No. 19-7569

IN THE SUPREME COURT
OF THE UNITED STATES

STANLEY NOEL AMES, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Elizabeth G. Daily
Counsel of Record
Assistant Federal Public Defender
Email: liz_daily@fd.org
Stephen R. Sady
Chief Deputy Federal Public Defender
Email: steve_sady@fd.org
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorneys for Petitioners

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Reply Brief In Support Of Petition For Writ Of Certiorari

Petitioners in this consolidated petition ask this Court to grant a writ of certiorari to review the decisions of the Ninth Circuit Court of Appeals on two federal questions of exceptional importance: (1) whether federal bank robbery qualifies as a "crime of violence" under the force clause of 18 U.S.C. § 924(c)(3)(A), and (2) whether *Dean v. United States*, 137 S. Ct. 1170 (2017), announced a substantive rule that applies retroactively to cases on collateral review. On both issues, the government's brief in opposition highlights the need for this Court's intervention by establishing that the circuits are entrenched in their incorrect positions that contravene this Court's precedent.

Regarding federal bank robbery, the position taken by the circuits creates internal inconsistencies in how the courts define the "intimidation" element of that crime. In the conviction context, courts give intimidation its broadest meaning, requiring neither a communicated threat of violence nor any culpable mens rea to find a defendant guilty of the crime. In the context of the categorical approach, when drastic sentencing enhancements are in play, the courts pivot to hold that intimidation is narrow enough to satisfy the crime of violence definition in 18 U.S.C. § 924(c)(3)(A), which requires the purposeful use, attempted use, or threatened use of violent force. The inconsistent approaches put the government in an unfair "heads I win; tails you lose" position. Because the issue is one of exceptional importance that can lead to decades of unlawful incarceration for a single defendant, let alone the systemic impact given the frequency with which the issue arises, this Court should grant review.

Regarding *Dean*'s retroactivity, the position taken by the circuits, and endorsed by the government, mistakes *Dean* as announcing a permissive, procedural rule, when in fact the case articulated a mandatory, substantive standard of reasonableness for aggregate sentences. Contrary to the government's argument, a sentencing judge does not have the discretion to disregard a consecutive sentence under 18 U.S.C. § 924(c), when doing so would mean imposing an aggregate sentence "greater than necessary" to serve the purposes of sentencing.

The present consolidated petition is an excellent vehicle for the Court's review of the two purely legal questions presented. Although the government asserts that there are various factual or procedural discrepancies among the five petitioners' cases, the legal issues related to each case are identical with respect to the questions presented. The single exception—that Mr. Rich's appeal does not implicate the second question presented under *Dean*—can be addressed as to that individual case, and provides no basis to deny certiorari in toto. Any remaining discrepancies among the various postures of the cases do not go to the merits of the questions presented, and those issues can be resolved by the Ninth Circuit in the first instance on remand.

A. The Circuits' Entrenched Position That Federal Bank Robbery Is A "Crime Of Violence" Under § 924(c)(3)(A) Is Inconsistent With The Expansive Conduct Punished As "Intimidation" Under 18 U.S.C. § 2113(a) And Warrants Review.

The government's brief in opposition to certiorari underscores the divide between precedent in the conviction context and precedent applying the categorical approach by

citing only the latter in support of its position that bank robbery is a crime of violence. But this Court has clearly instructed that the categorical approach asks how courts have actually applied the law. As actually applied, the "intimidation" element of § 2113 encompasses a mere demand for money or nonviolent snatching. Likewise, as actually applied, defendants need not have any culpable *mens rea* as to the "intimidation" element of § 2113(a), because the courts have only required conduct that is objectively fear-producing, regardless of the defendant's intent.

1. The Categorical Approach Requires Courts To Consider The Full Reach Of A Criminal Statute, Including The Least Culpable Conduct Actually Criminalized.

This Court's instructions for applying the categorical approach are clear and consistent on the two key points. First, courts applying the categorical approach must consider the outer contours of the statute and can find a categorical match only when the least culpable conduct punished satisfies the federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." (internal quotation marks and alterations omitted)); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same).

Second, courts cannot look solely to the title or text of the statute, but must consider how it has actually been applied. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (*Johnson 2010*) (holding that state court interpretations of a statute are controlling). When there is "a realistic probability,

not a theoretical possibility, that the [government] would apply [the] statute to conduct that falls outside the generic definition of a crime," then there can be no categorical match. *Duenas-Alvarez*, 549 U.S. at 193. A crime is not a categorical match when the defendant can "point to his own case or other cases in which the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

The government's argument that the "intimidation" element of armed bank robbery matches the crime of violence definition in § 924(c)(3)(A) ignores these two crucial points. The government, after securing convictions based on precedent applying § 2113(a) expansively to nonviolent conduct, now advocates under the categorical approach that the law is narrow and requires a knowing threat of violence. But the judicial application of § 2113(a) to nonviolent conduct without a culpable *mens rea* controls.

2. The Circuits Have Erred In Holding Under The Categorical Approach That Armed Bank Robbery By Intimidation Requires A Threat Of Violence.

Citing cases decided in the categorical approach context, the government asserts that bank robbery by intimidation necessarily requires proof of the "threat of force." *Johnson*, Br. in Opp. at 9.[1] It does not. Instead, in sufficiency of the evidence cases (*i.e.*, the cases that actually define the contours of a crime), the courts of appeals have held that

[1] "*Johnson*, Br. in Opp." refers to the government's Brief in Opposition in *United States v. Johnson*, No. 19-7079 (S. Ct.), which the government adopted by incorporation into its opposition in the present case. "*Ames*, Br. in Opp." refers to the government's Brief in Opposition filed in the present case.

a mere demand for money—uncoupled from any use, attempted use, or threatened use of force—constitutes intimidation. *See, e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983); *United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992). The Eleventh Circuit holds that the mere act of laying across a bank counter and stealing from a till constitutes intimidation—even though the defendant said nothing. *See United States v. Kelly*, 412 F.3d 1240, 1244-45 (11th Cir. 2005). The Fourth Circuit has made clear that any request for money will suffice. *See, e.g.*, *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (sufficient evidence of bank robbery by intimidation where defendant gave teller a note that read "[t]hese people are making me do this" and that "[t]hey are forcing me and have a gun. Please don't call the cops. I must have at least $500."). The Tenth Circuit has reached similar results. *See United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (saying "shut up" to teller in response to question while stealing from bank sufficient evidence of intimidation). These cases demonstrate that the least serious conduct encompassed by bank robbery by intimidation does not categorically require the use, attempted use, or threatened use of force.

The government argues that these cases all involve "implicit . . . threats of force or violence." *Johnson*, Br. in Opp. at 11. But the cases actually relieve the prosecutor of the burden to prove a threat of force by holding that *any* demand for money or interaction with a teller in the course of stealing can produce fear and so constitutes a threat. *See United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002) (holding that "unequivocal written and verbal demands for money to bank employees are a sufficient basis for a finding of

intimidation" under § 2113(a)). In *United States v. Armour*, for example, the Seventh Circuit held that federal bank robbery "inherently contains a threat of violent physical force" because "[a] bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." 840 F.3d 904, 909 (7th Cir. 2016). The fact that conduct might provoke a reasonable fear of bodily harm does not prove that the defendant "communicated [an] intent to inflict harm or loss on another," as necessary for a communication to qualify as a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015). When a fact is merely presumed, rather than proven beyond a reasonable doubt, it is not an element sufficient to satisfy the categorical approach. *See United States v. Mathis*, 136 S. Ct. 2243 (2016) (explaining reasons for limiting categorical approach to elements submitted to the jury and proved beyond a reasonable doubt).

While distancing itself from precedent actually applying § 2113(a) to nonviolent conduct, the government asserts that interpreting "intimidation" to require the threatened use of force "is consistent with the text and history of the bank-robbery statute." *Johnson*, Br. in Opp. at 9. That argument is misplaced in the categorical approach analysis. When courts apply the categorical approach, they must ask whether the elements of the underlying offense *as elaborated by case law* necessarily require the prosecutor to prove the use, attempted use, or threatened use of force. *Johnson 2010*, 559 U.S. at 138. The question is whether there is a "realistic probability"—based on actual dispositions—that a crime encompasses nonviolent conduct. *Duenas-Alvarez*, 549 U.S. at 193. While some of the circuits have accepted the government's invitation to focus on the legislative history

underlying the bank robbery statute, *see, e.g.*, *United States v. Carr*, 946 F.3d 598, 602-604 (D.C. Cir. 2020), that is a misguided approach to categorical analysis.

