

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

CHRISTIAN LEVON ROBINSON
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60136

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The specific question presented for review is whether the United States Court of Appeals for the Fifth Circuit erred by denying Mr. Robinson a Certificate of Appealability in this § 2255 case. The underlying question is **whether, under this Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), this Court should vacate Mr. Robinson’s convictions and sentences for possession of a firearm in relation to a crime of violence.** His entitlement to resentencing depends in part on whether the “crime of violence” definition stated in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Christian L. Robinson on December 7, 2005.¹ The conviction was for two counts (counts 3 and 5) of bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and two counts (counts 4 and 6) of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). The district court case number is 3:04cr152-TSL-JCS. The subject § 2255 case is based on the convictions for brandishing a firearm during a crime of violence. The bank robbery convictions are not at issue.

In 2015, after Mr. Robinson's conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015).² For reasons analyzed in the Argument section of this Petition, the holdings in *Johnson* (2015) affect Mr. Robinson's convictions for brandishing a firearm in relation to a crime of violence.

¹ The district court's Judgment is attached hereto as Appendix 1.

² This Petition cites two important Supreme Court cases captioned "*Johnson v. United States*." One was filed in 2015 and published at 135 S.Ct. 2551. That case renders the residual clause of § 924(e)(2)(B)(ii) unconstitutional. The other was filed in 2010 and published at 559 U.S. 133. That case defines the phrase "physical force" in § 924(e)(2)(B)(i). In this Petition, *Johnson v. United States*, 135 S.Ct. 2551 (2015) is referred to as "*Johnson* (2015)," and *Johnson v. United States*, 559 U.S. 133 (2010) is referred to as "*Johnson* (2010)."

Mr. Robinson filed the subject § 2255 Petition to Vacate on June 7, 2016. Invoking the holdings in *Johnson* (2015) he argued that his convictions and his sentences for brandishing a firearm in relation to a crime of violence should be vacated. The district court entered an Order denying the § 2255 Petition on February 28, 2017. Through the same Order, it also denied a Certificate of Appealability (hereinafter “COA”). The district court also entered a Judgment on February 28, 2017.³

Mr. Robinson appealed the case to the United States Court of Appeals for the Fifth Circuit on February 28, 2017. The Fifth Circuit case number is 17-60136. Because the district court denied a COA, Mr. Robinson was required to petition the appellate court for a COA before it would hear the merits of the case. *See* Rule 11(a), Rules Governing § 2255 Proceedings; Rule 22(b)(1), Federal Rules of Appellate Procedure; 28 U.S.C. § 2253(c). So he filed an Application for COA in the Fifth Circuit on April 27, 2017. The Fifth Circuit entered an Order denying the Application for COA on November 14, 2017, without hearing the merits of the case.⁴ This Petition for Writ of Certiorari followed.

³ The district court’s Order and Judgment are attached hereto as composite Appendix 2. The denial of a COA is stated on page 3 of the Order.

⁴ The Fifth Circuit’s Order is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit entered its Order denying the Application for COA on November 14, 2017. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Order, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

In *Johnson* (2015), a the case that Mr. Robinson’s argument is based on, this Court found that the “residual clause” portion of ACCA’s definition of “violent felony” is unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. 135 S.Ct. at 2563. The Due Process Clause of the Fifth Amendment states: “No person shall ... be deprived of life, liberty, or property, without due process of law[.]”

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Robinson moved to vacate his two convictions and sentences for possession of a firearm in relation to a crime of violence. The Judgment of Conviction was filed in the United States District Court for the Southern District of Mississippi. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the convictions arose from the laws of the United States of America.

B. Statement of material facts.

This § 2255 case arises out of convictions against Mr. Robinson for:

- Two counts (counts 3 and 5) of bank robbery in violation of 18 U.S.C. § 2113(a) and (d); and
- Two count (counts 4 and 6) of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1).

The court sentenced Mr. Robinson to serve “[f]ifty seven (57) months as to counts 3 and 5, to run concurrently each to the other and 7 years as to count 4 and 7 years as to count 6, to run consecutively each to the other and consecutively to counts 3 and 5.” This required him to serve a total of 57 months in prison in regard to both of the bank robbery convictions that are not at issue on § 2255 review, plus

a total of 14 years in prison in regard to the brandishing convictions that are at issue in this Petition.

