

No. _____

IN THE
Supreme Court of the United States

ERSKINE JAMES MCKINLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
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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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence and carries a seven-year mandatory minimum penalty to run consecutively to any other term of imprisonment. This petition presents the following questions:

I. Whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague after *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Samuel Johnson*).¹

II. Whether bank robbery (18 U.S.C. § 2113), which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, has as an element “the use . . . of physical force against the person or property of another,” under 18 U.S.C. § 924(c)(3)(A).

¹ The issue of whether the identically-worded residual clause in 18 U.S.C. § 16(b) is unconstitutionally vague after *Samuel Johnson* is currently before this Court in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016). Reargument was held on October 2, 2017.

LIST OF PARTIES

Petitioner, Erskine James McKinley, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Ersine James McKinley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, *McKinley v. United States*, 698 F. App'x 597 (11th Cir. 2017), is unpublished and provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. McKinley's criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. McKinley's § 2255 motion on July 29, 2016. On November 8, 2016, the district court granted Mr. McKinley a certificate of appealability (COA) on the following issues: "[W]hether *Johnson v. United States*, 135 S. Ct. 2551 (2015) extends to the residual clause under 18 U.S.C. § 924(c), and if so, whether bank robbery under 18 U.S.C. § 2113 qualifies as a 'crime of violence' under 18 U.S.C. § 924(c)'s force clause." On September 23, 2016, Mr. McKinley filed a timely notice of appeal. On October 10, 2017, the Eleventh Circuit affirmed the lower court judgment. See Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides in pertinent part:

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

18 U.S.C. § 924(c) provides in pertinent part:

- (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 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; and
- (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.

18 U.S.C. § 2113 provides in pertinent part:

- (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.

STATEMENT OF THE CASE

Mr. McKinley pled guilty to bank robbery, in violation of §§ 2113(a) and 2 (count one), and brandishing a firearm in relation to a “crime of violence,” in violation of § 924(c) (count two). The “crime of violence” referenced in count two was the bank robbery charged in count one. On October 1, 2014, Mr. McKinley was sentenced to 116 months’ imprisonment on count one and 84 months on count two, to be served consecutively. No appeal was filed.

On June 19, 2016, Mr. McKinley moved to vacate his sentence under § 2255, raising only one claim, that his conviction on count two was unconstitutional in light of *Samuel Johnson*. On July 29, 2016, the district court denied the motion, stating that *Samuel Johnson* does not apply to § 924(c), and even if it did, bank robbery qualifies as a “crime of violence” under § 924(c)’s force clause. On September 23, 2016, Mr. McKinley filed a timely notice of appeal. Subsequently, the district court granted Mr. McKinley a COA on whether *Samuel Johnson* applies to § 924(c), and if so, whether bank robbery under § 2113(a) qualifies as a “crime of violence.”

On October 10, 2017, the Eleventh Circuit affirmed the lower court’s judgment, stating:

Mr. McKinley contends that his conviction for brandishing a firearm during a crime of violence under § 924(c) violated his due process rights because the residual (or risk-of-force) clause under § 924(c)(3)(B) is unconstitutionally vague under *Johnson*, 135 S. Ct. at 2557–2558, 2563 (striking down the residual clause of the Armed Career Criminal Act as unconstitutionally vague). In June of 2017, we recently considered that argument and held that *Johnson* “does not apply to or invalidate” the risk-of-force clause under § 924(c)(3)(B). *Ovalles v. United States*, 861 F.3d 1257, 1263–65 (11th Cir. 2017). Mr. McKinley’s argument is therefore foreclosed by circuit precedent.

Mr. McKinley also argues that his bank robbery offense does not qualify as a crime of violence under § 924(c)’s use-of-force clause because it “may be committed by ‘force and violence’ or by ‘intimidation.’ ” Appellant’s Br. at 3. That argument, however, is also foreclosed by circuit precedent. See *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (holding that “a bank robbery conviction under § 2113(a) by

force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause”).

We affirm Mr. McKinley’s conviction under § 924(c).

REASONS FOR GRANTING THE WRIT

I. Section 924(c)’s residual clause is unconstitutionally vague.

This Court granted certiorari in *Sessions v. Dimaya*, 137 S. Ct. 31 (2016), because the circuits are split regarding whether § 16(b)’s residual clause is unconstitutionally vague in light of *Samuel Johnson*. Compare *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (holding that § 16(b)’s residual clause is unconstitutional), and *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (same), with *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc) (holding that § 16(b)’s residual clause is constitutional). Not only are the residual clauses in § 16(b) and § 924(c) identically worded, but the circuits are also divided on whether § 924(c)’s residual clause is unconstitutionally vague in light of *Samuel Johnson*. Compare *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that § 924(c)’s residual clause is unconstitutionally vague), with *Ovalles*, 861 F.3d at 1266–67 (holding that § 924(c)’s residual clause is constitutional), *United States v. Taylor*, 814 F.3d 340, 375–79 (6th Cir. 2016) (same), and *United States v. Hill*, 832 F.3d 135, 150 (2d Cir. 2016) (same).

