No._____

IN THE
SUPREME COURT OF THE UNITED STATES

DEVON MITCHELL

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS Overnight Delivery: December 10, 2020

QUESTIONS PRESENTED

1. By denying Petitioner's Petition For Certificate of Appealability, did the Ninth Circuit Court of Appeals err in implicitly holding that Bank Robbery, and Armed Bank Robbery, in violation of 18 U.S.C. § 2113(a) and (d), respectively, are "crimes of violence" under 18 U.S.C. § 924(c)(1)(A)?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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The Petitioner, Devon Mitchell ("Mitchell"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted herein.

OPINION BELOW

The underlying conviction and sentence was entered on July 16, 2018. (Appendix A, hereto)

On June 27, 2016, Mitchell filed an application to the Ninth Circuit Court of Appeals to file a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The Ninth Circuit granted the application on February 22, 2017.

On April 6, 2020 the district court denied relief, and denied a certificate of appealability. (Appendices B and C, hereto)

On May 20, 2020, Mitchell filed, in the Ninth Circuit Court of Appeals, a motion for a certificate of appealability. (Appendix D, hereto) That motion was denied on September 14, 2020. (Appendix E, hereto) No petitions for rehearing or rehearing *en banc* were filed.

JURISDICTION

The Order of dismissal of the United States Court of Appeals for the Ninth Circuit denying relief was entered on September 14, 2020. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On June 20, 2006, a federal grand jury returned a superseding indictment charging Mitchell and his co-defendant with one count of conspiracy in violation of 18 U.S.C. § 371; three counts of bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2; one count of armed bank robbery in violation of 18 U.S.C. §§ 2113(a), (d) and 2; and one count of possession of a firearm during a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2. (CR 05-886-PHX-EHC, Dkt. 41)

On March 5, 2008, following a seven-day jury trial, Mitchell was convicted of three counts of bank robbery, one count of armed bank robbery, and one count of possession of a firearm during a crime of violence. (CR 05-886-PHX-EHC, Dkt. 233) The jury found no verdict on the conspiracy count. The district court sentenced Mitchell to concurrent terms of 162 months' imprisonment on the bank robbery counts, and to a consecutive term of 60 months' imprisonment on the § 924(c) count. (CR 05-886-PHX-EHC, Dkt. 278) (Appendix A, hereto)

CASE HISTORY

Mitchell filed a direct appeal to the Ninth Circuit Court of Appeals raising the following issues: (1) Whether the district court erred by denying Mitchell's Rule 29 motion for judgment of acquittal; (2) whether the district court violated Mitchell's right to a fair trial when it admitted evidence that Mitchell was a drug dealer, and Mitchell's statements about his criminal history; (3) whether the district court abused

its discretion when it admitted expert testimony on handwriting without holding a *Daubert* hearing; (4) whether the district court abused its discretion when it denied Mitchell's objections to the jury instructions and the court's answers to the jury's questions; and (5) whether the court erred in enhancing Mitchell's sentence based on his role as a leader or organizer in the offenses, and a prior state-court sentence, and whether the district court abused its discretion in denying Mitchell's request for a downward departure based on a state-court sentence he had previously served. (C.A. No. 08-10323, Dkt. 15) The Ninth Circuit affirmed Mitchell's conviction and sentence on October 2, 2009. (C.A. No. 08-10323, Dkt. 41)

Mitchell thereafter filed a petition for panel rehearing and rehearing *en banc*, which the Ninth Circuit denied on November 23, 2009. (C.A. No. 08-10323, Dkt. 46) The United States Supreme Court denied Mitchell's petition for writ of certiorari on March 29, 2010. (C.A. No. 08-10323, Dkt. 50)

On March 28, 2011, Mitchell filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (CV 11-580-PHX-DGC Dkts. 1, 2) In his motion, Mitchell alleged six grounds of relief: (1) Constructive amendment of Count 6 of the indictment; (2) insufficient evidence that the banks robbed in Counts 2, 3, 5 and 6 were, at the time of the robberies, insured by the Federal Deposit Insurance Corporation; (3) insufficient evidence to sustain the conviction of the bank robbery of the National Bank of Arizona on August 5, 2005; (4) the court failed to give an alibi

instruction; (5) the court abused its discretion in failing to promptly respond to jury notes seeking clarification of legal issues; and (6) ineffective assistance of counsel. (CV 11-580-PHX-DGC, Dkts. 1, 2) On May 17, 2012, the district court denied Mitchell's § 2255 motion. (CV 11-580-PHX-DGC, Dkt. 18)

On December 5, 2013, Mitchell filed a *pro se* application for leave to file a second or successive § 2255 petition, which the Ninth Circuit denied on January 23, 2014. (C.A. No. 13-74204, Dkts. 1, 2) On April 8, 2014, Mitchell filed another *pro se* application for leave to file a second or successive § 2255 petition, which the Ninth Circuit denied on May 29, 2014. (C.A. No. 14-71036, Dkts. 1, 2)

On June 27, 2016, Mitchell filed yet another application for leave to file a second or successive § 2255 motion. (C.A. No. 16-72115, Dkt. 1) The Ninth Circuit granted the application on February 22, 2017. (C.A. No. 16-72115, Dkt. 12) On March 17, 2017, Mitchell filed an amended motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, contending that his possession of a firearm conviction under 18 U.S.C. § 924(c) is invalid under *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson 2015*") (Dkt. 21)

In his second amended § 2255 motion, Mitchell asserted his conviction under 18 U.S.C. § 924(c) is invalid because bank robbery under 18 U.S.C. § 2113(a) no longer qualifies as a "crime of violence" after *Johnson 2015*. (Dkt. 21) Essentially, Mitchell posited that by invalidating the residual clause of the ACCA, the Supreme

Court also invalidated the residual clause of § 924(c); thus it could not serve as a basis for his § 924(c) conviction. Mitchell further asserted that bank robbery can be accomplished without the attempted use, or threatened use of violent physical force, and because it is indivisible and does not categorically have as an element the use, attempted use, or threatened use of violent force as defined in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson 2010*"), it does not qualify as a "crime of violence" under the elements clause of § 924(c)(3). (Dkt. 21 at 5-7)

Mitchell moved the district court to dismiss the gun count, or, alternatively, to grant him a new trial on that count, as the jury instruction declaring bank robbery to be a "crime of violence" was no longer legally correct under *Johnson 2015*.

MAGISTRATE JUDGE'S RULING

In her Report and Recommendations (Dkt. 59) (Appendix B, hereto), the Magistrate Judge ("MJ") recommended to the District Court that it deny relief, dismiss Mitchell's § 2255 motion, and deny a certificate of appealability, all because Mitchell's motion was without merit, and Mitchell failed to make a substantial showing of the denial of a constitutional right.

Specifically, the MJ found that *United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017) and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) (*per curiam*), cert. denied, 139 S.Ct. 203 (2018), foreclosed the relief Mitchell sought, as both cases affirmed that federal bank robbery is a "crime of violence" under the "elements

clause" of 18 U.S.C. § 924(c). In her analysis, the MJ rejected Mitchell's argument that *Gutierrez* and *Watson* could not be reconciled with *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) and *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), and, instead, found that *Parnell* and *Geozos* were inapposite because they analyzed state robbery statutes rather than 18 U.S.C. § 2113, and that *Geozos* has been abrogated by *Stokeling v. United States*, 139 S.Ct. 544 (2019) and *Ward v. United States*, 936 F.3d 914 (2019).

Mitchell filed objections to the MJ's Report and Recommendations, noting that in *Gutierrez*, the sole question presented by the panel was whether the federal offense of *carjacking* is a "crime of violence" under 18 U.S.C. § 924(c). There, the Court focused on whether carjacking by "intimidation", as that term is used in the statute, constitutes a use of force sufficient to satisfy the requirements articulated in *Johnson 2010*. The Court held, in pertinent part, as follows:

> To be guilty of carjacking "by intimidation", the defendant must take a motor vehicle through conduct that would put an ordinary, reasonable person in fear of bodily harm, which necessarily entails the threatened use of violent physical force. It is particularly clear that "intimidation" in the federal carjacking statute requires a contemporaneous threat to use force that satisfies *Johnson* because the statute requires that the defendant act with "the intent to cause death or serious bodily harm". 18 U.S.C. § 2119; see *Holloway v. United States*, 526 U.S. 1, 12, 119 S.Ct. 966, 143 L.Ed. 2d 1 (1999) ("*The intent requirement of § 2119 is satisfied when the government proves that at the moment the defendant demanded or took control over the driver's automobile the defendant possessed the intent to seriously*

> *harm or kill the driver if necessary to steal the car"). As a result, the federal offense of carjacking is categorically a crime of violence under § 924(c).* (emphasis added)

Mitchell argued that because the federal bank robbery statute does not require that the perpetrator act with "the intent to cause death or serious bodily harm", *Gutierrez* is inapposite.

Mitchell noted that in *Watson*, the defendants, like Mitchell in this case, were convicted of armed bank robbery under 18 U.S.C. § 2113(a), (d), and using or carrying a firearm during a "crime of violence" under 18 U.S.C. § 924(c)(1)(A). *Id*. at 784. The defendant in *Watson* argued that because the federal bank robbery statute criminalizes robbery "by force and violence, or by intimidation", the least violent form of the offense – bank robbery by intimidation – did not necessarily involve the violent physical force required by *Johnson 2010*. *Id*. at 785. The Ninth Circuit disagreed. It cited *Gutierrez* in holding that "intimidation" requires the defendant to "take property 'in such a way that would put an ordinary, reasonable person in fear of bodily harm'", which cannot be done "without threatening to use force capable of causing physical pain or injury". *Id*. (quoting *Gutierrez*, 876 F.3d at 1257). Mitchell noted that the *Watson* panel came to that conclusion notwithstanding *Gutierrez's express* reliance on the requirement, under the carjacking statute, that the perpetrator act with the intent to seriously harm or kill the driver/victim – a requirement not present in the federal bank robbery statute.

Mitchell posited that the holding in *Watson* cannot be reconciled with that in *Johnson 2010*, or certain other Ninth Circuit precedent, and, therefore, relief should be granted based on the Supreme Court's holding in *Johnson 2015*. He noted that in *Johnson 2010*, the Supreme Court held that the definition of "crime of violence" that is predicated on the "force clause" means "violent force – that is force capable of causing physical pain or injury to another person". *Id*. at 140. However, bank robbery – even armed bank robbery – can be effectuated with no more force than is necessary for a purse snatching, which is a form of robbery under Massachusetts's law that was determined by the Ninth Circuit as *not* satisfying the "force clause" of the ACCA (18 U.S.C. § 924(e)(2)(B)(i)). *United States v. Parnell*, 818 F.3d at 979. (the snatching of a purse from a victim's hand does not constitute force capable of causing physical pain or injury to another person).

Robbery, under Mass.Gen.Laws. Ann. Ch 265 §19(b) is described as follows:

> "Whoever, not being armed with a dangerous weapon, *by force and violence*, or by assault and putting in fear, robs, steals or takes from the person of another, or from his immediate control, money or other property which may be the subject of larceny, shall be punished by imprisonment in the state prison for life or for any term of years". (Emphasis added).

Mitchell argued that under that statute, purse snatching was deemed to require sufficient force to constitute robbery, but not sufficient force to satisfy the "force

clause" of the ACCA. *Both the Massachusetts robbery statute, and the federal bank robbery statute use/used the phrase "by force and violence*".

Parnell also held that *armed* robbery, under Massachusetts law, likewise, does not satisfy the "force clause" of the ACCA, as the crime can be committed despite the victim having no knowledge that the perpetrator was armed. *Id*. at 981.

Mitchell argued that merely snatching cash from a bank teller's hand where there was little or no resistance would, arguably, constitute bank robbery under § 2113(a) because some level of "force and violence" would be required in the process. Mitchell also cited, *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017), an Oregon robbery case in which "the victim and the thief had a tug-of-war over a purse" as an example of a robbery case involving something less than "violent force" within the meaning of *Johnson 2010*. The force required to snatch money from the hand of a bank teller would be no greater (and possibly less) than that required for a robbery by way of a purse snatching. Mitchell noted that the Court in *Watson* did not *expressly* overturn *Parnell* or *Strickland*. He noted that the appellant in *Watson conceded* that committing federal bank robbery "by force and violence" necessarily entails the level of violent physical force that *Johnson 2010* requires. Thus, the *Watson* panel focused *exclusively* on whether the "by intimidation" clause within § 2113(a) met the requirements of a "crime of violence" under 18 U.S.C. § 924(c)(3), and found that it did. Because bank robbery can be

committed in a manner no more violent than purse snatching, the decision in *Watson* cannot be reconciled with those in *Parnell* and *Strickland*, except to say that the *Watson* panel was *not* asked to decide whether bank robbery by "force and violence" was a "crime of violence" because the defendant had conceded same. In *Watson* the panel also assumed, without expressly finding, that robbery "by intimidation" was the least violent form of that offense in arriving at its decision – *an assumption that is arguably untrue*. Mitchell posited that *Watson* left unresolved the narrow question that *Parnell* and *Strickland* seem to have answered: Can federal bank robbery "by force and violence" be committed using less force than necessary to constitute a violation of § 924(c)(3)(A) in light of *Johnson 2010*? The answer appears to be yes.

Thus, Mitchell argued, because federal bank robbery under the "force clause" is overinclusive, in that it criminalizes some conduct that would qualify as a predicate offense, and other conduct that would not (e.g., snatching cash from the hand of a bank teller), neither federal armed bank robbery nor federal unarmed bank robbery is categorically a "crime of violence". Moreover, the modified categorical approach is inapplicable because the "by force or violence" prong of § 2113(a) is arguably indivisible.

In her Report and Recommendation, the MJ held that the Supreme Court's recent decision in *Stokeling v. United States*, *supra*, has abrogated the holding in *Geozos*. In *Stokeling*, the Supreme Court held that the same Florida robbery statute

analyzed in *Geozos* was a "violent felony" under the ACCA's elements clause. *Id*. at 555. Mitchell responded by pointing out that the five-to-four decision in *Stokeling* was decided in the context of the ACCA (specifically 18 U.S.C. § 924(e)(B)(i)), not 18 U.S.C. § 924(c), and did not address 18 U.S.C. § 2113 at all. The same goes for the holding in *Ward v. United States*, *supra*, also cited by the MJ; though in all fairness, *Parnell*, *Geozos* and *Strickland* were all decided in the context of the ACCA.

Mitchell argued that the dissent in *Stokeling* left open the door for a different result under § 2113(a) and § 924(c), given the dissenters' ardent belief that *Johnson 2010* applies to robbery, as well as battery, statutes. In *Stokeling*, the Supreme Court relied heavily on the Florida courts' *own* interpretation of its robbery statute to arrive at its (the Supreme Court's) conclusion that one can violate that statute by employing just enough force to overcome resistance, and then declared that the ACCA required no more. *Id*. at 555. Thus, Mitchell argued, *Stokeling* is two steps removed from foreclosing relief in this case – different robbery statute, and different sentencing enhancement statute with different definitional terms.

In summary, Mitchell argued that he is entitled to relief under *Johnson 2015*, *Johnson 2010*, *Parnell* and *Strickland*. Because federal bank robbery (armed and unarmed) "by force and violence" can be undertaken with no more force or violence than a purse snatching, or grabbing money from a bank teller's hand, § 2113(a) and

(b) are not "crimes of violence" as defined in § 924(c)(3)(A). Moreover, the residual clause of § 924(c)(3)(B) has, effectively, been deemed unconstitutionally vague under *Johnson 2015*, and, more recently, under *United States v. Davis*, 139 S.Ct. 2319 (2019). (Appendix B, hereto)

DISTRICT COURT'S RULING

On April 6, 2020, the district court adopted the Magistrate Judge's Report and Recommendation, including the MJ's factual and legal findings, and denied relief with prejudice. The district court further denied a certificate of appealability, ruling that Mitchell had not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2), and had not demonstrated that "reasonable jurists would find the [Court's] assessment of the constitutional claims debatable or wrong," citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). (Appendix C, hereto)

On May 20, 2020, Mitchell filed, in the Ninth Circuit of Appeals a motion for a certificate of appealability. (Appendix D, hereto) That request was denied on September 14, 2020. (Appendix E, hereto)

REASONS FOR GRANTING THE WRIT

In denying Mitchell a certificate of appealability, the Ninth Circuit Court of Appeals implicitly held that 18 U.S.C. § 2113(a) and (d) are "crimes of violence" under 18 U.S.C. § 924(c)(1)(A), thereby deciding an important federal question in a way that is clearly inconsistent with the Supreme Court's decisions in *Johnson v. United States*, 559 U.S. 133 (2010), *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *United States v. Davis*, 139 S.Ct. 2319 (2019).

ARGUMENT

Under the Supreme Court's decisions in *Johnson v. United States*, 559 U.S. 133 (2010), *Johnson v. United States,* 135 S.Ct. 2551 (2015), and *United States v. Davis*, 139 S.Ct. 2319 (2019), 18 U.S.C. § 2113(a) and (d) are not "crimes of violence" under 18 U.S.C. § 924(c)(1)(A). The Ninth Circuit of Appeals erred in effectively holding otherwise.

Under 18 U.S.C. § 924(c)(3), a "crime of violence" is defined as a crime that is a felony and that:

a. Has as an element the use, attempted use, or threatened use of physical force against the person or property of another. (18 U.S.C. § 924(c)(3)(A)) 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)(B))

The first prong of this definition is known as the "force clause." The second prong of this definition ("that by its nature involves. . .") is known as the "residual clause."

In *Johnson 2015*, the Supreme Court held that the similarly-worded residual clause in 18 U.S.C. § 924(e), the Armed Career Criminal Act ("ACCA"), was unconstitutionally vague. Subsequently, in *Davis*, the Supreme Court held that 18 U.S.C. § 924(c)(1)(B) was also unconstitutionally vague. Since *Davis* announced a new substantive rule, see *In re Hammond*, 931 F. 3d 1032, 1038 (11th Cir. 2019), it applies retroactively to cases on collateral review, such as this one. *Sehriro v. Summerlin*, 542 U.S. 348, 351-52 (2004).

Under 18 U.S.C. § 2113(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," is guilty of bank robbery. The elements of bank robbery are three: (1) Taking money belonging to a

bank, (2) by using force and violence or by intimidation, (3) with the bank being federally insured. See *United State v. Davis*, 437 F.3d 989, 993 (10th Cir. 2006).

By “force and violence" and “by intimidation" are alternative means by which the second element may be committed; they do not render bank robbery divisible into two different offenses. *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000) ("one of the elements of the offense is taking 'by force and violence, or by intimidation'"). See, also, *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 n. 3 (9th Cir. 2015) (under *Descamps v. United States*, 133 S.Ct. 2276 (2013), courts determine whether a disjunctively worded statute is divisible or not by looking to whether . . the parts of the statute on opposite sides of the 'or' [are] alternative elements or alternative means") (quotation marks omitted; citing *Rendon v. Holder*, 764 F.3d 1077, 1088 (9th Cir. 2014)).

Admittedly, § 2113(a) requires proof of “knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation). *Carter v. United States*, 530 U.S. 255, 268 (2000).

Robbery "by intimidation" requires that the robber take bank money "in such a way that would put an ordinary, reasonable person in fear of bodily harm," and, therefore, appears to meet the § 924(c)(3)(A) definition of “crime of violence.” *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990).

However, in *Johnson 2010*, the Supreme Court held that the definition of "crime of violence" that is predicated on the "force clause" means "violent force - that is, force capable of causing physical pain or injury to another person." *Id*. at 140. While bank robbery under § 2113(a) "by force and violence" requires the use of force, *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016), that could be something as benign as snatching money from the hand of a non-resisting Teller. Regarding armed bank robbery, a bank robber could "use" a weapon during a bank robbery, per § 2113(d), without revealing it to the bank employees. See, e.g., *United States v. Ferguson*, 211 F.3d 878, 883 (5th Cir. 2000). Finally, 18 U.S.C. § 2113(a) does not expressly state that the "force and violence" must be sufficient to satisfy the requirement of physical force under § 924(e)(2)(B)(i) (and, by analogy, § 924(c)(3)(A)) – "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. Thus, the "force clause", alone, does not qualify 18 U.S.C. § 2113(a) as a "violent felony" under 924(c)(1)(A). Because bank robbery under § 2113(a) does not categorically have, as an element, the use, attempted use, or threatened use of "violent force" as defined in *Johnson 2010*, it does not qualify as a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3).

And because the "residual clause" is unconstitutional under *Davis*, bank robbery under § 2113(a) does not amount to a "crime of violence" under 18 U.S.C. § 924(c)(1)(A).

Mitchell's § 924(c) conviction is unconstitutional under *Johnson 2010, Johnson 2015 and Davis*, and must be vacated.

As discussed, *supra*, relief here is not foreclosed by this Court's holding in *Stokeling v. United States*. The dissent in *Stokeling* left open the door for a different result under § 2113(a) and § 924(c), given the dissenters' ardent belief that *Johnson 2010* applies to robbery, as well as battery, statutes. In *Stokeling,* this Court relied heavily on the Florida courts' own interpretation of its robbery statute to arrive at its conclusion that one can violate that statute by employing just enough force to overcome resistance, and then declared that the ACCA required no more. *Id.* at 555. Thus, Mitchell argues, *Stokeling* is two steps removed from foreclosing relief in this case – different robbery statute, and different sentencing enhancement statute with different definitional terms.

The federal robbery statute (§ 2113(a)) does not expressly require that the "force" used to take…from the person or presence of another be great enough to overcome the resistance of the victim. Federal robbery, it would seem, may occur in the absence of any real resistance on the part of the victim. Thus, while *Stokeling* may have impacted certain cases interpreting robbery statutes that expressly require the overcoming of resistance on the part of the victim, it does not necessarily speak to all robberies under § 2113(a).

In summary, Mitchell posits that he is entitled to relief under *Johnson 2015*,

Johnson 2010, and *Davis*. Because federal bank robbery (armed and unarmed) "by force and violence" can be undertaken with no more force or violence than a purse snatching, or grabbing money from a non-resisting bank Teller's hand, § 2113(a) and (b) are not "crimes of violence" as defined in § 924(c)(3)(A). Moreover, the residual clause of § 924(c)(3)(B) has, effectively, been deemed unconstitutionally vague under *Johnson 2015*, and more recently, under *Davis*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions to vacate Mitchell's § 924(c) conviction and sentence.

RESPECTFULLY SUBMITTED this 10th day of December, 2020 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnehan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 10th day of December, 2020, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 10th day of December, 2020, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Karla Delord, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, Devon Mitchell, Registration No. 85738-008, Federal Correctional Institution –

Phoenix, 37900 North 45th Avenue, Phoenix, Arizona 85086.

EXECUTED this 10th day of December, 2020.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner