

No: ****

IN THE
Supreme Court of the United States

OCTOBER TERM, 2017

MICHAEL CHANCE,
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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QUESTIONS PRESENTED

18 U.S.C. § 924(c) criminalizes brandishing a firearm during and in relation to a crime of violence. A first conviction carries a seven-year mandatory minimum penalty, while a second conviction carries an additional 25-year mandatory minimum. 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 armed bank robbery (18 U.S.C. § 2113) has as an element “the use . . . of physical force against the person or property of another,” under either 18 U.S.C. § 924(c) or the ACCA’s use-of-force clause.

III. Whether attempted Hobbs Act robbery (18 U.S.C. § 1951(a)), has as an element the “use of physical force against the person or property of another,” under 18 U.S.C. § 924(c).

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

LIST OF PARTIES

Petitioner, Michael Chance, 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.

TABLE OF CONTENTS

Questions Presented	i
List of Parties	i
Table of Authorities	iv
Petition for a Writ of Certiorari	1
Opinion and Order Below	2
Jurisdiction	2
Relevant Constitutional and Statutory Provisions	2
Statement of the Case	5
Reasons for Granting the Writ	8
I. Reasonable jurists could debate whether § 924(c)'s residual clause is unconstitutionally vague	8
II. Reasonable jurists could debate whether armed bank robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another for the purposes of the elements/use-of-force clauses found in § 924(c)(3)(A) or in the ACCA	10
III. Reasonable jurists could debate whether attempted Hobbs Act robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another for purposes of the elements/use-of-force clause found in § 924(c)(3)(A).	14
IV. 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 <i>Miller-El</i> and <i>Buck</i>	23
Conclusion	25

Appendix

Report and Recommendations on Motion to Correct Sentence (DE 1) and Amended Motion to Correct Sentence (DE 3)	A-1
Objections to Report and Recommendation	A-2
Order of the United States District Court for the Southern District of Florida adopting the Report and Recommendation of magistrate judge recommending that the motion to vacate sentence pursuant to 28 U.S.C. § 2255 de denied, <i>Michael Chance v. United States</i> , No. 16-81074-Cv-Hurley (S.D. Fla. Nov. 15, 2017)	A-3
Final Judgment of the United States District Court for the Southern District of Florida in favor of the United States and against Andre Sanders denying motion to vacate sentence, <i>Michael Chance v. United States</i> , No.16-81074-Cv-Hurley (S.D. Fla. Nov. 14, 2017).....	A-4
Decision of the Court of Appeals for the Eleventh Circuit, Michael Chance <i>v. United States</i> , No. 18-10083, denying Certificate of Appealability (11th Cir. Feb. 26, 2018).....	A-5

TABLE OF AUTHORITIES

CASES:

Buck v. Davis,

137 S. Ct. 759 (2017)..... 23-24

Gordon v. Sec’y, Dep’ of Corr.,

479 F.3d 1299 (11th Cir. 2007)..... 23

Hamilton v. Sec’y, Fla. Dep’t of Corr.,

793 F.3d 1261 (11th Cir. 2015)..... 23

In re Gomez,

830 F.3d 1225 (11th Cir. 2016)..... 7

In re Jones,

No. 16-14106 (11th Cir. July 27, 2016) 7, 13

In re Moore,

No. 16-14214, Order (11th Cir. July 27, 2016) 13

Johnson v. United States (“Curtis Johnson”),

559 U.S. 133 (2010)..... 11-13

Johnson v. United States (“Samuel Johnson”),

135 S. Ct. 2551 (2015).....*passim*

Lawrence v. Florida,

421 F.3d 1221 (11th Cir.2005)..... 24

Leocal v. Ashcroft,

543 U.S. 1 (2004)..... 11

<i>Mathis v. United States</i> ,	
136 S. Ct. 2243 (2016).....	11
<i>Miller-El v. Cockrell</i> ,	
537 U.S. 322 (2003).....	23-24
<i>Moncrieffe v. Holder</i> ,	
133 S. Ct. 1678 (2013).....	11
<i>Ovalles v. United States</i> ,	
861 F.3d 1257 (11th Cir. 2017),	
<i>pet. for reh’g en banc filed</i> (Aug. 14, 2017)	6, 9-10, 18
<i>Richardson v. United States</i> ,	
526 U.S. 813 (1999).....	11
<i>Rosemond v. United States</i> ,	
134 S. Ct. 1240 (2014).....	17
<i>Sessions v. Dimaya</i> ,	
138 S. Ct. 1204 (2018).....	8-9
<i>Tompkins v. Sec’y, Dep’t of Corr.</i> ,	
557 F.3d 1257 (11th Cir. 2009).....	23
<i>Welch v. United States</i> ,	
136 S. Ct. 1257 (2016).....	24
<i>United States v. Archer</i> ,	
531 F.3d 1347 (11th Cir. 2008).....	16

<i>United States v. Carmen Ramirez,</i>	
823 F.2d 1 (1st Cir. 1987)	14
<i>United States v. Cornillie,</i>	
92 F.3d 1108 (11th Cir. 1996)	12
<i>United States v. Gonzales,</i>	
322 Fed.App’x 963 (11th Cir. 2009).....	<i>passim</i>
<i>United States v. Kelley,</i>	
412 F.3d 1240 (11th Cir. 2005)	11
<i>United States v. McGuire,</i>	
706 F.3d 1333 (11th Cir. 2013)	10, 15, 18-19
<i>United States v. Murrell,</i>	
368 F.3d 1283, 1286 (11th Cir. 2004)	14
<i>United States v. Palomino Garcia,</i>	
606 F.3d 1317 (11th Cir. 2010)	11
<i>United States v. Royal,</i>	
731 F.3d 333 (4th Cir. 2013)	20
<i>United States v. Salas,</i>	
Fed.Appx, 2018 WL 1638833 May 5, 2018.....	9
<i>United States v. Serafin,</i>	
562 F.3d 1105 (10th Cir. 2009)	9
<i>United States v. St. Hubert,</i>	
883 F.3d 1319 (11th Cir. 2018)	19, 22

United States v. Turner,

501 F.3d 59 (1st Cir. 2007) 16

United States v. Vivas-Ceja,

808 F.3d 719 (7th Cir. 2015) 9

United States v. Williams,

531 Fed.App'x 270 (3rd Cir. 2013)..... 16

United States v. Wrobel,

841 F.3d 450 (7th Cir. 2016)..... 16, 19

CONSTITUTIONAL, STATUTORY, AND OTHER AUTHORITY:

U.S. Const. Amend. V 2

18 U.S.C. § 16(b) 8-10

18 U.S.C. § 922(g) 5

18 U.S.C. § 924(c).....*passim*

18 U.S.C. § 924(c)(1) 9

18 U.S.C. § 924(c)(1)(A) 2

18 U.S.C. § 924(c)(1)(A)(i) 3

18 U.S.C. § 924(c)(1)(A)(ii)..... 3, 5

18 U.S.C. § 924(c)(1)(A)(iii)..... 3

18 U.S.C. § 924(c)(3) 3, 9

18 U.S.C. § 924(c)(3)(A) 3, 10, 14, 19

18 U.S.C. § 924(c)(3)(B)*passim*

18 U.S.C. § 924(e)..... 5

18 U.S.C. § 924(e)(2)(B)(i).....	4
18 U.S.C. § 1951.....	4-5
18 U.S.C. § 1951(a)	i, 4
18 U.S.C. § 1951(b)(1)	4, 19
18 U.S.C. § 2113.....	<i>passim</i>
18 U.S.C. § 2113(a)	3, 5, 11-12
18 U.S.C. § 2113(d)	3, 5, 12-13
18 U.S.C. § 3231.....	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253.....	24
28 U.S.C. § 2253(c).....	4
28 U.S.C. § 2253(c)(1)(A)	4
28 U.S.C. § 2253(c)(1)(B)	4
28 U.S.C. § 2253(c)(2)	4, 23
28 U.S.C. § 2255.....	2, 5
1st Cir. Pattern Cr. Jury Instructions 4.16 (1998).....	21
11th Cir. Pattern Cr. Jury Instructions 70.03 (2010)	21
11th Cir. Pattern Jury Instructions 76.1.....	11
11th Cir. Pattern Jury Instructions 76.2.....	13
Section 5.01 of the American Law Institute’s Model Penal Code.....	14
Section 5.01(3) of the American Law Institute’s Model Penal Code.....	17
Sand & Siffert, Modern Federal Jury Instructions – Criminal 50-3.	20

