No.

In The Supreme Court Of The United States

Barry Addison Gray,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Dated: November 23, 2020

Questions Presented for Review

I. Are 28 U.S.C. § 2255 motions raising due process vagueness challenges to fixed sentences imposed through application of the pre-2005 mandatory career offender Sentencing Guideline's residual clause timely when filed within one year of *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

II. Do Tennessee's 1982 armed robbery or aggravated assault statutes fail to constitute crimes of violence under the force clause of the pre-2005 mandatory career offender Sentencing Guideline?

III. Does the federal armed bank robbery statute fail to constitute a crime of violence under the force clause of the pre-2005 mandatory career offender Sentencing Guideline?

IV. Does the commentary at U.S.S.G. § 4B1.2 cmt. n.2 (1995), fail to provide an independent basis for a crime of violence finding, should this Court hold the residual clause of the pre-2005 mandatory career offender Sentencing Guideline enhancement void?

Proceedings and Orders Below

1. *United States v. Gray*, No. 2:95-cr-00324-JAD, 2018 WL 3058868 (D. Nev. June 20, 2018), denying Gray's motion to vacate under 28 U.S.C. § 2255, attached as Appendix A; and

2. *United States v. Gray*, No. 2:95-cr-00324-JAD, ECF 52 (D. Nev. July 10, 2018), order granting a certificate of appealability, attached as Appendix B; and

3. *United States v. Gray*, 808 F. App'x 540 (9th Cir. 2020) (unpublished), the memorandum opinion affirming denial of Gray's motion to vacate under 28 U.S.C. § 2255, attached as Appendix C; and

4. *United States v. Gray*, No. 18-16399, App. Dkt. 41 (9th Cir. Aug. 21, 2020), the order denying reconsideration, attached as Appendix D.

Table of Contents

Table of Authorities

Federal Constitution **Page(s)**

Federal Cases

Federal Statutes

Federal Rules

Federal Sentencing Guidelines

State Cases

State Statutes

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Petitioner Barry Gray's case on August 21, 2020. *See* Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). Gray's petition is timely per Supreme Court Rule 13.1 and under this Court's Order of March 19, 2020, extending the deadline from 90 days to 150 days to file a petition for a writ of certiorari after the lower court's order denying discretionary review.

Relevant Constitutional, Statutory, and Sentencing Guidelines Provisions

1. U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V.

2. Tennessee's 1982 armed robbery statute, Tenn. Code Ann. § 39-2-501 (1982):

> (a) Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years.
>
> Provided further, that if the robbery be accomplished by the use of a deadly weapon and the robbery be of a business establishment which sells controlled substances classified in Schedules I-VI pursuant to chapter 14 of title 52 the punishment shall be imprisonment for life or for any time not less than ten (10) year and no person convicted of such offense shall be eligible for release classification, or parole, until such time as he has served ten (10) full calendar years of such sentence. Such offense is a Class X felony.

3. Tennessee's 1982 aggravated assault statute, Tenn. Code Ann. § 39-2-101 (1982):

> (b) Any person who:
>
> (1) Attempts to cause or causes serious bodily injury to another willfully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
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> (2) Attempts to cause or willfully or knowingly causes bodily injury to another with a deadly weapon;
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> (3) Assaults another while displaying a deadly weapon or while the victim knows such person has a deadly weapon in his possession; or
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> (4) Being the parent or custodian of a child or the custodian of an adult, willfully or knowingly fails or refuses to protect such child or adult from an aggravated assault described in (1), (2), or (3) above;
>
> is guilty of the offense of aggravated assault regardless of whether the victim is an adult, a child, or the assailant's spouse.

4. Tennessee's definition of "assault," Tenn. Code Ann. § 39-13-101 (1982):

> (1) [i]ntentionally, knowingly, or recklessly caus[ing] bodily injury to another; (2) [i]ntentionally or knowingly caus[ing] another to reasonably fear imminent bodily injury; or (3) [i]ntentionally or knowingly caus[ing] physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

5. The federal armed bank robbery statute, 18 U.S.C. § 2113(a), (d):

> (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; or

> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.
>
> * * *
>
> (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.

6. The 1995 career offender Sentencing Guideline, U.S.S.G. § 4B1.2 (1995), provides in relevant part:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) 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.
>
> (2) The term "controlled substance offense" means an offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
>
> (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a

crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

2. "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry. . . .

Statement of the Case

Petitioner Barry Gray is one of the many defendants sentenced under the pre-2005 mandatory Sentencing Guidelines regime. This mandatory regime required the district court to impose a career offender sentence. Now, despite relief this Court provides for those sentenced under the unconstitutionally vague residual clauses of 18 U.S.C. § 924(e), 18 U.S.C. § 16(b), and 18 U.S.C. § 924(c), Gray and similarly situated defendants remain incarcerated serving sentences imposed under U.S.S.G. § 4B1.2's nearly identical residual clause.

A. District Court Proceedings

Gray, now age 74, received a 235-month sentence in 1996 under the then-mandatory U.S.S.G. § 4B1.2(a)'s career offender enhancement after pleading guilty to one count of federal armed bank robbery. Dist. Ct. Dkt. Nos. 9, 12.[1]

In 1995, the Sentencing Guidelines mandated federal courts impose the enhanced career offender sentencing provisions if: (1) the defendant was at least 18 years of age when committing the underlying federal offense; (2) the underlying federal offense was a "crime of violence" or a "controlled substance offense"; and (3) the defendant had at least two prior felony convictions for a "crime of violence" or a "controlled substance offense." U.S.S.G. § 4B1.1(a) (1995). The 1995 Guidelines defined a "crime of violence" in three ways[2]:

> The force clause (also known as the elements clause) encompassing offenses requiring "as an element the use, attempted use, or threatened use of physical force against the person of another" U.S.S.G. § 4B1.2(a)(i) (1995);
>
> The enumerated offense clause encompassing offenses for "burglary of a dwelling, arson, or extortion, involve[d] use of explosives" U.S.S.G. § 4B1.2(a)(ii) (1995); or
>
> The residual clause encompassing offenses that "otherwise involves conduct that presents a serious potential risk of physical injury to another" U.S.S.G. § 4B1.2(a)(ii) (1995).

