**No. 19-7732**

In The

# Supreme Court of the United States

**JERAD HANKS**

*Petitioner*,

v.

**UNITED STATES,**

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit**

**PETITION FOR REHEARING OF DENIAL OF PETITIONER HANKS' PETITION FOR WRIT OF CERTIORARI PENDING THE COURT'S DECISION ON A RELATED PETITION FOR A WRIT OF CERTIORARI STILL PENDING BEFORE THIS COURT, ARISING FROM THE SAME FACTS AND CASE BELOW, RAISING THE IDENTICAL ISSUES AND ARGUMENTS, AND FOR WHICH THE COURT HAS REQUESTED A RESPONSE FROM THE RESPONDENT UNITED STATES**

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**PETITION FOR REHEARING OF PETITIONER HANKS' PETITION FOR WRIT OF CERTIORARI PENDING THE COURT'S DECISION ON A RELATED PETITION FOR A WRIT OF CERTIORARI STILL PENDING BEFORE THIS COURT, ARISING FROM THE SAME FACTS AND CASE BELOW, RAISING THE IDENTICAL ISSUES AND ARGUMENTS, AND FOR WHICH THE COURT HAS REQUESTED A RESPONSE FROM THE RESPONDENT UNITED STATES**

Petitioner Jerad Hanks, pursuant to Rule 41, respectfully requests that the Court reconsider the denial of Mr. Hanks' Petition for a Writ of Certiorari entered on March 30, 2020 pending the Court's resolution of the pending Petition for a Writ of Certiorari in the related case of Petitioner Hanks' co-defendant below in *Jurden Rogers v. United States*, No. 19-7320 (copy attached), which raised the identical issues and arguments raised by Petitioner Hanks, and for which the Court has requested a response from the Respondent United States, and in support of this Petition for Rehearing and related requests states as follows:

***Jerad Hanks' Already Denied Petition for a Writ of Certiorari***

On February 11, 2020, Petitioner Hanks filed his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Mr. Hanks' Petition") and Appendix (hereinafter "Mr. Hanks' Appendix). On March 30, 2020 this Court denied Mr. Hanks' Petition.

In Mr. Hanks' Petition the following questions were presented and argued:

> I. Whether 18 U.S.C. § 924(c)(1), which criminalizes the use of a firearm during a "crime of violence," in this case, the federal bank robbery statute, 18 U.S.C. § 2113, which may be committed by unintentionally intimidating a victim through verbal demands or the passing of a demand note rather than the use or threatened use of physical force, and the definition of the term "crime of violence" cabined in 18 U.S.C. §

> 924(c)(3)(A)(The Use of Force" or "Elements Clause") is unconstitutionally vague, on its face, and unconstitutionally vague under the rule of lenity?
>
> II. Whether there is currently a conflict among the circuit courts of appeals and an ambiguity in the law regarding the federal statutory definition of the term "crime of violence", and a conflict between the holdings of some circuits, specifically the Eleventh Circuit, and this Court's previous holdings regarding the constitutional viability of the current definition of the term "crime of violence" in § 924(c) and related federal statutes?

Mr. Hanks Petition at pp. ii, 12-19, 19-22.

Essentially, Petitioner Hanks argued, first, that under this Court's recent holdings on the definition of term "crime of violence" contained in portions, specifically the residual clauses, of various federal statutes is unconstitutionally vague, since bank robbery can be committed without the actual use or threat of the use of force or violence, and the same reasoning applies to the "use-of-force" or "elements clause" of 18 U.S.C. § 924(c)(3)(A), rendering that clause equally unconstitutional. *See,* Mr. Hanks' Petition, at pp. 12-13, 15-18, *citing, United States v. Davis*, 586 U.S. ___, 139 S.Ct. 2319, 2323-28, 202 L.Ed. 2d 757 (2018) (The Court holding that the "residual clause" definition of violent felony in § 924(c)(3)(B), the federal statute providing for enhanced consecutive mandatory minimum sentences based on using, carrying, or possessing a firearm in connection with a federal crime of violence, was unconstitutionally vague under due process and separation of powers principles); *Johnson v. United States*, 576 U.S.____, 135 S.Ct. 2551, 2556-58, 192 L.Ed.2d 569 (2015)(Holding that Due Process Clause's prohibition of vagueness in criminal statutes applies not only to statutes defining elements of crimes, but also to statutes fixing

