No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW KARAHALIOS
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

Submitted by:
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QUESTIONS PRESENTED

1. Does unarmed bank robbery in violation of 18 U.S.C. § 2113(a) serve as a predicate offense for a conviction under 18 U.S.C. § 924(c)(3)(A) of using or carrying a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(3)(A)?

2. By filing his Petition within one year of the ruling in Johnson II was the Petitioner's Motion to Correct Sentence under 28 U.S.C. § 2255(f) timely?

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The April 4, 2018 opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is reported at 2016 U.S. Dist. LEXIS 125730 *; 2016 DNH 163; 2016 WL 4926157.

JURISDICTION

On April 2, 2012, the Petitioner was sentenced on multiple counts of a superseding indictment to 264 months in the custody of the Bureau of Prisons ("BOP"). At issue in this Petition is the Petitioner's convictions and sentence on Counts 4 and 5 of the Superseding Indictment charging him with aiding and abetting unarmed bank robbery and possession of a short barreled rifle during a crime of violence. On Count 4, along with other charges, the Petitioner was sentenced to a term of imprisonment of 144 months. On count 5 the Petitioner was sentenced to a mandatory consecutive term of imprisonment of 120 months.

The Petitioner filed a motion to correct sentence under 28 U.S.C. § 2255 with the United States District Court for the District of New Hampshire on June 27, 2016. On September 15, 2016, the District Judge issued a Memorandum and Order. The District Judge determined that the Petitioner's motion was time-barred under 28 U.S.C. § 2255(f). See App. B. The District Court issued an Order granting a Certificate of Appealability to the Petitioner. See App. C. Judgment was entered on September 15, 2016. See App. D.

On November 9, 2016, the Petitioner filed a timely notice of appeal of the decision of the District Court with the United States Court of Appeals for the First Circuit. The First Circuit affirmed the order of the District Court on April 4, 2018. See App. A. This Court has jurisdiction to review the decision of the First Circuit Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 924(c) of the United States Code provides, in pertinent part:

. . . .

(c) (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.

(B) If the firearm possessed by a person convicted of a violation of this subsection-
(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall-
(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law-
(i) a court shall not place on probation any person convicted of a violation of this subsection; and
(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(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.

. . . .

(e) (1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)].

> (2) As used in this subsection-
> (A) the term "serious drug offense" means-
> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.], for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that-
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(c), (e) (2019).

Title 18, Section 2113 provides, in pertinent part:

> 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) (2019).

Title 28, Section 2255 of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f) (2019).

Title 18, Section § 16 provides:

> The term "crime of violence" means-
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) 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.

18 U.S.C. § 16 (2019).

Title 18, Section § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (2019).

Title 18, Appendix Section § 4B1.2 provides in pertinent part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that-
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

STATEMENT OF THE CASE

The Petitioner entered a plea agreement with the Government. On April 2, 2012, the Petitioner was sentenced on multiple counts of a superseding indictment to 264 months in the custody of the Bureau of Prisons ("BOP"). This Petition concerns the Petitioner's convictions and sentence on Counts 4 and 5 of the Superseding Indictment charging him with aiding and abetting unarmed bank robbery[1] and possession of a short barreled rifle during a crime of violence. On Count 4 along with other charges[2] the Petitioner was sentenced to a term of imprisonment of 144 months. On count 5 the Petitioner was sentenced to a mandatory consecutive term of imprisonment of 120 months.

The Petitioner filed a motion to correct sentence under 28 U.S.C. § 2255 with the United States District Court for the District of New Hampshire on June 27, 2016. The Petitioner argued that his sentence should be corrected because he was convicted under the unconstitutionally vague residual clause of 18 U.S.C. § 924(c)(3)(B). On July 15, 2016, the Petitioner, along with other similarly situated

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[1] Although Count 4 of the indictment cited both 18 U.S.C. § 2113(a) and 2113(d), it did not allege the use of a dangerous weapon or device, the element which raises bank robbery to armed bank robbery. Statutory references on an indictment are surplusage, not elements of the offense. See United States v. Rollins, Case No. 10-00189-01-CR-W-DW, 2011 U.S. Dist. LEXIS 90053, at *4-5 (W.D. Mont. July 12, 2011). The use of a dangerous weapon or device is an element which must be alleged in the indictment to enhance bank robbery to armed bank robbery. See Alleyne v. United States, 570 U.S. 99, 116 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 478-479 (2002)).

