No. _____

9th Cir. No. 17-10251
D.C. No. CR-15-01149-PHX-NVW

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAIME VILLA,

Defendant-Appellant.

On Petition For Writ of Certiorari
From The United States Court of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether There Was Insufficient Evidence To Prove Villa Guilty Beyond A Reasonable Doubt?

II. Whether Armed Bank Robbery Constitutes A Crime Of Violence Under §924(c)?

III. Whether Evidence Of The Police Chase Was Inadmissible Under Federal Rules Of Evidence 404(b)?

IV. Whether Villa's Sentence Violates The Eighth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Jaime Villa ("Villa"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Villa's Petition for Panel Rehearing and Petition for Rehearing En Banc is annexed as Appendix A. A copy of the Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming Villa's convictions and sentence is annexed as Appendix B. A copy of the Judgment of the United States District Court for the District of Arizona is annexed as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was October 24, 2018. The Petition for Panel Rehearing and Petition for Rehearing En Banc was denied on November 28, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. §924(c)
2. 18 U.S.C. §2113
3. U.S.S.G. §4B1.1
4. The 8th Amendment

STATEMENT OF THE CASE

Villa was originally indicted on charges of: 1) Armed Bank Robbery (Counts 1, 3, 5, 7, 9 and 11) in violation of 18 USC §2113(a) and (d); and 2) Possessing Firearm During a Crime of Violence (Counts 2, 4, 6, 8, 10, and 12) in violation of 18 USC §924(c). *See* Superseding Indictment dated September 27, 2016, EOR 73.

The Government presented its evidence at trial in reverse chronological order, and for consistency, Villa will do the same in this brief.

August 24, 2015: National Bank of Arizona, Chandler, Arizona

Mia Rodriguez ("Rodriguez"), a bank teller on August 24, 2015, stated that an individual came to her window and asked to make a withdrawal. A binder was placed in the window, and it was opened by the individual and a weapon was displayed. T. 11/29/16 at 178, EOR 80. Rodriguez emptied out the case from her top drawer and provided it to the individual. *Id.* at 182, EOR 81. The individual stated he wanted the "second drawer" or he would shoot her. Rodriguez provided the contents of the second drawer. *Id.* at 185, EOR 84. Some of the money had a strap or was "bundled". *Id.* at 196, EOR 85.

Rodriguez did not notice a gap in the teeth of the individual. *Id.* at 207, EOR 88. Rodriguez stated that the binder that she saw was soft and did not have any sort of metal ring binders. *Id.* at 209, EOR 90. Rodriguez stated that she was not focused on the individual (or his mouth or binder) during the incident. *Id.* at 210, EOR 91.

Diane Chau ("Chau"), a bank employee, followed the individual out to try to get his license plate number. *Id.* at 215, EOR 96. Chau saw an individual drive away in a "purplish reddish car". *Id.* at 218, EOR 99.

Chau completed the audit loss, and the amount was $9,622.41. *Id.* at 221, EOR 102. Chau did not get a good enough look at the individual and could not recognize him again. T. 11/30/16 at 233, EOR 107. Chau could not remember if she gave a description to the police about the individual being in his 50's. *Id.* at 236, EOR 110.

Officer Joshua Pueblo ("Off. Pueblo"), a Chandler patrol officer, was working on August 24, 2015. *Id.* at 239, EOR 113. Off. Pueblo received a notice that a bank had been robbed by a white, bald male in a purple vehicle. *Id.* at 241, EOR 115. Off. Pueblo spotted a vehicle and person with that description, and he began following the vehicle. *Id.* at 242, EOR 116. The bald head was really the only characteristic on the person that Off. Pueblo was able to see. *Id.* at 264, EOR 126. The vehicle stopped, and Off. Pueblo was shot at and his window was shattered. *Id.* at 243, EOR 117. Off. Pueblo shot back, and he was unsure if he hit his own car during the shooting. *Id.* at 246, EOR 120. The purple vehicle drove away. *Id.* at 248, EOR 122. Off. Pueblo pursued the vehicle into Phoenix, and he was told that the Phoenix units and helicopter were taking over. *Id.* at 251, EOR 125.

Officer Judy Crosson ("Off. Crosson"), with the Chandler Police Department, was on duty on August 24, 2015. *Id.* at 266, EOR 128. Off. Crosson was in pursuit. She testified that she shot at the vehicle, and she tried to disable the vehicle by bumping it.

Id. at 270-281, EOR 132-143. No officer was able to describe the suspect with specificity from the chase. *Id.* at 298, 313, 332, EOR 144, 145, 155.

Detective Wiseman ("Det. Wiseman"), from the Chandler Police Department, followed the vehicle until it stopped and the suspect exited the vehicle. Det. Wiseman did not see the suspect leave the vehicle. *Id.* at 323, EOR 146. Villa was arrested at an AMC theater ticket counter on Mill Avenue. Det. Wiseman was present for the arrest. Det. Wiseman guarded a binder at the theater and interviewed the ticket booth employee. *Id.* at 324, EOR 147. The binder contained money and a gun. *Id.* at 325-326, EOR 148-149.

Anthony Casey ("Casey") was working at AMC on Mill Avenue on August 24, 2015. *Id.* at 347, EOR 156. A man approached his ticket counter and asked to see the next movie. Casey gave the person the option of the next two movies that were starting. The individual selected *Sinister II.* Casey asked the person to select a seat, and the person said that he would take any seat. Casey explained that a seat must be selected since it was reserved seating. The person said, "Oh, fuck." Casey observed police cars pulling up and people running toward the ticket booth. The individual said, "You are going to hear a lot about me on the news. I'm not a murderer. I'm just a robber." The individual was then arrested. *Id.* at 350, EOR 159. Casey could not remember if he told Detective Wiseman that Villa said "mass murderer" verses "murderer". *Id.* at 365, EOR 174.

