No.

IN THE

SUPREME COURT OF THE UNITED STATES

JERAD HANKS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether 18 U.S.C. § 924(c)(1), which criminalizes the use of a firearm during a "crime of violence," in this case, the federal bank robbery statute, 18 U.S.C. § 2113, which may be committed by unintentionally intimidating a victim through verbal demands or the passing of a demand note rather than the use or threatened use of physical force, and the definition of the term "crime of violence" cabined in 18 U.S.C. § 924(c)(3)(A)(The Use of Force" or "Elements Clause") is unconstitutionally vague, on its face, and unconstitutionally vague under the rule of lenity?

II. Whether there is currently a conflict among the circuit courts of appeals and an ambiguity in the law regarding the federal statutory definition of the term "crime of violence", and a conflict between the holdings of some circuits, specifically the Eleventh Circuit, and this Court's previous holdings regarding the constitutional viability of the current definition of the term "crime of violence" in § 924(c) and related federal statutes?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the original proceeding in the United States District Court for the Middle District of Florida and the Eleventh Circuit Court of Appeals were the Petitioner Jerad Hanks, defendant-appellant, and the Respondent is the United States (hereinafter "the government"), plaintiff-appellee. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerad Hanks, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

On January 13, 2020, the Eleventh Circuit Court of Appeals, relying on prior circuit precedent, affirmed Petitioner Jerad Hanks' (hereinafter "Mr. Hanks" or "the Petitioner") conviction and sentence in an unpublished *per curiam* opinion. *United States v. Jerad Hanks,* No. 18-14183, ___ Fed. Appx. ___, 2020 WL 132736 (11th Cir. Jan. 13, 2020)(Per Curiam), *citing, In Re Sams,* 830 F.3d 1234 (11th Cir. 2016) (copy attached - Pet. App. I). The Eleventh Circuit Court of Appeals, concluding that it was bound by the court's prior decision in *In Re Sams, see Hanks,* 2020 WL 132736, at *1,*2 (Pet. App. I at *1, *2), rejected Petitioner's arguments that count two of the indictment, charging Petitioner with a violation 18 U.S.C. § 924(c)(1) for use of a firearm during a "crime of violence," here the bank robbery charged in count one of the indictment, and the definition of the term "crime of violence" cabined in § 924(c)(3)(A) (the "elements clause") and § 924(c)(3)(B)(the "residual clause"), is unconstitutionally vague, on its face, and is certainly unconstitutional under the rule of lenity, and therefore the Petitioner's conviction for count two for using a firearm during a "crime of violence" must be vacated, count two must be dismissed, and the Petitioner's case must be remanded for resentencing. *Id.* Instead the Eleventh Circuit affirmed Mr. Hanks' conviction and sentence, including the additional consecutive seven year minimum

mandatory term of imprisonment enhancement for brandishing a firearm during the commission of a "crime of violence" under § 924(c)(a)A)(ii). *Id.*[1]

JURISDICTION

The Eleventh Circuit entered a judgment and issued an unpublished *per curiam* opinion affirming the Petitioner's conviction and sentence that was entered on January 13, 2020. That decision is in conflict prior decisions of this Court, and with at least one other holding of another United States court of appeals. Pursuant to Supreme Court Rule 13.1, this petition is seasonably filed within the prescribed 90-day time period from the date of the judgment of the United States Eleventh Circuit Court of Appeals in the Petitioner's case *sub judice*. This Court's jurisdiction is invoked under Title 28, United States Code, §1254 providing for review by this Court of decisions of the United States courts of appeals, Supreme Court Rule 10(a) addressing the Court's jurisdiction to review conflicting decisions among the United States courts of appeals, and Supreme Court Rule 10(c) addressing the Court's jurisdiction to review decisions of a United States court of appeals that conflicts with relevant decisions of this Court.

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[1]Petitioner's co-defendant and brother, Jurden Rogers, has a pending Petition before this Court, seeking review of the Eleventh Circuit's rejection of, *inter alia,* a similar attack on the constitutionality of § 924(c) and the federal statutory definition of the term "crime of violence." *See, United States v. Jurden Rogers*, No. 18-15152, ___ Fed. Appx. ___, 2019 WL 5814566 (11th Cir. Nov. 7, 2019), *petition for cert. filed,* 2020 WL ___ (U.S. Jan. 14, 2020)(No. 19-7320)(copy attached - Pet. App. II).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

Supreme Court Rule 10

Considerations Governing Review on writ of certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .

. . .

(c) . . . a United States court of appeals has decided . . . an important federal question in a way that conflicts with relevant decisions of this Court.

. . . .

Supreme Court Rule 13

Review on Certiorari; Time for petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. . .

Title 18, U.S.C. § 16:

The term"crime of violence" means:

(a) an offense that has as an element the use, attempted use, or threatened use of physical

(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.

Title 18, U.S.C. § 924(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 which 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 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less that 7 years;

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

. . .

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and–

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Title 18, U.S.C. § 924 (e):

. . .

(2) As used in this subsection:

. . .