[2] In total the Petitioner pled guilty and was convicted on ten counts in the indictment: conspiracy to distribute and to possess with intent to distribute oxycodone (Count 1), conspiracy to commit bank robbery (Count 2), aiding and abetting bank robbery (Count 4), conspiracy to violate 18 U.S.C. § 1951 (Hobbs Act)(Counts 6 and 21), aiding and abetting violations of the Hobbs Act (Counts 8 and 23), conspiracy to commit pharmacy robbery (Count 17), aiding and abetting pharmacy robbery(Count 19), and one count of using and brandishing a firearm during and in relation to a crime of violence contrary to 18 U.S.C. § § 924(c)(1)(A)(ii) & 924(c)(1)(B) (Count 5). The crime of violence predicate for the § 924(c) count (Count 5) was aiding and abetting bank robbery in violation of 18 U.S.C. § 2113(a).

petitioners, filed a Joint Memorandum in support of his motion to correct sentence. The Petitioner argued that he is entitled to relief under 28 U.S.C. § 2255 because 18 U.S.C. § 924(c) is unconstitutionally vague and violates due process of law. See Johnson v. United States, 135 S.Ct. 2551 (2015) (Johnson II); see also Welch v. United States, 136 S. Ct. 1257, 1268 (2016) (Johnson II applies retroactively.)

On July 28, 2016, the Government filed an objection to the Petitioner's motion to correct sentence under 28 U.S.C. § 2255. On August 3, 2016, the Government filed a Notice of Supplemental Authority. On August 5, 2016, the Petitioner and others filed a Supplemental Memorandum in response to the Government's Objection.

On August 9, 2016, after hearing argument, the District Court allowed the parties to file supplemental briefs within fourteen days of the hearing.

On August 17, 2016, the Petitioner and others filed a Second Supplemental Memorandum.

On September 15, 2016, the District Judge issued a Memorandum and Order finding that the Petitioner's motion is time-barred under 28 U.S.C. § 2255(f). See App. B. The District Court also issued an Order granting a Certificate of Appealability to the Petitioner. See App. C. Judgment was entered on September 15, 2016. See App. D.

On October 19, 2016, the Petitioner and other affected petitioners filed a Motion for Relief from Judgment. The Government objected to the Petitioner's

Motion on November 2, 2016. A Motion to Reconsider was denied on November 10, 2016.

On November 9, 2016, the Petitioner filed a timely notice of appeal of the decision of the District Court with the United States Court of Appeals for the First Circuit. On September 27, 2017, the United States Court of Appeals for the First Circuit issued an Order requesting the Petitioner to file a memorandum explaining why the Petitioner's challenged offense does not categorically qualify as a crime of violence under the force clause of 18 U.S.C. § 924(c)(3)(A). The Petitioner filed a responsive memorandum on October 30, 2018. The Court of Appeals determined that the Petitioner's challenged offense qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A). See App. A.

The Petitioner seeks certiorari on this issue.

REASONS FOR GRANTING THE PETITION

THE FIRST CIRCUIT COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

A. Unarmed Bank Robbery Under 18 U.S.C. § 2113(a) Cannot Be A Predicate For A Conviction of Using or Carrying a Firearm During a Crime of Violence Under 18 U.S.C. § 924(c)

18 U.S.C. § 924(c) prohibits using or carrying a firearm during and in relation to any crime of violence or drug trafficking crime. See Rosemond v. United States, 572 U.S. 65, 67 (2014). As used in 18 U.S.C. § 924(c)(3), the term "crime of violence" means an offense that is a felony 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) 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). Subsection A is referred to as the "force clause" whereas subsection B is referred to as the "residual clause." The residual clause, 18 U.S.C. 924(c)(3)(B) was deemed unconstitutionally vague in United States v. Davis, 588 U.S. ____, 2019 U.S. Lexis 4210 (June 24, 2019).

