No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL TYRONE SIMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

1. Is federal bank robbery a crime of violence under the force clause of 18 U.S.C. § 924(c), in light of this Court's holding in *Carter v. United States*, 530 U.S. 255, 268 (2000), that the offense is a general intent crime, and given decades of circuit precedent holding that intimidation under the statute does not require purposeful, violent conduct?

2. Is the residual clause of the mandatory Sentencing Guidelines at U.S.S.G. § 4B1.2(a)(2) void for vagueness?

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

Petitioner Michael Tyrone Simpson respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 4, 2019.

OPINION BELOW

The Court of Appeals affirmed the denial of Mr. Simpson's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See United States v. Simpson,* 775 F. App'x 364 (9th Cir. 2019) (attached here as Appendix A). Mr. Simpson then petitioned for panel rehearing and rehearing en banc. On December 4, 2019, the panel denied Mr. Simpson's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On August 22, 2019, the Court of Appeals affirmed the denial of Mr. Simpson's habeas petition. *See* Appendix A. On December 4, 2019, the Court of Appeals denied rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

The federal statute criminalizing armed bank robbery states:

> (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;
>
> * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113.

The federal statute criminalizing use of a firearm during a crime of violence defines a "crime of violence" as a felony that:

> (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(c)(3).

The mandatory Sentencing Guideline in effect at the time of Mr. Simpson's case defined a "crime of violence" as an offense that:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a) (1995).

STATEMENT OF FACTS

In 1998, a jury found Mr. Simpson guilty of one count of federal bank robbery under 18 U.S.C. § 2113 and one count of using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). In calculating his Sentencing Guidelines range, the Presentence Report relied on both his bank robbery conviction and a prior attempted robbery under California Penal Code § 211 to allege that Mr. Simpson was a career offender under U.S.S.G. § 4B1.1(a).

This career offender enhancement dramatically altered Mr. Simpson's Sentencing Guidelines range, which was mandatory at the time. Without the enhancement, his Guidelines range was 84-105 months. *With* the enhancement, his Guidelines range was 262-327 months—over three times higher. On top of this, the judge was statutorily bound to impose a consecutive five-year sentence for the § 924(c) count. Because of these additional sentencing penalties, Mr. Simpson received a total sentence of 360 months, or 30 years in prison.

In 2015, this Court held in *Johnson v. United States*, 559 U.S. 133 (2015), that the "residual clause" of the Armed Career Criminal Act was unconstitutional

because it was void for vagueness. Within one year of *Johnson*, Mr. Simpson filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 arguing that the nearly-identical "residual clauses" in § 924(c) and § 4B1.1(a) were similarly void for vagueness. Mr. Simpson also argued that federal bank robbery did not satisfy an alternative crime of violence definition under 18 U.S.C. § 924(c)(3)(A) that covered offenses requiring the "use, attempted use, or threatened use of physical force. "

While his petition was pending, this Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017). In *Beckles*, the Court held that "the advisory Sentencing Guidelines, including §4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine." *Id.* at 896. But *Beckles* stressed that its holding only applied to the "advisory" Sentencing Guidelines, using the words "advisory," "discretionary," and "discretion" no fewer than 40 times. *Id.* at 890-97. Mr. Simpson submitted supplementary briefing arguing that *Beckles* did not foreclose his arguments as to the mandatory Guidelines (and indeed supported them), and the district court heard oral arguments on the issue.

The district court agreed with Mr. Simpson that *Beckles* did not foreclose challenges to the mandatory Guidelines. Nevertheless, it denied Mr. Simpson's habeas petition, finding that his convictions remained crimes of violence under alternative definitions unaffected by *Johnson*. Although it denied his petition, the district court granted Mr. Simpson a certificate of appealability.

On appeal to the Ninth Circuit, Mr. Simpson again contended that both his § 924(c) conviction and career offender enhancement fell exclusively under the residual clause. The Ninth Circuit disagreed. *See* Pet. App. 1-3. First, it held that federal bank robbery was categorically a crime of violence under the force clause of § 924(c)(3)(A), relying on *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). Pet. App. 2-3. Second, it held that "'*Johnson* did not recognize a new right applicable to the mandatory Sentencing Guidelines on collateral review,'" which meant that Mr. Simpson's petition was untimely. Pet. App. 2 (quoting *United States v. Blackstone,* 903 F.3d 1020, 1028 (9th Cir. 2018)).

