor in *Stokeling* would satisfy that GVR standard. For the reasons discussed in Section C above, there would be a reasonable probability that favorable decision would call into doubt the Tenth Circuit's reliance on a broad view of what constitutes "physical force" to hold federal bank robbery is a crime of violence. Subverting that view would leave the Tenth Circuit with no choice but to grant Lloyd's § 2255 motion, vacate his § 924(c) conviction and sentence and remand for resentencing without that conviction. No procedural issues would stand in the way of that outcome.

For these reasons, this Court should hold this petition pending its resolution in *Stokeling*. If this Court rules in the petitioner's favor in *Stokeling*, this Court should grant certiorari in this case, vacate the Tenth Circuit's judgment and remand to the Tenth Circuit for reconsideration in light of the *Stokeling* decision.

II. This case presents an important question of federal law which has not been, but should be, settled by this Court, specifically, what amount of force satisfies this Court's definition of "physical force" from *Johnson I*.

A. Introduction

If the *Stokeling* decision does not justify a GVR, Lloyd asks the Court to grant certiorari in his case to answer what amount of force satisfies the Court's "physical force" definition in *Johnson I*.

B. The Tenth Circuit's decision that federal bank robbery categorically is a crime of violence is incorrect because robbery by "intimidation" may be committed without resorting to the use or threatened use of physical force.

A robbery statute that requires proof of *de minimis,* or even no physical force is not a crime of violence. Section 2113(a) does not require that any particular quantum of force be used, attempted or threatened. Categorically labeling this offense a crime of violence, as the Tenth Circuit does, when the offense involves less than the intentional use or threatened use of force violates the "bedrock principle" of *Leocal v. Ashcroft*, 543 U.S. 1

(2004): "an offense must involve the intentional use of force against the person or property," otherwise, it is not a crime of violence. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1131 (9th Cir. 2006). The Tenth Circuit overlooks cases in which convictions for violating this statute have been upheld where no force or violence was used or was even explicitly threatened. These cases demonstrate intimidation can be proven through inferences extrapolated from knowing – but not intentionally threatening – behavior.

For example, in *Slater*, 692 F.2d 107, the court affirmed a federal bank robbery conviction although the accused did use or threaten to use any physical force. There, the accused walked into a bank, went behind the counter and took money from the tellers' drawers. *Id.* at 107-08. He did not speak to or interact with anyone. He did not touch or threaten anyone. On appeal he argued without a weapon or verbal threats the government had not satisfied the intimidation element. The court disagreed. It explained that the act of entering the tellers' area was objectively "forceful and purposeful." *Id.* at 109. Even without threatening the use of violence, a jury could infer Slater "intended and relied on the surprise and fear of the bank personnel . . . to carry out the crime." *Id.* Although he did not have a weapon or intimate he may be carrying one, the Court said a jury still "could find that an expectation of injury was reasonable [in a crime] where a weapon and a willingness to use it are not uncommon." *Id.*

Yet, the Court questioned whether a jury would have viewed Slater's behavior as intimidating if it had heard an instruction on bank larceny. Perhaps all the evidence showed was that he intended to take money from the bank. It reversed Slater's conviction because a jury could have decided either way. 692 F.2d at 109. The Court's doubt confirms that intimidation was not shown by Slater's actual knowledge that his conduct was intimidating. Had it been, the trial court's error would not have been prejudicial. *Id.* *Slater* establishes that §§ 2113(a) and (d) do not require proof of the intentional use of force or intentional conduct coupled with actual knowledge that such conduct will be

perceived as intimidating. *See also United States v. Mott*, 979 F.Supp. 1293, 1296 (D.Or. 1997) (accused who passed note that said money should be put in bag on counter guilty of bank robbery by intimidation although teller described him as nice, polite and completely unthreatening); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (accused who "slammed the counter," even though "he did not possess a weapon, did not produce a demand note, did not speak to a teller, and physically took the money himself instead of requiring a bank teller to hand it over," guilty of bank robbery by intimidation); *United States v. McCarty*, 36 F.3d 1349, 1357 (5th Cir. 1994) (robbery by intimidation did not require proof of express verbal threat or threatening display of weapon, or proof of actual fear).

United States v. Ketchum, 550 F.3d 363 (4th Cir. 2008), also illustrates that federal bank robbery does not expect proof of an intentional threat or the use violent force. There the accused handed a bank teller a note that read, "These people are making me do this." *Id*. at 365. He also told the teller, "They are forcing me and have a gun. Please don't tell the cops. I must have at least $500." *Id*. Once the teller gave him the money and returned the note, the defendant left the bank without further incident. *Id*.

The court found these facts sufficient to convict, in part because "by intimidation" in § 2113(a) "is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, *whether or not the defendant actually intended the intimidation*." *Id.* at 367 (citation and quotation marks omitted; emphasis added). In *Ketchum*, the accused knew what he was saying, but whether he actually intended to threaten the teller with violence was "irrelevant." *Id.*; *accord. Foppe*, 993 F.2d at 1451 ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *Kelley*, 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."). The courts' expansive

interpretation of intimidation illustrates that the threat of violent physical force is not a requisite element of bank robbery.

