No.19-8004

In The
Supreme Court of the United States

LAMARCUS HARVEY.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY ARGUMENT

In its Brief in Opposition, the government aligns the case at bar with the pending case of Johnson v. United States, No. 19-7079 (April 24, 2020). In the Johnson case, however, the primary issue is whether bank robbery qualifies categorically as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A), when the offense may be committed through the mere use of intimidation. In the case at bar, however, the primary issue involves whether attempted robbery qualifies as a "crime of violence" under 18 U.S. C. 924(c)(3)(A).

With respect to the issues raised in the pending case of Johnson v. United States, No. 19-7079 (April 24, 2020), Mr. Harvey replies as follows:

I. The circuits' entrenched position that a federal bank robbery is a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) is inconsistent with the expansive conduct punished as "intimidation" Under 18 U.S.C. § 2113(A).

The merits of this argument were expounded on in Johnson v. United States, No. 19-7079 (April 24, 2020), Reply Brief in Response to Opposition to Petition for Writ of Certiorari, Pages 2-4. Mr. Harvey respectfully adopts and incorporates the arguments set forth by the Petitioner in Johnson, Id.

II. The circuits have wrongfully concluded that armed bank robbery by intimidation categorically requires proof of threat of violence

The merits of this argument were expounded on in Johnson v. United States, No. 19-7079 (April 24, 2020), Reply Brief in Response to Opposition to Petition for Writ of Certiorari, Pages 4-9. Mr. Harvey respectfully adopts and incorporates the arguments set forth by the Petitioner in Johnson, Id.

III. The circuits have wrongfully concluded that armed bank robbery necessarily requires proof that the defendant engaged in knowing intimidation.

The merits of this argument were expounded on in Johnson v. United States, No. 19-7079 (April 24, 2020), Reply Brief in Response to Opposition to Petition for Writ of Certiorari, Pages 9-11. Mr. Harvey respectfully adopts and incorporates the arguments set forth by the Petitioner in Johnson, Id.

IV. It is exceptionally important that the Court take up the circuit courts' error.

The merits of this argument were expounded on in Johnson v. United States, No. 19-7079 (April 24, 2020), Reply Brief in Response to Opposition to Petition for Writ of Certiorari, Pages 12-13. Mr. Harvey respectfully adopts and incorporates the arguments set forth by the Petitioner in Johnson, Id.

With respect to the issue of attempted robbery, Mr. Harvey adds as follows:

V. The offense of "Attempted Robbery" fails to qualify as a "crime of violence pursuant to 18 U.S.C. § 924(c)(3)(A).

In its Brief in Opposition, the government argues that simply because the underlying offense (in this instance, bank robbery) is considered to be a "violent felony" then it must necessarily follow that an attempt to commit the offense must also qualify, and this is an argument which has been embraced by the various courts of appeals (BIO Page 12).

Mr. Harvey asserts that such reasoning misses the mark because from an analysis standpoint, an attempt to commit an offense is a separate animal from the offense itself and requires different elements.

It should be so identified and evaluated.

Mr. Harvey agrees that in order to commit the offense of attempt, a defendant must 1) have the intent to commit each element of the substantive crime and 2) take a "substantial step" toward its commission that strongly corroborates his criminal intent. United States v. St. Hubert , 909 F.3d 335, 352 (11th Cir. 2018) citing, United States v. Jockisch, 857 F.3d 1122. 1129 (11th Cir.), cert. denied, 138 S.Ct. 284 (2017)

He contends however that, much like conspiracy, the offense of attempt is an inchoate crime and because the crime itself never came to fruition, then the analysis of the circumstances surrounding the offense must necessarily become fact-based, and this is contrary to the mandate that the "categorical approach" be used

in assessment of whether an offense qualifies as a "crime of violence" as provided in Stokeling v. United States, ____ U.S. _____. 139 S.Ct. 544 (2019). In attempt cases, the court is forced to review and consider whether the facts support more than mere preparation, but an actual attempt. Mr. Harvey argues that such a yardstick is vague because, with no further instruction by the legislature, the line between preparation and attempt varies with each fact pattern.

Further, the fact-based determination as to whether an offender committed attempted armed robbery is (necessarily) different than that of whether the offender committed actual robbery. In the evaluation of whether an attempted bank robbery was committed, the facts assessed include whether the defendant surveyed the bank and made preparations for the crime. Mr .Harvey argues that these acts may be accomplished without the use of force, violence or intimidation and cites his very case as an example to illustrate the issues before this Court.

In this case, after having "cased" the bank, the co-defendant approached the bank doors, but did not receive access to the bank lobby. Upon returning to his vehicle, he and his co-defendants were arrested. There is no indication that the use of force, violence or intimidation came into play in any of the acts committed by these defendants or whether the defendants at that point had abandoned the plan.

Also, in the case at bar, the co-defendant did not tender a note to a bank teller, did not brandish or show a firearm and in fact, had no contact or communication with any bank staff at all. No facts came into play by which a teller could be intimidated.

The case at bar is precisely the scenario which Judge Jill Pryor posited in her dissenting opinion in United States v. St. Hubert , 918 F.3d 1174 (11th Cir. 2019). She was joined by Judges Wilson and Martin, JJ, and said:

> We can easily imagine that a person may engage in an overt act- in the case of robbery for an example, overt acts may include renting a getaway van, parking the van a block from the bank, and approaching the bank door before being thwarted- without having used, attempted to use or threatened to use force. Would the would-be robber have intended to use. attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? No.

St. Hubert, at 1212 (Pryor, dissenting from the denial of rehearing en banc).

Mr. Harvey asserts that Judge Pryor's assessment of the analysis is accurate to the case at bar. He contends that, as in the case at bar, the elements to commit attempted robbery could be met without the use, attempted use or threatened use of violence, and as such, the offense of attempted robbery is over-broad and fails to qualify as a "crime of violence" pursuant to 18 U.S.C. § 924(c)(3)(A).

VI. Mr. Harvey's case is an excellent vehicle

Mr. Harvey's case is an ideal vehicle in which to decide this issue on the merits. It is a true "attempt" case, in which the facts clearly delineate the differences between "attempted" bank robbery and bank robbery itself. This case lends itself to discussion and evaluation of whether: A) attempted bank robbery should be considered a "crime of violence" merely because bank robbery itself should so be considered, and B) whether the offense of attempted bank robbery, standing alone, meets the criteria of serving as a "crime of violence" under 18 U.S.C. § 924(

c)(3)(A).

Further, the issue was preserved and the court of appeals squarely and specifically determined that, under prior precedent, bank robbery "by intimidation" categorically qualifies as a "crime of violence" and that "when a substantive federal offense qualifies as a "crime of violence" under the elements clause of § 924(c), an attempt to commit that offense is itself a "crime of violence".

VI. Conclusion

For these reasons and those states in the petition, the court should grant the petition for a writ of certiorari.

Respectfully submitted on this 11th day of August, 2020.

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