No. _____

IN THE SUPREME COURT OF THE UNITED STATES

---

MARIO DENANE FULTZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

---

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

---

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

## QUESTION PRESENTED

Whether Congress intended the phrase "by force and violence, or by intimidation," that appears in multiple federal criminal statutes to include the use of *violent, intentional* physical force.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*Page*

### Federal Cases

**Federal Statutes**

IN THE SUPREME COURT OF THE UNITED STATES

MARIO DENANE FULTZ,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner Mario Denane Fultz respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 12, 2019.

## OPINION BELOW

On May 10, 2019, the Ninth Circuit Court of Appeals issued a published opinion affirming the denial of Mr. Fultz's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See United States v. Fultz*, 923 F.3d 1192 (9th Cir. 2019) (attached here as Appendix A). Mr. Fultz then filed a petition for panel rehearing and rehearing en banc. On August 12, 2019, the panel denied Mr. Fultz's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

## JURISDICTION

On May 10, 2019, the court of appeals affirmed the denial of Mr. Fultz's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See* Appendix A. On August 12, 2019, the court of appeals denied his petition for panel and en banc rehearing. *See* Appendix B. The Court thus has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 of the United States Code, Section 924(c)(3) states:

> 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.

The federal statute criminalizing robbery in a special maritime and territorial jurisdiction states:

> Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.

18 U.S.C. § 2111.

## STATEMENT OF THE CASE

Mario Fultz was raised in Indiana, graduated from high school, and completed some college courses. He subsequently served in the United States

Marine Corps and was honorably discharged. At the time of his arrest in 1993, he had a wife and two young children and no criminal history.

In August 1992 and January 1993, Mr. Fultz robbed a post exchange on the Camp Pendleton Military Base near San Diego, California. The Government subsequently charged Mr. Fultz with two counts of robbery in a special maritime or territorial jurisdiction ("maritime robbery"), in violation of 18 U.S.C. § 2111, and two counts of Using a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1). A jury found Mr. Fultz guilty on all four counts.

Because Mr. Fultz had no prior criminal convictions, he was subject to a Guidelines range of only 63-78 months for the robbery counts, for which the district court gave him a low-end sentence of 63 months. But because the robberies involved the use of a firearm, Mr. Fultz was subject to a consecutive mandatory minimum of 60 months' custody for the first firearm violation and twenty years' custody for the second firearm violation. So despite having no previous criminal convictions, Mr. Fultz received a total sentence of over *thirty years* for the two robbery offenses.

In 2015, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the "residual clause" in the Armed Career Criminal Act was unconstitutional because it was void for vagueness. Within one year of *Johnson*, Mr. Fultz filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 arguing that a nearly-identical "residual clause" in § 924(c) was similarly void for vagueness.

In his petition, Mr. Fultz preemptively argued that robbery under § 2111 did not satisfy an alternative definition of a "crime of violence" located at § 924(c)(3)(A). This alternative definition, known as the "force clause," covers offenses requiring the "use, attempted use, or threatened use of physical force." The district court disagreed, finding that § 2111 satisfied the force clause because the language of the statute required that the offense be committed "by force and violence, or by intimidation." Nevertheless, the district court granted Mr. Fultz a certificate of appealability to the Ninth Circuit Court of Appeals, and Mr. Fultz timely appealed.

On appeal, Mr. Fultz argued that federal courts had interpreted the "by force and violence, or by intimidation" language of § 2111 to include offenses that required something less than the intentional, violent physical force necessary to satisfy the force clause. For instance, he pointed to *United States v. Goldtooth*, 754 F.3d 763 (9th Cir. 2014), where several defendants had been charged with § 2111 for an incident in which they merely "nudged" a victim with a baseball bat and then "snatched" a packet of tobacco from him. He also pointed to *United States v. Sherman*, 2001 WL 37125117, at *1 (D.N.M. Mar. 14, 2001), where the defendant stole a truck and accidentally hit the truck's owner as he was driving away. And at oral argument, Mr. Fultz noted the textual differences between the federal carjacking and maritime robbery statutes, arguing that the omission in maritime robbery of an intent to cause serious bodily harm or death showed that Congress intended maritime robbery to sweep more broadly, encompassing offenses involving *de minimis* force and non-intentional injuries. Because Congress drafted this

broader maritime robbery statute to fall within the now-invalidated residual clause, rather than the force clause, Mr. Fultz argued that the court should vacate his 25-year sentence for § 924(c).