sentences, and imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA); *Sessions v. Dimaya,* 584 U.S. ___, 138 S.Ct. 1204, 1215-16, 200 L.Ed.2d 549 (2018) (The Court citing *Johnson* and holding that the residual clause of the federal criminal code's § 16(b) definition of "crime of violence", as incorporated into the Immigration and Nationality Act's (INA) definition of "aggravated felony", 8 U.S.C.A. §1101(a)(43)(F), was impermissibly vague in violation of due process); *see also and compare, Stokeling v. United States,* __ U.S. __, 139 S.Ct. 544, 553, 202 L.Ed.2d 512 (2019)(This Court finding that robbery under Florida's robbery statute is a "crime of violence" for purposes of sentencing enhancements under the Federal Armed Career Criminal Act (ACCA), see 18 U.S.C. § 924(e)(2)(B)(I), but citing *Johnson* and *Dimaya* also holding that to meet the definition of a "crime of violence" under the "elements clause" of the Armed Career Criminal Act (ACCA), the term "physical force" means violent force, that is, force capable of causing physical pain or injury to another person, and requires force exerted by and through concrete bodies, thereby distinguishing physical force, from intellectual force or emotional force).

Second, Petitioner Hanks argued that in the good faith opinion of the undersigned counsel this court needed to address and resolve both a conflict among the circuit courts of appeal regarding the constitutionality of the "use of force" or "elements clause" cabined in §924(c)(3)(A), and a conflict between the holdings of these same appellate courts and the holding of this Court. 10(a) and 10(c). *See,* Mr. Hanks' Petition, at pp. 19-22, *citing,* Petitioner Hanks' decision by the Eleventh Circuit in

*United States v. Jerad Hanks,* No. 18-14183, 795 Fed. Appx. 783, 784-85 (11th Cir. 2020)(Per Curiam)(Mr. Hanks' Appendix I)[1]; *In Re Sams,* 830 F.3d 1234, 1238-39 (11th Cir. 2016) and the conflicting decisions in *United States v. Shelby*, 939 F.3d 975, 978-79 (9th Cir. 2019)(In a case with facts hauntingly similar to the facts in Mr. Hanks' case, the Ninth Circuit reversing and remanding defendant's case conviction under Oregon's first degree robbery statute holding that defendants convictions and ACCA sentencing enhancement were illegal since the underlying conviction was not categorically predicate "violent felonies" under ACCA's "use-of-force" or "elements clause"; offense could be committed if perpetrator was merely armed with deadly weapon, regardless of whether he actually used it or made any representations about it); *United States v. Jones*, 914 F.3d 893, 901 (4th Cir. 2019)(Fourth Circuit holding that defendant's sentencing enhancement under ACCA based on, inter alia, prior South Carolina conviction of felony offense of assaulting, beating, or wounding law enforcement officer while resisting arrest was improper, and South Carolina conviction not categorically a predicate "violent felony" such as could support enhancement of defendant's sentence under the ACCA; Minimum conduct needed to support a conviction under state criminal statute includes any conduct that there is a realistic probability the state would punish under this criminal statute; if there is realistic probability that state would apply the statute to conduct that does not involve the use, attempted use, or

[1]*See also, United States v. Jurden Rogers,* No. 18-15152, 794 Fed. Appx. 828, 829-30 (11th Cir. 2019), raising the same issues and arguments which the Eleventh Circuit also rejected.