In *Johnson* (2015), after Mr. Robinson’s judgment was filed in district court, this Court held that the “residual clause” of the ACCA is unconstitutionally vague. The “residual clause” of the ACCA is in 18 U.S.C. § 924(e)(2)(B)(ii). It defines “violent felony” in part as a crime that “involves conduct that presents a serious potential risk of physical injury to another.”

Mr. Robinson filed his § 2255 Petition to Vacate based on the law set forth in *Johnson* (2015). He argued that post-*Johnson* (2015), the two convictions for brandishing a firearm during a crime of violence should be vacated. He reasoned that bank robbery, the purported “crime of violence” on which the brandishing convictions were based, is no longer a “crime of violence” under *Johnson* (2015).

Mr. Robinson’s brandishing convictions are under 18 U.S.C. § 924(c)(1)(A)(ii). For his legal argument to prevail, the holdings in *Johnson* (2015) must apply to the “crime of violence” definition in § 924(c)(3)(B)⁵ with the same force that it applies to the ACCA’s residual clause definition of “violent felony” in §924(e)(2)(b)(2). As Mr. Robinson admitted in his Brief to the Fifth Circuit, his

⁵ Section 924(c)(3)(B) defines “crime of violence” in part as any crime “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.”

argument is contrary to Fifth Circuit precedent in *United States v. Jones*, 854 F.3d 737 (5th Cir. 2017).

A number of other circuits have taken a position contrary the Fifth Circuit's holdings in *Jones*. Also, this Court is reviewing Petitions for Writs of Certiorari in two cases that present the same argument that Mr. Robinson asserts – that the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague. The circuit split and the cases before this Court are described below in the Argument section.

The district court followed the precedent established in *Jones*, and denied the Petition to Vacate. The Fifth Circuit followed suit and denied the Motion for COA. Mr. Robinson filed the instant Petition for Writ of Certiorari in hopes that this Court will solve the circuit split on the issue of whether the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague.

V. ARGUMENT:

Under this Court’s decision in *Johnson* (2015), this Court should vacate Mr. Robinson’s conviction and sentence for possession of a firearm in relation to a crime of violence.

A. Review on certiorari should be granted in this case.

Supreme Court Rule 10 states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” One example of a “compelling reason” to grant certiorari is when “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[.]” Sup. Ct. R. 10(a).

Whether Mr. Robinson’s conviction and sentence for possession of a firearm in relation to a crime of violence must be vacated hinges in part on a finding by this Court that the crime of violence definition in § 924(c)(3)(B) is unconstitutionally vague. In turn, whether that definition is unconstitutionally vague hinges on a finding that the holdings in *Johnson* (2015) apply to § 924(c). Both the district court and the Fifth Circuit took the position that *Johnson* (2015) does not apply to § 924(c). Accordingly, the lower courts rejected Mr. Robinson’s arguments.

We have a circuit split on the issue of whether the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague. In *United States v.*

Jackson, 865 F.3d 946, 954 (7th Cir. 2017), the Seventh Circuit held that the definition is unconstitutionally vague. The Second, Fifth, Sixth, Eighth and Eleventh Circuits hold that it is not. *United States v. Hill*, 832 F.3d 135, 145–49 (2d Cir. 2016); *United States v. Jones*, 854 F.3d 737 (5th Cir. 2017); *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 699–700 (8th Cir. 2016); *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).

Petitions for Writs of Certiorari are pending in *Taylor* and *Prickett*. *Taylor* is assigned case number 16-6392, and was distributed for conference on September 25, 2017. *Prickett* is assigned case number 16-7373, and was distributed for conference on May 11, 2017.

In addition to the cases that have directly ruled on whether the “crime of violence” definition in § 924(c)(3)(B) is unconstitutionally vague, the Ninth Circuit has ruled on whether the identically worded “crime of violence” definition in 18 U.S.C. § 16(b) is unconstitutionally vague. *Dimaya v. Lynch*, 803 F.3d 1110 (2015). Applying the holdings in *Johnson* (2015), the Ninth Circuit held that § 16(b)’s definition is unconstitutionally vague. This is consistent with the Second Circuit’s holding in *Jackson* that the residual clause of § 924(c)(3)(B) is unconstitutionally vague.

