No. _____

In the

Supreme Court of the United States

KENNETH SPANGLE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

AMY M. KARLIN
Interim Federal Public Defender
BRIANNA MIRCHEFF*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4784
Facsimile: (213) 894-0081

Attorneys for the Petitioner
* Counsel of Record

Questions Presented

Whether the Circuit's decision to deny a certificate of appealability without any analysis or explanation for its decision at all was so arbitrary and capricious that it deprived Petitioner of his right to due process under the Fifth Amendment or of his right to meaningful review in this Court.

Whether federal 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) and U.S.S.G. § 4A1.2, where the offense does not require the intentional use, attempted use, or threat of violent physical force

Statement of Related Proceedings

- *United States v. Kenneth Spangle*,
  8:12-cr-194-JLS (C.D. Cal. Nov. 18, 2013)
- *United States v. Kenneth Spangle*,
  13-50559 (9th Cir. September 18, 2015)
- *Kenneth Spangle v. United States*,
  15-8334 (S. Ct. Mar. 28, 2016)
- *Kenneth Spangle v. United States*,
  8:17-cv-485-JLS (C.D. Cal. Aug. 20, 2018)
- *Kenneth Spangle v. United States*,
  18-56122 (9th Cir. Jul. 22, 2019)

Table of Contents

Page(s)

Table of Authorities

Page(s)

Federal Cases

Table of Authorities

Page(s)

Federal Cases (continued)

Table of Authorities

Page(s)

Federal Cases (continued)

Table of Authorities

Page(s)

Federal Cases (continued)

Table of Authorities

Page(s)

Federal Cases (continued)

State Cases

Federal Statutes

In the

Supreme Court of the United States

KENNETH SPANGLE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Kenneth Spangle petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

Opinions Below

The Ninth Circuit's order denying Mr. Spangle the issuance of a certificate of appealability ("COA") was not published. App. 1a. The district court issued a written order denying Mr. Spangle's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and denying his request for a certificate of appealability. App. 2a-28a.

Jurisdiction

The Ninth Circuit issued its order denying Mr. Spangle a COA on July 22, 2019. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

22 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 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.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(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 -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(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

1. Mr. Spangle was convicted, after a jury trial, of two counts of conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 371, two counts of armed bank robbery, in violation of 18 U.S.C. § 2113(a),(d), and two counts of two counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). On March 13, 2006, the district court sentenced him to 37 years imprisonment--five years for the armed bank robbery counts, and a mandatory consecutive 32 years for the Section 924(c) convictions. He is set to be released from custody at the age of 81.

Mr. Spangle challenged his career-offender designation on direct appeal. He argued that his prior conviction under 18 U.S.C. § 876(c), mailing a threatening communication, was not a crime of violence, because it did not require the *immediate* threat of violence. At oral argument, a member of the panel queried whether a threat to kidnap, which is also covered under the statute, required violent force. (This was not an issue that appellate counsel has raised.) The government acknowledged that the statute was indivisible and that it was theoretically possible to threaten a non-violent kidnapping, but that there was no "realistic probability" of such a prosecution. Shortly thereafter, the panel issued a memorandum disposition denying the claim. *See United States v. Spangle*, 617 F. App'x 764, 765 (9th Cir. Sept. 18, 2015).

The panel found that, by its "plain terms," a threat to injure constituted the threatened use of force. *Id.* The panel added:

> We reach the same conclusion with respect to the sending of a threat to kidnap. There may be circumstances in which a kidnapping itself can be accomplished by means other than force (for example, by deceit). *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir.1988). But we conclude that there is no "realistic probability," as distinct from a "theoretical possibility," *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007), that a communication would threaten to kidnap a person by means other than physical force. Defendant has not pointed to any case in which a person was convicted for sending a threat to kidnap someone by deceit. *Id.*

Id.

Though the defendant had preserved below whether unarmed bank robbery was a crime of violence, counsel on direct appeal did not present that claim to the Circuit, and the Circuit did not address it.

Counsel on appeal filed a petition for rehearing or rehearing en banc, but did not address the *Duenas-Alvarez* problem highlighted in the decision. The petition for rehearing was denied. This Court denied a petition for writ of certiorari on March 28, 2016. *Spangle v. United States*, 136 S. Ct. 1506 (2016).

