

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2017

QUINTON BANNISTER,
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

This case presents important issues concerning the proper application of 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm during and in relation to a crime of violence or a drug trafficking crime. Specifically, **first**, whether the Eleventh Circuit erred in denying Mr. Bannister a certificate of appealability by relying on its holding in *Ovalles v. United States*, 861 F. 3d 1257 (11th Cir. 2016) (*Johnson* does not apply to the “force clause” of § 924(c)). *Ovalles* has been seriously called into question by this Court’s decision in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018) and is contrary to this Court’s earlier decision in *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). Reasonable jurists would find the court’s reliance on *Ovalles* debatable in light of *Dimaya*. **Second**, whether Bannister’s § 924(c) predicate convictions for conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery qualify as crimes of violence.

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Quinton Bannister respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA), rendered and entered in case number 17-14176-K in that court, *Quinton Bannister v. United States*.

OPINION AND ORDER BELOW

The district court entered a written order adopting a magistrate judge's report and recommendation and denying the petition and denying a certificate of appealability. The Eleventh Circuit entered a written order denying the Petitioner's motion for a certificate of appealability in Appeal No. 17-14176. (Appendix A-1). Copies of the report and recommendation and all relevant orders are included in the appendix attached hereto.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Florida had jurisdiction over Mr. Bannister's case under 28 U.S.C. § 2255. The United States Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals was entered on February 9, 2018. This petition is timely filed under Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of 18 U.S.C. § 924(c)(1)(A), (C) and (3). Subsection (c)(1)(A) of that statute states in pertinent part:

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 a crime of violence . . . (including a crime of violence . . . 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 . . .

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm was 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;

Subsection (c)(1)(C) provides:

In the case of a second or subsequent conviction under this subsection, the person shall----

(i) Be sentenced to a term of imprisonment of not less than 25 years.

In relevant part, the § 924(c) defines a “crime of violence” as:

[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.

Mr. Bannister was charged and convicted of three counts of conspiracy to commit armed bank robbery under 18 U.S.C. § 371. In pertinent part, that statute provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

The substantive charge in Count 2 and the alleged object of the § 371 conspiracy charges was armed bank robbery under 18 U.S.C. § 2113(a) and (d). The relevant portions of that statute state:

Whoever, by force or 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.

Finally, Bannister was charged with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). That section provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Mr. Bannister was charged in all counts of a ten count superseding indictment: **Count 1**, conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371; **Count 2**, armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d); **Count 3**, conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); **Count 4**, using a firearm during or in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A); **Count 5**, conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371; **Count 6**, conspiracy to commit

Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); **Count 7** using a firearm during or in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A); **Count 8**, conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371; **Count 9**, conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a); and **Count 10**, using a firearm during or in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). (CR:DE 32).

Of particular importance, **the superseding indictment charged multiple predicate counts for each § 924(c) count.** For the § 924(c) charge in **Count 4**, the grand jury **charged as predicates the crimes charged in Counts 1, 2 and 3** (conspiracy to commit bank robbery, bank robbery, and conspiracy to commit Hobbs Act robbery); for the charge in **Count 7**, the grand jury **charged as predicates the crimes alleged in Counts 5 and 6** (conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery); and for **Count 10**, the grand jury **charged as predicates the crimes alleged in Counts 8 and 9** (conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery). (CR:DE 32). Mr. Bannister was convicted after a jury trial. (CR:DE 123).

Prior to sentencing, a presentence report was prepared. (PSR). It recommended that Mr. Bannister be designated as a career offender, based on two prior felony convictions for Florida battery on a detention staff member and Florida battery on a law enforcement officer. PSI, at paragraph 66. Mr. Bannister filed a written objection to those priors being considered “crimes of violence.” (CR:DE 134). The Court denied the objection and sentenced Mr. Bannister as a career offender.

Mr. Bannister appealed his conviction and sentence, but his appeal was denied. (CR:DE 138, 160).

