NO:

IN THE
SUPREME COURT OF THE UNITED STATES

JOCELYN FAURISMA

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

After *Johnson v. United States*, 576 U.S. _____, 135 S. Ct. 2551 and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), can reasonable jurists debate whether armed bank robbery, in violation of 18 U.S.C. § §2113 (a) and (d), is a crime of violence within the meaning of 18 U.S.C. §924(c)(3)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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OCTOBER TERM, 2018

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Joycelyn Faurisma respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his Motion for Certificate of Appealability by the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 16-16734 in that court on March 28, 2018, *United States v. Jocelyn Faurisma*, 716 F. App'x 932, 933 (11th Cir. 2018), which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the Rule of the Supreme Court of the United States. The decision of the court of appeals was entered on March 28, 2018. The district court had jurisdiction because petitioner, under U.S.C. § 2255, challenged his sentence as being imposed in violation of the Constitution of the United States. The court of appeals had jurisdiction pursuant to 28 U.S.C. §2253 (a), which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts under 28 U.S.C. § 2255. This petition is timely filed pursuant to Supreme Court Rule. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 2113(a) and (d)

> (a) 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;

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 924(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

On July 12, 2013, Mr. Faurisma pled guilty to all three counts of a three count indictment. (DE CR 36); (DE CR 55:3). [1] Count one charged armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). DE 9. Count two charged carrying and brandishing a firearm in furtherance of a crime of violence-the bank robbery charged in count 1, in violation of 18 U.S.C. §924(c)(1)(A)(ii). (DE CR 9). Count three charged possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (DE CR 9).

As to count three, the possession of a firearm by a convicted felon count, Mr. Faurisma was sentenced pursuant to the armed career criminal act (ACCA), 18 U.S.C. § 924(e). (DE CR 56:12). Under the ACCA, a person convicted of possession of a firearm by a convicted with three previous convictions for a violent felony or a serious drug offense is subject to a mandatory minimum prison sentence of 15 years. 18 U.S.C. § 924(e)(1).

Mr. Faurisma was found to have five qualifying prior convictions: burglary dwelling; aggravated assault; aggravated fleeing and eluding; and two convictions for possession of cannabis with intent to sell or deliver. DE CR 56:10-12; (DE CR 42, Presentence Investigation Report (PSIR) ¶ 21).

Pursuant to statute, count two, carrying and brandishing a firearm in furtherance of a crime of violence, was punishable by a mandatory minimum

[1] Docket entry references from the criminal case, *United States v. Joycelyn Faurisma*, case no. 13-60050-Cr-Zloch will be denoted as ("DE CR .") Docket entry references from the 28 U.S.C. § 2255 civil case, *Jocelyn Faurisma v. United States*, 15-Cv-62520-Zloch will be denoted as ("DE CV.").

consecutive 7-year term of imprisonment. 18 U.S.C. § 924(c)(1)(A)(ii); (DE CR 42, PSIR ¶ 92).

On September 24, 2013, Mr. Faurisma was sentenced to a term of imprisonment of 300 months. (DE CR 43). The term of imprisonment consisted of 216 months for the bank robbery and felon in possession of a firearm counts to be served concurrently with each other, and an 84 month-sentence for the carrying and brandishing count to be served consecutive to the other counts. (DE CR 43); (DE CR 56: 20)

Mr. Faurisma appealed and his sentence was affirmed on July 24, 2014. *United States v. Faurisma*, 572 Fed. App'x 952 (11th Cir. 2014)(unpublished). The mandate was issued on September 24, 2014. (DE CR 70).

On December 1, 2015, Mr. Faurisma filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (DE CR 71); (DE CV 1). The district court granted Mr. Faurisma's motion to vacate on July 28, 2016. DE 72.

The district found that Mr. Faurisma no longer met the ACCA criteria. The district court specifically found that Mr. Faurisma's two prior convictions for possession of cannabis with intent to sell did not qualify as serious drug offenses. (DE CV 17); (DE CV 22); (DE CV 24). The district court further found that after *United States v. Johnson*, 135 S.Ct. 2551 (2015), Mr. Faurisma's prior conviction for aggravated fleeing and eluding did not qualify as a violent felony under the ACCA's residual clause. (DE CV 17); (DE CV 22); (DE CV 24). Thereafter, the district court scheduled a resentencing hearing. (DE CR 74).

Prior to the resentencing hearing, the United States Probation Office Prepared a sentencing memorandum which included amended guideline computations. (DE CR 77, Sentencing Memorandum). Under the amended guideline computations, Mr. Faurisma's advisory guideline imprisonment range was 63 to 78 months for counts one and three, followed by the statutorily mandated consecutive 84-month sentence for count two, carrying and brandishing a firearm during a crime of violence offense pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). (DE CR 77:3, Sentencing Memorandum). At the resentencing hearing, Mr. Faurisma objected to the imposition of the mandatory consecutive 84-month (7-year) sentence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). (DE CR 87:4). Mr. Faurisma argued because that bank robbery was no longer a crime of violence, the 7-year mandatory consecutive sentence should not be imposed. (DE CR 87:3-5). The Court overruled Mr. Faurisma's objection. (DE CR 87:5).