The Ninth Circuit disagreed. In a published opinion, the Ninth Circuit declined to consider Mr. Fultz's cases showing that maritime robbery reached conduct involving non-violent and unintentional "force." Instead, it focused on the plain language of § 2111, holding that because other robbery statutes, such as carjacking under § 2119 and bank robbery under § 2113, employed the same "by force and violence, or by intimidation" language and had been held to fall under the force clause, the same must be true of maritime robbery. While the Ninth Circuit admitted that maritime robbery lacked the element of an intent to cause serious bodily harm or death that appears in the carjacking statute, this "does not persuade us that the force clauses in these statutes have different meanings." *United States v. Fultz*, 923 F.3d 1192, 1196 (9th Cir. 2019). On this basis, the Ninth Circuit affirmed the denial of Mr. Fultz's § 2255 petition.

Mr. Fultz filed a petition for panel and en banc rehearing, which the Ninth Circuit denied on August 12, 2019. *See* Attachment B. The district court had original subject matter jurisdiction under 28 U.S.C. § 3231.

This petition for a writ of certiorari follows.

## REASONS FOR GRANTING THE PETITION

### I. The Court Should Grant Certiorari to Determine Which Federal Statutes in §§ 2111-2119 Congress Intended to Satisfy the Force Clause.

In the federal criminal statutes at 18 U.S.C. §§ 2111-2119, Congress created a series of robbery, theft, burglary, larceny, and carjacking crimes. Some of these statutes require that the defendant "rob" a victim or commit "larceny." *See* 18 U.S.C. § 2112, 2115, 2117. Some of them require that the defendant commit a taking "by force and violence, or by intimidation." *See* 18 U.S.C. §§ 2111, 2113, 2118, 2119. And some of them require that the defendant "assault[]," "wound," or "put[] [the victim's] life in jeopardy by the use of a dangerous weapon"; "willfully or maliciously assault[]" the victim; or have the "intent to cause death or serious bodily harm." *See* 18 U.S.C. §§ 2114, 2116, 2119.

Congress also created a generic definition of a "crime of violence" for purposes of 18 U.S.C. § 924(c). This definition contains two alternative clauses. The first one, known as the "force clause," includes an offense that has, as an element, the "use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A). The second one, known as the "residual clause," includes an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §924(c)(3)(B).

But this Court has held that not *every* type of "force" necessarily satisfies the "force clause" of § 924(c)(3)(A). For instance, this Court has interpreted the force

clause to require "*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 2010"). *See also Stokeling v. United States*, 139 S. Ct. 544, 553 (2019). Courts have also interpreted the force clause to require *intentional* force—not force that is merely reckless or negligent. *See Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).

Yet Congress never specified which offenses at §§ 2111-2119 required this type of *violent, intentional* physical force and which did not. And the mere use of the word "force" in several of the statutes does not show that they necessarily meet this heightened standard, as Congress elsewhere used the term "force" to refer to crimes that did *not* require violent, intentional force. *See United States v. Castleman*, 572 U.S. 157, 162 (2014) (interpreting "force" for purposes of 18 U.S.C. § 922(g)(9) as requiring only "offensive touching"); *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016) (interpreting "force" for purposes of the same statute as requiring only a mens rea of recklessness).

So the question is, did Congress intend the phrase "by force and violence, or by intimidation" in § 2111 to mean the type of *violent, intentional* physical force that would satisfy the most serious definition of a crime of violence (the force clause at § 924(c)(3)(A))? Or did Congress' use of the terms "assault," "wound," "serious bodily harm," and "death" in the surrounding statutes show that it reserved the force clause for these other, more serious crimes and intended § 2111 to satisfy at most only the residual clause?