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[1] Gray appealed the criminal fine to the Ninth Circuit, but not his career offender sentence, and the appeal was dismissed due to the appellate waiver in his plea agreement. Dist. Ct. Dkt. No. 21.

[2] The Guidelines maintained this "crime of violence" definition until August 1, 2016. U.S.S.G. § 4B1.2(a)(2); *see* U.S.S.G. Supp. App. C, amend. 798.

The district court did not indicate which prior convictions qualified as career offender predicates for Gray: three Tennessee armed robbery convictions[3]; one Tennessee aggravated assault conviction[4]; or a Florida armed robbery conviction.[5] Presentence Investigation Report ("PSR") ¶¶ 31, 33, 34.

B. Gray's Habeas Proceedings under *Johnson* and *Beckles*

Beginning in 2016, Gray sought habeas relief from his sentence under this Court's cases holding various statutory residual clauses unconstitutionally vague. Dist. Ct. Dkt. Nos. 33, 35; *Johnson*, 135 S. Ct. 2551 (holding the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), void for vagueness under Due Process Clause); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding the residual clause in Immigration and Nationality Act, 18 U.S.C. § 16(b), void for vagueness under Due Process Clause); *United States v. Davis*, 139 S. Ct. 2319 (2019) (holding the residual clause in firearm statute, 18 U.S.C. § 924(c), void for vagueness under Due Process Clause). In *Welch v. United States*, 136 S. Ct. 1257,

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[3] Gray was convicted of one count of Tennessee armed robbery in 1980, and two counts of Tennessee armed robbery in 1985. PSR ¶¶ 31, 33. Gray uses the 1982 Tennessee armed robbery statute herein, Tenn. Code Ann. § 39-2-501 (1982), that was in effect for both the 1980 and 1985 convictions.

[4] Gray was convicted of one count of Tennessee aggravated assault in 1985. PSR ¶ 33. Gray uses the 1982 Tennessee aggravated assault statute herein, Tenn. Code Ann. § 39-2-101 (1982), that was in effect for the 1985 conviction.

[5] Gray agreed below the Florida armed robbery conviction qualifies as a crime of violence under the force clause of U.S.S.G. § 4B1.2(a)(2) (1995), given *Stokeling v. United States*, 139 S. Ct. 544 (2019), which held Florida robbery, Fla. Stat. § 812.13, is a qualifying violent felony under the ACCA's force clause. App. Dkt. 12, pp. 46-47.

1267 (2016), this Court held that *Johnson* announced a new substantive rule with retroactive effect in cases on collateral review.

After Gray moved to vacate his sentence, this Court issued *Beckles v. United States*, 137 S. Ct. 886 (2017), holding the now-advisory Sentencing Guidelines' career offender residual clause (U.S.S.G. § 4B1.2 (2007)), did not fix sentences and thus the advisory Guidelines' residual clause was not susceptible to due process vagueness challenges. *Id.* at 890. In contrast, *Beckles* explained the mandatory guideline scheme in effect before this Court rendered them advisory in *United States v. Booker*, 543 U.S. 220 (2005) was "binding on district courts" and "constrain[ed]" them. *Beckles*, 137 S. Ct. at 894.

Without ordering the government to file a response, the district court denied Gray's motion to vacate in March 2017, holding *Beckles* precluded relief. Dist. Ct. Dkt. No. 37. Gray asked for reconsideration, noting *Beckles* merely addressed the advisory Guidelines; *Beckles* did not preclude claims under the mandatory Guidelines. Dist. Ct. Dkt. No. 38. The district court granted reconsideration, denied the motion to vacate, but granted a certificate of appealability. Dist. Ct. Dkt. Nos. 51, 52. Significantly, the district court held the mandatory Guidelines' residual clause in U.S.S.G. § 4B1.2 (1995) was unconstitutionally vague under *Johnson* and that Gray timely moved to vacate. Dist. Ct. Dkt. No. 51, pp. 5-9. The district court found, however, that federal armed bank robbery qualified as a crime of violence under § 4B1.2's force clause, as did the prior convictions for Tennessee

armed robbery. Dist. Ct. Dkt. No. 51, pp. 9-12. The district court did not address prior conviction for Tennessee aggravated assault.

The district court issued a certificate of appealability, noting this Court has not yet decided whether the mandatory Guidelines career offender residual clause in U.S.S.G. § 4B1.2(a)(2) is unconstitutional or whether Tennessee armed robbery is a qualifying offense under the force clause of § 4B1.2(a)(1). Dist. Ct. Dkt. No. 52.

C. Habeas Appeal to Ninth Circuit

Mr. Gray timely appealed to the Ninth Circuit. ECF 54. After Gray filed his notice of appeal, but before appellate briefing, the Ninth Circuit issued *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2761 (2019). *Blackstone* erroneously held 28 U.S.C. § 2255 does not afford relief to defendants sentenced under the then-mandatory career offender sentence as this Court has not yet recognized a new right regarding the then-mandatory career offender residual clause. While Gray's appeal was pending, this Court issued *Davis*, 139 S. Ct. 2319, holding the residual clause of 18 U.S.C. § 924(c) is unconstitutionally vague.

In his appellate briefing, Gray noted the federal Circuit Courts of Appeal were split over whether *Johnson* applies to mandatory guideline sentences and urged the Ninth Circuit to overrule its decision in *Blackstone*. App. Dkt. 12, pp. 15-26. Gray explained the right he seeks in habeas for a new sentence is the same right *Johnson* announced and *Welch* made retroactive—that defendants have a due process right not to have a sentence fixed by a residual clause identical textually and operationally to the ACCA's now-void residual clause. App. Dkt. 12, pp. 15-26.

Gray further argued the current and underlying offenses do not qualify under the force clause. App. Dkt. 12, pp. 31-48.

The Ninth Circuit panel, bound by *Blackstone*, affirmed the district court's denial of his motion to vacate, finding his "motion is clearly untimely." App. Dkt. 37, pp. 1-2. The panel concluded, without analysis, that *Blackstone* "is not 'clearly irreconcilable'" with subsequent Supreme Court law. App. Dkt. 37, p. 2.