At the conclusion of the resentencing hearing, Mr. Faurisma was sentenced to a 156-month term of imprisonment. (DE CR 82); (DE 87:14-15) The new term of imprisonment consisted of a 72-month concurrent sentence for the robbery and the felon in possession counts, and an 84-month consecutive sentence for the carrying and brandishing a firearm in relation to a crime of violence count. (DE CR 82); (DE 87:14-15).

Mr. Faurisma appealed the district court's sentence. (DE CR 83). After the briefs on the merits were submitted, the Eleventh Circuit entered a limited remand to the district court to determine whether a certificate of appealability (COA) should

be granted. (DE CR 79). On August 22, 2017, the district court entered an order denying a COA (DE CV 25); (DE CR 90).

After the district court entered the order denying COA, the Eleventh Circuit considered whether Mr. Faursima should be granted a COA. On March 28, 2018 the Eleventh Circuit Court denied Mr. Faurisma' motion for COA and dismissed his appeal.

The Eleventh Circuit ruled that under Eleventh Circuit precedent, armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d), was a crime of violence under the use-of-force clause under § 924(c)(3)(A). Additionally, citing its holding in *Ovalles v. United States*, 861 F.3d 1257, 1269 (11th Cir. 2017), *reh'g en banc granted, opinion vacated*, 889 F.3d 1259 (11th Cir. 2018, the Eleventh Circuit further held that armed bank robbery was a crime of violence under the risk-of-force clause in § 924(c)(3)(B).

REASONS FOR GRANTING THE WRIT

After *Johnson* and *Dimaya*, reasonable jurists can debate whether armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d) is a crime of violence within the meaning of 18 U.S.C. § 924(c)(3).

A. Legal Standard for Certificate of Appealability

A certificate of appealability must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. As this Court has emphasized, a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas

corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

B. Armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d) is not a crime of violence within the meaning of 18 U.S.C. § 924(c)(3).

Under 18 U.S.C. § 924(c)(1)(A)(ii), a person who carries and brandishes a firearm during a crime of violence is subject to a mandatory 7-year term of imprisonment. Under § 924(c)(1)(D), no term of imprisonment imposed upon a person pursuant § 924(c) shall run concurrent with any other term of imprisonment imposed upon the person.

In this case, Mr. Faurisma was sentenced to a 7-year consecutive term of imprisonment after he pled guilty to carrying and brandishing a firearm during an armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). Subsection (a) of the bank robbery statute provides:

> (a) 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;

18 U.S.C. § 2113(a). Subsection (d) of the same statue provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

For purposes of section 924(c), a crime of violence is defined as 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, 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). The Eleventh Circuit has referred to subsection (A) as the "use-of-force" clause and subsection (B) as the "risk-of-force" clause, *United States v. Faurisma*, 716 Fed. App'x 932, 933 (11th Cir. 2018). However, subsection (B) has also been called the residual clause." *See In re Gordon*, 827 F.3d 1289, 1293 (11th Cir. 2016). Also the "use-of-force" clause, § 924(c)(3)(A), is frequently referred as the "elements clause." *See In re Colon*, 826 F.3d 1301,1306 (11th Cir. 2016) (Martin, J., dissenting) (stating that the § 924(c)(3)(A) definition of "crime of violence" is usually called the "elements clause" or "use of force" clause); *see also In re Chance*, 831 F.3d 1335, 1337 (11th Cir. 2016) (referring to § 924(c)(3)(A) as the "elements clause").

1. Risk-of-force Clause/Residual Clause of § 924(c)(3)(B)

Subsequent to the ruling below, this Court declared 18 U.S.C. § 16(b) to be unconstitutionally vague. *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204 (2018).

The language which the Court struck down as vague in 18 U.S.C. § 16(b) alternatively defined a crime of violence as follows:

> any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Court in *Dimaya* concluded that §16(b) was unconstitutionally vague by straightforwardly applying *Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015). *See Dimaya,* 138 S.Ct. at 1213. In *Johnson,* the Court struck down the residual clause in ACCA has being unconstitutionally vague. 135 S.Ct. at 2563. In *Dimaya,* the Court found § 16(b) indistinguishable from the residual clause struck down in *Johnson*. *Dimaya,* 138 S.Ct. at 1213.

The language in the risk-of-force/residual clause of § 924(c)(3)(B) is virtually identical to language this Court struck down in *Dimaya.* Accordingly, the language in of § 924(c)(3)(B), is unconstitutionally vague and therefore, armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d) cannot be deemed a crime of violence under § 924(c)(3)(B), the risk of force/residual clause.

2. Use of force clause/elements clause of 924(c)(3)(A)

In determining whether a predicate offense, such as bank robbery, qualifies as a crime of violence under 924(c), appellate courts apply the categorical approach. *See United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013). Under the categorical approach, courts may 'look only to the statutory definitions'—*i.e.*, the elements—of an offense, and not 'to the particular facts underlying the offense. *See*

McGuire, 706 F.3d at 1336. Additionally, when applying the categorical approach, courts must presume that the offense was committed in the least culpable manner. *Moncrieffe v. Holder*, 569 U.S. 184, 190-191, 133 S. Ct. 1678, 1684 (2013).