This question implicates the well-known rule that "because statutes are not read as a collection of isolated phrases," a particular word "may or may not extend to the outer limits of its definitional possibilities." *Abuelhawa v. United States*, 556 U.S. 816, 819–20 (2009) (quotations and citation omitted). Rather, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quotations omitted). *See also Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (noting that "[m]ost words have different shades of meaning, and consequently may be variously construed").

Here, for example, Congress could have intended the phrase "by force and violence, or by intimidation," in § 2111 to refer to the kind of violent, intentional physical "force" at issue in *Johnson* 2010. But it could have also intended this phrase to refer to the kind of *de minimis* or reckless "force" at issue in *Castleman* or *Voisine*. The fact that Congress included crimes at §§ 2111-2119 that are both *more* and *less* serious than § 2111 shows that it did not necessarily regard the phrase "by force and violence, or by intimidation," as the most serious type of "crime of violence." In other words, Congress may have intended § 2111 to satisfy only the residual clause—not the force clause. And because this Court recently struck down the residual clause at § 924(c)(3)(B) as unconstitutional, this Court should grant certiorari to determine whether § 2111 (and by extension, several other offenses codified at §§ 2111-2119) pose a categorical match to the force clause.

## II. The Question of Which Federal Statutes Congress Intended to Satisfy the Force Clause Presents an Important National Issue.

For years, courts had no reason to determine whether a particular crime fell within the force clause versus the residual clause since both qualified as a "crime of violence." *See* 18 U.S.C. § 924(c)(3). For instance, if a defendant's § 924(c) charge rested on § 2111, and the judge determined that § 2111 satisfied the residual clause, the judge had no independent need to determine whether § 2111 also satisfied the force clause. So although the federal robbery, burglary, theft, and carjacking statutes at §§ 2111-2119 frequently provided the basis for a § 924(c) "crime of violence," courts rarely addressed whether these statutes required the type of violent, intentional force necessary to satisfy the force clause.

This all changed with the Court's decisions in *Johnson* and *Davis*. In *Johnson*, the Court struck down a similarly-worded residual clause in the Armed Career Criminal Act as void for vagueness. *See Johnson*, 135 S. Ct. at 2557. Three years later, the Court held that the § 924(c) residual clause was unconstitutional for the same reason. *See United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). Going forward, then, federal courts have little precedent to guide their determinations of whether common offenses like § 2111 satisfy the force clause. Not only does this affect future § 924(c) prosecutions, it potentially impacts thousands of prior § 924(c) convictions that are still being adjudicated through habeas petitions post-*Johnson* and *Davis*. Guidance from this Court could help efficiently resolve those cases without tying up judges, prosecutors, defense attorneys, and court resources for years to come.

## III. Mr. Fultz's Case Presents an Ideal Vehicle to Resolve This Issue.

At every stage of the proceedings, Mr. Fultz argued and preserved the sole issue in this case—whether § 2111 required the use of violent, intentional force such that it could satisfy the force clause for purposes of his § 924(c) conviction. Because the Ninth Circuit's published opinion squarely addressed this issue on the merits, and no other issue would deprive Mr. Fultz of his right to relief, it presents an ideal case for this Court's review.

## IV. The Ninth Circuit Erroneously Interpreted the Language in § 2111 to Satisfy the Force Clause.

A straightforward application of this Court's precedent shows that courts have interpreted federal robbery crimes like § 2111 that contain the phrase "by force and violence, or by intimidation," as not categorically satisfying the force clause. To determine whether a statute reaches conduct broader than the generic definition of a crime, courts must discern the "minimum conduct criminalized" by the statute at issue and "presume that the conviction 'rested upon nothing more" than this minimum conduct. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). One way a defendant can establish such "minimum conduct" is to "point to his own case or other cases in which the [] courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 184 (2007). So if Mr. Fultz can point to other federal criminal cases where courts have interpreted the language in § 2111 to reach conduct that does not

involve violent, intentional force, the statute does not categorically match the force clause.

Here, Mr. Fultz pointed to at least two cases showing that a person may be prosecuted under § 2111 for conduct that does not involve violent, intentional force. What's more, examples abound of cases involving other federal robbery statutes, such as bank robbery under § 2113, that do not involve violent, intentional force. These case provide demonstrable proof that federal courts are not interpreting the phrase "by force and violence, or by intimidation" in the §§ 2111-2119 statutes in a way that categorically matches the force clause.