Mr. Simpson filed a petition for panel and en banc rehearing. On December 4, 2020, the panel denied Mr. Simpson's petition for panel rehearing, and the full court declined to hear the matter en banc. This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

Mr. Simpson's case presents two compelling questions in need of resolution. First, circuit courts continue to hold that federal bank robbery by intimidation categorically qualifies as a crime of violence for purposes of the force clause at 18 U.S.C. § 924(c)(3)(A). But "intimidation," as construed by this Court in *Carter v. United States*, 530 U.S. 255, 268 (2000), and by the circuit courts in sufficiency-of-the-evidence cases, requires no specific intent on the part of the defendant, nor does it require that the defendant communicate an intent to use violence. The courts of appeals cannot have it both ways—either bank robbery requires a threat of violent force, or it doesn't, but the same rule must apply to both sufficiency cases and to the

categorical analysis. The Court should grant certiorari to bring internal consistency to federal circuit precedent interpreting the intimidation element of federal bank robbery.

Second, the question of whether *Johnson* applies to the mandatory Sentencing Guidelines is not going away. The inter-circuit split is permanently entrenched. District and circuit court judges spend countless hours adjudicating mandatory Guidelines petitions and appeals, sometimes leading to contentious disputes with their colleagues. Department of Justice attorneys and federal defenders spend countless hours briefing a repetitive version of the same issue. Petitioners spend countless hours awaiting unsatisfying decisions, while the Bureau of Prisons spends over $36 million a year incarcerating prisoners who might otherwise be released. All it would take to spare everyone this unnecessary waste of time and resources is for the Court to reach the merits of this issue in a single case.

Mr. Simpson's case provides an opportunity to resolve both of these issues. His § 924(c) conviction rested on a federal bank robbery statute that courts have repeatedly held does not require purposeful or violent conduct. His career offender enhancement was triggered by an offense that *only* qualifies as a "crime of violence" under the residual clause of § 4B1.2(a)(2) pursuant to binding Ninth Circuit law. He preserved his legal claims and filed them timely at every stage of litigation. Accordingly, Mr. Simpson's petition is the case that can resolve both of these important and recurring issues.

REASONS FOR GRANTING THE PETITION

I.

As Interpreted by This Court and the Courts of Appeal, Federal Bank Robbery Is Not a Crime of Violence Under 18 U.S.C. § 924(c)(3)(A) Because, "Intimidation" Does Not Require the Use or Threatened Use of Violent Force.

Federal armed bank robbery is not a categorical match for § 924(c)(3)(A) (the "force clause") for two independent reasons. First, the force clause requires purposeful conduct, while this Court has held that bank robbery is a general intent crime, with no culpable *mens rea* as to the intimidation element.[1] Second, the force clause requires physical force that is violent in nature, while bank robbery by intimidation does not require a communicated intent to use violence.

A. The Force Clause Requires a Purposeful Threat, While Bank Robbery by Intimidation Is a General Intent Crime That Does Not Require Any Intent to Intimidate.

In *Leocal v. Ashcroft*, this Court held that the "use of physical force against the person or property of another" within the meaning of § 924(c) means "active employment" of force and "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. 1, 9 (2004). In *Watson*, the Ninth Circuit considered and rejected the defendant's claim that the bank robbery statute permits a defendant's conviction "if he only negligently intimidated the victim." 881 F.3d at

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[1] This Court recently granted certiorari in *United States v. Walker*, No. 19-373 (2019), to decide whether the force clause's intent component encompasses reckless as well as intentional uses of force. Although *Walker* was dismissed due to the death of the petitioner, a similar case will not impact the argument here because, as explained below, the mental state for "intimidation" in the federal bank robbery statute falls below the standard for recklessness.