Casey described the person as being "in a hurry" and placed down two $10.00 bills for a ticket that cost $7.56. *Id.* at 351, EOR 160. (In cross-examination, Casey acknowledged that different people place money in front of him in different ways and that he had not told Villa the cost of the movie ticket. *Id.* at 361, EOR 170.) Casey identified a picture that showed the counter and a "book bag" or "Bible cover book" that the individual was holding as he came up to the ticket counter. Later, Casey could see money coming out of the binder. *Id.* at 352, EOR 161.

Casey identified Villa as the man that was at his theater counter. *Id.* at 353, EOR 162. Casey stated that Villa looked different in court. On August 24, 2015, Casey stated that the man was bald and was clean shaven. He described Villa in court has having a beard and hair on the top of his head. Casey claimed that he could recognize Villa by his "eye shape" and "nose shape". *Id.* at 354, EOR 163. Casey reviewed a video of the ticket transaction, and Villa was in white clothing. *Id.* at 358, EOR 167.

Detective Duncan ("Det. Duncan"), with the Chandler Police Department, was on duty on August 24, 2015. *Id.* at 385, EOR 175. Det. Duncan was the case agent. *Id.* at 386, EOR 176. Det. Duncan identified the contents of the purplish car. Det. Duncan identified Villa as the person who was arrested on August 24, 2015. *Id.* at 429, EOR 177.

Det. Duncan was not present when Villa was arrested at the AMC. *Id.* at 430, EOR 178. Det. Duncan verified that everything could have been tested for DNA. *Id.* at 433, EOR 181. Det. Duncan believed only the revolver was tested for DNA. No other

items were tested. Det. Duncan stated that Villa was not tested for GSR (gunshot residue). *Id.* a 434, EOR 182.

The vehicle was registered to someone other than Villa. Det. Duncan did not talk to the registered owner, Alfredo Villa. *Id.* at 436, EOR 184. Det. Duncan did not see if Alfredo Villa had handled any of the evidence found in the vehicle. *Id.* at 437, EOR 185.

Det. Duncan identified the amount of money in evidence as $9,602.00. *Id.* at 441, EOR 189. The $20.00 from AMC was under different evidence number, and the total money collected was $9,622.00. *Id.* at 468, EOR 216.

Kristilyn Baldwin ("Baldwin"), a crime scene technician for Chandler Police Department, went to the bank on August 24, 2015. *Id.* at 443, EOR 191. Baldwin collected swabs and processed for fingerprints at the Bank. *Id.* at 444, EOR 192. Baldwin also packed and marked items from the Chrysler. *Id.* at 450-460, EOR 198-208.

Lisa Peloza ("Peloza") with the Arizona Department of Public Safety, Central Regional Laboratory, processed a firearm and shell casings from this case. T. 12/1/16 at 491, EOR 218. Peloza determined that the seven fired cartridge cases were fired from the firearm submitted. *Id.* at 493, EOR 220. Peloza did not, however, compare any other firearms that were the same make and model to see if the markings on the bullets were the same. *Id.* at 545, EOR 234.

Villa's counsel objected to the testimony regarding the gun evidence. *Id.* at 525-527, EOR 525-527. Specifically, there was an objection that Peloza testified regarding documents or items that were tested or looked at or compared, but not made part of the

report. The objection was also based on Peloza testifying that her opinion was based on documents that were part of her report. An objection was also based on foundation. *Id.* at 527-529, EOR 223-225. The Government argued that the objection was inaccurate because the Government was asking her to testify to her methodology that takes into comparison both class characteristics and individual characteristics. Villa argued that Peloza was unable to say whether the markings were unique because she had not tested the markings with any other firearms of the same make and model. *Id.* at 532-533, EOR 228-229. The trial court allowed the testimony. *Id.* at 536-537, EOR 232-233. The court then stated ultimately the expert testimony does not matter because there was "overwhelming evidence" that Villa possessed the gun and shot it.

July 18, 2015—Desert Schools Federal Credit Union, Superstition Branch

Robert Lopez ("Lopez"), was a teller working on July 18, 2015 at Desert Schools Federal Credit Union, Superstition Branch. *Id.* at 549, EOR 235. A man came to the counter, put a leather folder on the counter, pointed a gun at Lopez and demanded money. Lopez gave the man money, and the man demanded more money. *Id.* at 551, EOR 237. Lopez dispensed more money ($10,000.00) from the cash machine. *Id.* at 553, EOR 239. The man told Lopez that he wanted "purple straps". *Id.* at 577, EOR 240.

When Lopez described the robber to the police, he stated the individual was approximately 220 pounds and 5'9". He stated the binder was large enough to hold an 8 ½ x 11-inch pad of paper. *Id.* at 579, EOR 242. Regarding his identification of the

firearm, Lopez was shown one firearm only and asked to identify it. *Id.* at 582, EOR 245. Lopez did not remember the binder having rings. *Id.* at 583, EOR 246.

David Quezada ("Queszada") was a teller on July 18, 2015. *Id.* at 586, EOR 249. Quezada recognized the individual from a picture that he saw of bank robbers from a website. Quezada sent an instant message to his team when he noticed the individual. *Id.* at 589, EOR 252. The individual came to Quezada's window after leaving Lopez's window. *Id.* at 592, EOR 255 Before coming to Quezada's window, the individual said to Quezada, "I know that you recognize me, mother fucker." *Id.* at 593, EOR 256. Quezada gave the individual the cash that he had. The individual did not take the cash. *Id.* at 594, EOR 257. Quezada told the individual that the cash machine was going to lock, and the individual left the branch. *Id.* at 596, EOR 259. Quezada stated that Exhibit 100 was the gun that he saw that day. *Id.* Quezada identified Villa as the robber. *Id.* at 597, EOR 260.