threatened use of violent physical force against another, then the state offense is not categorically a "violent felony" under the ACCA's "use-of -force" or "elements clause"); *United States v. Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019) (en banc) (In another case with strikingly similar facts to Mr. Hanks' case, the Fourth Circuit, pre-*Davis*, holding that to determine whether an offense is a "crime of violence" within the meaning of "use-of-force" or "elements" clause of § 924(c) which imposed a mandatory minimum sentence of seven years for brandishing a firearm during and in relation to crime of violence, the court must look to whether the offense's statutory elements necessarily require use, attempted use, or threatened use of physical force, and if statute defines offense in way that allows for both violent and nonviolent means of commission, that offense is not categorically crime of violence under the "use-of-force" or "elements" clause; Hobbs Act robbery conspiracy categorically failed to qualify as a "crime of violence" under the both the "residual clause" and the remaining § 924(c) "use-of-force" or "elements" clause because proof of the conspiratorial agreement does not, of necessity, require proof of actual, attempted, or threatened use of physical force).

In *fine,* Petitioner Hanks argued in his Petition that the Ninth and Fourth Circuits' holdings in *Shelby, Jones* and *Simms* clearly conflict with the Eleventh Circuit's holding in *Hanks, Rogers*, and *In Re Sams*. This issue is one that will be raised frequently and therefore is one of great importance. Thus, this Court should now address the constitutional viability of § 924(c)(3)(A) and the conflict that exists regarding the meaning of "crime of violence", and resolve this conflict among the

circuits, and between the circuits and previous holdings of this Court. Rule 10(a) and 10(c).

***Jurden Rogers' Still Pending Petition for a Writ of Certiorari***

> As noted in footnote 1 of Mr. Hanks' Petition:
>
> > Petitioner's co-defendant and brother, Jurden Rogers, has a pending Petition before this Court, seeking review of the Eleventh Circuit's rejection of, inter alia, a similar attack on the constitutionality of § 924(c) and the federal statutory definition of the term "crime of violence." See, *United States v. Jurden Rogers*, No. 18-15152, Fed. Appx. , 2019 WL 5814566 (11th Cir. Nov. 7, 2019), *petition for cert. filed*, 2020 WL (U.S. Jan. 14, 2020)(No. 19-7320)(copy attached).

Mr. Hanks' Petition at p. 2 n 1. The questions presented in Mr. Rogers' Petition for a Writ of Certiorari (hereinafter "Mr. Rogers' Petition") were as follows:

> I. Whether bank robbery (18 U.S.C. § 2113) which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, has as an element "the use of physical force against the person or property of another." under 18 U.S.C. § 924(c)(3)(A).
>
> II. While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "violent felonies" under the elements clause of the Armed Career Criminal Act, creating a conflict amongst the Circuit courts.

Mr. Rogers' Petition, at pp. i, 6-9, 9-14 (copy attached as Addendum to this Petition for Rehearing). It is respectfully submitted that Petitioner Rogers raised essentially the same issues and made essentially the identical arguments citing the same cases in his Petition for a Writ of Certiorari (*Id.*), as Petitioner Hanks did in his Petition for a Writ of Certiorari.

According the Court's docket in Mr. Rogers' Petition, the Respondent United States filed its waiver of its right to respond to Mr. Rogers' Petition on January 28, 2020. However, again according the Court's docket, on February 6, 2020, Mr. Rogers' Petition was "[d]istributed for Conference of 2/21/2020" and on February 18, 2020, the Court requested that the Respondent United States file a response to Mr. Rogers' Petition and set a due date of March 19, 2020. This due date was extended on April 1, 2020, allowing the Respondent United States to file its response by May 1, 2020.

As such, at this time the Court has denied Mr. Hanks' Petition while awaiting the Respondent's response to Mr. Rogers' Petition in order to decide that petition, and both petitions arise from the same facts and charges below and raised essentially identical issues and arguments.

