No. _____

In the

Supreme Court of the United States

JAMES DOUGLAS PRIDGEN, 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

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Questions Presented

1. Whether the Ninth Circuit wrongly denied the request for a certificate of appealability where the Section 924(c) conviction was charged as to two different underlying offenses, where the jury was not called on to unanimously decide which of the two prior offenses the conviction was based on, where one of those two prior offenses is decidedly not a crime of violence after *Johnson*--and where a number of other courts have granted relief on similar facts.

2. Whether federal bank robbery under 18 U.S.C. § 2113(a), (d) and federal carjacking under 18 U.S.C. § 2119 are crimes of violence under 18 U.S.C. § 924(c)(3)(A), where the offense fails to require any intentional use, attempted use, or threat of violent physical force.

3, Whether the Ninth Circuit wrongly declined to grant a certificate of appealability standard as to the *Napue* claim, where the government admitted that it presented false hair-sample testimony and where the question of that effect on the trial was at least debatable.

Statement of Related Proceedings

- *United States v. James Douglas Pridgen*
  2:98-cr-00043-SVW (C.D. Cal. Aug. 4. 1998)
- *United States v. James Douglas Pridgen*,
  98-50498 (9th Cir. Jul. 10 2002)
- *James Douglas Pridgen v. United States, v. United States*,
  2:03-5589-WDK (C.D. Cal. Dec, 3, 2004)
- *James Douglas Pridgen v. United States, v. United States*,
  05-55266 (9th Cir. Jun. 23, 2005)
- *James Douglas Pridgen v. United States, v. United States*,
  2:17-cv-03016-SVW (C.D. Cal. Mar. 7, 2018)
- *James Douglas Pridgen v. United States*,
  18-55308 (9th Cir. Aug. 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)

Federal Statutes

Table of Authorities

Page(s)

Other Authorities

In the

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JAMES DOUGLAS PRIDGEN, Petitioner

v.

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Petition for Writ of Certiorari

James Douglas Pridgen 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. Pridgen's application for a certificate of appealability ("COA") was not published. App. 1a. The district court issued a written order denying Mr. Pridgen'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-10a.

Jurisdiction

The Ninth Circuit issued its order denying Mr. Pridgen a COA on August 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

Mr. Pridgen was convicted by a jury of five counts—carjacking in violation of 18 U.S.C. § 2119 (Count 1); using and carrying a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c) (Count 2); conspiracy 18 U.S.C. § 371 to commit federal bank robbery in violation of 18 U.S.C. § 2113 (a) (Count 3); bank robbery in violation of 18 U.S.C. § 2113(a) (Count 4); and using and carrying a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c) (Count 5). On August 4, 1998, the Court imposed a sentence of 397 months—97 months on Counts 1, 3, and 4, and a consecutive 300 months on Counts 2 and 5.

His conviction was affirmed on appeal. *United States v. Pridgen*, 41 Fed. Appx. 103 (9th Cir. 2002). His *pro se* motion to vacate his sentence under 28 U.S.C. § 2255 was denied on November 1, 2004. Neither raised questions related to the one presented here.

On October 27, 2015, Mr. Pridgen received a letter from his trial counsel informing him that the government relied upon false forensic testimony regarding microscopic hair comparison analysis in securing his conviction and sentence of 397 months. On June 29, 2016, Mr. Pridgen filed a *pro se* motion under 28 U.S.C. § 2255 arguing that his convictions should be vacated under *Napue* because the government introduced false evidence

against him. He also argued that his 25-year mandatory consecutive sentence under 18 U.S.C. § 924(c) violated the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). More specifically, Mr. Pridgen argued that his conviction for Count 5 was predicated on conspiracy to commit armed bank robbery and conspiracy offenses are not crimes of violence under the force clause of 18 U.S.C. § 924(c). In the alternative, Mr. Pridgen argued that neither armed bank robbery or carjacking is a crime of violence.

On March 7, 2018, the district court denied Mr. Pridgen's motion. App. 2a. The court denied Mr. Pridgen's *Napue* claim because it found that there was other "significant" evidence that placed Mr. Pridgen at the crime scene and because defense counsel cross-examined the hair analyst on the limitations of hair examination. The court denied Mr. Prigen's *Johnson* claims, concluding that the Ninth Circuit had already held that armed bank robbery and carjacking were crimes of violence under the force clause. *See United States v. Watson*, 881 F.3d 782 (9th Cir. 2018); *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017). The district court did not address his argument that his Section 924(c) conviction in Count 5 was based on conspiracy to commit armed bank robbery, not the substantive crime of armed bank robbery.

On August 22, 2019, the Ninth Circuit denied his request for a certificate of appealability in a summary order. App. 1a.

Reasons for Granting the Writ

The Court should grant the writ of certiorari for three reasons. *First*, the Ninth Circuit misapplied the standard for a certificate of appealability, when it declined to consider whether Mr. Pridgen's Section 924(c) conviction was based on bank robbery or *conspiracy* to commit bank robbery. *Second*, the Ninth Circuit's decisions holding that armed bank robbery and carjacking are crimes of violence for purposes of Section 924(c) are wrongly decided and should be revisited. And *third*, the Ninth Circuit's denial of a certificate of appealability on Mr. Pridgen's *Napue* claim was in error and misapplied the controlling standard.

I. The Ninth Circuit wrongly denied a certificate of appealability on the question of a Section 924(c) based on two different convictions.

In denying Mr. Pridgen's *Johnson* claim as to Count Five, the district court found there was no need to decide whether the residual clause was vague because the Ninth Circuit had already decided that armed bank robbery was a crime of violence under the force clause. The district court, however, overlooked Mr. Pridgen's argument that the court should assume Count 5 was predicated on conspiracy to commit armed bank robbery, rather than armed bank robbery.

The government bears the burden to "clearly establish" the statute of conviction for a predicate crime of violence. *United States v. Matthews*, 278

F.3d 880, 884 (9th Cir. 2002) (en banc) (remanding for resentencing without ACCA enhancement where district court did not properly find the underlying statutes of conviction). To determine the statute of conviction, a district court may examine a limited number of court documents: "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy or some comparable judicial record . . . ." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)). These judicial documents are commonly called "*Shepard* documents." When there is an ambiguity about which statute serves as the crime-of-violence predicate, the government has not met its burden and the conviction cannot stand. For example, in *Taylor v. United States*, the Supreme Court vacated a sentencing enhancement under the ACCA where the record was too "sparse" to identify the statutes under which the defendant was previously convicted. 495 U.S. 575, 602 (1990). Consulting the *Shepard* documents here reveals ambiguity about whether Count 5's predicate crime of violence was conspiracy to commit armed bank robbery or armed bank robbery.

Relevant to Count Five, the jury was instructed that there were two ways Mr. Pridgen could be found guilty: because he personally committed the crimes or because he was part of the conspiracy to commit those crimes. The verdict did not indicate which theory of liability the jury adopted, nor did it ask jurors to specify whether they found Mr. Pridgen guilty of violating

Section 924(c) based on his participation in a *conspiracy* to commit armed bank robbery or his violation of the substantive crime of armed bank robbery. The government adopted this strategy because, as discussed below, the identity of the masked robbers who entered the bank was in dispute at trial and the witnesses who implicated Mr. Pridgen were highly motivated to lie. In closing, the government explained to the jury:

> I also mentioned that conspiracy is an alternative theory. And "alternative" is an important word to remember, because it's an alternative theory to find him guilty of either the credit union robbery or the use of the firearm. … But if you had to, you could also use the conspiracy theory, especially on the gun count, because you heard the statement of David Wilkerson, who admitted that he was at the credit union that day, and that he also had a gun. The shotgun.

As a result, the jury returned a general verdict without having to decide if Mr. Pridgen participated in the robbery himself or only conspired to do so.

The record is thus unclear, or at best ambiguous, as to which crime-of-violence theory serves as the predicate for Mr. Pridgen's Count Five conviction: Count Three (conspiracy) or Count Four (armed bank robbery). To assume that the verdict rested on anything more than the least charged offense would require judicial fact finding that this Court cannot engage in--the reviewing courts must assume that the conviction rested on "nothing

more than the least of the acts criminalized" under the statute. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

Moreover, if the basis of the conviction was 18 U.S.C. § 371, that offense is not a crime of violence. In order to be found guilty of conspiracy to commit armed bank robbery under 18 U.S.C. § 371, a defendant need only have (1) agreed that an armed bank robbery should be committed and (2) possessed the intent that an armed bank robbery occur, and (3) the defendant or one of the co-conspirators must have committed an overt act. None of these elements requires the intentional use of violent force, or any force at all. The only element that even requires any action beyond mere talking is the overt act requirement. However, overt acts need not be forceful or violent. Indeed, "[t]he overt act need not [even] be unlawful." *United States v. Posey*, 864 F.2d 1487, 1492 (9th Cir. 1989). Nor is it necessary that the purpose of the conspiracy be accomplished. *Id.* Instead, to satisfy the overt act requirement, the defendant or one of his co-conspirators must merely "do *any* act to effect the object of the conspiracy." 18 U.S.C. § 371 (emphasis added).