This Court granted certiorari in *Dimaya*. It is assigned case number 15-1498.⁶ The parties reargued the case on October 2, 2017, but no opinion has been rendered yet.

The circuit split on the subject issue is creating a scenario where defendants who engage in the exact same conduct can be convicted of a crime in the Second, Fifth, Sixth, Eighth and Eleventh Circuits, but not in the Seventh and Ninth Circuits. Granting certiorari in this case will provide balance among the circuits on this important due process issue.

B. Procedure for reviewing a § 2255 ruling on appeal.

Appeal of a denied § 2255 petition is procedurally unique because the right to appeal hinges on obtaining a COA. In *Buck v. Davis*, 137 S.Ct. 759 (2017), this Court described the required procedure. The Court held:

A ... prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. 28 U.S.C. § 2253(c)(1). A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.

The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.”

⁶ The case is now captioned *Sessions v. Dimaya*.

This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.”

Id. at 773 (case law citations omitted).

Under *Buck*, an appellate court lacks jurisdiction to consider the merits of an argument presented in a § 2255 petition until it answers the threshold question of whether “the applicant has made a substantial showing of the denial of a constitutional right.” 137 S.Ct. at 773 (holding that when an appeal court sidesteps the COA process by deciding the issue on the merits, “it is in essence deciding an appeal without jurisdiction.”

In Mr. Robinson’s case, the Fifth Circuit followed proper procedure. That is, the court decided whether it believed that Mr. Robinson was entitled to a COA, and it did not address the merits of the issue. This begs the question of what this Court can review at this point in the case.

The first option is to limit review to deciding whether the Fifth Circuit erred by denying a COA. If the Court agrees with Mr. Robinson’s argument, then the remedy under this option will be to remand the case to the Fifth Circuit and order the Court to rule on the merits of the subject arguments.

The second option is limitless review, allowing this Court to review the merits of the subject arguments. That is the option that the Court followed in *Buck*. 137 S.Ct. at 774-75 (holding “[w]ith respect to this Court’s review, § 2253 does not limit the scope of our consideration of the underlying merits, and at this

juncture we think it proper to meet the decision below and the arguments of the parties on their own terms.”).

Given the detailed level of briefing that has been submitted to the courts below, Mr. Robinson suggests that this case is ripe for review on the merits. However, he recognizes that the decision is left to this Court’s discretion.

C. Section 2255 standard.

Mr. Robinson’s Petition is filed under the provisions of 28 U.S.C. § 2255.

Section 2255(a) states:

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 that the sentence 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.

(Emphasis added).

Mr. Robinson contends that his sentence “was imposed in violation of the Constitution.” His argument is based on the rulings in *Johnson* (2015), a case decided by this Court on June 26, 2015. The Court later held that *Johnson* (2015) is retroactively applicable to cases on collateral review. *United States v. Welch*, 136 S.Ct. 1257 (2016).

D. The holdings in *Johnson* (2015).

The initial paragraph of the *Johnson* (2015) opinion provides a good synopsis of the issue addressed by the Court. This paragraph states:

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a “violent felony,” a term defined to include any felony that “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B). We must decide **whether this part of the definition of a violent felony survives the Constitution’s prohibition of vague criminal laws.**

Johnson (2015), 135 S.Ct. at 2555 (emphasis added).

The opinion focuses on a provision of the ACCA codified in 18 U.S.C. § 924. The relevant provision of § 924 states:

(e)(1) In the case of a person who violates section 922(g)[⁷] of this title and has three previous convictions by any court referred to in section 922(g)(1)[⁸] of this title for a **violent felony** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and **imprisoned not less than fifteen years**, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (emphasis added; bracketed footnotes added).

Johnson (2015) pertains to the “violent felony” language in § 924(e). This phrase is defined in 18 U.S.C. § 924(e)(2)(B) as follows:

(e)(2) As used in this subsection –

⁷ 18 U.S.C. § 922(g) makes it a crime for a convicted felon to possess a firearm.

⁸ 18 U.S.C. § 922(g)(1) limits the definition of a convicted felon to a felon “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[.]”

* * * * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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**[.]

(Emphasis added).

The *Johnson* (2015) holdings particularly focus on the language of § 924(e)(2)(B)(ii), which states that the definition of “violent felony” includes any act that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” This language is commonly referenced as the ACCA’s “residual clause.” See *Johnson* (2015), 135 S.Ct. at 2555-56.