Ultimately then, it is not necessary to say anything or to act threateningly to be found guilty of robbery by intimidation. *See Kelley*, 412 F.3d at 1244-45; *McCarty*, 36 F.3d at 1357. As *Slater* and *Kelley* make clear, "intimidation" does not require any actual, communicated threat of use of violent force, but merely conduct that may be perceived as potentially causing harm by a reasonable observer. That is why courts have ruled that the element of intimidation may be satisfied simply by a demand note. *See e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983); *United States v. Gilmore*, 282 F.3d 398, 402-03 (6th Cir. 2002) (intimidation satisfied by demand for money); *United States v. Mitchell*, 113 F.3d 1528, 1530-31 (10th Cir. 1997) (same); *United States v. Henson*, 945 F.2d 430, 439-40 (1st Cir. 1991) (demand for money by note was sufficient to cause fear and therefore satisfied element of intimidation). An *inherent* threat of harm as perceived by the observer is not the same as an element of use of force. *See In re Smith*, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J., dissenting). Thus, federal bank robbery can be perpetrated without any use, attempted use or explicit threatened use of force.[4]

C. Since bank robbery in § 2113(a) is not divisible, extortion is another way to commit bank robbery which also does not require the use or threatened use of violent physical force.

A single element of federal bank robbery – the second element – contains the word "force." But as explained above, that element may be completed in two other ways: "by intimidation" and "by extortion." The least culpable way of completing the second

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[4] If the statute insisted on proof that the accused intentionally intimidated someone it would say so explicitly. *See Carter v. United States*, 530 U.S. 255, 271 (2000) (examining statute's text and cautioning against speculating about what those who enacted it meant).

element appears to be "by extortion," which is accomplished with "wrongful use of actual or threatened force, violence, or fear." *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998).

Notably, wrongful "fear" need not involve fear of physical force. *United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). Indeed, extortion can be committed by putting another person in fear of financial or reputational loss. *See Bouveng v. NYG Capital LLC*, 175 F.Supp.3d 280, 320 (S.D.N.Y. Mar. 31, 2016) (extortion by threatening to initiate lawsuit); *Azzara v. United States*, 2011 WL 5025010, at *3 (S.D.N.Y. Oct. 20, 2011) (extortion by threatening to give sexually explicit videotapes to employer).[5]

Extortion, like intimidation, does not call for proof that the accused used or threatened to use violent physical force. A person may extort another without threatening physical harm. *See e.g. Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1130 (9th Cir. 2014) (alleging extortion by wrongful threats of economic harm). It also can be committed by holding a

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[5] These cases concerned convictions for Hobbs Act extortion, not § 2113(a), but Congress intended the two to be largely equivalent except in their jurisdictional elements. *See United States v. Holloway*, 309 F.3d 638, 651 (9th Cir. 2014); H.R. Rep. No. 99-797 sec. 51 (1986) (indicating that "extortionate activity involving the obtaining of [federally insured] bank monies" should be prosecuted under § 2113, while the same activity involving "the channels of interstate and foreign commerce" should be prosecuted under the Hobbs Act). Hobbs Act extortion involves "force, violence, or fear"– the same language used to define "by extortion" in § 2113(a). *See Askari*, 140 F.3d at 548 n.16 (noting that "[b]oth the Hobbs Act and 18 U.S.C. § 2113(a) punish extortion."). Hobbs Act extortion can also be committed "under color of right," but that aspect was not at issue in *Bouveng* or *Azzara*.

bank employee's family member for ransom without using or threatening force. *See United States v. Carpenter*, 611 F.2d 113, 114 (5th Cir. 1980) (affirming attempted bank robbery conviction for accused who used telephone threats to convince bank officer to leave bank's money at specified location); H.R. Rep. No. 99-797 sec. 51 (giving as an example of "extortionate conduct" the situation where "a perpetrator who, from a place outside the bank, threatens the family of a bank official in order to cause the bank official to remove money from the bank and deliver it to a specified location"). As this Court recognized, holding a person for ransom need not involve any violence whatsoever. *Torres v. Lynch*, 136 S. Ct. 1619, 1629 (2016) ("The 'crime of violence' provision [of 18 U.S.C. § 16] would not pick up demanding a ransom for kidnapping."); *see also Delgado-Hernandez v. Holder*, 697 F.3d 1127, 1130 (9th Cir. 2012) (concluding that statute prohibiting kidnapping "forcibly, or by any other means of instilling fear" does require use, attempted use, or threatened use of force). The second element of armed bank robbery is therefore not "an element [necessarily involving] the use, attempted use, or threatened use of physical force[.]" 18 U.S.C. § 924(c)(3)(A); *see Werle*, 815 F.3d at 621 (finding statute defined force more broadly than *Johnson I*'s physical force description because statute referred only to "force" and did not specify that it must be physical or capable of causing any pain or injury).

D. If this Court decides the *Stokeling* decision does not warrant a GVR, the Court should grant certiorari in this case.

This Court's grant of certiorari in *Stokeling* demonstrates the importance of the issue this case presents: how much force satisfies the *Johnson I* definition of "physical force?" With the residual clause out of the picture after *Johnson II* and the Tenth Circuit's *Salas* decision, a non-drug offense, such as robbery, is a "crime of violence" only if it has an element that fits the description in § 924(c)(3)(A)'s force clause. Consequently, after *Johnson II*, the force clause has become the principal battleground. As a result, what

constitutes "physical force" plays a critical role in statutory sentencing enhancement jurisprudence. Section 924(c)'s legislative history demonstrates that Congress intended that a particular type of offender – anyone committing a violent offense with a dangerous weapon – be given a mandatory sentence. S.Rep. No. 225, 98th Congr., 2d Sess. 312-13 (1984). Where the offense is not violent, there is "no reason to believe that Congress intended" a mandatory prison term. *Begay v. United States*, 553 U.S. 137, 146 (2008). It is crucial then that this Court define the quantum of force needed to constitute violent physical force and resolve whether the minimum conduct criminalized by the armed bank robbery statute would come within that definition.