### A. The federal robbery statutes do not require *violent* physical force.

Before the Ninth Circuit, Mr. Fultz argued that prior cases show a person could be prosecuted under § 2111 for conduct that did not involve violent physical force. For instance, in *United States v. Goldtooth*, two teens were sitting outside a gas station rolling tobacco and smoking cigarettes when three men arrived and approached them in a menacing way. 754 F.3d 763, 765–66 (9th Cir. 2014). The teens "offered to roll the men" some cigarettes. *Id.* One man "nudged" the teen rolling the cigarettes with his baseball bat to "hurry him up," while another man "smacked [the other teen] on the back of the head" with his friend's hat. *Id.* Then, as the teen handed over the cigarettes, one man "suddenly and without permission, snatched the remaining tobacco from [the teen's] lap" and walked away. *Id.* "No verbal threats were ever made," and the teens "were not physically harmed." *Id.*

The Ninth Circuit declined to consider *Goldtooth* as an example of § 2111's overbreadth in Mr. Fultz's case because *Goldtooth* was ultimately reversed on a different sufficiency-of-the-evidence theory that involved aiding and abetting. *See* Appendix A at 7-10. But in *Goldtooth*, the Ninth Circuit confirmed that the relevant elements of the offense were "(1) that the defendant took or attempted to take a package of Tops brand tobacco from [the teen]; [and] (2) that the defendant used *force, violence, or intimidation* in doing so." 754 F.3d at 768 (emphasis added). And the Ninth Circuit upheld the legal conclusion that a "robbery" of the tobacco had occurred, concluding that "a robbery was committed by someone." *Id.* at 768-79. So *Goldtooth* establishes a "realistic probability" that a person could be convicted of § 2111 for *de minimis* force—"nudging" someone with a baseball bat, "smacking" a person on the back of the head with a hat, and "snatching" tobacco away with no resistance from the victim.

Numerous courts have similarly interpreted bank robbery under § 2113—which contains the same clause as § 2111—as requiring no more than the same *de minimis* force. For example, in *United States v. Kelley*, a teller at a bank left her station, and two men laid across the bank counter to open her unlocked cash drawer, grabbed $961 in cash, and ran out. 412 F.3d 1240, 1243-45 (11th Cir. 2005). The tellers testified they were "shocked, surprised, and scared," but did nothing to stop the robbery. *Id.* Similarly, in *United States v. Lucas*, the defendant was convicted after he simply walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that

read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And in *United States v. Ketchum*, the defendant told the teller that "[t]hese people are making me do this," and "[t]hey are forcing me and have a gun"; after the teller gave him $1,686, he then left the bank. 550 F.3d 363, 365 (4th Cir. 2008).[1]

These examples show that federal courts interpret the language in these robbery statutes—"by force and violence, or by intimidation"—extremely broadly. The defendants in these examples never used violent physical force, nor did they even *threaten* to use it because none of them were armed or pointed a gun at the teller. Because the defendants in these cases either used, attempted to use, or threatened to use *de minimis* force (or no force at all), Mr. Fultz has shown that the minimum conduct implicated by the language in the federal robbery statutes does not categorically satisfy the force clause.

### B. The federal robbery statutes do not require *intentional* physical force.

Before the Ninth Circuit, Mr. Fultz also argued that prior cases show a person could be prosecuted under § 2111 for conduct that did not involve intentional

---

[1] *See also United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing); *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery," then "left the bank in a nonchalant manner" when the teller said she had no hundreds or fifties).

physical force. For instance, in *United States v. Sherman*, the defendant tried to steal a truck from a man who was drunk and "stumbling around outside" while the truck was still running. 2001 WL 37125117, at *1 (D.N.M. Mar. 14, 2001). But while driving away, the defendant accidentally hit the truck's owner, killing him. *Id.* The defendant was convicted of § 2111 and involuntary manslaughter, the latter of which demonstrates that any use of force was negligent. *See id.*

Furthermore, in *United States v. Foppe*, the Ninth Circuit held that a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held that a specific intent instruction was unnecessary because "the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* What's more, *Foppe* clarified that "[w]hether [the defendant] specifically intended to intimidate [the teller] is irrelevant." *Id.* And in *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996), the Fourth Circuit held that § 2113 is satisfied "if an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts, *whether or not the defendant actually intended the intimidation.*" (emphasis added) (citation omitted). As *Woodrup* explained, "nothing in the statute even remotely suggests that the defendant must have intended to intimidate." *Id.* The Eleventh Circuit similarly held in *Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d at 1244.

As with *de minimis* force, these cases demonstrate that federal courts interpret the phrase "by force and violence, or by intimidation" extremely broadly to include nonviolent, nonintentional conduct. And because the force clause requires the *intentional* use, attempted use, or threatened use of force against another, the federal robbery statutes cannot satisfy the force clause set forth at § 924(c)(3)(A) on the basis of this phrase alone. Consequently, this Court should grant certiorari to correctly instruct circuit courts on the elements of these common federal statutes.

## CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: November 8, 2019

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

# APPENDIX A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee*,<br><br>v.<br><br>MARIO DENANE FULTZ,<br>*Defendant-Appellant.* | No. 17-56002<br><br>D.C. Nos.<br>3:16-cv-01558-DMS<br>3:93-cr-00351-DMS-1<br><br>OPINION |

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge Presiding

Argued and Submitted February 6, 2019
Pasadena, California

Filed May 10, 2019

Before: Ronald M. Gould and Jacqueline H. Nguyen,
Circuit Judges, and Algenon L. Marbley,* District Judge.

Opinion by Judge Marbley

---

* Honorable Algenon L. Marbley, District Judge for the United States District Court for the Southern District of Ohio, sitting by designation.

## SUMMARY**

### 28 U.S.C. § 2255

The panel affirmed the district court's denial of Mario Fultz's motion under 28 U.S.C. § 2255 in which he argued that his sentence was improperly enhanced under 18 U.S.C. § 924(c)(1) on the ground that his underlying offense, Robbery on a Government Reservation in violation of 18 U.S.C. § 2111, was a "crime of violence" under 18 U.S.C. § 924(c)(3).

The panel held that § 2111 Robbery, even if done by "intimidation" alone, is categorically a "crime of violence" under the elements clause of § 924(c)(3)(A).

## COUNSEL

Kara Hartzler (argued), Federal Defenders of San Diego Inc., San Diego, California, for Defendant-Appellant.

Helen H. Hong (argued), Chief, Appellate Section; Adam L. Braverman, United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

**OPINION**

MARBLEY, District Judge:

In 2016, the Supreme Court decided *Johnson v. United States* (*Johnson II*), 135 S. Ct. 2551. In *Johnson II*, the Court invalidated the "residual clause" of the Armed Career Criminal Act ("ACCA")—18 U.S.C. § 924(e)(2)(B)(ii)—as void for vagueness. Following *Johnson II,* Defendant-Appellant Mario Fultz filed a second or successive motion to vacate his sentence under 28 U.S.C. § 2255. Fultz argues that his sentence was improperly enhanced under § 924(c)(1). First, he argues that, because the underlying offense, robbery, was not a "crime of violence" under the elements clause of § 924(c)(3)(A), his sentence was enhanced pursuant to the residual clause of § 924(c)(3)(B). Second, he argues that his sentence enhancement under the residual clause is unconstitutional after *Johnson II*. The district court denied Fultz's § 2255 motion but issued a certificate of appealability, allowing Fultz to appeal its denial order. This appeal was timely filed.

Between the time this appeal was filed and the time this court began consideration of this case, the Supreme Court granted certiorari in *United States v. Davis*, 18-431, which was argued April 17, 2019. *Davis* will address the question of whether the residual clause of §924(c)(3) is unconstitutional. In the interim, this court heard argument on the first certified question: whether the crime of which Fultz was convicted, robbery in violation of 18 U.S.C. § 2111, is a crime of violence under the elements clause.