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year. . ., 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, . . .

Title 18, U.S.C. § 2113(a):

> (a) Whoever by force and violence, or by intimidation, takes or attempts to take from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of any bank, credit union or any savings and loan association...Shall be fined under this title or imprisoned not more than twenty years, or both.

Title 28, U.S.C. § 1254(1)

> Court of appeals; certiorari; certified questions
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> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> . . . .

STATEMENT OF THE CASE

I. Brief History of the Proceedings in the District Court.

A. The Indictment

Petitioner Jerad Hanks, (Mr. Hanks) was indicted on February 14, 2018, and charged along with his brother, Jurden Rogers, with aiding and abetting a bank robbery at Seacoast Bank in Sanford, Florida on January 18, 2018, in violation of 18 U.S.C. § 2113(a) and § 2 (count one), and aiding and abetting his brother in the knowing use, carrying, and brandishing of a firearm, and knowingly possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (seven year consecutive minimum mandatory sentence), and § 2 (aiding and abetting)(count two).

B. Facts.

According to the government's version of the facts set out in Mr. Hanks' Presentence Report, Mr. Hanks was driven by his brother to Seacoast Bank in Sanford on January 18, 2018, and while his brother waited in the car outside the bank, Mr. Hanks entered the bank wearing black gloves, a gray hoodie, and a ski mask to cover his face, carrying his brother's loaded 12 gauge shotgun, tossed a duffle bag to the tellers and demanded money while purportedly brandishing the shotgun, and after being told that there was no other money, left the bank with $2,472. Shortly after the robbery, officers with the Sanford Police Department located the vehicle seen on bank surveillance video outside an apartment building in Sanford. Inside the vehicle officers observed a black hooded sweatshirt and a box of Winchester 12 gauge shotgun shells.

Officers then surrounded the residence and ordered Hanks and Rogers outside. Both exited the residence and were arrested. During a post-*Miranda* interview, Hanks gave a full confession.[2] Officers then searched the residence and the vehicle. Shotgun shell casings were found in the vehicle. The shotgun was located in a bedroom of the residence as well as clothing matching the description of the clothing worn by Hanks during the robbery. The cash was split in two with half in one room and half in another room.

C. The Motion to Stay and Dismiss in the District Court, Change of Plea and Sentence.

On May 17, 2018, Mr. Hanks plead guilty as charged without a plea agreement after reserving his right to raise challenges to the constitutionality of the 18 U.S.C. §924(c)(1) and § 924(c)(3) and the federal definition of "crime of violence" generally as applied in his case, based on, *inter alia*, this Court's decisions in *Johnson v. United States*, 576 U.S. ___ , 135 S.Ct. 2551, 2556-58, 192 L.Ed.2d 569 (2015) (Holding that due process clause's prohibition of vagueness in criminal statutes applies not only to statutes defining elements of crimes, but also to statutes fixing sentences, and imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA), which provides that a felony that "involves conduct that presents a serious potential risk of physical injury to another" should be treated as a "violent felony," violates the Constitution's guarantee of due process) and *Sessions v. Dimaya*,

[2]It bears noting here that although Mr. Hanks admitted entering the bank with a shot gun, he denied pointing the weapon at anyone. Instead he held the weapon at the ready while facing the bank's employees and demanding the money.

584 U.S. ___, 138 S.Ct. 1204, 1215-16, 200 L.Ed.2d 549 (2018) (this Court's holding, *citing Johnson,* that the residual clause of the federal criminal Code's §16 (b) definition of "crime of violence", as incorporated into the Immigration and Nationality Act's (INA) definition of "aggravated felony", 8 U.S.C.A. §1101(a)(43)(F), was impermissibly vague in violation of due process). *Id.* Specifically, prior to entering his guilty pleas, Mr. Hank's filed a "Motion to Stay Pending Resolution by the Eleventh Circuit of the Constitutionality of 18 U.S.C. § 924(c)(3) Based on this Court's decisions in *Johnson* and *Dimaya*, or in the Alternative to Continue this Case . . . to Allow Court to Consider Motion to Dismiss Count Two, and Incorporated Motion to Dismiss the Firearms Penalty Enhancement Count, or in the Alternative to Allow Mr. Hanks to Enter a Guilty Plea Reserving the Challenge to Count Two and the Constitutionality of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 924(c)(3)(A) and (B),With Incorporated Citation of Authorities" (Hereinafter "Mr. Hanks' Motion for Stay or Dismiss"). The government opposed Mr. Hanks' Motion for Stay or Dismiss, arguing that under controlling Eleventh Circuit precedent, even if the 924(c) residual clause was found to be unconstitutional under *Johnson* and *Dimaya*, the bank robbery statute was still a crime of violence under the § 924(c) "elements clause."

