No. 18 - _____

**In The**
**Supreme Court of the United States**

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SHERMAN WILLIAMS,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent.

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**On Petition for a Writ of Certiorari**
**To the United States Court of Appeals**
**For the Eleventh Circuit**

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I. Prisoners must file a petition with the Court of Appeals for permission to pursue a second or successive habeas or 2255 petition. Most such petitions are filed *pro se*. In the Eleventh Circuit, the petitioner must use a form and cannot add attachments to it. The form has room for between 40 and 100 words of argument. Unlike many other circuits, the Eleventh Circuit treats the thirty day deadline for resolving such petitions as mandatory. The government is not permitted to respond, and there is no avenue of appeal for a denial of such permission. Nevertheless, the Eleventh Circuit publishes many of its decisions ruling on these petitions, and those published rulings are binding on future merits panels deciding direct appeals and appeals of rulings on initial 2255 proceedings.

Decisions granting or denying petitions to file second or successive (SOS) habeas petitions should not be binding on merits panels pursuant to the prior-panel-precedent rule, because it violates due process and fundamental fairness, and, in contrast, decisions granting permission to file a second habeas

petition are not even binding on the district court below, which may conclude after full briefing and review that relief is not warranted.

The rule is applied very differently from the practice of other circuits. It is also controversial within the Circuit. See *In re Octavious Williams*, 898 F.3d 1098 (11th Cir. 2018) (Judges Wilson, Martin and Jill Pryor, concurring). This court should grant certiorari to determine the constitutionality of the Eleventh Circuit's prior-precedent rule as applied to orders on petitions to file SOS petitions because it effectively denies due process and access to the courts to those, like Mr. Williams, who raise initial habeas challenges or direct appeals and are prevented from being heard because these published SOS orders are treated as binding precedent.

II. The residual clause of 18 U.S.C. § 924(c) is void for vagueness. After *Dimaya*, the Fifth, Tenth and D.C. Circuits joined the Seventh Circuit in concluding that the residual clause of section 924(c) is void for vagueness. The Second Circuit has concluded it is not, and in so doing has abandoned the

categorical approach. The Eleventh Circuit's panel opinion concluding it is not void for vagueness has been vacated and is pending an *en banc* decision.

This court should grant certiorari to resolve the split among the circuits on this important question affecting hundreds of pending cases. Whether the residual clause is vague, and if so, whether the courts should abandon the categorical approach and engage in a case-by-case determination that ignores the plain language of the statute's text and provides defendants no notice of whether their conduct violates the statute, and creates the risk of inconsistent verdicts in similar cases and the development of a jury-determined common law of risk is an issue of utmost importance that should be resolved to provide clarity to courts and litigants.

III. Federal armed bank robbery is not a crime of violence as defined in 18 U.S.C. § 924(c)(3)(A), because it can be accomplished in various ways, including by violence, intimidation or extortion, and these alternatives are means of committing the same offense and not elements of distinct crimes.

Furthermore, the intimidation need not even be intentional, and thus, armed bank robbery can be committed without the necessary *mens rea* required for an intentional crime of violence. Because armed bank robbery is categorically not a crime of violence, it cannot serve as a predicate offense to support a conviction under section 924(c). This conclusion is required by the categorical approach set forth by this Court in *Mathis v. United States*, 579 U.S. __, 136 S.Ct. 2243 (2016). This Court should grant certiorari to resolve this important question, because every circuit to have addressed the question thus far has erred in concluding that bank robbery does qualify as a crime of violence.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Sherman Williams respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

## OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals denying the petition for rehearing *en banc*, Pet. App. 1a, is not reported. The panel decision is reported at 709 Fed. App'x 676 (11th Cir. 2018).

## JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on January 23, 2018. The Court of Appeals denied the petition for *en banc* review on May 28, 2018. This Court granted an extension of time to file the petition for writ of certiorari until September 18, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1), which permits review of criminal and civil cases from the courts of appeals.

## STATUTORY PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause states:

> . . . nor be deprived of life, liberty, or property, without due process of law . .

U.S. Const. amend. V

Section 924(c)(3) of Title 18 provides that:

> **(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.A. § 924(c)(3).

Section 2244 of Title 28 provides:

> **(a)** No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
> **(b)(1)** A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
> **(2)** A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

**(3)(A)** Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
**(B)** A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
**(C)** The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
**(D)** The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
**(E)** The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.
**(4)** A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.
**(c)** In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

28 U.S.C.A. § 2244(a) – (c).

Rule 22-3(a) of the Eleventh Circuit Rules, provides that:

> (a) Form. An applicant seeking leave to file a second or successive habeas corpus petition or motion to vacate, set aside or correct sentence should use the appropriate form provided by the clerk of this court. In a death sentence case, the use of the form is optional.

11th Cir. Rule 22-3(a).[1]

## STATEMENT OF FACTS

In 2009, Mr. Williams and a co-defendant were indicted on one count of armed bank robbery, in violation of sections 2 and 2113(a) and (d) of Title 18, and one count of brandishing a handgun during a crime of violence, in violation of section 924(c) of Title 18. *Id.* Mr. Williams went to trial and was convicted of both counts of the indictment. Doc. 57. He was sentenced to a total of 219 months imprisonment, which included 135 months on the bank robbery count and a consecutive 84 months for the 924(c) count. Doc. 66.

After two appeals and re-sentencings, Mr. Williams's ultimate sentence imposed was 192 months, including 108 months for the bank

[1] Available at: http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_AUG18.pdf.

robbery count and 84 months for the 924(c) count. Docs. 152, 153. That sentence was affirmed by the Eleventh Circuit. Doc. 168.

Mr. Williams subsequently filed a timely 2255 petition that was denied by the district court without a hearing. Mr. Williams timely appealed and moved for a COA from the Eleventh Circuit. After *Johnson* was decided, he supplemented his request for a COA, raising a challenge to his 924(c) conviction on *Johnson* grounds. The Court of Appeals granted the COA and undersigned counsel was appointed for the appeal.

A panel of the Eleventh Circuit denied relief on his 924(c) claim on January 23, 2018. In denying relief, the panel found that the residual clause of section 924(c) is not void for vagueness. In denying relief on the elements clause portion of the claim, it also cited as binding precedent a published opinion disposing of a petition to file a second or successive habeas petition (SOS petition). *Williams v. United States*, 709 Fed. Appx. 676 (11th Cir. 2018) (citing *In re Hines*, 824 F.3d 1334 (11th Cir. 2016)).

Mr. Williams timely sought *en banc* review, challenging the viability of the residual clause of section 924(c) and the applicability of the elements clause of section 924(c) to armed bank robbery. He also raised a due process challenge to the Eleventh Circuit's practice of publishing, as binding

precedent, unreviewable opinions denying petitions to file second or successive habeas petitions under 28 U.S.C. § 2255.

The petition for rehearing *en banc* was denied and this petition followed.

## REASONS FOR GRANTING THE PETITION

### I. The Eleventh Circuit's Prior-Precedent Rule, When Applied to Orders Denying SOS Petitions, Violates Due Process and Fundamental Fairness to Merits Litigants

At its core, the right to due process reflects a fundamental value in our American constitutional system. *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780, 784 (1971). Due process is the cornerstone of that system. And "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. *Boddie*, 401 U.S. at 377.

As this Court has "emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433, 102 S. Ct. 1148, 1156 (1982). But through its rules, the Eleventh Circuit denies the meaningful right to be heard and to have a case judged on the merits when

it publishes decisions denying petitions for second or successive (SOS) habeas petitions and binds all future merits panels with that unreviewable holding. *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018) (making clear that such orders "are binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks").

The SOS decision-making process is not conducive to making well-reasoned, precedential decisions. Most petitions are filed *pro se*, without the benefit of counsel. And, as Chief Judge Carnes of the Eleventh Circuit has said:

> When we make that prima facie decision we do so based only on the petitioner's submission. We do not hear from the government. We usually do not have access to the whole record. And we often do not have the time necessary to decide anything beyond the prima facie question because we must comply with the statutory deadline. *See* § 2244(b)(3)(D) (requiring a decision within 30 days after the motion is filed). Even if we had submissions from both sides, had the whole record before us, and had time to examine it and reach a considered decision on whether the new claim actually can be squeezed within the narrow exceptions of § 2244(b)(2), the statute does not allow us to make that decision at the permission to proceed stage. It restricts us to deciding whether the petitioner has made out a prima facie case of compliance with the § 2244(b) requirements.

*Jordan v. Sec'y Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007).

It is for this reason that SOS orders granting permission to file have no binding effect on district courts, and further proceedings in the district court are *de novo*. *Id*. "At this early stage we are authorized only to 'certif[y]' if the applicant made 'a prima facie showing'... Deciding anything more in this context is dangerous." *In re McCall*, 826 F.3d 1308, 1311 (11th Cir. 2016) (Martin, J., concurring).

Nevertheless, in the Eleventh Circuit, what is good for the goose is not so good for the gander. Whereas a finding that there is a *prima facie* case for relief on an SOS petition does not bind a district court that will have the benefit of full briefing and a government response, a published order denying permission binds future merits panels of the Circuit on the question of law. *United States v. St. Hubert*, 883 F.3d 1319, 1328-29(11th Cir. 2018); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015).

This prevents full review by a merits panel with briefing of all arguments in favor of both sides of the question with the "guiding hand of counsel." *Luis v. United States*, __ U.S. __, 136 S.Ct. 1083, 1088 (2016). Indeed, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 797 (1963). Furthermore, the SOS decision that

binds future merits panels is also unreviewable. *In re Octavious Williams*, 898 F.3d 1098, 1102 (11th Cir. 2018) (Wilson, J., concurring).

In the wake of this Court's decisions in *Johnson* and *Dimaya*, hundreds of SOS petitions were filed in each Circuit. In the Eleventh Circuit, they must be filed on the mandatory form. *See* 11th Cir. R. 22-3(a) (noting the form should be used and is only optional in a death penalty case). The form provides space for as few as 40 words of argument and no more than 100. *See In re Octavious Williams*, 898 F.3d 1098, 1100 and n. 3 (11th Cir. 2018) (Wilson, J. concurring) (noting 43 and 98 words respectively squeezed onto two SOS petition forms where the panel published its decision).

Many, if not most, petitions were filed by *pro se* prisoners. And, in the Eleventh Circuit, the applications had to be decided within a 30-day window. *See, e.g., In re McCall*, 826 F.3d at 1311 (Martin, J., concurring) (Orders "are typically based on nothing more than a form filled out by a prisoner, with no involvement from a lawyer.").

The Eleventh Circuit's SOS process also has been criticized by judges within the Circuit, troubled by many SOS rulings. *See, e.g., In re William Hunt*, 835 F.3d 1277, 1284 (11th Cir. 2016)(Jill Pryor, J., concurring, joined by Wilson and Rosenbaum, JJ.) ("Since the Supreme Court decided in *Johnson* that this

language is unconstitutionally vague, we have repeatedly misinterpreted and misapplied that decision . . . . In throwing up these sorts of barriers [to successive § 2255 motions], this Court consistently got it wrong.")

Moreover, the Eleventh Circuit's rules are very different from their sister circuits'. As Judge Wilson summarized:

> all of our sister circuits that have definitively spoken on the matter do *not* consider themselves constrained by the thirty-day time limit for deciding a second or successive petition. We have once tried to so hold, but—in what appears to be the only time a panel order has been taken en banc in this Circuit (via an ad hoc process)—we reversed ourselves. *See In re Johnson*, 814 F.3d 1259, 1262 (11th Cir. 2016) (per curiam), *vacated*, 815 F.3d 733 (11th Cir. 2016) (en banc). In line with this, judges in this Circuit consider themselves bound by the thirty-day limit, and we dispose of "virtually every one of the thousands" of applications under §§ 2244 and 2255 "(at least 99.9% of them)" within thirty days. *See also In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014) ("[T]his Court necessarily must apply § 2244(b)(2) under a tight time limit in all cases, since the statute expressly requires us to resolve this application within 30 days, *no matter the case*." (emphasis added) ). This extremely compressed timeline can lead to odd results that we would likely not accept in a merits appeal. *See, e.g.*, *In re Sapp*, 827 F.3d 1334 (11th Cir. 2016) (per curiam) (published, unsigned panel order followed by a three-judge special concurrence); *see also, e.g.*, *In re Armstrong*, No. 18-10948 (11th Cir. Apr. 3, 2018) (per curiam) (unsigned panel order followed by three single-judge special concurrences).
>
> Third, even in non-death cases, many other circuits often consider briefing from the government before issuing a published order; some also entertain oral argument from both parties. We never grant oral argument in non-death second or

> successive petitions. And, having reviewed the thirty-nine non-death published second or successive orders for which docket information is readily available, I was unable to locate *any* docket on which the United States filed an individualized brief prior to the published order's issuance.

*In re Williams*, 898 F.3d at 1102–04.

Not only does the Eleventh Circuit follow this stringent procedure with no opportunity for reasoned briefing, largely *pro se* litigants, and no opportunity for review, it also binds future merits panels at a rate not seen in any other circuit.

> perhaps most importantly, other circuits simply do not publish panel orders with anywhere near the frequency that we do. In the last five years, we have published forty-five second or successive panel orders, while all of the other circuits combined have published eighty.

*Id*., at 1102.

In short:

> [P]rocedurally speaking, we have the worst of three worlds in this Circuit. We publish the most orders; we adhere to a tight timeline that the other circuits have disclaimed; and we, unlike most circuits, do not ever hear from the government before making our decision. But, despite these shortcomings, published panel orders not only now bind all panels of this court—they are also unreviewable.

*In re Williams*, 898 F.3d at 1104.

As a result of the Eleventh Circuit's own rules and limitations, imposed by no other circuit, the panel here denied Mr. Williams due process and meaningful review of his case. The court addressed his constitutional and statutory challenge to the validity of his armed bank robbery conviction with the conclusory holding that armed bank robbery "clearly meets the requirement" of a 924(c) predicate with a single cite to *In re Hines*, 824 F.3d 1334 (11th Cir. 2016). And *Hines* dealt with the issue with a single sentence.

> And a conviction for armed bank robbery clearly meets the requirement for an underlying felony offense, as set forth in §924(c)(3)(A), which requires the underlying offense to include as an element "the use, attempted use, or threatened use of physical force against the person or property of another."

*Id*., at 1337. Mr. Hines, of course, had no ability to seek *en banc* review or to appeal to this Court for a petition for writ of certiorari. Instead, a one sentence ruling on his under 100 word, *pro se* argument doomed all subsequent claims by any other litigant within the Circuit.

Mr. Williams was denied due process, access to the courts and meaningful review because this conclusory holding, despite the limitations inherent in rulings on SOS petitions, bars all future panels of the circuit from examining the merits of the issue. Because the Eleventh Circuit's prior-precedent rule, as applied to published orders on SOS petitions is so

different in practice than that of the other circuits, this Court should grant certiorari to resolve the question of whether publishing, as binding precedent, unreviewable orders on largely uncounseled petitions for second or successive habeas petitions, on forms limiting argument to 100 words or less, violates the due process rights of defendants seeking full merits review on direct appeal or initial habeas review.

## II. The Residual Clause of 18 U.S.C. § 924(c) is Void for Vagueness. This Court Should Accept Certiorari to Resolve the Split Among the Circuits and Reject the Second Circuit's Abandonment of the Categorical Approach

After this Court's decision in *Dimaya*, the Circuits have split on whether the residual clause of 924(c) is void for vagueness. The government has made a 180 degree turn and now argues to the Courts of Appeal that the categorical approach should not apply to analysis of the residual clause of section 924(c). Only the Second Circuit has accepted the government's about-face.[2]

[2] Before *Dimaya*, the Eleventh Circuit found the residual clause was not void for vagueness on the basis of textual differences between § 924(c)'s residual clause and the residual clause in the Armed Career Criminal Act (ACCA), § 924(e), an analysis that was rejected in *Dimaya*. *Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017), *vacated and reh'g en banc granted*, 889 F.3d 1259 (11th Cir. 2018). That case remains pending, but the government has argued to the *en banc* court that the categorical approach should not apply.

The other four circuits to address the question have rejected this case by case approach because it contradicts the plain language of the statute, ignores the application of the categorical approach in *Dimaya*, and the historical practice in the Circuits of analyzing both 16(b) and 924(c)(3)(B) similarly. Rejecting the categorical approach also creates different constitutional problems, both depriving a defendant of notice of what does and does not constitute a crime of violence, and inevitably leading to inconsistent verdicts on nearly identical facts. This Court should accept certiorari to resolve this important constitutional question to provide certainty to the hundreds of criminal defendants currently charged and who will be charged with a 924(c) offense in the future and to re-affirm that the categorical approach is the only path that avoids constitutional infirmity.

In *Barrett*, the Second Circuit accepted the government's abandonment of the categorical approach and concluded that a jury can make the necessary findings about the nature of the predicate offense and the degree of risk it poses. *United States v. Barrett*,__ F.3d __, 2018 WL 4288566, at *9 (2nd Cir. September 10, 2018). The court did so despite acknowledging that *Dimaya* pointed out that the categorical approach was required to analyze the phrase

"by its nature", common to the residual clauses of both § 16(b) and § 924(c)(3)(B). *Dimaya*, 138 S.Ct., at 1217-18.

The court glossed over the constitutional problems raised by lack of notice to defendants and inconsistent verdicts. *Barrett*, 2018 WL 4288566, at *13. The court also dismissed the effect of *Dimaya* by noting that, in the context of that decision, this Court was analyzing § 16(b)'s application to prior convictions, a concern not present in § 924(c) cases. However, nothing in *Dimaya* limited its holding to the application of § 16(b) to prior convictions or in the context of immigration proceedings. To the contrary, § 16(b) is a definitional statute, affecting many aspects of the criminal code, including current offenses. *See Dimaya*, 138 S. Ct., at 1241 (Roberts, J., dissenting) (describing various criminal code sections affected by *Dimaya*'s holding, including racketeering and money laundering).

The government's argument and the Second Circuit's analysis is flawed and raises constitutional challenges of its own. This Court should grant certiorari to reject the government's new abandonment of the categorical approach and confirm that the Fifth, Seventh, Tenth and D.C. Circuits have adopted the constitutionally correct view in concluding that the residual clause of section 924(c) is void for vagueness. *United States v.*

*Davis*, _ F.3d __, 2018 WL 4268432 (5th Cir. Sept. 7, 2018); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016).

These four circuits have all noted that the language of § 16(b) and §924(c)(3)(b) are "materially identical." *Eshetu*, 898 F.3d at 37. *See also Davis*, 2018 WL 4268432, at *3; *Cardena*, 842 F.3d at 996. The circuits also have historically interpreted them similarly. *Salas*, 889 F.3d at 685 ("'[W]e have previously treated precedent respecting one as controlling analysis of the other.'"). Thus they conclude correctly that the residual clause of § 924(c) is as problematic and void for vagueness as § 16(b).

These circuits also reject abandoning the categorical approach.

> *Dimaya* nowise calls into question *Kennedy*'s requirement of a categorical approach. To the contrary, a plurality of the High Court concluded that section 16(b)—which, again, is textually parallel with section 924(c)(3)(B)—is "[b]est read" to "demand[ ] a categorical approach" "*even if* that approach [cannot] in the end satisfy constitutional standards." *Dimaya*, 138 S.Ct. at 1217 (plurality opinion) (emphasis added).

*United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018).

And the Tenth Circuit explicitly rejected the government's argument for case-by-case determinations in *Salas,* arguing that it makes no difference

that § 924(c) deals with a current offense requiring a jury determination of guilt beyond a reasonable doubt whereas sometimes § 16(b) does not.

> This is a distinction without a difference, though, and is incorrect to the extent it suggests that whether an offense is a crime of violence depends on the defendant's specific conduct. As an initial matter, a law can be unconstitutionally vague even if it is a criminal offense that requires a determination of guilt beyond a reasonable doubt. *E.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (invalidating a vagrancy ordinance). Additionally, "[w]hether a crime fits the § 924(c) definition of a 'crime of violence' is a question of law," *United States v. Morgan*, 748 F.3d 1024, 1034 (10th Cir. 2014), and we employ the categorical approach to § 924(c)(3)(B), meaning we determine whether an offense is a crime of violence "without inquiring into the specific conduct of this particular offender," *Serafin*, 562 F.3d at 1107–08 (quoting *United States v. West*, 550 F.3d 952, 957 (10th Cir. 2008) ). Consequently, § 924(c)(3)(B), like § 16(b), "requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." *Dimaya*, 138 S.Ct. at 1207 (quoting *James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), *overruled on other grounds by Johnson*, 135 S.Ct. 2551). Regardless of whether a jury must find the defendant guilty of § 924(c) beyond a reasonable doubt, then, this "ordinary-case requirement and an ill-defined risk threshold" combines "in the same constitutionally problematic way" as § 16(b) and "necessarily 'devolv[es] into guesswork and intuition,' invit[es] arbitrary enforcement, and fail[s] to provide fair notice." Id. at 1207, 1223 (quoting *Johnson*, 135 S.Ct. at 2559).

*Salas*, 889 F.3d at 686.

And of course, the statute's text requires a categorical approach because a court must make a determination of whether the offense poses a substantial risk "by its nature". *Dimaya*, 138 S.Ct. at 1217.

> An offense's "nature" means its "normal and characteristic quality." Webster's Third New International Dictionary 1507 (2002). So § 16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is *missing* from § 16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See *Descamps,* 570 U.S., at 267, 133 S.Ct. 2276. If Congress had wanted judges to look into a felon's actual conduct, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Id.,* at 267–268, 133 S.Ct. 2276. The upshot of all this textual evidence is that § 16's residual clause—like ACCA's, except still more plainly—has no "plausible" fact-based reading. *Johnson,* 576 U.S., at ––––, 135 S.Ct., at 2562.

*Dimaya*, 138 S. Ct. at 1217–18.

The text requires a categorical approach. The statutes are materially identical in wording and analysis. Section 924(c)'s residual clause should be found void for vagueness. The government's new-found zeal for a case-by-case analysis should be rejected because it would require rejection of long-standing precedent requiring application of the categorical approach. It would also create further constitutional problems with notice to defendants

about what is and is not a crime of violence, because the only way to know would be to go to trial and have a jury decide. *Dimaya*, 138 S.Ct., at 1212 (finding vagueness doctrine requires that "ordinary people have 'fair notice' of the conduct the statute proscribes"). And what is a court of appeals to do when two defendants in different cases engage in identical attempts or conspiracies, and one jury convicts and the other does not? How is the trial court to instruct on how to decide whether the offense "by its nature" poses a substantial risk of harm? How is the magistrate judge to decide if the § 924(c) offense is subject to a presumption against bond? 18 U.S.C. § 3142(e)(3)(B) (including § 924(c) offenses in category of those where presumption against bond applies).

And the government knows the text dictates a categorical approach and the residual clause of § 924(c) is as void as those in § 924(e) and § 16(b). The Solicitor General conceded as much during *Johnson*, that the language at issue in *Johnson* and here pose the same problem. He acknowledged that the definitions of a "crime of violence" in both §924(c)(3)(B) and §16(b) are identical, stating:

> Although Section 16 refers to the risk that force will be used rather than that injury will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like the

> ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters.

*Johnson v. United States*, S. Ct. No. 13-7120, Supp. Br. of Resp. at 2223, *available at* 2015 WL 1284964)(Mar. 30, 2015).

Courts regularly equate these three clauses – §924(c)(3)(B), §16(b), and the ACCA residual clause. *Chambers v. United States*, 555 U.S. 122, 133 n.2 (2009) (citing ACCA and §16(b) cases and noting that §16(b) "closely resembles ACCA's residual clause")(Alito, J., concurring); *United States v. Sanchez-Espinal*, 762 F.3d 425, 432 (5th Cir. 2014)("we have previously looked to the ACCA in deciding whether offenses are crimes of violence under §16(b)"); *Roberts v. Holder*, 745 F.3d 928, 93031 (8th Cir. 2014); *United States v. Ayala*, 601 F.3d 256, 267 (4th Cir. 2010) (relying on an ACCA case to interpret the definition of a crime of violence under §924(c)(3)(B)); *Jimenez-Gonzales v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008)(noting that the Supreme Court's analyses of the ACCA and §16(b) "perfectly mirrored" each other).

So, the text demands a categorical approach to deciding how much risk is posed by the ordinary case. Therefore, the residual clause of § 924(c) is just as vague as those of in § 924(e) and § 16(b). A case-by-case analysis is

unworkable and poses the same notice problem as the categorical approach does. Mr. Williams respectfully requests that this Court grant certiorari to resolve the split among the circuits on this issue of critical importance to so many.

## III. Bank Robbery is Not a Crime of Violence Under the Elements Clause

Because the residual clause in §924(c)(3)(B) is void for vagueness, a predicate conviction can only qualify as a "crime of violence" if it satisfies the elements clause in §924(c)(3)(A). That is, if it has as an element the "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Federal armed bank robbery, however, is not a "crime of violence" under §924(c)'s elements clause. This conclusion follows from the required categorical approach.

Whether an offense constitutes a crime of violence must be decided utilizing the categorical approach, which examines the elements of the offense, not the facts. The categorical framework derives from the Supreme Court's decisions in *Descamps v. United States*, 133 S. Ct. 2275 (2013), and *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

Courts must "look no further than the statute and judgment of conviction." *United States v. Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014)(citation omitted). And they "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2011) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

*Mathis* makes clear that the categorical approach addresses only the statute's elements, not the alternative means by which those elements might be met. Thus, if a statute contains alternative means by which a defendant might satisfy those elements, those means are not relevant – only the elements are considered. To illustrate its point, the *Mathis* Court used an example of "a statute [that] requires use of a "deadly weapon" as an element of a crime and further provides that the use of a 'knife, gun, bat, or similar weapons' would all qualify." *Id*. at 2249.

As in *Mathis*, the federal bank robbery statute presents "diverse means" or "various factual ways of committing some component of the offense", because the plain text of the statute is "drafted to offer illustrative examples." §2113(a), (d) ("whoever, in committing, or attempting to commit, any offense defined in subsection (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 . . . ."] "assaults any person, **or** puts in jeopardy the life of any person by the use of a dangerous weapon **or** device" . . . .); 11th Cir. Pattern Jury Instr. 76.3 (2010) (alternative means to satisfy third element as "assaulted someone" **or** "put someone's life in jeopardy by using a dangerous weapon or device").

Using a categorical analysis, the armed bank robbery statute cannot qualify as a "crime of violence" because the crime is overbroad, covering conduct that falls outside the elements of use, attempted use or threatened use of physical force. Armed bank robbery incorporates §2113(a) (unarmed bank robbery) as one element. This incorporation of elements prevents it from qualifying as a crime of violence. The armed crime, just like the unarmed version, can be accomplished by "intimidation" or by "extortion" which do not require the use, attempted use, or threatened use of "*violent* force." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

Additionally, because "intimidation" and "extortion" under the bank robbery statute can be accomplished without an *intentional* threat of physical force, it fails to satisfy the *intentional mens rea* required under the elements clause.

The plain language of the bank robbery statute demonstrates it can be committed not only by intimidation, but also by extortionate means, which merely requires the threat of economic harm. *See* §2113(d) (requiring proof of subsection (a), which requires "[w]hoever, 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 . . ."). It is well settled that extortion can be committed by putting the victim in "[f]ear of economic harm." *United States v. Vallejo*, 297 F.3d 1154, 1165 (11th Cir. 2002). No threat of any physical force is required. *Id.;* Sand and Siffert, 3-50 Modern Federal Jury Instructions - Criminal §50-12 ("[t]he use or threat of violence does not have to be directed at the person whose property is taken. The use of threat of force or violence might be aimed at a third person, or at causing economic rather than physical injury.").

Thus, bank robbery can be accomplished by a phone caller who threatens the reputation of a bank or to vandalize the bank if the banker does not deposit money into his account. *United States v. Golay*, 560 F.2d 866, 869 n.2 (8th Cir. 1977). Such conduct does not require the use, attempted use, or threat of violent physical force, let alone any physical force against a person necessary to qualify as a "crime of violence" under the elements clause of

§924(c). Because "the full range of conduct" covered by the bank robbery statute does not require "violent force," it cannot qualify as a "crime of violence" under §924(c)(3)'s elements clause. And it makes no difference that the possibility of violating the bank robbery statute without the use or threat of violent physical force may be slim. Because the possibility exists, a court cannot find, categorically, that bank robbery is a "crime of violence."

Further, "intimidation" as defined under the bank robbery statute does not constitute a "crime of violence" under the elements/force clause because it does not require an intentional threat of physical force.

The term "physical force" in §924(c)'s elements clause has the meaning given by the Supreme Court in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), which relied upon and extended *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which the Court had previously construed the elements clause in §16(a), a "very similar" provision to § 924(e)(2)(B)(i). The term "use" in §16(a)'s elements clause requires an "active employment" of force, which "most naturally" requires a high degree of intent." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004). Indeed, a crime that does not need to be committed intentionally does not "have as an element the use of physical force." *United States v.*

*Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010) (citing and following *Leocal*). *See also Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006).

All circuits have held the same. *Palomino Garcia*, 606 F.3d at 1335-36; *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127-32 (9th Cir. 2006)(en banc); *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005); *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001).