785. Citing *Carter*, the Ninth Circuit concluded that federal bank robbery "must at least involve the knowing use of intimidation, which necessarily entails the knowing use, attempted use, or threatened use of violent physical force." *Id.*

But *Watson*'s conclusion that bank robbery by intimidation requires a knowing threat of force is inconsistent with *Carter* and the intimidation element of bank robbery. In *Carter*, the question was whether § 2113(a) implicitly requires an "intent to steal or purloin," which is an element of the related offense of bank larceny in § 2113(b). 530 U.S. at 267. In evaluating that question, this Court emphasized that the presumption in favor of scienter would allow it to read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269. Thus, the Court recognized that § 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.* at 269.

But the Court found no basis to impose a specific intent requirement on § 2113(a). *Id.* at 268-69. Instead, the Court determined that "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 (emphasis in original). So under *Carter*, a defendant must be aware that he or she is engaging in the actions that constitute a taking by

intimidation, but the government need not prove that the defendant knew the conduct was intimidating.

This reading of *Carter* finds support in circuit precedent both pre-dating and post-dating the opinion. Prior to *Carter*, the Ninth Circuit defined "bank robbery by intimidation" as "willfully to take, or attempt to take, in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). That definition attached the willful *mens rea* solely to the "taking" element of bank robbery, not the "intimidation" element. Similarly, in *United States v. Foppe*, the Ninth Circuit rejected a jury instruction that would have required the jury to conclude that the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The court never suggested that the defendant must know the actions were intimidating. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."). And in *United States v. Hopkins*, the Ninth Circuit held that the defendant used "intimidation" by simply presenting a demand note stating, "Give me all your hundreds, fifties and twenties. This is a robbery," even though he spoke calmly, was unarmed, and left the bank "in a nonchalant manner" without having received any money. 703 F.2d 1102, 1103 (9th Cir. 1983). The court approved a jury instruction that stated 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. *Id.*

Other circuit decisions reflect the same interpretation of intimidation that focuses on the objectively reasonable reaction of the victim rather than the defendant's intent. The Fourth Circuit held in *United States v. Woodrup* that "[t]he 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." 86 F.3d 359, 363 (4th Cir. 1996) (quoting *United States v. Wagstaff*, 865 F.2d 626, 627 (4th Cir. 1989)). "[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate." *Woodrup*, 86 F.3d at 364. The Eleventh Circuit also held in *United States v. Kelley* that "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." 412 F.3d 1240, 1244 (11th Cir. 2005).

Finally, the Eighth Circuit case of *United States v. Yockel*, decided three years after *Carter*, leaves no doubt on the matter—there, the court expressly stated that a jury may not consider the defendant's mental state, even as to knowledge of the intimidating character of the offense conduct. 320 F.3d 818, 823-24 (8th Cir. 2003). In *Yockel*, the defendant was attempting to withdraw $5,000 from his bank account, but the teller could not find an account in his name. 320 F.3d at 820. Eventually, after searching numerous records for an account, the defendant told the teller, "If you want to go to heaven, you'll give me the money." *Id.* at 821. The teller became fearful, and "decided to give Yockel some money in the hopes that he would

leave her teller window." *Id.* She gave Yockel $6,000 and asked him, "How's that?" The defendant responded, "That's great, I'll take it." *Id.*

The government filed a motion in limine seeking to preclude evidence of the defendant's mental health offered to demonstrate his lack of intent to intimidate. *Id.* at 822. The defendant argued that the evidence was relevant because bank robbery requires knowledge with respect to the intimidation element of the crime. *Id.* The district court disagreed and "exclude[d] mental health evidence in its entirety as not relevant to any issue in the case." *Id.* The Eighth Circuit affirmed. *Id.* at 823. Citing *Foppe*, the court held that intimidation is measured under an objective standard, without regard to the defendant's intent, and is satisfied "if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the [defendant's] acts[.]" *Id.* at 824 (internal quotation marks and alterations omitted). Accordingly, the court decided that "the *mens rea* element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Together, *Carter* and these circuit cases establish that a defendant is guilty of bank robbery by intimidation within the meaning of § 2113(a) so long as the defendant engages in a knowing act that reasonably instills fear in another, without regard to the defendant's intent to intimidate. As so defined, intimidation cannot satisfy § 924(c)(3)(A)'s *mens rea* standard. The fact that § 2113(a) requires a defendant "to actually know the words of and circumstances surrounding" the taking by intimidation "does not amount to a rejection of negligence." *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (interpreting federal threat statute).

