NO. 18-7573

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW HEARN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Rene L. Valladares
Federal Public Defender
*Cristen C. Thayer
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 100
Las Vegas, Nevada 89101
(702) 388-6577
Cristen_Thayer@fd.org
*Counsel for Petitioner

April 8, 2019

Table of Contents

Table of Authorities

Federal Cases

Federal Statutes

Reply Brief for the Petitioner

Hearn requests this Court grant certiorari as to:

1. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), retroactively invalidates the residual clause of 18 U.S.C. § 924(c)(3)(B), rendering challenges filed pursuant to 28 U.S.C. § 2255 within one year of *Johnson* timely; and

2. Whether general intent "intimidation," as used in the federal armed bank robbery statute, 18 U.S.C. § 2113(a) and (d), is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because the statute does not require any intentional use, attempted use, or threat of violent physical force.

The federal Circuits are split as to the first issue and erroneously apply this Court's precedent as to the second. As a result of the Circuits' failure to consistently or effectively resolve these issues, Hearn has served his entire prison sentence, including the 7-year unconstitutional sentence for the 18 U.S.C. § 924(c) count. Other defendants serving these unconstitutional § 924(c) sentences are similarly timing out daily as they reach their release dates, illustrating Gladstone's adage that "justice delayed is justice denied." The time is ripe for final resolution of § 924(c)'s unconstitutional vagueness, retroactivity, and the timeliness of challenges thereto.

I. Certiorari is necessary to resolve the federal circuit split regarding whether *Johnson* retroactively invalidated the residual clause of 18 U.S.C. § 924(c)(3)(B) and whether challenges under 28 U.S.C. § 2255 filed within one year of *Johnson* are timely.

After Hearn filed his petition for certiorari, this Court granted certiorari in *Davis v. United States*, No. 18-431 (Jan. 4, 2018), to address whether 18 U.S.C. § 924(c)(3)(B)'s residual clause is unconstitutionally vague. Should this Court find

in *Davis* that § 924(c)(3)(B)'s residual clause remains valid, Hearn's arguments regarding the armed bank robbery statute will be precluded. However, should this Court find in *Davis* that § 924(c)(3)(B)'s residual clause is void for vagueness, Hearn presents the ideal companion case to *Davis* for at least two reasons.

First, the *Davis* case is a direct appeal and does not address whether voiding § 924(c)(3)(B)'s residual clause will retroactively apply to 28 U.S.C. § 2255 challenges. *See United States v. Davis*, 903 F.3d 483 (5th Cir. 2018). Hearn's case—a challenge raised under 28 U.S.C. § 2255—squarely presents the issue of retroactivity. The government does not address the unconstitutionality of 18 U.S.C. § 924(c)(3)(B)'s residual clause under *Johnson*. Gov. Resp. p.15 n.3. However, the government does not dispute that Circuits are split as to whether a § 924(c)(3)(B) vagueness finding applies retroactively. Pet., pp. 10-11.[1] This split requires resolution by this Court, with Hearn's case providing a ripe vehicle to do so.

Second, the *Davis* case will not address whether § 2255 challenges filed within one year of *Johnson* raised a timely challenge to § 924(c)'s vagueness. Circuits are also split on this timing issue. Pet., pp. 10-11. The day before Hearn filed his petition for certiorari, the Ninth Circuit declined to rehear en banc its holding that post-*Johnson* § 2255 challenges to § 924(c)'s residual clause are untimely as this Court has not yet specifically held § 924(c)'s residual clause to be

[1] Hearn cites to his Petition for a Writ of Certiorari as "Pet." and the government's Response Brief as "Gov. Resp."

retroactively vague. *United States v. Blackstone*, 903 F.3d 1020, 1028-29 (9th Cir. 2018), *r'hrg denied* (9th Cir. Jan. 17, 2019) (No. 17-55023).

Hearn's case squarely presents the question of whether a § 2255 petition raising a *Johnson* claim is timely. The government does not dispute that Hearn filed his § 2255 motion seeking relief within a year of this Court's *Johnson* decision. Thus, Hearn's case would clarify timeliness for the hundreds (if not thousands) of similarly filed § 2255 petitions challenging § 924(c) convictions that remain pending in both district and circuit courts throughout the country.