We conclude that § 2111 Robbery is a "crime of violence" under the elements clause. Fultz conceded that, if his conviction under § 2111 also satisfies the elements clause of § 924(c)(3)(A), he would be unable to obtain relief

under *Johnson II*. Accordingly, the district court is **AFFIRMED**.

## Background

The facts of this case are not in dispute. In August 1992 and January 1993, Defendant-Appellant Mario Fultz robbed an exchange on Camp Pendleton Military Base, near San Diego, California. Mr. Fultz was charged with two counts of Robbery on a Government Reservation, in violation of 18 U.S.C. § 2111, and two counts of Using and Carrying a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. § 924(c)(1). In total, Fultz stole approximately $123,500. In 1994, after a jury trial, he was convicted on all four counts. During the robberies, Fultz carried, but did not fire, a pistol. He was sentenced to consecutive mandatory minimum of 60 months' custody for the first firearm violation, and a consecutive mandatory minimum of twenty years' custody for the second firearm violation. Although Fultz had no prior criminal history, he was sentenced to more than thirty years for the two robbery offenses.

Fultz appealed both his conviction and his sentence, but this court affirmed. *United States v. Fultz*, 60 F.3d 835 (9th Cir. 1995) (unpublished). Fultz also alleged his trial counsel was ineffective and filed several *pro se* § 2255 motions, all of which were denied.

In June 2015, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson II* held that the "residual clause" of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness. The next year, the Supreme Court said *Johnson II* was a substantive rule change, and so was retroactive. *Welch v. United States*, 136 S. Ct. 1257 (2016).

Fultz filed this § 2255 motion within one year of *Johnson II*. This Court granted Fultz's application to file a second or successive § 2255 motion. In July 2017, the district court denied Fultz's § 2255 motion, reasoning that § 2111 Robbery is a crime of violence under the elements clause, and, in any event, *Johnson II* did not render § 924(c)(3)(B) void for vagueness. However, the district court granted Fultz a certificate of appealability. This appeal followed.

**Jurisdiction and Standard of Review**

We have jurisdiction under 28 U.S.C. § 2253. We review *de novo* the district court's denial of a § 2255 motion. *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014).

**Discussion**

The question presented is whether Robbery on a Government Reservation, 18 U.S.C. § 2111, is an elements clause "crime of violence," that is, whether it is an offense that "has as an element the use, attempted use, or threatened use of physical force" under 18 U.S.C. § 924(c)(3)(A). We hold today that § 2111 Robbery is a "crime of violence" under the elements clause.

In *Johnson I*, the Supreme Court considered whether battery in Florida was categorically a crime involving the "use, attempted use, or threatened use of physical force." *Johnson v. United States*, 559 U.S. 133 (2010).[1] The Court held that the phrase "physical force" requires "violent

[1] Although the Court was interpreting a provision of the ACCA, § 924(e)(2)(B)(i), the operative language—"use, attempted use, or threatened use of physical force"—is identical to the portion of the statute at issue, § 924(c)(3)(A). This clause in both statutes is referred to interchangeably as the "elements clause" or the "force clause."

force—that is, force capable of causing physical pain or injury to another person." *Johnson I*, 559 U.S. at 140.

The relevant language of § 2111 criminalizes robbery done "by force and violence, or by intimidation." 18 U.S.C. § 2111. We use the "categorical approach" to determine whether a crime qualifies as a predicate offense under § 924(c)(3). *See Taylor v. United States*, 495 U.S. 575 (2000). This approach requires the Court to "assess[] whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Johnson II*, 135 S. Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). Under the categorical approach, courts must ask whether the conviction could stand if it rested upon the "least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson I*, 559 U.S. at 137) (alteration omitted). If the least of the acts criminalized by § 2111 would be a crime of violence under § 924(c)(3)(A), then § 2111 Robbery is categorically a crime of violence under the elements clause.

We have previously held that 18 U.S.C. § 2119—carjacking—qualifies as a crime of violence under the elements clause following *Johnson I*. *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017). Section 2119 has the same force language—"by force and violence or by intimidation"—as does § 2111 Robbery. This conclusion also echoes our earlier decision that § 2113 Bank Robbery is a crime of violence, *United States v. Selfa*, 918 F.2d 749, 751–52 (9th Cir. 1990), although *Selfa* was decided before *Johnson I*.