Mr. Hanks' request for a stay or to dismiss was denied by the District Court. Instead, the District Court allowed Mr. Hanks to enter his pleas of guilty while reserving his challenge to the federal firearm's statute based on, *inter alia, Johnson* and *Dimaya.* On September 27, 2018, Mr. Hanks was sentenced by the District Court

to consecutive sentences of 33 months imprisonment on count one (bank robbery) and 84 months imprisonment on count two (a 7 year consecutive minimum mandatory enhancement of Mr. Hanks' sentence pursuant to § 924(c)(1)(A)(ii) for brandishing a firearm during a crime of violence), for a total sentence of 117 months imprisonment, followed by two concurrent 3 year terms of supervised release. Mr. Hanks appealed.

II. Appellate Proceedings - The Stay Pending this Court's Decision in *Davis* - The Eleventh Circuit's Decision.

On appeal, Mr. Hanks requested that the Eleventh Circuit "Stay the Appellate Proceedings Pending this Court's Decision in *United States v. Davis*" (hereinafter "Motion to Stay Appeal"), *see, United States v. Davis*, 586 U.S. ___ , 139 S.Ct. 782, 202 L.Ed. 2d 511 (2018)(Mem.), a case this Court accepted to resolve the split in the circuits regarding the constitutionality of the definition of the term "crime of violence" as that term is used and defined in 18 U.S.C. § 924(c). *Id.* Notwithstanding the government's opposition, the Eleventh Circuit granted Mr. Hanks' motion to stay his appeal pending the decision in *Davis*. On June 24, 2019, this Court decided *United States v. Davis,* ___ U.S. ___ , 139 S.Ct. 2319, 204 L.Ed. 2d 2319 (2019), holding that the "residual clause" definition of violent felony in the federal statute providing mandatory minimum sentences based on using, carrying, or possessing a firearm in connection with a federal crime of violence, § 924(c)(3)(B) was unconstitutionally vague under due process clause and separation of powers principles, *abrogating, inter alia*, *Ovalles v. United States*, 905 F. 3d 1231 (11th Cir 2019) (*en banc*). United States v. *Davis,* ___ U.S., at ___, 139 S.Ct. at 2323-36. Then, on January 13, 2020,the Eleventh Circuit

issued its *per curiam* opinion affirming Mr. Hank's conviction and sentence, finding that although this court struck down the definition of "crime of violence" under § 924(c)(3)(B), the "residual clause", under controlling circuit precedent, § 924(c)(3)(A), the "elements clause", was still viable and constitutional, rejecting Mr. Hanks' attack on his conviction and sentence concluding that "Hank's arguments are foreclosed by binding circuit precedent[,][w]e therefore affirm." *Hanks,* 2020 WL 132736 at *1.(Pet. App. I at *1).

At present, Mr. Hanks is in prison serving his sentence.

REASONS FOR GRANTING THE PETITION

I. 18 U.S.C. § 924(C)(1), WHICH CRIMINALIZES THE USE OF A FIREARM DURING A "CRIME OF VIOLENCE," IN THIS CASE, THE FEDERAL BANK ROBBERY STATUTE, 18 U.S.C. § 2113, WHICH MAY BE COMMITTED BY UNINTENTIONALLY INTIMIDATING A VICTIM THROUGH VERBAL DEMANDS OR THE PASSING OF A DEMAND NOTE RATHER THAN THE USE OR THREATENED USE OF PHYSICAL FORCE, AND THE DEFINITION OF THE TERM "CRIME OF VIOLENCE" CABINED IN § 924(C)(3)(A)(THE "ELEMENTS CLAUSE"), AND OF NECESSITY, 18 U.S.C. § 16 (CRIME OF VIOLENCE DEFINED) IS UNCONSTITUTIONALLY VAGUE, ON ITS FACE, AND UNCONSTITUTIONALLY VAGUE UNDER THE RULE OF LENITY.

> ***The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.' To be free of tyranny in a free country, the causeways edges must be clearly marked.***
>
> ***United States v. Brown,* 79 F.3d 1550, 1562 (11th Cir. 1996), *quoting*, Robert Boalt, "A Man For All Seasons" Act II, 89 (vintage 1960) (Speech of Sir Thomas More)**

A. THE TERM "CRIME OF VIOLENCE" CABINED IN §924(C)(3)(A)(THE "ELEMENTS CLAUSE") IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

After this court's recent decisions addressing the viability and constitutionality of the definition of the term "crime of violence" in applicable federal statutes, the definition of the term "crime of violence" under the "use-of-force" or "elements clause" cabined in § 924(c)(3)(A), just like its definition under the "residual clause" cabined in § 924(c)(3)(B), *Davis,* is so vague as to be fatally flawed, and thus plainly not constitutional under due process and separation of powers principles. *See and compare, United States v. Davis*, 586 U.S. ___ , 139 S.Ct. 2319, 2323-28, 202 L.Ed. 2d 757 (2018) (The Court holding that the "residual clause" definition of violent felony in § 924(c)(3)(B), the federal statute providing for enhanced consecutive mandatory