In 2009, Mr. Bannister filed of petition for a writ of *habeas corpus* under 28 U.S.C. § 2255, *Bannister v. United States*, Case No. 09-cv-81070-DTKH, Southern District of Florida. In his petition, Mr. Bannister complained of ineffective assistance of counsel. The petition was ultimately denied by the Honorable Daniel T. K. Hurley in 2012. (DE 49, 58). There was no appeal.

On July 27, 2016, the Eleventh Circuit granted Mr. Bannister's request for leave to file a second or successive § 2255 *habeas corpus* petition based upon *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). (DE 1). The Court granted the request because Mr. Bannister's convictions on Counts 4, 7 and 10 were based on multiple charged predicate offenses, some of which were arguably not "crimes of violence" as required for conviction under 18 U.S.C. § 924(c) and there was no way for the Court to determine which predicates the jury relied upon.

Accordingly, with leave granted, Mr. Bannister filed a second or successive petition in the district court. *Bannister v. United States*, Southern District of Florida, Case No. 16-cv-81345 DTKH, (DE 10). After full briefing, the magistrate judge issued a report and recommendation denying relief. (DE 15). The district judge adopted the report and recommendation and denied a certificate of appealability. (DE 16-17).

Mr. Bannister filed a timely of appeal and a motion for a certificate of appealability. (DE 23). The Eleventh Circuit denied a certificate of appealability on February 9, 2018. This petition follows.

REASONS FOR GRANTING THE WRIT

- I. The circuit court erred in not granting a certificate of appealability based on untimeliness because reasonable jurists could disagree whether: 1) whether the Eleventh Circuit erred in denying Mr. Bannister a certificate of appealability based upon *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2016) (*Johnson* does not apply to the “force clause” of § 924(c)). *Ovalles* has been seriously called into question by this Court’s decision in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018), and is contrary to this Court’s earlier decision in *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551 (2015). Reasonable jurists would find the court’s reliance on *Ovalles* debatable in light of *Dimaya*; 2) Bannister’s § 924(c) predicate convictions for conspiracy to commit armed bank robbery and conspiracy to commit Hobbs Act robbery do not qualify as crimes of violence after this Court’s decisions in *Johnson*, *Welch* and *Mathis*

Certificate of Appealability

A certificate of appealability (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)).

When the district court denies a claim on procedural grounds without reaching the underlying claim, a COA should issue “when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable

whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

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. “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 . . . This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 336). 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*, ___ U.S. ___, 136 S. Ct. 1257 (2016), which arose from the denial of a COA. *Id.* at 1263-64.

In that case, the Court broadly held that *Johnson* announced a substantive rule that applied retroactively in 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 Florida 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 1263-64, 1268. Accordingly, the Court held that a COA should issue.

As explained below, Bannister has satisfied this standard.

Mr. Bannister’s petition was timely because, as he contended, the ruling in *Johnson v. United States* invalidated the “residual clause” of 18 U.S.C. § 924(c)(3)(B) as void for vagueness.

The circuit court denied Mr. Bannister a certificate of appealability for one reason only. Under what it saw as binding circuit precedent, the court cited *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2016). “To the extent that Bannister argues his § 924(c) offense is invalid in light of *Johnson*, this argument fails under our binding precedent. *See Ovalles v. United States* . . . Because Bannister’s sole argument in his § 2255 motion is refuted by binding precedent, his motion was untimely, and his motion for a COA is DENIED.” Order Denying COA, *Bannister v. United States*, Eleventh Circuit Court of Appeals, Case No. 17-14176-K, at 2.

In *Ovalles*, a panel of the Eleventh Circuit held that *Johnson* did not apply to the validity of the “residual clause” in § 924(c)(3)(B).¹ That opinion has clearly been called into question by this Court’s holding in *Sessions v. Dimaya*, ___ U.S. ___, 138 S.Ct. 1204 (2018).