***Petitioner Hanks and Petitioner Rogers' Petitions for Writs of Certiorari Raising Identical Issues and Arguments Should be Decided by the Court at the Same Time***

Here, once again, Mr. Hanks' Petition raises essentially the identical issues raised in Mr. Rogers' Petition and makes similar, if not identical arguments, and both petitions arise from the same indictment, charges, and facts. *See and compare,* Mr. Hanks' Petition and Mr. Rogers' Petition (Addendum); *see also and compare, United States v. Jerad Hanks,* No. 18-14183, 795 Fed. Appx. 783, 784-85 (11th Cir. 2020)(Per Curiam)(Mr. Hanks' Appendix I) *and United States v. Jurden Rogers,* No. 18-15152, 794 Fed. Appx. 828, 829-30 (11th Cir. 2019), *petition for cert. filed,* 2020 WL (U.S. Jan. 14, 2020)(No. 19-7320)(Mr. Hanks' Appendix II). As such, it respectfully requested

that, in order to avoid potentially conflicting rulings by the Court on the same issues, making the same argument, and raised in two related cases arising from the same facts and charges below, that the Court reconsider the denial of Mr. Hanks' Petition at this time, and suspend the denial of Mr. Hanks' Petition until the Court receives the Respondent United States' response regarding Mr. Rogers' Petition and the Court finally decides Mr. Rogers' Petition. This will avoid potential future proceedings regarding Mr. Hanks' Petition, as well as potential future collateral proceedings should the Court ultimately decide to grant Mr. Rogers' Petition after having denied Mr. Hanks' petition raising identical issues and making almost identical arguments.[2] *See e.g. generally, Williams v. Jacksonville Terminal Co.* 315 U.S. 386, 394, 62 S.Ct. 659, 665, 86 L.Ed. 914 (1942)(This Court reviewing history of two cases raising similar legal issues where certiorari was initially denied in one, *Pickett v. Union Terminal Company,* 313 U.S. 591, 61 S.Ct. 1115, 85 L.Ed. 1546 (1941), subsequently granted the petition for rehearing, granted certiorari, 314 U.S. 704, 62 S.Ct. 55, 86 L.Ed. 563, and considered the legal arguments raised in both cases, *Williams,* 315 U.S. 386, 394, 62 S.Ct. 659, 665).

In accordance with Rule 44.2, the undersigned counsel has attached a signed certification that this Petition for Rehearing is is limited to other substantial grounds not previously considered and is made in good faith and not for delay.

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[2] If the Court grants the relief requested herein, and ultimately grants Petitioner Rogers' Petition for a Writ of Certiorari, it is respectfully requested that the Court consider consolidating both Mr. Rogers' Petition and Mr. Hanks' Petition for purposes of briefing and oral argument.

## CONCLUSION

THEREFORE, PETITIONER JERAD HANKS, respectfully requests that the Court grant the relief requested herein, reconsider the denial of his Petition for a Writ of Certiorari at this time, and suspend any denial of said Petition until the Court has received the requested response from the Respondent United States and ruled on the related and still pending Petition for a Writ of Certiorari filed by Mr. Hanks' co-defendant and brother Jurden Rogers raising identical issues and arguments.

RESPECTFULLY SUBMITTED, this April 7, 2020.

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## ADDENDUM

Jurden Rogers v. USA, No. 19-7320, Petition for a Writ of Certiorari

No._____

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In The
Supreme Court of the United States

_____

JURDEN ROGERS.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

_____

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

_____

# Petition for Writ of Certiorari

_____

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## QUESTIONS PRESENTED

I Whether bank robbery (18 U.S.C. § 2113) which may be committed by unintentionally intimidating a victim or by presenting a teller with a demand note, has as an element "the use of physical force against the person or property of another." under 18 U.S.C. § 924( c)(3)(A).

II. While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "violent felonies" under the elements clause of the Armed Career Criminal Act, creating a conflict amongst the Circuit courts.

## LIST OF PARTIES

Petitioner, Jurden Rogers, was the Defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the Plaintiff in the district court and the appellee in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Petitioner files this Petition as an individual, and is a non-corporation,

## PROCEEDINGS DIRECTLY RELATED TO THIS CASE

Unites States v. Jerad Hanks, is currently pending decision in the Eleventh Circuit Court of Appeals, bearing Case No: 18-14183.

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## PETITION FOR WRIT OF CERTIORARI

Jurden Rogers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION AND ORDER BELOW

The Eleventh Circuit's opinion, 18-15152 (11th Cir. 2019), is unpublished and is provided in Appendix A.

## JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Rogers's criminal case under 18 U.S.C. § 3231. On November 7, 2019 the Eleventh Circuit Court of Appeals affirmed the district court's judgment and sentence. See Appendix A. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY AND GUIDELINES PROVISIONS

8 U.S.C. § 16 provides in relevant part:

The term"crime of violence" means:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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

18 U.S.C. § 924( c) provides in pertinent part:

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--.

(i) be sentenced to a term of imprisonment of not less 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less that 7 years;

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(3) For purposes of this subsection the term "crime of violence" means 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.

18 U.S.C. § 924 (e) provides in pertinent part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and

imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection:

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year...

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ,

18 U.S.C. § 2113(a) provides 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...Shall be fined under this title or imprisoned not more than twenty years, or both.

## STATEMENT OF THE CASE

A jury found Mr. Rogers guilty of bank robbery, in violation of 18 U.S.C. § 2113(a) (count one) and possessing a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. § 924( c) (count two), and on November 30, 2018 he was sentenced to serve 141 months of imprisonment (57 months in count one and 84 months in count two, to run consecutive)

On December 12, 2018 Mr. Rogers appealed to the Eleventh Circuit Court of

Appeals, arguing that Mr. Rogers's conviction under 18 U.S.C. § 924( c) was invalid because the crime of bank robbery does not qualify as a "crime of violence" under either § 924( c)(3)(A) (the elements clause) or § 924( c)(3)(B) (the residual clause).

During the pendency of the appeal, the Supreme Court issued the opinion in Davis v. United States, 588 U.S. _____ (2019) determining 18 U.S.C. § 924( c)(3)(B) (the residual clause) to be unconstitutionally vague. Mr. Rogers continued to challenge whether bank robbery qualifies as a "crime of violence" under the elements clause, contending that because the offense of bank robbery could be committed by "intimidation", it does not qualify as a "crime of violence" because intimidation does not necessarily involve "physical" force as required by Johnson v. United States and as repeated in Stokeling v. United States. Mr. Rogers asserted that intimidation does not carry with it the requisite mens rea, and that it merely requires "intellectual or emotional force", which was specifically distinguished from "physical force".

On October 3, 2019, Mr. Rogers filed supplemental authority, listing the cases of United States v. Shelby, ____ F.3d ____, 2019 WL 450831 (9th Cir. 2019); United States v. Jones, 914 F.3d 893 (4th Cir. 2019) and United States v. Simms, 914 F.3d 229 (4th Cir. 2019) to show that the Ninth District Court of Appeals and Fourth District Court of Appeals have determined that various offenses did not qualify as predicate offenses under 18 U.S.C. § 294 (e)(2) (B)(i)(A.C.C.A.)because the offense charged could have been committed without "physical force".

On November 7, 2019 the Eleventh Circuit Court of Appeals affirmed Mr.

Rogers's conviction and sentence. The court opined that:

> We have held that federal bank robbery is a crime of violence under the elements clause of § 924( c)(3)(A). In re: Sams, 830 F. 3d 1234. 1239 (11th Cir. 2016), see Ovalles, 905 F.3d at 1304 (citing Sams, 830 F.3d at 1239)(stating that federal bank robbery "by intimidation" categorically qualifies as a crime of violence under §924( c)(3)(A)(quoting 18 U.S.C. § 2113(a))). We reasoned that federal bank robbery qualifies as a crime of violence because "[a] taking 'by force and violence' entails the use of physical force [and] a taking 'by intimidation' involves the threat to use such force" Sams, 830 F. 3d at1239 (quoting United States v. McNeal, 818 F.3d141, 153 (4th Cir. 2016)).

## REASONS FOR GRANTING THE WRIT

In United States v. Davis, No. 18-431, 2019 WL 2570623, at *13 (U.S. June 24, 2019), the Court determined § 924( c)'s residual clause to be unconstitutionally vague, thereby abrogating the Eleventh Circuit's contrary precedent in Ovalles. The question on this appeals remains, however, whether Mr. Rogers's bank robbery conviction is considered a "crime of violence" under § 924( c)'s elements clause. Because it is not, this Court should grant Mr. Rogers's petition and reverse the Eleventh Circuit's contrary precedent.