Rather, a threat is committed negligently when the mental state turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks[.]" *Id.*

B. The Force Clause Requires a Threatened Use of *Violent* Physical Force, Whereas Bank Robbery by Intimidation Does Not Require a Defendant to Communicate any Intent to Use Violence.

Even if § 2113(a) proscribed a sufficient *mens rea* for the "intimidation" element of the offense, the statute does not require a threatened use of *violent* physical force. In *Stokeling v. United States*, this Court confirmed that "physical force" within the meaning of the force clause must be "'*violent* force—that is, force capable of causing physical pain or injury to another person.'" 139 S. Ct. 544, 553 (2019) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). Physical force does not include mere offensive touching. *Id.* In *Watson*, the Ninth Circuit reasoned that, because "intimidation" in § 2113(a) must be objectively fear-producing, it satisfies the degree of force required under § 924(c)'s force clause. 881 F.3d at 785 ("[A] 'defendant cannot put a reasonable person in fear of bodily harm without threatening to use force capable of causing physical pain or injury.'" (quoting *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017)).

But that reasoning was in error because it is the content of a communication that defines a threat, not the reaction of the victim. As this Court recognized in *Elonis*, the common definition of a threat typically requires a "*communicated* intent to inflict harm or loss on another[.]" 135 S. Ct. at 2008 (quoting Black's Law Dictionary 1519 (8th ed. 2004)) (emphasis added). An uncommunicated "willingness

to use violent force is not the same as a threat to do so." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). Thus, 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." *Elonis*, 135 S. Ct. at 2008.

Intimidation does not require a communicated threat. For purposes of § 2113(a), intimidation can be (and frequently is) accomplished by a simple demand for money, without regard to whether the bank teller is afraid. *See, e.g., United States v. Nash,* 946 F.2d 679, 681 (9th Cir. 1991) ("[T]he threat implicit in a written or verbal demand for money is sufficient evidence to support [a] jury's finding of intimidation."); *Hopkins*, 703 F.2d at 1103 ("Although the evidence showed that Hopkins spoke calmly, made no threats, and was clearly unarmed, we have previously held that 'express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s]' are not required for a conviction for bank robbery by intimidation." (quoting *United States v. Bingham*, 628 F.2d 548, 549 (9th Cir. 1980))).

In *United States v. Ketchum*, the defendant handed a teller a note that read: "These people are making me do this," and then orally stated, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." 550 F.3d 363, 365 (4th Cir. 2008). The defendant's statement did not evidence a threat of force by the defendant against a victim (the defendant stated that he feared violence himself), but it was still held sufficient to qualify as "intimidation" under § 2113(a). *Id.*

Similarly, in *United States v. Lucas*, a defendant's bank robbery conviction was upheld where he placed several plastic shopping bags on the counter along with a note that read: "Give me all your money, put all your money in the bag," and then repeated, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). And, in *United States v. Smith*, the Eighth Circuit found sufficient evidence to affirm the defendant's bank robbery conviction where the defendant told the teller he wanted to make a withdrawal, and when the teller asked if that withdrawal would be from his savings or checking account, he stated, "No, that is not what I mean. I want to make a withdrawal. I want $2,500 in fifties and hundreds," and then yelled, "you can blame this on the president, you can blame this on whoever you want." 973 F.2d 603, 603 (8th Cir. 1992).

Although each of these cases involved circumstances that were deemed objectively fear-producing, the defendants made no written, oral, or physical threats to use "violent" force if the tellers refused. A simple demand for money does not implicitly carry a threat of violence because not all bank robbers are prepared to use violent force to overcome resistance. *See Parnell*, 818 F.3d at 980 (rejecting a similar argument that a purse snatching necessarily implies a threat of violent force and reasoning that, "[a]lthough some [purse] snatchers are prepared to use violent force to overcome resistance, others are not").