Sand & Siffert, Modern Federal Jury Instructions – Criminal 50-5	21
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PETITION FOR A WRIT OF CERTIORARI

Michael Chance 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 issue of whether his § 924(c) convictions are unconstitutional in light of this Court's decision in *Samuel Johnson*, and whether he still qualifies to be sentenced under the ACCA's elements clause based upon three prior convictions for bank robbery.

OPINION AND ORDER BELOW

The Eleventh Circuit's denial of Mr. Chance's application for a COA in Appeal No. 17-13775-H is provided in Appendix A.

JURISDICTION

The United States District Court for the Southern District of Florida had original jurisdiction over Mr. Chance's 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. Chance's § 2255 motion on November 11, 2017. Mr. Chance subsequently filed a notice of appeal and an application for a COA in the Eleventh Circuit, which was denied on February 26, 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;

(ii) if the firearm is 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.

. . .

(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.

. . .

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) . . . 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.

18 U.S.C. § 924(e)(2)(B)(i) provides, in relevant part:

the term violent felony means any crime punishable by imprisonment for a term exceeding one year . . . that—has as an element the use, attempted use, or threatened use of physical force against the person of another

18 U.S.C. § 1951 provides in pertinent part:

(a) 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 20 years or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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 March 8, 2007, Chance was convicted of Counts 1 – 5 of a six count indictment. Count 1 charged armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d). Counts 2 and 4 charged using, carrying or brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). Count 3 charged attempted Hobbs Act Robbery in violation of 18 U.S.C. § 1951. Count 5 charged felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(e). On May 18, 2007, the district court sentenced Chance to 660 months: Count 1-240 months to be served concurrently with Counts 3 and 5; Count 2-120 months to be served consecutively to Counts 1-5; Count 3-240 months to be served concurrently to Counts 1-5; Count 5-240 months to be served concurrently to Counts 1 and 3.

On June 24, 2016¹ Chance filed a motion to vacate sentence under § 2255, requesting that his § 924(c) convictions be vacated because they were imposed in violation of due process in light of *Samuel Johnson*. He also argued that bank robbery is not a crime of violence for purposes of the ACCA's elements clause. On November 11, 2017 the district court, adopting the Report and Recommendation of the magistrate judge, denied the motion. The magistrate relied on a number of Eleventh Circuit opinions issued upon application of second or successor ("SOS") motions to vacate holding that armed or unarmed bank robbery qualified as a crime of violence under the elements/use of force clause of the ACCA. In so ruling, the magistrate found the bank robbery statute divisible and applied the modified

¹ On June 27, 2016, chance filed an amended motion to vacate.

categorical approach, after which he determined Chance was convicted of bank robbery by force and violence, or intimidation. As to Chance's challenge to his § 924(c) convictions, the magistrate cited to *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *pet. for reh'g en banc* filed Aug. 14, 2017, in holding that *Samuel Johnson v. United States*, did not apply to § 924(c)'s residual clause. Next he relied on circuit precedent in foreclosing Chance's argument that armed bank robbery is not a crime of violence for purposes of § 924(c)'s elements/use-of-force clause. Finally he ruled that attempted Hobbs Act robbery qualified as a crime of violence for § 924(c)'s elements clause by relying on "numerous courts within this District." The district court also denied Chance a Certificate of Appealability (COA).

