No. _____

IN THE SUPREME COURT OF THE UNITED STATES

QUINTON OMAR JACKSON,
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.

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Petitioner Quinton Omar Jackson 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 14, 2019.

OPINION BELOW

On August 14, 2019, the Ninth Circuit Court of Appeals issued a memorandum disposition affirming the denial of Mr. Jackson's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See United States v. Jackson*, 775 F. App'x 311 (9th Cir. 2019) (attached here as Appendix A).

JURISDICTION

On August 14, 2019, the court of appeals affirmed the denial of Mr. Jackson's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See* Appendix A. 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

While Quinton Jackson was working at a retail store on the Camp Pendleton Military Base near San Diego, California, he facilitated the armed robbery of that store by others on several occasions. In 2010, a jury convicted him of multiple counts of conspiracy to commit robbery within a special maritime and territorial jurisdiction, in violation of 18 U.S.C. § 371, aiding and abetting robbery committed within a special maritime and territorial jurisdiction, in violation of 18 U.S.C. § 2111, and using and carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c)(1). At sentencing, the district court

imposed a seven-year mandatory consecutive sentence for the § 924(c) firearm offense.

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. Jackson 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. Jackson 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. Jackson a certificate of appealability to the Ninth Circuit Court of Appeals, and Mr. Jackson timely appealed.

On appeal, Mr. Jackson 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. Jackson 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. Jackson argued that the court should vacate his 25-year sentence for § 924(c).

The Ninth Circuit disagreed. The court relied on its precedent decision in *United States v. Fultz*, 923 F.3d 1192 (9th Cir. 2019),[1] which had declined to consider the same cases showing that maritime robbery reached conduct involving non-violent and unintentional "force." Instead, *Fultz* 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

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[1] A petition for a writ of certiorari of the Ninth Circuit's decision in *Fultz* is currently pending before this Court.

must be true of maritime robbery. On this basis, the Ninth Circuit affirmed the denial of Mr. Jackson's § 2255 petition.

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 (or neither). 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. Jackson's Case Presents an Ideal Vehicle to Resolve This Issue.

At every stage of the proceedings, Mr. Jackson 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 squarely addressed this issue on the merits, and no other issue would deprive Mr. Jackson 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. Jackson 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. Jackson 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. Jackson 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. Jackson'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).[2]

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. Jackson has shown that the minimum conduct implicated by the language in the federal robbery statutes does not categorically satisfy the force clause.

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[2] *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).

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

Before the Ninth Circuit, Mr. Jackson also argued that prior cases show a person could be prosecuted under § 2111 for conduct that did not involve intentional 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 12, 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

NOT FOR PUBLICATION

FILED

AUG 14 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. QUINTON OMAR JACKSON, Defendant-Appellant.	No. 17-56149 D.C. Nos. 3:16-cv-01545-DMS 3:08-cr-04324-DMS-2 MEMORANDUM*

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

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

Defendant Quinton Omar Jackson appeals the denial of his 28 U.S.C. § 2255 motion challenging his sentence on one count of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c). We have jurisdiction under 28

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

U.S.C. § 2253. Reviewing the denial of a § 2255 motion *de novo*, *United States v. Reves*, 774 F.3d 562, 564 (9th Cir. 2014), we affirm. Even assuming that Jackson's appeal is not barred by the appellate waiver in his plea agreement, his argument that his underlying conviction for robbery under 18 U.S.C. § 2111 is not a crime of violence is foreclosed by our precedent. *See United States v. Fultz*, 923 F.3d 1192, 1197 (9th Cir. 2019) ("Robbery in violation of 18 U.S.C. § 2111 is a 'crime of violence' under the elements clause of § 924(c)(3)(A).").

AFFIRMED.