minimum sentences based on using, carrying, or possessing a firearm in connection with a federal crime of violence, was unconstitutionally vague under due process and separation of powers principles); *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551, 2556-58, 192 L.Ed.2d 569 (2015)(Holding that Due Process Clause's prohibition of vagueness in criminal statutes applies not only to statutes defining elements of crimes, but also to statutes fixing sentences, and imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA); *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204, 1215-16, 200 L.Ed.2d 549 (2018) (The Court citing *Johnson* and holding that the residual clause of the federal criminal code's § 16(b) definition of "crime of violence", as incorporated into the Immigration and Nationality Act's (INA) definition of "aggravated felony", 8 U.S.C.A. §1101(a)(43)(F), was impermissibly vague in violation of due process); *see also and compare*, *Stokeling v. United States,* ___U.S. __, 139 S.Ct. 544, 553, 202 L.Ed.2d 512 (2019)(This Court finding that robbery under Florida's robbery statute is a "crime of violence" for purposes of sentencing enhancements under the Federal Armed Career Criminal Act (ACCA), *see* 18 U.S.C. § 924(e)(2)(B)(I), but citing *Johnson* and *Dimaya* also holding that to meet the definition of a "crime of violence" under the "elements clause" of the Armed Career Criminal Act (ACCA), the term "physical force" means violent force, that is, force capable of causing physical pain or injury to another person, and requires force exerted by and through concrete bodies, thereby distinguishing physical force, from intellectual force or emotional force). *See also e.g., Johnson v. United States*, 559 U.S.

133, 140, 130 S.Ct. 1265, 1271, 176 L.Ed. 2d 1 (2010) (Defining the term "violent force" under the Armed Career Criminal Act); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (Requiring "destructive" or "violent" force in the context of 18 U.S.C. § 16 [defining crime of violence], which is nearly identical to § 924(c)'s definition).

B. UNDER THE "RULE OF LENITY" THE TERM "CRIME OF VIOLENCE" CABINED IN § 924(C)(3)(A)(THE "ELEMENTS CLAUSE") IS UNCONSTITUTIONALLY VAGUE, ON ITS FACE.

The unconstitutionality of § 924(c)(3)(A) is even more clear when, as here, the Court is reviewing a criminal statute, and the "rule of lenity" necessarily applies. As this Court has made clear for well over a century now:

> [A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. This principle is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

United States v. Bass, 404 U.S. 336, 348, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971)(quotation marks and citations omitted); *see also generally and compare, United States v. Latcher*, 134 U.S. 624, 628, 10 S.Ct. 624, 626, 33 L.Ed. 1080 (1890)("For the

purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. . . . there can be no constructive offenses; and, before a man can be punished, his case must be plainly and unmistakably within the statute.")(citations omitted) *and United States v. Davis*, 139 S.Ct., at 2323 (This Court, over 130 years after the decision in *Latcher* again holding that "[i]n our constitutional order, a vague law is no law at all. . . When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.").

C. GIVEN THE PLAIN REALITY THAT THE FEDERAL BANK ROBBERY STATUTE CAN BE VIOLATED WITHOUT PHYSICAL VIOLENCE OR PHYSICAL FORCE, THE CURRENT DEFINITION OF THE TERM "CRIME OF VIOLENCE" UNDER FEDERAL LAW IS UNCONSTITUTIONAL.

Here, put simply, under the federal bank robbery statute, 18 U.S.C. § 2113(a), bank robbery is not always a "crime of violence" as a matter of law. For example, bank robbery may be committed "by force and violence, ***or by intimidation.***" *Id.* Whether bank robbery qualifies as a "crime of violence" under § 924(c)(3)(A)'s "elements clause" is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant's conduct. *See, Johnson,*136 S.Ct. at 2557; *Dimaya* 138 S.Ct. at 1211; *accord, United States v. St. Hubert*, 909 F.3d 335, 347-51 (11th Cir. 2018). Under this categorical approach, if bank robbery may be committed without "the use, attempted use, or threatened use of ***physical force***,"

which by the very terms of the federal bank robbery statute it can be, then that crime may not qualify as a "crime of violence" under § 924(c)'s "elements clause."

It is beyond serious per adventure that the crime of bank robbery can be committed by merely putting the victim in fear without the use of violence, or by the use of "physical force." One need not look long or far to find case law holding as much. *See e.g. and compare*, *United States v. Cornillie,* 92 F.3d 1108, 1110 (11th Cir. 1996) (Eleventh Circuit holding that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation); *United States v. Wooten*, 689 F.3d 570, 574-75 (6th Cir. 2012)(Court upholding bank robbery conviction but reversing application of sentencing guideline enhancement for making death threat holding that despite bank robbery defendant's use of the phrase "I have a gun," his conduct and demeanor were so nonthreatening as to eliminate the possibility that any reasonable teller under the circumstances would have believed his or her life was in danger, thus precluding a two-level sentencing enhancement for making a threat of death; defendant approached the tellers calmly, placed both hands in a visible position on the counter, and softly said that he was engaged in a robbery, he wore no mask or disguise and appeared no different than an ordinary customer, and the teller himself testified that he never felt threatened by defendant, and handed over money because he had been trained to do so); *United States v. Yockel*, 320 F.3d 818, 820-22 (8th Cir.)(Defendant convicted of bank robbery who entered bank disheveled, demanded money, and when the teller refused, told the teller "do you want to go to heaven or hell?", prompting the teller to become fearful and give the defendant money), *cert.*