This case provides an excellent vehicle to address the meaning of "physical force" and whether federal bank robbery has an element that fits that description. There are no procedural obstacles. If federal robbery is not a "crime of violence," then Lloyd is unquestionably entitled to the grant of his § 2255 motion and resentencing without the § 924(c) conviction.

For these reasons, should a GVR not be warranted after this Court's decision in *Stokeling*, this Court should grant *certiorari* in this case.

* * * * *

III. The Tenth Circuit has interpreted the federal bank robbery element 'use of a dangerous weapon' to mean that a weapon is always "employed" to perpetrate the offense. Furthermore, a weapon "necessarily threatens the use of violent force" and brings the offense within the force clause. This ruling creates a circuit conflict because other circuits have decided that neither a weapon nor a threat to use violent force is necessary to complete the offense.

Turning to the "armed" element of bank robbery, that element does not on its face include any reference to force or violence. It refers instead to "assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d).

Courts have construed that language so broadly that it encompasses situations where danger is posed by something other than the device or the person armed with it. In particular, danger posed by police and guards can meet this element. For instance, in *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989), the court found this element satisfied by a defendant's "'extremely light' toy gun" that he "held [] downward by his side" at all times. The court reasoned that lives were in jeopardy because the presence of the toy "creat[ed] a likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators." *Id.*

Although the "risk" of harm embodied in this element was sufficient to trigger the residual clause, it is not sufficient for the force clause. *Cf. United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) ("There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force. Only the latter falls within the ACCA's force clause. Offenses presenting only a risk of violence come within the ACCA's residual clause, [which is now void]."). This

point is illustrated by *United States v. Ray*, 21 F.3d 1134, 1141 (D.C. Cir. 1994). There, the court upheld an armed bank robbery conviction even though the evidence showed only that the accused may have possessed a weapon during the crime. There was no proof that he did and other courts relying on *Ray* have reiterated that an accused's claim that he has a dangerous device is enough proof to validate the conviction. *See United State v. Wolfe*, 245 F.3d 257, 259, 262-63 (3d Cir. 2001) (although teller did not see a weapon and there was no proof accused possessed a weapon, jury may infer he had one from comments he made during robbery); *United States v. Ferguson*, 211 F.3d 878, 883-84 (5th Cir. 2000) (using *Ray* to find that words or threats are sufficient to establish that accused possessed and used a dangerous weapon under § 2113(d)).

In *Wolfe*, the dissenting judge explained these cases illustrate a conviction under § 2113(d) will be upheld "where the only evidence of actual possession is [the accused's] threats [because] there is a strong possibility that he may have been deceiving the teller in an effort to intimidate her." *Id*. at 264-65. Beyond such minimal conduct – which involves nothing forceful at all – subsection (d)'s 'strong-arm' element requires nothing more of a bank robber. In *Johnson I*, the Court stressed that the phrase 'physical force' in the force clause "means violent force – that is, force capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140. Section 2113(d) encompasses conduct then that is outside of that defined by § 924(c)(3)(A)'s force clause: a jury would not have to find that a person used force against another, violent or not, to convict him of violating this statute.

Moreover, this Court has pointed out that the mere possibility that an accused possessed a weapon or a device is insufficient to satisfy the force clause requirements. In *Torres*, the Court, in addition to saying a demand for money would not suffice, said that felon-in-possession and similar firearm possession offenses were not sufficient either. 136 S.Ct. at 1629–1630 (section 16(a)'s force clause "would not reach

felon-in-possession laws and other firearms offenses"). Similarly, the Ninth Circuit held that being armed during an offense does not mean the accused used or threatened to use a weapon in any way. *Parnell*, 818 F.3d at 980–981. The cases interpreting § 2113(d) explain the government does not have to prove that the accused purposefully used a weapon, purposefully attempted to use it, or purposefully threatened to use it in a violently and physically forceful way because evidence that he had or was seen with a weapon is not necessary. Accordingly, subsection (d), does not aggravate a subsection (a) bank robbery in a way that matches, in every case, what § 924(c)(3)(A)'s force clause requires. In other words, because mere possession is enough to prove the accused violated § 2113(d), it is not enough to satisfy *Johnson I*'s violent force definition. Consequently, this Court should then hold that federal strongarm bank robbery is not a force clause crime of violence under § 924(c)(3)(A).

Because none of the elements of armed bank robbery require the use, attempted use, or threatened use of force, the Court should hold that this offense is not categorically a crime of violence.

CONCLUSION

Under Point I, Lloyd requests that this Court hold this petition pending *Stokeling*'s resolution, and upon that resolution, grant *certiorari* in this case, vacate the Tenth Circuit's decision, and remand for reconsideration in light of the decision in *Stokeling*. Under Point II, if a GVR is not appropriate after the decision in *Stokeling*, this Court should grant this Petition and review and reverse the Tenth Circuit's decision in Lloyd's case.