Nor is bank robbery by intimidation limited to those cases where a defendant makes a verbal demand for money. In *United States v. Slater*, for example, the defendant simply entered a bank, walked behind the counter, and removed cash

from the tellers' drawers, but the defendant did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what he was doing. 692 F.2d 107, 107-08 (10th Cir. 1982); *accord United States v. O'Bryant*, 42 F.3d 1407 (10th Cir. 1994) (unpublished) (affirming finding of intimidation where the defendant reached over the counter and took money from an open teller drawer after asking the teller for change). Those bank robberies involved no violence, nor any communicated intent to use violence, beyond that used in a typical purse snatching.

As *Watson* recognized, "intimidation" under § 2113(a) is not defined by the content of any communication, but rather by the reaction that the defendant's conduct might objectively produce. 881 F.3d at 785. Because conduct can be frightening, yet still not contain a threat, bank robbery by intimidation does not require a threatened use of violent physical force. Accordingly, the circuits have drastically strayed from precedent in concluding that intimidation requires a communicated threat to use violent force.

C. The Correct Interpretation of "Intimidation" Is an Exceptionally Important Question Because of its Broad Impact on Standards for Conviction and Sentencing.

This Court should grant certiorari because the circuits have, in effect, given "intimidation" under 18 U.S.C. § 2113(a) two contradictory meanings depending on whether the issue arises in the sufficiency-of-the-evidence context or on review under the categorical approach. Having a clear and consistent definition of the intimidation element of federal bank robbery is crucial to both the government and the defendant in prosecutions for that offense, and it will assist the courts in

efficiently administering the law. Correctly understanding the scope of the intimidation element of federal bank robbery is at the heart of determining whether the offense qualifies for numerous categorically-defined federal sentencing enhancements for crimes involving intentional violence, including the harsh mandatory minimum sentences required by the ACCA. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial.

II.

The Court Should Resolve Whether the Residual Clause of the Mandatory Guidelines Is Void for Vagueness.

Four years ago in *Johnson*, the Court struck down as unconstitutionally vague the "residual clause" of the Armed Career Criminal Act of 18 U.S.C. § 924(e)(2)(B)(ii). In its wake, courts, lawyers, and prisoners immediately began evaluating *Johnson*'s impact on U.S.S.G. § 4B1.2(a)(2), an identically-worded provision in the Sentencing Guidelines that triggers a "career offender" sentencing enhancement.

Less than one year later, this Court held that *Johnson* had no impact on § 4B1.2(a)(2) for defendants sentenced under the *advisory* Sentencing Guidelines. *See Beckles*, 137 S. Ct. at 896. But the Court took pains to clarify that its holding applied only in that context, using the words "advisory" and "discretion" or "discretionary" nearly 40 times. *Id.* at 890-97. As Justice Sotomayor rightly noted, this "at least leaves open the question" of whether defendants sentenced under the mandatory Guidelines could raise a similar challenge. *Id.* at 903 n.4.

But in the several years since, no petitioner has been able to get an answer from the Court on the question *Beckles* left open. This is not for lack of trying. Nearly 50 petitions have presented this issue.[2] The Court has denied them all.

Two Justices of this Court have consistently dissented from the denials of these petitions. *See, e.g., Brown v. United States,* 139 S. Ct. 14 (2018) (Sotomayor, J., with whom Ginsburg, J. joins, dissenting from denial of certiorari). They point out that one court of appeals permits challenges to the residual clause of the mandatory Guidelines while another "strongly hinted" that it would, after which the