Based on this Court’s consideration of the materially-identical provision in *Dimaya*, and the circuit split concerning the constitutionality of § 924(c)’s residual clause, Mr. McKinley respectfully seeks this Court’s review. Should this Court decide in *Dimaya* that § 16(b) is unconstitutionally vague, that decision will confirm Mr. McKinley’s position that § 924(c)’s residual clause is unconstitutionally vague.

Section 924(c)’s residual clause suffers from the same vagueness problems as the residual clause in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). In *Samuel*

Johnson, this Court determined that “[t]wo features of the [ACCA’s] residual clause conspire to make it unconstitutionally vague.” 135 S. Ct. at 2557. First, “the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime,” because “[i]t ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime” rather than “to real-world facts or statutory elements.” *Id.* Second, the ACCA’s residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony,” stating “[i]t is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.* at 2558.

Like the ACCA’s residual clause, § 924(c)(3)(B) requires an analysis of an “ordinary case” and the risk that it presents. *See United States v. McGuire*, 706 F.3d 1333, 1336–38 (11th Cir. 2013) (applying categorical approach to § 924(c)(3)(B)).² Section 924(c)(3)(B) therefore fails, like the ACCA’s residual clause, because it requires “courts to assess the hypothetical risk posed by an abstract generic version of the offense.” *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). As this Court reemphasized in *Welch*, the “vagueness of the residual clause rests in large part on its operation under the categorical approach.” *Id.* And like the ACCA, § 924(c)(3)(B) does not provide guidance as to what constitutes a substantial enough risk of force to fall within the statute.

Admittedly, the ACCA and § 924(c) are not identical insofar as the ACCA includes a list of enumerated offenses and § 924(c)(3)(B) does not. *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with* 18 U.S.C. § 924(c)(3)(B). However, the ACCA’s enumerated offenses were not necessary to this Court’s vagueness determination. True enough, the Court considered the enumerated offenses in concluding that the ACCA’s residual clause left too much uncertainty about “how much risk it

² Retired Supreme Court Justice O’Connor authored *McGuire*.

takes for a crime to qualify as a violent felony,” but that was not the central problem. *See Samuel Johnson*, 135 S. Ct. at 2558. To the contrary, the central problem was the ordinary-case analysis and uncertainty of the risk required to qualify as a predicate offense:

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime “*otherwise* involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.”

Id. (emphasis in underline added). The Court addressed the enumerated offenses again in response to the argument that its decision would also invalidate other laws that used terms such as “substantial risk.” *Id.* at 2561. After noting that “[a]lmost none” of these laws included “a confusing list of examples,” the Court stated:

More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as “substantial risk” to real-world conduct The residual clause, however, requires application of the “serious potential risk” standard to an idealized ordinary case of the crime.

Id. (emphasis in underline added). *Samuel Johnson* thus makes clear that the ordinary-case analysis drove its decision, and that problem is squarely presented by § 924(c)(3)(B). *See Welch*, 136 S. Ct. at 1262.

Moreover, the absence of any enumerated offenses in § 924(c)(3)(B), if anything, makes this provision even more vague. Without any enumerated offenses, there is no benchmark to measure the degree of risk required for an offense to be a “crime of violence.” For example, the Court acknowledged that a commonsense approach had not provided “a consistent conception of the degree of risk posed by each of the four enumerated crimes”; it therefore doubted it would

“fare any better with respect to thousands of unenumerated crimes.” *Samuel Johnson*, 135 S. Ct. at 2559. It follows, then, that in the absence of enumerated offenses to anchor the analysis regarding the degree of risk, § 924(c)(3)(B) provides no guidance for determining whether an offense is a crime of violence. Accordingly, for the reasons set forth above, § 924(c)(3)(B), like the ACCA’s residual clause, is unconstitutionally vague.

II. Bank robbery, which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, does not have as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Because the § 924(c)(3)(B) residual clause is unconstitutionally vague, the only way Mr. McKinley’s bank robbery offense may qualify as a “crime of violence” is under § 924(c)(3)(A)’s force clause.