Following is a summary of the relevant facts in *Johnson* (2015) and the Court’s framing of the issue in light of the case-specific facts:

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson’s previous offenses – including unlawful possession of a short-barreled shotgun, see Minn. Stat. § 609.67 (2006) – qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. We granted certiorari to decide whether Minnesota’s offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution’s prohibition of vague criminal laws.

Johnson (2015), 135 S.Ct. 2556 (citations to procedural history omitted).

In relation to the residual clause of the ACCA, the *Johnson* (2015) Court held:

[I]mposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process. Our contrary holdings in *James*[⁹] and *Sykes*[¹⁰] are overruled. Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.

Johnson (2015), 135 S.Ct. at 2563 (bracketed footnotes added).

Johnson (2015) holds that it is unconstitutional to increase a defendant’s sentence under § 924(e)(1) because he has any prior “violent felonies,” as defined under the residual clause of § 924(e)(2)(B)(ii). The Court also stated that its ruling is not applicable to the enumerated “violent felonies” stated in § 924(e)(2)(B)(ii), which are burglary, arson, extortion or crimes involving the use of explosives.

To summarize, post-*Johnson* (2015) a prior conviction qualifies as a “violent felony” under the ACCA if the conviction falls into one of two categories enumerated under 18 U.S.C. § 924(e)(2)(B). The crime of conviction must:

(1) have “as an element the use, attempted use, or threatened use of physical force against the person of another” (§ 924(e)(2)(B)(i)); or

⁹ The full cite for *James* is *James v. United States*, 550 U.S. 192, 180 L.Ed.2d 60 (2007).

¹⁰ The full cite for *Sykes* is *Sykes v. United States*, — U.S. —, 131 S.Ct. 2267 (2011).

(2) be “burglary, arson, or extortion” or “involve[] use of explosives” (§ 924(e)(2)(B)(ii)).

Prior to *Johnson* (2015), if a crime of conviction fell under a third category, the residual clause of § 924(e)(2)(B)(ii), then the prior conviction was a violent felony. Under the residual clause, a prior conviction is deemed a violent felony if it “otherwise involve[ed] conduct that present[ed] a serious potential risk of injury to another[.]” *Id.* Since *Johnson* (2015) declared the residual clause unconstitutional, it is no longer applicable to the violent felony analysis.

E. Mr. Robinson’s conviction for brandishing a firearm during a crime of violence must be vacated under the holdings in *Johnson* (2015).

1. Introduction.

Mr. Robinson’s convictions for brandishing a firearm during a crime of violence is premised on bank robbery under 18 U.S.C. § 2113(a) and (d) being a “crime of violence” under § 924(c). Under the holdings in *Johnson* (2015), bank robbery is not a crime of violence. Therefore, Mr. Robinson’s convictions and sentences for the brandishing count should be vacated, and his sentence should be reduced accordingly.

2. Analysis.

The brandishing convictions are under 18 U.S.C. § 924(c)(1)(A)(ii), which states:

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 ... 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--

* * * * *

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years[.]

(Emphasis added). The phrase “crime of violence” is defined as follows:

(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. § 924(c)(3) (emphasis added). Subsection (3)(A) contains the physical force definition of crime of violence and subsection (3)(B) contains the residual clause definition.

The residual clause definition of crime of violence stated in § 924(c)(3)(B) is comparable to the language of the ACCA’s residual clause found unconstitutional by *Johnson* (2015). Therefore, this clause of § 924 should be deemed unconstitutional as well.

This means the only option for determining whether bank robbery counts as a crime of violence is the physical force clause of § 924(c)(3)(A). We note that the lower courts in Mr. Robinson’s case never analyzed the physical force clause of §

924(c)(3)(A). Presumptively, the analysis was omitted because the courts found that bank robbery met the residual clause crime of violence definition stated in § 924(c)(3)(B). If this Court finds that *Johnson* (2015) applies to § 924(c)(3)(B), then an analysis of the physical force clause in § 924(c)(3)(A) is required.

Under the physical force clause, we must analyze whether bank robbery under § 2113(a) and (d) “has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]” See 18 U.S.C. § 924(c)(3)(A). If it does not, then the convictions for brandishing a firearm during a crime of violence must be vacated.