This Court, in *Dimaya*, held that the “residual clause” of 18 U.S.C. § 16(b) is void for vagueness. Finding that, “*Johnson* effectively resolved the case now before us,” the Court noted that § 16(b) contained the same two fatal defects as the ACCA, i.e., an “ordinary case” standard and an “ill-defined risk threshold.” *Id.*, at 1213, 1223.

Section 16(b) is essentially identical to the language contained in the “residual clause” of 18 U.S.C. § 924(c)(3)(B). It is therefore logical to assume that the majority of this Court, at least, would debate whether § 924(c)(3)(B) shares the same fatal defects. Moreover, in his dissent in *Dimaya*, Chief Justice Roberts, joined by Justices Kennedy, Thomas and Alito, observed that the majority’s holding “calls into question convictions under [§ 924(c)].” *Id.*, at 1241. Thus, this entire Court appears to have questions regarding the vagueness of § 924(c) after *Dimaya*.

Finally, since the *Dimaya* decision, at least one circuit has held that *Johnson* and *Dimaya* dictate that § 924(c)(3)(B) is void for vagueness. *United States v. Salas*, ___ F.3d ___, 2018 WL 2074547 (10th Cir. May 4, 2018). “Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA’s residual clause and §

¹ On July 6, 2017, the Eleventh Circuit issued an order withholding the mandate in the *Ovalles* case. On April 17, 2018, the court requested further briefing on the effect of *Dimaya* on the holding.

16(b) that combine to produce ‘more unpredictability and arbitrariness than the Due Process Clause tolerates,’ *Id.* at 1223 (quoting *Johnson*, 135 S.Ct. at 2558), and *Dimaya*’s reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague.”

For these reasons it is clear that after *Dimaya*, reasonable jurists can, and do, disagree on whether § 924(c)(3)(B) is void for vagueness.

II. Reasonable jurists could disagree whether Mr. Bannister’s § 924(c) predicate convictions for armed bank robbery, conspiracy to commit armed bank robbery, and conspiracy to commit Hobbs Act robbery qualify as crimes of violence under the “Elements Clause.”

Mr. Bannister’s § 924(c) convictions for using a firearm in relation to a “crime of violence” are void because the “crime of violence” element cannot be satisfied here. The predicate offenses of conspiracy to commit bank robbery, conspiracy to commit Hobbs Act robbery, and substantive bank robbery do not qualify as a “crimes of violence” as a matter of law.

Mr. Bannister was convicted of a violation of 18 U.S.C. § 924(c) in Counts 4, 7 and 10.

At the time of conviction, § 924(c)(1) provided:

Whoever, during and in relation to any crime of violence . . . 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 . . . if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty five years . . .

Under § 924(c)(3), the term “crime of violence” as used therein was (and still is) defined to mean 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.

The first clause – § 924(c)(3)(A) – is commonly referred to as the Elements Clause, with some Circuits also referring to it as the Force Clause. The other – § 924(c)(3)(B) – is commonly referred to as the Residual Clause.

Under the Elements Clause, the instant predicates do not qualify as “crimes of violence” because they (1) do not require threat of **violent physical force**, and (2) do not require the **intentional** threat of the same. Therefore, the “crime of violence” element of § 924(c) cannot be sustained here, and the convictions cannot be constitutionally sustained under the statute.

A. This Court Must Assume That Mr. Bannister’s § 924(c) Convictions Rest Upon The Least Culpable Of The Alleged Predicate Crimes

Under the categorical approach, in determining whether a predicate conviction is a crime of violence, a sentencing court must assume that the alleged predicate rests upon the least culpable elements available. The Court may not engage in speculation regarding what particular facts were found by the jury. “Because we examine what the state conviction necessarily involved, not the facts of the underlying case, we must presume that the conviction ‘rested upon [nothing]

more than the least of th[e] acts' criminalized, and then determine whether those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, ___U.S. ___, 133 S.Ct. 1678 (2013); *See also, Donawa v. U.S. Attorney General*, 735 F.3d 1275, 1280 (11th Cir. 2013) (quoting *Moncrieffe*, "we must presume that the conviction rested upon nothing more than the least of the acts criminalized..."). In *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013) (O'Connor, J.), the Eleventh Circuit applied the categorical approach to review whether an alleged § 924(c) predicate qualified as a crime of violence. In doing so, the court stated, "[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force can McGuire be held guilty of a crime of violence." 706 F.3d at 1337.