denied, 540 U.S. 839 S.Ct. 98. 157 L.Ed.2d 72 (2003); *United States v. Caldwell*, 292 F.3d 595, 596-97 (8th Cir. 2002)(Affirming conviction for bank robbery on an intimidation theory where the defendant merely jumped over the counter, made eye contact with a teller, and ran off with money from the drawer). And again, § 924(c), in the context of bank robbery charges, refers to, and requires "violent force—that is, [physical] force capable of causing some physical pain or injury to another person." *Johnson v. United States*, 559 U.S. at 140, 130 S.Ct. at 1271; *United States v. Landeros-Gonzales*, 262 F.3d at 426.

Also, a defendant cannot convicted of "use" of physical force unless the predicate offense requires, at a minimum, a knowing *mens rea. See, Leocal v. Ashcroft*, 543 U.S. 1, 10-11, 125 S.Ct 377, 382-83, 160 L.Ed.2 271 (2004) (Holding that an offense must include a higher degree of intent than negligence to qualify under the use-of-force clause in 18 U.S.C. § 16(a); *United States v. Palomino Garcia*, 606 F.3d 1317, 1336 (11th Cir. 2010) (Holding that an offense must include a higher degree of intent than recklessness to qualify under the use-of-force clause in U.S.S.G. § 2L1.2). Since the federal bank robbery statute may be committed without the "use" of "physical force" or "violent force" it does not qualify as a "crime of violence" under § 924(c)'s "elements clause." Again, this is so because bank robbery may be committed "by force and violence, ***or by intimidation***." 18 U.S.C. § 2113(a)(emphasis added). Because the statute lists alternative means and not alternative elements, the Court must presume that Mr. Hanks was convicted of the least culpable act - bank robbery by intimidation.

See generally, *Moncrieffe v. Holder*, 569 U.S. 184, 191, 133 S.Ct 1678, 1684, 185 L.Ed.2d 727 (2013) (This Court holding that because the court examines what a prior conviction necessarily involved, not the facts underlying the case, in determining under the categorical approach whether the conviction was for an aggravated felony under the Immigration and Nationality Act (INA), it must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense). Because a bank robbery under § 2113(a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the "use" of physical force. *Leocal; Palomino Garcia.*

As such, this Court should grant Mr. Hanks' petition for a writ of certiorari, hold that the elements clause of § 924(c) is unconstitutionally vague, violates the due process clause and separation of powers principles, and remand this case to the Eleventh Circuit with instructions to set aside Mr. Hanks' conviction and sentence and remand his case to the district court for resentencing under the "sentencing package doctrine." *See, United States v. Davis,* 139 S.Ct. at 2336, *citing, Dean v. United States,* __ U.S. ___, 137 S. Ct. 1170, 1176, 197 L.Ed.2d 490 (2017); *see generally*, *Greenlaw v. United States,* 554 U.S. 237, 253, 128 S.Ct. 2559, 2569, 171 L.Ed.2d 399 (2008) (The Court explaining "sentencing package cases" as "[t]hose cases typically involve multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction[][where] [t]he appeals court, in such instances, may vacate the

entire sentence on all counts so that, on remand, the trial court can reconfigure the sentencing plan to ensure that it remains adequate to satisfy statutory sentencing factors).

II. THE CIRCUIT COURTS ARE DIVIDED ON THE CONSTITUTIONALITY OF THE DEFINITION OF "CRIME OF VIOLENCE" UNDER THE ELEMENTS CLAUSE SET OUT IN 18 U.S.C. § 924(c)(3)(A); THIS COURT MUST ADDRESS THE CURRENT AMBIGUITY IN THE LAW REGARDING THE DEFINITION OF THE TERM "CRIME OF VIOLENCE" AND THE CONFLICT AMONG THE CIRCUITS, AND WITH SOME CIRCUITS NOT FOLLOWING THIS COURT'S PREVIOUS HOLDINGS REGARDING THIS ISSUE.

A. CONFLICT OF LAW AMONG AND BETWEEN THE ELEVENTH CIRCUIT AND THE NINTH AND FOURTH CIRCUITS REGARDING THE CONSTITUTIONALITY OF 18 U.S.C. § 924(c)(3)(A) AND THE MEANING OF "CRIME OF VIOLENCE."

