

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MICHAEL WILLIAM JECZALIK,

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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QUESTION PRESENTED FOR REVIEW

Whether reasonable jurists could debate whether Mr. Jeczalik was denied his due process rights under the Fifth Amendment to the United States Constitution when he was sentenced to a consecutive seven year term pursuant to 18 U.S.C. §924(c) for possessing a gun during a crime of violence, where the underlying bank robbery offense is not a crime of violence after *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Michael William Jeczalik respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the denial of his motion for certificate of appealability by the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-12525 in that Court on October 27, 2017.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit denying petitioner's motion for a certificate of appealability is contained in Appendix A-1. The decision of the United States District Court for the Southern District of Florida adopting the Magistrate Judge's Report and Recommendation that petitioner's 28 U.S.C. §2255 motion to vacate sentence be denied along with a certificate of appealability is contained in Appendix A-9. The final judgment of the United States District Court for the Southern District of Florida denying petitioner's 28 U.S.C. §2255 motion to vacate his sentence as well as a certificate of appealability is contained in Appendix A-11. The Report and Recommendation of the magistrate judge is contained in Appendix A-12.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. §2255. The decision of the court of appeals was entered on October 27, 2017. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

The Fifth Amendment to the Constitution provides in pertinent part:

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

U.S. Const. Amend. V.

28 U.S.C. 2255(a):

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court. . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Jeczalik was charged with conspiring to commit bank robbery in violation of 18 U.S.C. §371; armed bank robbery, in violation of 18 U.S.C. §§2113(a), (d), and (2); brandishing a gun during the bank robbery, in violation of 18 U.S.C. §924(c)(1)(A)(ii); and possession of a gun by a convicted felon, in violation of 18 U.S.C. §922(g)(1). *See United States v. Michael William Jeczalik*, Case No. 10-80114-Cr-Hurley, DE 21 (S.D. Fla). Mr. Jeczalik pled guilty to the bank robbery and the §924(c) charges, pursuant to a written plea agreement, which provided that he faced a mandatory consecutive seven years to life sentence for the gun charge. (DE 43).

A presentence investigation report (PSI) was prepared. Mr. Jeczalik's guidelines for the bank robbery were 37 to 46 months. For the §924(c) count, Mr. Jeczalik was subject to a statutorily required consecutive sentence of seven years. He filed an objection to the PSI, arguing that he should have been granted a minor role reduction based on the fact that he never even went to the bank. (DE 46).

At his January 4, 2011 sentencing, the district court denied the minor role reduction, although it found that a 24 month sentence was "sufficient but not greater than necessary" for the bank robbery. The district court then determined that Mr. Jeczalik qualified for the seven year enhanced sentence under 18 U.S.C. §924(c)(1)(A)(ii), for brandishing a firearm during and in relation to a crime of violence – the bank robbery. A sentence of 108 months was imposed – 24 months for the bank robbery and 84 months for the gun charge. (DE 52). Mr. Jeczalik did not

appeal his sentence.

On June 27, 2016, he filed a Motion to Vacate Sentence under 28 U.S.C. §2255 based on *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). See *Michael William Jeczalik v. United States*, 16-81108-Civ-Hurley, DE 1 (S.D. Fla). On April 11, 2017, the magistrate judge entered a Report and Recommendation, recommending that Mr. Jeczalik's §2255 motion be denied, and that no certificate of appealability should issue. (A-12). In that order, the magistrate judge found that armed bank robbery was a "crime of violence" under §924(c)'s elements clause. Mr. Jeczalik filed written Objections to the Report and Recommendation. (DE 23).

On April 27, 2017, the district court adopted the Report and Recommendation after "a *de novo* determination on the record as to all portions of the Magistrate Judge's disposition as to which specific written objection has been made." (A-9). In a separate order, the district court entered a Final Judgment denying the motion to vacate sentence and denying a certificate of appealability. (A-11).