Gray sought en banc review in the Ninth Circuit on two issues: (1) whether Supreme Court precedent—*Johnson, Welch, Dimaya,* and *Davis*—renders the mandatory Guidelines unconstitutional, overruling *Blackstone*; and (2) whether Tennessee's 1982 armed robbery and aggravated assault statutes and the federal armed bank robbery statute define crimes of violence under the remaining enumerated or force clauses. App. Dkt. 37. The Ninth Circuit denied en banc review on August 21, 2020. App. Dkt. 41. Gray now seeks review by this Court.

Reasons for Granting the Petition

Petitioner Gray asks this Court to grant review to resolve the ongoing split between federal appellate courts as to whether those sentenced under the residual clause of the formerly mandatory Sentencing Guidelines scheme may seek relief under 28 U.S.C. § 2255. Mr. Gray also asks this Court to grant review to clarify that statutes lacking intentional violent physical force do not qualify under the pre-2005 mandatory career offender Sentencing Guideline.

I. The federal Circuits cannot resolve the ongoing split over *Johnson*'s applicability to mandatory guideline sentences.

It is necessary for this Court to resolve the ongoing split between the federal appellate courts over whether *Johnson* provides an avenue for relief under 28 U.S.C. § 2255 to those sentenced under the formerly mandatory Sentencing Guidelines scheme. *Johnson* struck the ACCA's residual clause as unconstitutionally vague, with *Welch* holding *Johnson* retroactive. *Beckles* prohibited only due process vagueness challenges to the advisory Sentencing Guidelines, not due process challenges to mandatory Sentencing Guidelines that fix sentences and bind courts. However, federal circuit courts cannot agree whether *Johnson*'s due process analysis holding the ACCA's residual clause unconstitutionally vague applies to the identically worded mandatory career offender provision's residual clause.

This divide treats similarly situated petitioners disparately, with some permitted to litigate their habeas claims raising due process challenges to mandatory guidelines and others denied that opportunity. Given the dire sentencing consequences of the mandatory career offender guideline's enhanced penalties, this Court's guidance is critical to provide equity and consistency to decades-long incarceration decisions.

The First and Seventh Circuits hold habeas petitioners raising due process challenges to the residual clause of the mandatory Sentencing Guidelines "assert" the same "right" this Court announced in *Johnson*, 28 U.S.C. § 2255(f)(3), namely to be free of punishment based on identical, unconstitutionally vague sentencing

enhancements. *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020); *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). In these Circuits, petitioners can litigate timely-filed due process challenges to vague mandatory sentencing enhancements under *Johnson*.

The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits do not recognize *Johnson*'s rule as permitting habeas challenges to the unconstitutionality of vague sentencing provisions in the mandatory Guidelines regime, despite objecting judges attempting, unsuccessfully, to garner a contrary conclusion.[6] These circuits largely align with the Ninth Circuit's *Blackstone* opinion, finding there is no "recognized" "right asserted" for retroactivity purposes under 28 U.S.C. § 2255(f)(3), as this Court has not explicitly applied *Johnson* in a case involving a mandatory Sentencing Guidelines' residual clause.

Intra-circuit judicial requests to resolve the inter-circuit split have been unsuccessful:

- The Fourth Circuit's Chief Judge dissented, stating he would have found "*Johnson* compels the conclusion that the residual clause under the mandatory Guidelines is unconstitutionally vague" and would have

[6] *See Nunez v. United States*, 954 F.3d 465, 467 (2d Cir. 2020), *pet. for cert. pending*, No. 20-6221 (U.S. Nov. 2, 2020); *United States v. London*, 937 F.3d 502, 503 (5th Cir. 2019), *as revised* (Sept. 6, 2019), *cert. denied*, 140 S. Ct. 1140 (2020); *Blackstone*, 903 F.3d at 1023; *Russo v. United States*, 902 F.3d 880, 883 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1297 (2019); *United States v. Green*, 898 F.3d 315, 321 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019); *United States v. Greer*, 881 F.3d 1241, 1248 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018); *United States v. Brown*, 868 F.3d 297, 303 (4th Cir. 2017), *cert. denied*, 139 S. Ct. 14 (2018); *Raybon v. United States*, 867 F.3d 625, 629-30 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2661 (2018); *see also In re Griffin*, 823 F.3d 1350, 1356 n.4 (11th Cir. 2016) ("The Supreme Court has not applied Johnson to the Sentencing Guidelines, much less made such an extension retroactive for purpose of successive § 2255 motions.").

granted petitioner's request for resentencing. *Brown*, 868 F.3d at 304 (Brown, C.J, dissenting). The Fourth Circuit's precedent remains unchanged.

- A Fifth Circuit judge wrote separately to express that circuit is "on the wrong side of a split over the habeas limitations statute," and its "approach fails to apply the plain language of the statute and undermines the prompt presentation of habeas claims the statute promotes." *London*, 937 F.3d at 510 (Costa, J., concurring). The Fifth Circuit's precedent remains unchanged.

- A Sixth Circuit judge disagreed with that circuit's precedent in a concurrence, requesting the circuit to revisit the issue. *See Chambers v. United States*, 763 F. App'x 514, 521 (6th Cir. 2019) (unpublished) (Moore, J., concurring). The Sixth Circuit's precedent remains unchanged.

- A Ninth Circuit judge disagreed with *Blackstone*, stating "the Seventh and First Circuits have correctly decided this question." *Hodges v. United States*, 778 F. App'x 413, 414-15 (9th Cir. 2019) (unpublished), *cert. denied*, 140 S. Ct. 2675 (2020) (Berzon, J., concurring in judgment). The Ninth Circuit's precedent remains unchanged.

- Three Eleventh Circuit judges joined in a lengthy concurrence explaining why its circuit precedent was "deeply flawed and wrongly decided." *In re Sapp*, 827 F.3d 1334, 1337 (11th Cir. 2016) (Jordan, Rosenbaum, Jill Pryor, JJ., concurring). The Eleventh Circuit's precedent remains unchanged.

