

No: ****

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ANDRE SANDERS,
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

MICHAEL CARUSO
Federal Public Defender
Robin C. Rosen-Evans
Assistant Federal Public Defender
Counsel for Petitioner
450 S. Australian Ave., Suite 500
West Palm Beach, Florida 33401
Telephone (561) 833-6288
Robin_Rosen-Evans@fd.org

QUESTIONS PRESENTED FOR REVIEW

18 U.S.C. § 924(c) criminalizes carrying a firearm during and in relation to a crime of violence, with a first conviction carrying a five-year mandatory minimum penalty. This petition presents the following questions:

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

II. Whether bank robbery (18 U.S.C. § 2113) has as an element “the use . . . of physical force against the person or property of another,” under 18 U.S.C. § 924(c)(3)(A).

III. Whether the Eleventh Circuit erred in concluding that reasonable jurists could not debate any of the above issues.

LIST OF PARTIES

Petitioner, Andre Sanders, was the movant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the respondent in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Andre Sanders respectfully petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' denial of his application for a certificate of appealability (COA) on the following issues: whether his § 924(c) conviction is unconstitutional in light of this Court's decision in *Samuel Johnson*; and whether the Eleventh Circuit's rule that a certificate of appealability may not be granted where binding circuit precedent forecloses a claim erroneously applies the certificate of appealability standard articulated by this Court in *Miller-El* and *Buck*.

OPINION BELOW

The Eleventh Circuit's denial of Mr. Sanders' application for a COA in Appeal No. 17-14746-G is provided in Appendix A.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction over Mr. Sanders' criminal case under 18 U.S.C. § 3231 and jurisdiction over his civil proceeding under 28 U.S.C. § 2255. The district court denied Mr. Sanders' § 2255 motion, and his request for a Certificate of Appealability on August 22, 2017. Mr. Sanders subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on January 22, 2018. *See* Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

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

- (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

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

...

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . Shall be fined under this title or imprisoned not more than twenty years, or both.

...

28 U.S.C. § 2253(c) provides in pertinent part:

(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; or

(B) the final order in a proceeding under section 2255.

(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.

STATEMENT OF THE CASE

On January 16, 2013, Mr. Sanders entered a guilty plea to Counts 1-5 of a five count indictment. Counts 1-4 charged him with bank robbery in violation of 18 U.S.C. § 2113(a). Count 5 charged Mr. Sanders with carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A).¹ On March 28, 2013, the district court sentenced Mr. Sanders to a concurrent period of 66 months in the Bureau of Prisons as to all the bank robbery counts, and a consecutive 60 months on the count charging him with carrying a firearm during and in relation to a crime of violence.

On June 29, 2016, Mr. Sanders filed a motion to vacate sentence under § 2255, requesting that his § 924(c) conviction be vacated because it was imposed in violation of due process in light of *Samuel Johnson*. On August 22, 2017 the district court, adopting the Report and Recommendation of the magistrate judge, denied the motion. Specifically, the magistrate judge found Mr. Sanders could show “no actual prejudice . . . because the Eleventh Circuit” in *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *pet. for reh’g en banc filed Aug. 14, 2017*, “recently held that the rule of *Johnson* does not apply or extend to invalidate § 924(c)’s ‘risk-of-force’ clause.” In his Report and Recommendation, the magistrate considered the Eleventh Circuit’s, *sua sponte*, withholding of the mandate in *Ovalles* nothing more than a “routine ministerial act” thus making it “unlikely” that the Eleventh Circuit would “vacate its decision” in that case in the future. The magistrate further found that the outcome

¹ Mr. Sanders was also charged in a separate case with bank robbery. He entered a guilty plea to Counts 1 and 2, and was sentenced to a term of imprisonment concurrent to the four counts of bank robbery noted above.

of this Court’s decision in *Sessions v. Dimaya*, U.S. No. 15-1498 was a “collateral matter” since it dealt with the constitutionality of 18 U.S.C. § 16(b)’s residual clause, a different statute, and therefore did not “provide a basis . . . to ignore the Eleventh Circuit’s decision in *Ovalles*.” Finally, the magistrate concluded that Sanders’ challenge to his § 924(c) conviction would fail regardless of the constitutionality of that statute’s residual clause because “bank robbery still categorically qualifies as a predicate ‘violent felony.’” The district court adopted the magistrate’s Report and Recommendation, denied Mr. Sanders’ § 2255, and also denied him a Certificate of Appealability.