Regarding the constitutionality of § 924(c)(3)(A) and the continuing viability of the federal statutory definition of "crime of violence" against attacks of constitutionality in violation of due process, vagueness and separation of powers principles, the Eleventh Circuit's decisions rejecting these arguments and finding that the current statutory definition of "crime of violence"is constitutional is in direct conflict with both decisions of other circuit courts of appeals and prior holdings of this Court. *See e.g and compare, Hanks,* 2020 WL 132736 (Pet. App I); *In Re Sams,* 830 F.3d at 1238-39 and *United States v. Shelby*, 939 F.3d 975, 978-79 (9th Cir. 2019)(In a case with facts hauntingly similar to the facts in Mr. Hanks' case, the Ninth Circuit reversing and remanding defendant's case conviction under Oregon's first degree robbery statute holding that defendants convictions and ACCA sentencing

enhancement were illegal since the underlying conviction was not categorically predicate "violent felonies" under ACCA's "use-of-force" or "elements clause"; offense could be committed if perpetrator was merely armed with deadly weapon, regardless of whether he actually used it or made any representations about it)*; United States v. Jones,* 914 F.3d 893, 901 (4th Cir. 2019)(Fourth Circuit holding that defendant's sentencing enhancement under ACCA based on, *inter alia,* prior South Carolina conviction of felony offense of assaulting, beating, or wounding law enforcement officer while resisting arrest was improper, and South Carolina conviction not categorically a predicate "violent felony" such as could support enhancement of defendant's sentence under the ACCA; Minimum conduct needed to support a conviction under state criminal statute includes any conduct that there is a realistic probability the state would punish under this criminal statute; if there is realistic probability that state would apply the statute to conduct that does not involve the use, attempted use, or threatened use of violent physical force against another, then the state offense is not categorically a "violent felony" under the ACCA's "use-of -force" or "elements clause"); *United States v. Simms,* 914 F.3d 229, 233-34 (4th Cir. 2019) (en banc) (In another case with strikingly similar facts to Mr. Hanks' case, the Fourth Circuit, pre-*Davis,* holding that to determine whether an offense is a "crime of violence" within the meaning of "use-of-force" or "elements" clause of § 924(c) which imposed a mandatory minimum sentence of seven years for brandishing a firearm during and in relation to crime of violence, the court must look to whether the offense's statutory elements necessarily require use, attempted use, or threatened use of physical force, and if statute defines

offense in way that allows for both violent and nonviolent means of commission, that offense is not categorically crime of violence under the "use-of-force" or "elements" clause; Hobbs Act robbery conspiracy categorically failed to qualify as a "crime of violence" under the both the "residual clause" and the remaining § 924(c) "use-of-force" or "elements" clause because proof of the conspiratorial agreement does not, of necessity, require proof of actual, attempted, or threatened use of physical force). The Ninth and Fourth Circuits' holdings in *Shelby, Jones* and *Simms* clearly conflict with the Eleventh Circuit's holding in *Hanks, Rogers,* and *In Re Sams*. This issue is one that will be raised frequently and therefore is one of great importance. Thus, this Court must now address the constitutional viability of § 924(c)(3)(A) and the meaning of "crime of violence" and resolve this conflict among the circuits. Supreme Court Rule 10(a).

B. CONFLICT OF LAW BETWEEN THE ELEVENTH CIRCUIT AND THE PREVIOUS HOLDINGS OF THIS COURT.

Moreover, the Eleventh Circuit's holdings in *Hanks* and *In Re Sams* conflicts with prior holdings of this Court. *See e.g., Stokeling v. United States*, 139 S.Ct. at 553 (The Court finding that robbery under Florida's robbery statute is a "crime of violence" for purposes of sentencing enhancements under the Federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(I), but citing *Johnson* and *Dimaya* and also holding that to meet the definition of a "crime of violence" under the "elements clause" of the Armed Career Criminal Act (ACCA), the term "physical force" means violent

force, that is, force capable of causing physical pain or injury to another person, and requires force exerted by and through concrete bodies, thereby distinguishing physical force, from intellectual force or emotional force and precluding any finding that the federal bank robbery statute, which allows a defendant to be convicted based on intimidation alone, is a crime of violence). Again, the Eleventh Circuit's holdings in *Hanks, Rogers* and *In Re Sams,* essentially ignores this Court's holding in *Stokeling*. Thus, this Court must now address the constitutional viability of § 924(c)(3)(A) and the meaning of "crime of violence" and resolve this conflict between the Eleventh Circuit and this Court's previous holdings. Supreme Court Rule 10(c).

CONCLUSION

THEREFORE, for the reasons set out above, the petitioner Jerad Hanks, respectfully submits that the *writ of certiorari* should issue to review the judgment of the Eleventh Circuit Court of Appeals.

RESPECTFULLY SUBMITTED, this February 11, 2020.

H. MANUEL HERNÁNDEZ, P.A.

/s/ H. Manuel Hernández

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See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jerad HANKS, Defendant-Appellant.

No. 18-14183
|
Non-Argument Calendar
|
(January 13, 2020)

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:18-cr-00028-CEM-TBS-1

Before ROSENBAUM, JILL PRYOR, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

***1** After pleading guilty, Jerad Hanks was convicted of bank robbery, 18 U.S.C. § 2113(a), and brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A). He now appeals the denial of his motion to dismiss the § 924(c) count in his indictment, arguing that federal bank robbery does not qualify as a predicate crime of violence for purposes of § 924(c). Hanks's arguments are foreclosed by binding circuit precedent. We therefore affirm.

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, either a "crime of violence" or a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). We review *de novo* whether an offense qualifies as a "crime of violence" under § 924(c). *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013).