Whether bank robbery under § 2113(a) qualifies as a “crime of violence” under the force clause is a question that must be answered by reference to the elements of the offense, and not the facts of the defendant’s conduct. *See McGuire*, 706 F.3d at 1336–38; *see also Johnson v. United States*, 559 U.S. 133, 137 (2010) (*Curtis Johnson*); *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). Pursuant to the categorical approach, every bank robbery under § 2113 must be committed with “the *use*, attempted use, or *threatened use of physical force*” to qualify as a “crime of violence” under the force clause. 18 U.S.C. § 924(c)(3)(A) (emphasis added). The term “use” under the elements clause means that the defendant’s actions were undertaken with a degree of intent that is higher than negligence or recklessness. *See United States v. Palomino Garcia*, 606 F.3d 1317, 1334–36 (11th Cir. 2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). And the term “physical force” under the elements clause means “violent force”—that is, “force that is capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 140.

As explained below, this Court must presume Mr. McKinley's bank-robbery conviction was for bank robbery by "intimidation," and not bank robbery by "force and violence." And because bank robbery by "intimidation" may be committed without the "use" or "threatened use" of "physical force," it does not qualify as a "crime of violence" under § 924(c)'s force clause.

A. Mr. McKinley's bank robbery offense was presumably committed "by intimidation," and not by "force and violence."

To determine whether bank robbery qualifies as a "crime of violence" under § 924(c), this Court must employ a categorical approach, focusing on only the elements of the offense, and not the facts underlying a conviction. *See McGuire*, 706 F.3d at 1336–38; *Descamps*, 133 S. Ct. at 2281. However, in a narrow subset of cases, where a statute is "divisible"—meaning the statute sets forth a number of different crimes, only some of which qualify as a "crime of violence"—this Court may employ a modified categorical approach. *Descamps*, 133 S. Ct. at 2281. Under the modified categorical approach, this Court may review certain documents filed in the district court to determine which part of the state statute the defendant was convicted under. *See id.* at 2283–84; *Cf. Shepard v. United States*, 544 U.S. 13 (2005). However, if a statute is indivisible, the modified categorical approach is inapplicable, and "the *Shepard* documents are irrelevant to the ACCA issue." *United States v. Howard*, 742 F.3d 1334, 1345 (11th Cir. 2014). In light of the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and this Court's decision in *United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016), it is clear that the bank robbery statute is indivisible.

The key to "figuring out" whether a statute is divisible is whether the jury is "required" to find one of several alternative options beyond a reasonable doubt. *Lockett*, 810 F.3d at 1268. If the jury is required to choose between the alternatives, the alternatives are elements and the statute is divisible; if not, the alternatives are merely means, and the statute is indivisible. *Id.* To

determine whether the alternatives are means or elements, the Court may look to a number of authoritative sources including judicial decisions and jury instructions. *Mathis*, 136 S. Ct. at 2249, 2256–57.

A review of the Eleventh Circuit jury instructions clarifies that “force and violence” and “intimidation” are merely alternative means of accomplishing a single element. *See* 11th Cir. Pattern Jury Instructions 76.1 (describing force, violence, and intimidation as alternative “means” of satisfying a single element); *see also* Cr. Doc. 40 at 9. The jury is not required to choose among and agree upon one of these alternatives. Instead, they must only find beyond a reasonable doubt that one of them is applicable and need not agree on which. Therefore, the bank robbery statute is indivisible with respect to determining whether a bank robbery was accomplished by force and violence, or by intimidation.

Because the bank robbery statute is indivisible, this Court must presume Mr. McKinley’s bank-robbery conviction rests upon the least culpable conduct required under the statute. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The least culpable form of bank robbery is by “intimidation,” and, as explained below, that version of the offense does not qualify as a “crime of violence” under the force clause.³

B. Bank robbery by “intimidation” does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another.

A bank robbery committed by “intimidation” does not qualify as a “crime of violence” because: (1) it does not require the “use” of force, as that term was defined in *Leocal* and *Palomino*

³ Mr. McKinley maintains that the bank robbery statute is indivisible with respect to whether a robbery was committed by force and violence, or by intimidation. However, in this case, the Court need not decide that issue as the indictment charges all three. Therefore, regardless of whether the alternatives are means or elements, we must presume the taking was accomplished by the least culpable means. *See Moncrieffe*, 133 S. Ct. at 1684.

Garcia; and (2) it does not require the threatened use of “physical force,” as that term was defined in *Curtis Johnson*.

i. Bank robbery by “intimidation” does not qualify under the force clause because it does not require that a defendant intentionally intimidate a victim.