Focusing on a Senate Judiciary Committee report concerning the 1984 amendment to § 924(c), the government further contends that Congress wanted bank robbery to fall within the definition of a crime of violence set forth in § 924(c). *Johnson*, Br. in Opp. at 15 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983)). This contention again misses the mark. For one thing, the Senate Report is not the statutory text, and, when it wants to, Congress knows precisely how to create a sentencing enhancement for a specific crime. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (listing "burglary, arson, or extortion" as violent felonies for purposes of the armed career criminal enhancement); *see also Stokeling v. United States*, 139 S. Ct. 544, 564 (2019) (Sotomayor, J., dissenting) ("Congress could, at any time, []enumerate robbery . . . if it so chose."); *cf.* 18 U.S.C. § 3559(c)(2)(F)(i) (listing "robbery (as described in section 2111, 2113, or 2118) as a serious violent felony for purposes of the three-strikes statute).

More importantly, the Senate Report reflects Congress's recognition that bank robbery qualified as a crime of violence under the former version of § 924(c), *when the statute included the residual clause*. From the Senate Report's perspective, bank robbery was a crime of violence due to its "extremely dangerous" nature, not because one of its elements necessarily required the prosecutor to prove the use, attempted use, or threatened use of force. S. Rep. No. 225, 98th Cong., 1st Sess. 312-313; *see also Stokeling*, 139 S. Ct. at 563-64 (Sotomayor, J., dissenting) (noting that potential disqualification of robbery

offenses as violent felonies "would stem just as much (if not more) from the death of the residual clause as from" the Court's definition of physical force). The Senate Report does not support the conclusion that bank robbery satisfies the force clause, and it fails to rebut the many cases applying § 2113(a) to nonviolent conduct.

3. The Circuits Have Erred In Holding Under The Categorical Approach That Armed Bank Robbery Requires Knowing Intimidation.

The government next claims that armed bank robbery necessarily requires proof of purposeful violence, as required by the force clause, because a defendant must *know* that his conduct is intimidating. *Johnson*, Br. in Opp. at 17-18. That is not correct. The petition cites numerous circuit court opinions holding that the element of intimidation is judged by an objective, "reasonable reaction of the listener" standard, not by the defendant's subjective intent. Pet. at 11. The government contends those cases merely reject "proof of a specific[ ] inten[t] to intimidate." *Johnson*, Br. in Opp. at 19. But that explanation is not correct: the courts' reasoning negates a requirement of knowledge just as much as it negates specific intent.

In *United States v. Foppe*, for example, the Ninth Circuit approved a jury instruction that attached no *mens rea* to the intimidation element of § 2113(a). 993 F.2d 1244 (9th Cir. 1993). The court reasoned that, under a general intent standard, the conduct itself is all that is required:

> Unarmed bank robbery, as defined in section 2113(a), is a general intent crime, not a specific intent crime. The court should not instruct the jury on specific intent *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*. . . . "The determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions." . . . Whether Foppe specifically intended to intimidate Del Rosario is irrelevant. Because [t]he government need only prove that the taking of money was by intimidation," . . . the jury instructions in this case adequately described the elements of the offense.

993 F.2d at 1451 (emphasis added) (internal citations omitted). *Foppe* rejects *any* subjective mental state for intimidation, not just specific intent.

Just as in *Foppe*, the Eleventh Circuit's rejection of specific intent in *Kelly* was grounded on the conclusion that intimidation is judged objectively, negating any subjective mental state element: "Whether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d at 1244.

And in *United States v. Woodrup*, the Fourth Circuit similarly reasoned that specific intent is not required because intimidation is judged by the reasonable reaction of the listener:

> [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . We therefore reaffirm that 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.

86 F.3d 359, 364 (4th Cir. 1996).

While the government seizes on the fact that *Foppe*, *Kelly*, and *Woodrup* rejected specific-intent claims, the government fails to acknowledge that, in each case, the courts interpreted the intimidation element to require *no culpable mens rea*, because knowledge

of the conduct itself was sufficient for conviction. By focusing on conduct, not intent, the statute's reach expanded as the government sought lower barriers to conviction. This is contrary to the government's current premise that courts all along have required defendants to know their conduct was intimidating.

In any event, the Eighth Circuit's decision in *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003), is explicit in its rejection of even a knowing *mens rea* with respect to intimidation. In *Yockel*, the defendant sought to introduce mental health evidence to rebut the government's proof that he knew his conduct was intimidating. The Eighth Circuit affirmed the district court's conclusion that the evidence was "not relevant to any issue in the case." *Id.* Even where the mental state at issue was knowledge, the Eighth Circuit unequivocally declared: "[T]he *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.* Thus, the government's claim that intimidation requires subjective intent is inconsistent with how courts have actually applied the statute to adjudge defendants guilty of the offense.

It is telling that the only case law supporting the government's position that knowing intimidation is required are cases decided under the categorical approach. The omission of any conviction context precedent requiring evidence that a defendant knew his actions were intimidating speaks to the divide in authority—expansive interpretation of intimidation to secure convictions, narrow interpretation to fall within the crime of violence definition. The same statutory term cannot mean different things in different contexts. *Clark v.*

Martinez, 543 U.S. 371, 380 (2005) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2005), and *United States v. Thompson/Center Arms Co.*, 505 U.S. 505, 517-18 (1992)).

The government's and the circuits' error likely stems from conflating a defendant's knowledge of his actions with knowledge of the incriminating character of those actions, the same mistake this Court corrected in *Elonis*, 135 S. Ct. at 2011 ("[T]he fact that the Government would require a defendant to actually know the words of and circumstances surrounding a communication does not amount to a rejection of negligence"). As a general intent crime, § 2113(a) requires proof "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." *See Carter v. United States*, 530 U.S. 255, 268 (2000). While *Carter* required knowing conduct (the *actus reus*), it did not require a defendant to know the conduct's incriminating character. Certainly, the circuits applying *Carter* to affirm convictions for federal bank robbery have not required any such knowledge, concluding that intimidation is an objective standard without any requirement of a culpable *mens rea*.

This Court should grant certiorari to resolve the inconsistencies in the analysis of the lower courts. The expansive conviction context precedent is the only precedent relevant under the categorical approach, and it demonstrates that bank robbery by intimidation is not a crime of violence under § 924(c)(3)(A).

4. The Question Is Exceptionally Important.

This issue warrants review not only because of the critical inconsistencies in the lower courts' treatment of the "intimidation" element of federal bank robbery, but also

because of the frequency with which the issue arises and the severity of the consequences. Bank robbery is one of the most commonly charged federal crimes. The erroneous decisions below bind sentencing courts to impose mandatory consecutive terms on defendants charged with violating § 924(c) in connection with bank robbery and armed bank robbery. They do not just affect exercises of discretion or even the calculation of a defendant's advisory range under the Sentencing Guidelines. Instead, they bind judge's hands to impose lengthy consecutive sentences.

And the error does not end with § 924(c). Because § 924(c)'s force clause is materially indistinguishable from the force clause in 18 U.S.C. §§ 16 and 924(e), the circuit courts' error will result in unlawful sentencing under the Armed Career Criminal Act, unlawful classifications of bank robbery and armed bank robbery under the criminal code's general crime-of-violence provision, and unlawfully harsh immigration consequences.

Granting certiorari will provide the Court with a critical opportunity to correct the circuits' misguided categorical approach analysis. The circuits have gone astray from the core principles articulated in *Moncrieffe*, *Duenas-Alvarez*, *Johnson (2010)*, and *Mathis* by allowing a presumed fact to be treated as the equivalent of an element proven beyond a reasonable doubt. The circuits have ignored expansive judicial construction that permits convictions under § 2113(a) for nonviolent conduct. And the circuits have fostered an unfair dual construction of a single statute that differs depending on the context in which the statute is considered.

The circuit courts' errors offend against core categorical approach principles that this Court has not hesitated to enforce. Certiorari is warranted.

B. The Circuits' Entrenched Position That *Dean* Is Not Retroactive Warrants Review Because It Derives From The False Premise That *Dean* Announced A Permissive Rule Of Procedure, When In Fact The Rule Is A Mandatory, Substantive Sentencing Standard

In *Dean*, this Court held that the statutory requirement of consecutive sentences in 18 U.S.C. § 924(c) does not abrogate a sentencing court's duty to impose an *aggregate* sentence that satisfies the parsimony mandate of 18 U.S.C. § 3553(a) and 18 U.S.C. § 3584(b), directing that sentences should be no greater than necessary to accomplish the goals of sentencing. 137 S. Ct. at 1176-77. *Dean* reversed the existing rule in the Ninth Circuit, which required a sentencing court in cases involving a § 924(c) conviction in addition to a conviction for another substantive crime to impose a parsimonious sentence on the substantive crime alone, ignoring the aggregate sentence. *See* Pet. at 19 (citing *United States v. Thomas*, 843 F.3d 1199, 1205 (9th Cir. 2016) and *United States v. Working*, 287 F.3d 801, 807 (9th Cir. 2002)).

