No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JOSE BARRIERA-VERA,

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

This petition presents the following question:

Whether attempted armed bank robbery (18 U.S.C. § 2113) has as an element "the use . . . of physical force against the person or property of another," under 18 U.S.C. § 924(c)(3)(A).

LIST OF PARTIES

Petitioner, Jose Barriera-Vera, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Jose Barriera-Vera respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' judgment.

OPINION AND ORDER BELOW

The Eleventh Circuit's order granting summary affirmance in Mr. Barriera-Vera's 28 U.S.C. § 2255 appeal is provided in Appendix A. The district court order dismissing his § 2255 motion to vacate sentence is provided in Appendix B.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Barriera-Vera's case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court dismissed Mr. Barriera-Vera's 28 U.S.C. § 2255 motion on November 4, 2016. *See* Appendix B. Mr. Barriera-Vera subsequently filed a notice of appeal and an application for COA in the Eleventh Circuit, which was granted on two issues. Mr. Barriera-Vera filed an Initial Brief and the United States moved for summary affirmance. The Eleventh Circuit Court of Appeals granted summary affirmance on April 2, 2019. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND GUIDELINE OR STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

18 U.S.C. § 924(c) provides in pertinent part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> . . .
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 2113 provides in pertinent part:

> (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 . . . Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> . . .
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) . . . 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.

STATEMENT OF THE CASE

Mr. Barriera-Vera was convicted, following a jury trial, of armed bank robbery (count one), use of a firearm during the commission of a crime of violence (count two), attempted armed bank robbery (count three), and attempted use of a firearm during the commission of a crime of violence (count four). The "crime of violence" referenced in count four was the *attempted* armed bank robbery charged in count three. The district court then entered a judgment of acquittal on counts three and four. After Mr. Barriera-Vera was sentenced, the government appealed and Mr. Barriera-Vera cross-appealed.

The Eleventh Circuit then reversed the judgment of acquittal decision and reinstated the jury's verdict. Mr. Barriera-Vera was subsequently resentenced to time served on counts one and three, to run concurrent, 84 months' imprisonment on count two to run consecutive to counts one and three, and 300 months' imprisonment on count four to run consecutive to counts one, two, and three, for a total term of 418 months' imprisonment. Mr. Barriera-Vera appealed the amended judgment, and the judgment was affirmed. In 2011, he filed a § 2255 motion to vacate sentence that was denied on the merits. In 2016, he received authorization from the Eleventh Circuit Court of Appeals to pursue a successive 28 U.S.C. § 2255 motion to vacate, as to count four *only*.

After receiving permission, Mr. Barriera-Vera moved to vacate his sentence under 28 U.S.C. § 2255, raising only one claim, that his § 924(c) conviction on count four was unconstitutional in light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015). On November 4, 2016, the district court denied that motion, stating that

Samuel Johnson does not apply to 924(c), and even if it did, attempted armed bank robbery qualifies as a "crime of violence" under 924(c)'s elements clause. On December 31, 2016, Mr. Barriera-Vera filed a timely notice of appeal. Subsequently, on February 14, 2017, the district court denied a COA. On May 4, 2017, the Eleventh Circuit Court of Appeals granted a COA on two issues:

> (1) Whether the district court erred in dismissing Barriera-Vera's 28 U.S.C. § 2255 motion as untimely under 28 U.S.C. § 2255(f)(3) on the ground that *Johnson v. United States*, 135 S. Ct. 2551 (2015), does not apply to 18 U.S.C. § 924(c).
>
> (2) Whether Barriera-Vera's 18 U.S.C. § 924(c) conviction predicated on his companion offense for attempted armed bank robbery is now unconstitutional based on *Johnson v. United States*, 135 S. Ct. 2551 (2015).

In June 2017, Mr. Barriera-Vera filed his Initial Brief, and then the appellate proceedings were stayed pending the Eleventh Circuit's issuance of a mandate in *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018). After the mandate in *Ovalles* was issued, the United States filed a Motion for Summary Affirmance that was granted on April 2, 2019.

In its order granting summary affirmance, the Eleventh Circuit stated that the first question in the COA could be summarily affirmed because:

> Here, the district court did not err in determining that Barriera-Vera did not satisfy the requirements of § 2255(f)(3). *See Jones*, 304 F.3d at 1037. The Supreme Court invalidated the residual clause of the ACCA in *Johnson*, but did not address the constitutionality of the residual clause in § 924(c)(3)(B). *See* 135 S. Ct. at 2555-58, 2563. Likewise, although the Supreme Court later struck down the residual clause definition of "crime of violence" found in § 16(b), which used wording identical to § 924(c)(3)(B), it still did not address the constitutionality of § 924(c)(3)(B). *See Dimaya*, 138 S. Ct. at 1216. Finally, our binding precedent establishes that the reasoning in *Johnson* and *Dimaya* cannot

> be extended to invalidate the residual clause of § 924(c)(3)(B). *See Ovalles*, 905 F.3d at 1253. Accordingly, there is no substantial question as to whether *Johnson* made Barriera-Vera's motion timely under § 2255(f)(3), so we will grant the government's motion for summary affirmance as to the first question of the COA. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

Appendix A at 5.