Quezada confirmed that he only had a suspicion that the robber and the man from the website was the same person, but he was not a 100% accurate. *Id.* at 599-600, EOR 262-263. In the 911 call, Quezada reported the individual was 5'8" to 5'9" and 180 pounds. *Id.* at 603, EOR 266. Later, when talking to the police, Quezada stated the person was over 200 pounds. *Id.* at 604, EOR 267. Like Lopez, Quezada was not given a photo lineup of firearms. *Id.* at 608, EOR 271. Quezada could not recall if he made an identification of the individual in a photo lineup. *Id.* at 608-609, EOR 271-272.

Gabriel Madrid ("Madrid") was the branch manager on July 18, 2015. *Id.* at 612, EOR 275. Madrid received an instant message, and he went to the teller stations to observe. He saw a binder with a revolver in it on the counter. Madrid triggered an alarm. *Id.* at 615, EOR 278. Madrid identified Villa as the robber. *Id.* at 619, EOR 282. Madrid stated there was a loss of $5,558. *Id.* at 622, EOR 285. Madrid believed the individual who robbed the bank was 5'9" or 5'10". *Id.* at 623, EOR 286. Madrid also believed that the individual weighed 210-220 pounds. *Id.* at 624, EOR 287.

September 9, 2014—US Bank, Tempe

Kristin Arias ("Arias") was an assistant manager at US bank in Tempe. *Id.* at 638, EOR 288. Arias defined a "purple strap" as a $2,000 strap. This was an "industry standard". *Id.* at 641, EOR 291. A man came up and said he wanted to make a complaint against her. Initially, she thought he was joking. *Id.* at 642, EOR 292. She started laughing, and he said, "You think this is a joke" and he unzipped a black binder and showed a gun. *Id.* at 643, EOR 293. Arias provided the money in her drawer to the man. *Id.* at 644, EOR 294. He asked for more money and purple straps. The man moved to Arias's manager's window. *Id.* at 645, EOR 295. The gun was pointed at them during the robbery. *Id.* at 650, EOR 300. Arias identified Villa as the man who robbed her. *Id.* at 654, EOR 304. Arias described Exhibit 100 as being "very much like the gun" that was pointed at her. *Id.* at 658, EOR 308. Arias confirmed that she was never provided a choice of firearms to choose from. *Id.* at 660, EOR 310.

David Needham ("Needham") was working with Arias on that day. *Id.* at 664, EOR 314. Needham's story was similar to Arias's testimony. *Id.* at 666-683. Needham stated that he could not remember telling the officer that he did not believe that he would be able to provide a detailed description of the robber because he was zeroed in on the gun. *Id.* at 684, EOR 334. In Exhibit 121, Needham looked at a photo of the robber and agreed that there appeared to be a gap or discoloration or possibly a piece of food on the teeth. *Id.* at 689-690, 692, EOR 339-340, 342.

July 26, 2014 Wells Fargo, Baseline Road, Mesa

Denise Crockett ("Crockett") was working as a teller on this date. *Id.* at 754, EOR 346. An individual approached her and demanded money and all the straps in her drawer. Crocket provided the money and the individual left. *Id.* at 755, EOR 347. The individual had a black bag that he flipped open to reveal a gun. *Id.* at 758, EOR 350. He said, "I want all the straps." and he asked for hundreds. *Id.* at 759, 762, EOR 351, 354. Crockett identified Exhibit 100 as the gun from the robbery. *Id.* at 766, EOR 358. Crockett identified Villa as the individual. *Id.* at 768, EOR 360. Crockett identified the photo lineup that she was shown by the police. *Id.* at 769, EOR 361.

Crockett agreed that she only saw the individual for about 15 seconds and that he was wearing sunglasses and a jacket. Also, Crockett never described the gun as having rust or corrosion on it (like Exhibit 100). *Id.* at 770-775, EOR 362-367.

Veronica Silva, a senior security agent with Wells Fargo, testified that the loss from the robbery (Denise Crockett) was $5,237.00. *Id.*at 825-826, EOR 400-401.

June 11, 2014 Wells Fargo, Chaparral Road, Scottsdale

Christopher Billingsley ("Billingsley"), a teller, was approached by a man who put a laptop bag on the counter. *Id.*at 793, EOR 368. The man pulled out a firearm and pointed it at Billingsley. *Id.* at 794, EOR 369. The individual noticed Billingsley press the teller button, and he said, "I saw you press the button", and he told Billingsley if he could not get out, he would come back and shoot him and hold up the Safeway. *Id.* at 797, EOR 372. He said it was a robbery, not a joke, and requested large bills, specifically hundreds. *Id.* at 801, EOR 376.

Billingsley identified the photo lineup that he signed. *Id.* at 810, EOR 385. Billingsley stated Exhibit 100 looked familiar as the gun from the robbery. *Id.* at 811-812, EOR 386-387. When Billingsley was interviewed by the police, he said he could not remember the color of the suspect's eyes. The person was wearing a baseball cap. Billingsley "believed" or "assumed" the suspect was bald or did not have a lot of hair. *Id.* at 815, EOR 390. Billingsley could not identify the race of the individual-whether he was Caucasian, Hispanic, or Middle Eastern. *Id.* at 815-816, EOR 390-391. Billingsley identified the man as very heavy—230 to 300 pounds, but on the day of the trial, Billingsley could not identify him as being that heavy. *Id.* at 816, EOR 391.

Veronica Silva, a senior security agent with Wells Fargo, testified that the loss from the robbery was $3,000.00. *Id.* at 825, EOR 400.

November 30, 2010--Chase Bank, Mesa

Camille Cluff ("Cluff") was working as a teller at Chase Bank at Gilbert and McKellips on this date. *Id.* at 827, EOR 402. A man came to her window. A gun was pointed at her from a brief case. The person said that she "knew what this was about". Cluff gave the person money. *Id.* at 829, EOR 404. The man had his hand on the gun, but it stayed in the leather briefcase. *Id.* at 831, EOR 406. Cluff did not see anyone in the courtroom who looked familiar to her. *Id.* at 838, EOR 413. Cluff identified the photo lineup that she signed on that day. *Id.* at 839, EOR 414. Cluff claimed that she could see his eyes through his sunglasses, and that is what she remembered the most. *Id.* at 841, EOR 416.