2. On March 17, 2017, Mr. Spangle filed a timely first motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his counsel provided constitutionally deficient counsel in failing to effectively present his claim regarding Section 876(c), He also argued that his unarmed and armed bank robberies were not a crime of violence for purposes of Section 924(c) or for purposes of the career-offender enhancement. Appointed counsel filed a supplemental motion presenting examples of federal prosecutions that involved non-violent threats to kidnap under 18 U.S.C. § 876(c), and showed that the jury instructions of some circuits permitted conviction for a threat to kidnap by deceit--all of which, Petitioner claimed, proved a realistic probability that a non-violent threat to kidnap is covered under the statute.

After full briefing, the district court denied Mr. Spangle's claims, and declined to grant a certificate of appealability as to any claim. The court rejected the cases Petitioner raised, concluding that none represented a prosecution for a non-violent threat to kidnap--though it neglected to address the most compelling case, *United States v. Goba*. (App. 20a-23a.) The court also rejected the argument that unarmed bank robbery was not a crime of violence, joining those district courts which had held that unarmed bank robbery continued to be a crime of violence under the force clause even if the residual clause was wiped out after *Johnson*. (App. 23a-25a.)

3. Petitioner filed a request for a certificate of appealability in the Ninth Circuit, supported by full briefing on the standard and the reasons for granting the COA. The Ninth Circuit denied it in an order that stated the standard but did not analyze the question further. (App. 1a.)

Reason or Granting the Writ

The Court should grant the writ of certiorari for two reasons. First, this petition presents an important question--whether due process is satisfied where the Circuit denies a certificate of appealability without providing even a minimal explanation for its decision. Mr. Spangle's COA application involved an important question about whether an admitted overbroad and indivisible statute was a crime of violence for lack of a realistic probability of prosecution. The application presented numerous cases that were sufficient to confront the *Duenas-Alvarez* issue, and the district court's denial overlooked the most persuasive case in support of that argument. In the face of such argument, the Ninth Circuit's unreasoned and unexplained denial of the application for a certificate of appealability violates due process and deprives Mr. Spangle of a meaningful opportunity for review.

A second reason exists for granting the writ. A number of circuits have held that federal bank robbery by intimidation—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--while, at the same time, those same courts have acknowledged an ever decreasing bar for what constitutes "intimidation" in the context of *sufficiency* cases. The courts cannot have it both ways--either bank robbery requires a threat of violent force, or it doesn't, 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 caselaw into order.

I. The Court Should Grant Certiorari to Clarify the Standard for a Circuit Courts' Explanation When It Denies a Certificate of Appealability.

Mr. Spangle's COA application presented an important question on the application of the crime of violence definition to the admittedly overbroad federal threats statute. The Ninth Circuit, on direct appeal, faulted Mr. Spangle for failing to presented examples of prosecutions involving a non-violent threat to kidnap. In his Section 2255 motion, Mr. Spangle presented cases that did exactly that, including a recent prosecution involving an extortionate threat to marry a teenage girl to an adult abroad--despicable, but non-violent. Without any analysis or stated reasoning, the Ninth Circuit denied the certificate of appealability. Just as a district court must provide some reasoning for its sentencing decisions, and agencies must provide some

basis for the exercise of their decision-making power, the Circuit should be required to state some minimal reasoning for its decision to deny a certificate of appealability.

A. *The Claim Presented Here Overcame the Low Bar Necessary for Application of a Certification of Appealability.*

The government argued and the Ninth Circuit believed that Petitioner's prior conviction under 18 U.S.C. § 876(c) was a crime of violence because it satisfied the first, or "force" clause, of Section 4B1.1(a). *See Spangle*, 617 F. App'x at 765. Section 876(c) states:

> Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 876(c). Section 876(c) does not categorically satisfy the force clause because it incorporates both a threat to injure and a threat to kidnap, and, as the government admitted below, the statute is not divisible between those two.

Though the issue was not argued by appellate counsel, a member of the Ninth Circuit panel raised the question persistently throughout oral

argument. *See* Exh. E. Judge Graber pressed that kidnapping quite frequently happens through deceit or non-violent force, and that the *threat* to kidnap was even one degree removed from actual kidnapping. (Exh. E, at 1-3.)