1. The First Circuit's Categorical Approach Misapprehends the Nature of Intimidation Required by 18 U.S.C. § 2113(a)

The Petitioner's conviction under 18 U.S.C. § 924(c) violates the Petitioner's due process rights because his offense does not categorically satisfy the force clause of § 924(c)(3).

First Circuit case law recognizes that the categorical approach is required to determine whether an offense is a crime of violence under the force clause. In doing so a court must examine the elements of the offense, rather than the specific conduct of the defendant. See United States v. Ellison, 866 F.3d 32, 33 (1st Cir. 2017). Under the categorical approach, the offense qualifies as a crime of violence only if the least serious conduct encompassed by the elements still falls within the force clause. Id. The First Circuit has determined that certain federal offenses categorically qualify as crimes of violence under various iterations of the force clause, including bank robbery, armed bank robbery, Hobbs Act robbery, pharmacy robbery, and carjacking. See United States v. García-Ortiz, No. 16-1405, 2018 U.S. App. LEXIS 26267 (1st Cir. Sep. 17, 2018); United States v. Cruz-Rivera, No. 16-1321, 2018 U.S. App. LEXIS 26121 (1st Cir. Sep. 14, 2018); see also Hunter v. United States, 873 F.3d 388 (1st Cir. 2017); Ellison, 866 F.3d at 32.

Physical force is a requirement of the § 924(c) force clause. "'[P]hysical force' means *violent force* – that is, force capable of causing physical pain or injury to another person." Johnson v. United States, 559 U.S. 133, 140 (2010) (Johnson I) (emphasis in original). The use of force must be intentional, not just reckless or negligent. See United States v. Fish, 758 F.3d 1, 9-10 n.4 (1st Cir. 2014); see also Whyte v. Lynch, 807 F.3d 463, 468 (1st Cir. 2015).

In Ellison, the First Circuit analyzed whether bank robbery committed in violation of 18 U.S.C. § 2113(a) qualifies as a crime of violence under similar force clause contained in the United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a).

866 F.3d at 32. The court noted that U.S.S.G. § 4B1.2(a) defines a "crime of violence" as any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Id. at 34-35; see U.S.S.G. § 4B1.2(a). The court employed the categorical approach and held that an offense qualifies as a "crime of violence" only if the least serious conduct encompassed by the elements of the offense still fall within the force clause. 866 F.3d at 35. The Ellison Court recognized that bank robbery may be committed by intimidation. Id. But, the court then employed a very narrow definition of the term "intimidation" opining that the "use, attempted use, or threatened use of physical force against another" was necessary to its definition. Id. It found that "proving 'intimidation' under § 2113(a) requires proving that a threat of bodily harm was made." Id. at 37. After concluding that intimidation requires a threat of bodily harm the Ellison Court concluded that bank robbery qualifies as a "crime of violence" under the force clause contained in U.S.S.G. § 4B1.2(a). Id. at 39-40.

While determining whether bank robbery qualifies as a "crime of violence" under § 924(c)'s force clause a court is required to use a categorical approach and must assess the "most innocent conduct" encompassed in the elements of bank robbery. United States v. Torres-Miguel, 701 F.3d 165, 167 (4th Cir. 2012). If this conduct does not fall within the force clause, then the offense categorically fails to qualify as a crime of violence. Bank robbery cannot qualify as a crime of violence and may not be used as a § 924(c) predicate because the full range of conduct encompassed in the elements of the offense fails to match the force clause.