Further, the holdings of the Fourth Circuit Court of Appeals (that Assault, Beating or Wounding a law enforcement officer under South Carolina law for purposes of the ACCA), and of the Ninth Circuit Court of Appeals (that First Degree Robbery under Oregon law for purposes of ACCA) do not qualify as "crimes of violence" squarely bring to the forefront a conflict between appellate circuits as to the interpretation and the reasoning of what constitutes a "crime of violence"

under federal law.

I. Bank Robbery, which may be committed by unintentionally intimidating a victim, or by presenting to the teller a demand note, does not have as an element "the use, attempted use, or threatened use of physical force against the person or property of another".

For an offense to qualify under § 924( c)'s elements (force) clause, it must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924( c)(3)(A). Whether bank robbery qualifies as a "crime of violence" under § 924( c)'s force clause is a question that must be answered categorically– that is, by reference to the elements of the offense, and not by the actual facts of the defendant's conduct. Stokeling v. United States, 586 U.S. ____, 139 S.Ct. 544, 202 L.Ed2d 512 (2019) (upholding the use of the categorical approach in analysis of § 924( c)'s force clause). Pursuant to the categorical approach, in the case at bar, if bank robbery may be committed without "the use, attempted use, or threatened use of physical force" then that crime may not qualify as a "crime of violence" under § 924( c)'s force clause.

In Johnson v. United States, 559 U.S. 133 (2010), the Court defined "physical force" to mean violent force- that is, force capable of causing physical pain or injury to another person" Johnson, Id at 140. In Stokeling v. United States, the Court further determined that the level of force necessary to overcome a victim's resistance is inherently violent in the sense contemplated by Johnson because robbery that must overpower a victim's will- even a feeble or weak-willed victim necessarily involves a physical confrontation and struggle. Stokeling , 139 S.Ct at

553.

However, to qualify as a "crime of violence" under the "use-of-force" or the "elements" clause, the predicate crime must have a mens rea of at least "knowingly" or "intentionally". See Leocal v. Ashcroft, 543 U.S. 1, 10-11, 125 S.Ct. 377, 382-83, 160 L.Ed.2d 271 (2004); United States v. Palomina Garcia, 606 F.3d 1317, 1336 (11th Cir. 2010). Because bank robbery can be committed without the "use" of "physical force", it does not qualify as a "crime of violence" under §924( c)'s force clause.

Under 18 U.S.C. § 2113(a), bank robbery may be committed "by force and violence, or by intimidation". Because the statute lists alternative means and not alternative elements, the Court must presume that Mr. Rogers was convicted of the least culpable act- bank robbery by intimidation. Mathis v. United States, 136 S.Ct. 2243 (2016); Richardson v. United States, 526 U.S. 813, 817 (1999); Moncrieffe v. Holder, 133 S.Ct 1678 (2013).

According to the Eleventh Circuit's pattern jury instruction, a person may be convicted of bank robbery by "intimidation" where an ordinary person in the teller's position could infer a threat of bodily harm from the defendant's acts". 11th Cir. Pattern Jury Instructions 76.1 (citing United States v. Kelley, 412 F.3d 1240, 1244 (11th Cir. 2005)). Notably, it does not require proof of a defendant's state of mind, as required by Leocal and Palomino Garcia. Indeed, "whether a particular act constitutes intimidation is viewed objectively" Id. The defendant need not intend for the act to be intimidating. Id. Yet, under Leocal and Palomino Garcia s

defendant does not "use" force unless some degree of intent is required. See Leocal 543 U.S. at 9, (concluding that the "use" of physical force "most naturally suggests a higher degree of intent than negligent or merely accidental conduct"). Because a bank robbery under § 2113 (a) may be committed by unintentionally intimidating a victim, a conviction does not categorically require the "use" of physical force.

Moreover, a person may "intimidate" a victim without the threatened use of violent "physical force". For instance, the Eleventh Circuit has held that simply presenting a demand letter to a bank teller can support a conviction for bank robbery through intimidation. See United States v. Cornillie, 92 F. 3d 1108, 1110 (11th Cir. 1996). Presenting a demand letter does not necessarily require the threatened use of physical force, violent "physical force" or force "capable of causing physical pain ord injury to another person" as required by Johnson.