The rule from *Dean* is substantive, and therefore retroactive, for the same reasons this Court announced *in Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016), regarding the substantive rule from *Miller v. Alabama*, 567 U.S. 460 (2012), that a sentence of life imprisonment without parole is unconstitutional for a juvenile offender whose crime reflects the transient immaturity of youth. The government argues that *Dean*'s rule is procedural, not substantive, because it relates to "the manner of determining" the

defendant's sentence. Ames, Br. in Opp. at 23-24 (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). But *Montgomery* directly refutes that argument, explaining: "The hearing [to consider a juvenile offender's youth] does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." 136 S. Ct. at 735.

The same reasoning applies here. While *Dean* added a new factor for consideration in determining the sentence—namely, the consecutive sentence under § 924(c)—it did so in order to give effect to the substantive rule that the parsimony mandate applies to the aggregate sentence including the consecutive § 924(c) component. Just as in *Miller*, *Dean* announced a substantive sentencing standard that applies to a certain class of offenders—here, § 924(c) offenders also convicted of another substantive crime. Just as in *Miller*, the substantive sentencing standard requires consideration of particular discretionary factors to effect—here, the aggregate sentence including the consecutive sentence under § 924(c). And just as in *Miller*, *Dean* did not place any sentence beyond the sentencing court's power to impose. *Dean* is therefore retroactive for the same reasons that *Miller* is retroactive.

The government purports to distinguish *Miller* and *Montgomery* on the grounds that "*Dean*'s rule is permissive, not mandatory." *Ames*, Br. in Opp. at 25 (citing *United States v. Garcia*, 923 F.3d 1242, 1245 (9th Cir. 2019)). The government attempts to prove this point by asserting that "a sentencing court remains free to disregard the Section 924(c) sentence in deciding on the sentences for the underlying crimes, or to consider it and still impose the same punishment that it would have otherwise imposed[.]" The argument fails,

because the premise is not correct. Although it remains within the discretion of the court to conclude that the sentence on the underlying offense need not be reduced to account for the § 924(c) sentence, the court can do so *only* if after determining that the aggregate sentence is not overly harsh. In other words, the court must consider the § 924(c) sentence and determine that the combined sentence does not exceed the purposes of sentencing. Following *Dean*, a sentencing court has no discretion to ignore the § 924(c) sentence entirely, because doing so would be inconsistent with the substantive parsimony mandate that *Dean* announced.

In fact, the Seventh Circuit's ruling in *Worman v. Entzel*, relied on by the government, emphasizes this point by noting that *Dean* is "about the proper and available scope of discretion district judges can exercise in sentencing defendants." 953 F.3d 1004, 1010 (7th Cir. 2020). A decision that restricts the sentencing court's discretionary authority is, by nature, mandatory. *Dean* did not merely change the process by which a court exercises the full scope of its existing discretion. Rather, *Dean* established that a sentencing court *has no discretion* to impose a sentence on an underlying substantive offense that renders the aggregate sentence "greater than necessary" to serve the purposes of sentencing.

As a new rule with retroactive effect to cases on collateral review, *Dean* provides a basis for sentencing relief in the interests of justice under the equitable remedy of 28 U.S.C. § 2255.

C. These Petitioners' Consolidated Petition For Certiorari Provides An Excellent Vehicle For Resolving The Purely Legal Issues Presented, Which Were Addressed On The Merits By The Ninth Circuit Below.

The government asserts that there are various factual and procedural discrepancies between the petitioners' cases that stand as an obstacle to this Court considering the purely legal questions presented. To the contrary, as to the questions presented, the legal questions are identical, and because the questions are well-developed in the record and were squarely presented to the lower courts, these cases provide an excellent vehicle for review. At most, the asserted differences among the cases go to alternative bases for affirmance that the government can raise in the first instance before the lower courts on remand.