Although the bank robbery offense in the first paragraph of § 2113(a) is defined using multiple phrases – "[w]hoever, 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" property or money of a bank – these disjunctive phrases are alternative means, not alternative elements of the offense. See id.

The Pattern Criminal Jury Instructions for District Courts of the First Circuit confirm that these are alternative means as opposed to elements:

> [Defendant] is accused of robbing the [bank; savings and loan association; credit union] . . . For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of these things beyond a reasonable doubt
>
> . . .
>
> Second, that [defendant] used intimidation or force and violence when [he/she] did so; and . . .

Pattern Criminal Jury Instruction 4.18.2113(a) Unarmed Bank Robbery. Another treatise similarly defines the element:

> The third element the government must prove beyond a reasonable doubt is that the defendant took money from another person by using force and violence or by acting in an intimidating manner. The government can meet its burden on this element either by proving that the defendant used force and violence or that the defendant acted in an intimidating manner. The government does not have to prove that the defendant used force and violence if it proves that the defendant acted in an intimidating manner.

3 Leonard B. Sand et al, Mod. Fed. Jury Instr. – Criminal Instr. 53-5, at 53-15 (2018). Unanimity is not required regarding whether the defendant "robb[ed]" by

means of force, violence or intimidation. Id.

The Court in Ellison reasoned that committing bank robbery by "intimidation" requires a threat of bodily harm and knowledge that one's actions were objectively intimidating. 866 F.3d at 32. Intimidation is satisfied "if an ordinary person in the bank teller's position could reasonably infer a threat of bodily harm." United States v. Pickar, 616 F.3d 821, 825 (8th Cir. 2010). However, threatening physical injury does not require a threat to use violent physical force. See Lynch, 807 F.3d at 468-69; Torres-Miguel, 701 F.3d at 168-69; Chrzanoski v. Ashcroft, 327 F.3d 188, 194-96 (2d Cir. 2003). Intimidation does not require an intentional threat of violent force. "Intimidation is measured under an objective standard, and, therefore, whether the bank robber intended to intimidate the bank teller is irrelevant." Pickar, 616 F.3d at 825; see United States v. Henson, 945 F.2d 430, 439-440 (1st Cir. 1991). One can be intimidated in a manner that does not rise to the level of violent force required by Johnson – that is violent force – or force capable of causing physical pain or injury to another person.

Extortion is an alternative means of committing bank robbery. Extortion can be committed without violent physical force by putting the victim in "[f]ear of economic harm." United States v. Billups, 692 F.2d 320, 330 (4th Cir. 1982); United States v. Bucci, 839 F.2d 825, 828 (1st Cir. 1988). Unarmed bank robbery committed by extortion does not require the use, attempted use, or threat of violent physical force. Therefore, it categorically fails to qualify as a crime of violence under 18 U.S.C. § 924(c) force clause.

The First Circuit definition of intimidation is too narrow. There are many ways in which a bank teller may become intimidated. The bank teller may become intimidated simply by the size of a person. A bank teller may become intimidated by a scowl on a person's face. The bank teller may become intimidated by the fact that the person in the bank is wearing a mask or making some effort to hide his or her identity. None of this intimidation involves an intent to use or threat to use violent force. When the teller is intimidated under the foregoing circumstances there is not a robbery but a larceny. Thus, under the categorical approach when considering the "most innocent conduct" federal unarmed bank robbery cannot be reasonably separated from a common-law larceny or theft. Common-law larcenies do not necessarily involve violence force or threats and do not satisfy the force clause.

2. **The First Circuit's Treatment of State Armed Robbery Demonstrates that Federal Unarmed Bank Robbery Does Not Satisfy the Force Clause of 18 U.S.C. § 924(c)(3)(A)**

In United States v. Starks, 861 F.3d 306 (1st Cir. 2017) the First Circuit held that the Massachusetts state crimes of unarmed robbery and armed robbery can be accomplished without the use, attempted use, or threat of violent physical force described in Johnson I. 861 F.3d 306. The First Circuit analyzed whether armed robbery, as defined by Mass. Gen. Laws ch. 265, § 17, is a "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). Id. at 324. The Court noted that Mass. Gen. Laws ch. 265, § 17 defines armed robbery:

> Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years . . . .

