No. 18 - 6172

In The
Supreme Court of the United States

SHERMAN WILLIAMS,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Eleventh Circuit's prior-precedent rule, as applied to orders on petitions to file SOS petitions, 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. Whether the residual clause of 18 U.S.C. § 924(c) 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.

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

The government does not engage with the merits of Mr. Williams's claim that the Eleventh Circuit's prior-precedent rule, as applied to orders denying SOS petitions, violates due process and fundamental fairness. Indeed, the government cannot, as the flaws in the Eleventh Circuit's practice are clear, given the number of times such rulings have been wrong. *See, e.g., In re William Hunt*, 835 F.3d 1277, 1284-85 (11th Cir. 2016)(Jill Pryor, J., concurring) ("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.")

Instead, the government raises two arguments. First, it claims that this Court should also not engage with the issue because the Eleventh Circuit did not address it below. Gov't Brief, at 9. Second, the government argues that

no court has held that the Eleventh Circuit's rules are problematic, and courts have broad discretion to fashion their own procedural rules, so all is well. *Id*.

It is true that the *en banc* Eleventh Circuit did not address this issue on the merits in this case. However, it merely denied relief as to all issues in a one sentence order. And, contrary to the government's argument, this Court would not be acting as the court of "first view." Gov't Brief, at 9 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005)). In *United States v. St. Hubert*, the Eleventh Circuit expressly considered and rejected a challenge to that court's application of rulings on SOS petitions as binding precedent on all merits panels. 909 F.3d 335, 345-46 (11th Cir. 2018).

> Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, "unless and until [it is] overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *See Archer*, 531 F.3d at 1352.

United States v. St. Hubert, 909 F.3d 335, 346 (11th Cir. 2018).

The Eleventh Circuit has considered this issue on the merits and affirmed its own procedural rule. But it cannot be the case that its rule is

wholly unreviewable. Yet that is what the government's circular argument suggests. It argues that courts have broad discretion to construct their own procedural rules, therefore, the rule is valid as an exercise of that discretion.

But that broad discretion is not unfettered discretion. And the Eleventh Circuit's rules regarding SOS petitions as binding precedent deprive litigants of what the Due Process Clause requires: "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).

If the Circuit's rule remains in place, the only remedy for erroneous decisions is for a merits litigant to bring the issue to the *en banc* court, or this Court. And the grant of *en banc* hearing or a writ of certiorari are both extraordinary remedies, rarely granted. But the Circuit's SOS rules will generate additional litigation before this Court and the *en banc* circuit as that will be the only avenue to be heard with the benefit of counsel and more than 100 words of argument.

The flaws in the Eleventh Circuit's SOS decision-making process, set forth in Mr. Williams's initial brief, are well-documented by its own judges in its own opinions. Yet the rule persists. This Court should grant relief so that Mr. Williams and other litigants after him will not be deprived of their

due process right to a fair hearing under the outlier procedural rules of one circuit.

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

This Court has accepted certiorari in *United States v. Davis*, 18-431 to resolve the question of whether the residual clause of section 924(c) is void for vagueness. Mr. Williams submits that the respondent in *Davis* and the Fifth Circuit, 903 F.3d 483 (5th Cir. 2018), have the better argument and that the government's recent conversion to a conduct-based approach should be rejected as it raises serious constitutional questions of its own.

Rejecting the categorical approach deprives a defendant of notice of what does and does not constitute a crime of violence, and inevitably leads to inconsistent verdicts on nearly identical facts. Furthermore, whether a crime is a crime of violence is relevant to bond determinations under the Bail Reform Act. *See* 18 U.S.C. § 3142(e)(3)(B) and (f)(1)(A) (including crimes of violence in categories of cases in which presumption against bond applies).

Mr. Williams requests that this Court grant certiorari to reject the Second and Eleventh Circuit's abandonment of the categorical approach in

United States v. Barrett, 903 F.3d 166 (2nd Cir. 2018) and *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (*en banc*). Instead, Mr. Williams urges the Court to adopt the reasoning of the Fifth, Seventh, Tenth and D.C. Circuits, which adopted the constitutionally correct view in concluding that the residual clause of section 924(c) is void for vagueness. *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), cert. granted, No. 18-431, (U.S. Jan. 4, 2019); *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 circuits reject abandoning the categorical approach. And 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." *Sessions v. Dimaya*, __ U.S. __, 138 S.Ct. 1204, 1217 (2018). And abandoning the categorical approach would create constitutional problems with notice 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 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).

It is worth highlighting again that the Solicitor General conceded the point 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).

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). 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, and because bank robbery can be committed by intimidation.

The government's response does not address the intimidation argument at all. Intimidation does not necessarily involve the intentional, threatened use of physical force. Indeed, intimidation is judged from the perspective of the reasonable observer, and is wholly separate from the defendant's intent and in some cases, actions. As Justice Gorsuch has noted, "fear of force", i.e., intimidation, from the victim's point of view, is not the same as an intentional threat of force, from the defendant's point of view. Transcript of Argument, *Stokeling v. United States*, No. 17-5554, at 39.[1]

[1] The intimidation discussion appears at pages 37 – 41. Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-5554_7648.pdf

Similarly, Judge Jill Pryor of the Eleventh Circuit has raised the same distinction as problematic for federal crimes that can be committed by intimidation.

> Notably, the carjacking statute under which Mr. Tucker was convicted can be violated "by force and violence *or by intimidation*." 18 U.S.C. § 2119 (emphasis added). Although on its face, the term "intimidation" seems coterminous with "threatened use of physical force" as it appears in the elements clause, our precedent indicates that may not necessarily be the case. This Court previously has held that whether a defendant engaged in "intimidation" is analyzed from the perspective of a reasonable observer rather than the actions or threatened actions of the defendant. *See United States v. Kelley*, 412 F.3d 1240, 1244–45 (11th Cir. 2005). It is thus possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter, as occurred in *Kelley*. *Id.* at 1245. This, to me, raises a question regarding whether it is possible to commit the offense of carjacking without ever using, attempting to use, or threatening to use physical force as described in the elements clause.

In re Smith, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J. Jill, dissenting).

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. And 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.*

Because 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), or by intimidation, with no intentional threat of the use of physical force, bank robbery 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.

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

Mr. Williams was denied a fair hearing and a meaningful opportunity to be heard because the Eleventh Circuit relied on binding precedent from a ruling on a second or successive habeas petition to deny him relief. The Eleventh Circuit failed to apply the categorical approach and conclude that the residual clause of section 924(c) is void for vagueness. And armed bank robbery is not a categorical crime of violence because it can be committed by extortion or intimidation and without intent to use or threaten the use of physical force. For these reasons, this Court should grant the writ and reverse Mr. Williams's conviction under 18 U.S.C. § 924(c).

This 13th day of February, 2019.

Respectfully Submitted,

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