Further, in Johnson v. United States, 559 U.S. 133 (2010), the Court analyzed the term "physical force" and determined that the term "physical" is a modifier which "plainly refers to force exerted by and through concrete bodies-distinguishing physical force from, for example intellectual force or emotional force" Johnson, at 138, 130 S.Ct. 1265,

The Court in Stokeling reaffirmed that analysis of the term. Stokeling at 139 S.Ct 552.

Merriam-Webster describes "intimidating" as "causing a loss of courage or

self confidence; producing feelings of fear or timidity"[1]

Mr. Rogers concedes that in certain instances intimidation may involve the risk of physical violence, but urges that such is not always the case. Intimidation may not necessarily be willful, and if, under the categorical approach, analysis should focus on the least of the acts criminalized, then 18 U.S.C. 924( c) should fall, because intimidation does not necessarily involve "force exerted by and through concrete bodies" as required under the Johnson and Stokeling , but intellectual force or emotional force, which has been specifically distinguished from "physical force" by the court.

Based upon the foregoing, Mr. Rogers respectfully submits that bank robbery does not categorically qualify as a "crime of violence" under § 924( c)'s force clause. Given the important and recurring nature of this issue, Mr. Rogers respectfully seeks this Court's review.

## II. While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "crimes of violence" under the elements clause of the Armed Career Criminal Act.

Mr. Rogers was convicted of bank robbery, in violation of § 2113(a) (count one) and possessing a firearm during and in relation to a "crime of violence" in violation of § 924( c) (count two). In its opinion, the Eleventh Circuit determined

[1] See https://merriam-webster.com/dictionary/intimidating.

that bank robbery through intimidation categorically qualifies as a "crime of violence", under the elements clause of the statute § 924 ( c). citing In re: Sams, 830 F. 3d 1234. 1239 (11th Cir. 2016).

The language of § 924 ( c)'s elements clause defines a "crime of violence" as, inter alia, one that "has as an element the use, attempted use, or threatened use of physical force against the person of another"

This language is virtually identical to the language describing a "violent felony" under 18 U.S.C. § 924 (e) (Armed Career Criminal Act) which defines the term "violent felony" as, inter alia, one that "has as an element the use, attempted use, or threatened use of physical force against the person of another".

While the Eleventh Circuit (and many other circuits) has held fast to the notion that bank robbery by intimidation qualifies as a "crime of violence" under § 924 (c)'s elements clause, some other circuits have recently determined similar state statutes to not qualify as "crimes of violence" under the elements clause of the Armed Career Criminal Act.

In United States v. Shelby, ___ F.3d ___, 2019 WL 450831 (9th Cir. 2019), Mr. Shelby appealed the district court's denial of his 28 U.S.C. § 2255 motion in which challenged prior convictions for first degree robbery under Oregon law[2], alleging that conviction under such statute did not qualify as a "violent felony" predicate offense under the Armed Career Criminal Act (ACCA). In reversing the

[2] See Appendix B for full text of Oregon first degree robbery statute, and third degree robbery statute.

district court, the Ninth Circuit Court of Appeals determined that Mr. Shelby's prior convictions did not qualify as "violent felonies" under the ACCA's "use of force" or "elements" clause because the least chargeable offense under that statute allowed that the offense could be committed if the perpetrator was merely armed with a deadly weapon, regardless of whether he actually used it or made representations about it.

Mr. Rogers argues that the same argument is valid when considering robbery by intimidation, in that neither the Oregon statute nor the federal robbery by intimidation statute allows for consideration of the mens rea of the defendant. The Ninth Circuit has determined that offense not to qualify as a "violent felony" for purposes of the ACCA.