On May 31, 2017, Mr. Jeczalik filed a Notice of Appeal from the denial of his §2255 motion. (DE 27). On June 7, 2017, he filed a Motion for Certificate of Appealability in the Eleventh Circuit.

On October 27, 2017, the Eleventh Circuit Court of Appeals denied Mr. Jeczalik's motion for certificate of appealability. (A-1). In the order denying the motion for certificate of appealability, the Court ruled that Mr. Jeczalik failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. §2253(c)(2), citing *Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir.

2017) (*Johnson*'s ruling does not apply to or invalidate §924(c)'s risk-of-force clause) and *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016); *In re Hunt*, 835 F.3d 1277 (11th Cir. 2016); *In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (armed bank robbery satisfies §924(c)'s use-of-force clause). Because "binding precedent forecloses Jeczalik's argument that his §924(c) conviction is unconstitutional," reasonable jurists "would not debate" whether armed bank robbery is a crime of violence under either the "risk-of-force" clause or the "use-of-force" clause. (A-1).

REASON FOR GRANTING THE WRIT

"[R]easonable jurists could at least debate whether Mr. Jeczalik is entitled to relief" on his §924(c) claim following *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). See *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257, 1268 (2016). This is because it is at least debatable whether his conviction for armed bank robbery remains a "crime of violence" under either the residual clause or the elements clause in §924(c).

Legal Standard

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. §2255 motion to vacate sentence. A COA must issue upon a "substantial showing of the denial of a constitutional right" by the movant. 28 U.S.C. §2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529

U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

As this Court has emphasized, a court “should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Because a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Court explained: “We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

The Court recently applied this standard in *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-1264. In that case, this Court broadly held that *Johnson* announced a substantive rule that applied retroactively to cases on collateral review. *Id.* at 1268. But in order to resolve the particular case before it, the Court also held that the Court of Appeals erred by denying a COA because “reasonable jurists could at least debate whether Welch should obtain relief in his collateral challenge to his sentence.” *Id.* at 1264, 1268. In that case, the parties disputed whether Welch’s robbery conviction would

continue to qualify as a violent felony absent the residual clause, and there was no binding precedent resolving that question. *See id.* at 1263-1264, 1268. Accordingly, this Court held that a COA should issue.

For the reasons stated below, reasonable jurists could debate whether Mr. Jeczalik's sentence was properly enhanced by seven years for possession of a gun during a crime of violence, a bank robbery, in light of *Johnson*. Therefore, reasonable jurists could debate whether the sentence violated the Due Process Clause. Accordingly, the United States Court of Appeals for the Eleventh Circuit erred when it denied Mr. Jeczalik a certificate of appealability, and his petition for writ of certiorari should be granted.

A. Reasonable Jurists Could Debate Whether *Johnson* Invalidated the Residual Clause in §924(c)

In his §2255 motion, Mr. Jeczalik set forth at length arguments explaining why the residual clause in §924(c) is void for vagueness in light of *Johnson*, and therefore could not be used to support his §924(c) conviction. (DE 1:11-16). In the Report and Recommendation, the magistrate judge found "it is an open question" whether *Johnson* applies to §924(c)(3)(B)'s residual clause, but such is of no moment since armed bank robbery qualifies as a §924(c)(3)(A) "crime of violence" under the elements clause. (A-12).

While the Eleventh Circuit may believe that it has resolved the constitutionality of §924(c)'s residual clause in *Ovalles*, at least one other circuit has decided to the contrary. *See United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016)

and *United States v. Jackson*, 865 F.3d 946, 952 (7th Cir. 2017) (“that §924(c)(3)(B) is unconstitutional in light of *Johnson* is now a fait accompli”). Moreover, a petition for rehearing *en banc* is currently pending in *Ovalles*, see *United States v. Ovalles*, No. 17-10172 (11th Cir. Aug. 14, 2017), and a petition for writ of certiorari is currently pending in *Jackson*. See Case No. 17-651 (filed Nov. 2, 2017).