In *United States v. Gomez*, ___F.3d ___, 2016 WL 3971720 (11th Cir. July 25, 2016), the Eleventh Circuit held that a court reviewing a collateral challenge to a § 924(c) conviction could not speculate as to which of the multiple charged predicates the jury had found. There, the indictment of a § 924(c) count charged multiple predicates on the same day, i.e., two drug trafficking crimes, an attempted Hobbs Act robbery, and conspiracy to commit Hobbs Act robbery. The jury had returned a simple general verdict of guilty. Following the dictates of *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013), the court declined to theorize as to which of the charged § 924(c) predicates the jury had found. "[A] general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others... The way

Gomez's indictment is written, we can only guess which predicate the jury relied on. It's possible that we can make a guess based on the PSI or other documents from Gomez's trial or sentencing. But *Alleyne* expressly prohibits this type of "judicial factfinding" when it comes to increasing a defendant's mandatory minimum sentence." *Id.*, at 2, *See, Alleyne v. United States*, __ U.S.__, 133 S. Ct. 2151, 2155 (2013).

In the instant case, the grand jury charged multiple predicate crimes for each § 924(c) count. Count 3 relied on the crimes charged in Count 1, conspiracy to commit armed bank robbery (18 U.S.C. § 371), Count 2, armed bank robbery (18 U.S.C. § 2113(a)(d)), and Count 3, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Count 7 relied on the crimes charged in Count 5, conspiracy to commit armed bank robbery (18 U.S.C. § 371) and Count 6, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Finally, Count 10 relied on the crimes charged in Count 8, conspiracy to commit armed bank robbery (18 U.S.C. § 371) and Count 9, conspiracy to commit Hobbs Act robbery (18 U.S.C. § 1951(a)). Other than a question about whether the defendant "brandished" a firearm, the verdict was a general verdict and gave no indication of which charged predicate the jury relied upon in finding Mr. Bannister guilty of the 924(c) counts.²

² In its denial of a COA, the Eleventh Circuit incorrectly stated that the sentencing judge, "identified the armed-bank-robbery offense as the predicate for the 924(c) charge." In addition to the sentencing judge not having the power to decide which predicate(s) the jury found, two of the three § 924(c) counts (Counts 7 and 10) did not even charge armed bank robbery as a predicate.

Mr. Bannister respectfully contends that none of the relied upon predicates constitutes a crime of violence for § 924(c) purposes. However, in the alternative, should it be found that any of the predicates charged for a particular § 924(c) count does not qualify as a categorical crime of violence, under controlling precedent a sentencing court must presume that the jury found Mr. Bannister guilty based upon that predicate alone. In those circumstances, under the holdings in *Alleyne* and *Gomez*, the § 924(c) counts cannot survive because it cannot be determined that they were based upon a predicate categorical crime of violence.

As noted, none of the three alleged predicates in this case categorically constitutes a crime of violence.

1. Conspiracy To Commit Hobbs Act Robbery, 18 U.S.C. § 1951(a)

“To convict on a Hobbs Act conspiracy, the government must show that (1) two or more people agreed to commit a Hobbs Act robbery; (2) that the defendant knew of the conspiratorial goal; and (3) that the defendant voluntarily participated in furthering that goal.” *United States v. Ransfer*, 749 F.3d 914, 929 (11th Cir. 2014). Critically, however, there is no requirement that the defendant engage in an overt act in furtherance of the conspiracy. *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999). Nor is there any requirement that the defendant was “even capable of committing” the underlying Hobbs Act offense. *Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016). Rather, “[i]t is sufficient to prove that the conspirators agreed that the underlying crime be committed by a member of the conspiracy who was capable of committing it.” *Id.* (emphasis omitted).

Thus, for present purposes, a verbal or written agreement to commit Hobbs Act robbery is the least culpable way of committing the offense. *See, e.g., Pistone*, 177 F.3d at 959 (upholding conviction for conspiracy to commit Hobbs Act robbery where defendant did no more than agree and plan to commit robbery, but took no overt act). That way of committing the offense clearly lacks the use, attempted use, or threatened use of violent, physical force. As a result, conspiracy to commit Hobbs Act robbery is categorically overbroad and cannot qualify as a “crime of violence.”

Several courts around the country have already persuasively so held. *See, e.g., United States v. Edmundson*, 153 F. Supp. 3d 857, 859 (D. Md. Dec. 23, 2015) (“The parties have not cited, nor has my own research revealed, any authority that Hobbs Act Conspiracy . . . constitutes a crime of violence under the § 924(c) force clause, which is unsurprising considering the fact that this clause only focuses on the elements of an offense to determine whether it meets the definition of a crime of violence, and it is undisputed that Hobbs Act Conspiracy can be committed even without the use, attempted use, or threatened use of physical force against the person or property of another.”); *United States v. Ledbetter*, 2016 WL 3180872, at *6 (S.D. Ohio June 8, 2016) (“this Court agrees” that conspiracy to commit Hobbs Act robbery “qualifie[d] *only* under the ‘residual clause’ from § 924(c)(3)(B)”); *United States v. Luong*, 2016 WL 1588495, at *3 (E.D. Cal. Apr. 20, 2016) (“The court therefore finds that conspiracy to commit Hobbs Act robbery does not have as an element the use or attempted use of physical force and is not a crime of violence under the force clause.”). These decisions are persuasive, as reflected by the

Eleventh Circuit's favorable citation to them in *In re Pinder*, 824 F.3d 977, 979 n.1 (11th Cir. June 1, 2016).

And, in fact, the Eleventh Circuit has held that a "prior conviction for non-overt act criminal conspiracy" to commit strong-arm robbery was not a crime of violence under the Sentencing Guidelines. *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010). That case focused on whether the offense satisfied the Sentencing Guidelines Residual Clause, indicating that the parties and the Court considered it obvious that conspiracy to commit a violent offense does not satisfy the Elements Clause where no overt act is required. The court reasoned that the crime was complete once an agreement was reached. The same is true here.

For these reasons, this Court should conclude that reasonable jurists could disagree on whether § 1951 Hobbs Act conspiracy qualifies categorically as a crime of violence.

2. Conspiracy To Commit Bank Robbery, 18 U.S.C. § 371

Proof of a § 371 conspiracy requires the following elements:

1. Two or more people in some way agreed to try to accomplish a shared and unlawful plan;
2. The defendant knew the unlawful purpose of the plan and willfully joined in it;
3. During the conspiracy, one of the conspirators knowingly engaged in at least one overt act described in the indictment; and

4. The overt act was knowingly committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy

Eleventh Circuit Pattern Jury Instructions, O13.6, 2016. Clearly, the only element which could possibly be considered as involving the use of actual or threatened physical force is the “overt act.”

“An ‘overt act’ is any transaction or event, *even one which may be entirely innocent when viewed alone*, that a conspirator commits to accomplish some object of the conspiracy.” Eleventh Circuit Pattern Jury Instructions, O13.6, 2016 (emphasis added). A § 371 conspiracy is complete upon commission of the first charged overt act. *United States v. Dominguez*, 661 F.3d 1051, 1064 (11th Cir. 2011). “[P]hysical force’ means violent force—that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 1271 (2010).