Cluff did not dispute that the description that she gave law enforcement was for an individual between 5'9" and 6'. *Id.* at 844, EOR 419. Cluff could not remember if she told the police that she was not confident whether she could identify him again. She did agree that there was a long period of time between the time of the incident and the time that she was shown a photo lineup. Cluff could not remember if she ever gave the police a description of the suspect's eyes. *Id.* at 845-846, EOR 420-421. The photo lineup was provided on August 25, 2015. *Id.* at 846, EOR 421. Cluff did not dispute that she may have told the police that the gun was silver in color. *Id.* at 846-847, EOR 421-422.

Richard Comas ("Comas"), a customer from the bank, identified Villa as the man who committed the robbery. Comas stated that he remembered Villa's nose and structure of his face. *Id.* at 858, EOR 433. Comas stated Villa's beard and facial hair looked different at the trial. *Id.* at 859, EOR 434. Comas admitted that he was really not

fixated on the individual because he was waiting for his turn in line and also watching out for his family. *Id.* at 865, EOR 440. The robber did not look directly at Comas. *Id.* at 866, EOR 441.

Dawn Carney ("Carney"), the teller who was helping Comas, identified Villa as the individual in the bank. *Id.* at 878, EOR 453. Carney stated that she did not recognize Villa's beard, but the general body size and hair seemed to be the same. Carney stated the individual was carrying a binder. *Id.* at 879, EOR 454. Carney admitted that she was more focused on Comas and Cluff than the man at the counter. *Id.* at 882, EOR 457. Carney described the individual in her written statement as a person that was 5'8" and approximately 150 pounds. *Id.* at 884, EOR 459. Samantha Campbell completed the audit and determined that Cluff's drawer was short $4,515.00. *Id.* at 891, EOR 466.

The Brother, Alfredo Villa

Villa is the younger brother of Alfredo Villa (referred to herein as "Alfredo"). *Id.* at 892, EOR 467. Alfredo described himself as having a close relationship with Villa and explained that it was difficult to be at the trial. *Id.* at 893, EOR 468. When Alfredo was in his 40's, he was working in Colorado and he purchased a maroon (or purple) Chrysler Concorde. *Id.* at 895, EOR 470. The vehicle was purchased in October or November 2014. *Id.* at 896, EOR 471. In April 2015, Alfredo was living with his parents when Villa, his girlfriend and son and daughter moved into the house in Maricopa. *Id.* at 898-899, EOR 473-474.

Villa was self-employed, and he did drywall and handyman work. *Id.* at 899, EOR 474. Villa drove a white van that became unreliable. Villa asked Alfredo if he could drive his car for awhile, and Alfredo agreed. *Id.* at 900, EOR 475.

On August 23, 2015, Alfredo heard some commotion and he went downstairs and Theresa was on the phone with a person who appeared to be Villa. She was distraught. *Id.* at 902, EOR 477. Theresa stated that Villa was being chased by the police, and he was talking about doing something "foolish" and that he was not going to pull over. Alfredo put Villa's son on the phone to talk to his father. The family began watching a news report "of what was happening". *Id.* at 903, EOR 478. Theresa was calling the person on the phone "Jamie". Alfredo did not talk to him or hear a voice through the phone. *Id.* at 904, EOR 479. Alfredo saw the Concorde on the news, and it appeared to be his vehicle. *Id.* at 905, EOR 480. The last time that Alfredo saw the car was in the morning when Villa left in the vehicle. *Id.* at 907, EOR 482.

Alfredo identified five pictures (Exhibits 76 through 80), and he stated that the individual in the pictures was his brother. In the pictures, Alfredo stated that his brother had a "different grooming scheme going on". *Id.* at 908, EOR 483. Alfredo identified a picture of the license plate in the trunk of his car, and he did not know how it got in the trunk.

Alfredo was not aware of Villa having a firearm, and he never saw Villa with a firearm. *Id.* at 912, EOR 487. He was not aware of Villa possessing any ammunition. Alfredo viewed some items in the vehicle (shirt and boots), but he did not recognize

them at all. *Id.* at 914, EOR 489. Alfredo did not recognize the ammunition or sunglasses in the vehicle. *Id.* at 915, EOR 490.

Alfredo was shown a video (Exhibit 144) and stated that the individual looked like his brother around the mouth and nose. *Id.*at 916, EOR 491. Alfredo did not recognize his brother in other videos, but stated that they were "estranged". *Id.* at 917, EOR 492. Alfredo saw a picture on the television, and he did not recognize the person as his brother. *Id.* at 918, EOR 493.

Alfredo confirmed that he did not own the Concorde on September 9, 2014, July 26, 2014, June 11, 2014, and November 30, 2010. Alfredo stated that Villa does not have a gap between his teeth, but Alfredo had a gap. *Id.* at 930, EOR 494.

Case Agent Paul Lee

Paul Lee ("Lee"), the case agent, testified Villa lost weight and grew a moustache and beard since his arrest. T. 12/1/16 at 722-723, EOR 343-344. Lee verified that upon the execution of a search warrant on Villa's residence, NO items were recovered regarding any other robberies that occurred prior to August 24, 2015. T. 12/2/16 at 933, EOR 497. Lee confirmed that the video of September 9, 2014 (Exhibit 121) was used to prepare a description of the individual who committed the robbery. The bulletin created by the task force stated that the individual had a gap in the front of his teeth. *Id.* at 934, EOR 498.

