No. 18-6269

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW CLAYTON LLOYD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), qualifies as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 741 Fed. Appx. 570. The opinion of the district court (Pet. App. 6a-17a) is not published in the Federal Supplement but is available at 2016 WL 5387665.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2018. The petition for a writ of certiorari was filed on October 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted on one count of carjacking, in violation of 18 U.S.C. 2119; two counts of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and one count of using and brandishing 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). 08-cr-3048 Judgment 1-2. He was sentenced to 324 months of imprisonment, to be followed by five years of supervised release. 08-cr-3048 Judgment 3, 5. Petitioner did not appeal his conviction or sentence. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 2a. The district court dismissed petitioner's motion and denied his request for a certificate of appealability (COA). Id. at 6a-17a. The court of appeals granted a COA and then affirmed the dismissal of petitioner's motion. Id. at 1a-5a.

1. On August 24, 2007, petitioner stole a car from a Jaguar dealership in Albuquerque, New Mexico. Presentence Investigation Report (PSR) ¶¶ 8-9. After entering the car with a salesperson at the dealership, petitioner lifted his shirt and displayed a firearm. PSR ¶ 9. When the salesperson ran away, petitioner drove off in the car. Ibid.

Less than two weeks after the carjacking, petitioner attempted to rob a branch of the Washington Mutual Bank in Commerce

City, Colorado. PSR ¶ 10. Displaying a gun, petitioner said to the teller, "Give me all the money. I'm not even playing." Ibid. The bank branch operated, however, so that tellers had no cash at their stations. Ibid. When the teller's supervisor pushed a silent alarm button, petitioner fired a single gunshot into the ground and fled the bank without taking any money. Ibid.

The next day, petitioner robbed a branch of the Bank of America in Albuquerque. PSR ¶ 11. He displayed a firearm and demanded money from the teller. Ibid. After the teller complied, petitioner took more than $7000 and left in the stolen Jaguar. Ibid.

A federal grand jury in the District of New Mexico indicted petitioner on one count of carjacking, in violation of 18 U.S.C. 2119; one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); two counts of using and brandishing 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); and one count of unlawfully transporting in interstate commerce a stolen motor vehicle, in violation of 18 U.S.C. 2312. 07-cr-2238 Superseding Indictment 1-3. A federal grand jury in the District of Colorado indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). 08-cr-501 Indictment 1-2.

After the Colorado case was transferred to the District of New Mexico, petitioner entered into a written plea agreement

pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), in which he agreed to plead guilty to carjacking, the two armed bank robberies, and using and discharging a firearm during and in relation to the New Mexico armed bank robbery. 08-cr-3048 Plea Agreement ¶ 3 (D.N.M.). In exchange, the government agreed to move to dismiss the remaining charges. Id. ¶ 17. Petitioner and the government also agreed that a sentence of 324 months of imprisonment would be "appropriate." Id. ¶ 5 (emphasis omitted); see id. ¶ 10.

The district court accepted the plea agreement and sentenced petitioner, in accordance with the agreement, to a total term of 324 months of imprisonment, which reflected a sentence of 180 months on the carjacking count and 240 months on each of the two armed robbery counts, with the terms to run concurrently, and a consecutive sentence of 84 months on the Section 924(c) count. 08-cr-3048 Judgment 3. Petitioner did not appeal.

2. In 2016, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. 08-cr-3048 D. Ct. Doc. 9 (June 1, 2016); 08-cr-3048 D. Ct. Doc. 12 (June 24, 2016). Petitioner argued, as relevant here, that his conviction and sentence on the Section 924(c) count were invalid because armed bank robbery does not qualify as a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3). 08-cr-3048 D. Ct. Doc. 12, at 1. Section 924(c)(3) defines a "crime of violence" as a felony that either "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), or "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)(B). Petitioner argued that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), is void for vagueness. 08-cr-3048 D. Ct. Doc. 12, at 3-13.

The district court dismissed petitioner's motion and denied his request for a COA. Pet. App. 6a-17a. The court determined that, even if Section 924(c)(3)(B) is unconstitutionally vague, armed bank robbery nevertheless qualifies as a crime of violence under Section 924(c)(3)(A). Id. at 13a-16a.