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[2] *Lester v. United States*, U.S. No. 17-1366; *Allen v. United States*, U.S. No. 17-5684; *Gates v. United States*, U.S. No. 17-6262; *James v. United States*, U.S. No. 17-6769; *Robinson v. United States*, U.S. No. 17-6877; *Cottman v. United States*, U.S. No. 17-7563; *Miller v. United States*, U.S. No. 17-7635; *Molette v. United States*, U.S. No. 17-8368; *Gipson v. United States*, U.S. No. 17-8637; *Wilson v. United States*, U.S. No. 17-8746; *Greer v. United States*, U.S. No. 17-8775; *Raybon v. United States*, U.S. No. 17-8878; *Homrich v. United States*, No. 17-9045; *Sublett v. United States*, U.S. No. 17-9049; *Brown v. United States*, U.S. No. 17-9276; *Chubb v. United States*, U.S. No. 17-9379; *Smith v. United States*, U.S. No. 17-9400; *Buckner v. United States*, U.S. No. 17-9411; *Lewis v. United States*, U.S. No. 17-9490; *Garrett v. United States*, U.S. No. 18-5422; *Posey v. United States*, U.S. No. 18-5504; *Kenner v. United States*, U.S. No. 18-5549; *Swain v. United States*, U.S. No. 18-5674; *Allen v. United States*, U.S. No. 18-5939; *Whisby v. United States*, U.S. No. 18-6375; *Jordan v. United States*, U.S. No. 18-6599; *Robinson v. United States*, U.S. No. 18-6915; *Bright v. United States*, U.S. No. 18-7132; *Allen v. United States*, U.S. No. 18-7421; *Sterling v. United States*, U.S. No. 18-7453; *Russo v. United States*, U.S. No. 18-7538; *Cannady v. United States*, U.S. No. 18-7783; *Green v. United States*, No. 18-8435; *Blackstone v. United States*, U.S. No. 18-9368; *Gadsden v. United States*, 18-9506; *Brigman v. United States*, 19-5307; *Aguilar v. United States*, 19-5315; *Bronson v. United States*, 19-5316; *Douglas v. United States*, 19-6510; *Simmons v. United States*, 19-6521; *Hirano v. United States*, 19-6652; *Hicks v. United States*, 19-6769; *Simmons v. United States*, 19-6658; *Bridge v. United States*, 19-6670; *Hunter v. United States*, 19-6686; *Fernandez v. United States*, 19-6689; *Garcia-Cruz v. United States*, 19-6755; *Lackey v. United States*, 19-6759.

Government "dismissed at least one appeal that would have allowed the court to answer the question directly." *Id.* at 15-16 (citing *Moore v. United States*, 871 F.3d 72, 80-84 (1st Cir. 2017), and *United States v. Roy*, 282 F.Supp.3d 421 (D.Mass. 2017); *United States v. Roy*, Withdrawal of Appeal in No. 17–2169 (CA1)). On the other side, three courts of appeals have held that *Johnson* does not invalidate identical language in the mandatory Guidelines, while one has concluded that the mandatory Guidelines themselves cannot be challenged for vagueness. *Id.* at 15-16 (citing *United States v. Brown*, 868 F.3d 297 (4th Cir. 2017); *Raybon v. United States,* 867 F.3d 625 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018)).

Because of this, the two Justices opined that "[r]egardless of where one stands on the merits of how far *Johnson* extends," cases such as Mr. Simpson's present "an important question of federal law that has divided the courts of appeals." *Id.* at 16. The Justices also note that such a decision could "determine the liberty of over 1,000 people" who are still incarcerated pursuant to this enhancement under the mandatory Guidelines. *Id.* They conclude, "[t]hat sounds like the kind of case we ought to hear." *Id.*

It is difficult to overstate the negative effects of this Court's reluctance to grant certiorari on this issue. To begin, lower-court judges have long awaited guidance from this Court on the issue of whether *Johnson* applies to the mandatory Guidelines, ever since Justice Sotomayor's concurrence acknowledging it as an "open question" made its resolution seem imminent. But with no guidance

forthcoming, low-court judges must now expend substantial time and resources to arrive at a conclusion on their own—often leading to contentious results.

For instance, the judges of the Eleventh Circuit recently voted to deny a petition for rehearing en banc in a multi-part 27-page slip opinion. *See Lester v. United States*, 921 F.3d 1306 (11th Cir. 2019). One judge wrote separately to explain why the court's prior decisions denying relief to mandatory Guidelines petitioners were correct. *See id.* at 1307-17 (William Pryor, J.). Another judge, joined by two others, wrote to explain why one of the court's prior decisions was wrongly decided, noting that the petitioner's case was "a testament to the arbitrariness of contemporary habeas law, where liberty can depend as much on geography as anything else." *Id.* at 1317-28 (Martin, J., joined by Rosenbaum, J. and Jill Pryor, J.). And a third judge, joined by two others, wrote to "add a few points in response" to the first judge's statement respecting the denial of rehearing en banc. *Id.* at 1328-33 (Rosenbaum, J., joined by Martin, J., and Jill Pryor, J.). Specifically, Judge Rosenbaum responded to Judge William Pryor's claim that the Guidelines were "never really mandatory" by stating that such a claim was "certainly interesting on a metaphysical level" but that it "ignores reality." *Id.* at 1331. Judge Rosenbaum explained, "Back here on Earth, the laws of physics still apply. And the Supreme Court's invalidation of a law does not alter the space-time continuum" for defendants who "still sit in prison" because of the mandatory Guidelines. *Id.*

This judicial jousting exemplifies the desperate need of lower courts for guidance on the mandatory Guidelines issue. Without such guidance, judges will continue to struggle to interpret this Court's precedent in *Johnson* and *Beckles*, leading to evermore clashes and judicial sniping. And it will force judges to continue to invest significant time in opinions—time that could have been spent on the thousands of other cases piling up on their dockets.

The lack of guidance on this issue burdens other public servants as well. Virtually all lawyers providing briefing for the courts in these cases are employed by the Department of Justice or a federal defender organization. As employees or contractees of a government organization, they do not receive extra remuneration for these cases—they must absorb them into their already-overflowing caseloads. And while many mandatory Guidelines cases present similar fact patterns, attorneys on both sides must comb through the details of each case to avoid error and spend endless hours drafting repetitive opening, answering, reply, or supplemental briefs. So every mandatory Guidelines brief represents time that could have been better spent on cases that pose a greater threat to the public—terrorism, drug trafficking, or white-collar fraud schemes, to name a few. The longer the Court delays resolving this issue, the more time dedicated public servants will spend needlessly litigating nearly-identical cases with no clear outcome.

Finally, petitioners and even their jailers deserve a final resolution. The Bureau of Prisons spends over $36,000 a year to incarcerate a federal inmate.[3] With over one thousand mandatory Guidelines cases still pending, this means that it costs the Bureau of Prisons approximately $36 million a year to incarcerate people who might otherwise be released. And for many petitioners, even an unfavorable answer to their good-faith claim under the mandatory Guidelines would be better than no answer at all. Spending four years living in hope, only to see that hope extinguished in an unsatisfyingly-vague expiration of one's claim before a lower court, is hardly a guarantee of due process. "At some point, justice delayed is justice denied." *S. Pac. Transp. Co. v. Interstate Commerce Com.*, 871 F.2d 838, 848 (9th Cir. 1989).

III.

Mr. Simpson's Case Is an Ideal Vehicle for One or Both of These Issues.

Mr. Simpson's case squarely presents both issues in need of resolution here. His § 924(c) conviction rested solely on a federal bank robbery conviction. He was sentenced under the mandatory Guidelines in 1998. Both his § 924(c) conviction and his career offender enhancement were thus triggered by offenses that *only* qualified as a "crime of violence" under the residual clause, which this Court has repeatedly

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[3] *See* "Annual Determination of Average Cost of Incarceration," Federal Register, April 30, 2018, *available at*: https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration (stating that the average cost of incarceration for federal inmates in 2017 was $36, 299.25).

held is void for vagueness. He preserved both legal claims at every stage of litigation. All of his petitions and appeals were timely filed. There is nothing in Mr. Simpson's case to distract this Court from resolving one or both of these questions. Whatever the outcome, he deserves a fair, final, and objective answer to these good-faith legal claims.

CONCLUSION

For these reasons, Mr. Simpson respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Date: February 20, 2020

s/ Kara Hartzler

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