On January 10, 2018, Chance filed an application for a COA with the Eleventh Circuit on the issue of whether his § 924(c) convictions were unconstitutional in light of *Samuel Johnson*, and whether his prior bank robbery convictions qualified as crimes of violence under the ACCA's elements clause. In his application, Chance argued that reasonable jurists could debate the following issues: whether *Samuel Johnson* invalidated § 924(c)'s residual clause; and whether armed bank robbery and attempted Hobbs Act robbery qualified as a "crime(s) of violence" under the elements clauses found at § 924(c)(3)(B) and the ACCA.

Dealing first with whether bank robbery could qualify as a crime of violence under the elements clause of either § 924(c) or the ACCA, Chance argued that under the least-culpable-act rule, the substantive act of bank robbery could be committed by unintentionally intimidating a victim or by presenting a teller with a demand

letter. Chance further argued that the fact his conviction was for “armed” bank robbery should not affect the analysis because an individual may still be convicted of armed bank robbery without using, attempting to use, or threatening to use, violent “physical force.” Chance explained 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.”

As to his conviction for attempted Hobbs Act robbery, Chance argued that the issue remained unsettled in the Eleventh Circuit as recognized in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016). In *Gomez*, the Eleventh Circuit distinguished attempted Hobbs Act robbery from the substantive offense because a defendant can be convicted of the offense “even if he did not take substantial steps toward using or threatening the use of force.” *Id.* at 1228.

Based on the foregoing analysis, Chance 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) convictions are unconstitutional in light of *Samuel Johnson*, and whether bank robbery qualifies as a violent felony under the ACCA’s elements clause.

On February 26, 2018, the Eleventh Circuit denied Chance’s application for a COA without any further explanation.

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*, 576 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 this 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.

Dimaya fully vindicates Chance’s argument, both in the district court and the Eleventh Circuit Court of Appeals, 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), Chance made the same arguments this Court accepted in *Dimaya*. And, in arguing the opposite, the government made, and the district court and the Eleventh Circuit Court of Appeals accepted, the same arguments this Court 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 decision in *Dimaya* compels the conclusion that § 924(c)(3)(B) is void for vagueness as well. This Court should

accept certiorari to resolve whether § 924(c)(3)(B) is void for vagueness in light of both *Johnson*, and now *Dimaya*. 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 identical 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 can debate whether armed bank robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another for the purposes of the elements/use-of-force clause found in § 924(c)(3)(A) or in the ACCA.

Reasonable jurists may likewise debate whether armed bank robbery under § 2113 is a “crime of violence” under the use-of-force/elements clause found in both § 924(c) and the ACCA. For an offense to qualify under either clause it must have “as an element the use, attempted use, or threatened use of physical force against the person or property of another.” Whether armed bank robbery qualifies 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 (2013). Pursuant to the categorical approach, since

armed bank robbery may be committed without the use, attempted use, or threatened use of physical force, it cannot qualify as a crime of violence.

Under the elements clause of each statute, 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*). Armed bank robbery may be committed “by 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 Chance was convicted of the least culpable act—armed bank robbery by 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 Chance 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) or ACCA.

Mr. Chance was convicted of armed bank robbery under § 2113(d). Subsection (d) is implicated when a person, in violating subsection (a), “assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or

device” 18 U.S.C. § 2113(d). This subsection, like subsection (a), of § 2113 is not a “violent felony” under the elements clause.²

First, committing the offense through “assault” does not require the attempted or threatened use of violent physical force as required by *Curtis Johnson*. The Eleventh Circuit’s pattern jury instruction for § 2113(d) states that an “assault” may be committed without touching another person and occurs when a person “intentionally attempts or threatens to hurt someone else” with an apparent ability to do so. “Hurt” is not defined to require any force, let alone violent physical force. 11th Cir. Pattern Jury Instructions 76.2. Second, committing the offense under the “use of a dangerous weapon” prong cannot convert Chance’s bank robbery into a crime of violence, because it also does not require the use, attempted use, or threatened use of violent physical force required by *Curtis Johnson*. “[D]angerous weapon or device” is defined as “any object that a person can readily use to inflict serious bodily harm,” which includes poison, Anthrax and other chemical weapons that can inflict serious bodily harm without the use of *any* physical force. *Id.*

Based on the foregoing, Chance respectfully submits that, at a minimum, reasonable jurists may debate whether armed bank robbery categorically qualifies as a crime of violence under the elements clause of either § 924(c) or the ACCA. 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

² Arguably, these alternatives constitute means and not elements. However, the Court need not make that determination. Regardless of which alternative applies, neither converts a bank robbery into a “violent felony.”

27, 2016) (Martin, J., concurring). Given the important and recurring nature of this issue, Chance respectfully seeks this Court's review.

III. Reasonable jurists could debate whether attempted Hobbs Act robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another for purposes of the elements/use-of-force clause found in § 924(c)(3)(A).

Chance seeks this Court's review because reasonable jurists may likewise debate whether attempted Hobbs Act robbery is a crime of violence under § 924(c)'s use-of-force clause.

A federal attempt crime only requires that the government prove (1) that the defendant had the specific intent to engage in the underlying criminal conduct, and (2) that he took a "substantial step toward commission of the offense" that strongly corroborates his criminal intent. *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004). In that regard, "the federal courts have rather uniformly adopted the standard found in Section 5.01 of the American Law Institute's Model Penal Code." *United States v. Carmen Ramirez*, 823 F.2d 1 (1st Cir. 1987) (citation omitted). And notably, the Model Penal Code includes as conduct that will amount to a "substantial step" "strongly corroborative of the actor's criminal purpose:"

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, that are specifically designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; and

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Since none of the above-listed types of conduct are necessarily or categorically violent, the Model Penal Code itself confirms that attempted Hobbs Act robbery can indeed “plausibly” be committed without the “use, attempted use, or threatened use of physical force against the person of another.” *See United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013) (O’Connor, J.) (holding, in the context of a § 924(c) case, that “[o]nly if the plausible applications of the statute of conviction all require the use or threatened use of force,” can the defendant “be held guilty of a crime of violence;” thus, the question the Court must ask is “whether the crime, in general, plausibly covers any non-violent conduct”).

Although the “categorical approach” restricts any court to considering real cases on attempted Hobbs Act robbery in order to determine the “least culpable conduct” for conviction for that crime, it is clear from decisions in the various Circuits that an attempted Hobbs Act robbery does not categorically require the use, attempted use, or threatened use of violent force against any person or property. Courts have determined that acts nonviolent in nature are sufficient to establish the crime. In *United States v. Gonzales*, 322 Fed.App’x 963 (11th Cir. 2009), the court

upheld a conviction for attempting to commit a Hobbs Act robbery where the defendant simply planned a robbery, and traveled to a location in preparation for committing it, without the use of any force. *See id.* at 969. This confirms that a defendant may “plausibly” attempt to commit a Hobbs Act robbery without using, attempting to use, or threatening to use violent, physical force. In *United States v. Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016) a conviction for attempted Hobbs Act robbery, was upheld where defendants made plans to travel from Chicago to New York to rob a diamond merchant, they believed he would turn the diamonds over without the need to do anything to him, and they traveled as far as New Jersey in a rented van before they were arrested). In *United States v. Turner*, 501 F.3d 59, 68-69 (1st Cir. 2007) a conviction for attempted Hobbs Act robbery was upheld where a defendant and his compatriots planned a robbery, surveilled the target, prepared vehicles, and gathered at the designated assembly point on the date scheduled for the robbery.

Admittedly, there are many attempted Hobbs Act robbery cases in which someone has brought a gun on the way to a planned robbery. *See, i.e., United States v. Williams*, 531 Fed.App’x 270 (3rd Cir. 2013). But the act of merely possessing or carrying a firearm does not change the crime of violence calculus. *See United States v. Archer*, 531 F.3d 1347, 1349 (11th Cir. 2008) (holding that the mere act of “carrying” a concealed weapon “does not involve the use, attempted use, or threatened use of force, and so is not a crime of violence under [the elements clause]”). Were a court to hold differently, in a “concealed carry” state anyone with a

gun on his person or in his car would be guilty of a “crime of violence.” At most carrying a gun signifies the future capacity to use force if necessary; it is not, itself, an attempted or threatened use of force.

The above cases confirm that attempts to commit Hobbs Act robbery, by their nature, often fail to reach the stage where a defendant might use, attempt to use, or threaten to use physical force against the person or property of another and that the “substantial step” requirement can be satisfied in a Hobbs Act robbery without any act that is itself violent. Many attempted Hobbs Act robbery cases, like *Gonzales*, involve reverse stings” at fake “stash houses” where the defendant are arrested before the participants are anywhere near the target location. In such cases some participants may be armed but others will not be. In sum, depending upon their role and when they join the plan, an individual may not know that others will be armed. This knowledge is significant since the Model Penal Code suggests that any person who could be found guilty of a crime under an “aiding and abetting” theory, would also be guilty of an attempt to commit the crime. See Model Penal Code § 5.01(3) (“Conduct Designed to Aid Another in Commission of a Crime”). And in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), this Court clarified that to convict a defendant of aiding and abetting a § 924(c) offense, the government must present specific proof that the defendant knew a confederate would possess a gun. See *id.* at 1249 (noting that an accomplice may know “nothing of a gun until the peers at the scene,” and at that point, “he may already have completed his acts of assistance”).

Clearly there is confusion among the circuits as to how to classify an attempt crime when using the categorical approach.

In these and other regards, an attempted Hobbs Act robbery differs substantially from the federal attempt offenses at issue in *McGuire* and *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017). In *McGuire*, the Court underscored that the “least culpable conduct” for conviction -- attempting to disable an aircraft on the ground or in flight, such as by deflating the tires, or disconnecting the onboard circuitry -- was an “‘active crime’ done ‘intentionally’ against the property of another, with extreme and manifest indifference to the owner of that property and the well-being of the passengers.” 706 F.3d at 1338. The damage actually caused by such conduct was “exacerbated by indifference to others’ well-being.” 706 F.3d at 1338. The attempted carjacking crime at issue in *Ovalles* required as an element that the defendant have the “intent to cause death or serious bodily harm” in taking the motor vehicle. See 861 F.3d at 1268. According to *Ovalles*, “[p]roscribed criminal conduct where the defendant must take the car by intimidation and act with intent to kill or cause serious bodily injury is unmistakably a crime of violence.” *Id.* (citing *McGuire*, 706 F.3d at 1336-38).

But, there is no similar intent requirement in the Hobbs Act robbery statute. And indeed, as is clear, at least in the Eleventh Circuit from *Gonzales*, a defendant may be convicted of attempted Hobbs Act robbery simply because he intended to commit a robbery, and traveled to a location where he was supposed to retrieve a vehicle to hide the cocaine he and his confederates intended to steal. Unlike the

defendant in *McGuire*, defendant Hartsfield in *Gonzales* did not damage any property in any manner nor did he hurt any person. While he did have three black stockings in his pockets at the time of his arrest, 322 Fed.App'x. at 769, possession of such “materials” is not itself an attempt to use violence or a threat to use violence. Nor does it signify a future intent to use violence against the person or property of another. And again, there was demonstrably neither an attempt, nor an intent, to use violence in *Wrobel*. It is thus clear under the *McGuire* “plausibility” test that an attempted Hobbs Act robbery is not categorically a “crime of violence” under § 924(c)(3)(A).

The Eleventh Circuit’s decision in *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018), highlights the need for this Court to rule definitively on the parameters of determining whether and when an attempt to commit an act can ever qualify as a crime of violence. In *St. Hubert*, the Eleventh Circuit incorrectly held that attempted Hobbs Act robbery categorically qualified as a crime of violence under § 924(c)’s use of force clause.