Contrary to the Eleventh Circuit, then, reasonable minds continue to debate whether §924(c)’s residual clause is constitutional, and in fact several courts have found the arguments in Mr. Jeczalik’s §2255 motion persuasive in holding that the residual clause in §924(c) and the identical residual clause in 18 U.S.C. §16(b) is void for vagueness. See, e.g., *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (Sept. 29, 2016); *United States v. Thongsouk Theng Lattaphom*, 159 F. Supp. 3d 1157 (E.D. Cal. Feb. 2, 2016); *United States v. Bell*, 158 F. Supp. 3d 906 (N.D. Ca. Jan. 28, 2016); *United States v. Edmundson*, 153 F. Supp. 3d 857 (D. Md. Dec. 30, 2015). Other courts have disagreed. See, e.g., *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (*en banc*) (four judges dissenting); *United States v. Taylor*, 814 F.3d 340, 376-379 (6th Cir. 2016) (2-1 decision). The Court just heard a second re-argument in *Sessions v. Dimaya*, U.S. No. 15-1498, and a decision is expected this term, determining the constitutionality of residual clause in 18 U.S.C. §16(b), which is nearly identical to §924(c)’s residual clause.

Accordingly, Mr. Jeczalik has shown that reasonable jurists not only could, but in fact have, debated this issue. *See, e.g., Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (certificate of probable cause should have issued where other circuits had reached contrary conclusion to court below); *Franklin v. Hightower*, 215 F.3d 1196, 1200 (11th Cir. 2000) (granting COA where circuits were divided).

B. Reasonable Jurists Could Also Debate Whether Armed Bank Robbery Satisfies the Elements Clause in §924(c)

The magistrate judge and the district court concluded that armed bank robbery satisfies the elements clause in §924(c). However, reasonable jurists not only could, but in fact have, debated that issue, as explained in detail below.

Undersigned counsel acknowledges that *In re Sams*, 830 F.3d 1234 (11th Cir. 2016), and *In re Hines*, 824 F.3d 1334 (11th Cir. 2016), held that bank robbery and armed bank robbery qualify as crimes of violence under §924(c)'s elements clause. However, the existence of precedent does not mean that reasonable jurists could not debate the issue. *See, e.g., Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000) ("Under *Slack*, it is thus clear that we should not deny a petitioner an opportunity to persuade us through full briefing and argument to reconsider circuit law that apparently forecloses relief"); *United States v. Gomez-Sotelo*, 18 F. App'x 690, 692 (10th Cir. 2001) (granting COA where there was "a split among the circuits," even though the "issue has been settled in this circuit and not overturned by the Supreme Court").

And, indeed, members of the Eleventh Circuit *have* in fact debated whether

armed bank robbery satisfies the elements clause. Compare *In re Hines*, 824 F.3d 1334, with *In re Jones*, No. 16-14106 (11th Cir. July 27, 2016), Order at 13-19 (Martin, J., concurring in judgment) (expressing the view that *Hines* was “wrongly decided”). As explained below, armed bank robbery does not qualify as a “crime of violence” under the elements clause.

The bank robbery statute provides: “Whoever, by force and violence, or by *intimidation*, takes, or attempts to take, from the person or presence of another, or obtains or attempts to *obtain by extortion* any property or money” from a bank commits bank robbery. See 18 U.S.C. §2113(a) (emphasis added). Applying the categorical approach as required by binding precedent, see *United States v. McGuire*, 706 F.3d 1333, 1336-1337 (11th Cir. 2013), this offense fails to qualify as a crime of violence for several reasons.

As an initial matter, the plain language of the statute makes clear that bank robbery can be committed by extortion. Extortion, then, constitutes an alternative “means” of satisfying the second element of the offense. And, the jury instructions make clear that the bank’s property can also be taken by these alternative means: “by force and violence” or by “intimidation.” See Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). Thus, the statute is indivisible under *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 579 U.S. ___, 136 S. Ct. 2243 (2016). Accordingly, the Court must assume that under the least-culpable-act rule of *Moncrieffe v. Holder*, 569 U.S. 184 (2013), Mr. Jeczalik committed this offense by means of extortion.