Id.; see Mass. Gen. Laws ch. 265, § 17. The court noted that, in order to qualify as a "violent felony" under the ACCA, the robbery should have "as an element the use, attempted use, or threatened use of physical force against the person of another." See 18 U.S.C. § 924(e)(2)(B)(i); Starks, 861 F.3d at 314. The circuit court reluctantly applied a categorical approach and found that the small level of force (i.e. touching) by which a robbery can be accomplished under Mass. Gen. Laws ch. 265, § 17 "is not the violent force that the ACCA requires." Starks, 861 F.3d at 324. The Court concluded that the offense of armed robbery under Massachusetts law is not a "violent felony" for the purposes of the ACCA. Id.

18 U.S.C. § 2113(a)'s definition of bank robbery requires less violence than required for the purpose of the Massachusetts state crime. 18 U.S.C. 2113(a) states:

> 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.

Following the reasoning of Starks, bank robbery under 18 U.S.C. § 2113(a) would not qualify as "violent crime" under ACCA because it can be accomplished with very little or indeed no level of force. The definition of a "violent crime" under the ACCA is almost identical to the definition of a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). See 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 924(c)(3)(A). Both statutes

state that in order to be a "violent crime" or a "crime of violence," the offense should have "as an element the use, attempted use, or threatened use of physical force against the person [or property] of another." See 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 924(c)(3)(A). The same offense cannot be a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) and non-violent crime under the ACCA. The Massachusetts's armed robbery statute is not a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) for the same reasons as it is not a "violent crime" under the ACCA – it can be accomplished without the "force capable of causing physical pain or injury to another person." Johnson, 559 U.S. at 140. The same is true of federal unarmed bank robbery, 18 U.S.C. 2113 (a).

3. **Aiding and Abetting Unarmed Bank Robbery Is Not a Crime of Violence**

The Petitioner was not convicted as a principal in the bank robbery. The bank robbery charge against the Petitioner was for aiding and abetting – thus further removing the elements of the offense from the provisions of the force clause. The crime of aiding and abetting bank robbery does not categorically qualify as a "crime of violence" under §924(c)'s force clause because it can be committed without the "use, attempted use, or threatened use of physical force." The categorical approach requires that Courts "look only to the statutory definitions – *i.e.*, the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]." Descamps v. United States, 133 S. Ct. 2276, 2283 (2013) (citation omitted). A court must "focus on 'the minimum conduct necessary for a violation'" of the statute. United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016) (citation

omitted). If the most innocent conduct does not constitute a crime of violence then the statute categorically fails to qualify as a crime of violence.

A person is liable under 18 U.S.C. § 2 for aiding and abetting a crime if he: (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission. Rosemond, 572 U.S. at 71; United States v. Gaw, 817 F.3d 1, 7 (1st Cir. 2016) (the government must prove that: (i) the substantive offense was actually committed; (ii) the defendant assisted in the commission of that crime or caused it to be committed; and (iii) the defendant intended to assist in or cause the commission of the crime). "[A] defendant can be convicted as an aider and abettor *without proof that he participated in each and every element of the offense.*" Rosemond, 572 U.S. at 73 (emphasis added). Circuit Judge Martin of the U.S. Court of Appeals for the Eleventh Circuit, in his dissenting opinion in Colon, 826 F.3d 1301 (11th Cir. 2016), recognized that a defendant can be convicted of aiding and abetting a robbery without ever using, attempting to use, or threatening to use force. 826 F.3d at 1306. He explained:

> . . . a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all . . . the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, *or driving the principal somewhere*. And even if [the defendant's] contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the 'elements clause' definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime . . . As almost every court of appeals has held, a defendant can be convicted as an aider and

> abettor *without proof that he participated in each and every element* of the offense . . . Even when a principal's crime involves an element of force, there is no authority for demanding that an affirmative act go toward an element considered peculiarly significant; rather . . . courts have *never thought relevant the importance of the aid rendered.*

Id. at 1306-07 (dissenting) (citations and quotations omitted, emphasis added). Aiding and abetting a robbery does not categorically qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) because it can be accomplished without the use, attempted use, or threatened use of physical force.