Respectfully submitted,

STEPHEN P. MCCUE
Federal Public Defender

DATED: October 4, 2018

By: *s/ Devon M. Fooks*
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Attorneys for the Petitioner
* Counsel of Record

Appendix

FILED
United States Court of Appeals
Tenth Circuit

July 9, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MATTHEW CLAYTON LLOYD, Defendant - Appellant.	No. 16-2219 (D.C. Nos. 1:16-CV-00513-JB-WPL, 1:07-CR-02238-JB-1 & 1:08-CR-03048-JB-1) (D.N.M.)

ORDER AND JUDGMENT*

Before **LUCERO**, **HARTZ**, and **MORITZ**, Circuit Judges.

Matthew Lloyd appeals the dismissal of his 28 U.S.C. § 2255 motion. Exercising jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, we affirm.

I

Lloyd pled guilty in federal court to two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a), (d); one count of carjacking in violation of 18 U.S.C. § 2119; and one count of using and brandishing a firearm during and in relation to a crime of violence

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

(armed bank robbery) in violation of 18 U.S.C. § 924(c)(1)(A). The district court imposed the 27-year sentence specified by the parties' Rule 11(c)(1)(C) plea agreement. In doing so, the court apportioned seven years to the § 924(c) count consecutive to a total of twenty years for the robbery and carjacking counts. It did not identify which clause of § 924(c) applied.[1]

In 2016, Lloyd filed a § 2255 motion to vacate his § 924(c) sentence. He argued that his sentence could not be predicated on armed bank robbery after Samuel Johnson v. United States, 135 S. Ct. 2551, 2557 (2015). The district court rejected Lloyd's argument, concluding that even if Samuel Johnson invalidated § 924(c)'s residual clause, armed bank robbery nevertheless qualifies as a crime of violence under § 924(c)'s elements clause. We granted Lloyd a certificate of appealability.

II

"We review the district court's legal rulings on a § 2255 motion de novo and its findings of fact for clear error." United States v. Harris, 844 F.3d 1260, 1263 (10th Cir. 2017), cert. denied, 138 S. Ct. 1438 (2018) (quotation and alteration omitted). Whether

[1] The term "crime of violence" is defined in two clauses of § 924(c)(3). The first clause, known as the elements clause, includes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). The second clause, known as the residual clause, includes a felony "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." § 924(c)(3)(B).

an offense constitutes a crime of violence for purposes of § 924(c) is a legal question we review de novo. United States v. Serafin, 562 F.3d 1105, 1107 (10th Cir. 2009).[2]

To determine whether a predicate crime constitutes a crime of violence, we employ the categorical approach, looking "only to the fact of conviction and the statutory definition of the prior offense" without regard to "the particular facts disclosed by the record of conviction." Serafin, 562 F.3d at 1107-08. In doing so, "we must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the [statute]." Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013) (quotation and alteration omitted).

The federal bank robbery statute provides in part:

> 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 . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.

§ 2113(a). Subsection (d) elevates simple bank robbery to armed bank robbery by proscribing "the use of a dangerous weapon or device" to "assault[ ]" or "put[ ] in

[2] Like the district court, we need not decide the extent to which Lloyd's sentence arises from his Rule 11(c)(1)(C) agreement, rather than § 924(c), given that he is not eligible for resentencing in any event. We also note that after the district court denied Lloyd's § 2255 motion and the parties completed their appellate briefing, this court held that § 924(c)'s residual clause, like the Armed Career Criminal Act's residual clause, violates due process. United States v. Salas, 889 F.3d 681, 686 (10th Cir. 2018) (citing Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018), which invalidated § 924(c)(3)(B)'s counterpart in 18 U.S.C. § 16).

jeopardy the life of any person." § 2113(d); see also United States v. Davis, 437 F.3d 989, 993 (10th Cir. 2006).

Lloyd argues that bank robbery "by intimidation" is not a crime of violence because it can be accomplished without an intentional use of force. The term "crime of violence" does not "encompass accidental or negligent conduct." Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (discussing 18 U.S.C. § 16). But "§ 2113(a) requires more than mere recklessness or negligence; it requires proof of general intent—that is, that the defendant possessed knowledge with respect to the actus reus of the crime (here, the taking of property of another by force and violence or intimidation)." United States v. Deiter, 890 F.3d 1203, 1213 (10th Cir. 2018) (quotation, alteration, citation, and emphasis omitted). And because "intimidation requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury, . . . federal bank robbery convictions categorically qualify as crimes of violence." United States v. McCranie, 889 F.3d 677, 680-81 (10th Cir. 2018) (interpreting the similarly worded elements clause of U.S.S.G. § 4B1.2(a)(1)); accord In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016) (per curiam) (applying § 924(c)(3)'s elements clause and collecting cases holding that bank robbery by force and violence or by intimidation qualifies as a crime of violence). Given that "bank robbery is a lesser-included offense of § 2113(d) armed bank robbery, armed bank robbery is also a crime of violence" within the meaning of § 924(c)(3)'s elements clause. United States v. McNeal, 818 F.3d 141, 157 (4th Cir. 2016); accord United States v. Watson, 881 F.3d 782, 786 (9th Cir. 2018) (per curiam) ("Because bank robbery 'by

force and violence, or by intimidation' is a crime of violence, so too is armed bank robbery.").