In that regard, it is well settled in the Eleventh Circuit that extortion can be committed by putting the victim in “fear of economic loss as well as fear of physical violence.” *United States v. Vallejo*, 297 F.3d 1154, 1165 (11th Cir. 2002); *see also United States v. Bornscheuer*, 563 F.3d 1228, 1236-1237 (11th Cir. 2009); *United States v. Grassi*, 783 F.2d 1572, 1577 (11th Cir. 1986). Thus, no use or threatened use of physical violence is required to commit robbery by extortion. *See, e.g., United States v. Paul*, 175 F.3d 906, 908 (11th Cir. 1999) (upholding §2113(a) conviction where defendant placed extortion note under the front door of the bank and directed bank employee to bring money to location). Thus, the second element of the bank robbery statute is both indivisible and categorically overbroad. This offense cannot be a crime of violence for this reason. *See In re Jones*, No. 16-14106, Order at 15 (Martin, J., concurring in judgment) (“surely bank robbery by extortion does not” qualify under §924(c)’s elements clause). Notably, *In re Sams* failed to consider this argument at all.

Furthermore, even if bank robbery by extortion was a separate offense rather than an alternative means, that offense would still not be a crime of violence. This is because the jury instructions make it clear that at the very least, “force and violence” and “intimidation” are alternative means of committing the offense under *Mathis*. And bank robbery by intimidation is not a crime of violence for two independent reasons.

First, a defendant need not use violent, physical force to take money or property by intimidation. The jury instructions explain that “[t]o take ‘by means of

intimidation' is to say or to do something in a way that would make an ordinary person fear bodily harm." See Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). In other words, "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). But placing a person in fear of bodily harm does not necessarily entail the use or threatened use of violent physical force. For example, that fear can arise merely from the defendant's presentation of a demand note, which "does not require any physical force, let alone strong physical force." *In re Jones*, No. 16-14106, Order at 15 (Martin, J., concurring in judgment); see, e.g., *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Or it may arise from a threat to use poison, toxins, or infectious disease, which also does not require the use of force.

The decision in *Sams* failed to cite *Kelley*. Instead, it relied on decisions that have since been abrogated. Specifically, it cited *United States v. Moore*, 43 F.3d 568 (11th Cir. 1994), but that case involved carjacking, not bank robbery. And not only did that case contain no reasoning on that point, it – like two of the three extra-circuit decisions cited in *Sams* – pre-dated the seminal Court decisions in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Curtis Johnson v. United States*, 559 U.S. 133 (2010), *Descamps* (2013), *Moncrieffe* (2013), and *Mathis* (2016). The Eleventh Circuit therefore failed to conduct the legal analysis that is required today. Indeed, the decision in *Moore* actually acknowledged that the carjacking statute "encompassed" §924(c)'s elements clause, indicating that it was broader in scope. But under

Moncrieffe, *Descamps*, and *Mathis*, that would mean that the carjacking statute is categorically overbroad, and under the least-culpable act rule, could never qualify as a crime of violence. Accordingly, *Moore* and the other decisions cited in *In re Sams* have been abrogated and are no longer controlling. See *In re Parker*, 827 F.3d 1287, 1289 (11th Cir. 2016) (“Since *Weeks* was decided before *Descamps*, it is not a ‘binding precedent’”).