3. The court of appeals granted a COA and then affirmed the district court's dismissal of petitioner's motion. Pet. App. 1a-5a. Petitioner argued on appeal that armed bank robbery does not qualify as a crime of violence under Section 924(c)(3)(A) because the offense can be accomplished by nonviolent "intimidation." Id. at 4a. The court of appeals rejected petitioner's argument, noting that the court had previously

determined that federal bank robbery by force, violence, or intimidation categorically qualifies as a "crime of violence" under Section 924(c)(3)(A), because "'intimidation requires a purposeful act that instills objectively reasonable fear (or expectation) of force or bodily injury.'" Ibid. (quoting United States v. McCranie, 889 F.3d 677, 680 (10th Cir.), petition for cert. pending, No. 18-6257 (filed Oct. 1, 2018); and citing United States v. Deiter, 890 F.3d 1203, 1213 (10th Cir.), cert. denied, No. 18-6424 (Dec. 10, 2018)). The court explained that, because bank robbery is a lesser-included offense of armed bank robbery, armed bank robbery necessarily is also a crime of violence within the meaning of Section 924(c)(3)(A). Id. at 4a-5a.

The court of appeals also rejected petitioner's argument that bank robbery does not necessarily involve the use of physical force because it can be committed "by extortion." Pet. App. 5a. The court explained that armed bank robbery "involves the use of a dangerous weapon or device to either assault a person or jeopardize his life," ibid. (citing 18 U.S.C. 2113(d)), and that "[e]mploying such a weapon or device 'necessarily threatens the use of' violent force," ibid. (quoting United States v. Maldonado-Palma, 839 F.3d 1244, 1250 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017)).

ARGUMENT

Petitioner contends (Pet. 6-20) that armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), does not qualify as a

"crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A) because it does not have as an element the use, attempted use, or threatened use of "physical force" as this Court defined that term in Curtis Johnson v. United States, 559 U.S. 133 (2010). The court of appeals' decision is correct and in agreement with every other court of appeals to address the issue. This Court has recently and repeatedly denied review of petitions for a writ of certiorari raising the same question as this one, as well as petitions raising related questions under similarly worded federal statutes or the Sentencing Guidelines. See, e.g., Perry v. United States, 138 S. Ct. 1439 (2018) (No. 17-6611) (armed bank robbery); Stephens v. United States, 138 S. Ct. 502 (2017) (No. 17-5186) (same); Schneider v. United States, 138 S. Ct. 638 (2018) (No. 17-5477) (bank robbery); Castillo v. United States, 138 S. Ct. 638 (2018) (No. 17-5471) (same). The Court should follow the same course here. Contrary to petitioner's contention, no reason exists to hold this petition pending this Court's decision in Stokeling v. United States, No. 17-5554 (argued Oct. 9, 2018), which will not affect the outcome of this case. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that federal bank robbery is a "crime of violence" within the meaning of 18 U.S.C. 924(c)(3)(A) because it "has as an element the use,

attempted use, or threatened use of physical force against the person or property of another."

a. Petitioner's conviction for armed bank robbery required proof (or admissions) that he (1) took or attempted to take money from the custody or control of a bank "by force and violence, or by intimidation," 18 U.S.C. 2113(a); and (2) either committed an "assault[ ]" or endangered "the life of any person by the use of a dangerous weapon or device" while committing the robbery, 18 U.S.C. 2113(d). Every court of appeals to consider whether the federal offenses of bank robbery or armed bank robbery qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions has determined that they do. See, e.g., United States v. McCranie, 889 F.3d 677, 679-681 (10th Cir.), petition for cert. pending, No. 18-6257 (filed Oct. 1, 2018); United States v. Ellison, 866 F.3d 32, 35-39 (1st Cir. 2017); United States v. Williams, 864 F.3d 826, 830 (7th Cir.), cert. denied, 138 S. Ct. 272 (2017); United States v. Jones, 854 F.3d 737, 740 & n.2 (5th Cir.), cert. denied, 138 S. Ct. 242 (2017); Holder v. United States, 836 F.3d 891, 892 (8th Cir. 2016) (per curiam); In re Sams, 830 F.3d 1234, 1239 (11th Cir. 2016); Johnson v. United States, 779 F.3d 125, 128-129 (2d Cir.), cert. denied, 136 S. Ct. 209 (2015); United States v. Wright, 215 F.3d 1020, 1028 (9th Cir.), cert. denied, 531 U.S. 969 (2000); Royal v. Tombone, 141 F.3d 596, 602 (5th Cir. 1998); see generally United States v. McNeal,