Hearn's case presents questions of exceptional importance as to both § 924(c) vagueness retroactivity and timeliness of § 2255 challenges thereto, the resolution of which will lead to judicial consistency and efficiency. For the last four years, those challenging § 924(c) convictions through § 2255 petitions have languished in prison, watching others receive relief under identical unconstitutional residual clause provisions in both the Armed Career Criminal Act (18 U.S.C. § 924(e)) and the Immigration and Naturalization Act (18 U.S.C. § 16(b)). At present, the Office of the Federal Public Defender in the District of Nevada alone is litigating approximately 65 pending cases—in both the Ninth Circuit and district court—seeking § 2255 relief for defendants under *Johnson* who received convictions and sentences under § 924(c).

Circuit courts are deadlocked, staying both direct appeal and habeas appeals with the hope of receiving intervention and resolution by this Court. For example, the Ninth Circuit stayed numerous habeas appeals pending the petition for

certiorari filed in *Blackstone*.[2] Without resolution, petitioners like Hearn will return to the chasm of Circuit uncertainty on these issues. This Court should therefore grant certiorari to resolve these questions of exceptional importance: whether *Johnson* retroactively invalidated the § 924(c)(3)(B) residual clause and whether 28 U.S.C. § 2255 challenges filed within one year of *Johnson* are timely.

II. Certiorari is necessary to determine whether "intimidation," as used in the federal armed bank robbery statute, 18 U.S.C. § 2113(a) and (d), requires proof of an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(3)(A).

The residual clause in § 924(c)(3)(B) no longer provides a basis to hold that federal armed bank robbery (18 U.S.C. § 2113(a) and (d)) is a crime of violence; therefore, the § 924(c)(3)(A) elements clause is the only available avenue for its application. But the federal armed bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another," which the elements clause requires. 18 U.S.C. § 924(c)(3)(A); *see Johnson v. United States*, 559 U.S. 113 (2010) ("*Johnson 2010*"). Nor does the statute require an intentional mens rea, as required by the elements clause. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004). The federal armed bank robbery statute therefore does not meet the elements clause.

[2] At present, the Federal Public Defender for the District of Nevada represents 17 defendants with appeals currently stayed by the Ninth Circuit pending *Blackstone*, raising challenges to § 924(c) convictions through 28 U.S.C. § 2255.

Federal armed bank robbery can be committed "by force and violence or by intimidation." 18 U.S.C. § 2113(a). The government appears to agree that, applying the categorical approach, the least egregious conduct the statute covers is intimidation. Gov. Resp., pp. 8-11 (discussing armed bank robbery by "intimidation").

A. The federal armed bank robbery statute lacks the requisite intentional mens rea to qualify as a crime of violence.

This Court's precedent requires an intentional mens rea for crimes of violence. Pet., pp. 20-24; *Leocal*, 543 U.S. at 12-13. Under *Leocal*, a crime that can be committed negligently or recklessly does not qualify as a crime of violence. *Id.*

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Id.* The government agrees that, under *Carter*, federal armed bank robbery is a general intent crime. Gov. Resp. p.10.

First, the lack of intent in the federal armed bank robbery statute is amplified by the Fourth, Eighth, Ninth, and Eleventh Circuits' holdings that robbery by intimidation focuses on the objective reaction of the victim, *not* on the defendant's intent. Pet., pp. 22-24 (discussing cases). A victim-focused standard cannot meets this Court's requirement that a *defendant* must intentionally use, attempted to use, or threatened to use force for crime of violence purposes. *Leocal* 543 U.S. at 12-13.