The government posited at oral argument that that argument failed because there was not a "realistic probability" that the threat to kidnap could be premised on non-violent conduct. Ultimately, the memorandum disposition picked up this line of reasoning, stating:

> There may be circumstances in which a kidnapping itself can be accomplished by means other than force (for example, by deceit). *United States v. Sherbondy*, 865 F.2d 996, 1009 (9th Cir.1988). But we conclude that there is no "realistic probability," as distinct from a "theoretical possibility," *Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007), that a communication would threaten to kidnap a person by means other than physical force. Defendant has not pointed to any case in which a person was convicted for sending a threat to kidnap someone by deceit. *Id.*

Spangle, 617 F. App'x at 765. In other words, no one disputed that a threat to kidnap could theoretically be accomplished by a threat of non-violent force, and both the government and the Ninth Circuit believed that the barrier to finding that Section 876(c) was not a crime of violence was the defense's

failure to demonstrate that a non-violent threat to kidnap would be actually prosecuted, not just theoretically covered, under that provision.

But there was a simple answer to the Court's concern. As Judge Graber noted, kidnapping can be accomplished by means of deceit and also by means of non-violent force, force that would not rise to the level of violent force under the force clause. Indeed, a notorious prosecution under Section 876(c) proper involved a nun, committed to political non-violence, who was prosecuted based on a written threat to kidnap Henry Kissinger. In the letter that was the basis of the prosecution, she wrote of her belief that the movement should make a "citizen's arrest" of Henry Kissinger, that he was an ideal target because he was "not as much protected"—and thus would not require the show of force that would be required to kidnap a more high profile target. *United States v. Berrigan*, 482 F.2d 171, 177-78 (3d Cir. 1973). Her coconspirator responded that her plan was naïve, i.e., that it would "take a force of perhaps 10 of your best people." And yet, despite the fact that she believed the kidnapping could be accomplished non-violently, she was prosecuted under Section 876(c). Such a case demonstrates a realistic probability that Section 876(c) covers a threat to kidnap that does not involve the threat of violent force.

Similarly, section 875(c)—a statute that the Ninth Circuit has called "extremely similar" to 876(c), *United States v. Twine*, 853 F.2d 676, 679-80

(9th Cir. 1988)1—can be premised on threatening kidnapping to regain custody of a child. For example, in *United States v. Nishnianidze*, 342 F.3d 6, 11-12 (1st Cir. 2003), the defendant told the adoptive parents that he knew their address and would send someone to "take the child from [their] yard." There was no indication that the birth parents intended to harm their own child—the birth mother was "upset the boy had been adopted by an American family" but agreed not to pursue the child if they were compensated. *Id.* at 11. That may be extortion, but it is not a threat of violent behavior—indeed, it is, more or less, the example contemplated by the Ninth Circuit panel. *See* Ex. E (Transcript of Oral Argument) ("Kidnapping can be done by deception, so you can send a letter threatening to sneak them away so there's never going to be any violence . . . ."). As the child was three years old and the defendant wanted to restore the child to the biological parents, it cannot be said that this necessarily contemplated kidnapping by force—indeed, the exact opposite inference is the more plausible one. *Cf In re Michele D*, 29 Cal.

---

1 Prosecutions initiated under related statutes can satisfy the "realistic probability" test. *See Chavez-Solis v. Lynch*, 803 F.3d 1004, 1011 (9th Cir. 2015) (finding a realistic probability that certain conduct would be prosecuted in California under a statute requiring a depiction of sexual conduct, because the alien was able to identify prosecutions under a different statute that incorporated the term at issue "sexual conduct" and because the "same principles . . . apply" to both statutes. *see also Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014) (adopting same principle). Prosecutions under Section 875 are related because, as the Ninth Circuit has recognized, the two statutes are "extremely similar criminal statutes." *Twine*, 853 F.2d 679-80.

4th 600 (2002) (holding that it would be illogical to construe a kidnapping "by force" statute to require anything other than minimal force in the case of infants and young children, since they are incapable of consent).

United States v. Hill, likewise, premised liability under Section 875(c) where an eighteen-year-old defendant called the mother of a thirteen-year-old child who had previously left the state with the defendant "willingly" and "voluntarily" and told the mother that he was going to "take her." 943 F.2d 873, (8th Cir. 1991). He "thought she still wanted to run away from home." *Id.* at 874. As before, taking a child who had previously left with the defendant willingly cannot be said to involve a threat to use violent force to effectuate a kidnapping.

And finally, in *United States v. Goba*, 1:17-cr-112-LJV-MJR, Dkt. #4 (E.D.N.Y Jun. 7, 2017), the government charged a violation of Section 875(b) where the defendant had "threat[ened] to kidnap and injure [a minor child] by marrying the minor child to an individual in Yemen against the Victim Father's wishes unless the Victim Father paid the defendant . . . money." The government described the underlying conduct this way: The defendant made a demand for money, and, when it wasn't met, he married the young girl off to a Yemeni man and kept her from her family. *Id.* Dkt. #69, at 1-2. A clearer example of a non-violent threat could not be found. *Goba*, standing alone, establishes that it is more than theoretically possible for the government to

charge a threat of kidnapping or injury without an accompanying threat of violent physical force.

The district court accepted the government's parsing of three of these cases—the court did not discuss *United States v. Goba*—keying in on unsavory aspects of the case unrelated to the elements of the charged offense. This was error: the Supreme Court's decisions regarding the categorical approach require a laser focus, not on the atmospherics of the case or facts plucked out of context, but on how the government sought to satisfy the particular elements of each offense. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) ("Sentencing courts may 'look only to the statutory definitions'—i.e., the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990). *See also Alvarado v. United States*, 2016 WL 6302517, at *11 (C.D. Cal. Oct. 14, 2016) (rejecting argument that the underlying facts of the case were relevant to the categorical approach). And in each of the representative cases, the threat to kidnap being charged was non-violent. (*See* CR 33, at 3-4, explaining why the government's attempt to distinguish each case is wrong).)

The district court also failed to address Petitioner's argument that Seciton 876(c) incorporates the federal kidnapping statute's definition of kidnapping, which includes nonviolent kidnapping. As set out in his brief, the

phrase "threat to kidnap" incorporates the federal definition of kidnapping in 18 U.S.C. § 1201(a). *See* Pattern Crim. Jury Instr. 5th Cir. 2.39, 2.40 (2015) (instructing courts to use the definition of "kidnapping" from Section 1201 when defining "threat to kidnap" for purposes of Section 876(b)). Kidnapping under section 1201(a) "has no force requirement"; the statute allows for prosecutions based on seizure, restraint, or "inveigling" (i.e., deceit). *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1130 (9th Cir. 2012). And, indeed, Section 1201 is regularly applied to such non-violent conduct. *See, e.g.*, *United States v. Smith*, __ F. App'x __, 2016 WL 1697094, at *9 (7th Cir. Apr. 28, 2016) (upholding conviction of defendant who "took her half-sister's newborn son from his bassinette in the middle of the night and started out on the long drive from Beloit, Wisconsin, to her home in Colorado"); *United States v. Hoog*, 504 F.2d 45, 50-51 (8th Cir. 1974) (affirming conviction where "either [of defendant] Mills or Hoog induced each of [the victims] to accept a ride by false representations. Once they had accepted a ride, Hoog or Mills lured or enticed each of them—again by false promises—to stay in the vehicle during its roundabout course into Kansas"); *Davidson v. United States*, 312 F.2d 163, 166 (8th Cir. 1963) ("When the defendant enticed the six-year- old child into his automobile and drove away with her, that, in our opinion, constituted an involuntary and illegal seizure and restraint . . . ."). Because Section 876(c) shares "the common link" of the federal definition of

kidnapping, such examples satisfy Mr. Spangle's burden of showing a realistic probability that Section 876(c) would be applied to non-violent conduct. *See Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014) (using examples of prosecutions under one provision of law to satisfy the burden of showing a realistic probability of prosecution under another provision, where the two share a definition in common).

The question of whether there was a realistic probability of prosecution for a non-violent threat to kidnap was, at least, debatable and should have easily surpassed the low bar for a certificate of appealability.

B. *Due process requires at least a minimal explanation for denial of a certificate of appealability.*

It's unclear why the Ninth Circuit declined to grant a COA. Though the Court was presented with this briefing, its order reflects no discussion of any of these points. In its one-page order, the Court merely quoted the standard for a certificate of appealability and denied the application without explanation. Due process requires more.

A court's adequate explanation of its decision is a necessary component of due process. Indeed, this Court has insisted that sentencing judges "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall v. United States*, 552 U.S. 38, 50 (2007). A requirement of a statement of reasons at

sentencing has been held to "further[ ] the proper administration of justice" by "communicat[ing] that the parties' arguments have been heard, and that a reasoned decision has been made." *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc). Four courts have gone so far as to say that the failure to make such an explanation is prejudicial plain error, without a specific showing of prejudice. *See United States v. Lewis*, 424 F.3d 239, 247-49 (2d Cir. 2005); *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Blackie*, 548 F.3d 395, 402-03 (6th Cir. 2008); *United States v. Parks*, 823 F.3d 990, 997 (11th Cir. 2016).

In the same vein, this Court has held that a most "basic procedural requirement" applicable to administrative agencies is that they "give adequate reasons for [their] decisions. *Encino Motorcars, L.L.C. v. Navarro*, 136 S. Ct. 2117, 2125 (2016). That is not to say that the explanation need be encyclopedic in all cases; the requirement is satisfied where "the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Id.* (citation omitted). But "where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Id.*

While the Ninth Circuit has been happy to heap on requirements on the district court's exercise of its decision-making authority, it has adopted a postcard-denial format for certificates of appealability. This is error because

the denial effectively prevents this Court from reviewing the lower court's decision. There is no way to tell, from the Ninth Circuit's order, whether it made some error in the legal standard for a COA--which is extraordinarily low--or whether it harbored some factual misunderstand about the record. Indeed, it's not apparent from the face of the order whether the court was even aware of all of the Petitioner's claims. There is, in *Encino Motorcar*'s parlance, nothing from which the Court's "path may reasonably be discerned." *Encino Motorcars*, 136 S. Ct. at 2125. It's one thing to do so in a context where review is discretionary and where there is no higher court in which to seek review, as when a state's highest court or this Court deny review. It's another to do so in the context of a certificate of appealability.

Due process is violated by arbitrary and capricious government conduct. Here, the Ninth Circuit's failure to provide even minimal reasons why the arguments above do not satisfy the low bar for granting a certificate of appealability violated due process. And, if this Court will not clarify the Circuit's responsibility to provide a meaningful--if minimal--explanation for the reason for denying a COA, there is no other entity that will.

The Court should grant the writ of certiorari.

II. The Court Should Grant Certiorari to Address Whether Armed Bank Robbery Is A Crime of Violence after *Johnson*.

There's a second reason that the writ of certiorari should be granted: to address the question whether bank robbery, unarmed or armed, is a crime of violence under the force clause of Section 924(c) and of the career-offender guideline.

A. 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 "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Under the 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*, __ S. Ct. __, 2019 WL 189343, *6 (Jan. 15, 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." 559 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. __ S. Ct. __, 2019 WL 189343 at *8. 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).

The Ninth Circuit was wrong to conclude that federal bank robbery satisfied both requirement--in fact, bank robbery requires neither violent physical force or intentional force.

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

First, 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, *Stokeling*, __ S. Ct. __, 2019 WL 189343 at *8.

For example, in *United States v. Lucas*, the defendant 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 243, 244 (9th Cir. 1992). The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation," and sustained the conviction. *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.

Likewise, in *United States v. Hopkins*, the defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d 1102, 1103 (9th Cir. 1983). When the teller said she had no hundreds or fifties, the defendant responded, "Okay, then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* But the Ninth Circuit affirmed, holding "the threats

implicit in [the defendant's] written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.*

Despite the fact that the Ninth Circuit has concluded that such minimal conduct is sufficient to sustain a conviction, the Ninth 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 aren't 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 where the defendant affirmatively voiced no intent to use violent physical force. 550 F.3d 363, 365 (4th Cir. 2008). To the contrary, the *Ketchum* defendant gave a teller a note that read, "These people are making me do this," and then the defendant 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 the defendant $1,686, and he left the bank. *Id.* And yet, despite having cases like *Ketchum* on the books, the Fourth Circuit has *also* held for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016)), *cert. denied*, 137 S. Ct. 164 (2016).

Likewise, the Fifth Circuit upheld a conviction for robbery by intimidation where there was no weapon, no verbal or written threat, and when the victims were not actually afraid, because a reasonable person would feel afraid. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987). And yet again, the Fifth Circuit *also* holds 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).

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, by analyzing whether the defendant engaged in "intimidation" from the

perspective of a reasonable observer rather than the actions or threatened actions of the defendant. 412 F.3d 1240, 1244-45 (11th Cir. 2005). In *Kelley*, when a teller at a bank inside a grocery store left her station to use the phone, two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store. *Id.* The tellers testified they were "shocked, surprised, and scared," but did nothing to stop the robbery. *Id.* The defendant was found guilty of bank robbery by intimidation without ever uttering a verbal threat or expressing an implied one. *Id.* at 1245. Yet, once again, the Eleventh Circuit *also* holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018).

All of these courts have applied a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction, but have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. The two positions cannot be squared.

The Ninth Circuit reached its conclusion 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 2010*, 559 U.S. 133). It is wrong, however, to equate *willingness* to use force with a threat to do so. Indeed, the Ninth Circuit has previously acknowledged this very precept. In *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016), the government 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 does not qualify as a violent felony, the Court 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 honor, or even address, this distinction.

Certiorari is necessary to harmonize these contradictory lines of cases.

2. Federal bank robbery is a general intent crime.

Second, the elements clause of Section 924(c) and the career offender enhancement requires that the use of violent force to be intentional and not merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *Benally*, 843 F.3d at 353-54. But to commit federal bank robbery by intimidation, the defendant need not *intentionally* intimidate.

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* 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.

The *Carter* Court recognized 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. 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. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, the Ninth Circuit held a jury need not find the defendant intentionally used force and violence or

intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held a specific intent instruction was unnecessary 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 are in accord: 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) (citation omitted) ("The 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. . . . [N]othing in the statute even remotely suggests that the

defendant must have intended to intimidate.")*; 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).

As this Court has recognized, an act that turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," requires only a negligence standard, not intent. *Elonis*, 135 S. Ct. at 2011. 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.

In sum, *Watson*'s 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 clarify that bank robbery cannot be a crime of violence under the elements clause, because general intent "intimidation" does not satisfy that standard.

B. The "armed" element of armed bank robbery does not create a crime of violence.

Mr. Spangle's Section 924(c) conviction relies on his commission of *armed* bank robbery, which requires proof a defendant "use[d] a dangerous weapon or device." 18 U.S.C. § 2113(d). This fact does not undermine Mr.

Spangle's argument. Indeed, *Watson* did not address the armed element of armed bank robbery other than to state that because "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery," "armed bank robbery under § 2113(a) and (d) cannot be based on conduct that involves less force than an unarmed bank robbery requires." 881 F.3d at 786.

Moreover, the "dangerous weapon or device" standard is less pernicious than it seems. For one thing, because the standard applies from the point of view of the victim, a "weapon" was dangerous or deadly if it "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that "neither he nor [the defendant] 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." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a

real gun," and (2) he believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick,* 43 F.3d 877, 882-83 (4th Cir.1995); *see 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 "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).

Indeed, this Court's reasoning in *McLaughlin* holds that an unloaded or toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not

require *the defendant* to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.* 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.

In other words, *Watson* is correct that the "armed" part of armed bank robbery does not control.

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

The federal bank robbery statute is not a crime of violence for a third reason--the federal bank robbery statute includes both bank robbery and bank extortion. Because bank extortion does not require a violent threat, and because the statute is not divisible, this overbreadth is fatal.

The Ninth Circuit did not reach the question of whether bank extortion can be accomplished without fear of physical force--though the caselaw makes clear that it can. *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"). Rather, with little analysis, the Court 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.

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. *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.* 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)). 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 does not make the case for divisibility. *Eaton* points out that bank robbery is defined 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). But it goes on to note that the "essential element" of bank robbery "could [be] satisfied . . . through mere 'intimidation.'" This seems to make 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. *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. A statement of the statutes coverage does not affect the divisibility analysis.

Watson also failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which 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 the course of reaching that 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 similar decisions. 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 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.

In addition to the caselaw making this point, 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. And because the Ninth Circuit disregarded this Court's caselaw on

divisibility when it reached the opposite conclusion, the Court should grant this petition.

Conclusion

For the foregoing reasons, Mr. Spangle respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: October 11, 2019

By: _____
BRIANNA MIRCHEFF
Deputy Federal Public Defender
Attorney for the Petitioner