While not formally an inchoate offense, aiding and abetting is somewhat akin to the crime of conspiracy to commit robbery in that both acts can be accomplished without the use of any force. In 2007, the First Circuit found conspiracy to commit robbery is a "crime of violence" under the force clause of § 924(c). United States v. Turner, 501 F.3d 59, 68 (1st Cir. 2007). Following Turner, however, a number of the federal courts of appeal recognized that conspiracy does not require the use, attempted use, or threatened use of physical force. See United States v. Gore, 636 F.3d 728, 731 (5th Cir.2011); United States v. White, 571 F.3d 365, 368-69 (4th Cir. 2009); United States v. King, 979 F.2d 801, 801-03 (10th Cir.1992); United States v. Hernandez, 228 F. Supp. 3d 128, 138-39 (D. Me. 2017); United States v. Edmundson, 153 F. Supp. 3d 857, 859-60 (D. Md. 2015); United States v. Rossetti, CRIMINAL ACTION NO. 99-10098-RGS, 2018 U.S. Dist. LEXIS 132249, *8-9 (D.N.H. Aug. 7, 2018). Conspiracy requires only the intent to enter into an agreement and the intent to achieve the criminal objective of that agreement. Id.

Conspiracy therefore does not categorically qualify as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). Id. Similar to conspiracy to commit robbery, the crime of aiding and abetting can be committed without the use, attempted use, or threatened use of physical force. Aiding and abetting robbery should not qualify as a "crime of violence" under the force clause of § 924(c)(3)(A).

B. Petitioner's Motion to Correct Sentence Is Not Time-Barred Under 28 U.S.C. § 2255(f)(3)

Section 2255 motions are subject to a one-year statute of limitations. See 28 U.S.C. § 2255(f). If a motion is based on a new right announced after the conviction became final, the limitation period begins to run when "the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

On June 26, 2015, in Johnson v. United States, 135 S. Ct. 2551 (2015) (Johnson II), the Supreme found 18 U.S.C. § 924(e)(2)(B) defining "violent felony" to be unconstitutionally vague. 135 S. Ct. at 2563. The ACCA section speaks of offense that: "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)

While analyzing the constitutionality of the residual clause, the Supreme Court in Johnson II noted that, unlike the ACCA force clause, it directs a court to focus not on the elements of the predicate offense, but instead requires a court to picture the kind of conduct that the crime involves in "the ordinary case."

> Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. . . The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use . . . of physical force," the residual clause asks whether the crime "*involves conduct*" that presents too much risk of physical injury.

Johnson, 135 S. Ct. at 2557 (emphasis original) (citation omitted). The Court concluded that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," and that "[i]ncreasing a defendant's sentence under the clause denies due process." Id. Importantly, the Court explained that two features of the ACCA residual clause conspire to make it unconstitutionally vague. See id. at 2557-58. First, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime by tying the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. See id. Second, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. See id. It is one thing to apply an imprecise "serious potential risk" standard to real world facts; it is quite another to apply it to a judge-imagined abstraction. See id. Thus, the Court held that the ACCA residual clause was unconstitutionally vague because it involved a double-helping of indeterminacy. See id. In Welch v. United States, 136 S. Ct. 1257

(2016), the Supreme Court made Johnson II retroactive. The Petitioner filed a Motion to Correct Sentence within a year of Johnson II.

