

NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

STEVEN CORKER,

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 FOR REVIEW

18 U.S.C. § 924(c) criminalizes using or carrying a firearm during and in relation to a crime of violence, or possessing a firearm in furtherance of such an underlying crime. 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).
- II. Whether attempted Hobbs Act robbery (18 U.S.C. § 1951(a)), which may be committed by causing an individual to fear financial loss, has as an element “the use, attempted use, or threatened use of physical force against the person or property of another,” under 18 U.S.C. § 924(c)(3)(A).

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Steven Corker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10317-D in that court on March 28, 2018.

OPINIONS BELOW

The Eleventh Circuit's denial of Mr. Corker's application for a certificate of appealability ("COA") in Appeal No. 18-10317-D is reproduced in Appendix A-1. The district court's order adopting Report and Recommendation of Magistrate Judge is reproduced in Appendix A-2. The Report of Magistrate Judge is reproduced in Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2255. The jurisdiction of the court of appeals was invoked under 28 U.S.C. §§ 1291 and 2253(c). The decision of the court of appeals was entered on March 28, 2018. This petition is timely filed under Supreme Court Rule 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 2255(a)

Subsection (a) of section 2255 of Title 28, United States Code states:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

28 U.S.C. § 2253(c)

Subsection (c) of Section 2253 of Title 28, United States Code states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(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.

(3) A certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

18 U.S.C. § 924(c)

Title 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. § 16 (“Crime of violence defined”)

Title 18 U.S.C. § 16 provides, in pertinent part:

The term “crime of violence” means—

* * *

(b) any other offense that is a felony and 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. § 1951 (Hobbs Act Robbery)

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

- (a) Whoever in any way or degree obstructs, delays, or affects interstate commerce or the movement of any article or commodity in commerce by robbery, or extortion, or attempts or conspires to do so, 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.
- (b)(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.

STATEMENT OF THE CASE

On November 16, 1998, Corker was found guilty by a jury of attempted Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) (count two); theft of mail, in violation of 18 U.S.C. § 1708 (count seven); and using a firearm during and in relation to a “crime of violence,” in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (count three). On August 27, 1999, a sentencing hearing was held wherein the District Court sentenced Corker to 210 months’ imprisonment as to count two, 60 months’ imprisonment as to count seven, both terms to run concurrently to each other and 60 months’ imprisonment on count three to run consecutively to the sentences imposed as to counts two and seven for a total sentence of 270 months imprisonment. Mr. Corker timely appealed his sentence. The Eleventh Circuit issued an order on September 19, 2001, affirming Mr. Corker’s judgment and sentence.

On June 20, 2016, Mr. Corker filed a *pro se* motion to vacate under 28 U.S.C. § 2255, arguing that in light of *Johnson*, the analogous residual clause in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague, and the attempted Hobbs Act robbery offense underlying his § 924(c) conviction categorically failed to qualify as a “crime of violence” under the “force” clause found in 18 U.S.C. § 924(c)(3)(A). The motion was referred to a magistrate judge for a report and recommendation.

On October 30, 2017, United States Magistrate Judge White issued his Report and Recommendation that the district court deny Mr. Corker’s petition after finding that *Johnson* does not render Section 924(c)’s residual clause

unconstitutionally vague pursuant to *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).¹ App A-3. Mr. Corker filed timely objections, urging the district court not to follow *Ovalles* and to grant Mr. Corker a COA. The district court, however, entered an order on December 1, 2017, adopting the Magistrate Judge’s Report and Recommendation, and denying Mr. Corker a COA. App A-2.

Mr. Corker moved the Eleventh Circuit for a COA, arguing that a COA was warranted because reasonable jurists could debate whether his § 924(c) conviction should be vacated since § 924(c)’s residual clause was unconstitutionally vague in light of *Johnson v. United States*, 135 S.Ct. 2551 (2015), and attempted Hobbs Act robbery was not otherwise a “crime of violence.” The Eleventh Circuit denied Mr. Corker a COA holding that “[C]ircuit precedent forecloses Corker’s claim.” App A-1.

¹ In *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), the Eleventh Circuit held that the rule announced in *Samuel Johnson v. United States*, 135 S.Ct. 2551 (2015) does not apply to § 924(c)’s residual clause. Notably, on May 15, 2018, the Eleventh Circuit granted appellant’s petition for rehearing en banc. *Ovalles v. United States*, 17-10172 (11th Cir. May 15, 2018). Accordingly, the panel decision in *Ovalles* is vacated and withdrawn.

REASONS FOR GRANTING THE PETITION

I. Section 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).

This Court's decision in *Sessions v. Dimaya*, 584 U.S. ___, 2018 WL 1800371 (Apr. 17, 2018), is relevant to the issues in this petition for writ of certiorari. In *Dimaya*, this Court declared that 18 U.S.C. § 16(b) is unconstitutionally vague. As the Court noted in *Dimaya*, the invalidity of § 16(b) was compelled by a "straightforward application" of the "straightforward decision" in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Dimaya*, 138 S.Ct. at 1213. The Court in *Dimaya*, applying *Johnson*, found that 18 U.S.C. § 16(b), like ACCA violated *Johnson* because both § 16(b) and ACCA required courts to imagine an "ordinary case" and apply it against an uncertain level of risk. *Id.* at 1212-13. The Court also rejected the government's attempts to distinguish § 16(b) from ACCA, finding each reason "to be the proverbial distinction without a difference." *Id.* at 1212-18.