The result in these circuits leaves habeas petitioners incarcerated and serving unconstitutional career offender sentences with no relief available.

Justice Sotomayor and the late Justice Ginsberg routinely dissented from certiorari denials on this issue. *See, e.g., Bronson v. United States,* 140 S. Ct. 817 (2020) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Autrey v. United States*, 140 S. Ct. 867 (2020) (Sotomayor, J., joined by Ginsburg, J., dissenting). In the *Brown* dissent, Justice Sotomayor explained the residual clauses of the mandatory career offender guideline and the ACCA are identical in language and effect—both fixing sentences and "binding on judges." 139 S. Ct. at *14-15. Noting the circuit

split on this issue, Justice Sotomayor implored this Court to clarify "that if a sequence of words that increases a person's time in prison is unconstitutionally vague in one legally binding provision, that same sequence is unconstitutionally vague if it serves the same purpose in another legally binding provision." *Id.*

Gray asks this Court to grant review to find 28 U.S.C. § 2255 challenges to mandatory Guidelines sentences filed within one year of *Johnson* are timely because the then-mandatory residual clause in U.S.S.G. § 4B1.2(a)(2) is unconstitutionally vague.

II. Tennessee's 1982 armed robbery statute and aggravated assault statute only qualified as crimes of violence under the then-mandatory career offender residual clause.

The only path for Gray's prior Tennessee armed robbery and aggravated assault convictions to qualify as crimes of violence at the time of his sentencing was through U.S.S.G.§ 4B1.2's residual clause. Assuming *Johnson* applies to void the residual clause from the then-mandatory career offender guideline, these convictions no longer qualify as crimes of violence, leaving Gray without the requisite number of predicates for the career offender enhancement to apply.

However, because the panel affirmed the district court's denial of relief on timeliness grounds, it never addressed whether these prior convictions qualified as crimes of violence. App. Dkt. 37. The district court found Tennessee armed robbery qualified under the force clause and did not address Tennessee aggravated assault. Dist. Ct. Dkt. No. 51, pp. 9-12. Therefore, Gray asks this Court to grant review as this Court has not addressed these statutes under any force clause.

To determine if an offense qualifies as a "crime of violence," courts must use the categorical approach to discern the "minimum conduct criminalized" by the statute through an examination of cases interpreting and defining that minimum conduct. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 482 (9th Cir. 2016) (en banc). This Court first set forth the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), and provided further clarification in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). Recently, *Davis* reaffirmed the continuing applicability of the categorical approach to a crime-of-violence analysis. 139 S. Ct. at 2326-36. The categorical approach requires courts to "disregard[] the means by which the defendant committed his crime, and look[] only to that offense's elements." *Mathis*, 136 S. Ct. at 2248.

In undertaking the categorical approach, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190-91 (alterations omitted); *United States v. Castillo-Marin*, 684 F.3d 914, 923 (9th Cir. 2012) ("[E]ven the least egregious conduct the statute covers must qualify.") (alteration in original) (citation omitted)). If the statute of conviction criminalizes some conduct that does involve intentional violent force and some conduct that does not, the statute of conviction does not categorically constitute a crime of violence. *Mathis*, 136 S. Ct. at 2248.

Under U.S.S.G. § 4B1.2's force clause, two requirements must be met to satisfy the "violent force" component. First, the predicate offense must require

physical force be used, attempted, or threatened. *Stokeling*, 139 S. Ct. at 554 (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)) ("Johnson 2010"). In *Johnson 2010*, this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis in original). In *Stokeling*, this Court interpreted *Johnson 2010*'s "violent physical force" definition to encompass physical force with the "potentiality" of causing physical pain or injury to another. 139 S. Ct. at 554. Second, the use, attempted use, or attempted use physical force must be *intentional*, not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).[7]

A. Tennessee's 1982 armed robbery statute

Tennessee's 1982 armed robbery statute, Tenn. Code Ann. § 39-2-501 (1982), fails to meet the force clause of U.S.S.G. § 4B1.2 (1995), for at least three reasons: (1) it does not require intentional use of force; (2) it can be committed by mere snatching, without having to overcome any resistance by the victim as required by

[7] The Ninth Circuit holds the force clause requires an intentional mens rea. *United States v. Orona*, 923 F.3d 1197 (9th Cir. 2019) (holding Arizona's aggravated assault statute, which encompasses reckless conduct, does not qualify as a violent felony under the ACCA's force clause), *reh'g en banc held in abeyance*, No. 17-17508 (9th Cir. Apr. 1, 2020); *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019) (holding federal second-degree, which can be committed with reckless indifference, does not qualify as a categorical crime of violence under force clause at 18 U.S.C. § 924(c)), *pet. for reh'g held in abeyance*, No. 14-10080, 2019 WL 7900329 (9th Cir. Dec. 5, 2019). The Ninth Circuit has stayed rehearing in both *Orona* and *Begay* pending this Court's decision in *Borden v. United States*, No. 19-5410 (argument held Nov. 3, 2020), which will address whether the ACCA's force clause encompasses crimes with a mens rea of mere recklessness.

Stokeling, 139 S. Ct. at 554; and (3) the dangerous weapon requirement does not transform the offense into a crime of violence.

First, the only "intentional" conduct required for Tennessee robbery is permanently taking property—it does not require the intentional use of force. *United States v. Mitchell*, 743 F.3d 1054, 1059 (6th Cir. 2014). And, while the current Tennessee robbery statute requires "intentional or knowing" conduct, the 1982 statute required only "felonious" conduct. The intent to permanently steal an item, however, is distinct from required use, attempted use, or threatened use of intentional force when stealing an item, as *Young v. State*, 487 S.W.2d 305, 307 (Tenn. 1972), clarifies. In *Young*, the Tennessee Supreme Court reversed an armed robbery conviction where the defendant stole jail keys from a correctional officer at gunpoint, locked the officer in a cell with the keys, and threw the keys into a field while escaping. *Id.* at 306. The *Young* court found that because the defendant lacked the intent to permanently deprive the jail officer of the keys, a robbery did not occur. *Id.* at 307-08. Under *Young*, the only "intent" necessary for Tennessee robbery is the intent to permanently deprive a person of property, an element distinct from an intentional use of force.