The "intimidation" element of federal bank robbery is missing this necessary intentional *mens rea*. "Whether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under [federal bank robbery] even if he did not intend for an act to be intimidating." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). 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. Due to the lack of this intent, unarmed federal bank robbery criminalizes conduct that does not require an intentional threat of physical force. Therefore, unarmed bank robbery fails to qualify as a "crime of violence."

To prove armed bank robbery under §2113(d), the government must prove the robbery itself, and that during the commission of the robbery, the defendant "either assaulted another person by the use of a dangerous weapon or device, or the defendant put another person's life in jeopardy by the use of a dangerous weapon or device." *See* Modern Federal Jury Instructions, 53-14. "Use of a dangerous weapon" means "brandishing, displaying or even referring to the weapon." *Id*. The government may prove either that the defendant assaulted another person by the use of a dangerous weapon or device, or that he put another person's life in jeopardy by the use of a dangerous weapon or device; it need not prove both. *Id.* Neither of these means under §2113(d) converts a bank robbery into a "crime of violence" under the elements clause of §924(c)(3)(A).

Specifically, assaulting another person by the use of a dangerous weapon does not require the threat or use of violent physical force.

Additionally, putting another person's life in jeopardy by the use of a dangerous weapon or device does not require (1) an intentional threat, (2) of violent physical force.

A defendant can place someone's life in jeopardy under §2113(d) without any *intent* to threaten or use violent physical force. *Dean v. United States*, 556 U.S. 568, 577 (2008)(accidental discharge sufficient to sustain 10 year 924(c) conviction). A defendant also can violate this provision merely by carrying a gun during the bank robbery because "he feels secure with it," even though he has no intent to intimidate. *United States v. Martinez- Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989). No nexus is required between the weapon and the intimidation required under §2113(a). He "need not brandish" the weapon "in a threatening manner" or "make assaultive use of the device." *Id.*; *see also United States v. Bennett*, 675 F.2d 596, 599 (4th Cir. 1982) ("A weapon openly exhibited by a robber during a robbery" without more is sufficient to constitute a violation under §2113(d)). Therefore, armed robbery under §2113(d) fails to satisfy the intentional *mens rea* requirement of *Leocal* and *Palomino Garcia*.

For these reasons, armed bank robbery is not a predicate crime of violence. Nevertheless, the circuits continue to gloss over the categorical

approach and summarily conclude that bank robbery and its armed companion are crimes of violence. *See e.g., In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (deciding issue in one sentence); *Holder v. United States*, 836 F.3d 891, 892 (8th Cir. 2016) (denying SOS petition and concluding in one sentence that armed bank robbery qualifies as a crime of violence, with dissent arguing real question exists regarding whether bank robbery should qualify on the *mens rea* issue); *United States v. McNeal*, 818 F.3d 141, 152-53 (4th Cir. 2016) (conceding that force and intimidation are means of committing same element, but concluding that intimidation must involve the threat of force and relying on pre-*Curtis Johnson* cases without explaining why intimidation must involve the threat of violent physical force).

Indeed, reasonable jurists can and do disagree on this important question. Dissenting in *Holder*, Judge Melloy noted the issue was worthy of more searching review, particularly on the issue of the *mens rea* requirement. He noted that a knowing and intentional *mens rea* is not required for either use of force or intimidation in the Eighth Circuit, just as it is not required for intimidation in the Eleventh Circuit.

And, citing *Leocal*, he argued that the language of section 924(c)(3)(A), "[t]he key phrase ... the 'use ... of physical force against the person or

property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." (quoting 18 U.S.C. § 16(b)). " *Holder*, 836 F.3d at 893 (Melloy, J. , dissenting). Nevertheless, the Eighth Circuit, like the Eleventh, the Fourth and others, summarily denied relief without engaging in any analysis of the issue.

Because armed bank robbery and its unarmed counterpart do not meet the elements of a crime of violence, and the circuits have erroneously concluded otherwise, subjecting hundreds of defendants to illegal consecutive sentences, the petition should be granted to resolve the important question of whether armed bank robbery does or does not qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A).

## CONCLUSION

Wherefore, Mr. Williams respectfully requests that this Court grant the writ.

This 18th day of September, 2018.

Respectfully Submitted,

*/s/ Nicole M. Kaplan*

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