Section 1951(b)(1) defines a Hobbs Act robbery as “the unlawful taking or obtaining of personal property from the person or presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession.” Although this definition uses multiple phrases – “by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property” -- these disjunctive terms are means of committing the offense, not alternative

elements upon which a unanimous jury must agree. Jurors are never asked to specify which one of these phrases serves as the basis for the conviction. Specifically, jurors are not asked to determine whether the defendant took the property in question (1) by means of actual or threatened force, or (2) by means of fear of injury. Further, unanimity is not required on the question of whether fear or injury was future or immediate to person or property. Rather, all of these terms go to the jury in one single clump; “it is enough that each juror agree only that one of [these means] occurred, without settling on which.” *United States v. Royal*, 731 F.3d at 341. The model Hobbs Act robbery jury instruction makes this plain, delineating the following elements for Hobbs Act robbery:

First, that the defendant knowingly obtained or took the personal property of another, or from the presence of another;

Second, that the defendant took this property against the victim’s will, by actual or threatened force, violence, or fear of injury, whether immediately or in the future; and

Third, that as a result of the defendant’s actions, interstate commerce, or an item moving in interstate commerce, was delayed, obstructed, or affected in any way or degree.

Sand & Siffert, *Modern Federal Jury Instructions – Criminal* 50-3. The model instructions provide additional detail and guidance on the second element:

The second element the government must prove beyond a reasonable doubt is that a defendant unlawfully took this property against the victim’s will, by actual or threatened force, violence, or fear of injury, whether immediately or in the future.

In considering whether the defendant used, or threatened to use force, violence or fear, you should give those words their common and ordinary meaning, and understand

them as you normally would. The violence does not have to be directed at the person whose property was taken. The use or threat of force or violence might be aimed at 1/3 person, or at causing economic rather than physical injury. A threat may be made verbally or by a physical gesture. Whether a statement or physical gesture by the defendant actually was a threat depends upon the surrounding facts.

Sand & Siffert, Modern Federal Jury Instructions- Criminal 50-5. Likewise the Pattern Instruction in the Eleventh Circuit lists the following as Hobbs Act robbery elements:

- (1) the defendant knowingly acquired someone else's personal property;
- (2) the defendant took the property against the victim's will, by using actual or threatened force, or violence, or causing the victim to fear harm, either immediately or in the future; and
- (3) the defendant's actions obstructed, delayed, or affected interstate commerce.

The jury instruction further clarifies: "Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence." Pattern Crim Jury Instr. 11th Cir. 70.03 (2010). Critically, these instructions confirm that unanimity is not required regarding whether the defendant "robb[ed]" by means of actual or threatened force or violence or by means of fear of injury to person or property. *Id.* See also Pattern Crim. Jury Instr. 1st Cir. 4.16 (1998) (defining "by means of actual or threatened force, or violence, or fear of injury to his/her person or property" as a single unified element of Hobbs Act robbery). The jury does not have to unanimously decide one of these phrases to the exclusion of

another. Therefore, these different ways of committing Hobbs Act robbery are alternative means of a single element.

As a result, the categorical approach-- not the modified categorical approach -- applies in determining whether Hobbs Act robbery qualifies as a “crime of violence” under the § 924(c) force clause. Using the least-culpable-act rule, Hobbs Act robbery can be accomplished by the threat of injury to another’s intangible property. The Eleventh Circuit in *St. Hubert* rejected this clearly accepted statutory analysis when it concluded there is no plausible scenario under which a Hobbs Act violation could be committed without at a minimum the threat of force. But, if Hobbs Act robbery can be accomplished by the threat of future economic harm, as clearly shown in the pattern jury instructions for the Eleventh Circuit, a defendant does not have to prove a hypothetical example because the law is clear -- Hobbs Act robbery can be accomplished by the creation of fear of future economic harm. No example other than reference to the wording of the jury instruction need be shown to establish what needs to be proven for the government to obtain a conviction.

St. Hubert further erroneously concludes that because § 924(c)’s use-of-force clause includes attempt language, an attempt to commit an offense which qualifies as a crime of violence, will automatically qualify the attempt as a crime of violence. The problem with this reasoning is apparent when considering the type of conduct sufficient for conviction, which as explained above—is not categorically violent. At the very least, reasonable jurists could debate that issue.

It is important to clarify the issue of whether an attempt to commit an offense which requires no threat, intimidation or violence can qualify as a crime of violence.

IV. 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). 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, Chance 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.

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