Lloyd further argues that because bank robbery can be committed "by extortion," the crime does not necessarily involve the use of physical force. See Curtis Johnson v. United States, 559 U.S. 133, 140 (2010) (stating 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");[3] United States v. Valdez, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (stating that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). But Lloyd was convicted of armed bank robbery, which involves the use of a dangerous weapon or device to either assault a person or jeopardize his life. § 2113(d). Employing such a weapon or device "necessarily threatens the use of" violent force. United States v. Maldonado-Palma, 839 F.3d 1244, 1250 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017).

III

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

[3] In United States v. Melgar-Cabrera, No. 16-2018, 2018 WL 2749713, at *8 (10th Cir. June 8, 2018), this court held that Curtis Johnson's definition of "physical force" as "violent force" applies to § 924(c)(3)(A).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MATTHEW CLAYTON LLOYD,

Movant,

vs.

Nos. CIV 16-0513 JB/WPL
CR 07-2238 JB
CR 08-3048 JB

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court, under rule 4(b) of the Rules Governing Section 2255 Proceedings, on the Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 31, 2016 (CIV 16-0513 JB/WPL, Doc. 1; CR 07-2238 JB, Doc. 52; CR 08-3048 JB, Doc. 9), as amended by the Amended Motion to Vacate and Correct Sentence Pursuant to 28 U.S.C. § 2255, filed June 24, 2016 (CIV 16-0513 JB/WPL, Doc. 3; CR 07-2238 JB, Doc. 55; CR 08-3048 JB, Doc. 12)("Amended Motion"). Movant Matthew Clayton Lloyd seeks to vacate and correct his sentence under Johnson v. United States, 578 U.S. ___, 135 S. Ct. 2551 (2015)("Johnson"). The Court determines that Lloyd is not eligible for relief under Johnson and will dismiss the Motion.

FACTUAL AND LEGAL BACKGROUND

Lloyd was indicted on November 6, 2007 for Armed Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and 2113(d). See Indictment, filed November 6, 2007 (CR 07-2238 JB, Doc. 4). The Indictment states:

> On or about September 6, 2007, in Bernalillo County in the State and District of New Mexico, the defendant, Matthew Clayton Lloyd, by force and violence, and

> by intimidation, did unlawfully and intentionally take and attempt to take from the person and presence of another a sum of money belonging to and in the care, custody, control, management and possession of the Bank of America, . . . and in committing such offense, did assault and put in jeopardy the life of another person by use of a dangerous weapon and device, namely, a handgun.

Indictment at 1. By a Superseding Indictment, on March 25, 2008, Lloyd was charged, in addition to the Armed Bank Robbery, with Carjacking in violation of 18 U.S.C. § 2119 and two counts of Use and Discharge of a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (ii). See Superseding Indictment at 1-3, filed March 25, 2008 (CR 07-2238 JB, Doc. 8).

On November 20, 2008, Lloyd was indicted in the District of Colorado for Armed Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d). See Indictment at 1, dated November 20, 2008, filed December 30, 2008 (CR 08-3048 JB, Doc. 1)("Colorado Indictment"). The Colorado Indictment charged:

> On or about September 5, 2007, in the State and District of Colorado, Matthew Clayton Lloyd, defendant herein, did, by force and violence and by intimidation, attempt to take from the person and presence of another . . . money and other things of value belonging to and in the care, custody, control, management and possession of Washington Mutual Bank . . . and in the commission of said offense did assault and put in jeopardy the lives of . . . employees of Washington Mutual Bank and others, by the use of a dangerous weapon, to wit: a handgun . . . .

Colorado Indictment at 1. That criminal case was transferred to the United States District Court for the District of New Mexico and, on February 5, 2009, Lloyd entered into a Plea Agreement under rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure in which he pled guilty to the two counts of Armed Bank Robbery, the Carjacking charge, and one count of Use and Discharge of a Firearm During and in Relation to a Crime of Violence. See Plea Agreement at 1-2, filed February 5, 2009 (CR 07-2238 JB, Doc. 38; CR 08-3048 JB, Doc. 4). Lloyd was then sentenced to a term of imprisonment of twenty-seven years under the rule 11(c)(1)(C) Plea Agreement. See

Judgment, filed October 6, 2009 (CR 07-2238 JB, Doc. 46; CR 08-3048 JB, Doc. 7)("Sentence").

Lloyd filed a pro se Motion under 28 U.S.C. § 2255 on May 31, 2016. See Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 31, 2016 (CIV 16-0513 JB/WPL, Doc. 1; CR 07-2238 JB, Doc. 52; CR 08-3048 JB, Doc. 9)("Motion"). Lloyd's pro se Motion contends that, in light of Johnson, his Carjacking and Armed Bank Robbery offenses do not qualify as "crime[s] of violence," and could not be used to enhance his sentence. Motion at 5.

Lloyd filed a counseled Amended Motion under § 2255 on June 24, 2016. See Amended Motion to Vacate and Correct Sentence Pursuant to 28 U.S.C. § 2255, filed June 24, 2016 (CIV 16-0513 JB/WPL, Doc. 3; CR 07-2238 JB, Doc. 55; CR 08-3048 JB, Doc. 12)("Amended Motion"). The Amended Motion abandons the claim that Carjacking is not a proper predicate offense, but continues to argue that Armed Bank Robbery does not qualify as a crime of violence after Johnson. See Amended Motion at 1-13.