In *Gutierrez*, we discussed *Selfa* and concluded that "[b]ank robbery by intimidation thus requires at least an

implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard." *Gutierrez*, 876 F.3d at 1257. And because § 2113 Bank Robbery and § 2119 Carjacking are criminalized using the same language, there is "no reason to interpret the term 'intimidation' in the federal carjacking statute any differently." *Id.*

We employed the same reasoning in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) (per curiam), in which this court concluded that, even after *Johnson I*, § 2113 Bank Robbery is a "crime of violence under the force clause." *Id.* at 784. In *Watson*, after determining that the categorical approach applies, we rejected the defendants' argument that bank robbery by intimidation alone did not meet the requirements for a "crime of violence." *Id.* at 785. In doing so, we discussed and relied on *Gutierrez*, concluding that even bank robbery by intimidation involved "the type of violent physical force necessary to meet the *Johnson* [*I*] standard." *Id.* at 785 (quoting *Gutierrez*, 876 F.3d at 1257).

So too here. Because § 2111 uses the same force language as § 2113 (*Selfa*; *Watson*) and § 2119 (*Gutierrez*), the controlling cases on this question have led us to conclude that § 2111 Robbery, even if done by "intimidation" alone, is categorically a "crime of violence" for the purposes of § 924(c)(3)(A).

Fultz relies on *United States v. Goldtooth*, arguing that *Goldtooth* shows that a defendant can be convicted under § 2111 even when he uses only *de minimis* force and that this level of force is insufficient under *Johnson I* to qualify as a "crime of violence." *See United States v. Goldtooth*, 754 F.3d 763 (9th Cir. 2014). This argument, made by drawing conclusions from what the *Goldtooth* court did *not* say, is precluded by *Gutierrez*.

In *Goldtooth*, two defendants were convicted of § 2111 Robbery for "snatch[ing]" tobacco from two teenagers. *Goldtooth*, 754 F.3d at 766. The defendants carried baseball bats and knives but did not use these weapons on the teenagers. *Id.* The defendants patted down the teenagers, as if looking for weapons, and asked whether the teens had money or wallets on them. *Id.* At one point, one of the defendants "nudged" a teenager with the bat "to hurry him up." *Id.* After some back-and-forth, the defendants suddenly "snatched" the tobacco from the teenagers and fled. *Id.* "No verbal threats were ever made; [the teenagers] were not physically harmed." *Id.* A jury convicted the defendants of two counts, one for the robbery of the tobacco and the second for the attempted robbery of the money and wallet. The defendants were convicted on an "aiding and abetting" theory, whereby the government could satisfy its burden without having to prove "which person had actually carried out the robbery and which person or persons had aided and abetted." *Id.* at 768.

On appeal, the defendants' convictions were vacated because of insufficient evidence. *Id.* at 765. The Ninth Circuit concluded that, as to the robbery of the tobacco, the government lacked evidence that either defendant had the specific intent to aid and abet the robbery because they did not have advance knowledge that the robbery was going to take place. *Id.* at 768–69. The federal government failed to show that the defendants "had drawn up plans or had discussions prior to the taking." *Id.* at 769. In addition, the prosecution had presented insufficient evidence to sustain a conviction on the second count for attempted robbery of the wallet because attempted robbery also required specific intent, which the government was unable to prove. *Id.* at 770.

But the crux of *Goldtooth*, according to Fultz, is what the Ninth Circuit does *not* say. Although the panel reversed and remanded for entry of judgment of acquittal on both counts, it did so on the basis that the evidence was insufficient to sustain the specific intent elements of the crimes—*not* because § 2111 Robbery could not be accomplished by a mere "snatch" or with such *de minimis* use of force. Fultz urges this panel to follow *Goldtooth*'s assumption that such minimal force can accomplish a § 2111 Robbery. If this were the rule, then there would be evidence that § 2111 Robbery and § 2119 Carjacking are interpreted differently by courts. This would also support the conclusion that § 2111 Robbery would not be a "crime of violence" under the elements clause because *Johnson I* and subsequent cases indicate that a "snatch" is insufficient to qualify as "violent physical force."[2]