Courts may use a modified categorical approach when a statute is divisible, meaning one or more elements of the statute are set forth in the alternative. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) The modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative elements formed the basis of the defendant's prior conviction. *Id.* However, the modified categorical approach is inapplicable when a statute enumerates various factual means of satisfying a single element, or is indivisible. *Mathis v. United States* 136 S.Ct. 2243 (2016); *Descamps,* 133 S. Ct. at 2282.

A defendant can be found guilty of bank robbery if (1) the defendant knowingly took or attempted to take money or property possessed bank from or in presence of a person described in the indictment; and (2) the defendant did so [by means of force and violence] [by means intimidation]. *See* Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). Because the second element can be satisfied by means of force and violence, or by intimidation, the second element is indivisible.

An offense can only qualify as a "crime of violence" under the force clause if it has two elements. First, the offense must have an element use, attempted use, or threatened use of violent physical force, which means "strong physical force" that is "capable of causing physical pain or injury to another person." *Curtis Johnson v.*

United States, 559 U.S. 133, 140 (2010).

Second, the offense must have an element that requires the intentional use, attempted use, or threatened use of force. *Leocal v. Ashcroft*, 543 U.S. S.Ct. 1, 9, 125 S.Ct. 377, 382 (2004). The elements of federal bank robbery, specifically the "intimidation" prong of the statute, fail to satisfy either of these force clause requirements. Therefore, federal bank robbery is not a § 924(c) "crime of violence."

A defendant need not use violent, physical force to take money or property by intimidation. The jury instructions for bank robbery explain that "[t]o take 'by means of intimidation' is to say or to do something in a way that would make an ordinary person fear bodily harm." Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). In other words: "Under section 2113(a), intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). However, placing a person in fear of bodily harm does not necessarily entail the use or threatened use of violent physical force. For example, that fear can arise merely from the defendant's presentation of a demand note, which does not require any physical force, let alone strong physical force. Alternatively, it may arise from a threat to use of poison, toxin, or infectious disease, which also does not require the use of force.

The fact that Mr. Faurisma was convicted of armed bank robbery under §2113(d) does not alter the analysis. Under § 2113(d), a bank robbery is punishable by a maximum penalty of 25 years imprisonment, if during the robbery, the robber

assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device.

Assaulting another person does not require the threat or use of violent physical force. The law in this Circuit is clear that "only some amount of force must be used" to commit assault. *United States v. Fernandez*, 837 F.2d 1031, 1035 (11th Cir. 1988); *see also United States v. Hernandez*, 921 F.2d 1569, 1577 (11th Cir. 1991) (assault may occur "by minimal physical contact"); *United States v. Fallen*, 256 F.3d 1082, 1087-88 (11th Cir. 2001) (same); *United States v. Martinez*, 486 F.3d 1239, 1246 (11th Cir. 2007) (assault may be committed by physical contact without threat). Furthermore, where assault is committed by physical contact, the jury is not required "to find intent to inflict serious bodily injury," and the offense therefore lacks the *mens rea* element required by *Leocal*. *United States v. Gutierrez,* 745 F.3d 463, 470-71 (11th Cir. 2014).

Putting another person's life in jeopardy by the use of a dangerous weapon or device also does not require an intentional threat of violent physical force. The "use" of a firearm, for example, includes the mere "reference" to it. *Bailey v. United States,* 516 U.S. 137, 148 (1995). Thus, "a defendant could be convicted of armed bank robbery for mentioning a firearm that he never brandished, displayed, or even possessed during the crime." *In re Jones*, No. 16- 14106, Order at 16 (Martin, J., concurring in judgment) (citing *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996), which involved a "reference to a gun 'no one ever saw'"). In that regard, Eleventh Circuit precedent makes clear that the mere possession of a weapon –

even a dangerous weapon like a short-barreled shotgun – does not have as an element the use, attempted use, or threatened use of force. *United States v. Archer* 618 F.3d 1273 (11th Cir. 2010); *See United States v. McGill*, 531 F.3d 1347 (11th Cir. 2008).

Furthermore, a defendant can place someone's life in jeopardy under §2113(d) without any intent to threaten or use violent physical force. Indeed, a defendant can violate this provision merely by carrying a gun during the bank robbery because "he feels secure with it," even though he has no intent to intimidate another. *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989). No nexus is required between the weapon and the intimidation required under §2113(a). The defendant therefore need not possess the intentional *mens rea* required by *Leocal*.

In sum, federal bank robbery does not qualify as a crime of violence under § 924(c)'s elements clause. A defendant can commit this offense without the use or threatened use of "violent, physical force," as required by *Curtis Johnson*, or the intentional *mens rea*, as required by *Leocal*. Therefore, Mr. Faurisma respectfully that reasonable jurists can debate whether armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d) is a crime of violence within the meaning of 18 U.S.C. § 924(c)(3).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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