On November 1, 2017, Mr. Sanders filed an application for a Certificate of Appealability (“COA”) with the Eleventh Circuit, requesting a COA on the issue of whether his § 924(c) conviction is unconstitutional in light of *Samuel Johnson*. In his application, Mr. Sanders argued that reasonable jurists could debate both whether *Samuel Johnson* invalidated § 924(c)’s residual clause and whether bank robbery qualifies as a “crime of violence” under § 924(c)’s force clause.

Regarding the bank robberies, Mr. Sanders argued that bank robbery can be committed by the alternative means of extortion, force and violence, or intimidation. So under the least-culpable-act-rule the court would have to assume Sanders committed the bank robberies by either intimidation (the presentation of a demand note) or extortion (the threat of either economic loss or physical violence)(*United States v. Vallejo*, 297 F.3d 1154, 1165 (11th Cir. 2012), neither of which requires the use or threatened use of physical force. In support of his position, Mr. Sanders noted that in *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016), one

member of the Eleventh Circuit stated that she believed these offenses may not qualify as “crimes of violence.”

Mr. Sanders submitted that, at a minimum, he had made the threshold showing necessary to obtain a COA, because reasonable jurists could (and do) debate whether his § 924(c) conviction is unconstitutional in light of *Samuel Johnson*.

On January 22, 2018, the Eleventh Circuit denied Mr. Sanders’ application for a COA. In doing so, the Court cited to *Ovalles* which held “*Johnson* does not apply to, or invalidate, the risk-of-force clause in § 924(c)(3)(B) . . . [C]onsequently, Sanders’s underlying claim that the holding in *Johnson* applied to, and invalidated, § 924(c)’s risk-of-force clause is . . . foreclosed by binding circuit precedent . . .” The court further concluded that “a conviction for bank robbery under § 2113(a) qualifies as a crime of violence under § 924(c)(3)(A)’s use-of-force clause.”

REASONS FOR GRANTING THE WRIT

I. Reasonable jurists could debate whether § 924(c)’s residual clause is unconstitutionally vague.

In *Sessions v. Dimaya*, 584 U.S. ___, 138 S.Ct. 1204 (2018), this Court declared 18 U.S.C. § 16(b) unconstitutionally vague. That result was compelled by a “straightforward application” of the “straightforward decision” in *Johnson v. United States*, 567 U.S. ___, 135 S.Ct. 2551 (2015). *Id.* at 1213. This Court found § 16(b) indistinguishable from the residual clause struck down in *Johnson*. The Court emphasized that both provisions required courts to imagine an “ordinary case” and apply it against an uncertain level of risk. *Id.* at 1213-14. And the Court rejected the government’s textual and experiential attempts to distinguish the

clauses, finding each “to be the proverbial distinction without a difference.” *Id.* at 1218-23.