In *Johnson* (2010)¹¹ this Court defined the level of force required to meet the “physical force” requirement of § 924(e)(2)(B)(i). “[T]he phrase ‘physical force’ means **violent** force – that is, force capable of causing physical pain or injury to another person.” *Johnson* (2010), 599 U.S. at 141 (emphasis in original; citation omitted). “It plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138.

In the context of *Johnson* (2010), we must analyze the robbery statute – 18 U.S.C. § 2113(a) and (d). This statute states in relevant 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

¹¹ See *supra*, footnote 2.

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[.]

* * * * *

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the **use of a dangerous weapon or device**, shall be fined under this title or imprisoned not more than twenty-five years, or both.

Id. (emphasis added).

Under the plain language of § 2113(a), robbery can be committed “by intimidation,” which requires no physical force whatsoever. Robbery “by intimidation” is more akin to committing an offense through exertion of “intellectual force or emotional force,” which the *Johnson* (2010) Court explicitly found insufficient to meet the physical force clause. For this reason, robbery under § 2113(a) is not a crime of violence.

Next we consider the “use of a dangerous weapon or device” language of § 2113(d). In this context, we consider the Fifth Circuit’s decision in *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). The defendant in that case was convicted of illegally reentering the United States after deportation following a state court assault conviction. *Villegas-Hernandez*, 468 F.3d at 876-77. At issue was whether defendant’s assault conviction was an “aggravated felony” under

U.S.S.G. § 2L1.2(b)(1)(C).¹² *Id.* at 877. The district court found that it was, and defendant appealed. *Id.* at 877-78.

Both parties agreed that the applicable subsection of the Texas Misdemeanor assault statute – Texas Penal Code § 22.01 – makes a person guilty of the offense if it is proven that he “intentionally, knowingly, or recklessly causes bodily injury to another[.]” *Villegas-Hernandez*, 468 F.3d at 878. “The government contend[ed] that 22.01(a)(1)’s requirement that a defendant cause bodily injury incorporates a requirement to show the intentional use of force, such that *Villegas-Hernandez*’s prior assault conviction satisfies 16(a)’s definition of crime of violence.” *Id.* at 878-79. The Fifth Circuit disagreed. *Id.* at 879.

The Fifth Circuit held “an assault offense under section 22.01(a)(1) satisfies subsection 16(a)’s definition of a crime of violence only if a conviction for that offense could not be sustained without proof of the use of “destructive or violent” force. *Villegas-Hernandez*, 468 F.3d at 879 (emphasis added). Then, the court went on to provide examples of how a violation of the assault statute could be committed without the use of physical force:

The bodily injury required by section 22.01(a)(1) is “physical pain, illness, or any impairment of physical condition.” Tex. Pen. Code Ann. § 1.07(a)(8). Such injury could result from any of a number of acts, without use of “destructive or violent force”, making available to the victim a

¹² For purposes relevant to defendant’s appeal, § 2L1.2’s definition of “aggravated felony” is found in 18 U.S.C. § 16(a)’s definition of “crime of violence.” *See Villegas-Hernandez*, 468 F.3d at 877.

poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim. To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another. Thus, use of force is not an element of assault under section 22.01(a)(1), and the assault offense does not fit subsection 16(a)'s definition for crime of violence.

Villegas-Hernandez, 468 F.3d at 879.

While assault, the crime at issue in *Villegas-Hernandez*, is not the same as bank robbery, the crime at issue in Mr. Robinson's case, the holdings in *Villegas-Hernandez* are nevertheless applicable. Committing bank robbery under § 2113(d) can be done by using any "dangerous weapon or device." Just as in the example stated in *Villegas-Hernandez*, the dangerous weapon or device could be poison or numerous other weapons that can be used without exerting physical force on a victim.

Because § 2113(a) and (d) can be violated without application of any physical force, violation of this statute cannot serve as a predicate for a brandishing a firearm during a crime of violence charge under the "physical force" clause of § 924(c)(3)(A). Since the "residual clause" of § 924(c)(3)(B) was arguably rendered unconstitutional by *Johnson* (2015), Mr. Robinson's brandishing convictions must be vacated, and his sentence must be adjusted accordingly.

VI. CONCLUSION

For all of the reasons stated above, Mr. Robinson asks this Court to grant his
Petition for Writ of Certiorari.

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