On a similar theory, a number of courts have recognized that conspiracy crimes do not satisfy the force clause and are not crimes of violence following *Johnson*. *See, e.g.*, *Brown v. United States*, ___ F.3d ___, 2019 WL 5883708 (11th Cir. Nov. 12, 2019) (finding conspiracy to commit Hobbs Act robbery not to be a crime of violence); *United States v. Simms*, 914

F.3d 229, 233-34 (4th Cir. 2019) (en banc); *United States v. Lewis*, 907 F.3d 891, 895 (5th Cir. 2018); *United States v. Barrett*, 937 F.3d 126, 127-28 (2d Cir. 2019).

Because the record is unclear on the basis for a § 924(c) conviction, because the Court must presume that the defendant's conviction rests on the least of the acts criminalized under the statute, and because the least of the acts covered is not a crime of violence, reversal is required. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *see also United States v. Williams*, 441 F.3d 716, 721 (9th Cir. 2006) ("Where a jury returns a general verdict that is potentially based on a theory that was legally impermissible or unconstitutional, the conviction cannot be sustained").[1]

Mr. Pridgen met the lenient standard for issuance of a COA--as shown by the reasonable jurists who have granted relief under similar

[1] Several courts have applied the above principles in the context of *Johnson* claims. *See United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017) (reversing denial of *Johnson* claim and vacating sentence in a successive § 2255 motion challenging conviction under Armed Career Criminal Act); *United States v. Flores*, No. 2:08-cr-163-JCM-GWF, 2018 WL 2709855, at *9 (D. Nev. June 5, 2018) (vacating petitioner's § 924(c) conviction where the jury could have relied on the unconstitutional theory of liability that the predicate crime of violence was conspiracy to commit Hobbs Act robbery); *Mitchell v. United States*, No. 2:16-cv07473-TJH, ECF No. 28 (C.D. Cal. Aug. 1, 2017) (finding underlying offense unclear and holding conspiracy to commit Hobbs Act robbery did not qualify under § 924(c) post-*Johnson*); *Mose v. United States*, No. CR06-00545-GHK-04, 2017 WL 8727629 (C.D. Cal. July 26, 2017) (same).

circumstances--and the Ninth Circuit misapplied the standard for a certificate of appealability when it denied him that opportunity. His claim deserves further review.

II. Even if the question is whether bank robbery or carjacking are crimes of violence after *Johnson*, the Ninth Circuit's decisions on that point are wrong.[2]

A number of circuits have held that federal bank robbery and carjacking 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 and carjacking by intimidation require a threat of violent force, or they 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.

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[2] The Ninth Circuit's analysis of the intimidation element of the carjacking offense incorporates its analysis of whether bank robbery by intimidation is a crime of violence. This petition therefore deals with both questions together, and all arguments made with reference to bank robbery and also made with reference to carjacking.

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*, 139 S. Ct. 544, 552 (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. 139 S. Ct. at 554. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).

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

1. *Neither federal bank robbery nor carjacking require the use or threat of violent physical force.*

First, intimidation for purposes of the federal bank robbery statute and the carjacking statute can be, and often is, accomplished by a simple demand for money. In the bank robbery context, 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.

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).[3]

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 then incorporated that analysis into its reading of the carjacking statute. *United States v. Gutierrez*, 876 F.3d 1254, 1255 (9th Cir. 2017). It is wrong, however, to equate *willingness* to use force with a threat to do so. Indeed, the Ninth Circuit has previously

[3] The same examples exist in the carjacking context. *See*, *e.g.*, *United States v. Diaz-Rosado*, 857 F.3d 116, 121 (1st Cir. 2017) (holding evidence sufficient to sustain a carjacking conviction even though defendant did not make any threatening gestures or verbal threats, or otherwise manifest an intent to cause serious bodily harm, because the defendant was "willing to cause serious bodily harm in order to abscond with [the victim's] car").

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 crimes.*

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.

The fact that Mr. Pridgen was found guilty of armed bank robbery, which requires proof a defendant "use[d] a dangerous weapon or device," does not undermine his arguments. 18 U.S.C. § 2113(d). 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.