For an offense to qualify as a “crime of violence” under the force clause, it must have as an element “the *use*, attempted use, or *threatened use* of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Pursuant to the Supreme Court’s decision in *Leocal*, the word “use” requires an “active employment” of force, which “most naturally suggests a higher degree of intent than negligent or merely accidental conduct.” *Id.* at 9; *see also Palomino Garcia*, 606 F.3d at 1334–36. The bank robbery statute, however, does not require a higher degree of intent with respect to its “intimidation” element. According to the Eleventh Circuit’s pattern jury instruction, an individual may be convicted of bank robbery by “intimidation” where “an ordinary person in the teller’s position reasonably could infer a threat of bodily harm from the defendant’s acts.” 11th Cir. Pattern Jury Instructions 76.1 (citing *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005)). The defendant need not *intend* for the act to be intimidating. *Id.* Instead, it only requires a higher degree of intent with respect to the “taking” element. *Id.*

In this regard, the bank robbery offense at issue here is similar to the offense at issue in *Leocal* and *Palomino Garcia*. In *Leocal*, the Supreme Court addressed whether the Florida offense of driving under the influence (“DUI”) and causing “[s]erious bodily injury to another” qualified as a “crime of violence” under 18 U.S.C. § 16(a)’s force clause.⁴ Applying the “higher

⁴ Section 16(a)’s force clause is identical to § 924(c)’s force clause. *Compare* 18 U.S.C. § 16(a), *with* 18 U.S.C. § 924(c)(3)(A).

degree of intent” discussed above, the Court held that the Florida offense of DUI *and* “causing serious bodily injury in an accident” does *not* have as an element the *use* of physical force, and so it is not a “crime of violence” under § 16(a)’s force clause. *Id.* at 9–10.

This Court relied on *Leocal* in *Palomino Garcia*, which involved Arizona’s aggravated assault offense and U.S.S.G. § 2L1.2’s elements’ clause.⁵ Like the Florida DUI statute at issue in *Leocal*, Arizona’s aggravated assault statute has a “causation of injury” element. *Palomino-Garcia*, 606 F.3d at 1336. Since the Arizona statute does *not* require that the injury be caused “intentionally,” but rather permits conviction even if the injury was caused “recklessly,” this Court held that the Arizona aggravated assault offense does *not* have “as an element the *use* of physical force.” *Id.* at 1334–36.

Similar to the DUI offense in *Leocal*, the offense of bank robbery by “intimidation” does not associate any *mens rea* with the “causation of injury” element (the putting in fear), only with the conduct that triggers the offense (the taking). No matter how “great” the fear is, then, it is clear from the elements of the offense, the fear need not be caused intentionally or even recklessly. *See Palomino Garcia*, 606 F.3d at 1336. Accordingly, binding precedent in *Leocal* and *Palomino Garcia* compel the conclusion that the offense of bank robbery by “intimidation” under § 2113(a) does *not* qualify as a “crime of violence” because that offense does not “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) (emphasis added).

⁵ U.S.S.G. § 2L1.2’s force clause is essentially the same as § 924(c)’s force clause except that § 924(c) allows the physical force to be used against another’s property *or* person while § 2L1.2 allows the physical force to be used against only another person. *Compare* U.S.S.G. § 2L1.2, comment. (n.1(b)(iii)), *with* 18 U.S.C. § 924(e)(2)(B)(i).

ii. Bank robbery by “intimidation” does not qualify under the force clause because it does not require that a defendant threaten to use violent “physical force.”

For a conviction to be a “crime of violence” under the force clause, it must 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) (emphasis added). Not any physical force will do. The “physical force” must be “*violent* force — that is, force capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 140 (2010). “Even by itself, the word ‘violent’ . . . connotes a *substantial* degree of force.” *Id.* (emphasis added). Mr. McKinley’s bank robbery offense does not have as an element the use, attempted use, or threatened use of physical force against another person or property.

An individual may “intimidate” a victim without the threatened use of violent “physical force.” For instance, this Court has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. *See United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, let alone violent “physical force” or force “capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 139.

For instance, in *United States v. Graham*, 931 F.2d 1442 (11th Cir. 1991), the defendant entered a bank and handed a teller a note that read, “This is a robbery. Please give me small, unmarked bills, touch off no alarms, and alert no one for at least ten minutes. Thank you.” 931 F.3d at 1443. Initially, the teller thought the defendant was joking, but after seeing the defendant’s serious demeanor, she gave the defendant money. The defendant continued to stare at the teller as she pulled money out of her drawer and leaned over the counter. The defendant

made no threatening gestures. Under these facts, this Court held that the defendant's note and subsequent glares amounted to intimidation. *Id.*

Indeed, a defendant need not directly threaten a teller to be convicted of bank robbery by "intimidation." In *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005), after a teller walked away from her station, two men jumped over the teller's counter, opened her unlocked cash drawer, and grabbed handfuls of cash. 412 F.3d at 1242. The neighboring teller, however, was within arm's reach of the defendants. The Eleventh Circuit held that this was intimidation because leaping onto the nearby counter and being in reasonable proximity to the neighboring teller would cause a reasonable person in the neighboring teller's position to fear bodily harm. *Id.* at 1245–46.

