No. _____

In the

Supreme Court of the United States

RAYNARD GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether bank robbery, in violation of 18 U.S.C. 2113(a), qualifies as a "crime of violence" within the meaning of 18 U.S.C. § 924(c)(3)(A), the so called "elements" clause.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

STATUES & RULES

PRAYER

Petitioner Raynard Gray respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 30, 2019.

OPINIONS BELOW

The opinion of the Court of Appeals, App., *infra*, 1a-19a, is reported at 937 F.3d 546.

JURISDICTION

The Fifth Circuit issued its opinion on August 30, 2019. Justice Alito extended the time for filing a petition for certiorari to and including December 28, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 provides:

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;

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Section 924(c)(3) of Title 18 provides:

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.

Section 2113(a) of Title 18 provides:

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; or Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny— Shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

A Second Superseding Indictment charged Petitioner with bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and § 2, which occurred on July 26, 2014 (Count 1); using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), (3)(A) and § 2, which occurred on July 26, 2014 (Count 2); bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and § 2, which occurred on July 28, 2014 (Count 3); and using, carrying, brandishing and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), (3)(A) and § 2, which occurred on July 28, 2014 (Count 4).

On March 23, 2017, a jury convicted Petitioner of all four counts in the Second Superseding Indictment. The district court sentenced Petitioner on April 3, 2018. Petitioner appealed to the Fifth Circuit.

On appeal, Petitioner argued that "Section 2113 bank robbery can be committed through intimidation and thus does not have as a necessary element the 'use, attempted use, or threatened use of physical force' that would make it a 'crime of violence'" under 18 U.S.C. § 924(c)(3). Accordingly, Petitioner argued that the bank robbery convictions could not serve as predicate crimes of violence for the § 924(c) convictions.

Petitioner raised the issue to preserve it for further appeal. In fact, Petitioner conceded that the Fifth Circuit's decision in *United States v. Brewer*, 848 F.3d 711, 715–716 (5th Cir. 2017) foreclosed the issue. App., *infra*, 9a. After noting that it had

applied its holding in *Brewer* to § 924(c)(3)(A) in numerous unpublished decisions, the Fifth Circuit concluded that § 2113(a) is a crime of violence under 18 U.S.C. § 924(c)(3)(A). App., *infra*, 9a.

REASONS FOR GRANTING THE WRIT

This Court should grant review to determine whether bank robbery under § 18 U.S.C. 2113(a) categorically qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)'s "elements" clause.

I. Introduction

Section 924(c) of Title 18 defines a "crime of violence" as one of two things. First, under § 924(c)(3)(A), the so called "elements" clause, it is a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Second, under § 924(c)(3)(B), the so-called "residual" clause, it is any offense that "by its natures involves a substantial risk of physical force against the person or property of another."

In *United States v. Davis*, 139 S.Ct. 2319 (2019), this Court held that § 924(c)(3)(B)'s residual clause is unconstitutionally vague. *Id.* at 2336. Accordingly, the remaining question is whether bank robbery under § 18 U.S.C. 2113(a) categorically qualifies as a "crime of violence" under the "elements" clause of § 924(c)(3)(A).

To be sure, most courts of appeals have concluded that bank robbery under § 2113(a) is categorically a crime of violence under the "elements" clause. *See United States v. Wilson*, 880 F.3d 80, 85 (3rd Cir. 2018) (holding that bank robbery by intimidation under § 2113(a) is a crime of violence under the "elements" clause in the guideline's definition of "crime of violence"); *United States v. Harper*, 869 F.3d 624, 626-27 (8th Cir. 2017); *United States v. Ellison*, 866 F.3d 32, 39-40 (1st Cir. 2017) (same); *United States v. Campbell*, 865 F.3d 853, 854 (7th Cir. 2017) (same); *United*

States v. Brewer, 848 F.3d 711, 716 (5th Cir. 2017) (same); *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (holding "bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the [ACCA] use-of-force clause"); *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (concluding "[a] taking by intimidation under § 2113(a) . . . involves the threat to use physical force" under the guidelines); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016) (holding "bank robbery under . . . § 2113(a) is a 'crime of violence' within the meaning of ... [the ACCA]").

The better view, however, is that bank robbery under § 2113(a) fails to qualify as a "crime of violence" for two independent reasons. First, the statute does not require a threat of violent force. Second, the statute does not require the intentional threat of violent force.

II. Categorical Analysis

To determine whether a predicate offense qualifies as a "crime of violence" under § 924(c), courts use the categorical approach. *See Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). This 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]" in determining whether the offense qualifies as a "crime of violence." *Id.* at 2283 (citation omitted). In addition, under the categorical approach, a prior offense can only qualify as a "crime of violence" if all of the criminal conduct covered by a statute — including the "minimum conduct" criminalized by the statute

— matches or is narrower than the "crime of violence" definition. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013). If the minimum conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as a "crime of violence."

A. Bank robbery does not require a threat of violent force.

Bank robbery under § 2113(a) categorically fails to qualify as a "crime of violence" under § 924(c)(3)(A)'s elements clause because bank robbery can be committed through "intimidation." According to this Court, "physical force" means "violent force" — that is "strong physical force," which is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). Bank robbery, as defined by § 2113(a), does not meet this requirement because it can be accomplished by mere "intimidation," which does not require the use, attempted use, or threatened use of "violent force."

B. Bank robbery does not require the intentional threat of violent force.

Further, "intimidation" under the bank robbery statute can be accomplished without any intentional threat of violent physical force, so it fails to satisfy the intentional *mens rea* required under the § 924(c)(3)(A)'s elements clause. "Intimidation" under the bank robbery statute occurs whenever "an ordinary person in the [victim's position] reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrop*, 86 F.3d 359, 364 (4th Cir. 1996) (emphasis added); *see also United States v. Pickar*, 616 F.3d 821, 825 (8th Cir. 2010) (same);

United States v. Kelley, 412 F.3d 1240, 1241 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same); *United States v. Higdon*, 832 F.3d 312, 315 (5th Cir. 1987) (same). The unintentional act of placing another in fear of bodily harm does not qualify as a "crime of violence" under the § 924(c)(3)(A) elements clause because it does not require the use or threatened use of "violent force" against another.

Even more, "intimidation" as defined under the bank robbery statute does not constitute a "crime of violence" under the elements clause because it does not require an intentional threat of physical force. In *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006), the Fourth Circuit firmly held that an offense can only constitute a "crime of violence" under the elements clause if it requires an "intentional employment of physical force [or threat of physical force]." *Id.* at 468 (emphasis added). "Intimidation" is satisfied under the bank robbery statute "whether or not the defendant actually intended the intimidation," as long as "an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996). *See also Yockel*, 320 F.3d at 821 (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller, and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon); *Kelley*, 412 F.3d at 1244 ("Whether

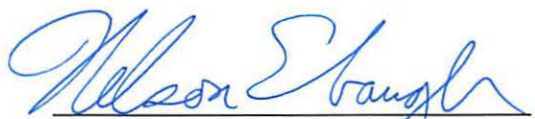
a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under [federal bank robbery] even if he did not intend for an act to be intimidating."); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) ("Whether [defendant] Foppe specifically intended to intimidate [the teller] is irrelevant.").

In other words, a defendant may be found guilty of bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably feared some risk of injury from the defendant's actions — whether or not the defendant actually intended to create that fear. Due to the lack of this intent, bank robbery criminalizes conduct that does not require an intentional threat of physical force. Therefore, bank robbery squarely fails to qualify as a "crime of violence."

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,



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