No. 20-6622

IN THE SUPREME COURT OF THE UNITED STATES

_____

DEVON MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

_____

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **REPLY TO MEMORANDUM OF THE UNITED STATES**, via first-class mail, postage prepaid, this 2nd day of March, 2021.

[See Attached Service List]

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

REPLY TO MEMORANDUM OF THE UNITED STATES

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REPLY

Citing to the arguments in its brief in opposition to the petition for a writ of certiorari in *Johnson v. United States*, No. 19-7079 (April 24, 2020), the government posits that Hobbs Act robbery and armed robbery qualify as "crimes of violence" under 18 U.S.C. § 924(c) because they have as an element "the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A). Gov's Br. in Opp. at 7-25, *Johnson*, *supra* (No. 19-7079).

The government, by reference to its brief at 7-8 in *Johnson*, *supra*, argues that "[e]very court of appeals with criminal jurisdiction has determined that the federal offenses of bank robbery or armed bank robbery qualify as crimes of violence under Section 924(c)(3)(A) and similar provisions," citing *Hunter v. United States*, 873 F.3d 388, 390 (1st Cir. 2017); *United States v. Hendricks*, 921 F.3d 320, 327-328 (2nd Cir. 2019), cert. denied, 140 S.Ct. 870 (2020); *United States v. Johnson*, 899 F.3d 191, 203-204 (3rd Cir.), cert. denied, 139 S.Ct. 647 (2018); *United States v. McNeal*, 818 F.3d 141, 152-153 (4th Cir.), cert. denied, 137 S.Ct. 164 (2016); *United States v. Brewer*, 848 F.3d 711, 715-716 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293, 295-296 (6th Cir. 2016), cert. denied, 137 S.Ct. 830 (2017); *United States v. Williams*, 864 F.3d 826, 830 (7th Cir.), cert. denied, 138 S.Ct. 272 (2017); *Estell v. United States*, 924 F.3d 1291, 1292-1293 (8th Cir.), cert. denied, 140 S.Ct. 490 (2019); *United States v. Watson*, 881 F.3d 782, 785-786 (9th Cir.) (per curiam), cert. denied, 139 S.Ct. 203 (2018); *United States v. McCranie*, 889 F.3d 677, 679-681 (10th Cir. 2018), cert. denied, 139 S.Ct. 1260 (2019); *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016); and *United States v. Carr*, 946 F.3d 598, 601 (D.C. Cir. 2020).

However, most of the circuit court decisions cited by the government were based entirely, or in part, on the "intimidation" prong of Hobbs Act Robbery, 18 U.S.C. 2113(a) – the assumption in several of those cases being that the least violent means of committing Hobbs Act robbery is by "intimidation." See, e.g., *Hunter*, 873 F.3d at n.1; *Hendricks*, 921 F.3d at 328; *Johnson*, 899 F.3d at 204; *McNeal*, 818 F.3d at 153; *Brewer*, 848 F.3d at 714; *McBride*, 826 F.3d at 296; *Williams*, 864 F.3d at 828; *Estell*, 924 F.3d at 1293; *Watson*, 881 F.3d at 785; *McCranie*, 889 F.3d at 679-80; *In re Sams*, 830 F.3d at 1238-39; and *Carr*, 946 F.3d at 601.

Rejecting that assumption, Mitchell asserts that robbery under the "force and violence" prong of 18 U.S.C. § 2113(a) can be committed less violently than through intimidation, and without the use or threatened use of violent force. Merely snatching cash from a bank teller's hand where there is little or no resistance would, arguably, constitute bank robbery under § 2113(a) because some level of "force and violence" would be required in the process. See, e.g., *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017), an Oregon robbery case in which "the victim and the thief had a tug of war over a purse" as an example of a robbery conviction involving something less than the "violent force" required under *Johnson v. United States*, 135 S.Ct. 2551 (2010) ("*Johnson 2010*"). Snatching money from a

teller while pointing a wholly concealed, loaded and functional gun at the teller without the teller's knowledge would arguably constitute armed bank robbery under § 2113(d). "The relevant inquiry is not whether the teller was frightened, but whether, objectively speaking, the accused's use of a dangerous weapon or device actually placed her life in danger." *United States v. Tutt*, 704 F.2d 1567, 1568 (11th Cir. 1983) (citing § 2113(d) and *United States v. Parker*, 542 F.2d 932, 934 (5th Cir. 1976)). The "use" of the gun, in that instance, would be to instill in the robber the confidence needed to commit the act, knowing he could repel, if necessary, any resistance by bank employees or others to the act, or the getaway. At the same time, the lives of the teller and others present would be in danger. Thus, the issue presented by Mitchel is far from settled at the circuit court level.

Moreover, relief here is not foreclosed by this Court's holding in *Stokeling v. United States*. The dissent in *Stokeling* left open the door for a different result under § 2113(a) and § 924(c), given the dissenters' ardent belief that *Johnson 2010* applies to robbery, as well as battery, statutes. In *Stokeling,* this Court relied heavily on the Florida courts' own interpretation of Florida's robbery statute to arrive at its conclusion that one can violate that statute by employing just enough force to overcome resistance, and then

declared that the ACCA required no more. *Id.* at 555. Thus, Mitchell argues, *Stokeling* is two steps removed from foreclosing relief in this case – different robbery statute, and different sentencing enhancement statute with different definitional terms.

The federal robbery statute (§ 2113(a)) does not expressly require that the "force" used to take…from the person or presence of another be great enough to overcome the resistance of the victim. Federal robbery, it would seem, may occur in the absence of any real resistance on the part of the victim. Thus, while *Stokeling* may have impacted certain cases interpreting robbery statutes that expressly require the overcoming of resistance on the part of the victim, it does not necessarily speak to all robberies under § 2113(a).

In summary, Mitchell posits that he is entitled to relief under *Johnson v. United States*, 135 S.Ct. 2551 (2015) ("*Johnson 2015*"), *Johnson 2010*, and *United States v. Davis*, 139 S.Ct. 2319 (2019). Because federal bank robbery (armed and unarmed) "by force and violence" can be undertaken with no more force or violence than a purse snatching, or grabbing money from a non-resisting bank Teller's hand, § 2113(a) and (d) are not "crimes of violence" as defined in § 924(c)(3)(A). Moreover, the residual clause of

§ 924(c)(3)(B) has, effectively, been deemed unconstitutionally vague under *Johnson 2015*, and, more recently, under *Davis*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to vacate Mitchell's § 924(c) conviction and sentence.

RESPECTFULLY SUBMITTED this 2nd day of March, 2021 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant