No. ___ – _____

In the Supreme Court of the United States

JOHNNY MADISON WILLIAMS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL FILIPOVIC
Federal Public Defender
**Counsel of Record*
VICKI W. W. LAI
Assistant Federal Public Defender
Federal Public Defender's Office
1601 5th Avenue, Suite 700
Seattle, WA 98101
(206) 553-1100
Michael_Filipovic@fd.org
Vicki_Lai@fd.org

Counsel for Petitioner

Questions Presented for Review

1. Did *Johnson v. United States*, 135 S. Ct. 2551 (2015), retroactively void as unconstitutional the residual clause of 18 U.S.C. § 924(c)(3)(B)?

2. Can federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) when the offense fails to require any intentional use, attempted use, or threat of violent physical force?

Table of Contents

Questions Presented for Review

Table of Contents i

Table of Authorities iii

Petition for Certiorari 1

Orders Below 1

Jurisdictional Statement 1

Relevant Constitutional and Statutory Provisions 2

Reasons for Granting the Writ 3

Related Cases Pending in this Court 5

Statement of the Case 5

I. A 85-year mandatory, consecutive sentence for use of a firearm during federal armed bank robbery. 6

II. Mr. Williams seeks relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). 7

Argument 9

I. Certiorari is necessary to resolve the federal circuit split regarding whether *Johnson* retroactively invalidated the residual clause at 18 U.S.C. § 924(c)(3)(B). 9

II. Certiorari is necessary to provide the proper interpretation of "intimidation" as used in the federal armed bank robbery statute to determine whether it requires proof of an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(3)(A). 12

A. The categorical approach determines whether an offense is a crime of violence under 18 U.S.C. § 924(c) 13

B. Intimidation within the meaning of 18 U.S.C. § 2113(a) is not a match for the definition of a crime of violence in 18 U.S.C. 924(c)(3)(A). 14

1. Section 924(c)(3)(A) requires a purposeful threat of physical force, whereas bank robbery by intimidation is a general intent crime that does not require any intent to intimidate. 14

2. Section 924(c)(3)(A) requires a threatened use of violent physical force, whereas bank robbery by intimidation does not require that a defendant communicate any intent to use violence. 20

C. The "dangerous weapon" element of armed bank robbery does not satisfy the force clause. 24

D. The federal armed bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c). 26

Conclusion 33

Index to Appendix

Appendix 1: Order Affirming Order Denying 28 U.S. C. § 2255 Motion, *United States v. Williams*, No. 16-36011 (9th Cir. Dec. 5, 2018) 1a

Appendix 2: Order Granting Certificate of Appealability, *United States v. Williams*, No. 16-36011 (9th Cir. Apr. 14, 2017) 2a

Appendix 3: Order Denying 28 U.S.C. § 2255 Motion and Request for Certificate of Appealability, *Williams v. United States*, No. CV16-814-TSZ (W.D. Wash. June 10, 2016) 4a

Appendix 4: Order Denying Motion for Reconsideration, *Williams v. United States*, No. CV16-814-TSZ (W.D. Wash. Nov. 7, 2016) 6a

Table of Authorities

Federal Cases **Page(s)**

Bailey v. United States, 516 U.S. 137 (1995) 26
Carter v. United States, 530 U.S. 255 (2000) 3, 15
Descamps v. United States, 570 U.S. 254 (2013) 13, 27
Elonis v. United States, 135 S. Ct. 2001 (2015) 18, 19, 20, 21
Johnson v. United States, 559 U.S. 133 (2010) 20, 21
Johnson v. United States, 135 S. Ct. 2551 (2015)..... 7, 9, 11, 12
Leocal v. Ashcroft, 543 U.S. 1 (2004) 14
Mathis v. United States, 136 S. Ct. 2243 (2016)..... *passim*
McLaughlin v. United States, 476 U.S. 16 (1986) 25
Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) 13
Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) 11
Ovalles v. United States, 905 F.3d 1300 (11th Cir. 2018) 4
Sessions v. Dimaya, 138 S. Ct. 1204 (2018)..... *passim*
Stokeling v. United States, 139 S. Ct. 544 (2019) 20
Taylor v. United States, 495 U.S. 575 (1990) 13
United States v. Arafat, 789 F.3d 839 (8th Cir. 2015) 24, 25
United States v. Askari, 140 F.3d 536 (3d Cir. 1998) 30
United States v. Barrett, 903 F.3d 166 (2d Cir. 2018) 11
United States v. Bingham, 628 F.2d 548 (9th Cir. 1980) 22
United States v. Blackstone, 903 F.3d 1020 (9th Cir. 2018) 11
United States v. Brewer, 848 F.3d 711 (5th Cir. 2017) 4
United States v. Cruz-Diaz, 550 F.3d 169 (1st Cir. 2008) 25
United States v. Davis, 903 F.3d 483 (5th Cir. 2018) 5, 10
United States v. Eaton, 934 F.2d 1077 (9th Cir. 1991)..... 27
United States v. Ellison, 866 F.3d 32 (1st Cir. 2017) 29, 30
United States v. Eshetu, 898 F.3d 36 (D.C. Cir. 2018) 10
United States v. Foppe, 993 F.2d 1444 (9th Cir. 1993) 16
United States v. Garrett, 3 F.3d 390 (11th Cir. 1993) 25
United States v. Gregory, 891 F.2d 732 (9th Cir. 1989) 29
United States v. Gutierrez, 876 F.3d 1254 (9th Cir. 2017) 21

United States v. Hamrick, 43 F.3d 877 (4th Cir. 1995) 24
United States v. Holloway, 309 F.3d 649 (9th Cir. 2002) 32
United States v. Hopkins, 703 F.2d 1102 (9th Cir. 1983) 16, 22
United States v. Jennings, 439 F.3d 604 (9th Cir. 2006) 27, 28
United States v. Jones, 84 F.3d 1206 (9th Cir. 1996) 25, 26
United States v. Kelley, 412 F.3d 1240 (11th Cir. 2005) 17
United States v. Ketchum, 550 F.3d 363 (4th Cir. 2008) 22
United States v. Lucas, 963 F.2d 243 (9th Cir. 1992) 22
United States v. Martinez-Jimenez, 864 F.2d 664 (9th Cir. 1989) 24, 25, 26
United States v. McBride, 826 F.3d 293 (6th Cir. 2016) 31
United States v. McNeal, 818 F.3d 141 (4th Cir. 2016) 4
United States v. Medved, 905 F.2d 935 (6th Cir. 1990) 25
United States v. Nash, 946 F.2d 679 (9th Cir. 1991) 22
United States v. O'Bryant, 42 F.3d 1407 (10th Cir. 1994) 23, 24
United States v. Parnell, 818 F.3d 974 (9th Cir. 2016) 21, 23
United States v. Salas, 889 F.3d 681 (10th Cir. 2018) 10
United States v. Selfa, 918 F.2d 749 (9th Cir. 1990) 16
United States v. Slater, 692 F.2d 107 (10th Cir. 1982) 23
United States v. Smith, 973 F.2d 603 (8th Cir. 1992) 23
United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989) 17
United States v. Watson, 881 F.3d 782 (9th Cir. 2018) ..... *passim*
United States v. Williams, 841 F.3d 656 (4th Cir. 2016) 30
United States v. Woodrup, 86 F.3d 359 (4th Cir. 1996) 17
United States v. Yockel, 320 F.3d 818 (8th Cir. 2003) 17, 18
Welch v. United States, 136 S. Ct. 1257 (2016) 7, 9

Federal Statutes

18 U.S.C. § 16 ..... 8, 10
18 U.S.C. § 371 6
18 U.S.C. § 875 19
18 U.S.C. § 924 ..... *passim*
18 U.S.C. § 2113 ..... *passim*
28 U.S.C. § 1254 1

28 U.S.C. § 2255 ..... *passim*

Other Authorities

BLACK'S LAW DICTIONARY (8th ed. 2004) 21
H.R. REP. No. 99-797 (1986) 32
PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 539 (2012 ed.) 30
U.S. CONST. amend. V..... 2
U.S.S.G. § 4B1.2 4

Petition for Certiorari

Petitioner Johnny M. Williams, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Orders Below

The Ninth Circuit Court of Appeals' unpublished order summarily affirming the district court's order denying Mr. Williams's 28 U.S. C. § 2255 motion, *United States v. Williams*, No. 16-36011 (9th Cir. Dec. 5, 2018), is attached as Appendix 1. The Ninth Circuit Court of Appeals' unpublished order granting a certificate of appealability, *United States v. Williams*, No. 16-36011 (9th Cir. Apr. 14, 2017), is attached as Appendix 2. The district court's unpublished order denying Mr. Williams's 28 U.S.C. § 2255 motion and his request for a certificate of appealability is attached as Appendix 3. The district court's unpublished order denying Mr. Williams's motion for reconsideration, including its previous denial of a certificate of appealability, is attached as Appendix 4.

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in this case on December 5, 2018. The Mandate issued on January 28, 2019. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(c)(3) defines "crime of violence" as:

> (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.

The federal armed bank robbery statute at 18 U.S.C. § 2113(a) and (d) reads as follows:

> (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; or

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (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.

Reasons for Granting the Writ

Mr. Williams requests certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal armed bank robbery under 28 U.S.C. § 2113(a) and (d) and to reconcile that precedent with this Court's interpretation of the bank robbery statute to encompass a minimal general intent requirement in *Carter v. United States*, 530 U.S. 255, 268 (2000).

Circuit courts continue to erroneously hold that federal armed bank robbery by intimidation qualifies as a crime of violence under § 924(c)'s elements clause and analogous sentencing enhancement provisions. *See*, *e.g.*, *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 203 (Oct. 1, 2018) (holding

federal bank robbery is a crime of violence under § 924(c)(3)(A)); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016) (same); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017) (holding that federal bank robbery is a crime of violence under U.S.S.G. § 4B1.2(a)(1)); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)). However, "intimidation," as broadly construed by this Court and by the circuits for decades, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. Thus, under the categorical lens, which considers only the least culpable conduct necessary to satisfy the offense of conviction, bank robbery does not have as an element the "use, attempted use, or threatened use of physical force against the person or property of another" within the meaning of § 924(c)'s elements clause.

This case presents a question of exceptional importance regarding federal criminal law that requires this Court's guidance. Having a clear and consistent definition of the intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in efficiently administering the law. Moreover, correctly understanding the scope of the intimidation element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, including the harsh mandatory consecutive sentences required by 18 U.S.C.

§ 924(c)(1)(A). Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses committed by "intimidation" as crimes of violence under § 924(c), and respectively, that trial courts appropriately instruct juries regarding the correct offense elements of bank robbery.

Related Cases Pending in this Court

Mr. Williams's case presents similar arguments to the petition for certiorari recently granted in *Davis v. United States*, No. 14-431 (U.S. Jan. 4, 2019), in which this Court will review the Fifth Circuit's holding that 18 U.S.C. § 924(c)'s residual clause is void for vagueness under *Johnson*. *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018). Mr. Williams's case also presents similar argument to the petition for certiorari currently pending before this Court in *Mark Lee Murray v. United States*, No. 18-6569 (U.S.), regarding challenges under 28 U.S.C. § 2255 to § 924(c)'s residual clause. This Court ordered the government to respond to Mr. Murray's petition for writ of certiorari and the government filed its response on January 28, 2019. Mr. Murray filed a reply on February 11, 2019, and the case was distributed for the March 1, 2019 conference.

Statement of the Case

Petitioner Johnny M. Williams, Jr. is serving a 92-year prison sentence, 85 years of which is unconstitutional. His 1994 federal armed bank robbery convictions

are not crimes of violence under 18 U.S.C. § 924(c)'s elements clause because they can be committed by intimidation without specific intent to harm. No use, attempted use, or threatened use of violent physical force was required for conviction. As such, the conviction can only be argued to qualify as a predicate crime of violence under § 924(c)'s now-void residual clause. Mr. Williams requests certiorari to correct the Ninth Circuit's deviation from established federal law on the requirements for § 924(c)'s elements clause.

I. A 85-year mandatory, consecutive sentence for use of a firearm during federal armed bank robbery.

On September 7, 1994, Mr. Williams pled guilty to one count of conspiracy in violation of 18 U.S.C. § 371, five counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (originating from several districts), and five counts of the use of a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c). CR 31 (No. CR94-398-TSZ).[1] On January 20, 1995, the district court sentenced Mr. Williams to 84 months on the conspiracy and bank robbery counts, and mandatory minimum consecutive sentences of 1,030 months on the five § 924(c) counts, for a total imprisonment term of 92 years (1,114 months). CR 45.

Mr. Williams is currently in federal custody with a projected release date of September 1, 2074.

---

[1] The citation "CR" refers to the lower federal district court record, specifically to the document's ECF number on the district court's criminal docket for *United States v. Williams*, No. CR94-398-TSZ (W.D. Wash.).

II. Mr. Williams seeks relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

On June 26, 2015, this Court held that imposing an enhanced sentence under the residual clause of 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), violates the Constitution's guarantee of due process. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court subsequently held that *Johnson* announced a new substantive rule retroactively applicable to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257 (2016).

On May 31, 2016, Mr. Williams filed a pro se motion to vacate, set aside, or correct his sentence under § 2255, arguing that his convictions for conspiracy and federal bank robbery do not constitute crimes of violence under 18 U.S.C. § 924(c), and that its residual clause is void for vagueness. CVR 1 (No. C16-814-TSZ).[2] Because the Federal Defender's Office had formerly represented Mr. Williams, it received notice of his filing via ECF on the day he filed his motion and promptly filed notices of appearance on June 13, 2016, after receiving permission from Mr. Williams to do so. CVR 5, 6. On June 10, 2016, the district court denied the pro se petition, ten days after it was filed, without benefit of counseled briefing or a response from the government. CVR 4. The district court also denied Mr. Williams's motion for a certificate of appealability (COA) in that same order. Appendix 3. On June 14, 2016, Mr. Williams, represented by counsel, filed a motion for

[2] The citation "CVR" refers to the lower federal district court record, specifically to the document's ECF number on the district court's civil docket for *United States v. Williams*, No. CV16-814-TSZ (W.D. Wash.).

reconsideration asking that the court vacate its order and set a briefing schedule. CVR 7. The motion further asked that the court reconsider its decision denying a COA. On November 7, 2016, the district court denied the motion for reconsideration, including its previous denial of a COA. Appendix 4.

On December 7, 2016, Mr. Williams filed a Motion for Certificate of Appealability, which the Ninth Circuit granted on April 14, 2017, with respect to the issue of whether "appellant's 18 U.S.C. § 924(c) use-of-a-firearm convictions must be vacated because armed bank robbery does not qualify as a predicate 'crime of violence' under either the elements/force clause or the residual clause of § 924(c)(3)." Appendix 2. The court summarily affirmed the district court's order denying petitioner's 28 U.S.C. § 2255 motion in an unpublished opinion on December 5, 2018, citing to *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018). Appendix 1.