818 F.3d 141, 153 (4th Cir.) ("Our sister circuits have uniformly ruled that other 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."), cert. denied, 137 S. Ct. 164 (2016).

b. Petitioner contends (Pet. 11-14) that armed bank robbery is not a crime of violence under 18 U.S.C. 924(c)(3)(A) because it can be accomplished by nonviolent "intimidation," which in his view includes nonviolent and unintentional conduct. The courts of appeals, however, have uniformly rejected the view that "intimidation" does not require a threat of the use of force. See, e.g., United States v. Armour, 840 F.3d 904, 909 (7th Cir. 2016) ("A bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force * * * because bank robbery under [Section] 2113(a) inherently contains a threat of violent physical force."); United States v. McBride, 826 F.3d 293, 296 (6th Cir. 2016) (same), cert. denied, 137 S. Ct. 830 (2017); McNeal, 818 F.3d at 154 (same); United States v. Selfa, 918 F.2d 749, 751 (9th Cir.) (same), cert. denied, 498 U.S. 986 (1990); United States v. Ferreira, 821 F.2d 1, 6 n.8 (1st Cir. 1987) (same); see also Pet. App. 5a.

Petitioner's focus on the mens rea accompanying a threatened use of force in a bank robbery is similarly misplaced. As this Court has explained, Section 2113(a) "requir[es] 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)." Carter v. United States, 530 U.S. 255, 268 (2000). That general intent requirement "suffices to separate wrongful from 'otherwise innocent' conduct." Id. at 269. In other words, "[t]he defendant must at least know that his actions would create the impression in an ordinary person that resistance would be met by force." McBride, 826 F.3d at 296.

Petitioner's argument that knowingly threatening another person with physical force does not qualify as a crime of violence is inconsistent with this Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016), which held that the similarly worded term "use * * * of physical force" in 18 U.S.C. 921(a)(33)(A) includes intentional, knowing, and even reckless conduct. 136 S. Ct. at 2279. The Court explained that "the word 'use' does not demand that [a] person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." Ibid.; see ibid. (concluding that "use of physical force" "is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct") (internal quotation marks omitted). The knowledge requirement for bank robbery ensures, at

a minimum, that a defendant knew his victims would interpret his words and actions as threats to injure or kill them if they did not comply with his demands for money. The offense thus necessarily involves the threatened use of physical force.

Moreover, petitioner's arguments disregard that he was convicted of armed bank robbery, which entails "assault[ing]" or "putting in jeopardy the life of" another person "by the use of a dangerous weapon or device." 18 U.S.C. 2113(d). Petitioner does not explain how "intimidation" under such circumstances would fail to constitute the "threatened use of force against the person or property of another," 18 U.S.C. 924(c)(3)(A).

c. Petitioner separately contends (Pet. 14-16) that his bank robbery offense cannot qualify as a "crime of violence" because 18 U.S.C. 2113(a) also prohibits "obtain[ing] or attempt[ing] to obtain" bank property "by extortion." In his view, "obtain[ing] by extortion" and "taking" by "force and violence or by intimidation" are alternative means of committing a single indivisible crime rather than two separate crimes and a court must consider nonviolent extortion in applying Section 924(c)(3)(A) to his bank robbery offense. Petitioner's argument lacks merit.

