

No. 18-9724

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CLIFFORD MARCUS WINKLES — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CLIFFORD MARCUS WINKLES
(Your Name)

P.O. Box 1034
(Address)

COLEMAN, FL. 33521
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED:

1. WHETHER AN UNSOLICITED AND UNAPPOINTED ATTORNEY'S FILING TRUMPS A PRISONER'S PRO SE FILING WHEN BOTH FILINGS RELATE TO THE SAME ISSUE BUT RELY ON DIFFERENT LEGAL THEORIES AND DIFFERENT LEGAL POSITIONS AS TO MATERIAL FACTS AND LAW.

2. WHETHER THIS SUPREME COURT SHOULD REVERSE AND REMAND THIS CASE IN LIGHT OF THE RAMIFICATIONS OF FINALITY ATTACHING TO THE PRISONER'S PROCEDURAL HISTORY WHICH WILL PREVENT THE PRISONER FROM FILING ANY FUTURE PETITIONS UNDER 28 U.S.C. § 2255.

3. WHETHER THIS SUPREME COURT SHOULD USE ITS SUPERVISORY POWERS TO CORRECT THE MANIFEST INJUSTICE PREVALENT IN THIS CASE.

4. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE AS TO THE MERIT OF THE FPD'S ARGUMENTS.

LIST OF PARTIES:

All the parties appear in the caption on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A-2 to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix N/A to the petition and is

☐ reported at N/A _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.



JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was ~~JANUARY 22, 2019~~ FEBRUARY 27, 2019

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE:

As relevant here, on or about June 2016, the prisoner, Clifford Marcus Winkles ("Winkles"), filed a pro se application for permission to file a second or successive section 2255 motion. SEE USCA Case Number 16-72276, 9th Cir. 2016. He did so following the previous submission by the Federal Public Defender's Office ("FPD") requesting the same leave to file a second or successive section 2255 motion. SEE USCA Case Number 16-71427, 9th Cir. 2016. Winkles filed his pro se request because he was not in agreement with FPD, as to the material facts of his case. The two applications both relied on JOHNSON V. UNITED STATES, 135 S.Ct. 2551 (2015), however, they set out different legal arguments. COMPARE APPLICATION 16-72276 with APPLICATION 16-71427. (The FPD's application alleged that the convictions under 18 U.S.C. § 924(c) were unconstitutional because "armed bank robbery" was no longer a qualifying crime of violence, while Winkles's pro se application alleged that his convictions under 18 U.S.C. § 924(c) were unconstitutional because the companion charge it rested upon, i.e., Conspiracy, "18 U.S.C. § 371," did not qualify as a crime of violence in light of Johnson).

On September 29, 2016, a panel of the Ninth Circuit sua sponte "consolidated" the applications and determined that based upon that "consolidated application" Winkles had made a prima facie showing for relief under Johnson. SEE APPENDIX B1-2; USCA Case Numbers 16-71427 and 16-72276. In the Court's Order granting authorization, the Court ordered that "the[ir] Clerk shall serve this order and applications filed in case numbers 16-71427 and 16-72276 directly on the chambers of the Honorable R. Gary Klausner." Id. (Underlines added for emphasis). However, the Clerk of the Court for the Ninth Circuit did not serve the application filed in case number 16-72276 upon the chambers of Judge Klausner.

Upon a review of the application the district court ordered the United States to respond. SEE USDC Case Number 16-cv-07504-R6K. When the United States responded it did so by only addressing the argument made by the FPD. The United States did not mention or address in any manner Winkles's pro se arguments. Accordingly, Winkles filed several motions in the district court averring that his pro se argument had been overlooked. Id. USDC No 16-cv-07504-R6K. However, each of Winkles's attempts were turned aside because, according to the district court, "Winkles was represented by appointed counsel." Id.

The above circumstance led to Winkles filing additional motions, in which he averred he was not appointed counsel, that the Ninth Circuit Court of Appeals denied the FPD's motion for appointment of counsel. Id.; see also USCA Case Numbers 16-71427 and 16-72276; APPENDIX B (denying the request for appointment of counsel.) Winkles's motions were denied without explanation.

On March 9, 2017, without considering Winkles's pro se application (which was ordered to be served upon the chambers of Honorable Gary Klausner), the district court denied Winkles's section 2255 motion as well as his request for a certificate of appealability ("COA"). Id.

Following the denial of **the FPD's** §2255 motion, Winkles filed a sequence of motions arguing that his pro se motion filed in case number 16-72276 was not addressed and that his §2255 proceeding had been hijacked by an unsolicited and unappointed counsel -- who had good intentions but who viewed the case differently than Winkles -- and that he "had a right" to be heard on his pro se arguments. Id. The district court denied each motion for various reasons, including that Winkles's motions were improper because he was "represented by counsel", and thus, pro se filings were not authorized. Id.

During the pendency of Winkles's §2255 proceeding, the FPD's office underwent substitutions of counsel for various reason,

such a maternity leave, job reassignment, and one counsel leaving the FPD's organization. Accordingly, Winkles had three different counsels in and out of his case, all unfamiliar with his

individual case. Winkles was unable to properly correspond to and strategize with the FPD. Winkles's simple requests to have motions filed went unanswered. Winkles could do nothing.

Ultimately the FPD's filed a notice of appeal and request for a COA. See USCA Case Number 17-55313. Winkles did the same. See Docket Entry 7, filed on 8/6/18. However, it appears

Winkles's pro se motion for a COA did not get addressed. See APPENDIX A (not mentioning the pro se request)

Winkles now comes before this Honorable Court and respectfully requests it issue a COA on the questions presented, however, the aforementioned facts are also noteworthy since they demonstrate why this Court should use its discretionary review to grant Winkles relief.

Worth noting, Winkles had filed an original § 2255 motion

(his first) back in 2004. That motion was denied, however, Winkles was not afforded an opportunity to appeal the judgment rendered. This lack of appeal was detrimental to Winkles because had he been afforded an opportunity to appeal he would have succeeded at the appellate level. Such allegation is not speculative because the claims raised in Winkles's first § 2255 motion were identical to those heard by this Court in *LAETER V. COOPER*, 566 U.S. 156 (2012) and *ALLERYNE V. UNITED STATES*, 133 S.Ct 2151 (2013).

In those cases the defendants succeeded, and thus had Winkles been afforded an opportunity to take an appeal, he would have become what *LAETER* and *ALLERYNE* became: successful appellants. This event of Winkles not being able to take an appeal was caused by government action, (or lack thereof). In a proceeding before a panel of the Ninth Circuit, the United States conceded this point. The government conceded that Winkles was not able to make a timely notice of appeal as codified in the Fed. R. App. P 41(a), however, the government

successfully argued that Rule 4(a) was a jurisdictional and mandatory rule that could not be subject to equitable exceptions. SEE Brief for United States, USCA Case Number 13-56376; see also UNITED STATES V. WINKLES, 795 F.3d 1134 (9th Cir. 2015) (published opinion) (acknowledging the government's concession that Winkles was prevented from making a timely notice of appeal due to an impediment created by circumstances beyond Winkles's control) ①

Additionally, a review of the briefing by Winkles's appoint counsel and the United States in case number 13-56376, demonstrates that Winkles has spent the better part of two decades challenging his unlawful detention. Winkles has sought relief through every mechanism permitted by law. Diligence has been shown in this case. Winkles simply asks for a fair hearing on his legal argument, such request is prayed for.

Lastly, as relevant to Winkles's pro se arguments, in Winkles case, the Second Superseding Indictment ("SSI") alleges that the convictions under 18 U.S.C. §924(c) are supported on the companion "bank robbery" charges, however, in truth the firearm offenses are supported on the companion "conspiracy" offense. This is because the petit-jury was instructed, "once [they] find a conspiracy everything that happens in furtherance of that conspiracy, including... [the codefendant's] carrying of a gun, can be subject of [Winkles's] liability, if it's reasonably foreseeable and a natural consequence of the agreement to rob a bank." SEE REPORTER TRANSCRIPTS, OCTOBER 13, 2000, PAGE 75. (underline added for emphasis) The petit-jury was allowed to convict Winkles of the §924(c) offenses even if they found him innocent of the bank robbery. This is because

FOOTNOTE:

① Frustratingly, since Winkles's appeal was dismissed on the ground that Rule 4(a)(6) could "not [be] subject to equitable exceptions[.]" the Ninth Circuit, sitting en banc, has held to the contrary. See WASHINGTON V. RYAN, BL 263109, 9th Cir. NO. 05-99009, 8/15/16.

the §924(c) offenses relied on conspiratorial liability. No criminal liability could attach without the conspiracy charge, i.e., 18 USC § 371, because Winkles never personally used, carried, nor commanded the use or carrying of a firearm during any crime. The evidence at trial only established that Winkles was a lookout/getaway driver during the bank robberies.

Before providing the work for why this Honorable Court should grant the petition, Winkles wishes to share some words with you. Winkles understands he is just one case out of thousands wishing to be heard and that his case doesn't completely meet this Court's typical requirements to be heard. However, this case does present issues "arguable on the merits" and thus can be addressed by this Honorable Court. For that reason - along with the fact that Winkles has been imprisoned for nearly 2 decades already - Winkles avers this Court should reach the merit of his arguments. When Winkles committed the present offense he was an 18 year old teenager who suffered from mental health problems, including psychosis, and he was easily manipulated. This does not justify his appalling actions, it simply supports the contention that Winkles could have been rehabilitated long ago and has in fact changed his way of thinking. Twenty years in prison is a very long time and causes some to change for the better. This has been the case with Winkles. If given the opportunity to live in the free world Winkles would make the most of such a blessing. Winkles is definitely a changed man, and shall succeed once given the chance. With that said, Winkles respectfully and humbly asks this Honorable Court to hear his case and to reach the merit of the substance of his issues. With such a request, Winkles sends a prayer, praying that for once he will be given a fair and sufficient hearing on his legal position. Thank you for reading Winkles's petition this far already.

As set forth in the aforementioned "Reasons for Granting the Petition", Winkles has provided multiple arguments. Winkles respectfully asks this Court to reach the "substance" of his filing. Please submissions are not always presented as they should. Thank you.

REASONS FOR GRANTING THE PETITION:

1.

WHETHER AN UNSOLICITED AND UNAPPOINTED ATTORNEY'S FILING
TRUMPES A PRISONER'S PRO SE FILING WHEN BOTH FILINGS
RELATE TO THE SAME ISSUE BUT RELY ON DIFFERENT
LEGAL THEORIES AND DIFFERENT LEGAL POSITIONS AS TO
MATERIAL FACTS AND LAW.

Winkles contends the FPD's filings should not have trumped his pro se filings. This is supported by the FPD's own request to the district court in its reply to the United States's response. See REPLY BRIEF (AMENDED), Page 2, FN 1, Docket Entry 16 ("On December 27, 2016, Mr. Winkles filed a pro se brief in reply to the government's opposition. The arguments in this reply supplement, but are not meant to replace, the arguments Mr. Winkles made in his filing.") While the FPD's attorneys were working in good faith and did a good job arguing their points, the FPD and Winkles did not view the case in the same light. According to Winkles, the FPD's had their agenda to advance and did not have the time nor resources to handle Johnson cases on an "individual" basis, and could not spend much time, if any, thinking "outside the box". Winkles, on the other hand, is imprisoned with only time on his hands. Winkles originally agreed to allow the FPD to act upon his behalf, however, the agreement ~~contained~~ Winkles receiving a copy of the application "before" its submission. This did not occur. Accordingly, from that point on Winkles was not in agreement that the FPD represent him. Accordingly, upon reviewing the already submitted application for authorization for leave to file a second or successive section 2255 motion, Winkles disagreed with the FPD's legal allegations, and thereafter he prepared his own pro se application for leave to file a second or successive section 2255 motion. See USCA NO. 16-72276. (raising a different legal position based on Johnson). 9th Cir. 2016.

In September of 2016, the Ninth Circuit sua sponte consolidated the two applications, and granted the consolidated application. The Ninth Circuit chose to consolidate the two requests and grant permission, rather than deny one of the requests as moot. This, contends Winkles, demonstrates that the Ninth Circuit noticed the differences in legal facts and arguments. Further, the Ninth Circuit directed their Clerk to serve both applications on the district court. This direction also supports a finding that Winkles was authorized to be heard on his pro se filing. Why would the Ninth Circuit have an application served upon the district court unless it too was authorized to be heard. An order must be read to make sense.

Moreover, as the §2255 proceedings were being conducted Winkles filed, yet again, another application for leave to file a second or successive section 2255 raising his pro se Johnson argument. SEE USCA Case Number 18-70036. In denying the request, the Ninth Circuit noted that "[i]n September 29, 2016, the court granted the applicant authorization to raise a JOHNSON claim in case nos. 16-71427 and 16-72276." SEE APPENDIX C; see also USCA No. 18-70036. (Underline emphasis added). Again, if Winkles was not authorized to be heard on his pro se application filed in case number 16-72276, then why would the Ninth Circuit deny Winkles's latter request based upon the determination that he had already been granted permission in case number 16-72276 to proceed with a Johnson claim. To Winkles, this would not make much sense. If something does not add up correctly, then there is something in the equation wrong. Winkles contends its the factor that the FPD's filing is trumping his own pro se filing. This should not be authorized to occur.

Winkles argues that in such a case, as now present, a pro se litigant's filings must be considered first and foremost, and if a district court or court of appeals is going to trump the

pro se filing with the professionals filing, then a "warning" should be issued, that way the pro se litigant can decide whether he wishes to forego his own legal position in favor of the professionals position. That's a reasonable solution. Here, Winkles argues, additionally, he was not represented by "appointed counsel" as the district court repeatedly states in denying Winkles's pro se submissions. Winkles's argument is supported by the Ninth Circuit's order granting authorization to file a second or successive section 2255 motion. There, the Ninth Circuit "denied" the appointment of counsel, See Appendix B, see also USCA Case Nos. 16-71427 and 16-72276. ("The applicant's unopposed motion for appointment of counsel is denied without prejudice[.]", and Winkles is unaware of any order by the district court appointing the EPD to represent Winkles. Therefore, Winkles was not appointed counsel, and the EPD's filings (legal arguments) are not in line with Winkles's position. Accordingly, the EPD's filings should not have trumped Winkles's pro se filings, and this Honorable Court should grant a certificate of appealability to resolve this manifest injustice. If not, Winkles loses his right to be heard. Winkles has a constitutional right to habeas corpus, and while Congress has the power to regulate that right within boundaries, under 28 U.S.C. § 2255 Winkles had a statutory right to be heard on his pro se filing. He made a prima facie showing of entitlement to relief under Johnson, and therefore if that right is taken away from him because of legal error it violates Winkles's Fifth Amendment to the United States Constitution. See generally *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993); see also *McQuinn v. Perkins*, 133 S.Ct. 1924, 1931 (2013). It also violates Winkles's Eighth Amendment, Cruel and Unusual Punishment Clause, to bar Winkles from some recourse to the judicial system. See *Herrera*, at 432, n2 (1993). ~~Winkles's~~ stating the distinct possibility that the continued

incarceration of an innocent person violates the Eighth Amendment and suggesting that, for that reason, such a person must have recourse to the judicial system)

In *BOUMEDIENE V. BUSH*, 533 U.S. 723, 778 (2008), this Court determined that the Suspension Clause, Article I, §9, Clause 2, is violated when a prisoner is denied "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law." Here, Winkles avers he did not receive a "meaningful" opportunity to demonstrate he is being held unlawfully. His pro se arguments -- arguments he timely filed -- were not considered. Accordingly, Winkles was forced to accept the arguments made by the FPD, which Winkles did not necessarily agree with. Simply stated, Winkles deserves to be heard on his pro se arguments that he is actually innocent of his charged crimes and thus unlawfully detained.

Winkles prays this Honorable Court will grant the Writ of Certiorari on this question. Thank you.

2. WHETHER THIS SUPREME COURT SHOULD REVERSE AND REMAND THIS CASE IN LIGHT OF THE RAMIFICATIONS OF FINALITY ATTACHING TO THE PRISONER'S PROCEDURAL HISTORY WHICH WILL PREVENT THE PRISONER FROM FILING ANY FUTURE PETITIONS UNDER 28 U.S.C. §2255.

Winkles argues that if this Honorable Court refuses to use its discretionary review to correct the injustice that has occurred in this case, finality will attach to Winkles procedural history and he will be barred from bringing a future §2255 motion without prior authorization. While Winkles is presently proceeding on a "second or successive" section 2255 motion, Winkles

avers that his original §2255 motion filed in 2004 should not (and does not) count as a "first" because of the defect that occurred during the §2255 proceeding, i.e., Winkles's inability to take an appeal from that judgment. Such argument is not relevant here at the present time, however, if this present second or successive §2255 becomes "final" it may - more than likely - count as a "first" for all future habeas corpus purposes. This, Winkles avers, is a manifest injustice because Winkles can demonstrate he is both legally and factually innocent of his conviction without reliance on Johnson.^②

This Court has stated time and again the importance of a federal prisoners right to receive at least one fair round of meaningful post-conviction review, e.g., See generally BOUMEDIENE V. BUSH, 533 U.S. at 778 (2008), which includes a right to be notified that a judge plans to construe a particular filing as one under 28 U.S.C. §2255 because of the ramifications of that proceeding barring all future attempts at habeas corpus. See UNITED STATES V. CASTRO, ___ U.S. ___ () for example.

Therefore, Since the Government has previously conceded - and the Ninth Circuit acknowledged by referencing the circumstance as an "injustice" - that Winkles lost his opportunity to appeal his "first" §2255 motion due to circumstances beyond his control, and now Winkles is losing his opportunity to be heard on his pro se Johnson claims due to the good intentions - though unsolicited and unappointed - actions of the FPD, this Court should find that finality should not attach to this §2255 proceeding. To allow finality to attach will not only be unfair and unfortunate for Winkles, it will raise questions to the Constitutionality of 28 U.S.C. §2255(h). Winkles avers that if finality attaches to this present §2255 proceeding he will be

FOOTNOTE:

② Without even considering this Court's decision in Johnson, Winkles avers he has two legitimate arguments supporting ~~that~~ he is both legally and factually innocent of his conviction under 18 U.S.C. §924(c). Those arguments will be barred from judicial review if the portal to §2255 is shut. Accordingly, such event should only occur where a defendant has a "meaningful" shot at post-conviction relief. Here, that has not yet occurred. Two "half" opportunities do not qualify as a "meaningful opportunity" to test ones alleged ~~unlawful~~ unlawful detention.

Winkles does not come before this Honorable Court contending to be some angel. No, Winkles was an appalling and dangerous youth. He did violate the law - though not necessarily the laws he's convicted of - and the record demonstrates that Winkles was in desperate need of help, punishment, and rehabilitation at the time he was convicted of the offenses he stands guilty of. In the eyes of the law Winkles comes before this Court as a man properly convicted of crimes against the United States. However, this same view of Winkles's guilt and troubled youth should not be the deciding factor as to whether he has a right to be heard by the federal courts. Unlike every other federal prisoner, Winkles has yet to receive a valid post conviction review. His first attempt ended with a district court ruling that can be shown to be erroneous without any opportunity to correct that ruling by way of the appellate process. Then Winkles's second attempt begins with him not

3. WHETHER THIS SUPREME COURT SHOULD USE ITS SUPERVISORY POWERS TO CORRECT THE MANIFEST INJUSTICE PREVALENT IN THIS CASE.

required to move the federal courts to find that the statute 28 U.S.C. § 2255(h) is unconstitutional as to the facts of his case. The doctrine to constitutional avoidance can guide this case and allow Winkles to receive his day in court as he directly seeks and prays for. Wherefore this Court should (and is asked to) reverse and remand this case to the lower court with instructions to determine whether Winkles was authorized to be heard on his pro se application for leave to file a second or successive section 2255 motion, in case number 16-72276, 9th Cir. 2016. Winkles would like to state that he would rather his second or successive § 2255 proceeding be stricken all together if he was not authorized to proceed with his pro se Johnson claims. Counsel was not solicited by Winkles, and Winkles is unaware of any court appointing the FPD to represent him, and thus Winkles should not be forced to except such action on his behalf regardless of the FPD's good intentions.

receiving a merits determination on the legal position he stands firm on. Throughout each step of his second or successive § 2255 proceeding, including on appeal, Winkles was prevented from arguing his own case because he is "represented by counsel." However, who appointed the counsel that is representing Winkles? No court that Winkles is aware of. As the Ninth Circuit recently held, "[Winkles's] pro se motion for 'additional briefing on specific issues' (Docket Entry 9) is rejected because [Winkles] is represent by counsel. This court therefore declines to entertain the pro se submission." SEE APPENDIX j see also USCA Case Number 17-55313, Docket Entry 9. (Original emphasis and citation). Consistently and diligently Winkles sought to proceed pro se, however, not once did the lower courts give appropriate consideration of this event. Winkles's litany of requests to file on his own behalf went unnoticed, but that should have not occurred. A de novo review of Winkles filings clearly demonstrate that Winkles disagreed with his (alleged) counsel's representation. The federal courts should have taken heed to this sua sponte. They did not, and therefore this Honorable Court should use its supervisory power to correct such an error.

Wherefore Winkles prays this Court issues an order correcting the manifest injustice that is prevalent in this case.

4. WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE: AS TO THE MERIT OF THE FPD'S ARGUMENTS.

As relevant to this question, Winkles argues that the district court improperly used the "modified categorical approach" analysis to decide whether Winkles's Johnson claim held merit. The district court was required by Ninth Circuit precedent to follow the holding of MANDUJANO-REAL v. MIKASEY, 526 F.3d 585 (9th Cir. 2008). The Ninth Circuit Court of Appeals determined in MANDUJANO-REAL that when and where the government does not ask the court to use the modified version of the categorical approach, the reviewing court is required only to determine whether the categorical approach is satisfied. In Winkles case, Winkles argued to

the district court that the government had failed to ask for the court to use the "modified categorical approach," and had in fact conceded that the "categorical approach" alone was the proper analysis to be applied to Winkles's Johnson claim. The district court ignored this argument and instead used the modified categorical approach to make its finding. This was an abuse of discretion.

Winkles was convicted of violating 18 U.S.C. § 2113(a), which is bank robbery. Statute 18 U.S.C. § 2113(a) may have always been meant to be considered a crime of violence, however, under the proper made-of-analysis, i.e., the categorical approach, it can be shown that one can violate that specific statute without the use, attempted use, or threatened use of physical force. The statute does not cover every aspect of a crime of violence, and therefore is not "categorically"

a crime of violence. E.g., *United States v. Jones*, 993 F.3d 58 (5th Cir. 1993) ("Jones's indictment plainly alleges that he entered the bank with intent to commit a felony affecting the bank. He thus was properly charged with a crime under section 2113(a). Although the jury properly convicted Jones of a crime in count one under section 2113(a) it did not convict him of a crime of violence.") *Id.* Jones, 993 F.3d at 60-62. Winkles avers there are more cases like Jones that supports a finding that § 2113(a) can be deemed a non-crime-of-violence offense, see *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (acknowledging that "[t]he government note[d] that the second paragraph of § 2113(a) cannot serve as a predicate crime of violence to support a § 924(c)(3) charge[.]" and that the court "cannot bend the statute simply to accommodate the government's zeal to obtain stiffer penalties.")

Simply put, under the "categorical approach" as established in *Descamps v. United States*, 133 S.Ct. 2276 (2013), *Mattis v. United States*, 136 S.Ct. 2243 (2016), and *United States v. Benally*, 2016 U.S. App. Lexis 13885, 9th Cir. 2016, statute 18 U.S.C. § 2113(a) does not qualify categorically as a crime of violence. This was the only question the district court should have answered. The district court abused its discretion when it violated the Ninth Circuit's

precedent of MANDUJANO-REAL. SEE RENALLY, 2016 U.S. App LEXIS 13885 No. 14-10452 9th Cir. 2016, citing MANDUJANO-REAL V. MUKASEY. ("Where... the government has not ask [the court] to apply the modified categorical approach, [the court] considers only whether the categorical approach is satisfied."); see also SCALIA ANTONIN J., THE RULE OF LAW AS A LAW OF RULES, 56 V. CHI. L. REV. 1175, 1177 (1989) ("lower courts are not only bound by the narrow 'holdings' of higher court decisions, but also by their 'mode-of-analysis.'") (original quotations or emphasis). Here, the proper mode of analysis was the categorical approach; and therefore, since the district court in Winkles's case did not use it -- even though Winkles argued for it and the government conceded to it -- the district court abused its discretion and a COA should be granted on this issue.

CONCLUSION:

WHEREFORE WINKLES PRAYS FOR AND REQUESTS THIS HONORABLE UNITED STATES SUPREME COURT TO GRANT THE WRIT OF CERTIORARI AND REVERSE AND REMAND THIS CASE TO THE LOWER COURTS FOR ADDITIONAL PROCEEDINGS CONSISTENT WITH ITS ORDER.

C. Winkles

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DATED: JANUARY 28th, 2019

NEWLY DATED: FEBRUARY 27th, 2019.