No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BRIAN WINSTON,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

This Court held in *Carter v. United States*, 530 U.S. 255, 268 (2000), that federal armed bank robbery under 18 U.S.C. § 2113(a) and (d) is a general intent offense. Decades of circuit precedent hold that intimidation under the statute is judged by the reasonable reaction of the victim, rather than by the defendant's intent.

The question presented is:

Can reasonable jurists conclude that federal armed bank robbery by intimidation is not a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A) because the offense fails to require any intentional use, attempted use, or threatened use of violent physical force?

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To the Honorable Chief Justice and the
Associate Justices of the Supreme Court:

ROBERT BRIAN WINSTON, by and through appointed counsel, respectfully petitions for a writ of certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit, denying a certificate of appealability.

OPINIONS BELOW

The order denying Mr. Winston a certificate of appealability is unpublished; a copy of the order is attached to this petition in an Appendix.

(Appendix, *infra* App-2.) The order denyingWinston's timely filed motion for reconsideration is unpublished; a copy of the order is attached. (App-1.)

The district court's judgment and order denying habeas relief was also unreported. A copy of it together with the magistrate judge's findings and recommendations that the district court adopted is included in the appendix. (App-3 to App-12.)

JURISDICTION

The Ninth Circuit order denying Mr. Winston a certificate of appealability was filed on November 6, 2018. (App-2.) Mr. Winston timely filed a motion for reconsideration of this order. The Court of Appeals denied reconsideration on December 20, 2019. (App-1.) This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. *See Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (holding Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel.)

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PROVISIONS OF LAW INVOLVED

The provisions of constitutional law whose application is disputed in this case is the Fifth Amendment to the United States Constitution. It reads, in pertinent part:

> [N]or shall any person . . .be deprived of life, liberty, or property, without due process of law.

Title 18 of the United States Code, Section 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, 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 2005 federal bank robbery statute at issue here reads, in pertinent part:

> (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.

18 U.S.C. § 2113(a), (d) (2005).

The federal statutory and court rules governing the appeal from the denial of habeas relief are also involved. 28 U.S.C. § 2253 provides, in relevant part:

> (a) In a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * * *
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -- . . . (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a

> substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Winston is a federal prisoner held by the Bureau of Prisons serving 192 months in prison. On december 21, 2007, Winston pleaded guilty to one count of violating 18 U.S.C. § 924(c) pursuant to a plea agreement. District Court Docket entry no. 28. On March 21, 2008, the district court sentenced Winston; he received an 84 month sentence for the § 924(c) conviction and a consecutive 108 month sentence for the other counts and a separate case. Docket entry nos. 37 (judgment). Winston neither appealed nor sought certiorari review with the United States Supreme Court.

On June 26, 2015, this Court decided *Samuel James Johnson v. United States,* 135 S. Ct. 2551 (2015) ("*Johnson II*"), holding that Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutional. Winston filed a timely 28 U.S.C. § 2255 motion attacking his conviction and sentence. He argued that *Johnson* applied to and voided the residual clause in § 924(c)(3)(B), and that its predicate, that he used and carred a firearm during and in aid of a bank robbery in violation of 18 U.S.C.

§ 2113(a), (d), was not categorically a crime of violence under the elements clause in the relevant provision. On the latter point, Mr. Winston argued that federal bank robbery was not a crime of violence under the elements clause because "intimidation" for purposes of Section 2113 did not require the use, attempted use, or threatened use of *violent* physical force, nor did it require intentional threatened force.

On October 6, 2017, the district court, by adopting the magistrate judge's findings and recommendations, denied relief and declined to issue a certificate of appealability. (App-3 to App-4.)

On October 20, 2017, Winston filed a timely notice of appeal. On November 1, 2017, he then filed a motion for a certificate of appealability with the Circuit. *See* Rule 22(b)(2) of Fed. R. App. Proc.; Ninth Circuit Rule 22-1(d).

On November 16, 2018, a motions panel of the Circuit Court denied Winston's request for a certificate of appealability. (App-2.) Winston timely sought rehearing. The Circuit Court denied reconsideration on December 20, 2018. (App-1.)

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REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

A number of circuits have reached logically inconsistent positions regarding federal bank robbery by intimidation. These courts hold that this offense —whose conduct that does not require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses of section 924(c)(3)(A) – while, at the same time, applied an ever decreasing bar for what constitutes "intimidation" in the context of sufficiency of the evidence challenges. *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); *Brewer,* 848 F.3d at 716(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) (en banc) (holding that federal carjacking by intimidation is a crime of violence under § 924(c)(3)(A)).

The courts cannot have it both ways – either bank robbery requires a threat of violent force, or it does not; but the same rule must apply to both sufficiency cases and to the categorical analysis. Given the heavy

consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of law into order. 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.

A. STANDARDS GOVERNING THE GRANT OR DENIAL OF A CERTIFICATE OF APPEALABILITY

To obtain a certificate of appealability, a habeas corpus petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant "need not show that he should prevail on the merits." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). A claim warrants issuance of a certificate if it presents a "question of some substance," i.e., an issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court could resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." *Id*., at 893 n.4, 894. As this Court has explained:

> At the COA stage . . ., a court need not make a definitive inquiry into [the merits of the habeas petition]. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Miller-El v. Cockrell, 537 U.S. 322, 342 (2003) (citations omitted). *See also Tennard v. Dretke,* 542 U.S. 274, 281-88 (2004); *Silva v. Woodford*, 279 F.3d 825, 832 (9th Cir. 2002) (distinguishing standard of review for purposes of granting certificate of appealability and for granting writ of habeas corpus).

B. THE CATEGORICAL APPROACH DETERMINES WHETHER AN OFFENSE IS A CRIME OF VIOLENCE

To determine if an offense qualifies as a "crime of violence," courts apply the categorical approach to discern the "minimum conduct criminalized" by the statute. *Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684-85 (2013); *Almanza-Arenas v. Lynch,* 815 F.3d 469, 482 (9th Cir. 2016) (en banc). Courts must "disregar[d] the means by which the defendant committed his crime, and loo[k] only to that offense's elements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under this rubric, 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.

There are two requirement for "violent force." First, violent *physical* force is required for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States,* 139 S. Ct. 544, 552-53 (2019) (citing *Johnson v. United States,* 559 U.S. 133, 140 (2010) ("*Johnson I*)). In *Johnson I,* this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 139 U.S. at 140. In *Stokeling*, this Court recently interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. 139 S. Ct. at 554. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft,* 543 U.S. 1, 12-13 (2004); *United States v. Benally,* 843 F.3d 350, 353-54 (9th Cir. 2016).

This Court held that the residual clause in the Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), is void for vagueness and violates due process for the same reasons articulated in

Johnson II. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). The residual clause in § 16(b) is identical to the residual clause in § 924(c)(3)(B).

Following *Dimaya*, the government has argued that the residual clause in § 924(c)(3)(B) can be saved from vagueness by jettisoning the categorical approach in favor of a conduct-specific approach. *See, e.g.*, Petition for a Writ of Certiorari, *United States v. Davis*, No. 18-431 (S. Ct.) (filed Oct. 3, 2018). On January 4, 2019, this Court granted certiorari in *Davis* to decide whether the residual clause in § 924(c)(3)(B) is unconstitutionally vague.[1/] In any event, because the district court and the lower court decided this case on the grounds of the elements clause alone, that is the sole issue presented in this petition for certiorari. The Ninth Circuit erred by concluding that federal bank robbery satisfied both requirements – in fact, bank robbery requires neither violent physical force or intentional force.

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[1] However, when Mr. Winston was convicted, Ninth Circuit law required application of the categorical approach for the crime of violence determination. *See United States v. Piccolo*, 441 F.3d 1084, 1086-87(9th Cir. 2006) (citing *United States v. Amparo*, 68 F.3d 1222, 1224-26 (9th Cir. 1995))("[I]n the context of crime-of-violence determinations under § 924(c), our categorical approach applies regardless of whether we review a current or prior crime.").

C. 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)

1. Federal bank robbery does not require the use or threat of violent physical force

Intimidation for purposes of the federal bank robbery statute can be, and often is, accomplished by a simple demand for money. While a verbal request for money may have an emotional or intellectual force on a bank teller, it does not require a threat of violent force must be "capable" of "potentially" "causing physical pain or injury" to another as *Stokeling,* 139 S. Ct. 554, requires. The Ninth Circuit's *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), provides an example. Lucas walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d at 244. The Circuit held that Lucas's conduct, by "opening the bag and requesting the money," employed "intimidation," and rejected an insufficiency challenge. *Id.* at 248. Because there was no threat – explicit or implicit – to do anything, let alone use violence, if that demand was not met, the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling's* standard for

a crime of violence under the elements clause. *See also United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (rejecting insufficiency challenge where defendant gave bank teller a note demanding money in denominations the teller did not have and "left the bank in a nonchalant manner" after the teller walked toward the vault. " 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapons' are not required for a conviction for bank robbery by intimidation").

Though such minimal conduct is sufficient in the Ninth Circuit to sustain a bank robbery conviction, the Circuit concluded in *Watson* that bank robbery *always* requires the threatened use of *violent* physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence---or, for decades, people have been found guilty of crime of bank robbery who simply are not guilty. Either way, the matter requires this Court's intervention.

This pattern of inconsistent holdings applies broadly across the circuits. For example, the Tenth Circuit affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to the money and made neither a demand nor a threat to use violence. *United States v. Slater,* 692

F.2d 107, 107-08 (10th Cir. 1982) (defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing). And yet, the same Court has consistently concluded since *Johnson I* and *Johnson II* that bank robbery requires the violent use of force. *E.g., United States v. Higley*, 726 F. App'x 715, 717 (10th Cir. 2018).

The Fourth Circuit, in *United States v. Ketchum,* similarly upheld a bank robbery by intimidation conviction against a sufficiency challenge where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, Ketchum gave a teller a note that read, "These people are making me do this," and then told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave Ketchum money and he left the bank. *Id.* And yet, the Fourth Circuit has *also* held that "intimidation" necessarily meets the threatened use of violent physical force required for crime of violence purposes. *McNeal,* 818 F.3d at 157.

Likewise, the Fifth and Eleventh Circuits uphold convictions for robbery by intimidation where there was no weapon, no verbal or written threat, and where the victims were not actually afraid, if the hypothetical ordinary and

reasonable person would be in fear. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (when teller stepped away from her station to use the phone, defendants reached across counter, opened her unlocked cash drawer, grabbed cash, and ran away without saying anything; found sufficient for robbery by intimidation conviction). But these Circuit inconsistently hold for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. Brewer,* 848 F.3d 711, 716 (5th Cir. 2017); *Ovalles,* 905 F.3d 1300.

Each of these courts have applied a non-violent construction of "intimidation" in rejecting insufficiency of the evidence challenges to bank robbery convictions, but have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. The two positions cannot be squared.

In *Watson*, the Ninth Circuit reached its conclusion that bank robbery qualifies as a crime of violence by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson I,* 559 U.S. 133). It is wrong, however, to equate the imputed willingness to use force

with a threat to do so. Indeed, the Ninth Circuit previously acknowledged this very distinction. In *United States v. Parnell,* 818 F.3d 974, 980 (9th Cir. 2016), the government had argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding that Massachusetts armed robbery statute at issue does not qualify as a violent felony, the Circuit rejected the government's position and held that "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id.* *Watson* failed to follow, or even address, this distinction.

Certiorari is necessary to reconcile and correct these contradictory lines of cases.

2. Federal bank robbery is a general intent crime

A second independent reason for granting certiorari rests with the Circuit's failure to recognize the implications for "crime of violence" analysis that bank robbery is a general intent crime. To commit a crime of violence, the use of violent force must be intentional and not merely reckless or negligent. *Leocal,* 543 U.S. at 12-13; *Benally,* 843 F.3d at 353-54. But, a

defendant can commit a bank robbery by intimidation without intentionally intimidating anyone.

The Circuit refused to grant Mr. Winston a certificate of appealability by relying on *Watson*. (App-2.) But *Watson* plainly conflicts with this Court's *Carter v. United States*, 530 U.S. 255 (2000), decision. *Carter* holds the federal bank robbery statute, § 2113(a), "contains no explicit *mens rea* requirement of any kind." 530 U.S. at 267. *Carter* further explained that federal bank robbery does not require an "intent to steal or purloin." *Id.* In evaluating the applicable *mens rea*, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct."' *Id.* at 269.

Thus, *Carter* recognized that bank robbery under § 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.,* but found no basis to impose a specific intent in § 2113(a), *id.* at 268-69. Instead, the Court determined "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 of another by force and violence or intimidation)." *Id.* at 268.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower *mens rea* than the specific intent required by the elements clause of § 924(c)(3)(A) to categorically qualify as a "crime of violence."

Consistent with *Carter,* the Ninth Circuit holds juries need not find intent in § 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. *United States v. Foppe,* 993 F.2d 1444, 1451 (9th Cir. 1993) (holding jury need not find defendant intentionally used force and violence or intimidation.) A specific intent instruction was unnecessary, *Foppe* concluded, because "the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically

intended to intimidate [the teller] is irrelevant."); *see also Hopkins,* 703 F.2d at 1103 (approving instruction stating 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).

Other circuits' decisions agree that bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) ("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . The intimidation element of § 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation.")(internal quotations omitted); *Kelley,* 412 F.3d at 1244 ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."); *United States v. Yockel,* 320 F.3d 818, 823-24 (8th Cir. 2003) (discussing *Foppe* with approval).

This Court recognizes that if an act turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," then only a negligence standard is required. Such offenses

do not require an intentional *mens rea*. *Elonis v. United States,* 135 S. Ct. 2001, 2011 (2015). Because jurors in a bank robbery case are called on only to judge what a reasonable bank teller would feel – as opposed to the defendant's intent – the statute cannot be deemed a categorical crime of violence.

The Ninth Circuit and its sister Circuits' *sub silentio* holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to address whether bank robbery is categorically a "crime of violence" under the elements clause, because general intent "intimidation" does not satisfy this standard.

D. 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 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 creating 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 the 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.

E. THE FEDERAL BANK ROBBERY STATUTE IS INDIVISIBLE AND NOT A CATEGORICAL CRIME OF VIOLENCE UNDER 18 U.S.C. § 924(c)

A final reason should prevent federal bank robbery from being classified as a crime of violence – the statute includes both bank robbery and bank extortion. Because bank extortion does not require a violent threat, and because the statute is indivisible, the statute's over breadth is fatal to this classification.

Case law in this Circuit makes is clear that bank extortion can be accomplished without fear of physical force. *See United States v. Valdez,* 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). But with little analysis, the Ninth Circuit in *Watson* concluded that bank robbery and bank extortion were

divisible portions of the statute. *Watson,* 881 F.3d at 786. This analysis gives short shrift to this Court's divisibility opinions.

In *Mathis*, this Court has held that, where a portion of a statute is overbroad, a court must determine whether the overbroad statute is divisible or indivisible. 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.* If a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,"' the statute is divisible. *Descamps v. United States,* 570 U.S. 254, 263-64 (2013). 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)). The sources it cited do not establish that § 2113(a) is divisible. Rather, each indicates the exact opposite: that force and violence, intimidation, and extortion are indivisible means of satisfying a single element.

Eaton points out that bank robbery is defined as "taking 'by force and violence, *or* by intimidation . . by extortion' . . .*or* anything of value from the 'care, custody, control, management, or possession of, any bank. . . ." *Eaton,* 934 F.2d at 1079 (emphasis added) (citation omitted). But it goes on to note that the "essential element" of bank robbery "could [be] satisfied . . . through mere 'intimidation.'" This thus makes the opposite case – that the element is a wrongful taking, and that violence, intimidation, and extortion are merely means of committing the offense.

Jennings is no more persuasive support for *Watson*'s erroneous conclusion about divisibility. *Jennings* addressed the application of a guideline enhancement to the facts of a bank robbery conviction. 439 F.3d at 612, and in so doing, notes that bank robbery "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. This statement regarding the statute's coverage does not affect the divisibility analysis.

Watson failed to cite, and appears to have overlooked, other cases that analyzed the elements of section 2113. The Ninth Circuit's own decision in *United States v. Gregory,* 891 F.2d 732, 734 (9th Cir. 1989), considered the language in 2113(a) as alternative means and not distinct elements. It 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. In reaching 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).

Other circuits have reached similar decisions. The First Circuit specifically held 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's *United States v. Williams* decision 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 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. Because the Ninth Circuit disregarded this Court's case law on divisibility when it reached the opposite conclusion in *Watson* and then applied it to this case, the Court should grant this petition.

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F. THE DENIAL OF A CERTIFICATE OF APPEALABILITY FAILS TO MAINTAIN UNIFORM CONFORMITY TO THIS COURT'S BINDING PRECEDENT

Mr. Winston's case was entitled to further appellate consideration. As discussed at lenght above, Winston's case presents serious questions concerning the interpreation and application of this Court's precedent to the "crime of violence" analysis of the bank robbery statute. Winston did not need, at a COA stage, to demonstrate that he will prevail on the merits. Rather, the standard for issuing a COA requires only a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); . In *Slack v. McDaniel*, this Court held that a COA should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." 529 U.S. 473, 478 (2000). The review under the COA standards is deliberately supposed to be a "threshold inquiry" where "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El*, 537 U.S. at 342.

The questions raised in this petition , the same questions raised in Mr. Winston's § 2255 motion, meet the certificate of appealability threshold because they are debatable by reasonable jurists and they deserve

encouragement to proceed further. In *United States v. Dawson*, for example, the district court judge granted a certificate of appealability on virtually identical arguments to those presented here, reasoning that the Ninth Circuit's decision in *Watson* stands in tension with this Court's *mens rea* opinion in *Carter* and with earlier Ninth Circuit precedent regarding the intimidation element of bank robbery. 300 F. Supp. 3d 1207, 1210-12 (D. Or. 2018). *Dawson* demonstrates that at least one reasonable jurist has debated whether *Watson* deviated from established precedent.

The issues presented here warranted fuller exploration in the Circuit because they address critical issues of national importance regarding the circuits' inconsistent standards for defining the elements of federal bank robbery. By denying Mr. Winston a COA, the Ninth Circuit inappropriately cut off his viable challenges that are well-grounded in Supreme Court and Circuit authority.

/ / /

CONCLUSION

For all the above reasons, this Court should grant this petition.

Respectfully submitted,

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