Second, to avoid *Leocal*, the government mistakenly asserts a knowing or reckless mens rea qualifies as crimes of violence under § 924(c)(3)(A), suggesting that Leocal was overruled by *Voisine v. United States*, 136 S. Ct. 2272 (2016). Gov. Resp., pp.10-11. But *Voisine* did not involve analysis under § 924(c) and instead addressed the firearm prohibition for those convicted of a misdemeanor crime of domestic violence under 18 U.S.C. §§ 922(g)(9) and 921(a)(33)(A). *Id.* at 2279-80. In fact, *Voisine* specifically noted it did *not* resolve whether reckless behavior would satisfy "use of force" requirements in other statutes such as 18 U.S.C. § 16(a), which is worded identically to § 924(c)(3)(A). *Id.* at 2280 n.4. Therefore, the government overextends *Voisine*'s holding.

Third, the government does not dispute that a threat is *negligently* committed when the mental state depends on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks." Pet., pp. 17, 23 (quoting *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015)). Under *Leocal*, a crime that can be committed negligently does not qualify as a crime of violence. 543 U.S. at 12-13. The government's focus on the ordinary or reasonable person's reaction or impression of the defendant's conduct is insufficient to show the *defendant* intentionally threated force or violence. Gov. Resp., pp. 10-11. Under the Circuit courts' victim-focused standard, robbery "by intimidation" can be committed negligently and therefore does not qualify under § 924(c)'s elements clause.

Fourth, pre-*Johnson* cases addressing the federal armed bank robbery statute do not defeat Hearn's position. Gov. Resp., pp. 8-9 (citing pre-2000 cases). These cases pre-date several holdings by this Court that altered the crime-of-violence landscape: the *Carter* decision clarifying the intent required for the federal armed bank robbery statute; the *Leocal* intentional mens rea requirement for the elements clause; the *Johnson 2010* violent physical force requirement for the elements clause; and the *Johnson* ruling invalidating the residual clause. Thus, the government's reliance on pre-*Carter, Leocal, Johnson 2010,* and *Johnson* cases is unpersuasive.

Accordingly, this Court should grant certiorari to correctly instruct Circuit courts that the federal armed bank robbery statute does not require the requisite intentional mens rea and therefore is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A).

B. Intimidation does not require the use or threat of violent physical force necessary to qualify as a crime of violence.

The government fails address Hearn's principle argument that the Fourth, Fifth, Ninth, and Eleventh Circuits apply a broad non-violent construction of "intimidation" when determining sufficiency of the evidence to sustain a bank robbery conviction. Pet., pp. 16-20. The government does not dispute these non-violent sufficiency findings.

These same Circuits ignore their own broad non-violent "intimidation" sufficiency findings when holding "intimidation" *always* requires a defendant to threaten the use of violent physical force for crime of violence purposes. Pet., pp.

16-20 (discussing cases). The inconsistent definitions of "intimidation"—a non-violent one for sufficiency analysis and a violent one for crime-of-violence analysis—cannot stand.

This Court's recent decision clarifying the "violent physical force" necessary under § 924(c)(3)(A)'s elements clause does not change Hearn's analysis. *Stokeling v. United States*, 139 S. Ct. 544 (2019). In *Stokeling*, this Court found Florida's robbery statute requires "resistance by the victim that is overcome by the physical force of the offender" and thus categorically qualifies under the ACCA's elements clause at 18 U.S.C. § 924(e)(2)(B)(i). *Id.* at 549, 554. The federal armed bank robbery statute, in contrast, does not require a defendant to overcome a victim's resistance. Therefore, *Stokeling* does not alter the "violent physical force" analysis in Hearn's case.

The government erroneously claims an armed bank robbery conviction requires that the "defendant *knew* his victims would interpret his words and actions as threats to injury or kill them if they did not comply with his demands for money." Gov. Resp. pp. 10-11. Case law does not support this argument. As set forth above, a knowing mens rea is insufficient under § 924(c). Furthermore, examples of non-violent robbery by intimidation set forth in Hearn's petition for certiorari do not satisfy either the *Johnson 2010* or *Stokeling* requirements for "violent physical force." Pet., pp. 16-20. These examples do not contain an intent of violent physical force, a communicated threat of violent physical force, or resistance by the victims.