In *Sams*, the Eleventh Circuit also relied on *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016). That decision, however, is not binding on that Court and involved only plain error review. *Id.* at 151. In any event, it too is unpersuasive. *McNeal* did not address robbery by extortion at all or the statute’s indivisibility in that regard. As for robbery by intimidation, it equated intimidation with threatened use of physical force because it found that distinguishing between the two would be “irrelevant in the vast majority of bank robbery cases.” *Id.* at 156. But that misapplies the categorical approach; the elements of the statute must be a direct match with the requirements of the elements clause, such that every conviction necessarily requires as an element the use, attempted use, or threatened use of force. And this Court must assume that Mr. Jeczalik committed the act in the least culpable manner, even if that does not represent the “vast majority” of cases.

The second reason why bank robbery by intimidation does not constitute a crime of violence is that it does not require an *intentional* threat of violent physical force, as required by *Leocal*. As the Eleventh Circuit clearly explained in *Kelley*, “a defendant can be convicted under section 2113(a) even if he did not intend for an act

to be intimidating,” let alone threatening violent physical force. 412 F.3d at 1244. Yet, *In re Sams* failed to address this *mens rea* issue at all. And the Fourth Circuit in *McNeal* incorrectly rejected this argument, reasoning that the defendant must know that his actions were objectively intimidating. 818 F.3d at 155. But the question is not whether or not a defendant has knowledge that his actions are objectively intimidating; rather, the question under *Leocal* is whether he intentionally used or threatened to use violent, physical force. And, again, binding Circuit precedent in *Kelley* clearly states that “a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating,” much less violent. 412 F.3d at 1244. Accordingly, *In re Sams* is not persuasive.

And, in fact, a certificate of appealability has been recently been granted by a district court on this exact issue – whether the use of “intimidation” is a separate and distinct means or mode of violating 18 U.S.C. §2113(a), in addition to, and apart from, the use of “force and violence,” and if so, whether a conviction under §2113(a), resting upon a finding of “intimidation” as the means or mode of committing the offense, may constitutionally be used as a crime of violence sentencing enhancer under 18 U.S.C. §924(c)(3)(B) in view of *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015). See *Renita Mount Rayner v. United States*, Case No. 16-414-Civ-Hodges, DE 14 (M.D. Fla. Dec.14, 2016). The Eleventh Circuit has stayed proceedings in the *Rayner* case pending the issuance of the mandate in *Ovalles* and the decision in *Dimaya*. See *Rayner v. United States*, No. 16-16644 (11th Cir. Nov. 15, 2017).

And most recently, in *Gibson v. United States*, Case No. 16-16584 (11th Cir. Mar. 8, 2017), in granting a COA in a §2255 case challenging a §924(c) conviction, the Eleventh Circuit determined that while *In re Sams* was binding in the context of applications to file second or successive motions, citing *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015), “reasonable jurists could debate whether any conclusion about the reach of *Lambrix* outside of the second or successive application context is dicta, and therefore non-binding.” *Gibson, Id.* at *4. And, if *Sams* is *not* binding outside of that context, “then reasonable jurists could debate whether bank robbery is a crime of violence for the purposes of §924(c).” *Id.*

In granting the COA, the Court held in *Gibson* that “if bank robbery can be committed without ‘the use, attempted use, or threatened use of physical force,’ then that crime obviously can’t have ‘as an element the use, attempted use, or threatened use of physical force.’” *Id.* at *7-8. The Court opined that bank robbery may be committed “by force and violence,” or “by intimidation,” or “by extortion,” or “by entering or attempting to enter any bank . . . with intent to commit in such bank . . . any felony affecting such bank.” *Id.* at *8-9. Only if a bank robbery is committed “by force and violence” would it involve the *Curtis Johnson* level of “physical force” as used in §924(c)(3)(A).

After the *Gibson* case was fully briefed, the Court decided *Ovalles*, 861 F.3d 1257 (11th Cir. 2017), which “squarely foreclose[d] the challenge” that Gibson made to his §924(c) conviction and sentence.” *But see* Order holding Gibson’s appeal in abeyance, *Gibson v. United States*, No. 16-16584 (11th Cir. Sept. 8, 2017) (“A

member of this Court having requested that the mandate in *Ovalles* be withheld, the Court exercises its authority *sua sponte* to hold Gibson's appeal in abeyance pending issuance of a final decision in *Ovalles*").

