No. 19-8044

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN VIDRINE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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The two questions presented ask this Court to consider the effects this Court's *Johnson v. United States*, 135 S. Ct. 2551 (2015), decision and its progeny had on Mr. Vidrine's convictions for violating 18 U.S.C. § 924(c) and the application of the mandatory sentencing guidelines, specifically its career offender sentencing enhancement. The government opposes granting certiorari and incorporates by referencing its reasons from oppositions it filed in earlier cases. Brief in Opposition, pp. 10 (citing to its own brief in *Johnson v. United States*, No. 19-7079 (April 24, 2020) regarding the section 924(c) aspect of the questions presented) and pp. 11-14 (citing to its own brief in *Gipson v. United States*, No. 17-8637 (July 25, 2018), *cert.*

denied, 139 S.Ct. 373 (2018), regarding the mandatory guideline aspect of the questions presented). It offers no additional analysis.

This latest *Johnson* case was set for conference on May 28, 2020. It remains on this Court's docket. Other cases raising challenges to section 924(c) convictions under the Court's 2015 *Johnson* decision and under this Court's more recent decision, *United States v. Davis*, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), include: *Ames v. United States*, No. 19-7569 (distributed for conference of September 29, 2020); *Jordan v. United States*, No. 19-7067 (distributed for conference of May 28, 2020); *Blake, et al. v. United States,* No. 19-6354 (same). The Solicitor General's brief in the *Jordan* and *Blake* cases repeats the same sort of incorporation by reference. *Jordan*, No. 19-7067, Brief in Opposition, pp. 9-10 (filed April 24 2020), citing *Johnson* Brief in Opposition at 9-20; *Blake*, No. 19-6354, Brief in Opposition, pp. 7-8 (filed February 14, 2020), citing Brief in Opposition, pp. 6-13, filed in *Lloyd v. United States*, No. 18-6269 (January 9, 2019), *cert. denied*, 139 S. Ct. 1167 (2019).

A. The Circuits Have Created an Entrenched Conflict Justifying Certiorari Review of the First Question Presented

The government's repeated reliance on its earlier briefing and this Court's denial of earlier certiorari petitions have not resolved the core problem that exists: the Circuits have created an entrenched conflict. They take the position that "intimidation"

as an element of federal bank robbery for sufficiency of the evidence in assessing the conviction is different from "intimidation" for purposes of applying the categorical approach. In the sufficiency of the evidence context, courts give "intimidation" its broadest meaning and require neither a communicated threat of violence nor any culpable *mens rea*. In the context of the categorical approach, when drastic sentencing enhancements are to be applied, 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. Nothing in the government brief in opposition addresses this conflict. All of the cases it cites are taken from the categorical analysis pool and fail to address the conflict with the sufficiency of the evidence cases. Nor do they address this Court's *mens rea* cases, such as *Carter v. United States*, 530 U.S. 255, 269-70 (2000) (holding government need not prove beyond a reasonable doubt that the defendant purposely threatened to harm anyone).

The government's *Johnson* Brief in Opposition does posit that bank robbery requires at least a threat of violence. *Johnson*, No. 19-8044, p. 10. But the government still ignores that actual manner in which bank robbery by intimidation is applied. As actually applied, the "intimidation" element of 18 U.S.C. § 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, because the courts have only required conduct that is objectively fear-producing, regardless of the defendant's intent. *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). In the Eleventh Circuit, 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.

As long as the cases continue to relieve the prosecution of its burden to prove a threat of force — which they do 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 — armed bank robbery cannot categorically be a crime of violence for 924(c) purposes. *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. 2000, 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 proven beyond a reasonable doubt).

In its *Johnson* briefing, the government also 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. But this is wrong. In actual cases, the government is not required to prove that a defendant know his conduct is intimidating. 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. *United States v. Selfa*, 918F.2d749,751 (9th Cir. 1990) (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.") *Selfa*'s definition attached the willful *mens rea* solely to the "taking" element of bank robbery, not the "intimidation" element. *See also United States v. Foppe*, 993 F .2d 1444, 1451 (9th Cir. 1993) (rejected 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.) The *Foppe* court never suggested that the defendant must know the actions were intimidating. *Id*. ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *United States v. Hopkins*, 703 F.2d 1102,1103 (9th Cir. 1983) (held 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 clearly unarmed, and left the bank "in a nonchalant manner" without having received any money. 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*.)