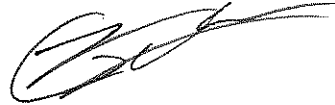
Graham and *Kelley* confirm that actions that may cause a reasonable person to fear bodily harm do not require threats or threatening gestures, let alone the threatened use of violent force. Therefore, bank robbery by "intimidation" under § 2113(a) does not have as an element the threatened use of "physical force," and does not qualify as a "crime of violence" under the force clause.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit.....	A-1
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This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Erskine James MCKINLEY, Petitioner–Appellant,

v.

UNITED STATES of America,
Respondent–Appellee.

No. 16–16188

|
Non–Argument Calendar

|
(October 10, 2017)

Appeal from the United States District Court for the Middle District of Florida, *598 D.C. Docket Nos. 8:16–cv–01645–CEH–AAS, 8:14–cr–00165–CEH–AAS–2

Attorneys and Law Firms

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Linda Julin McNamara, Germaine Seider, Natalie Hirt Adams, Arthur Lee Bentley, III, Josephine W. Thomas, U.S. Attorney's Office, Tampa, FL, for Respondent–Appellee.

Before TJOFAT, MARCUS, and JORDAN, Circuit Judges.

Opinion

PER CURIAM:

Erskine McKinley, a federal prisoner, appeals the district court's order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Because our precedent forecloses his arguments on appeal, we affirm.

In June of 2014, Mr. McKinley pled guilty to one count of bank robbery, in violation of 18 U.S.C. § 2113(a),

and one count of brandishing a firearm in relation to a crime of violence, in violation of § 924(c)(1)(A)(ii). The district court varied below the advisory guidelines range, and imposed a sentence of 116 months' imprisonment for the bank robbery count, to be followed by 84 months' imprisonment for the firearm count.¹

Mr. McKinley did not appeal his conviction or sentence, and his conviction became final in October of 2014. He then filed an initial § 2255 petition in June of 2016. The district court denied that petition, but later granted him a certificate of appealability on one issue: “whether *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) extends to the residual clause under 18 U.S.C. § 924(c), and if so, whether bank robbery under 18 U.S.C. § 2113(a) qualifies as a ‘crime of violence’ under 18 U.S.C. § 924(c)'s force clause.” D.E. 9.

We review *de novo* whether a defendant's prior conviction qualifies as a crime of violence under 18 U.S.C. § 924(c). See *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013).

Mr. McKinley contends that his conviction for brandishing a firearm during a crime of violence under § 924(c) violated his due process rights because the residual (or risk-of-force) clause under § 924(c)(3)(B) is unconstitutionally vague under *Johnson*, 135 S.Ct. at 2557–2558, 2563 (striking down the residual clause of the Armed Career Criminal Act as unconstitutionally vague). In June of 2017, we recently considered that argument and held that *Johnson* “does not apply to or invalidate” the risk-of-force clause under § 924(c)(3)(B). *Ovalles v. United States*, 861 F.3d 1257, 1263–65 (11th Cir. 2017). Mr. McKinley's argument is therefore foreclosed by circuit precedent.

Mr. McKinley also argues that his bank robbery offense does not qualify as a crime of violence under § 924(c)'s use-of-force clause because it “may be committed by ‘force and violence’ or by ‘intimidation.’ ” Appellant's Br. at 3. That argument, however, is also foreclosed by circuit precedent. See *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (holding that “a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as *599 a crime of violence under the § 924(c)(3)(A) use-of-force clause”).

We affirm Mr. McKinley's conviction under § 924(c).

AFFIRMED.

All Citations

698 Fed.Appx. 597 (Mem)

Footnotes

- 1 Based on a total offense level of 29 and a criminal history category of VI, the advisory guidelines range was 188 to 235 months' imprisonment. Because § 924(c)(1)(A)(ii) requires a mandatory minimum of 84 months' imprisonment to run consecutively to any other term of imprisonment and Mr. McKinley qualified as a career offender under U.S.S.G. §§ 4B1.1(c)(3) and 5G1.2(e), his adjusted guidelines range was 262 to 327 months' imprisonment.

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