

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS LAMAR MITCHELL,

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

Whether bank robbery (18 U.S.C. § 2113), which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, 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, Carlos Lamar Mitchell, 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

Carlos Lamar Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 767 F. App'x 772 (11th Cir. 2019), is unpublished and provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Mitchell's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. On June 25, 2016, the district court dismissed Mr. Mitchell's § 2255 motion. *See* Appendix B. On February 27, 2017, the Eleventh Circuit granted Mr. Mitchell certificate of appealability (COA). On April 2, 2019, the Eleventh Circuit affirmed the district court's denial of Mr. Mitchell's § 2255 motion. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND GUIDELINES PROVISIONS

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(a) 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.

STATEMENT OF THE CASE

A jury found Mr. Mitchell guilty of bank robbery, in violation of § 2113(a) (count one), and possessing a firearm during and in relation to a “crime of violence,” in violation of § 924(c) (count two), and on June 3, 2011, he was sentenced to 189 months’ imprisonment (105 months on count one and 84 months on count two, to be served consecutively).

On June 22, 2016, Mr. Mitchell moved to vacate his sentence under 28 U.S.C. § 2255 based on *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*), requesting that his § 924(c) conviction be vacated because it was imposed in violation of due process. Two days later, the district court dismissed the motion, stating that bank robbery qualifies as a “crime of violence”

under § 924(c)'s force clause. The district court also denied Mr. Mitchell a COA. Mr. Mitchell filed a timely notice of appeal.

On February 27, 2017, the Eleventh Circuit granted Mr. Mitchell a COA on the following issue: “Whether the district court erred in concluding Mr. Mitchell’s conviction under 18 U.S.C. § 924(c), predicated on a bank robbery conviction under 18 U.S.C. § 2113(a), was unaffected by the Supreme Court’s ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015).”

A little over two years later, the Eleventh Circuit affirmed the denial of the district’s court dismissal of Mr. Mitchell’s § 2255 motion based on its decisions in *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), and *In re Sams*, 830 F.3d 1234 (11th Cir. 2016). The Eleventh Circuit stated:

In *Ovalles*, we held that § 924(c)'s residual clause is not unconstitutionally vague under *Johnson* as long as it is interpreted to require “a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant’s offense.” 905 F.3d at 1234. *Ovalles* forecloses Mitchell’s argument on appeal. See *In re Garrett*, 908 F.3d 686, 689 (11th Cir. 2018) (holding, in the context of a second or successive § 2255 motion, that *Johnson* and its progeny do not “support a vagueness-based challenge to the residual clause of section 924(c)”).

In any event, even if *Johnson* did invalidate § 924(c)(3)'s residual clause, Mitchell’s conviction still would be unaffected because his predicate offense of bank robbery also qualifies as a crime of violence under the elements clause, § 924(c)(3)(A). *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (holding, in denying an application to file a second or successive § 2255 motion, that § 2113(a) bank robbery qualifies as a crime of violence under § 924(c)(3)(A)). This is because § 2113(a)—which requires the use of force and violence or intimidation—necessarily requires the use, attempted use, or threatened use of physical force. *Id.* at 1238–39; cf. *Johnson*, 135 S.Ct. at 2563 (clarifying that the invalidation of the ACCA’s residual clause did not call into question either the enumerated crimes clause or the elements clause).

Mitchell v. United States, 767 F. App'x 772, 774 (11th Cir. 2019).

REASONS FOR GRANTING THE WRIT

Recently, this Court held § 924(c)'s residual clause is unconstitutionally vague, thereby abrogating the Eleventh Circuit's contrary precedent in *Ovalles*. *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). Therefore, the only remaining question is whether Mr. Mitchell's bank robbery conviction is a "crime of violence" under § 924(c)'s elements clause. Because it is not, this Court should grant Mr. Mitchell's petition and reverse the Eleventh Circuit's contrary precedent.

I. Bank Robbery, which may be committed by unintentionally intimidating a victim or presenting a teller with a demand note, 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 force 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 bank robbery qualifies as a "crime of violence" under § 924(c)'s force 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 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 force clause.

Under § 924(c)'s force clause, the term "physical force" means "violent force—that is, force that is capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). 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 bank robbery may be committed without the “use” of “physical force,” it does not qualify as a “crime of violence” under § 924(c)’s force clause.

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. Mitchell was convicted of the least culpable act—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*, 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. Mitchell’s bank robbery offense was committed by using of “intimidation” rather than by force or violence. Because 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 force clause.

Based on the foregoing, Mr. Mitchell respectfully submits that bank robbery does not categorically qualify as a “crime of violence” under § 924(c)’s force clause. Given the important and recurring nature of this issue, Mr. Mitchell respectfully seeks this Court’s review.

CONCLUSION

For the above reasons, Mr. Mitchell respectfully requests that this Court grant his petition.

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