Like its earlier briefing, the government's brief in opposition in Mr. Vidrine's case fails to recognize the ongoing conflict between these lines of cases: the ones reducing the government's burden to prove the defendant's guilt in the first instance, and the other line that inconsistently analyze the same offense to permit an enhanced conviction and resulting enhanced sentence. This Court should grant certiorari to resolve this conflict.

The government holds to the view that this issue is not of pressing importance. But the critical inconsistencies in the lower courts' treatment of the "intimidation" element of federal bank robbery, the frequency with which the issue arises, and the severity of the consequences make this question important. 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 judges' 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 erroneous sentencing under the Armed Career Criminal Act, erroneous classifications of bank robbery and armed bank robbery under the criminal code's general crime-of-violence provision, and erroneous immigration consequences as well.

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*,[1/] *Duenas-Alvarez*,[2/] *Johnson (2010)*,[3/] and *Mathis*. The circuits' analysis has allowed 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

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[1] *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)).

[2] *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (courts cannot look solely to the title or text of the statute, but must consider how it has actually been applied).

[3] *Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that state court interpretations of a state statute are controlling).

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 Circuit Spilt Regarding the Application of *Johnson*'s Due Process Vague Holding to the Mandatory Guidelines Requires Resolution

Regarding the mandatory guidelines component of Mr. Vidrine's cases, the government again relies on its old briefing, this time from *Gipson v. United States*, No. 17-8637 (July 25, 2018), *cert. denied*, 139 S. Ct. 373 (2018). Brief in Opp., p. 11. The government in *Gipson* admitted that "a disagreement on the question presented exists in the circuits," but called it "shallow" and "of substantially more limited importance. . . ." *Gipson* Brief in Opp, p. 9. The government hoped the conflict among the Circuit would "resolve itself without the need for this Court's intervention." *Id*.

1. As pointed out in Mr. Vidrine's petition, this Circuit split has hardened. The Seventh and First Circuit have found a mandatory guideline claim timely when filed within one year of *Johnson*. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018); *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019) ("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson*

recognized a new right as to the mandatory sentencing guidelines."); *D'Antoni v. United States*, 916

F.3d 658, 665 (7th Cir. 2019); *Moore v. United States*, 871 F.3d 72, 81-83 (1st Cir. 2017); *Diaz-Rodriguez v. United States*, 2020 U.S. Dist. LEXIS 8898 *3; 2020 WL 265932 (D. P.R. January 17, 2020) (granting § 2255 relief after holding "the pre-*Booker* Sentencing Guidelines are subject to vagueness challenges because their mandatory nature fixes the statutory boundaries for sentences.")[4]; *Boria v. United States*, 427 F. Supp. 3d 143, 149 (D. MA 2019) (granting relief after holding "the limited instances in which a sentencing court was permitted to depart from the pre-*Booker* mandatory Sentencing Guidelines do not remove the pre-*Booker* Sentencing Guidelines from the reach of *Johnson II*."); *United States v. Moore*, No. 1:00-10247-WGY-1, 2018 U.S. Dist. LEXIS 194252, *5, 2018 WL 5982017, *6-7 (D. Mass. Nov. 14, 2018) (granting relief after rejecting government's argument that the mandatory guidelines did not fix the permissible ranges of sentences: "This is sophistry, pure and simple. We must always remember that the oxymoronic mandatory guidelines had the force of law and that law was unconstitutional."); *United States v. Carter*, 422 F. Supp. 3d 299, 317 (D. DC 2019) (granting § 2255 in part, to vacate the

[4] *United States v. Booker*, 543 U.S. 220 (2005). The vagueness challenge is under the Due Process Clause of the Fifth Amendment.

career offender sentence). The law regarding the vagueness of the mandatory guidelines' career offender provision is settled in conflict.

The government's reliance on its *Gipson* briefing is odd in light of this Court's post-*Gipson* decision in the 2019 *Davis* case to apply *Johnson* to invalidate section 924(c)(3)(B) on due process vagueness grounds. As here, the government had tried to distinguish 924(c)(3)(B) from *Johnson*. It tried to import into clear statutory language an abandonment of the categorical analysis set forth in the language of 924(c)(3)(B), to allow "a new case-specific approach." *Davis,* 139 S. Ct. 2319, 2327, 204 L. Ed. 2d 757, 767. *Davis* rejected the argument and applied *Johnson* to invalidate § 924(c)(3)(B). The anniversary of *Davis* approaches and so the circuit and district courts will face another round of applications to file challenges to mandatory guideline career offender sentencing enhancements based on this Court application of *Johnson* retroactively in *Davis*.