Stokeling reiterated that the modifier "physical" in § 924(c)(3)(A) "plainly refers to force exerted by and through concrete bodies—*distinguishing physical force, from, for example, intellectual force or emotional force*." 139 S. Ct. at 552 (quoting *Johnson 2010*, 559 U.S. at 138, 140) (emphasis added). While the conduct in the above examples was no doubt emotionally or intellectually disturbing to the victims, the offenses did not involve any physical force or threat of physical force. The government fails to explain how such non-violent robbery by intimidation could qualify under either *Johnson 2010* or *Stokeling*.

Thus, the Ninth Circuit's denial of relief to Hearn is at odds with both this Court's precedent and its own ruling that to satisfy § 924(c)'s elements clause, a threat of physical force "requires some outward expression or indication of an intention to inflict pain, harm or punishment." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). The federal armed bank robbery statute has no such requirement.

Accordingly, certiorari is necessary to direct Circuit courts that "intimidation" as used in the federal armed bank robbery statute does not require the *intentional threatened* use of violent physical force necessary under § 924(c)'s elements clause.

C. The "armed" element of armed bank robbery does not create a crime of violence.

The government's argument that armed bank robbery convictions must, by their nature, rise to the level of violent force (Gov. Resp., p. 11) ignores that the Ninth Circuit routinely affirms armed bank robbery convictions that do not involve

actual weapons. *See* Pet., pp. 24- 26. Such convictions rest on this Court's victim-centered analysis, permitting armed bank robbery convictions where the victim's reasonable belief as to the nature of the gun used in the robbery determines whether the "weapon" was dangerous or deadly because its display "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986). Relying on *McLaughlin*, the federal circuits hold armed bank robbery includes the use of fake guns. *See* Pet., pp. 24-26 (discussing cases).

In other words, the armed element does not require *the defendant* to use or threaten to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. The risk is that a weapon's presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666-667 (9th Cir. 1989). A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the defendant. Given the broad definition of a "dangerous weapon or device," armed bank robbery does not satisfy the § 924(c) elements clause.

D. The federal bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The final step of categorical analysis is to determine if an overbroad statute is divisible or indivisible. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The government asserts the federal armed bank robbery statute cannot be for

"extortion." Gov. Resp., pp. 11-12. However, this does not answer the question if "extortion" is a separate means of bank robbery, rather than a separate element.

The government asserts "extortion" is divisible from the other means of committing bank robbery "by force and violence or intimidation." Gov. Resp., pp. 12-13. Bank robbery is defined, in relevant part, as taking "by force and violence, *or* by intimidation. . . *or* . . . by extortion" anything of value from the "care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a) (emphasis added). Hearn relies on his petition, which thoroughly addresses why § 2113(a) is indivisible. Pet. pp. 27-33.

Conclusion

The Ninth Circuit Court of Appeals' denial of relief in Hearn's case adds to the uncertainty and disagreement regarding: the fate of 18 U.S.C. § 924(c)'s residual clause; if that clause is vague; whether vagueness applies retroactively; when post-*Johnson* challenges to § 924(c) convictions under 28 U.S.C. § 2255 are timely; and what offenses qualify as crimes of violence under § 924(c)'s remaining elements clause. Hearn's case is an ideal companion to the *Davis* case that will address the viability of § 924(c)'s residual clause in a direct appeal. Hearn's case presents a question of exceptional importance for defendants convicted under 18 U.S.C. § 924(c) that mandate consecutive sentences for the use of a firearm during a crime of violence.

In addition, Circuit courts continue to ignore this Court's precedent on federal armed bank robbery. This federal statute does not require an intentional

mens rea nor requires the use, attempted use, or threat of violent physical force. Courts of appeals continue to treat "intimidation" differently for sufficiency purposes than for crime-of-violence purposes. Although non-violent offenses are routinely affirmed as sufficient, the federal appellate and district courts continue to hold armed bank robbery is a crime of violence on the false assumption that bank robbery by intimidation requires violent physical force. The resulting conflation amongst the Circuits requires guidance from this Court.

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

RENE VALLEDERES
Federal Public Defender

CRISTEN C. THAYER
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Cristen_Thayer@fd.org

Counsel for Petitioner Matthew Hearn