A review of the instant superseding indictment shows that most, if not all, of the charged overt acts did not require “the use, attempted use, or threatened use of physical force against the person or property of another...” 18 U.S.C. § 924(c). In the alternative, each of the charged § 371 general conspiracy counts charged multiple overt acts which are unquestionably nonviolent. Given the general verdict returned in this case, it is impossible to determine which of the overt acts the jury found beyond a reasonable doubt. Therefore under *Alleyne* and *Gomez*, the Court must assume that the requisite overt act(s) were nonviolent ones.

Count 1 of the superseding indictment charged that “at least one of the coconspirators *committed at least one of the following overt acts ...* (emphasis added):

1. “Some of the coconspirators drove in stolen cars to the vicinity of the First National Bank and Trust Company in Tequesta, Florida.
2. Some of the coconspirators covered their faces and wore gloves.
3. Some of the coconspirators armed themselves with one or more firearms.
4. Some of the coconspirators entered the First National Bank and Trust Company.
5. Some of the coconspirators, using one or more firearms, demanded money from First National Bank and Trust Company employees.
6. Some of the coconspirators stole approximately \$94,100 in United States currency from the First National Bank and Trust Company.
7. Some of the coconspirators fled the First National Bank and Trust Company in a stolen car.”

(CR:DE 32).

Under *Dominguez*, the offense was complete after the conspirators, drove in stolen cars to the vicinity of the First National Bank and Trust in Tequesta, Florida,” or when they “covered their faces and wore gloves.” It was not necessary, nor can it now be determined, that the jury found Mr. Bannister guilty of any more serious or violent overt acts. Under the precedent of *Alleyne* and *Gomez*, the sentencing court

cannot speculate as to which overt acts were found by the jury. It must presume that the jury only based its verdict on the nonviolent acts alleged.

The same principles and argument applies to Counts 5 and 8. In both counts, the superseding indictment again alleges that “at least one of the coconspirators *committed at least one of the following overt acts ...*” (emphasis added). Count 5 charged no overt acts which constituted attempted, threatened or actual violent force:

1. “A coconspirator stole a van in Palm Beach County, Florida.
2. Quinton Bannister and his coconspirators drove in vehicles, including the stolen van, to Volusia County, Florida.
3. A coconspirator waited behind a building in the vicinity of Colonial Bank in Port Orange, Florida, while Quinton Bannister and other coconspirators, who were armed with one or more firearms and dressed in dark clothing, entered the stolen van and drove to the Colonial Bank.
4. Some of the coconspirators, who were armed with one or more firearms and dressed in dark clothing, attempted to enter the Colonial Bank by pulling on the locked front doors of the bank.
5. The coconspirators fled in the stolen van after Colonial Bank employees refused to unlock the front doors.

6. Quinton Bannister and some of his coconspirators returned in the stolen van to the area behind a building where a coconspirator was waiting and got out of the van.
7. Quinton Mr. Bannister and his coconspirators fled the area in three vehicles.”

(CR:DE 32).

Again, under *Dominguez*, the crime was complete when overt act 1, the stealing of a van, was accomplished. This act would certainly not involve attempted, threatened or actual physical force. It cannot now be determined that the jury necessarily found any further overt acts were committed.

Count 8 also requires that the coconspirators “committed at least one of the following overt acts:”

1. “The coconspirators acquired a stolen vehicle from Palm Beach County, Florida.
2. Quinton Bannister and his coconspirators drove in two vehicles, including the stolen vehicle, to Palm Bay, in Brevard County, Florida.
3. Quinton Bannister and his coconspirators parked behind a building in the vicinity of Harbor Federal Savings Bank, in Palm Bay, Florida.
4. Some of the coconspirators armed themselves with firearms and put on masks and gloves.