Second, Tennessee robbery can be committed without force sufficient to overcome resistance by a victim. *State v. Witherspoon*, 648 S.W.2d 279 (Tenn. Crim. App. 1983). The *Witherspoon* court upheld a Tennessee robbery conviction where the defendant grabbed a bag of money from behind the victim's driver's seat, without touching the victim. *Witherspoon* concluded the "facts present an

admittedly close case," but assumed "the victim *may* have let down her guard from fear engendered by the defendant['s close proximity], thus permitting him to grab the money *without* resistance and escape." *Id.* at 281 (emphasis added). Under *Stokeling*, mere proximity to a victim, standing alone, does not establish the requisite use of, attempted use of, or threatened use of force. *See, e.g., United States v. Shelby,* 939 F.3d 975, 978 (9th Cir. 2019) (finding, post-*Stokeling*, neither first- nor third-degree Oregon robbery qualify as violent felonies under ACCA's force clause); *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (finding Massachusetts armed robbery is not a categorical crime of violence under 18 U.S.C. § 924(c)'s force clause).

Third, involvement of a deadly weapon does not transform Tennessee armed robbery into a crime of violence. The Ninth Circuit has repeatedly held the present of a weapon alone does not establish the requisite force necessary under the force clause. "There is a material difference between the presence of a weapon, which produces a risk of violent force, and the actual or threatened use of such force. Only the latter falls within ACCA's force clause." *Shelby*, 939 F.3d at 979. "The mere fact an individual is armed, however, does not mean he or she has used the weapon, or threatened to use it, in any way." *Parnell*, 818 F.3d at 980 (citing *United States v. Werle*, 815 F.3d 614, 621-22 (9th Cir. 2016)).

Therefore, Tennessee's 1982 robbery statute does not qualify as a crime of violence under the then-mandatory career offender element's clause.

B. Tennessee's 1982 aggravated assault statute

Tennessee's 1982 aggravated assault statute, Tenn. Code Ann. § 39-13-101 (1982), fails to meet the force clause of U.S.S.G. § 4B1.2 (1995), for at least two reasons: (1) it can be committed without intentional use of force; (2) it can be committed without using violent physical force.

First, the Ninth Circuit holds the Tennessee aggravated assault statute includes a divisible subsection that can be committed recklessly. *United States v. Perez-Silvan*, 861 F.3d 935, 939-40 (9th Cir. 2017). Here, the government provided no *Shepard* documents[8]—either at the original sentence or in the habeas litigation—thus failing to prove the subsection under which Gray was convicted. PSR ¶ 33. On this record, the prior offense does not qualify as a crime of violence and cannot be harmless error. *See Dunlap v. United States*, 784 F. App'x 379, 387-89 (6th Cir. 2019) (unpublished) (finding petitioner's 1988 Tennessee aggravated assault conviction insufficient under ACCA's force clause because the record lacked *Shepard* documents). Accordingly, district courts continue to hold Tennessee aggravated assault is not necessarily a crime of violence. *See, e.g.,* D*illard v. United*

[8] The government bears the burden to "necessarily" and "conclusive[ly]" establish the statute of conviction for a predicate crime of violence. *Shepard v. United States*, 544 U.S. 13, 16, 21, 24-26 (2005). To determine the statute of conviction for a predicate offense, this Court in *Shepard* limited the record examination to a narrow list of documents: "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy or some comparable judicial record . . . ." *Moncrieffe*, 569 U.S. at 190-91 (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The limited *Shepard* documents must establish with "certainty" that the defendant's conviction rested on a predicate offense "necessarily" including the elements required to constitute a crime of violence. *Shepard*, 544 U.S. at 24-25.

States, 420 F. Supp. 3d 718, 737-39 (E.D. Tenn. 2019) (granting § 2255 relief because Tennessee aggravated assault could not serve as "violent felony" under ACCA's force clause where record did not establish subsection for prior conviction).

Second, the Sixth Circuit recently found the Tennessee aggravated assault statute includes a subsection criminalizing failing to protect a child or adult from aggravated assault that does not require force. *Dunlap*, 784 F. App'x at 389 (citing *United States v. Mayo*, 901 F.3d 218, 227 (3d Cir. 2018) (holding Pennsylvania aggravated assault was not a predicate offense under the ACCA's force clause)). Because the record here lacks *Shepard* documents, Gray "could have been convicted of failing to protect a child or adult from aggravated assault, however remote the possibility," and therefore "his aggravated assault conviction under Tennessee law is not categorically a violent felony." *Dunlap*, 784 F. App'x at 389.

Gray's prior conviction for aggravated assault under Tennessee's 1982 statute does not qualify as a crime of violence under U.S.S.G. § 4B1.2 (1995).

III. Federal armed bank robbery by intimidation does not categorically require intentional violent physical force as an element of the offense.

Federal armed bank robbery can be committed by three means: "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a), (d). Applying the categorical approach, armed bank robbery by intimidation and bank robbery by extortion are the least egregious of § 2113(a)'s range of covered conduct. Because armed bank robbery by intimidation or extortion does not require the intentional use, attempted use, or threatened use of violent physical force, the statute is not a crime of violence under U.S.S.G. § 4B1.2's force clause.

During pendency of Mr. Gray's appeal, the Ninth Circuit issued *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018), finding federal armed bank robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)'s force clause. *Watson*, however, failed to acknowledge this Court's prior case law interpreting and applying the federal bank robbery statute, and also creates inter-circuit conflicts. Certiorari is necessary to clarify that, under the categorical approach, federal armed bank robbery is overbroad and not a crime of violence.

A. Intimidation does not require the use, attempted use, or threatened use of violent physical force.

"Intimidation" does not meet § 4B1.2's force clause. In *Stokeling*, this Court, looking to common-law robbery, clarified violent physical force is more than "nominal conduct" and includes "the force necessary to overcome a victim's physical resistance." 139 S. Ct. at 553. "[R]obbery that must overpower a victim's will," this Court explained, "*necessarily* involves a physical confrontation and struggle." *Id.* (emphasis added). Thus, violent physical force must at least be "*capable* of causing physical pain or injury." *Id.* at 554 (emphasis in original) (quoting *Johnson 2010*, 559 U.S. at 140).