Rule 29 Motion

The defense moved for a judgment of acquittal. *Id.* at 946, EOR 14. The defense argued that a reasonable jury would not reach a verdict of guilty as to each of the bank robbery counts and as to the possession of a firearm in furtherance counts. In bank robberies 1 through 5, there was no evidence of money, no articles of clothing found. There was also no biological evidence (DNA or fingerprint) that linked Villa to the robberies. The court said, "We have the eye witness testimony in every robbery, don't we?" The court then stated, "It is clear to me there's ample evidence of identification of eye witnesses and…didn't we have video recordings for all…of them?" *Id.* at 947, EOR 15.

The government argued that regarding the 924(c) counts that the witnesses testified to "various things that they looked metal (sic), the gun looked metal, various tarnishings, even Ms. Cluff who did say it didn't look like a revolver said she heard a click and it looked real to her." The court said, "For those reasons and the reason I said the Rule 29 motion is denied." *Id.* at 948, EOR 16.

After the close of the defense case, the defense renewed the Rule 29 motion. *Id.* at 970, EOR 18. The court again denied the motion. *Id.* at 971, EOR 19.

Villa testimony

On the fifth day of trial, defense counsel confirmed that Villa wished to testify. 12/6/16 at 953-954, EOR 500-501. Defense asked if Villa could testify in a narrative form. The court stated that it was not disposed to grant that, and the testimony would proceed by question and answer. *Id.* at 956, EOR 503. The court then said, "And

counsel, I will tell the jury that Mr. Villa has elected to proceed by posing the questions to himself so as to dispel risk of inference that there's something improper." *Id.* at 958, EOR 505.

When the jury returned, the court stated the following, "And Mr. Villa has elected to proceed by asking his questions of himself. So he will first state the question he's asking himself and then, absent an objection, he will give the answer to that question. And we'll proceed in that fashion with Mr. Villa asking his questions and giving his answers. You may proceed, Mr. Villa.". *Id.* at 958-959, EOR 505-506.

Villa stated, "Hi. I prepared a few but they were taken from me [by the CCA officer] when I arrived here. I never received [the questions]." The court asked, "Did you ask for them back?". Villa stated, "In the past I have never had to. On this occasion they just didn't come back." The court stated, "Well, we are where we are. If you did not ask for them back, that's where you are….All right. Please proceed." *Id.* at 959, EOR 506.

Villa then stated that he did not understand that he would be asking himself questions. He believed his own counsel would be asking questions. At that point, the trial court turned the questioning over to defense counsel.

Villa stated that he did not rob the Chase Bank on November 30, 2010. *Id.* at 960, EOR 507. He also stated that he did not rob the Wells Fargo on June 11, 2014, the Wells Fargo on July 25, 2014, the US Bank on September 9, 2014, or Desert Schools Federal Credit Union on July 18, 2015. *Id.* at 961, EOR 508. Villa testified that he did not enter

bring a firearm into those banks on the dates listed above as well. *Id.* at 961-963, EOR 508-510.

Villa verified that he was using his brother's Chrysler Concorde in August 2015. He would use the vehicle to do drywall jobs. *Id.* at 964, EOR 511. Villa identified his tools and equipment in the vehicle. On August 24, 2015, Villa did not know how the license plate got into the trunk. Regarding the shirt in the vehicle, Villa stated that he has one that looks a lot like the picture. *Id.* at 965, EOR 512. Looking at the actual shirt, Villa believed it was his shirt. Villa stated that he was wearing a tee-shirt when he was arrested. He did not recognize pictures of a tan hat. *Id.* at 966, EOR 513. Villa stated that he was not wearing that hat on August 24, 2015. *Id.* at 967, EOR 514. Villa stated that he was happy for the jury to ask questions, but he did not believe that was allowed. The defense rested. *Id.* at 969, EOR 516.

Jury verdict and Sentencing

On December 7, 2016, the jury reached a verdict on all counts. The jury found Villa guilty on all 12 counts and answered yes to each interrogatory. T. 12/7/16 at 1028-1030. EOR 21-23.

Sentencing took place on June 5, 2017. The government recommended 142 years plus one month. T. 6/5/17 @ 6-9, EOR 40-43. The court stated that regarding the penalties, "And Congress thought people would know about it ahead of time….Well, anybody who commits bank robberies over five years it's a fair inference that they know what is involved with using a firearm." *Id.* at 12, EOR 46. Then the court stated,

"Well, actually my comment, which I guess does not matter either, that people robbing banks usually don't know about mandatory extra years for using a firearm….[I]t looks like the firearm offenses are all mandatory minimums…..There's nothing for me to do there but send it to the Court of Appeals." *Id.* at 13. EOR 47. The court asked, "Are there any Supreme Court cases or even Ninth Circuit cases that find cruel and unusual punishment for anything other than lifetime sentence for juveniles and some capital cases?" *Id.* at 16, EOR 50. The court also stated, "But if it were up to me I would have a more robust Eighth Amendment scrutiny." *Id.* at 20, EOR 54. Then later commented, "Maybe it's a due process violation that the mandatory minimum effectively deprives the defendant of their right to trial." *Id.* at 32, EOR 66.

Defense counsel stated that most likely Villa was facing charges for attempted murder or aggravated assault in state court. *Id.* at 21, EOR 55. Defense stated the sad factors of Villa's life and also asked that Villa be sentenced one day for the bank robberies due to the lengthy mandatory minimums. *Id.* at 22, EOR 56. Defense stated that Villa was suffering from major depressive disorder as well as schizoid personal disorder. *Id.* at 24, EOR 58. Villa made no statement on his own behalf. *Id.* at 25, EOR 59.

The court concluded that any sentence that he gave would be an unjust sentence based on the length of the mandatory minimums. *Id.* at 26, EOR 60. The judge sentenced Villa to one month for each bank robbery for a total of 132 years and 6 months. *Id.* at 27-28, EOR 61-62.

Appeal

Villa timely filed a notice of appeal and submitted briefing to the Ninth Circuit. *See* Notice of Appeal dated 6/9/2017, EOR 517. On October 24, 2018, the Court of Appeals affirmed Villa's convictions and sentence. On November 28, 2018, the Ninth Circuit denied Villa's petition for rehearing and suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. There Was Insufficient Evidence To Prove Villa Guilty Beyond A Reasonable Doubt.

a. Bank robberies

The evidence was insufficient to sustain the convictions for armed bank robbery. To prove armed bank robbery, the government must show: (1) the defendant took money belonging to a bank, credit union, or savings and loan, (2) by using force and violence or intimidation, (3) the deposits of the institution were insured by the Federal Deposit Insurance Corporation ("FDIC"), and (4) in committing the offense, the defendant assaulted any person, or put in danger the life of any person by the use of a dangerous weapon. *See* 18 U.S.C. § 2113(a) & (d); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).

The prosecution failed to demonstrate beyond a reasonable doubt that Villa was the bank robber in each separate count, i.e., that he was the person who took the money from each bank on each occasion. Of the first five robberies – 11/30/2010, 6/11/2014, 7/26/14, 9/9/14, and 7/18/15 – absolutely no physical evidence ties Villa to any of the robberies. There was no evidence of money found with Villa or tied to him, and no

articles of clothing found that were worn during the robberies. There was also no biological evidence (DNA or fingerprints) that linked Villa to the robberies. There were many photographs and videos introduced of the individual wearing certain items of clothing…jacket, shirt, hat, sunglasses, holding a bag or binder of some sort. None of these items are found with Villa, either in his possession or in his car or home, including the currency. The Government simply asked the jury to rely on the testimony of eyewitnesses who had viewed the robberies and suspects years prior to the trial.

Eyewitness testimony can be very unreliable. Concerns with eye witness testimony as the basis for convicting innocent people has been acknowledged by the Supreme Court for some time. *See Perry v. New Hampshire*, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694 (2012) ("We do not doubt either the importance or the fallibility of eyewitness identifications . . . [W]e observed that the annals of criminal law are rife with instances of mistaken identification."). Evidence suggests that eyewitness testimony, while potentially unreliable, can be very influential to the determinations of juries. "[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime." *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting).

At Villa's trial, some of the eyewitness descriptions were different than the robber depicted in the videos. For example, Mia Rodriguez stated that the robber wore a golfer style hat, but he was actually wearing a baseball hat. Also, many of the

eyewitnesses could not identify Villa in court as the person who robbed them (Rodriguez, Chau, Pueblo, Crosson, Cacciola, Garcia, and DeCoste). Exhibit 121 (the US Bank robbery surveillance video from the 9/9/14 robbery) shows that the robber had a gap in his front teeth. The gap in the robber's front teeth was also included with a description of the bank robber in a task force bulletin that was identified by Agent Lee. However, Villa's brother, Alfredo, testified that Villa did not have a gap in his teeth (but Alfredo did). Villa also testified there was no gap in his teeth. T. 12/6/16 at 1015.

Even though there was no evidence beyond the shaky eyewitness testimony to connect Villa to five of the bank robberies, the Government argued to the jury that they could simply make inferences about how robber acted, behaved, the kinds of money that he wanted (large bills or straps), how he moved his body, the position of his finger on the trigger, and that he had a gun in a binder to conclude that all of the bank robberies were committed by the same person. The Government argued in its closing, "This is a criminal trade craft. This is this robber's trade craft…. And yes, you can start with what you know about robbery number six." *Id*. at 1019-1020. Because there was more evidence, including physical evidence, for the August 24, 2015 bank robbery ("robbery number six"), the jury likely concluded that Villa must have been the person who committed them all. That was a violation of due process. Evidence that a person has committed one crime is not admissible to show the identity of the person committing another crime merely because the two offenses are similar. *United States v. Quinn*, 18 F.3d 1461, 1466 (9th Cir. 1994). The offenses must be so similar in their

circumstances as to guarantee a reasonable likelihood that they were committed by the same person. *Id*. Otherwise, the possibility that the jury will draw improper conclusions as to the accused's character is too great to allow admission of the evidence, notwithstanding its marginal probative value. *Id*. The generic circumstances of these six bank robberies were not so similar as to guarantee a reasonable likelihood that they were all committed by the same person, or that the person was Villa.

b. Firearm Charges

The evidence was also insufficient to sustain the convictions for possessing a firearm during a crime of violence in violation of 18 U.S.C. §924(c). The crime of using or carrying a firearm during a crime of violence requires proof of an underlying predicate offense - that is, a crime of violence - during which a firearm was used or carried. *See United States v. Castaneda*, 9 F.3d 761, 765 (9th Cir. 1993); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000). Therefore, to convict a defendant of a violation under 924(c), the United States must prove beyond a reasonable doubt that: 1) the defendant committed or aided and abetted the commission of a crime of violence; 2) the defendant used, carried, possessed, or brandished a firearm during and in relation to the crime of violence; 3) the using, carrying, possessing, or brandishing facilitated the commission of the crime of violence, or advanced the offense in some way. *See United States v. Harris,* 536 U.S. 545, 550-51 (2002).

First, because there is insufficient evidence that Villa committed each of the bank robberies the corresponding convictions for the firearms charges cannot stand. The

crime of using or carrying a firearm during a crime of violence requires proof of the underlying predicate offense – in this case, bank robbery - during which a firearm was used or carried.

Even if this Court finds that there is enough evidence to convict Villa on the bank robberies, there is insufficient evidence that the firearm was used to facilitate or advance each one of the robberies. The mere presence of a gun during each robbery is not enough for a conviction under §924(c). *United States v. Sparrow*, 371 F.3d 851, 853 (3rd Cir. 2004); *United States v. Krouse*, 370 F.3d 965, 967 (9th Cir. 2004). The Government did not prove for each count that the firearm shown to the tellers was an actual firearm or whether the firearm was capable of firing a projectile. Although many witnesses identified the gun as the one used in the robberies, the jury instructions stated that the jury had to consider whether such identification was the product of a witness's own recollection or whether it was the result of subsequent influence or suggestiveness. The witnesses were never asked to compare the gun they saw to any other firearms, or to identify the gun they saw out of many options. Instead, they were only shown one firearm (the gun from August 24, 2015) and asked whether or not they could identify that firearm as the gun used during the other robberies.

II. <u>Armed Bank Robbery Constitutes A Crime Of Violence Under §924(c).</u>

Villa filed a Motion to Dismiss arguing that the predicate offenses of armed bank robbery underlying the §924(c) offenses categorically failed to qualify as crimes of violence within the "force clause" of 18 U.S.C. §924(c)(3)(A). Further, the "residual

clause" of 18 U.S.C. §924(c)(3)(B) is unconstitutionally vague under *Johnson v. United States*, 135 S.Ct. 2551 (2015) (hereinafter "*Johnson II*"). The district court ruled that armed bank robbery is a crime of violence under the "force clause" pursuant to this Court's decision in *United States v. Wright*, 215 F. 3d 1020, 1028 (9th Cir. 2000). *See* Order dated 11/16/2016, EOR 10.

Villa acknowledges that during the pendency of his appeal the Ninth Circuit decided the case of *United States v. Watson*, 881 F. 3d 782 (9th Cir. 2018) establishing that armed bank robbery in violation of §2113(a) and (d) is a crime of violence under §924(c). However, Villa continues to maintain that *Watson* was incorrectly decided for the following reasons.

18 U.S.C. §924(c)(3) defines "crime of violence" as 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 (the "force clause"), 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 (the "residual clause").

To determine whether a predicate offense, such as armed bank robbery, qualifies as a "crime of violence" under § 924(c)(3)(A)'s force clause, courts must use the categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015). This approach requires that courts "look only to the statutory definitions – i.e., the elements – of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "crime of violence." *Descamps*, 133 S. Ct. at 2283

(citation omitted). In *United States v. Johnson*, 559 U.S.133, 140 (2010) (hereinafter "*Johnson I*"), the Supreme Court clarified that a "crime of violence" or "violent felony" requires the use of "violent force." "Violent force" is defined as "force capable of causing physical pain or injury to another person." *Id*.

Post-*Johnson I*, a predicate offense can only qualify as a "crime of violence" if all of the criminal conduct covered by a statute – "including the most innocent conduct" – matches or is narrower than the "crime of violence" definition. *See, e.g., United States v. Torres-Miguel*, 701 F.3d 165, 167 (4th Cir. 2012). A court must focus on the minimum culpable conduct in which the Government would seek to enforce the law. *Moncrief v. Holder*, 133 S. Ct. 1678, 1684 (2013). If the most innocent conduct penalized by a statute does not constitute a "crime of violence," then the statute categorically fails to qualify as a "crime of violence."

18 U.S.C. 2113(a) and (d) states:

> (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 no more than twenty years or both.
>
> …
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) or (b) of this section, 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. (2015)

18 U.S.C. § 2113(a) and (d) can be violated absent the use or threatened use of violent physical force. Armed bank robbery may be committed through "intimidation"

which requires no actual or attempted force. Under the categorical approach, the Court must consider the most innocent violation of the bank robbery statute to determine whether it qualifies as a crime of violence. Intimidation does not require an explicit threat or threat of violent physical force. *See United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation.") (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980)). The Ninth Circuit has also rejected the notion that implicit in intimidation is a threat of violent force. *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) ("[An] uncommunicated willingness or readiness to use [physical] force…is not the same as a threat to do so.").

Twenty years prior to the Supreme Court's *Johnson I* decision, the Ninth Circuit did define bank robbery by intimidation under 18 U.S.C. §2113 as a "crime of violence" under the Career Criminal Guideline, U.S.S.G. §4B1.1. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). In *Selfa*, the Court held that bank robbery accomplished through intimidation satisfied the "threatened use of physical force" element of § 4B1.2(1). *Id*. However, it is debatable whether *Johnson I* abrogated *Selfa. See Doriety v. United States*, 2016 U.S. Dist. LEXIS 166337, *14 (W.D. Wash. Nov. 9, 2016) (it is debatable whether *Johnson I* and *Narvaez-Gomez* abrogated *Selfa*). *Johnson I* has since defined "physical force" under the ACCA as "violent force" — that is, force capable of causing physical

pain or injury to another person. *Johnson I*, 559 U.S. at 140. The *Selfa* court did not determine whether bank robbery through intimidation satisfies the higher standard of *violent* physical force that was later adopted in *Johnson I*.

Since the *Johnson* decisions, other Courts have concluded that robbery offenses do not qualify as crimes of violence, *See United States v. Leonard Lee Estes*, 05-CR-00187-WYD (D.Colo. September 15, 2016)(holding Colorado bank robbery statute that included robbery by intimidation is not "crime of violence" under the Armed Career Criminal Act); *United States v. Gardener*, 823 F.3d 793 (4th Cir. 2016) (holding North Carolina robbery statute is not "crime of violence" under ACCA); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016) (holding Arkansas robbery statute is not "crime of violence" under ACCA).

A reading of 18 U.S.C. 2113 (a) and (d) also suggests that an individual can commit armed bank robbery through intimidation (absent the use of dangerous weapon or device) if the individual "assaults any person." Assault can be committed with a "reckless" mental state in many instances. For example, several of the assault offenses under 18 U.S.C. § 113 are general intent offenses that can be committed with a reckless mental state. Recently, in *United States v. Benally*, the Ninth Circuit held that involuntary manslaughter was not a crime of violence under 18 U.S.C. §924(c)(3) because the offense could be committed with a "reckless" mental state. *United States v. Benally*, 831 F.3d 1141 (2016). The Court concluded "'crimes of recklessness cannot be crimes of violence."' *Id*.