For the purposes of § 924(c), "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.

Id. § 924(c)(3). We refer to subsection (c)(3)(A) as the "elements clause." Subsection (c)(3)(B), what we call the "residual clause," has been struck down by the Supreme Court as unconstitutionally vague. *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019).

We use a categorical approach to decide whether an offense satisfies the elements-clause definition. *McGuire*, 706 F.3d at 1336. Under that approach, we look solely to the elements of the offense of conviction, assume that the conviction rested upon the least of the acts criminalized, and then determine whether those acts qualify as a crime of violence. *United States v. Vail-Bailon*, 868 F.3d 1293, 1296 (11th Cir. 2017) (*en banc*), *cert. denied*, —— U.S. ——, 138 S. Ct. 2620, 201 L.Ed.2d 1031 (2018).

Federal bank robbery may be committed "by force and violence, or by intimidation." 18 U.S.C. § 2113(a). "Under section 2113(a), intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (quotation marks omitted). Whether an act constitutes intimidation is viewed objectively, and a defendant can be convicted even if he does not intend for an act to be intimidating. *Id.*

Seeking reversal of his § 924(c) conviction, Hanks makes two interrelated arguments. First, he says that the "same constitutional vagueness infirmity" that led the Supreme Court to invalidate the residual clause also applies to the elements clause. The reason § 924(c)(3)(A) is vague,

according to Hanks, is that it sweeps in offenses, like federal bank robbery, that can be committed without the use, attempted use, or threatened use of physical force. That leads to his second argument, which is that federal bank robbery "by intimidation" lacks the required level of force or *mens rea* to qualify as a crime of violence under the elements clause. Hanks's two arguments therefore collapse into one: that federal bank robbery is not categorically a crime of violence under § 924(c)(3)(A).

***2** As he acknowledges, however, we have held that federal bank robbery under § 2113(a), including "by intimidation," does categorically qualify as a crime of violence under the elements clause of § 924(c)(3). *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016). We reasoned that federal bank robbery categorically qualifies as a crime of violence because "[a] taking 'by force and violence' entails the use of physical force [and] a taking 'by intimidation' involves the threat to use such force." *Id.* (*quoting United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)).

Although Hanks believes that *Sams* was wrongly decided, we are bound by that decision under the prior-precedent rule because it has not been overruled or undermined to the point of abrogation by this Court sitting *en banc* or the Supreme Court. *See United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2018) (holding that the prior precedent rule "applies with equal force" to published decisions involving applications to file second or successive habeas petitions), *cert. denied*, —— U.S. ——, 139 S. Ct. 1394, 203 L.Ed.2d 625 (2019). And because *Sams* is controlling, we have no occasion to resolve any ambiguity through application of the rule of lenity, as Hanks proposes.

Because *Sams* holds that federal bank robbery is a crime of violence under the elements clause, Hanks's § 924(c) conviction is valid, notwithstanding the Supreme Court's invalidation of the residual clause. A crime needs to satisfy only one clause of § 924(c)(3) to be considered a crime of violence. Accordingly, we affirm the district court's denial of Hanks's motion to dismiss the § 924(c) count in his indictment, and we affirm his resulting conviction.

AFFIRMED.

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See Fed. Rule of Appellate Procedure 32.1
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See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.
Jurden ROGERS, Defendant - Appellant.

No. 18-15152
|
Non-Argument Calendar
|
(November 7, 2019)

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:18-cr-00028-CEM-TBS-2

Before ROSENBAUM, JILL PRYOR, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

***1** Jurden Rogers appeals the district court's denial of his motion to dismiss his § 924(c) charge and his subsequent conviction for brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Rogers argues that his conviction for federal bank robbery, in violation of 18 U.S.C. § 2113(a), required sufficient force or *mens rea* to qualify as a crime of violence under § 924(c). Rogers also contends that the district court clearly erred in finding that he had committed perjury at trial and erroneously applied the guideline enhancement for perjury. Additionally, Rogers challenges for the first time on appeal the specificity of the district court's findings regarding perjury.

I.

We review *de novo* whether a crime is a crime of violence under 18 U.S.C. § 924(c). The prior-precedent rule binds us to follow a prior binding precedent unless and until it is overruled or undermined to the point of abrogation by this Court *en banc* or the Supreme Court. *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008). To undermine our precedent to the point of abrogation, a subsequent decision of the Supreme Court must be squarely on point and directly conflict with a holding rather than merely weaken it. *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). The prior-precedent rule "applies with equal force" to published decisions involving applications to file second or successive habeas petitions. *United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2018), *cert. denied*, —— U.S. ——, 139 S. Ct. 246, 202 L.Ed.2d 164 (2018).

Section 924(c) provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during a crime of violence or a drug-trafficking crime. 18 U.S.C. § 924(c)(1). For the purposes of § 924(c), "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.

Id. § 924(c)(3). The first clause is referred to as the elements clause, and the second clause is referred to as the residual clause. In *United States v. Davis*, —— U.S. ——, 139 S. Ct. 2319, 2336, 204 L.Ed.2d 757 (2019), the Supreme Court ruled that the residual clause was unconstitutionally vague.