APPLICABLE LAW ON JOHNSON V. UNITED STATES AND SECTION 2255 COLLATERAL REVIEW

Lloyd seeks collateral review of his sentences in CR 07-2238 and CR 08-3048 under 28 U.S.C. § 2255. Section 2255 provides:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. § 2255(a). Because Lloyd seeks collateral review more than a year after his sentences became final, he relies on a right that the Supreme Court of the United States recognized in

Johnson and made retroactively applicable to cases on collateral review in Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2016)("Welch"). See 28 U.S.C. § 2255(f)(3).

In Johnson, the Supreme Court held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), is impermissibly vague and that imposing an increased sentence under the residual clause of 18 U.S.C. § 924(e)(2)(B) violates the Constitution's guarantee of due process. 135 S. Ct. at 2562-63. Under the ACCA, 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." 18 U.S.C. § 924 (e)(2)(B). The Act defines "violent felony" to mean:

> "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 the 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)(B) (emphasis added). The Supreme Court struck down the underlined residual clause language of § 924(e)(2)(B)(ii) as unconstitutionally vague. See Johnson, 135 S. Ct. at 2555-63. Section 924(e)(2)(B)(i), which defines "violent felony" to mean a crime that "has as an element the use, attempted use, or threatened use of physical force," is commonly referred to as the "element" or "force" clause. The "enumerated" clause is the language of § 924(e)(2)(B)(ii) that lists the crimes of burglary, arson, extortion, or the use of explosives as violent felonies. The Supreme Court expressly stated that its holding with respect to the residual clause does not call into question the ACCA's application to the four enumerated offenses or to the remainder of the definition of a violent felony in § 924(e)(2)(B). See 135 S. Ct. at 2563.

Johnson therefore has no application to sentences enhanced under § 924(e)(2)(B)(i)'s force or element clause or § 924(e)(2)(B)(ii)'s enumerated clause.

ANALYSIS

The Court concludes that Lloyd is ineligible for Johnson relief for two reasons. First, Johnson did not clearly invalidate § 924(c)'s residual clause. Second, armed bank robbery is a crime of violence under § 924(c)'s force or element clause.

I. JOHNSON DOES NOT CLEARLY INVALIDATE § 924(c)'S RESIDUAL CLAUSE.

Lloyd's sentence was not enhanced under the ACCA's § 924(e)(2)(B). Instead, Lloyd argues that the Johnson ruling should be applied to § 924(c)'s residual clause. The Supreme Court has not decided whether Johnson applies to invalidate § 924(c)'s residual clause. In Johnson, the Supreme Court indicated that its ruling did not place the language of statutory provisions like the § 924(c)(3)(B) residual clause in constitutional doubt. See 135 S. Ct. at 2561. The lower courts have divided on how the Johnson ruling applies to § 924(c) and similar provisions. See United States v. Taylor, 814 F.3d 340, 375-79 (4th Cir. 2016)(declining to find § 924(c) void for vagueness); United States v. Vivas-Ceja, 808 F.3d 719, 723 (7th Cir. 2015)(finding language similar to § 924(c) void for vagueness); Dimaya v. Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015)(holding similar language in the Immigration and Nationality Act void); In re Smith, ___ F.3d ___, 2016 WL 3895243 at **2-3 (11th Cir. 2016)(noting the issue, but not deciding it in the context of an application for permission to file a second or successive § 2255 motion).

Courts have cited several grounds that distinguish the ACCA's § 924(e)(2)(B) residual clause from § 924(c)(3)(B). First, § 924(c)(3)(B)'s statutory language more narrowly defines "crime of violence" based on physical force rather than on physical injury. While the ACCA

residual clause requires conduct "that presents a serious potential risk of physical injury to another," § 924(c)(3)(B) requires the 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)(B) (emphasis added). By requiring that the risk of physical force arise "in the course of" committing the offense, § 924(c)(3)(B)'s language mandates that the person who may potentially use physical force be the charged offender. See United States v. Taylor, 814 F.3d at 376-77.

Moreover, § 924(c)(3)(B), unlike § 924(e)(2)(B), requires that the felony be one which "by its nature" involves the risk that the offender will use physical force. In Johnson, the Supreme Court was concerned with the wide judicial latitude that the ACCA's residual clause language permitted, which did not limit a court's inquiry to the crime's elements. See 135 S. Ct. at 2557. Section 924(c)(3)(B), by contrast, does not allow a court to consider risk-related conduct beyond the elements of the predicate crime. The phrase "by its nature" restrains the court's analysis to the risk of force in the offense itself. United States v. Amos, 501 F.3d 524, 527 (6th Cir. 2007). See United States v. Stout, 706 F.3d 704, 706 (6th Cir. 2013); United States v. Serafin, 562 F.3d 1105, 1109, 1114 (10th Cir. 2009); Leocal v. Ashcroft, 543 U.S. 1, 10 (2004)(construing 18 U.S.C. § 16(b)).