This Court’s decision in *Dimaya* fully vindicates Mr. Sanders’ argument that *Johnson* renders 18 U.S.C. § 924(c)(3)(B) void for vagueness. Indeed, that provision is perfectly identical to § 16(b). Thus, in arguing that the ACCA’s residual clause was indistinguishable from § 924(c)(3)(B), Mr. Sanders made the same arguments this Court accepted in *Dimaya*. And, in arguing the opposite, the government made, and the lower courts accepted, the same arguments that were rejected in *Dimaya*. Because § 16(b) and § 924(c)(3)(B) are identical, they stand in the same relation to *Johnson*. As a result, this Court’s holding in *Dimaya* compels the conclusion that § 924(c)(3)(B) is void for vagueness as well. Therefore Mr. Sanders requests this Court grant certiorari to resolve this important question. At the very least, reasonable jurists could debate (and are debating) that issue at the moment. In fact, a split in the circuits now exists in light of the recent decision in the Tenth Circuit, *United States v. Salas* (---Fed.Appx.---, 2018 WL 1638833 May 5, 2018), holding that in light of this Court’s decision in *Dimaya*, § 924(c)(3)(B) is unconstitutionally vague. In *Salas*, the defendant raised for the first time on appeal his conviction and sentence under § 924(c)(1) for using a destructive device in furtherance of a crime of violence. (*Id.* at *1). Specifically, Salas was convicted under § 924(c)(1) for using a destructive device, a Molotov cocktail, in furtherance of a crime of violence--arson. (*Id.* at *2). Both Salas and the government agreed that the elements clause of § 924(c) did not apply, and therefore Salas “could have been convicted only under . . . § 924(c)(3)’s ‘residual clause.’” *Id.* at *3. Conducting a

plain error analysis, because Salas failed to raise the issue below, the Tenth Circuit concluded based upon this Court’s reasoning in *Dimaya* that § 924(c)(3)(B) is unconstitutionally vague. *Id.* at *9.

The Tenth Circuit first recognized that the language found in the two statutes, §§ 16(b) and 924(c)(3)(B) is identical: “[T]he language of § 16(b) is indetical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other.” *Id.* at *5. *Accord: United States v. Serafin*, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009); and *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015). Next, the court rejects the argument advanced by the government, and adopted by the Eleventh Circuit in *Ovalles*, that § 924(c)(3)(B) is distinguishable from § 16(b) because the “former requires a sufficient nexus to a firearm, which narrows the class of offenses that could qualify as crimes of violence,” *Id.* at *6, because “this requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that § 924(c)(3)(B) possesses the same two features that rendered the ACCA’s residual clause and § 16(b) unconstitutionally vague: ‘an ordinary-case requirement and an ill-defined risk threshold,’ . . . Requiring a sufficient nexus to a firearm does not remedy those two flaws.” *Id.* at *6-7.

Because a split in the circuits exists as to the constitutionality of § 924(c)(3)(B), the Court should grant certiorari, vacate the decision below, and remand (GVR) this case.

II. Reasonable jurists could debate whether bank robbery has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

Reasonable jurists may likewise debate whether bank robbery under § 2113 is a “crime of violence” under § 924(c)’s force clause. 18 U.S.C. § 924(c)(3)(A). For an offense to qualify under the force clause, it must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* Whether bank robbery qualifies as a “crime of violence” under § 924(c)’s force clause is a question that must be answered categorically—that is, by reference to the elements of the offense, and not the actual facts of the defendant’s conduct. *See United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013).

Under § 924(c)’s force clause, the term “physical force” means “violent force,” “force that is capable of causing physical pain or injury to another person.” *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (*Curtis Johnson*). Bank robbery may be committed by “extortion” “force and violence” or by “intimidation.” 18 U.S.C. § 2113(a). Because the statute lists alternative means, and not alternative elements, it must be presumed that Mr. Sanders was convicted of the least culpable act—either bank robbery by extortion or intimidation. *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

According to the Eleventh Circuit’s pattern jury instruction, an individual may be convicted of bank robbery by “intimidation” where “an ordinary person in the teller’s position could infer a threat of bodily harm from the defendant’s acts.” 11th Cir. Pattern Jury Instructions 76.1 (citing *United States v. Kelley*, 412 F.3d 1240,

1244 (11th Cir. 2005)). Notably, it does not require proof of a defendant's mental state, as required by *Leocal v. Ashcroft*, 543 U.S. 1, 9–10 (2004) and *United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010). Indeed, “whether a particular act constitutes intimidation is viewed objectively.” *Kelley*, 412 F.3d at 1244. The defendant need not *intend* for the act to be intimidating. *Id.* However, under *Leocal* and *Palomino Garcia*, a defendant does not “use” force unless some degree of intent is required. *See Leocal*, 543 U.S. at 9 (concluding that the *use* of physical force “most naturally suggests a higher degree of intent than negligent or merely accidental conduct”). Because a bank robbery conviction under § 2113(a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the “use” of physical force.