Thereafter, without discussing *attempted* armed bank robbery, or citing to a case that discussed *attempted* armed bank robbery, or attempt crimes at all, the Eleventh Circuit Court of Appeals also granted summary affirmance as to the second question of the COA because:

> Decisions published in the context of successive applications are "binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks." *United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) (emphasis in original).
>
> Here, as noted above, *Johnson* and subsequent decisions had no impact on the constitutionality of § 924(c)(3)(B) and, therefore, would not render Barriera-Vera's Count Four conviction unconstitutional. *See Ovalles*, 905 F.3d at 1253. Moreover, even if § 924(c)(3)(B) were unconstitutional, his Count Four conviction would remain valid because his predicate offense of attempted armed bank robbery is a crime of violence under the elements clause of § 924(c)(3)(A). *See Hines*, 824 F.3d at 1337. Accordingly, there is no substantial question as to the outcome of this issue, and we will grant the government's motion for summary affirmance in this respect as well. *See Groendyke Transp., Inc.*, 406 F.2d at 1162.

Appendix A at 6.

REASONS FOR GRANTING THE WRIT

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. A first conviction under § 924(c) carried a seven-year mandatory minimum penalty if a firearm was brandished, while a second conviction carried an additional 25–year mandatory minimum.

Recently, this Court held § 924(c)'s residual clause is unconstitutionally vague under due process and separation of powers principles, abrogating the Eleventh Circuit's precedent in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc). *United States v. Davis*, No. 18-431, 2019 WL 2570623, at *13 (U.S. June 24, 2019) (holding that § 924(c)'s residual clause is unconstitutionally vague). This precedent was largely relied on to deny Mr. Barriera-Vera full appellate review when the Eleventh Circuit Court of Appeals granted summary affirmance to both questions of his Certificate of Appealability. The only remaining question is whether Mr. Barriera-Vera's attempted armed bank robbery conviction is a "crime of violence" under § 924(c)'s elements clause. Because it is not, this Court should grant Mr. Barriera-Vera's petition for certiorari and reverse the Eleventh Circuit's judgment.

The Eleventh Circuit erred in granting summary affirmance because attempted armed bank robbery does not have as an element the "use, attempted use, or threatened use of physical force against the person or property of another."

For an offense to qualify under § 924(c)'s elements clause, it must have "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). Whether attempted armed bank robbery qualifies as a "crime of violence" under § 924(c)'s elements clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See United States v. St. Hubert*, 909 F.3d 335, 347–51 (11th Cir. 2018). Pursuant to this categorical approach, if attempted armed bank robbery may be committed without "the use, attempted use, or threatened use of physical force," then that crime may not qualify as a "crime of violence" under § 924(c)'s elements clause.

Under § 924(c)'s elements clause, the term "physical force" means "violent force—that is, force that is capable of causing physical pain or injury to another person." *See Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Moreover, a defendant cannot "use" physical force unless the predicate offense requires, at a minimum, a knowing *mens rea*. *See Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004); *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010). Because attempted armed bank robbery may be committed without the "use" of "physical force," it does not qualify as a "crime of violence" under § 924(c)'s elements clause. [1]

[1] In count three, Mr. Barriera-Vera was alleged to have committed his attempted armed bank robbery by "force and violence and by intimidation…" Because these are

Significantly, bank robbery may be committed "by force and violence, or by intimidation." 18 U.S.C. § 2113(a). Because the statute lists alternative means, and not alternative elements, this Court has no occasion to decide which statutory alternative was at issue, and must presume Mr. Barriera-Vera was convicted of the attempt of the least culpable act—attempted armed bank robbery by intimidation. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

According to the Eleventh Circuit's pattern jury instruction, an individual may be convicted of bank robbery by "intimidation" where "an ordinary person in the teller's position could infer a threat of bodily harm from the defendant's acts." 11th Cir. Pattern Jury Instructions 76.1 (citing *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). Notably, it does not require proof of a defendant's mental state, as required by *Leocal* and *Palomino Garcia*. Indeed, "whether a particular act constitutes intimidation is viewed objectively." *Id*. The defendant need not *intend* for the act to be intimidating. *Id*. However, under *Leocal* and *Palomino Garcia*, a defendant does not "use" force unless some degree of intent is required. *See Leocal*,

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different means by which an attempted armed bank robbery may be committed, it must be presumed that Mr. Barriera-Vera's offense was committed by the least culpable among them—which, as explained below, is an attempted robbery by intimidation, rather than force or violence. *See Mathis v. United States*, 136 S. Ct. 2243 (2016) (discussing the difference between means and elements). However, even assuming *arguendo* that they are different elements, it must nevertheless be presumed that Mr. Barriera-Vera's attempted armed bank robbery was committed by the least culpable among them because the indictment lists all three. *See also In re Gomez*, 830 F.3d 1225, 1228 (11th Cir. 2016) (citing *Alleyne v. United States*, 133 S. Ct. 2151 (2013)).