Second, the Johnson Court was concerned that the ACCA's enumerated crimes, when paired with the residual clause, cause confusion and vagueness in the residual clause's application. See 135 S. Ct. at 2561. The lower courts have noted no similar concerns with § 924(c)(3)(B). The ACCA links the residual clause by the word "otherwise" to the four enumerated crimes. See Johnson, 135 S. Ct. at 2558. The Supreme Court explained in Johnson that, by using the word "otherwise," "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes -- burglary, arson, extortion, and crimes

involving the use of explosives." 135 S. Ct. at 2558. Gauging the level of risk required was difficult because the four listed crimes "are 'far from clear in respect to the degree of risk each poses.'" 135 S. Ct. at 2558 (quoting Begay v. United States, 553 U.S. 137, 143, (2008)). Unlike the ACCA, § 924(c)(3)(B) does not link its "substantial risk" standard "to a confusing list of examples." Johnson, 135 S. Ct. at 2561.

The Johnson Court addressed the fact that the ACCA residual clause requires the application of a categorical approach to analysis of the predicate crime. See Johnson, 135 S. Ct. at 2557-58. The Supreme Court refrained from invalidating the categorical analysis. See 135 S. Ct. at 2561-62. Instead, the Supreme Court stated that the ordinary case analysis and the level-of-risk requirement "conspire[d] to make [the statute] unconstitutionally vague," and determined that the concern with the ACCA residual clause was that it combined an overbroad version of the categorical approach with other vague elements. 135 S. Ct. at 2557. Statutes like § 924(c)(3)(B)'s residual clause do not raise the same analytical concerns when combined with the categorical approach. See 135 S. Ct. at 2561.

Third, the Supreme Court reached its void-for-vagueness conclusion only after deciding a number of cases calling for the clause's interpretation. See, e.g., James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008); Chambers v. United States, 555 U.S. 122 (2009); Sykes v. United States, 564 U.S. 1 (2011). In Johnson, the Supreme Court recognized its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause." 135 S. Ct. at 2558. In the nine years preceding Johnson, the Supreme Court applied four different analyses to the residual clause. See 135 S. Ct. at 2558-59. These inconsistent decisions led to "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." 135 S. Ct. at 2560.

By contrast, the Supreme Court has not been called on multiple occasions to articulate a standard applicable to the § 924(c)(3)(B) analysis.

While the Supreme Court and the United States Court of Appeals for the Tenth Circuit have not decided the issue, the Court determines that Johnson's reasoning should not extend to § 924(c)(3)(B)'s residual clause. As set out below, however, even if Johnson was extended to § 924(c), Lloyd's predicate Armed Bank Robbery crimes come within the force or element clause, not the residual clause, and he is not eligible for resentencing.[1]

II. ARMED BANK ROBBERY IS A CRIME OF VIOLENCE UNDER THE "FORCE" OR "ELEMENT" CLAUSE OF § 924(c).

Under 18 U.S.C. § 924(c)(1)(A), a defendant who "uses or carries" a firearm "during and in relation to any crime of violence" faces a five-year mandatory minimum sentence, to run consecutively to any sentence for the underlying offense. See United States v. Johnson, 32 F.3d 82, 85 (4th Cir. 1994). If, during the commission of the crime of violence, "the firearm is brandished," the mandatory minimum sentence increases to seven years. 18 U.S.C. § 924(c)(1)(A)(ii). Section 924(c) defines "crime of violence" to mean:

> [A]n offense that is a felony and --
>
> > (A) has as an element the 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). Lloyd contends that his Armed Bank Robbery convictions do not qualify as crimes of violence under § 924(c)(3)(A)'s "force" or "element" clause and, therefore, must

[1]There is also a question whether, in light of his 11(c)(1)(C) Plea Agreement to a specified term of imprisonment, Lloyd was sentenced under § 924(c). Because the Court concludes that Lloyd would not be eligible for resentencing even if he was sentenced under § 924(c), the Court does not reach the 11(c)(1)(C) issue.

come within § 924(c)(3)(B)'s presumably invalid residual clause. Contrary to Lloyd's argument, the Armed Bank Robbery crimes charged against Lloyd have as an element the use, or threatened use of physical force against the person or property of another, and support enhancement of his sentence under § 924(c) without resort to the residual clause language.

To determine whether a prior conviction constitutes a crime of violence under the force or element clause, the Supreme Court employs a categorical approach. See United States v. Perez-Jiminez, 654 F.3d 1136, 1140 (10th Cir. 2011). The Supreme Court looks only to the fact of conviction and the statutory definition of the prior offense, and does not generally consider the particular facts that the record of conviction discloses. See United States v. Wray, 776 F.3d 1182, 1185 (10th Cir. 2015). Where a statute defines multiple crimes by listing alternative elements, the Supreme Court uses a modified categorical approach, which permits it to look at the charging documents to determine the elements under which the defendant was charged and convicted. See Mathis v. United States, ___ U.S. ___, 136 S. Ct. 2243, 2248-49 (2016).

Armed bank robbery under 18 U.S.C. § 2113(d) has four elements: (i) the defendant took, or attempted to take, money belonging to, or in the custody, care, or possession of, a bank, credit union, or saving and loan association; (ii) the money was taken "by force and violence, or by intimidation"; (iii) the institution's deposits were federally insured; and (iv) in committing or attempting to commit the offense, the defendant assaulted any person, or put in jeopardy the life of any person, by the use of a dangerous weapon or device. See United States v. Davis, 437 F.3d 989, 993 (10th Cir. 2006). The first three elements of armed bank robbery are drawn from § 2113(a) and define the lesser-included offense of bank robbery. The fourth element is drawn from § 2113(d). The Court focuses on the second element: that the money was taken from the bank "by force and violence, or by intimidation." 18 U.S.C. § 2113(a).