This reading of *Goldtooth* is precluded by *Gutierrez* and *Watson*. Fultz is correct that the *Goldtooth* court did not say it was vacating the convictions because the "snatching" was insufficient to sustain § 2111 Robbery. But we cannot infer

[2] The Supreme Court recently suggested this continues to be its approach to these questions in *Stokeling v. United States*, No. 17-5554 (U.S. Jan. 15, 2019). Stokeling was convicted of robbery in Florida and argued that the Florida robbery statute did not qualify as a "crime of violence" under §924(e)(2)(B)(i)—the elements clause at issue in *Johnson I*. The relevant Florida robbery statute criminalizes "the use of force, violence, assault, or putting in fear." Slip op. at 2. The Supreme Court held that the "elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance." Slip op. at 3. Although *Stokeling* involves Florida robbery and not § 2111 Robbery, the language defining the offense is similar. The Supreme Court's conclusion first reaffirms that the categorical approach is the correct one, slip op. at 3, and reaffirms that the level of force defined by Florida robbery qualifies as a "crime of violence" under the ACCA elements clause at § 924(e)(2)(B)(i).

a conclusion one way or the other from the silence in *Goldtooth* when *Gutierrez* and *Watson* are on point.

At oral argument, Fultz made a further argument in an attempt to distinguish the language of § 2119 Carjacking and § 2111 Robbery. Fultz noted that § 2119 Carjacking has an intent element—"whoever, with the intent to cause death or serious bodily harm"—that § 2111 Robbery does not. This observation is correct, but does not persuade us that the force clauses in these statutes have different meanings. Section 2113 Bank Robbery, discussed in *Selfa*, lacks a specified intent "to cause death or serious bodily harm," and thus resembles Section 2111 Robbery. Although *Selfa* was decided before *Johnson I*, the *Gutierrez* court relied on both *Selfa* and *Johnson I* when it held that § 2119 Carjacking is a crime of violence. Relying on the manner of execution and not any specified intent, it explained that "[b]ank robbery by intimidation thus requires at least an implicit threat to use the type of violent physical force necessary to meet the *Johnson* standard." *Gutierrez,* 876 F.3d at 1257. The reasoning in *Gutierrez* illustrates that we consider *Selfa* to be consistent with *Johnson I* and have continued to interpret the force clause in the same way. And in *Watson,* decided after *Johnson I*, we also dismissed an argument that bank robbery by intimidation lacks the *mens rea* to meet the threshold set forth in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). *Watson*, 881 F.3d at 784. *Watson* held that, because § 2113 Bank Robbery by intimidation cannot be done by mere negligence, it does meet the *mens rea* threshold. *Id.* Accordingly, the language difference in these statutes does not affect our understanding of the force clause of § 2111 Robbery, which we find meets the *Johnson I* standard to be an elements clause "crime of violence."

With this precedent, we decline to change course today. There is not a compelling reason at this time to read "by force and violence or by intimidation" differently in § 2111 Robbery and in § 2119 Carjacking. Because § 2119 Carjacking and § 2113 Bank Robbery, by means of "intimidation," qualifies as a "crime of violence" under the elements clause after *Johnson I*, so too does § 2111 Robbery.

**Conclusion**

Robbery in violation of 18 U.S.C. § 2111 is a "crime of violence" under the elements clause of § 924(c)(3)(A). Accordingly, Fultz is ineligible for relief under *Johnson II*, and the district court is affirmed.

**AFFIRMED.**

# APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>MARIO DENANE FULTZ,<br><br>Defendant-Appellant. | No. 17-56002<br><br>D.C. Nos. 3:16-cv-01558-DMS<br>3:93-cr-00351-DMS-1<br>Southern District of California,<br>San Diego<br><br>ORDER |

Before: GOULD and NGUYEN, Circuit Judges, and MARBLEY,* District Judge.

Defendant-Appellant's Petition for Rehearing (Dkt. 38) is **DENIED**.

The full court has been advised of the Petition for Rehearing En Banc (Dkt. 38) and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Defendant-Appellant's Petition for Rehearing En Banc is also **DENIED**.

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.