

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

DONDRELL CHANDLER,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

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The Petitioner, DONDRELL CHANDLER, respectfully prays  
that a writ of certiorari issue to review the  
judgment/order of the United States Court of Appeals for  
the Eleventh Circuit entered on December 4, 2017.

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OPINION BELOW

On December 4, 2017 the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence. A copy of the opinion, as well as the District Court's order denying Petitioner's Motion to

Vacate and Certificate of appealability are attached as Appendix A.

#### JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

#### STATEMENT OF THE CASE

Petitioner was the defendant in the district court and will be referred to by name or as the Petitioner. The respondent, the United States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The Petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court  
Below

Petitioner, Dondrell Chandler, Jr. was charged with bank robbery, in violation of 18 U.S.C. §§2113(a), (d), and (2), and discharging a firearm during the bank robbery, in violation of 18 U.S.C. §924(c)(1)(A)(iii). He pled guilty to both counts of the indictment.

At his sentencing hearing, the district court determined that Petitioner, qualified for an enhanced sentence under 18 U.S.C. §924(c)(1)(A)(ii), which provides a ten (10) year consecutive sentence based upon the accidental discharge a firearm during and in relation to a crime of violence. The "crime of violence" was the bank robbery. The district court thereafter imposed a sentence of 120 months and one day - one day for the bank robbery pursuant to a downward variance and a consecutive term of 120 months for the gun charge. (DE 80). Petitioner did not file a direct appeal his sentence.

On June 24, 2016, Petitioner filed a Motion to Vacate Sentence under 28 U.S.C. §2255 based on *Johnson v. United States*, 135 S.Ct. 2551 (2015), Chandler v. United States of America, 16-51515-FAM. On February 17, 2017 the District Court denied the motion and entered a Final Judgment

denying the motion to vacate (DE 9). In that Order, the court ruled that based upon "a *de novo* review of the entire record herein," the motion to vacate should be denied. On March 12, 2017, Petitioner filed a notice of appeal from the denial of his \$2255 motion (DE 10.) Petitioner filed his Motion for Certificate of Appealability in the Eleventh Circuit Court of Appeals. On Motion for Certificate of Appealability was denied.

#### Statement of the Facts

The facts on appeal arise from the record of the change of plea and sentencing proceedings. The evidence of Petitioner's offense was as follows:

On September 4, 2013, at approximately 12:36 p.m., the defendant and David Anthony Lockhart entered the TD Bank located at 7999 Pines in Pembroke Pines, Florida, armed with handguns while wearing masks/bandanas over their faces to conceal their identities. The defendant vaulted on top of the teller counter, stood above the bank teller, pointed his firearm at the teller and demanded she give him the money. Lockhart stood next to the counter with his gun drawn. After the victim teller unlocked her top money drawer, the defendant reached down into the drawer and stole approximately \$2,571.10. While doing so, he

discharged two rounds from his firearm toward the ground causing no injuries. After the robbery, both men fled in a 1998-2001 black Pontiac Firebird. As a result of the robbery, the bank was closed for a period of time to allow the police to investigate and process the scene. At the time of the robbery, TD Bank was insured by the Federal Deposit Insurance Corporation. In a post-Miranda interview on February 25, 2014, the defendant admitted that he and Lockhart robbed the TD bank on September 4, 2013. The defendant told the FBI that the gun he used during the robbery was provided by Lockhart. He also stated that he and Lockhart divided the proceeds up equally after the robbery. The defendant identified himself in a still image from the bank surveillance video and memorialized his identification by signing a copy of the image. The defendant also hand-wrote a confession." Source Factual Proffer, 14-60051-CR-ROSENBAUM, D.E. 47

#### REASONS FOR GRANTING THE WRIT

ISSUE 1: Whether the trial and appellate court erred in denying Petitioner's Motion for Certificate of Appealability?

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, this 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).

This Court recently applied this standard in *Welch v. United States*, 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.