The Courts of Appeals have uniformly ruled that federal crimes involving takings "by force and violence, or by intimidation," have as an element the use, attempted use, or threatened use of physical force. In United States v. Boman, 810 F.3d 534 (8th Cir. 2016) the United States Court of Appeals for the Eighth Circuit held that robbery in the special maritime and territorial jurisdiction of the United States under 18 U.S.C. § 2111 satisfies the ACCA's similar force clause, because it requires a taking "by force and violence, or by intimidation." United States v. Boman, 810 F.3d at 542-43. The United States Courts of Appeals for the Second and Eleventh Circuits reached the same conclusion with respect to the carjacking statute, 18 U.S.C. § 2119. See United States v. Moore, 43 F.3d 568, 572-73 (11th Cir. 1994); United States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994). The United States Court of Appeals for the Fourth Circuit expressly stated in United States v. Adkins, 937 F.2d 947 (4th Cir. 1991), that "armed bank robbery is unquestionably a crime of violence, because it 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" 937 F.2d at 950 n.2 (quoting 18 U.S.C. § 924(c)(3)(A)). The Courts of Appeals have also consistently determined that a § 2113(a) bank robbery is a crime of violence under the force clause of Guidelines § 4B1.2, which contains force clause language nearly identical to the § 924(c)(3) force clause. See Johnson v. United States, 779 F.3d 125, 128–29 (2d Cir. 2015); United States v. Davis, 915 F.2d 132, 133 (4th Cir. 1990); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989); United States v. Jones, 932 F.2d 624, 625 (7th Cir. 1991); United States v. Wright, 957 F.2d 520, 521 (8th Cir. 1992); United States v. Selfa, 918 F.2d 749, 751 (9th Cir. 1990). A taking "by force and violence" entails the use of physical force.

Likewise, a taking by intimidation involves the threat to use such force. See United States v. Jones, 932 F.2d at 625 ("Intimidation means the threat of force[.]"); United States v.

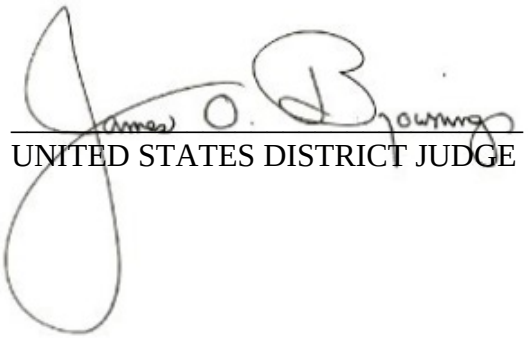
Selfa, 918 F.2d at 751 (explaining that the intimidation element of § 2113(a) meets the Guidelines § 4B1.2(1) requirement of a threatened use of physical force). Bank robbery under § 2113(a), "by force and violence," requires the use of physical force. Bank robbery under § 2113(a), "by intimidation," requires the threatened use of physical force. Either of those alternatives includes an element that is "the use, attempted use, or threatened use of physical force," and thus bank robbery under § 2113(a) constitutes a crime of violence under § 924(c)(3)'s force clause. See United States v. Gilmore, 282 F.3d 398, 402 (6th Cir. 2002).

Moreover, Lloyd was charged with and pled guilty to armed bank robbery by force and violence, and by intimidation. See Sentence at 1. He was thus charged with and convicted of robbery by force as well as robbery by intimidation. Regardless whether "intimidation" has as an element the threatened use of physical force, Lloyd was convicted of crimes that include an element that is the use, attempted use, or threatened use of physical force. Mathis v. United States, 136 S. Ct. at 2248-49. Lloyd's sentence was properly enhanced under § 924(c)(3)(A)'s force clause and without resort to § 924(c)(3)(B)'s residual clause. He is not entitled to relief, and the Court will dismiss his Motion under rule 4(b) of the Rules Governing Section 2255 Proceedings.

Under 28 U.S.C. § 2253(c)(1) and (3), the Court determines that Lloyd has not made a substantial showing of denial of a constitutional right. The Court will, therefore, not grant a certificate of appealability. See rule 11(a) of the Rules Governing Section 2255 Proceedings.

IT IS ORDERED that: (i) the Movant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed May 31, 2016 (CIV 16-0513 JB/WPL, Doc. 1; CR 07-2238 JB, Doc. 52; CR 08-3048 JB, Doc. 9), as amended by the Amended Motion to Vacate and Correct Sentence Pursuant to 28 U.S.C. § 2255, filed June 24,

2016 (CIV 16-0513 JB/WPL, Doc. 3; CR 07-2238 JB, Doc. 55; CR 08-3048 JB, Doc. 12)("Amended Motion"), is dismissed under rule 4(b) of the Rules Governing Section 2255 Proceedings; and (ii) a Certificate of Appealability is denied under rule 11(a) of the Rules Governing Section 2255 Proceedings.



UNITED STATES DISTRICT JUDGE

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No. _____

In the

Supreme Court of the United States

MATTHEW LLOYD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Certificate of Service

I, Devon M. Fooks, hereby certify that on October 4, 2018, a copy of the petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614,

950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

STEPHEN P. MCCUE
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DATED: October 4, 2018

s/ Devon M. Fooks

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