III. The Ninth Circuit wrongly applied the certificate of appealability standard when it denied Mr. Pridgen's *Napue* claim.

To establish a *Napue* false testimony claim, the defendant must show that (1) the testimony was actually false, (2) the prosecution know or should have known that the testimony was actually false, and (3) the false testimony was material. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc). The government conceded the first two elements below. The district court concluded that the hair analysis testimony was not material because there was "significant" additional evidence that Mr. Pridgen was at the crime scene and because Mr. Pridgen's cross-examined the hair analyst about the scientific limitations of his conclusion. However, the prosecution's evidence placing Mr. Pridgen at the crime scene was far from "significant." And, defense counsel was unable to effectively attack the hair analyst's ultimate conclusion. At the very least, reasonably jurists could debate whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008). Because, again, the Ninth Circuit misapplied the standard for a certificate of appealability, certiorari is appropriate.

The case against Mr. Pridgen was entirely circumstantial. Not a single witness was able to identify the credit union robbers, beyond stating that one was Hispanic and the other was African American. Only the testimony of Christopher Hopkins, the hair analyst, placed Mr. Pridgen seemingly without question, in the credit union as the assailant wearing the red/maroon mask. Hopkins was the sole witness who testified that Mr. Pridgen had worn the red/maroon ski mask *just before* its discovery in the getaway car, because hair evidence "is lost [] off the objects very, very quickly." He also told the jury that the hairs he examined were "consistent with the action of ripping off a hat." His testimony, of course, was false, as the government has conceded.

The district court gave too much weight to the other pieces of evidence, none of which definitively placed Mr. Pridgen at the credit union. The DNA examiner, Debbie Hobson, found a mixture of DNA from multiple individuals on the ski masks recovered from the getaway car. Of the seven fabric cuttings she took from the red/maroon mask, just one cutting contained DNA matching Mr. Pridgen. But critically and in contrast to Hopkins, she explained that DNA remains stable for extended periods of time, and she could not, therefore, draw any conclusion about when Mr. Pridgen had come into contact with the mask.

In addition, Mr. Pridgen's co-defendant testified against him pursuant to a cooperation plea agreement that afforded him significant benefits, and,

even then, his testimony was internally inconsistent and at odds with the prosecution's case (e.g., he testified that Mr. Pridgen wore a green/turquoise mask).

Most of the other witnesses, as the district court recognized, presented evidence that was, at best, consistent with an accessory-after-the-fact theory of liability. None placed Mr. Pridgen at the crime scene, nor testified to his involvement prior to the crime.

Unsurprisingly, the government presented Hopkins' hair comparison evidence to close this gap. While Mr. Pridgen's defense attorney had the opportunity to cross-examine Hopkins, he was *not* able to do so effectively. His questions went to the limitations of the science of hair comparison as he then knew them to be, i.e., that Hopkins could not make an absolute identification of Mr. Pridgen to the exclusion of all others. But those questions did nothing to attack Hopkins' critical assertion that Mr. Pridgen very likely wore the red/maroon ski mask shortly before it was discovered in the getaway car, and ripped that mask of his face before discarding it. His cross-examination was hardly effective.

There is no question, in light of these facts, that Hopkins' testimony could have influenced the jury. Hopkins filled a critical void in the prosecution's case. Surely, this is why the government presented him as a

witness, and would not have wasted the court or the jury's time presenting evidence that stood to have no impact upon the jury at all.

Finally, at least two analogous cases make plain that reasonable jurists could debate whether Mr. Pridgen meets the *Napue* materiality standard. In these cases, the prosecution's case rested upon considerable undisputed circumstantial evidence. The hair comparison evidence critically tied the petitioners there, as here, to the crime scene and bolstered the testimony of cooperating witnesses.

In *Matta-Ballesteros v. United States*, 2:16-cv-02596-JAK, Dkt. No. 37 (May 22, 2017), the petitioner challenged his conviction for three felonies: kidnapping as a crime of violence in furtherance of racketeering, conspiracy to kidnap a federal agent, and kidnapping a federal agent engaged in his official duties. *Id.* at 1. The convictions were related to the 1985, kidnapping and subsequent murder of DEA Agent Enrique Camarena in Guadalajara, Mexico. The petitioner was sentenced to life imprisonment for each conviction. *Id.* The court explained that the government introduced three categories of evidence against the petitioner: first, witnesses identified the petitioner as a person who participated in meetings prior to Camarena's disappearance; second, the petitioner was involved with the Mexican drug trafficking cartel that was alleged to have conspired to kill Camarena; and, third, petitioner and Camarena were both present at a guest house where the