Dimaya fully vindicates Mr. Corker's argument in this question presented that *Johnson* renders 18 U.S.C. § 924(c)(3)(B) void for vagueness. Indeed, that provision is perfectly identical to § 16(b). Thus, this first question, "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)," is based on the same arguments that were made and accepted in the *Dimaya* case when this Court compared the residual clauses of ACCA and 18 U.S.C. § 16(b). As a result, *Dimaya* compels the

conclusion that the residual clause of § 924(c) is void for vagueness as well. Accordingly, this Court should grant Mr. Corker's petition for writ of certiorari.

II. Reasonable jurists could debate whether attempted Hobbs Act robbery, which may be committed by causing an individual to fear financial loss, has as an element the “use, attempted use, or threatened use of physical force against the person or property of another.”

The Hobbs Act statute, 18 U.S.C. § 1951, in pertinent part, defines the term “robbery” in subsection (b)(1) to mean:

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.

An “attempt” requires intent to commit the crime and a “substantial step” toward committing the crime. “A ‘substantial step’ is an important action leading up to committing of an offense....It must be an act that would normally result in committing the offense.” *See* 11th Cir. Pattern Jury Instr. 11 (2010).

In evaluating whether an offense qualifies as a “crime of violence” under the elements clause, sentencing courts must employ the categorical approach. *Descamps v. United States*, 133 S. Ct. 2275, 2283 (2013); *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2014). Under that approach, courts look to the elements of the predicate offense alone, without reference to the particular facts of the offense. *Id.* at 1331 (citing *United States v. Keelan*, 786 F.3d 865, 870-71 (11th Cir. 2015)). “In doing so, [courts] must presume that the conviction rested upon

[nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts' qualify as crimes of violence." *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)). While courts may use the "modified" categorical approach when the statute is "divisible" into separate, alternative elements, it may not do so for an "indivisible" statute. *Id.* (citing *Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016)). By "physical force," § 924(c) refers to "violent force—that is, force capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (defining the term under the Armed Career Criminal Act); *see also United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001) (requiring "destructive" or "violent" force in the context of 18 U.S.C. § 16, which is nearly identical to § 924(c)'s definition).

By its terms, Hobbs Act robbery under 18 U.S.C. § 1951 can be committed by putting one in fear of future injury to his person or property. And the Eleventh Circuit's pattern jury instructions make clear that Hobbs Act robbery is an indivisible offense. *See* 11th Cir. Pattern Jury Instr. 70.3 (2010) (listing as the second, indivisible element of the offense – without any bracketed alternatives – that the government must prove beyond a reasonable doubt that "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").

As a threshold matter, because Hobbs Act robbery can be accomplished by placing somebody in fear of injury to his *property*, it does not require the use of violent physical force in every case. Notably, "[t]he concept of 'property' under the

Hobbs Act is an expansive one” that includes “*intangible assets*, such as rights to solicit customers and to conduct a lawful business.” *United States v. Arena*, 180 F.3d 380, 392 (2d. Cir. 1999); *abrogated in part on other grounds by Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003) (emphasis added). *See also* 11th Cir. Pattern Jury Instruction 70.3 (“Property includes . . . intangible rights that are a source or element of income or wealth”); *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the Circuits “are unanimous in extending Hobbs Act to protect intangible as well as tangible property”). For example, Hobbs Act robbery can be committed via threats to cause a devaluation of some economic interest. *United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction when boss threatened “to slow down or stop construction projects unless his demands were met”). Such threats to economic interests are certainly *not* threats of “violent force.” And even where a Hobbs Act robbery is committed by “causing the victim to fear harm, either immediately or in the future,” the Eleventh Circuit pattern instruction states that the term “fear” “includes the fear of financial loss as well as fear of physical violence.”

Second, even if the “fear of injury” aspect of the statute *required* placing the victim in fear of “physical violence” and therefore, bodily injury – which it certainly does *not* in every case – federal cases interpreting the analogous “intimidation” element in the federal bank robbery statute (18 U.S.C. § 2113(a)) compel the conclusion that the statute is overbroad vis-a-vis an offense within § 924(c)’s

elements clause. Notably, federal bank robbery may be accomplished by “intimidation,” which means placing someone in fear of bodily harm. And notably, the standard is an objective, “reasonable person” test. *See United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (“intimidation” under federal bank robbery statute means “an ordinary person in the [victim’s position] reasonably could infer a threat of *bodily harm* from the defendant’s acts”) (emphasis added); *see also United States v. Pickar*, 616 F.3d 821, 825 (2010) (same); *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (same); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) (same).