543 U.S. at 9 (concluding that the *use* of physical force "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"). Because a bank robbery conviction under § 2113(a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the "use" of physical force.

Moreover, an individual may "intimidate" a victim without the threatened use of violent "physical force." For instance, the Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. *See United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, violent "physical force" or force "capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 139. Thus, under the least-culpable-act rule, the Court must presume Mr. Barriera-Vera's attempted armed bank robbery offense was committed by using of "intimidation" rather than by force or violence. Because attempted armed bank robbery under § 2113 committed by intimidation does not necessarily have as an element "the use, attempted use or threatened use" of violent physical force, § 2113(a) bank robbery does not categorically qualify as a "crime of violence" under § 924(c)'s elements clause.

Further, that the attempted bank robbery was "armed" under § 2113(d) does not affect the above analysis. Subsection (d) is implicated when a person, in violating subsection (a), "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). Neither prong converts an attempted armed bank robbery into a “violent felony” under the elements clause.[2]

First, committing the offense through “assault” does not require the attempted or threatened use of violent physical force as required by *Curtis Johnson*. The Eleventh Circuit’s pattern jury instruction for § 2113(d) states that an “assault” may be committed without touching another person and occurs when a person “intentionally attempts or threatens to hurt someone else” with an apparent ability to do so. “Hurt” is not defined to require any force, let alone violent physical force. 11th Cir. Pattern Jury Instructions O76.2. Second, committing the offense under the “use of a dangerous weapon” prong cannot convert Mr. Barriera-Vera’s attempted armed bank robbery into a crime of violence, because it also does not require the use, attempted use, or threatened use of violent physical force required by *Curtis Johnson*. “[D]angerous weapon or device” is defined as “any object that a person can readily use to inflict serious bodily harm,” which includes poison, Anthrax, and other chemical weapons that can inflict serious bodily harm without the use of *any* physical force. *Id*.

Finally, had Mr. Barriera-Vera been charged with committing a substantive violation of 18 U.S.C. §§ 2113(a) and (d), armed bank robbery, the issue of whether that offense qualifies under the elements call may be a closer question. However, that

[2] Arguably, these alternatives constitute means and not elements. However, the Court need not make that determination. Regardless of which alternative applies, neither converts an attempted armed bank robbery into a “violent felony.”

is not the issue here. The issue is whether his conviction for *attempted* armed bank robbery qualified as a "violent felony."

To support a conviction for an attempt to commit a crime, the government must prove that the defendant had the specific intent to commit the crime and took a "substantial step" toward the commission of the crime. *United States v. Brown*, 374 F. App'x 927, 932 (11th Cir. 2010) (citing *United States v. Root*, 296 F.3d 1222, 1227–28 (11th Cir. 2002)). To show a substantial step was taken, "the defendant's objective acts, without reliance on the accompanying *mens rea*, must mark the defendant's conduct as criminal." *Id*.

In determining whether Mr. Barriera-Vera's attempt offense qualifies as a "violent felony," this Court must presume that he committed the least culpable conduct required for a conviction. *See Moncrieffe*, 133 S. Ct. at 1684. Regarding the intent requirement, this Court would have to presume that Mr. Barriera-Vera merely *intended* to intimidate the victim, not that he actually did. And regarding the overt act requirement, the least culpable conduct is conduct akin to planning to rob a bank, reconnoitering a bank, or assembling disguises. *See United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984). Under the least-culpable-conduct rule, Mr. Barriera-Vera presumably *intended* to intimidate (but did not actually intimidate) the victim and took some substantial step like planning to rob a bank, reconnoitering, or assembling a disguise. Intending to intimidate without actually intimidating someone and assembling a disguise does not require the use of substantial or violent "physical force," as contemplated under the elements clause. *See Curtis Johnson*, 559 U.S. 133.

As recently stated by the concurring opinion in *Hylor v. United States*:

> . . . But having the *intent* to commit a crime involving the use of force simply is not the same thing as using, attempting to use, or threatening the use of force.
>
> Attempt crimes also have an overt act element, but that element does not fill *St. Hubert*'s logical gap. It is readily conceivable that a person may engage in an overt act—in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank door before being thwarted—without having used, attempted to use, or threatened to use force. Would this would-be robber have *intended* to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? Definitely not. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act in furtherance of the intended offense that does not involve the use, attempted use, or threatened use of such force.

896 F.3d 1219, 1226 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1375, 203 L. Ed. 2d 612 (2019) (J. Pryor, J., concurring). Thus, Mr. Barriera-Vera's *attempted* armed bank robbery offense cannot qualify as a "crime of violence."

Based on the foregoing, Mr. Barriera-Vera respectfully submits that attempted armed bank robbery does not categorically qualify as a "crime of violence" under § 924(c)'s elements clause. Given the important and recurring nature of this issue, Mr. Barriera-Vera respectfully seeks this Court's review.

CONCLUSION

For the foregoing reasons, Mr. Barriera-Vera respectfully requests that this Court grant his petition.

Respectfully submitted,

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