Therefore, Villa asks this Court to find that 18 U.S.C. § 2113 offenses are not "crimes of violence" under the force clause of 18 U.S.C. §924(c)(3)(A) because they can be committed without the use or threatened use of violent physical force, and can also be committed, in part, with a reckless mental state.

III. Evidence Of The Police Chase Was Inadmissible Under Federal Rules Of Evidence 404(b).

Villa filed a Motion in Limine to preclude any evidence concerning the introduction of uncharged conduct during the law enforcement pursuit on August 24, 2015. Specifically, that Villa may have discharged multiple shots from a firearm at two law enforcement agents during the vehicular pursuit of Villa on August 24, 2015 and that Villa assaulted other law enforcement agents and civilians by pointing a firearm at them at different intervals during the pursuit.

The Government did introduce such evidence at trial. Officer Joshua Pueblo ("Off. Pueblo"), a Chandler patrol officer, was working on August 24, 2015. *Id.* at 239, EOR 113. Both Off. Pueblo and Off. Crosson testified regarding the police pursuit of Villa and the gun fight that ensued. Off. Pueblo testified that he received a notice that a bank had been robbed by a white, bald male in a purple vehicle. T. 11/30/16 at 241, EOR 115. Off. Pueblo spotted a vehicle and person with that description, and he began following the vehicle. *Id.* at 242, EOR 116. The vehicle stopped, and Off. Pueblo was shot at and his window was shattered. *Id.* at 243, EOR 117. Off. Pueblo testified that he shot back. *Id.* at 246, EOR 120. Off. Pueblo pursued the vehicle into Phoenix, and he was told that the Phoenix units and helicopter were taking over. *Id.* at 251, EOR 125.

Off. Crosson testified that she also was involved in the pursuit. She testified that she shot at the vehicle, and she tried to disable the vehicle by bumping it. *Id.* at 270-281, EOR 132-143. None of this conduct from the police pursuit or discharge of a weapon was charged in the Superseding Indictment.

The introduction of evidence of numerous instances of serious uncharged conduct relating to the discharge of a weapon was not relevant under Fed.R.Evid. 401. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed.R.Evid. 401. Evidence that is not relevant is not admissible. Fed.R.Evid. 402.

Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Fed.R.Evid. 403. The testimony of Off. Pueblo and Off. Crosson violated Fed.R.Evid. 403 because it unfairly prejudiced Villa at trial and confused the issues for the jury with evidence that the jury ultimately did not need in order to decide Villa's guilt on the bank robbery counts. Lastly, this other bad acts evidence also violated Fed.R.Evid. 404(b)(1) because it was offered to prove actions in conformity therewith.

Allowing testimony at trial suggesting Villa fired a gun at police while fleeing from them violated his Fourteenth Amendment right to a fair trial because the conduct was not relevant to the charged offenses and its probative value was substantially outweighed by the unfair prejudice such evidence had on his case.

IV. Villa's Sentence Violates The Eighth Amendment.

The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII; *United States v. Barajas-Avalos*, 359 F.3d 1204, 1218 (9th Cir. 2004). "In determining whether a sentence violates the Eighth Amendment, [courts] must accord substantial deference to legislative determinations of appropriate punishments." *United States v. Patterson*, 292 F.3d 615, 631 (9th Cir. 2002) (internal quotations omitted). The Eighth Amendment "forbids . . . extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring in part and concurring in the judgment). This narrow proportionality principle applies to non-capital sentences. *Ewing v. Cal.*, 538 U.S. 11 (2003). In *Ewing*, the U.S. Supreme Court recognized that, "'[t]he Eight Amendment...contains a narrow proportionality principle that applies to noncapital sentences.' 538 U.S. at 20. The Eighth Amendment has been applied to lengthy sentences of incarceration. *See Lockyer v. Andrade*, 538 U.S. 63 (2003).

Prior to sentencing, Villa filed a Sentencing Memorandum asserting that a sentence in excess of 135 years violates the Eighth Amendment cruel and unusual punishment clause. The sentence that was received required him to serve a sentence equivalent to nearly two full lifetimes. The district court acknowledged during sentencing that Villa's sentence was unreasonable. The court asked, "Are there any Supreme Court cases or even Ninth Circuit cases that find cruel and unusual

punishment for anything other than lifetime sentence for juveniles and some capital cases?" T. 6/5/17 at 16, EOR 50. The court stated, "But if it were up to me I would have a more robust Eighth Amendment scrutiny." *Id.* at 20, EOR 54. Then later commented, "Maybe it's a due process violation that the mandatory minimum effectively deprives the defendant of their right to trial." *Id.* at 32, EOR 66. The court concluded that any sentence that he gave would be an unjust sentence based on the length of the mandatory minimums. *Id.* at 26, EOR 60. The judge ultimately sentenced Villa to a total of 132 years and 6 months. *Id.* at 27-28, EOR 61-62.

Unfortunately, to date, this Court has found that lengthy consecutive 924(c) sentences do not violate the Eighth Amendment cruel and unusual punishment clause. *See, e.g., United States v. Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001). However, a sentence of 132-years (just on the gun charges alone) equates to nearly two life sentences for Villa, who is already in his mid-forties. Such a sentence is completely disproportionate to the crimes for which Villa was convicted when considering the facts of this case. Such a sentence is also not proportionate to the crimes and far exceed the sentences that most defendants receive in this circuit and others. But for the mandatory consecutive 25-year sentences required by 18 U.S.C. §924(c), the district court would have been able to fashion a reasonable sentence that was more consistent with sentences that other offenders receive based upon the particular facts of this case.

It is clear that the mandatory minimum did not render a reasonable sentence in this case. Since the sentence is a violation of the Eighth Amendment, Villa asks that this Court reconsider its prior rulings regarding the same.

CONCLUSION

For these reasons, Villa respectfully requests that this Court grant certiorari on these issues.

RESPECTFULLY SUBMITTED this 5th day of February 2019.

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