“Intimidation” is satisfied under the bank robbery statute “whether or not the defendant actually intended the intimidation,” as long as “an ordinary person in the [victim’s] position reasonably could infer a threat of bodily harm from the defendant’s acts.” *Woodrup*, 86 F.3d at 36. Indeed, “[w]hether a particular act constitutes intimidation is viewed objectively, and a defendant can be convicted under [the federal bank robbery statute] even if he did not intend for an act to be intimidating.” *Kelley*, 412 F.3d at 1244 (internal citation omitted). *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not

appear to possess a weapon); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (same). In other words, a defendant may be found guilty of federal bank robbery even though he did not intend to put another in fear of injury. It is enough that the victim reasonably fears injury from the defendant's actions – whether or not the defendant actually *intended* to create that fear.

But the elements clause in § 924(c) requires that a defendant *intentionally* place another in fear of injury. *See Garcia v. Gonzalez*, 455 F.3d 465, 468 (4th Cir. 2006) (analyzing 18 U.S.C. § 16(a)'s identical elements clause, and holding that an offense can only constitute a “crime of violence” under the [elements] clause if it has an element that requires an “*intentional* employment of physical force [or threat of physical force]”). Due to the lack of this intent, federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. And for the same reason that federal bank robbery therefore squarely fails to qualify as a “crime of violence,” *see id.*, the “fear of injury” component of the Hobbs Act statute renders that statute as well categorically overbroad.

Finally, even if the statute required the causation or threat of physical injury to the person of another – which again, it does *not* – the statute would still not necessarily require the use or threatened use of any physical force, let alone violent physical force. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012) (evaluating Cal. Penal Code § 422(a) and reasoning that “[o]f course, a crime may *result* in death or serious injury without involving *use* of physical force”); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 194 (2d Cir. 2003) (noting that “there is a

difference between the causation of an injury . . . and an injury's causation by the use of physical force"); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (holding that statute criminalizing threatening to commit a crime which will result in death or great bodily injury to another person is not a crime of violence because it does not necessarily involve the use of force); *United States v. Perez-Vargas*, 414 F.3d 1282, 1287 (10th Cir. 2005) (explaining that although Colorado assault statute required causation of bodily injury, imposing injury does not "necessarily include the use or threatened use of 'physical force' as required by the Guidelines").

As the Second Circuit has explained, "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient" or someone who causes physical impairment by placing a tranquilizer in the victim's drink. *Chrzanoski*, 327 F.3d. at 195-96. Likewise, the Tenth Circuit has reasoned that "several examples [exist] of third degree assault that would not use or threaten the use of physical force: . . . intentionally placing a barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals." *Perez-Vargas*, 414 F.3d at 1286. The same is true of Hobbs Act robbery. It, too, can be accomplished without using or threatening to use physical force.

Several cases establish that one can attempt to commit Hobbs Act robbery without actually using, attempting to use, or threatening to use violent, physical force. *See, e.g., United States v. Gonzalez*, 322 F. App'x 963, 969 (11th Cir. 2009)

(upholding a conviction for attempted Hobbs Act robbery where the defendants merely traveled to location in preparation for committing a robbery); *United States v. Muratovic*, 719 F.3d 809, 815–16 (7th Cir. 2013) (upholding a conviction for attempted Hobbs Act robbery where defendant finalized plans, conducted surveillance, procured supplies, and arrived at destination point on the day set for the robbery); *United States v. Gonzalez*, 441 F. App'x 31, 36 (2d Cir. 2011) (upholding a conviction for attempted Hobbs Act robbery where defendant was casing a location and began preparations to commit a robbery); *United States v. Turner*, 501 F.3d 59, 68–69 (1st Cir. 2007) (upholding a conviction for attempted Hobbs Act robbery where a defendant and his compatriots planned a robbery, prepared, and gathered at designated assembly point); *United States v. Villegas*, 655 F.3d 662, 669 (7th Cir. 2011) (upholding a conviction for attempted Hobbs Act robbery where defendant arrived at prearranged location a mile away from robbery site, told his co-defendant that he had seen an armored truck, brought a license plate to use after the robbery, and discussed what clothing would be worn during the robbery); *United States v. Williams*, No. CRIM.A. 10-427-6, 2011 WL 2621005, at *1 (E.D. Pa. July 5, 2011) (upholding a conviction for attempted Hobbs Act robbery where a defendant participated in meetings, gathered documents, and armed himself).

In all of these cases, the evidence was sufficient for conviction even though none of the defendants actually used, attempted to use, or even threatened to use any physical force. By their nature, attempts to commit Hobbs Act robbery often

fail to reach the stage where a defendant must use actual, attempted, or threatened physical force. Therefore, it is clear that attempted Hobbs Act robbery also does not categorically qualify as a “crime of violence” under § 924(c)’s force clause.

Accordingly, reasonable jurists could debate whether attempted Hobbs Act robbery is a “crime of violence” under § 924(c)’s elements clause.

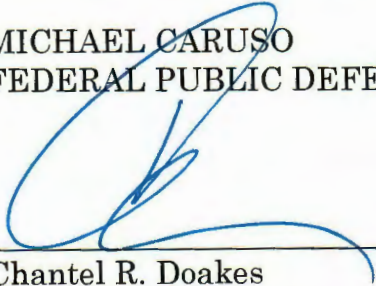
CONCLUSION

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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