2. The government errs by arguing that the commentary provides an independent basis for salvaging the to the career offender guideline. Brief in Opp., p. 13. Sentencing Guideline's § 4B1.2(a) defined "crime of violence" as any offense under federal or state law punishable by imprisonment for a term exceeding one year that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "force clause"); (2) "is burglary of a dwelling,

arson, or extortion, involves use of explosives, " (the enumerated offenses) or (3) any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). U.S.S.G. § 4B1.2(a) (1995 ed.). The commentary to the Guideline also included the generic crime of "robbery" and "extortion" but excluded "offense of unlawful possession of a firearm by a felon." *Id.* at CMT. n.2.

The commentary to U.S.S.G. § 4B1.2 only ever interpreted the residual clause. It has no freestanding defining power and cannot add to the text. If the residual clause of the text is unconstitutionally vague, the commentary cannot import an enumerated list that the Guideline does not possess. The Sentencing Reform Act of 1984 created the Sentencing Commission and authorized it to create "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). Those Guidelines are submitted to Congress in advance, *id.* § 994(p), making the Sentencing Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Commentary, by comparison, does not receive the same treatment as the Guidelines. The Sentencing Reform Act does not explicitly authorize the creation of commentary. 28 U.S.C. § 994(a) (authorizing "guidelines" and "policy statements"); *see also Stinson v. United States*, 508 U.S. 36, 41 (1993). Nor does the Sentencing Reform Act require that commentary

be submitted to Congress for approval. *See* 28 U.S.C. § 994(p) (requiring only that amendments to guidelines be submitted to Congress); *Stinson*, 508 U.S. at 46 (commentary "is not reviewed by Congress").

This Court has explained that only commentary "that interprets or explains a guideline" is authoritative. *Stinson*, 508 U.S. at 38. Commentary is subordinated to the text of the Guidelines precisely because, *Stinson* says, the text of the Guidelines receives Congressional approval where the commentary does not. 508 U.S. at 41, 45-46. It follows that, if a portion of a Guideline is declared unconstitutional, the commentary that interpreted that portion of the Guideline must be excised as well.

3. The government also expresses concern that Mr. Vidrine's case arises as a second § 2255 motion. Brief in Opp., 14. It mentions that the Section 2244(b)(2)(A) limitations on second and successive motions "may provide an independent basis for denying a motion like petitioner's." *Id*. The government cites to its *Gipson* brief in opposition, but that brief does not explain this comment with much detail. The current brief in opposition offers no elaboration.

First, the Circuit already authorized the filing of Mr. Vidrine's *Johsnon* habeas petion challenging both his 924(c) conviction and the application of the career offender provisions of the mandatory guidelines. *Vidrine v. United States*, CA No. 16-72003, (9th Cir. Order dated February 21, 2017). Thus, Vidrine complied with these

requirements. He received authorization from the Ninth Circuit Court of Appeals before filing his *Johnson* § 2255 motion. *See* 28 U.S.C. § 2255(h). The Court of Appeals certified his "motion makes a prima facie showing for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The application is granted. *See Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016) (*Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review)." CA No. 16-72003, Order, p. 1; *see* 28 U.S.C. § 2244(b)(3)(C) (establishing a prima facie standard, which section 2255(h) incorporates).

Second, the government's comment appears to require us to believe there is a difference between the "new rule" and "new right" language found §§ 2255(f)(3) and 2255(h)(2), respectively. The government did not raise this distinction below. It did not challenge the certification of Mr. Vidrine's application to file his *Johnson* § 2255 motion in either the Circuit or in the district court after the application had been granted. Thus, this issue is not developed in this case. Nor is it encompassed in the question presented. It is not a ground that should be considered. Given that the Circuit already granted Mr. Vidrine's application and the district court already expended its resources on this case, this collateral question should not be considered. It simply does not provide a basis for addressing the conflict that exists among the Circuit regarding the application of *Johnson* to the mandatory guidelines's career offender enhancement.

CONCLUSION

For all the above reasons, together with those set forth in the Petition, Mr. Vidrine asks this Court to issue a writ of certiorari.

Dated: June 25, 2020

Respectfully submitted,

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