In *Watson*, the Ninth Circuit held bank robbery by intimidation "requires at least 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson* [*2010*] standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). Yet, in the Ninth Circuit, "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." *United States v. Eaton*, 934 F.2d

1077, 1079 (9th Cir. 1991) (alteration and emphasis in original) (citation omitted). More importantly, *Watson* failed to acknowledge this Court's teachings that: (1) violent force must be "capable" of potentially "causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 554; and (2) violent force must be physical force, rather than "intellectual force or emotional force," *id.* at 552 (quoting *Johnson 2010*, 559 U.S. at 138).

Indeed, intimidation in a federal bank robbery can be, and often is, accomplished by a simple demand for money. While a verbal request for money may have an emotional or intellectual impact on a bank teller, it does not require threatening, attempting, or inflicting violent physical force capable of causing pain and injury to another or another's property.

To find federal bank robbery by intimidation a crime of violence under § 924(c), *Watson* made two erroneous assumptions: (1) an act of intimidation necessarily involved a separate willingness to use violent physical force; (2) that willingness was the equivalent of threatening to use violent physical force. These assumptions are fallacious for at least three reasons. First, intimidation does not require a willingness to use violent physical force, robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). Second, as the Ninth Circuit elsewhere acknowledges, "[a] willingness to use violent force is not the same as a threat to do so." *Parnell*, 818 F.3d at 980. Third, even if a defendant was willing to use violent physical force, an intimidating act does not require the defendant to communicate any such

willingness to the victim. And, a victim's reasonable fear of bodily harm does not prove a defendant actually "communicated [an] intent to inflict harm or loss on another." *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (defining "threat").

An examination of bank robbery by intimidation cases reveals numerous circuit affirmances for evidentiary sufficiency despite a lack of threatened violent physical force. The Fourth, Fifth, Ninth, and Eleventh Circuits incorrectly apply the categorical approach by defining "intimidation" under 18 U.S.C. § 2113 broadly for sufficiency purposes to affirm § 2113 convictions involving non-violent conduct that does not involve the use, attempted use, or threatened use of violent force. Yet, notwithstanding this broad definition, these same circuits also find "intimidation" always requires as an element the use, attempted use, or threatened use of violent force under § 924(c)'s force clause. These circuits cannot have it both ways.

For example, in *United States v. Lucas*, 963 F.2d 243, 244, 248 (9th Cir. 1992), the Ninth Circuit found intimidation under § 2113 where the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." The defendant never threatened to use violent physical force against anyone, demonstrating that bank robbery does not require the use or threatened use of "violent" physical force.

The Tenth Circuit, in *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982), affirmed a bank robbery by intimidation conviction where the defendant simply helped himself to money and made neither a demand nor threat to use

violence. The defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing. *Id.* Yet the Tenth Circuit conversely holds that, under crime of violence analysis, intimidation necessarily requires "a threatened use of physical force." *United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1260 (2019).

The Fourth Circuit, in *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008), similarly upheld a bank robbery by intimidation conviction where defendant gave the teller a note that read, "These people are making me do this," and then the defendant told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave the defendant $1,686, and the defendant left the bank. *Id.* Paradoxically, the Fourth Circuit also holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016)), *cert. denied*, 137 S. Ct. 164 (2016).

The Fifth Circuit permits conviction for robbery by intimidation when a reasonable person would feel afraid even where there was no weapon, no verbal or written threat, and when the victims were not actually afraid. *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987). And yet, the Fifth Circuit also inconsistently holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017).

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005), where a teller at a bank inside a grocery store left her station to use the phone and two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and said nothing when they ran from the store. *Id.* Yet, once again, the Eleventh Circuit also holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018).

Applying a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction on sufficiency grounds, but then finding—under the categorical approach—that "intimidation" *always* requires a defendant to threaten the use of violent physical force is impermissibly inconsistent and injudicious. Certiorari is necessary to direct circuits that "intimidation" as used in the federal armed bank robbery statute does not require the threatened use of violent physical force sufficient to satisfy § 4B1.2's force clause.

B. "Intimidation" lacks the requisite intentional mens rea.

Section 4B1.2's force clause requires the use of violent force to be intentional and not merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *Benally*, 843 F.3d at 353-54. But to commit federal armed bank robbery by intimidation, a defendant's conduct need not be intentionally intimidating.

This Court holds § 2113(a) "contains no explicit mens rea requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). Instead, federal bank

robbery is a general intent crime, requiring only proof "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. As a general intent crime, an act of intimidation can be committed negligently, a mens rea insufficient to demonstrate an intentional use of violent force. A statute also encompasses a negligence standard when it measures harm as viewed from the perspective of a hypothetical "reasonable person," without requiring subjective awareness of the potential for harm. *Elonis*, 135 S. Ct. at 2011. Thus, bank robbery lacks the specific intent required by § 4B1.2's force clause.

Consistent with *Carter*, the Ninth Circuit holds juries need not find intent in § 2113(a) cases. A finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This cannot qualify as a crime of violence. *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) (holding the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," and "[w]hether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983) (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," requiring no finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions are in accord: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. *Kelley*, 412

F.3d at 1244-45 (holding "a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating."); *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (holding a jury may not consider the defendant's mental state as to the intimidating character of the offense conduct); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (holding "[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," as "nothing in the statute even remotely suggests that the defendant must have intended to intimidate.").

Without an intentional mens rea requirement, a conviction under the federal bank robbery statute does not categorically qualify as a crime of violence. *Watson*'s sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Certiorari is necessary to correctly instruct circuit courts that general intent "intimidation," as used in the federal bank robbery statute, does not require an intentional threat of violent physical force, and therefore, is not a crime of violence under the force clause of § 4B1.2.

C. Federal bank robbery by extortion does not categorically require an element of intentional violent force.

Section § 2113(a) does not define "extortion." This Court thus broadly defines generic extortion "as obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (citation and internal quotation marks omitted).

"[T]he threats that can constitute extortion . . . include threats to harm property and to cause other unlawful injuries." *United States v. Bankston*, 901 F.3d 1100, 1103 (9th Cir. 2018) (citation omitted); *see also United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, 770 F.*3d 834, 838 (9th Cir. 2014) (holding wrongful fear under 18 U.S.C. § 1951 "include[s] fear of economic loss"). For example, in *United States v. Nardello*, 393 U.S. 286, 295-96 (1969), this Court held the defendants' attempt "to obtain money from their victims by threats to expose alleged homosexual conduct . . . encompasse[d] a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear and threats of exposure." To the extent extortionate conduct under § 2113 encompasses threats made to intangible property, or to future harm to devalue an economic or reputational interest, federal bank robbery by extortion does not require violent physical force.

The plain language of § 2113(a) also illustrates why extortion does not encompass violent force. Section 2113(a) expressly sets forth other alternative means to commit bank robbery: taking "by force and violence, or by intimidation." Following this Court's mandate, to "give effect . . . to every clause and word of [the] statute," extortion under § 2113(a) must not be read to require violent force. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations and internal quotation marks omitted). Extortion by intimidation, therefore, does not require "force and violence." Certiorari is necessary to clarify federal armed bank robbery by extortion is therefore not a crime of violence under the force clause of § 4B1.2.

D. The "armed" element of federal armed bank robbery does not create a crime of violence.

As discussed supra, p. 17, the Ninth Circuit has repeatedly held the presence of a weapon alone does not establish the requisite force necessary under the force clause. *Shelby*, 939 F.3d at 979; *Parnell*, 818 F.3d at 980.

Moreover, this Court applies a subjective standard from the viewpoint of the victim as to the "armed" element of § 2113(d), sustaining convictions where the victim's reasonable belief about the nature of the item used in the robbery determines whether it was a dangerous "weapon or device" because its display "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986) (holding a toy gun is a "dangerous weapon" under § 2113(d)). Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. *United States v. Martinez-Jimenez*, 864 F.2d 664, 665 (9th Cir. 1989) (affirming armed bank robbery conviction committed with toy gun where the defendant (1) did not "want[] the bank employees to believe [he] had a real gun," and (2) believed anyone who perceived the gun accurately would know it was a toy).

Certiorari is necessary to clarify the "armed" element of federal armed bank robbery does not render the offense a crime of violence under § 4B1.2.

E. The federal bank robbery statute is not divisible.

The final step of categorical approach analyzes whether an overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. In assessing whether a statute is divisible, courts assess whether the statute sets forth indivisible alternative means by which the crime could be committed or divisible alternative

elements that the prosecution must select and prove to obtain a conviction. *Id.* at 2248-49. And, "[i]f statutory alternatives carry different punishments, then . . . they must be elements." *Id.* at 2256. Here, the statute provides one punishment—a person who violates § 2113(a) "[s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a). Because the federal armed bank robbery statute is indivisible, it cannot constitute a crime of violence.

In holding otherwise, *Watson* failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which held § 2113(a)—bank robbery—contains alternative means, while § 2113(b)—bank larceny—is a separate specific intent crime. *Watson* instead summarily held the federal bank robbery statute, 18 U.S.C. § 2113(a), is divisible because "it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006) and *Eaton*, 934 F.2d at 1079). But the cited cases do not establish that § 2113(a) is divisible. For example, in *Eaton*, the Ninth Circuit clarified that "force and violence," "intimidation," and "extortion" are three alternative means—rather than alternative elements—to take property. 934 F.2d at 1079. And the *Jennings* opinion only addressed a guideline enhancement to a bank robbery conviction. 439 F.3d at 612. It is therefore unclear what part of *Jennings*'s analysis *Watson* relied upon.

Circuits are split over whether § 2113(a) is divisible. Like *Watson*, the First, Second, and Fifth Circuits similarly misapply the divisibility analysis, holding § 2113(a) sets forth separate elements. *See King v. United States*, 965 F.3d 60, 69 (1st

Cir. 2020); *United States v. Evans*, 924 F.3d 21, 28 (2d Cir.), *cert. denied*, 140 S. Ct. 505 (2019); *United States v. Butler*, 949 F.3d 230, 236 (5th Cir. 2020), *cert. filed*, (No. 20-5016) (U.S. July 10, 2020).

But the Third, Fourth, Sixth, and Seventh Circuits treat "force and violence," "intimidation," or "extortion" as alternative means of committing § 2113(a) bank robbery. *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017); *United States v. Williams*, 841 F.3d 656 (4th Cir. 2016) (holding § 2113(a), bank robbery, has a single "element of force and violence, intimidation, or extortion."); *United States v. Askari*, 140 F.3d 536, 548 (3d Cir.) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery."), *vacated on other grounds,* 159 F.3d 774 (3d Cir. 1998); Pattern Crim. Jury Instr. 7th Cir. 539 (2012) ("The statute, at § 2113(a), ¶1, includes a means of violation for whoever 'obtains or attempts to obtain by extortion.' If a defendant is charged with this means of violating the statute, the instruction should be adapted accordingly.").

Certiorari is necessary to clarify that because § 2113(a) lists alternative means, it is an indivisible statute and federal armed bank robbery is not a crime of violence under § 4B1.2.

IV. The commentary to the pre-2005 mandatory career offender Guideline cannot provide an independent basis for application of the career offender guideline.

Clarification is also required from this Court beyond resolving the circuit split over *Johnson*'s application to the mandatory Sentencing Guidelines. The

guideline commentary to U.S.S.G. § 4B1.2 (1995) listed other offenses that qualified under the residual clause, providing:

> "Crime of violence" includes . . . aggravated assault . . . robbery . . . Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2 cmt. n.2 (1995). This commentary does not provide an independent basis for a crime of violence finding, as it only ever interpreted the residual clause. It has no freestanding definitional power and cannot add to the text. With the residual clause void, the commentary no longer interprets or explains any remaining component of § 4B1.2. Neither the district court nor the Ninth Circuit addressed this issue below.

The pre-2016 Guidelines commentary interpreted the residual clause. This Court holds commentary is authoritative only when it "interprets or explains a guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). The Sentencing Commission itself acknowledges commentary plays a secondary, interpretative role. *See* U.S.S.G. § 1B1.7 (2018) (explaining the commentary's purpose is to "interpret [a] guideline or explain how it is to be applied"); *see also United States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991), *abrogated on other grounds by Stinson*, 508 U.S. 36 (noting Sentencing Commission's belief that commentary "is an aid to correct interpretation of the guidelines, not a guideline itself or on a par with the guidelines themselves").

Commentary has no freestanding definitional power and cannot add to the text of the guidelines. 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). The Sentencing Commission submits those Guidelines 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. *See* 28 U.S.C. § 994(a) (authorizing "guidelines" and "policy statements"); *see also Stinson*, 508 U.S. at 41. Nor does the Sentencing Reform Act require the Sentencing Commission submit the commentary to Congress for approval. *See* 28 U.S.C. § 994(p) (requiring only guideline amendments be submitted to Congress); *Stinson*, 508 U.S. at 46 (commentary "is not reviewed by Congress").

Because only commentary "that interprets or explains a guideline" is authoritative, *Stinson*, 508 U.S. at 38, and potential conflicts between the text and the commentary render the text controlling, *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011), any guideline commentary interpreting unconstitutional text must also be excised. Vestigial commentary without a textual hook is invalid because its only "functional purpose" was to "assist in the interpretation and application" of text that no longer exists. *Stinson*, 508 U.S. at 45.

Removal of the mandatory career offender residual clause thus removes the commentary that interpreted it. The commentary only ever interpreted the residual clause by providing certain types of generic offenses that may pose enough "risk" to qualify as a crime of violence under the residual clause. Under *Johnson*, that risk analysis is void for vagueness, taking with it the explanatory commentary.

Pre-*Beckles* decisions in the First, Seventh, and Eighth Circuits were in accord. *United States v. Soto-Rivera*, 811 F.3d 53, 59 (1st Cir. 2016); *United States v. Rollins*, 836 F.3d 737, 743 (7th Cir. 2016); *United States v. Bell*, 840 F.3d 963, 968 (8th Cir. 2016). *Beckles* did not decide whether commentary offenses constituted crimes of violence and thus does not undermine the commentary analysis of these opinions.

The First Circuit explained that, absent the residual clause, a listed commentary offense that neither interprets nor explains one of the two remaining clauses in § 4B1.2 is not a crime of violence. *Soto-Rivera*, 811 F.3d at 59 (internal citations omitted). Sitting en banc, the Seventh Circuit found *Soto-Rivera* "ha[d] it exactly right." *Rollins*, 836 F.3d at 743. The *Rollins* Court explained the commentary does not interpret the remaining enumerated or force clauses: "If the application note's list is not interpreting one of those two subparts—and it isn't once the residual clause drops out—then it is in effect *adding* to the definition. And that's *necessarily* inconsistent with the text of the guideline itself." *Id.* at 742 (emphasis in original). Because "application notes are *interpretations of*, not *additions to*, the Guidelines themselves," the commentary cannot have freestanding

definitional power. *Id.* at 742 (emphasis in original); *see also id.* at 739 (commentary has "no legal force independent of the guideline"). The Seventh Circuit continues to hold the mandatory Guidelines commentary is invalid. *D'Antoni v. United States*, 916 F.3d 658, 663-64 (7th Cir. 2019) (holding the then-mandatory U.S.S.G. § 4B1.2 commentary invalid as it only interpreted the void residual clause).

The Eighth Circuit similarly held a state robbery conviction does not qualify as a crime of violence simply because "robbery" was listed in the commentary. *Bell*, 840 F.3d at 968. *Bell* explained "the residual clause may have served as an anchor for the commentary's inclusion of 'robbery' as a crime of violence because it 'otherwise involve[d] conduct that presents a serious potential risk of physical injury to another.'" *Id.* Without the residual clause, however, "§ 4B1.2's commentary, standing alone, cannot serve as an independent basis for a conviction to qualify as a crime of violence because 'doing so would be inconsistent'" with removal of the residual clause. *Id.* (quoting *Soto-Rivera*, 811 F.3d at 60). "The issue," *Bell* observed, "is whether the government can rely solely upon the commentary when it *expands* upon the four offenses specifically enumerated in the [text of the] Guideline itself. The answer is no." *Id.* at 967 (emphasis in original).

The only valid function of the commentary is to interpret or explain the definition of "crime of violence" set forth in the residual clause text of § 4B1.2(a)(2) (1994). Absent the residual clause, the commentary listing robbery does not interpret or explain any remaining text. Thus, the commentary contradicts the

text, "in that following [the commentary] will result in violating the dictates of [the Guideline]." *Stinson*, 508 U.S. at 43. The commentary is invalid, and the cases relying on commentary to find robbery offenses crimes of violence, are legally flawed.

Gray's current and prior convictions do not meet the requisites for a career offender predicate under the 1995 mandatory Sentencing Guidelines under *Johnson* and *Beckles*, and the guideline commentary cannot otherwise render these convictions crime of violence predicates. He therefore does not have either an instant conviction or two prior convictions qualifying as career offender predicates, rendering his career offender sentence unconstitutional.

Conclusion

The continuing split between and within federal circuit courts indicates the judiciary cannot agree on whether *Johnson* applies to the mandatory Sentencing Guidelines' residual clause, despite numerous inter-circuit requests to review decisions holding it does not. The unfortunate result is that only petitioners in the First and Seventh Circuits may seek habeas relief from decades-long unconstitutional career offender sentences received under the mandatory residual clause, while those serving identical sentences in the remainder of the country cannot. Gray's case presents the same unpredictable, arbitrary, and unconstitutional sentence this Court corrected in *Johnson*, *Dimaya*, and *Davis*. This case permits the Court to carry on its work by correcting arbitrary punishments suffered by those serving mandatory career offender sentences.

Gray requests this Court grant this petition for certiorari.

Dated: November 23, 2020

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