On April 17, 2018, this Court held the residual clause of the federal criminal code's definition of "crime of violence," as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was void for vagueness and violated due process for the same reasons articulated in *Johnson*. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). The residual clause in 18 U.S.C. § 16(b) is identical to the residual clause in 18 U.S.C. § 924(c).

Argument

I. Certiorari is necessary to resolve the federal circuit split regarding whether *Johnson* retroactively invalidated the residual clause at 18 U.S.C. § 924(c)(3)(B).

Section 924(c) provides for a series of graduated, mandatory, consecutive sentences for using or carrying a firearm during and in relation to a "crime of violence." 18 U.S.C. § 924(c)(3). The statute defines "crime of violence" as:

> (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.

Id. The first clause, § 924(c)(3)(A), is referred to as the elements clause. The second clause, § 924(c)(3)(B), is referred to as the residual clause.

In *Johnson*, this Court struck the ACCA's residual clause, at 18 U.S.C. § 924(e), as unconstitutionally vague. 135 S. Ct. at 2557. This Court also held *Johnson* retroactively applies to all defendants sentenced under the ACCA. *Welch*, 136 S. Ct. at 1265. The ACCA contains similar element and residual clauses to 18 U.S.C. § 924(c). The ACCA defines "violent felony" as:

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

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B)(i)–(ii). It follows that § 924(c)'s residual clause is likewise unconstitutionally vague.

Additionally, on April 17, 2018, this Court held the Immigration and Nationality Act's residual clause defining "crime of violence," at 18 U.S.C. § 16(b), to be void for vagueness under the Due Process Clause. *Dimaya*, 138 S. Ct. at 1204. The § 16(b) residual clause is identical to § 924(c)'s residual clause. This further supports Mr. Williams's argument that § 924(c)'s residual clause is unconstitutional.

Federal circuits are split on two critical § 924(c) issues that affect thousands of individuals including Mr. Williams: whether *Johnson* applies to § 924(c)'s residual clause and, if so, whether voidance of § 924(c)'s residual clause retroactively applies to collateral challenges. On January 4, 2019, in *United States v. Davis*, No. 18-431 (U.S.), this Court granted certiorari to address the first question, and will review the Fifth Circuit's conclusion that § 924(c)'s residual clause is void for vagueness under *Johnson*. *See Davis*, 903 F.3d 483. The Fifth Circuit's *Davis* decision tracks those in the Tenth and D.C. Circuits that also hold § 924(c)'s residual clause is void for vagueness under *Johnson*. *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (direct appeal), *petition for reh'g filed*, (D.C. Cir. Aug. 31, 2018) (No. 15-3020); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (direct appeal), *petition for cert. filed*, (U.S. Oct. 3, 2018) (No. 18-428).

Taking the opposite view, however, the Second and Eleventh Circuits hold that § 924(c)'s residual clause is not void for vagueness. *See Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc) (§ 2255 appeal); *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) (direct appeal), *petition for cert. filed*, (U.S. Dec. 3, 2018) (No. 18-6985).

The remaining circuits have not yet resolved whether *Johnson* applies to 18 U.S.C. § 924(c)'s residual clause, either on direct appeal or retroactively, since *Dimaya*. The leading Ninth Circuit § 924(c) challenge on direct appeal is *United States v. Begay*, No. 14-10080 (submission deferred pending *United States v. Davis*). In another case, *United States v. Blackstone*, the Ninth Circuit recently held that 28 U.S.C. § 2255 challenges to § 924(c)'s residual clause under *Johnson* are untimely because this Court has not yet specifically held *Johnson* applies to § 924(c). *United States v. Blackstone*, 903 F.3d 1020, 1028–29 (9th Cir. 2018), *petition for reh'g denied*, (9th Cir. Jan. 17, 2019) (No. 17-55023).

This Court's stated reasons in *Dimaya* for voiding § 16(b)'s residual clause apply with equal force to voiding § 924(c)'s residual clause. Section 924(c)'s residual clause requires courts to create the very type of abstract, hypothetical, "ordinary case" under the statute and determine "what threshold level of risk made any given crime a 'violent felony.'" *Dimaya*, 138 S. Ct at 1213–15; *see also Johnson*, 135 S. Ct. at 2557–58 (finding same vagueness bases for ACCA). The outcome is the same: § 924(c)(3)(B) results in "more unpredictability and arbitrariness than the Due

Process Clause tolerates." *Dimaya*, 138 S. Ct. at 1216 (quoting *Johnson*, 135 S. Ct. at 2558).

Another critical factor is that both § 924(c) and the ACCA (at § 924(e)) impose mandatory prison sentences. "The prohibition of vagueness in criminal statutes . . . appl[ies] not only to statutes defining elements of crimes, but also to *statutes fixing sentences*." *Johnson*, 135 S. Ct. at 2556–57 (citation omitted) (emphasis added). Section § 924(c) mandates progressively increased consecutive sentences for use of a firearm during a crime of violence—starting at five-year minimum consecutive sentences and increasing up to mandatory life sentences. The ACCA, at § 924(e), imposes a mandatory minimum fifteen-year sentence. In *Johnson*, this Court found the ACCA's mandatory nature to be a weighty factor in holding its residual clause unconstitutional. 135 S. Ct. at 2256–57. For these reasons, § 924(c)(3)(B)'s residual clause is also unconstitutional.

Because this Court recently granted certiorari on the first issue in *Davis*, No. 18-431, whether *Johnson* invalidated § 924(c)'s residual clause, Mr. Williams requests this Court also grant certiorari on the closely aligned issue of whether that invalidation applies retroactively.

II. Certiorari is necessary to provide the proper interpretation of "intimidation" as used in the federal armed bank robbery statute to determine whether it requires proof of an intentional threat of violent physical force necessary to meet the elements clause of 18 U.S.C. § 924(c)(3)(A).

Mr. Williams's 18 U.S.C. § 924(c) conviction and sentence rest on the district court's finding that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a crime of violence. As explained, the residual clause in § 924(c) no longer provides a

basis to hold that federal armed bank robbery is a crime of violence, and thus the § 924(c) elements clause is the only available avenue. *See* Section I *infra* (requesting certiorari on this issue). But the federal armed bank robbery statute does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another" that the elements clause requires. 18 U.S.C. § 924(c)(3)(A). The federal armed bank robbery statute does not therefore meet the elements clause of § 924(c)(3)(A).

A. The categorical approach determines whether an offense is a crime of violence under 18 U.S.C. § 924(c).

To determine if an offense qualifies as a "crime of violence," courts must use the categorical approach to discern the "minimum conduct criminalized" by the statute at issue through an examination of cases interpreting and defining that minimum conduct. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and refined the analysis in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). The narrow categorical approach mandated by this precedent requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis*, 136 S. Ct. at 2248.

Because the categorical approach is concerned only with what conduct the offense necessarily involves, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190–91 (alterations omitted). If the statute of conviction criminalizes some conduct that

does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis*, 136 S. Ct. at 2248.

B. Intimidation within the meaning of 18 U.S.C. § 2113(a) is not a match for the definition of a crime of violence in 18 U.S.C. 924(c)(3)(A).

The least culpable conduct criminalized by federal armed bank robbery is not a match for at least two of the requirements of § 924(c)'s elements clause. First, § 924(c)'s elements clause requires *purposeful* violent conduct. But this Court has held that bank robbery is a general intent crime, and the circuits have not applied any culpable mens rea to the intimidation element. Second, § 924(c)'s elements clause requires that physical force be *violent* in nature. But bank robbery by intimidation does not require a communicated intent to use violence.

1. Section 924(c)(3)(A) requires a purposeful threat of physical force, whereas bank robbery by intimidation is a general intent crime that does not require any intent to intimidate.

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of § 924(c) means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). In the Ninth Circuit's *Watson* decision, the court considered and rejected the defendant's claim that the mental state for bank robbery is not a match for the crime of violence definition in § 924(c) because the statute permits a defendant's conviction "if he only negligently intimidated the victim." 881 F.3d at 785. Citing *Carter*, the court concluded that federal bank robbery "must at least involve the knowing use of intimidation, which

necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

Watson's conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with the standard announced by this Court in *Carter* and with the manner in which the circuits have consistently construed the intimidation element of bank robbery outside the categorical approach context. In *Carter*, the question under consideration was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269. Thus, the Court recognized that § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)." *Id.* at 269. But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at 268–69. Instead, this Court determined that "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent—that is, that the defendant possessed knowledge with respect to the actus reus of the crime (here, the taking of property from another by force and violence or intimidation)." *Id.* at 268 (emphasis in original).

Under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by intimidation, but the government need not prove

that the defendant knows the conduct is intimidating. That reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Before *Carter*, the Ninth Circuit defined "bank robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). This definition attached the willful mens rea solely to the "taking" element of bank robbery, not the "intimidation" element.

Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions are intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). Similarly, in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds, fifties and twenties. This is a robbery," even though he spoke calmly, was clearly unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The court approved a jury instruction that stated intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The Fourth Circuit held in *United States v. Woodrup* that "[t]he intimidation element of § 2113(a) is satisfied if 'an ordinary person in the [victim's] position reasonably could infer a threat of bodily harm from the defendant's acts,' whether or not the defendant actually intended the intimidation." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at 364. The Eleventh Circuit held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005).

The Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no question on the matter: there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823–24 (8th Cir. 2003). In *Yockel*, the defendant was attempting to withdraw $5,000 from his bank account, but the teller could not find an account in his name. *Id.* at 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If you want to go to heaven, you'll give me the money." *Id.* at 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would leave

her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at 822. The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and decided "to exclude mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eight Circuit affirmed. *Id.* at 823. Citing *Foope*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the mens rea element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Thus, *Carter* and circuit precedent together establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy § 924(c)(3)(A)'s mens rea standard. In *Elonis v. United States*, this Court explained that engaging in a knowing act is not equal to knowing the character of that act. 135 S. Ct. 2001, 2011 (2015). In *Elonis*, the Court considered as a matter of statutory interpretation whether a culpable mental state is required

for a threatening communication to be punishable under 18 U.S.C. § 875(c). Relying on the "basic principle" that "wrongdoing must be conscious to be criminal," the Court concluded that a culpable mental state must "apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2009, 2011.

The government in *Elonis* had argued that a defendant's statements should be punished as threats as long as "he himself knew the contents and context" of the statements and "a reasonable person would have recognized that [the] would be read as genuine threats." 135 S. Ct. at 2011. The Supreme Court made clear that this proposed mental state could not be characterized "as something other than a negligence standard" because it ultimately relied on whether a "reasonable person," not the defendant, would view the conduct as harmful:

> [T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence. Criminal negligence standards often incorporate "the circumstances known" to a defendant . . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct . . . . That is a negligence standard.

Id. (citation omitted).

Comparing the mens rea standard articulated in *Foppe* and *Yockel* with *Elonis* demonstrates that the intimidation prong of bank robbery requires no more than a negligent threat of harm. As in *Elonis*, the fact that § 2113(a) requires a defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *Id.* Rather, a

threat is committed only negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.* Although § 2113(a) requires that a defendant have knowledge of his or her actions, it leaves the question of whether the actions are intimidating to be judged solely by what a reasonable person would think, not what the defendant thinks. As in *Elonis*, "[t]hat is a negligence standard." 135 S. Ct. at 2011.

This Court should intervene to affirm the minimal mental state requirement applicable to federal bank robbery by intimidation, as confirmed by *Carter* and decades of circuit precedent. Because intimidation is satisfied when a reasonable person, not the defendant, would view the defendant's conduct as intimidating, § 2113(a) does not meet § 924(c)(3)(A)'s requirement of purposeful violence.

2. Section 924(c)(3)(A) requires a threatened use of violent physical force, whereas bank robbery by intimidation does not require that a defendant communicate any intent to use violence.

Even if § 2113(a) proscribed a sufficient mens rea for the "intimidation" element of the offense, the statute does not require a threatened use of violent physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of § 924(c)(3)(A) must be ""violent force—that is, force capable of causing physical pain or injury to another person."' 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson*

2010")) (emphasis in original).[3] Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in 18 U.S.C. § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under the ACCA's force clause. 881 F.3d at 785 ("[A] 'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)). That reasoning was in error because it is the content of a communication that defines a threat, not the reaction of the victim.

As this Court recognized in *Elonis*, the common definition of threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at 2008 (quoting BLACK'S LAW DICTIONARY 1519 (8th ed. 2004)) (emphasis added). In *United States v. Parnell*, the Ninth Circuit reasoned that an uncommunicated "willingness to use violent force is not the same as a threat to do so." 818 F.3d 974, 980 (9th Cir. 2016). Thus, a threat depends on the content of a communication, not the victim's reaction. The fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another." *Elonis*, 135 S. Ct. at 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand

---

[3] *Stokeling* and *Johnson 2010* considered the meaning of "physical force" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), but the same standard has been applied to § 924(c)(3)(A). *See*, *e.g.*, *Watson*, 881 F.3d at 784.

for money, without regard to whether the bank teller is afraid. *See, e.g., United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703 F.2d at 1103 ("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)).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have a least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the court found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a

withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 608 (8th Cir. 1992).

Although each of these cases involved circumstances that were objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. It also includes taking money without a demand and without physical force capable of causing any pain or injury. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107–08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (Table) (affirming finding of intimidation where the defendant reached over the counter and took money from an

open teller drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As the *Watson* court recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at 785. However, conduct can be frightening, yet still not contain a threat. Accordingly, the circuits have strayed from precedent in concluding that intimidation requires a threat of violent force. *See, e.g., Watson*, 881 F.3d at 785.

C. The "dangerous weapon" element of armed bank robbery does not satisfy the force clause.

The element that elevates unarmed bank robbery into armed bank robbery—putting "in jeopardy the life of any person by the use of a dangerous weapon or device"—does not transform the crime in a manner that satisfies § 924(c)'s elements clause. The circuits have interpreted the "dangerous weapon" element broadly to include non-assaultive and non-brandishing uses of even a toy weapon. *See United States v. Martinez-Jimenez*, 864 F.2d 664, 666–67 (9th Cir. 1989) (reasoning that the apparent danger from a toy gun creates a greater risk that law enforcement or bank guards may use deadly force); *United States v. Hamrick*, 43 F.3d 877, 882 (4th Cir. 1995) ("[E]very circuit court considering . . . the question of whether a fake weapon that was never intended to be operable [can be a 'dangerous weapon'] has come to the same conclusion."); *see also, e.g., United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of

§ 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting a "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993) (same); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990) (same).

The defendant in *Martinez-Jimenez* held a toy gun during a bank robbery. His codefendant testified that neither of the two perpetrators "wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." 864 F.2d at 665. The defendant testified that he held the gun because it made him feel secure, but he held it toward his leg during the crime in an attempt to hide it from view. *Id.* The court held that this conduct constituted the use of a dangerous weapon within the meaning of § 2113(d). The weapon qualified as dangerous, although just a toy, because it could still "instill fear" and "create[ ] an immediate danger that a violent response will ensue." *Id.* at 666 (quoting *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986)). Focusing on the reactions of others, the court held that "the potential of an apparently dangerous article to incite fear" satisfies the statutory requirement in § 2113(d). *Id.* at 667; *see also id.* ("Section 2113(d) is not concerned with the way that a robber displays a simulated or replica weapon. The statute focuses on the harms created, not the manner of crating the harm.").

In *United States v. Jones*, the Ninth Circuit clarified that something more than mere possession of a "dangerous weapon" is required to constitute the "use" of a weapon under § 2113(d), but the court did not limit the use to a threatening or

assaultive use. 84 F.3d 1206, 1211 (9th Cir. 1996). Instead, the court explained that "use" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* (quoting *Bailey v. United States*, 516 U.S. 137 (1995)); *see also Martinez-Jimenez*, 864 F.2d at 667 ("A bank robber's use of a firearm during the commission of a crime is punishable even if he does not make assaultive use of the device. He need not brandish the firearm in a threatening manner."). The court in *Jones* held that a defendant's mere reference to possessing a gun, without actually displaying the gun or making any threat to use the gun, is sufficient to sustain a conviction under § 2113(d). 84 F.3d at 1211.

A mere reference to possessing a potential weapon does not necessarily communicate an intent to inflict harm as required to constitute a threatened use of violence. A statute does not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone other than the defendant. Given the broad definition of a "dangerous weapon or device," armed bank robbery does not satisfy the § 924(c) elements clause.

D. The federal armed bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The final step of categorical analysis determines if an overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. If the statute is divisible, the court may apply the modified categorical approach to determine if any of the divisible parts are crimes of violence and if the defendant violated a qualifying section of the statute. *Id.* The federal armed bank robbery statute is overbroad, indivisible, and not a crime of violence.

If a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the statute is divisible. *Descamps*, 570 U.S. at 263–64. In assessing whether a statute is divisible, courts must assess whether the statute sets forth indivisible alternative means by which the crime could be committed **or** divisible alternative elements that the prosecution must select and prove to obtain a conviction. *Mathis*, 136 S. Ct. at 2248–49. Only when a statute is divisible may courts then review certain judicial documents to assess whether the defendant was convicted of an alternative element that meet the elements clause. *Descamps*, 570 U.S. at 262–63.

Watson summarily held the federal bank robbery statute, 18 U.S.C. § 2113(a), is divisible because "it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006), and *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991)). These sources do not establish that § 2113(a) is divisible. Rather, each indicates the exact opposite: (1) force and violence, (2) intimidation, and (3) extortion are indivisible means of satisfying a single element.

First, *Watson* did not explain how *Eaton* supports divisibility. That is because it does not. *Eaton* clarified the elements required for a bank robbery conviction under § 2113(a): "Bank robbery under section 2113(a) is defined, in relevant part, as taking 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank. . . ." *Eaton*, 934 F.2d at 1079 (emphasis added) (citation omitted). *Eaton* recognizes

"force and violence," "intimidation," and "extortion" are three ways to take property. It follows under *Eaton* that "extortion" is a means of committing a § 2113(a) robbery, as is "intimidation." Accordingly, § 2113(a) is indivisible as to "force and violence," "intimidation," and "extortion."

Second, *Watson*'s reliance on *Jennings* is no more persuasive. *Jennings* addressed the application of a guideline enhancement to the facts of a bank robbery conviction. 439 F.3d at 612. *Watson* did not include an explanatory parenthetical when citing *Jennings*. 881 F.3d at 786. It is therefore unclear what part of *Jennings*'s analysis *Watson* relied on to support its position that § 2113(s) sets forth alternative elements.

Watson may have been relying on *Jennings*'s statement that "§ 2113(a) covers not only individuals who take property from a bank 'by force and violence, or by intimidation,'" as defendant Jennings did," "but also those who obtain property from a bank by extortion." *Jennings*, 439 F.3d at 612. But this statement is not instructive to the divisibility analysis. Every statute, whether divisible or indivisible, "covers" the alternatively worded methods of incurring liability. That a statute "covers" multiple courses of conduct says nothing about whether those courses of conduct are means or elements. The Iowa robbery statute in *Mathis*, for example, "covered" robberies committed in a building, structure, or vehicle, yet *Mathis* concluded those locations were means, not elements. 136 S. Ct. at 2250 (clarifying standard for divisibility analysis).

Thus, none of the sources *Watson* cited establish "extortion" is divisible from "force and violence" and "intimidation."

Watson also failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which demonstrates § 2113(a) is indivisible. In *Gregory*, the Ninth Circuit held that "bank larceny" under § 2113*(b)*—which prohibits taking a bank's property "with intent to steal or purloin"—is not a lesser included offense of "bank robbery" under § 2113*(a)*. 891 F.2d at 734. Bank *larceny*, *Gregory* reasoned, requires "a specific intent element which need not be proved in the bank robbery context." *Id.* To support this conclusion, *Gregory* compared the elements of the two offenses, holding "[b]ank robbery is defined as taking or attempting to take 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .' 18 U.S.C. § 2113(a)." *Id.* (alteration in original) (emphasis added).

As the statute's wording—with the use of the disjunctive "or"—suggests, *Gregory* notes "force and violence," "intimidation," and "extortion" are three separate ways of taking property, each of which is independently sufficient to prove a robbery. *Gregory*'s discussion of these three alternatives as ways to commit the single offense of bank robbery suggests that each alternative is a means.

Other circuits are in accord. The First Circuit specifically holds that § 2113(a) "includes both 'by force and violence, or intimidation' and 'by extortion' as separate *means* of committing the offense." *United States v. Ellison*, 866 F.3d 32, 36 n.2

(1st Cir. 2017) (emphasis added). The Seventh Circuit's model jury instructions specifically define extortion as a "means" of violating § 2113(a): "The statute, at § 2113(a), ¶1, includes a *means* of violation for whoever 'obtains or attempts to obtain by extortion.' If a defendant is charged with this *means* of violating the statute, the instruction should be adapted accordingly." PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 539 (2012 ed.) (emphasis added). The Third Circuit agrees. *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery."), *vacated on other grounds*, 159 F.3d 774 (3d Cir. 1998).

The Fourth Circuit, in *United States v. Williams*, treated "force and violence," "intimidation," and "extortion" as separate means of committing § 2113(a) bank robbery. 841 F.3d 656 (4th Cir. 2016). "As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force and violence, intimidation, or extortion; and (2) bank burglary, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein." 841 F.3d at 659. Bank robbery, the Fourth Circuit wrote, has a single "element of force and violence, intimidation, or extortion." *Id.* at 660.

And the Sixth Circuit, without definitively deciding the issue, noted § 2113(a) "seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or

extortion on one hand and entering a bank intending to commit any felony affecting it . . . on the other." *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017).

Section 2113(a), in other words, may be divisible into two crimes at most: robbery (under the first paragraph) and entering a bank with the intent to commit a felony (under the second paragraph). But the robbery offense is not further divisible; it can be committed through force and violence, *or* intimidation, *or* extortion. These three statutory alternatives exist within a single set of elements and therefore must be means.

Furthermore, the text of § 2113(a) supports the finding that bank robbery is indivisible. First, as this Court held in *Mathis*, "[i]f statutory alternatives carry different punishments, then . . . they must be elements." 136 S. Ct. at 2256. Nothing in § 2113's statutory text suggests it criminalizes different offenses depending on whether the underlying conduct was committed "by force and violence, or by intimidation, . . . or . . . by extortion." 18 U.S.C. § 2113(a). The statute provides one punishment—a person who violates § 2113(a) "[s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a). Regardless of whether a defendant takes property by force and violence, or by intimidation, or by extortion, he is subject to the same penalty. *See* § 2113(a). A key divisibility indicator this Court identified in *Mathis* is absent here.

Second, the statute's history confirms bank robbery is a single offense that can be accomplished "by force and violence," "by intimidation," or "by extortion."

Until 1986, § 2113(a) covered only obtaining property "by force and violence" or "by intimidation." *See United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002). A circuit split ensued over whether the statute applied to wrongful takings in which the defendant was not physically present inside the bank. H.R. REP. No. 99-797 sec. 51 & n.16 (1986) (collecting cases). Most circuits held it did cover extortionate takings. *Id.* Agreeing with the majority of circuits, the 1986 amendment added language to clarify that "extortion" was a means of extracting money from a bank. *Id.* ("Extortionate conduct is prosecutable [] under the bank robbery provision. . . ."). This history demonstrates Congress did not intend to create a new offense by adding "extortion" to § 2113(a), but did so only to clarify that such conduct was included within bank robbery. Obtaining property by extortion, in other words, is merely an alternative means of committing robbery.

Because § 2113(a) lists alternative means, it is an indivisible statute. Since § 2113(a) is indivisible, the analysis is limited to the categorical approach. Under the categorical approach, federal armed bank robbery is overbroad and not a crime of violence under § 924(c).

//

//

Conclusion

For the above reasons, Mr. Williams requests the Court grant the Petition for a Writ of Certiorari.

Dated this 5th day of March 2019.

Respectfully submitted,

s/ *Michael Filipovic*
Federal Public Defender
* *Counsel of Record*

s/ *Vicki W. W. Lai*
Assistant Federal Public Defender

Counsel for Petitioner Johnny Williams, Jr.