The United States District Court for the District of New Hampshire concluded, however, that Johnson II did not recognize a new right applicable to the Petitioner because Johnson II did not declare that 18 U.S.C. 924(c)(3)(b) was unconstitutional. Kucinski v. United States, 2016 U.S. Dist. LEXIS 125730, *10 (D.N.H. Sept. 15, 2016). The Court concluded that Johnson II did not recognize a new right to challenge conviction based on unconstitutionally vague residual clause of 18 U.S.C. § 924(c) and did not start the statute of limitations for such challenges. See id. The Court made its determination after noting that "a substantial number of capable jurists have reasonably determined after careful analysis that Johnson does not require invalidation of § 924(c)'s residual clause." Id. at *9.

Following the Court's ruling, on April 17, 2018, the United States Supreme Court extended Johnson beyond the ACCA when it considered whether the Immigration and Naturalization Act's ("INA") residual clause violated due process. See Sessions v. Dimaya, 138 S. Ct. 1204 (2018) ("Dimaya"). The INA identifies a number of offenses as aggravated felonies and cross-references 18 U.S.C. § 16(b), which defines "crime of violence" for purposes of determining whether the petitioner was a removable alien as "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." Id. at 1223. The Supreme Court determined that 18 U.S.C. § 16(b) was unconstitutionally vague.

See id. at 1223. It clarified that Dimaya's holding is not restricted to 18 U.S.C. § 16(b), but applies to invalidate any provision that possesses "an ordinary-case requirement and an ill-defined risk threshold." Id. Dimaya made it clear that a statute that includes these features deprives a person of due process rights and "minor linguistic disparities" between statutes that share these features do not "make any real difference." Id. "If the right recognized in Johnson were confined to ACCA, Dimaya would not have been decided as it was." United States v. Meza, No. CR 11-113, 2018 U.S. Dist. LEXIS 74551, *13 (D. Mont. May 2, 2018).

On June 24, 2019, in United States v. Davis, 588 U.S. ____, 2019 U.S. Lexis 4210 (June 24, 2019), the United States Supreme Court confirmed that Johnson II and Dimaya "teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary care'." 2019 U.S. Lexis 4210, *6. The Supreme Court confirmed that the same inquiry applies to the § 924(c)'s residual clause as to ACCA and 18 U.S.C. § 16(b). See id. at 7-24. It confirmed that the residual clause of § 924(c) is unconstitutionally value. See id. at 24.

The statute of limitation for the purposes of challenging constitutionality of 18 U.S.C. § 924(c) started running when the Supreme Court, in Johnson II and Dimaya, recognized the right to challenge unconstitutionally vague provisions that contain "an ordinary-case requirement and an ill-defined risk threshold" similar to ACCA and 18 U.S.C. § 16(b). The Petitioner made his challenge in a timely manner. Since his filing the Supreme Court has held that 18 U.S.C. 924(c)(3)(B) is

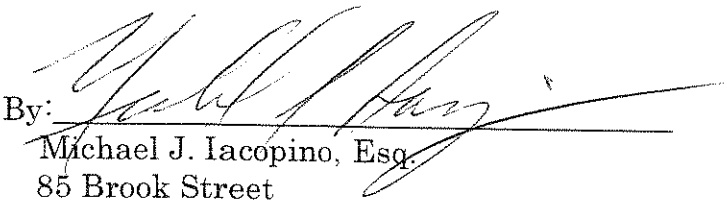
unconstitutionally vague. United States v. Davis, 588 U.S. ____, 2019 U.S. Lexis 4210 (June 24, 2019). The district court ruling finding that the motion to correct sentence was untimely filed is erroneous. The Petitioner's Motion to Correct Sentence is not time-barred by 28 U.S.C. § 2255(f). It was filed within a year of the new right recognized by the Supreme Court in Johnson II.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,
Matthew Karahalios, Petitioner
By his Attorneys,
BRENNAN LENEHAN IACOPINO & HCKEY

Date: July 3, 2019

By: 

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