First, the fact that four of the petitioners' § 924(c) convictions were premised on armed bank robbery and one was premised on unarmed bank robbery is a distinction without a difference. As presented here, the only question is whether the "intimidation" element of § 2113(a) necessarily requires violent force. The same intimidation element applies to both armed and unarmed bank robbery. That was the premise of the lower courts' rulings across the board, and none of the courts relied in their decisions on the enhancing weapon element that differentiates armed bank robbery from unarmed bank robbery. If this Court agrees with petitioners that "intimidation" alone does not require violence, then each of the five cases should be remanded to the lower courts for further proceedings. The government at that point can raise any further basis for affirmance of the defendant's § 924(c) convictions for the lower courts to decide in the first instance.

The same answer applies to the government's contention that three of the petitioners—Mr. Ames, Mr. Wilcoxson, and Mr. Rich—waived their rights to challenge their convictions or sentences on collateral review in their plea agreements. The lower courts addressed each of the petitioners' claims on the merits, and none of the claims were deemed barred by a collateral attack waiver. The government can raise its position regarding waiver on remand, if it did not already waive that defense, and the lower courts can rule on that issue in the first instance.[2]

In any event, the government's waiver defense provides no independent basis for denying the present claims based on new, intervening precedent establishing the defendants' innocence of their § 924(c) convictions and the illegality of their sentences. *See McQuiggin v. Perkins*, 569 U.S. 383, 394-97 (2013) (holding that the Antiterrorism and Effective Death Penalty Act incorporated a miscarriage of justice exception for procedural obstacles to review); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (holding that an otherwise-valid collateral-attack waiver may not be enforced against a claim that the sentence "violates the law," which includes a sentence that "exceeds the permissible statutory penalty for the crime or violates the Constitution"). In fact, the

[2] The government waived waiver in Mr. Rich's case by failing to raise the defense in the district court or on appeal. *See United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995) ("This court will not address waiver if not raised by the opposing party."); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (holding government "waived [its] waiver" argument by failing to raise it); *see also United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992) ("[A]n argument not raised on appeal is deemed abandoned.").

government's Ninth Circuit response briefs in *Ames* and *Wilcoxson*, the only cases where the government raised waiver, recognized that the enforceability of the collateral attack waiver here would rise or fall on the merits of the § 2255 claims. *See* Gov't Ans. Br. at 6-7, *Ames*, No. 18-35134 (9th Cir.); Gov't Ans. Br. at 6-7, *Wilcoxson*, No. 18-35135 (9th Cir.).

Finally, the government asserts that "petitioners Rich and Knutson lack any cognizable claim under *Dean*," because Mr. Rich was sentenced only under § 924(c), without a conviction for another substantive crime, and because Mr. Knutson raised his claim in a second § 2255 motion. *Ames*, Br. in Opp. at 27. However, the fact that not every case in a consolidated petition presents each question presented provides no basis to deny certiorari in toto. This Court has broad discretion to grant or deny certiorari in whole or in part on either or both of the questions presented, and the Court can grant or deny certiorari as to any of the petitioners individually or all of them together.

As to Mr. Rich, if this Court were to conclude that certiorari is warranted only as to the second question under *Dean*, then it would be appropriate for the Court to deny certiorari as to Mr. Rich, because his case does not present that issue.

As to Mr. Knutson, his claim under *Dean* was fairly presented and warrants review. Although he had previously filed a first § 2255 motion, Mr. Knutson asserted in the district court that an equitable exception to the rules for second or successive habeas petitions should provide a procedural avenue for him to raise the *Dean* claim. The district court granted a certificate of appealability on that issue, which the Ninth Circuit failed to address.

If this Court grants certiorari on either of the two questions presented, or both, Mr. Knutson's case should be included. In the event that the Court agrees with the petitioners on *Dean*'s retroactivity, the lower court can address in the first instance on remand whether Mr. Knutson claim is subject to the second-or-successive bar in 28 U.S.C. § 2255(h).

In sum, the petitioners' consolidated petition for certiorari provides an ideal vehicle for this Court to consider the two questions presented. Both questions were pressed in the lower courts and resolved on their merits, with the single exception noted. Any factual or procedural discrepancies have little impact on the merits of those questions, and they provide no basis to leave the Ninth Circuit's erroneous rulings in place.

Conclusion

For the foregoing reasons, and those set forth in the Petition, the Court should issue a writ of certiorari.

Dated this 17th day of June, 2020.

/s/ Elizabeth G. Daily
Elizabeth G. Daily
Attorney for Petitioner