“Reasonable jurists could at least debate whether Mr. Mercado is entitled to relief” on his §924(c) claim following *Johnson* 135 S.Ct. 2551 (2015). *United States v. Welch*, 136 S.Ct. at 1268. 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). The District Court's order denying Petitioner's relief held that "The Eleventh Circuit has squarely found that 2113 bank robbery conviction constitutes a "crime of violence" under the use of force clause, 18 U.S.C. §943(c)(3)(A) " citing *In re: Sams*, 830 F.3d 1234 at 1238 (11<sup>th</sup> Cir. 2016). *The Sams* decision relief upon the prior decision in *In re Hines*, 824 F.3d 1334 (11<sup>th</sup> Cir. 2016).

The Eleventh Circuit Court of Appeals granted the motion for certificate of appealability in *Juan Mercado vs. United States of America*, Case No 17-10343-B which appeal concerned a nearly identical case as that of Petitioner and appears to distinguish *Sams* and *Hines* as those decisions were not substantive decisions in that they both concerned the question as to whether or not to order a certificate of appealability. Similar to Petitioner, "Mr. Mercado was charged in Count 1 with armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and in Count 2 with carrying a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §924(c)(1)(A). The indictment specifically indicated that the armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) was the predicate crime of violence for the purposes of the § 924(c) charge. Section 924(c) requires a longer prison sentence whenever a

defendant uses a firearm during a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). The statute gives more than one definition of "crime of violence," including any felony "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." *Id.* §924(c)(3)(B). Mercado claimed that this definition is unconstitutional in light of *Johnson*, which held that the phrase "involves conduct that presents a serious potential risk of physical injury to another" in 18 U.S.C. § 924(e)(2)(B)(ii) is unconstitutionally vague. The Eleventh Circuit recently ruled that *Johnson* could invalidate the "very similar" § 924(c)(3)(B) language. *In re Pinder*. 824 F.3d 977, 978 (11th Cir. 2016). And if *Johnson* applies, then Mr. Mercado's predicate offense—armed bank robbery under § 2113(a) and (d)—may not "categorically" qualify as a crime of violence for purposes of § 924(c)'s elements clause. This Court's precedent in *Mines* held that bank robbery under § 2113(a) and (d) is a crime of violence for the purposes of § 924(c)'s elements clause. However, *Hines* was decided in the unique context of an application for leave to file a second or successive § 2255 motion. This Court did hold that published decisions in the context of

applications to file second or successive motions have precedential effect in this circuit. *In re Lambrix*. 776 F.3d 789,794 (11th Cir. 2015). But *Lambrix* was itself a published decision in the context of an application to file a second or successive motion. See *id.* And arguably, any conclusion about the reach of *Lambrix* outside of the second or successive application context is non-binding dicta. As this Court has "explained time and again: A decision can hold nothing beyond the facts of that case." *United States v. Birge*. 830 F.3d 1229 (11th Cir. 2016) (quotation omitted and alteration adopted)." Mercado at pages 3-4.

The lower court concluded in Mercado that: "The Hines panel came to its conclusion without citing any case law or other authority about this crime. This complex issue surely deserves more thorough consideration. For these reasons, reasonable jurists could debate the District Court's assessment of Mr. Mercado's constitutional claim. *Slack*, 529 U.S. at 484,120 S. Ct. at 1604. As a result, Mr. Mercado's motion for a COA is GRANTED on the following issue: Whether the District Court erred in concluding Mr. Mercado's conviction under 18 U.S.C. § 924(c), predicated on armed bank robbery under 18 U.S.C. § 2113(a) and (d), was unaffected by the Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015)."

Petitioner submits that this case is indistinguishable from Mercado and requests this court to adopt the reasoning in Mercado and grant this petition and direct the issuance of a Certificate of Appealability as reasonable jurists could at least debate, and members of the lower court have in fact debated and are debating, whether bank robbery satisfies the elements clause in §924(c).

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petitioner for writ of certiorari should be granted.

DATED this 2nd day of March, 2018.

Respectfully submitted,

/s/ A. Wallace

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## **APPENDIX "A"**