5. Some of the coconspirators entered the Harbor Federal Savings Bank.
6. Some of the coconspirators, using one or more firearms, ordered the persons inside the bank to the floor.
7. One of the coconspirators demanded money from a bank employee and repeatedly hit the employee on the head.
8. Some of the coconspirators stole approximately \$47,500 in United States currency from Harbor Federal Savings Bank.
9. Some of the coconspirators fled the bank in a stolen car.”

(CR:DE 32).

In this count, the first two charged overt acts are not even necessarily criminal, much less purposeful, violent and aggressive. From the general verdict returned on this count it cannot be determined that the jury must have found Mr. Bannister guilty of a predicate crime of violence.

Thus, reasonable jurists could disagree on whether the § 371 counts charged against Mr. Bannister can stand categorically as a predicate crime of violence for § 924(c) purposes.

3. Armed Bank Robbery under 18 U.S.C. § 2113 (a) and (d) does not qualify as a crime of violence under the Elements Clause in § 924(c)

“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. 18 U.S.C. § 2113(a)

(emphasis added). 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. Importantly, extortion constitutes an alternative “means” of satisfying the second element of the offense. The jury instructions make clear that the bank’s property can be taken by alternative means: “by force and violence,” or by “intimidation.” Eleventh Circuit Pattern Jury Instr. No. 76.1 (2010). And the statute itself makes clear that the property can also be taken “by extortion.” See *In re Watson*, No. 16-14123, Order at 4 (11th Cir. Aug. 5, 2016) (“Section 2113(a) sets forth various means of committing bank robbery”). Thus, the statute is indivisible under *Descamps v. United States*, 570 U.S. 274, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, ___ U.S. ___, 136 S.Ct. 2243 (2016). Accordingly, the Court must assume that, under *Moncrieffe*’s least-culpable-act rule, the defendant committed this offense by means of extortion.

In that regard, 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 *United States v. Bornscheuer*, 563 F.3d 1228, 1236-37 (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. Accordingly, 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); *In re Watson*, No. 16-14123, Order at 4 (11th Cir. Aug. 5, 2016) (suggesting the same).

Furthermore, and 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 so because the jury instructions make clear that, at the very least, “force and violence” and “intimidation” are alternative means of committing the offense under *Mathis*.

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 v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377 (2004). 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. 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.

Finally, there is yet another reason why bank robbery is categorically not a crime of violence: it can be committed not only by extortion and intimidation, but by entering a bank with intent to commit “any felony affecting [the] bank.” 18 U.S.C. § 2113(a). “That language could easily cover many nonviolent felonies,” such as entering the bank to “commit loan fraud.” *In re Jones*, No. 16-14106, Order at 17 (Martin, J., concurring in judgment). This does not represent an alternative crime, but rather represents an alternative means of committing the same offense, thus rendering the statute indivisible (and therefore categorically overbroad) on this additional basis. *Id.* at 17-18 (so suggesting); see *In re Watson*, No. 16-14123, Order at 4 (11th Cir. Aug. 5, 2016) (same).

In sum, 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.

As previously explained, that the offense here was for *armed* bank robbery under § 2113(d) does not alter this conclusion. Indeed, neither assault during a bank robbery nor use of a dangerous weapon would transform this offense into a crime of violence. 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 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, 1087-88 (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, 470-71 (11th Cir. 2014).

Second, putting another person’s life in jeopardy by the use of a dangerous weapon or device also 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, 148 (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*. It is clearly debatable among reasonable jurists whether armed bank robbery is a categorical crime of violence.

* * *

For all the reasons discussed above, armed bank robbery under 18 U.S.C. § 2113(d) is not a "crime of violence" under § 924(c)'s elements clause.

For these reasons, Bannister respectfully contends that the record and the applicable law demonstrate that reasonable jurists would find it debatable whether: 1) the circuit court erred in denying a certificate of appealability. Accordingly, this Court should grant a writ of certiorari, vacate the Eleventh Circuit order denying a certificate of appealability, and remand the case with instructions to grant such certificate.

CONCLUSION

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

Respectfully submitted,

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