Mr. Jeczalik maintains that federal bank robbery does not qualify as a crime of violence under §924(c)'s elements clause. A defendant can commit this offense without the use or threatened use of "violent, physical force," as required by *Curtis Johnson*, or the intentional *mens rea*, as required by *Leocal*. Therefore, it is categorically overbroad.

That the conviction here was for *armed* bank robbery under §2113(d) does not alter this conclusion. Indeed, there is no reason why an assault during a bank robbery or the use of a dangerous weapon would transform this offense into a crime of violence. Nor can there be any dispute that under *Mathis*, these represent two alternative means of satisfying the third element of §2113(d), such that if even one of them is overbroad, that entire element is overbroad. See Eleventh Circuit Pattern Jury Instr. No. 76.3 (2010) (alternative means to satisfy third element as "assaulted someone" or "put someone's life in jeopardy by using a dangerous weapon or device").

First, assaulting another person does not require the threat or use of violent physical force. The law in the Eleventh Circuit is clear that "only some amount of force must be used" to commit an assault. *United States v. Fernandez*, 837 F.2d 1031, 1035 (11th Cir. 1988); see *United States v. Hernandez*, 921 F.2d 1569, 1577 (11th Cir. 1991) (assault may occur "by minimal physical contact"); *United States v.*

Fallen, 256 F.3d 1082, 1087-1088 (11th Cir. 2001) (same); *see also United States v. Martinez*, 486 F.3d 1239, 1246 (11th Cir. 2007) (assault may be committed by physical contact without threat). Furthermore, where assault is committed by physical contact, the jury is not required “to find intent to inflict serious bodily injury,” and the offense therefore lacks the *mens rea* element required by *Leocal*. *United States v. Gutierrez*, 745 F.3d 463, 470-471 (11th Cir. 2014).

Second, putting another person’s life in jeopardy by the use of a dangerous weapon or device does not require an intentional threat of violent physical force. The “use” of a firearm, for example, includes the mere “reference” to it. *Bailey v. United States*, 516 U.S. 137 (1995). Thus, “a defendant could be convicted of armed bank robbery for mentioning a firearm that he never brandished, displayed, or even possessed during the crime.” *In re Jones*, No. 16-14106, Order at 16 (Martin, J., concurring in judgment) (citing *United States v. Jones*, 84 F.3d 1206, 1211 (9th Cir. 1996), which involved a “reference to a gun ‘no one ever saw’”). In that regard, Eleventh Circuit precedent makes clear that the mere possession of a weapon – even a dangerous weapon like a short-barreled shotgun – does not have as an element the use, attempted use, or threatened use of force. *See United States v. McGill*, 618 F.3d 1273 (11th Cir. 2010); *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

Furthermore, a defendant can place someone’s life in jeopardy under §2113(d) without any intent to threaten or use violent physical force. Indeed, a defendant can violate this provision merely by carrying a gun during the bank robbery because “he

feels secure with it,” even though he has no intent to intimidate another. *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989). No nexus is required between the weapon and the intimidation required under §2113(a). The defendant therefore need not possess the intentional *mens rea* required by *Leocal*.

In sum, reasonable jurists could at least debate, and members of the Eleventh Circuit have in fact debated, whether armed bank robbery satisfies the elements clause in §924(c).

For all these reasons, the Eleventh Circuit erred when it failed to grant a certificate of appealability on the following question:

Whether reasonable jurists could debate whether Mr. Jeczalik was denied his due process rights under the Fifth Amendment to the United States Constitution when he was sentenced to a consecutive seven year term pursuant to 18 U.S.C. §924(c) for possessing a gun during a crime of violence, where the underlying bank robbery offense is not a crime of violence after *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015)?

CONCLUSION

Based upon the foregoing petition, this Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

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