No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRENT DELVALEN BLAKE,
DEREK LADONTE MADDOX, and
MICHAEL DENNIS WILLIAMS,

Petitioners,
v.

UNITED STATES OF AMERICA,

Respondent.

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

Heather E. Williams
Federal Defender
Ann C. McClintock*
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, CA 95814
ann_mcclintock@fd.org
(916) 498-5700

Attorneys for Petitioners
*Counsel of Record

QUESTION PRESENTED FOR REVIEW

Federal armed bank robbery, 18 U.S.C. § 2113(a), (d), is a general intent offense. *Carter v. United States*, 530 U.S. 255, 268 (2000). 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.

This Court has ruled that the language found in 18 U.S.C. § 924(c)(B)'s definition of a "crime of violence" is unconstitutionally vague. *United States v. Davis,* 139 S. Ct. 2319, 2336 (2019); *see Johnson v. United States,* 135 S. Ct. 2551 (2015) (holding the Armed Career Criminal Act's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), unconstitutional); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018) (holding Immigration and Nationality Act's "crime of violence" definition, 18 U.S.C. § 16(b), void for vagueness).

Following *Johnson*, Petitioners challenged their § 924(c) convictions on constitutional vagueness grounds asserting that the predicate offense, federal bank robbery, was not categorically a crime of violence. The district court denied relief and both it and the Circuit denied the Petitioners certificates of appealability. Under this Court's controlling precedent, a movant "need not show that he should prevail on the merits" to be granted a certificate of appealability. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Rather, 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.

The question presented is:

> Can reasonable jurists debate whether 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?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI. 1

OPINIONS BELOW. 2

JURISDICTION. 2

PROVISIONS OF LAW INVOLVED. 3

STATEMENT OF THE CASE. 5

REASONS FOR GRANTING THE PETITION
AND ISSUING A WRIT OF CERTIORARI 7

A. STANDARDS GOVERNING THE GRANT OR DENIAL OF A CERTIFICATE OF APPEALABILITY. 9

B. THE CATEGORICAL APPROACH DETERMINES WHETHER AN OFFENSE IS A CRIME OF VIOLENCE. 10

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). 12

1. Federal bank robbery does not require the use or threat of violent physical force. 12

2. Federal bank robbery is a general intent crime.. 17

D. THE DENIAL OF A CERTIFICATE OF APPEALABILITY FAILS TO MAINTAIN UNIFORM CONFORMITY TO THIS COURT'S BINDING PRECEDENT.. 21

CONCLUSION 23

APPENDIX.. . . . . App-1

Order of the United States Court of Appeals for the Ninth Circuit Denying Mr. Blake a Certificate of Appealability, *United States v. Blake*, CA No. 18-17167 (July 22, 2019). App-1

Order of the United States Court of Appeals for the Ninth Circuit Denying Mr. Maddox a Certificate of Appealability, *United States v. Maddox*, CA No. 18-17172 (July 22, 2019) App-2

Order of the United States Court of Appeals for the Ninth Circuit Denying Mr. Williams a Certificate of Appealability, *United States v. Williams*, CA No. 18-17173 (July 22, 2019) App-3

Order of the United States District Court for the Eastern District of California Denying Section 2255 Relief (October 16, 2018). App-4

Magistrate Judge's Findings and Recommendations to Deny Section 2255 Relief (June 18, 2018). App-6

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Almanza-Arenas v. Lynch,
815 F.3d 469 (9th Cir. 2016) (en banc). 10

Barefoot v. Estelle,
463 U.S. 880 (1983). . . . . i, 9

Carter v. United States,
530 U.S. 255 (2000). . . . . i, 17, 18, 19, 22

Elonis v. United States,
135 S. Ct. 2001 (2015). 20

Hohn v. United States,
524 U.S. 236, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). 2

Johnson v. United States,
559 U.S. 133 (2010). 11, 14, 16

Johnson v. United States,
135 S. Ct. 2551 (2015). . . . . i, 6, 11, 14

Leocal v. Ashcroft,
543 U.S. 1 (2004). 11, 17

United States v. Benally,
843 F.3d 350 (9th Cir. 2016). 11,17

Mathis v. United States,
136 S. Ct. 2243 (2016). 10, 11

Miller-El v. Cockrell,
537 U.S. 322 (2003). 10, 22

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013). 10, 11

Ovalles v. United States,
905 F.3d 1300 (11th Cir. 2018) (en banc). 8, 16

Sessions v. Dimaya,
138 S. Ct. 1204 (2018). . . . . i, 12

Silva v. Woodford,
279 F.3d 825 (9th Cir. 2002). 10

Slack v. McDaniel,
529 U.S. 473 (2000). 21

Stokeling v. United States,
__S. Ct.__ , 2019 WL 189343 (Jan. 15, 2019). 11, 12, 13

Tennard v. Dretke,
542 U.S. 274 (2004). 10

United States v. Brewer,
848 F.3d 711 (5th Cir. 2017). 8, 16

United States v. Dawson,
300 F. Supp. 3d 1207 (D. Or. 2018). 22

United States v. Foppe,
993 F.2d 1444 (9th Cir. 1993). 19, 20

United States v. Higdon,
832 F.2d 312 (5th Cir. 1987). 15

United States v. Higley,
726 F. App'x 715 (10th Cir. 2018). 14

United States v. Hopkins,
703 F.2d 1102 (9th Cir. 1983). 13, 19

United States v. Kelley,
412 F.3d 1240 (11th Cir. 2005). 15, 20

United States v. Ketchum,
550 F.3d 363 (4th Cir. 2008). 8, 14, 15

United States v. Lucas,
963 F.2d 243 (9th Cir. 1992). 12, 13

United States v. McNeal,
818 F.3d 141 (4th Cir. 2016). 7, 8, 15

United States v. Parnell,
818 F.3d 974 (9th Cir. 2016). 16

United States v. Slater,
692 F.2d 107 (10th Cir. 1982). 8, 14

United States v. Watson,
881 F.3d 782 (9th Cir. 2018). 7, 13, 16, 17, 22

United States v. Woodrup,
86 F.3d 359 (4th Cir. 1996). 20

United States v. Yockel,
320 F.3d 818 (8th Cir. 2003). 20

STATUTES

Title 18 U.S.C.

§ 16(b). . . . . i, 11, 12

§ 924(c)(3). 3

§ 924(c)(3)(A). . . . . i, 6, 7, 8, 9, 12, 18

§ 924(c)(3)(B). 6, 12

§ 924(e)(2)(B)(ii).. . . . . i, 6

§ 2113. . . . . *passim*

Title 28 U.S.C.

§ 1254(1). 2

§ 2253. . . . . 4, 9, 21

§ 2255. . . . . 4, 6, 22

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRENT DELVALEN BLAKE,
DEREK LADONTE MADDOX, and
MICHAEL DENNIS WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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

BRENT DELVALEN BLAKE, DEREK LADONTE MADDOX, and MICHAEL DENNIS WILLIAMS, by and through appointed counsel, respectfully petition 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 orders denying Misters Blake's, Maddox's, and Williams's certificates of appealability are unpublished; copies of the orders are attached to this petition in an Appendix. (App-1 to App-3.)

The district court's judgments and orders denying habeas relief were also unreported. Copies of these orders, together with the magistrate judge's findings and recommendations that the district court adopted, are included in the appendix. (App-4 to App-11.)

JURISDICTION

The Ninth Circuit order denying Petitioners' certificates of appealability were each filed on July 22, 2019. (App-1 to App-3.) 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.)

/ / /

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 2003 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) (2003).

The federal statutory 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

Misters Blake, Maddox, and Williams are federal prisoners held by the Bureau of Prisons serving lengthy prison terms, 346 months in Blake and Maddox's cases and 534 months in Williams's case. Each was charged by indictment with counts of armed credit union or bank robbery in violation of 18 U.S.C. § 2113(a), (d), and using a firearm in furtherance of a "crime of violence," alleging the robberies to be the "crime of violence" in violation of 18 U.S.C. § 924(c). District Court Docket entry no. 260, pages 7-8. After jury trials, each was convicted on the 924(c) counts alleged against them. (Blake and Maddox were convicted of counts 11 and 12 of the fifth superseding indictment. Docket entry nos. 576, 577, 578; Williams was convicted in a separate trial of counts 11, 12, 17 and 18 of the fifth superseding indictment; Docket entry nos. 367, 369.)

Each appealed. The Circuit affirmed their sentences in memorandum decisions. *United States v. Blake*, CA No. 07-10286; Docket entry no. 722; *United States v. Maddox*, CA No. 08-10042; Docket entry no. 802; *United States v. Williams*, CA No. 06-10369; Docket entry no. 802. Blake and Williams filed

petitions for certiorari review with this Court; each was denied. *Blake v. United States,* No. 08-7327; *Williams v. United States*, No. 10-6808.

In 2015, this Court held that Armed Career Criminal Act's (ACCA) residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), was vague and unconstitutional. *Johnson v. United States,* 135 S. Ct. 2551 (2015) ("*Johnson II*"). Within one-year of this decision, Petitioners filed timely 28 U.S.C. § 2255 motions attacking their § 924(c) convictions and their sentences. Each argued that *Johnson* applied to and voided the residual clause in § 924(c)(3)(B), and that the bank robbery charged as the predicate offense for 924(c) purposes was not categorically a crime of violence under the remaining elements clause of § 924(c)(3)(A). On the latter point, Petitioners 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 the *intentional* use of threatened force.

On October 16, 2018, the district court, by adopting the magistrate judge's findings and recommendations, denied relief. (Docket entry nos. 1104, 1088; App-4 to App-11.) The district court later declined to issue certificates of appealability. (Docket entry no. 1109.)

Petitioners each filed timely notices of appeal and motions for certificates of appealability. On July 22, 2019, the Circuit denied these motions. (App-1 to App-3.)

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

The issue presented asks if it is simply debatable among jurists of reason to question whether a defendant's conviction for federal bank robbery, 18 U.S.C. § 2113(a), (d), necessarily establishes that he is someone who was more than negligent regarding his conduct, so that others would construe his actions as a threat of violent physical force *against another*. Is it appropriate to subject such a defendant to the severe sentencing enhancements that section 924(c) convictions impose?

Numerous Circuits have reached logically inconsistent positions regarding federal bank robbery. These courts hold that this offense —whose conduct 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). *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)). At the same time, these Circuits also apply an ever-decreasing bar for what constitutes "intimidation" in the context of sufficiency of the evidence challenges. *See e.g., United States v. Slater,* 692 F.2d 107, 107-08 (10th Cir. 1982) (rejecting insufficiency challenge where 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); *United States v. Ketchum,* 550 F.3d 363, 365 (4th Cir. 2008) (affirming bank robbery by intimidation conviction where the defendant affirmatively voiced no intent to use violent physical force).

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 applicable to § 924(c) convictions and consecutive sentences imposed based on the bank robbery. 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. Given the deliberately low threshold for granting certificates of appealability, certiorari is necessary to ensure all circuits appropriately review and consider whether bank robbery categorically is a crime of violence under 924(c)(3)(A) in light of the sufficiency cases that bring into this offense's orbit conduct that is neither intentionally intimidating nor involve actual threats of violence.

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." 559 U.S. at 140. In *Stokeling,* this Court interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. 139 U.S. 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).

Following *Johnson II*'s holding in the ACCA context, 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. *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 the *Dimaya* decision, the government shifted gears and began to argue that the residual clause in § 924(c)(3)(B) could 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). The government lost this argument in *Davis*. This Court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. *Davis*, __ U.S. __, 139 S. Ct. 2319, 2330, 2336 (2019).

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, *Stokeling*, 139 S. Ct. at 554. 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 a minimal level of conduct is sufficient in the Ninth Circuit to sustain a bank robbery conviction, the Circuit nonetheless concluded in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), 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.

The Court's attention is needed because 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). Yet, these Circuit also hold that for "crime of violence" purposes the "intimidation" element is meet because such an

offense 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 the Massachusetts armed robbery statute at issue did 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.

In light of these conflicting cases, within the Ninth Circuit and among the Circuits, certificates of ability should have issued. Certiorari is necessary to reconcile and correct the Circuit's failure to follow the applicable standards and to resolve 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 a certificate of appealability by relying on *Watson*. (App-1 ro App-3.) 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 that 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) (affirming conviction, holding jury need not find defendant intentionally used force and violence or intimidation on the victim bank teller.) 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 DENIAL OF A CERTIFICATE OF APPEALABILITY FAILS TO MAINTAIN UNIFORM CONFORMITY TO THIS COURT'S BINDING PRECEDENT

Petitioners' cases were entitled to further appellate consideration. These cases present serious questions concerning the interpreation and application of this Court's precedent to the "crime of violence" analysis of the bank robbery statute. Petitioners did not need, at a COA stage, to demonstrate that they 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 the § 2255 motions, 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 Petitioners a COA, the Ninth Circuit inappropriately cut off their viable challenges that are well-grounded in Supreme Court and Circuit authority.

CONCLUSION

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

Dated: October 18, 2019

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender

ANN C. McCLINTOCK*
Assistant Federal Defender

Attorneys for Petitioners
BRENT DELVALEN BLAKE
DEREK LADONTE MADDOX
MICHAEL DENNIS WILLIAMS
*Counsel of Record