Moreover, an individual may “intimidate” a victim without the threatened use of violent “physical force.” For instance, the Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. *See United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, violent “physical force” or force “capable of causing physical pain or injury to another person.” *Curtis Johnson*, 559 U.S. at 139. Thus, under the least-culpable-act rule, a court must presume the bank robbery Sanders committed was a bank robbery occurring by the use of “intimidation” rather than by force or violence. Because bank robbery under § 2113 committed by intimidation does not necessarily have as an element “the use, attempted use or threatened use” of violent

physical force, § 2113(a) bank robbery does not categorically qualify as a “crime of violence” under the elements clause of § 924(c).

Based on the foregoing, Mr. Sanders respectfully submits that, at a minimum, reasonable jurists may debate whether bank robbery categorically qualifies as a “crime of violence” under § 924(c)’s force clause. Indeed, some have said as much. *In re Jones*, No. 16-14106, Order at 13 (11th Cir. June 27, 2016) (Martin, J. concurring); *In re Moore*, No. 16-14214, Order at 4–9 (11th Cir. July 27, 2016) (Martin, J., concurring). Given the important and recurring nature of this issue, Mr. Sanders respectfully seeks this Court’s review.

III. The Eleventh Circuit’s rule that a COA may not be granted where binding circuit precedent forecloses a claim erroneously applies the COA standard articulated by this Court in *Miller-El* and *Buck*.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case.” *Buck*, 137 S. Ct. at 773 (citing *Miller-El*, 537 U.S. at 336). “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.’” *Id.* (quoting *Miller-El*, 537 U.S. at 327). “This threshold question should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Id.* (quoting *Miller-El*, 537 U.S. at 336). “When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a

COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.” *Id.* (quoting *Miller-El*, 537 U.S. at 336–37).

The Eleventh Circuit has adopted a rule requiring that COAs be adjudicated on the merits. Under the Eleventh Circuit’s rule, COAs may not be granted where binding circuit precedent forecloses a claim. *See Hamilton*, 793 F.3d 1261 (“[R]easonable jurists will follow controlling law.”); *see also Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009); *Gordon v. Sec’y, Dep’t of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007); *Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005). To be sure, the Court phrased its decision in Mr. Sanders’ case using the proper terms—that reasonable jurists would not debate whether Mr. Sanders is entitled to relief—but reached its conclusion by essentially deciding the case on the merits. *Buck*, 137 S. Ct. at 773. The Eleventh Circuit’s rule places too heavy a burden on movants at the COA stage. As this Court recently stated in *Buck*:

[W]hen a court of appeals properly applies the COA standard and determines that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the [Eleventh] Circuit here) inverts the statutory order of operations and “first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits,” it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller-El*, 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by § 2253.

Id. at 774.

Indeed, as this Court stated in *Miller-El*, “[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.” 537 U.S. at 338. A COA should be denied only where the district court’s conclusion is “beyond all debate.” *Welch*, 136 S. Ct. at 1264. That is not the case with any of the issues raised above here.

Because the Eleventh Circuit’s rule essentially requires a merits determination, and precludes the issuance of COAs where reasonable jurists debate whether a movant is entitled to relief, Mr. Sanders respectfully requests that this Court grant this petition to review the Eleventh Circuit’s erroneous application of the COA standard.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Michael Caruso
Federal Public Defender

By: s/ Robin C. Rosen-Evans
Robin C. Rosen-Evans
Assistant Federal Public Defender
Counsel for Petitioner

West Palm Beach, Florida
May 9, 2018