government argued that Camarena was tortured and interrogated prior to his murder. *Id.* at 18. The court concluded that the petitioner satisfied *Napue*'s materiality standard, even though the government's false hair comparison testimony influenced only the third category of evidence. *Id.* In reaching this conclusion, the court contrasted *Napue*'s materiality standard with the sufficiency-of-the-evidence standard on direct appeal, because, notably, the petitioner had appealed his case and the Ninth Circuit had already determined that the non-forensic evidence tying the petitioner to a conspiracy to kidnap and murder Camarena *was sufficient* to support his conviction:

> The sufficiency of the evidence standard that was applied during the direct appeal of Petitioner's convictions is different than the materiality standard that applies here. Even where there is sufficient unchallenged evidence to support a conviction, a motion under Section 2255 may be granted. … The evidence here meets the standards for relief under *Napue*. . . . [The FBI examiner]'s testimony directly linked Petitioner to the very serious and gruesome conduct that resulted from the alleged conspiracy. [The examiner] testified that Petitioner's hair was located in the room where the interrogation of Camarena allegedly occurred. This nexus is significant because it was the only evidence that Petitioner was at the location. Further, it substantially bolstered the testimony of [the co-conspirator] concerning Petitioner's presence on two occasions when the alleged conspiracy was discussed. That testimony was offered to support the allegation that Petitioner knew of, and agreed to participate in, the alleged conspiracy to kidnap and interrogate

> Camarena. . . . It was material that the challenged evidence placed Petitioner at the location where some of the most significant acts of the alleged conspiracy occurred. Because the testimony of [the co-conspirator] was hearsay, and was challenged on cross examination, the decision of the jury that Petitioner was a member of the conspiracy *may have been affected* by the discredited testimony of [the FBI examiner].

Id. at 22-23 (citations omitted, emphasis added).

Like *Matta-Ballesteros*, the government's false forensic evidence in Mr. Pridgen's case was the only direct and seemingly credible evidence placing him at the crime scene. Both cases relied upon the testimony of a co-conspirator, whose account the false forensics corroborated in critical ways, to establish the defendant/petitioner's role in the worst acts of the alleged offenses (interrogation and murder in one case, and armed robbery in the other). The court's conclusion that *Napue*'s materiality standard was satisfied in *Matta-Ballesteros* should, therefore, weigh heavily in this Court's analysis.

In *Verdugo-Urquidez v. United States*, the petitioner also challenged his convictions relating to the kidnapping and murder of Agent Camarena. 2:15-cv-09274-JAK, Dkt. No. 37 (May 22, 2017). There too, the government presented false microscopic hair comparison evidence that placed the petitioner and Camarena inside the guest house where Camarena was allegedly interrogated and murdered. *Id.* at 15-16. Aside from the false

forensics, the government presented "[e]xtensive non-forensic evidence" that tied the petitioner to the drug cartel that allegedly planned and executed the crime. *Id.* at 19. In addition, there was "unchallenged" evidence that petitioner stayed at a hotel in close proximity to the guest house; that the same two phone numbers were dialed from petitioner's hotel room and from the main house adjacent to the guest house; and, that petitioner made inculpatory statement about a "narc" who had been "beat to sh-t," and stated that he had "taken care of" a "problem." *Id.* at 19-20. The court nonetheless concluded that the petitioner satisfied *Napue*'s materiality standard, reasoning that the forensic evidence was the sole piece of direct evidence that placed the petitioner and the victim together at the crime scene, that it corroborated other witnesses' otherwise questionable accounts, and therefore, that there was a "reasonable likelihood" that it "could have affected the judgement of the jury." *Id.* at 22-23, 24 (citation omitted). Thus, *Verdugo-Urquidez* again demonstrates that Mr. Pridgen meets *Napue*'s materiality standard: there, as here, the government's false forensic evidence was critical to placing the petitioner at the crime scene, and critical to bolstering government witnesses' otherwise impeachable testimony. Surely, applying *Verdugo-Urquidez* here, Hopkins's testimony could have influenced the jury's verdict.

In sum, Hopkins's testimony filled a critical gap in the government's

narrative; there is little question that it *could have* influenced the jury. At the very least, reasonably jurists could disagree with the district court's contrary conclusion.

Conclusion

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

Respectfully submitted,

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DATED: November 15, 2019

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