Similarly, in United States v. Jones, 914 F.3d 893 (4th Cir. 2019), Mr. Jones appealed the district's court's denial of his 28 U.S.C. § 2255 motion requesting that his sentence for assault, beating, or wounding a law enforcement officer[3] be set aside or corrected because under recent Supreme Court decisions, his prior South Carolina conviction no longer qualified as a predicate offense under the ACCA. In reversing and remanding the case for re-sentencing, the Fourth Circuit noted that the least culpable offense that can reasonably be charged under the statute in question is "assault" and because assault can be committed without the use of violent physical force against another, that offense is not a "violent felony" under

[3] See Appendix C for the complete text of the South Carolina's assault, beating or wounding a law enforcement officer statute.

the ACCA's use of force clause.

In Jones, because the offense at issue did not specifically define "assault", the Fourth Circuit looked to South Carolina's definition of the term and stated:

> The Supreme Court of South Carolina has defined an "assault" in various but similar ways. For example, an assault is an "attempted battery or an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery

Jones at 905, citing State v. Sutton, 92 S.C. 427, 75 S.E.2d 283, 285-286 (2000).

The Court further noted that "In other decisions, the state supreme court has described an assault as 'intentionally creating a reasonable apprehension of bodily harm' in another person by words or conduct." Jones, Id, citing In re: McGee, 278 S.C. 506, 299 S.E.2d 334 (1983).

It was upon consideration of these definitions of "assault" that the Fourth Circuit Court of Appeals determined that their assault, beating, or wounding a law enforcement officer statute cannot qualify as a violent felony for purposes of the ACCA.

Mr. Rogers asserts that the language in the definitions for assault analyzed by the Fourth Circuit Court of Appeals can also be applied to the concept of intimidation because they each involve the idea of creating apprehension of bodily harm in the victim. Mr. Rogers contends that like Oregon's statue relating to assault, beating, or wounding a law enforcement officer, the bank robbery by intimidation offense should not qualify as "crime of violence" under 18 U.S.C. 924 (

c).

Mr. Rogers acknowledges that the cases cited in support of the argument that a conflict in jurisdictions exists involve primarily cases falling under the Armed Career Criminal Act, and not 18 U.S.C. 924 ( c), but asserts that the language in the force clause at issue is identical to that set forth in the Armed Career Criminal Act.

This Court has made clear that similar language must be interpreted consistently. In Johnson, supra, the Court held that Florida's offense of felony battery did not qualify as a predicate offense for a heightened sentence under the Armed Career Criminal Act. The Court was called upon to interpret the definition of a "violent felony" as it applies to Florida's felony battery offense. The Court found that such offense fell under the "residual clause" of § 924(e)(2)(B)(ii), and then determined that the wording in such statue is impermissibly vague.

Im Sessions v. Dimaya, 584 U.S. ___, 138 S.Ct. 1204, 200 L.Ed.2d 512 (2019), the Court was called upon to evaluate the term "crime of violence" within the context of the Immigration and Nationality Act. The specific language at issue was 8 U.S.C. § 16(b), the residual clause of which defines a "crime of violence" as "...any other offense that is a felony and 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."

In determining that §16(b) of the Immigration and Nationality Act to be void for vagueness, the Supreme Court relied on its prior decision in the Johnson case,

stating that "Johnson is a straightforward decision, with equally straightforward application here". Dimaya at 1213.

In United States v. Davis, 588 U.S. ____, 139 S.Ct. 2319, 204 L.Ed 2d 757 (2019), the Court again crossed the bridge. In Davis, the Supreme Court, noting the resemblance between the residual clauses under the Armed Career Criminal Act and under 18 U.S.C. 924( c), and relying on the opinions in Johnson and Dimaya, found the residual clause of 18 U.S.C. 924( c)(3)(B) to be unconstitutionally vague.

Mr. Rogers asserts that by interpreting the same language within different statutes inconsistently, the courts of appeal have established a conflict amongst themselves, and involvement of the Supreme Court is necessary to order to resolve such conflict, and to promote consistency throughout the circuits.

Given the important and recurring nature of this issue, Mr. Rogers respectfully seeks this Court's review.

## CONCLUSION

For the above reasons, Mr. Rogers respectfully requests that this Court grant his petition.

Respectfully submitted,

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