We use a categorical approach to determine whether an offense qualifies as a crime of violence under the elements clause of § 924(c)(3). *Ovalles v. United States*, 905 F.3d 1300, 1302-03 (11th Cir. 2018). Under that approach, we look to the elements of the offense of conviction, presume " 'that the conviction rested upon nothing more than the least of the acts criminalized,' " and then determine whether those acts qualify as crimes of violence. *United States v. Vail-Bailon*, 868 F.3d

1293, 1296 (11th Cir. 2017) (en banc) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 185, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)), *cert. denied*, —— U.S. ——, 138 S. Ct. 2620, 201 L.Ed.2d 1031 (2018).

With the categorical approach in mind, we consider the crime of federal bank robbery. Federal bank robbery may be committed "by force and violence, or by intimidation." 18 U.S.C. § 2113(a). "Under section 2113(a), intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (quotation marks omitted). "Whether an act constitutes intimidation is viewed objectively, and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." *Id.* (citation omitted).

***2** We have held that federal bank robbery is a crime of violence under the elements clause of § 924(c)(3). *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016); *see Ovalles*, 905 F.3d at 1304 (citing *Sams*, 830 F.3d at 1239) (stating that federal bank robbery " 'by intimidation' " categorically qualifies as a crime of violence under § 924(c)(3)(A) (quoting 18 U.S.C. § 2113(a))). We reasoned that federal bank robbery qualifies as a crime of violence because "[a] taking 'by force and violence' entails the use of physical force [and] a taking 'by intimidation' involves the threat to use such force." *Sams*, 830 F.3d at 1239 (quoting *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016)).

Here, our prior precedent of *Sams* precludes Rogers's argument that bank robbery is not a crime of violence under § 924(c)(3)'s elements clause. Rogers's argument is little more than that we should revisit *Sams*. While *Davis* invalidated § 924(c)(3)'s residual clause as unconstitutionally vague, a crime needs to satisfy only one clause of § 924(c)(3) to be considered a crime of violence, and *Sams* holds that bank robbery is a crime of violence under the elements clause. Accordingly, we affirm the district court's denial of Rogers's motion to dismiss the § 924(c) charge and Rogers's § 924(c) conviction.

II.

We review for clear error the district court's factual findings supporting an obstruction-of-justice enhancement, and we give due deference to the district court's application of the Guidelines to those facts. *United States v. Singh*, 291 F.3d 756, 763 (11th Cir. 2002). In doing so, we accord great deference to the district court's credibility determinations. *Id.*

We will not hear challenges to the specificity of the district court's findings regarding perjury if they were not raised at the sentencing hearing. [1] *United States v. Esquenazi*, 752 F.3d 912, 938 (11th Cir. 2014), *superseded on other grounds by statute as recognized in United States v. Gross*, 661 F. App'x. 1007, 1023 (11th Cir. 2016).

Rogers did not challenge the specificity of the district court's findings at sentencing, so he cannot challenge it here. But even if he could, he could not succeed.

A factual finding is clearly erroneous only if it leaves us with a ' "definite and firm conviction that a mistake has been committed." ' *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010). A factual finding cannot be clearly erroneous when the factfinder chooses between two permissible views of the evidence. *United States v. Saingerard*, 621 F.3d 1341, 1343 (11th Cir. 2010).

"Although it is preferable that the district court make specific findings by identifying the materially false statements individually, it is sufficient if the court makes a general finding of obstruction encompassing all the factual predicates of perjury." *United States v. Duperval*, 777 F.3d 1324, 1337 (11th Cir. 2015) (citation and quotation marks omitted). To satisfy the factual predicates for a finding of perjury, the testimony must have been (1) under oath; (2) false; (3) material; and (4) given with the willful intent to provide false testimony. *Singh*, 291 F.3d at 763 & n.4. The district court makes a sufficient general finding of obstruction when it expressly adopts the facts in the presentence investigation report ("PSI") and the PSI addresses in detail the defendant's actions that warrant the enhancement. *United States v. Smith*, 231 F.3d 800, 820 (11th Cir. 2000).

***3** Here, the district court did just that. It complied with its obligation to make a general finding of obstruction encompassing all the factual predicates of perjury by expressly adopting the PSI and the probation officer's position in the PSI addendum. In short, the district court did not clearly err in finding Rogers committed perjury based on the evidence at trial that contradicted Rogers's testimony. The district court correctly applied the guidelines enhancement for obstruction of justice.

AFFIRMED.

All Citations

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Footnotes

1 At sentencing, the district court must allow the defendant's attorney to comment on the PSI and other matters relating to an appropriate sentence. Fed. R. Crim. P. 32(i)(1)(C). After imposing a sentence, the district court must (1) elicit fully articulated objections to the court's findings of fact and conclusions of law, and (2) ensure that the grounds are clearly stated. *See* *United States v. Campbell*, 473 F.3d 1345, 1347 (11th Cir. 2007). Here, that occurred.

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