As a threshold matter, as the court of appeals recognized, petitioner's argument cannot be squared with his conviction for armed bank robbery. Because that conviction required proof that he, in the course of the robbery, "assault[ed] any person, or

put[ ] in jeopardy the life of any person by the use of a dangerous weapon or device," 18 U.S.C. 2113(d), petitioner's offense necessarily required a threat of the use of violent, physical force. See United States v. Maldonado-Palma, 839 F.3d 1244, 1250 (10th Cir. 2016), cert. denied, 137 S. Ct. 1214 (2017). Petitioner does not identify any court of appeals that has disagreed or found it possible to commit armed bank robbery "by extortion" without threatening physical force.[1]

In any event, even outside the context of armed bank robbery, Section 2113(a) defines two different crimes against banks: one requires the offender to commit robbery by using "force and violence" or "intimidation" to "take[ ]" money from a "person," while the other requires the offender to "obtain[ ]" money "by extortion." 18 U.S.C. 2113(a). Those alternatives, like the separate robbery and extortion offenses in the Hobbs Act, see 18 U.S.C. 1951(b)(1) and (2), are best understood as separate crimes with different elements, notably the presence or absence of consent. See Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016) (noting that consent is what "distinguish[es]" extortion from robbery).

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[1] Petitioner cites (Pet. 18-19) a small number of cases holding that defendants can be convicted of armed bank robbery based on possession of a toy gun or statements that the defendant had a gun. Those cases, however, involved a threat of physical force, even if the defendant would not have followed through on the threat.

Petitioner was charged with and pleaded guilty to violating Section 2113(a) "by force and violence and by intimidation" -- not by extortion. Pet. App. 6a-7a (quoting 07-cr-2238 Indictment 1 (D.N.M.); 08-cr-501 Indictment 1 (D. Colo.)); cf. Mathis v. United States, 136 S. Ct. 2243, 2257 (2016) ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime."). Thus, even assuming that "extortion" in this context may include threats of economic or reputational harm, cf. Pet. 15-16, that would not be relevant to the particular crime petitioner committed. And petitioner identifies no court of appeals that has adopted his view that the relevant portions of Section 2113(a) are indivisible and categorically overbroad.

2. Petitioner errs in suggesting (Pet. 5-11) that his petition for a writ of certiorari should be held pending this Court's decision in Stokeling, supra. The question in Stokeling is whether a state-law robbery statute requiring force sufficient to overcome the victim's resistance contains as an element the type of violent "force" referred to in the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). See Pet. ii, Stokeling, supra (No. 17-5554). Even assuming the requisite amount of "force" is the same under Section 924(c)(3)(A) as under the ACCA, the resolution of the question in Stokeling will not affect this case

because the Court in Stokeling will not address the type of force at issue in federal bank robbery. Unlike the Florida robbery statute at issue in Stokeling, which is derived from the common law, this Court has declined to impute the common-law meaning of robbery into the federal bank robbery statute. See Carter, 530 U.S. at 264-267.[2]

Furthermore, unlike the robbery offense at issue in Stokeling, the offense here involved an armed bank robbery. As mentioned above, that aggravated form of federal robbery requires that the defendant, in committing or attempting to commit the offense, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. 2113(d). Thus, regardless of whether force sufficient to overcome resistance by a victim -- of the sort at issue in Stokeling -- would in itself be sufficient, armed bank robbery qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A) because the defendant's use of a deadly weapon in committing the crime eliminates any possible doubt that the crime has as an element the "threatened use of physical force." Cf. United States v.

[2] This Court has denied a prior petition for a writ of certiorari, notwithstanding the petitioner's request that the petition be held for Stokeling, which presented the closely related question whether federal bank robbery in violation of 18 U.S.C. 2113(a) is a "violent felony" under the ACCA because it "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). See Ybarra v. United States, 139 S. Ct. 456 (2018) (No. 18-5435).

Whindleton, 797 F.3d 105, 114 (1st Cir. 2015) ("[T]he element of a dangerous weapon imports the 'violent force' required by [Curtis Johnson] into the otherwise overbroad simple assault statute."), cert. dismissed, 137 S. Ct. 23, and cert. denied, 137 S. Ct. 179 (2016).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Because Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. 924(c)(3)(A), this case does not present any question of whether the alternative definition of a "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague. Accordingly, no need exists to hold the petition for a writ of certiorari pending the disposition of United States v. Davis, No. 18-431, cert. granted Jan. 4, 2018.