No.

In The Supreme Court Of The United States

Dominic A. Davis,
Harlon B. Jordan,

Petitioners,

v.

United States of America,

Respondent.

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

Joint Petition for a Writ of Certiorari

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Questions Presented

I. Where an 18 U.S.C. § 924(c) conviction rests on more than one possible predicate offense, the *Shepard* documents must conclusively establish that a jury unanimously based its § 924(c) conviction on one constitutionally qualifying predicate offense. Here, the government concedes that one possible predicate offense—conspiracy—no longer qualifies as a § 924(c) predicate for Petitioners' convictions in light of *United States v. Davis*, 139 S. Ct. 2319 (2019). For habeas challenges to ambiguous § 924(c) trial convictions, circuits are split as to the applicable review. The Fourth Circuit holds this Court's modified categorical approach applies, which limits review to the *Shepard* documents, and held that if one predicate offense does not qualify, the Court must vacate the § 924(c) conviction. In contrast, the Ninth Circuit applied a fact-based harmless-error review by examining the trial evidence to affirm Petitioners' § 924(c) convictions.

The question presented is whether courts must apply the modified categorical approach of *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13, 16 (2005), rather than the fact-based harmless-error review of *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), to determine the legality of the § 924(c) conviction where a jury's general verdict does not identify the predicate offense.

II. Petitioners also ask this Court to address whether aiding and abetting armed bank robbery and substantive armed bank robbery are qualifying crimes of violence under § 924(c)'s force clause.

Related Proceedings

United States District Court (D. Nev.):

United States v. Myrie et al., No. 2:06-cr-00239-RCJ-PAL, 2017 WL 58564 (D. Nev. Jan. 4, 2017) (unpublished) (Consolidated Order denying 28 U.S.C. § 2255 Motions) App. C, pp. 6a-8a.

United States v. Davis, No. 2:06-CR-00239-RCJ-PAL, Dkt. Nos. 154, 142, 100, 99, 36 (D. Nev.) (Final Judgments; Jury Verdict; Jury Instructions; Superseding Criminal Indictment) App. F-J, pp. 14a-55a.

United States Court of Appeals (9th Cir.):

United States v. Jordan and Davis, Nos. 17-15097, 17-15100 (9th Cir. Oct. 28, 2020) (unpublished) (Consolidated Order denying Petition for Rehearing) App. A, pp. 1a-2a.

United States v. Jordan and Davis, 821 F. App'x 792 (9th Cir. 2020) (unpublished) (Consolidated Memorandum affirming 28 U.S.C. § 2255 denial) App. B, pp. 3a-5a.

United States v. Jordan et al., 351 F. App'x 248 (9th Cir. 2009) (unpublished) (Consolidated Memorandum affirming convictions and sentences on direct appeal) App. E, pp. 10a-13a.

United States Supreme Court:

Davis v. United States, 559 U.S. 1057 (2010) (Denying Petition for Writ of Certiorari on direct appeal) App. D, p. 9a.

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Petition for Certiorari

Petitioners Dominic A. Davis and Harlon B. Jordan jointly petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Supreme Court Rule 12.4, as Petitioners each challenge the same judgment from the same court on identical issues.

Opinions Below

The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 821 F. App'x 792. App. B, pp. 3a-5a. The order of the district court is unreported. App. C, pp. 6a-8a.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals denying rehearing en banc was entered on October 28, 2020. App. A, pp. 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This petition is timely filed per Supreme Court Rule 13.1 and this Court's order issued 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.

Constitutional and Statutory Provisions Involved

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. Section 924(c) of Title 18 of the United States Code provides, in relevant part:

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
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> (i) be sentenced to a term of imprisonment of not less than 5 years;
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> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
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> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
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> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
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> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
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> (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.

3. The federal conspiracy statute, 18 U.S.C. § 371, provides, in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

4. The federal aiding and abetting statute, 18 U.S.C. § 2(a), provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

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

> (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
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> 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—
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> Shall be fined under this title or imprisoned not more than twenty years, or both.
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> * * *
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> (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.

Statement of the Case

Petitioners Dominic A. Davis and Harlon B. Jordan are two of the many defendants convicted and sentenced to mandatory consecutive prison terms under 18 U.S.C. § 924(c) despite a general jury verdict failing to unanimously identify a qualifying predicate offense. Because federal circuits are split regarding the type of review applicable to habeas challenges for ambiguous § 924(c) convictions, resolution by this Court is necessary to ensure congruous results.

A. Original Proceedings

Petitioners Davis and Jordan are co-defendants convicted under 18 U.S.C. § 924(c) following a joint jury trial in 2007. Petitioners were convicted in 2007 of conspiracy to commit bank robbery (Count One), aiding and abetting armed bank robbery (Count Two), and brandishing a firearm during, in relation to, and in furtherance of a crime of violence (Count Three). App. F and G, pp. 14a-29a. The *Shepard* documents, including the jury's verdict, fail to clearly establish a qualifying crime of violence under 18 U.S.C. § 924(c) for Count Three.

The grand jury issued a Superseding Indictment alleging four counts against Jordan and Davis:

> Count One: Conspiracy to commit bank robbery, 18 U.S.C. §§ 371 and 2113(a)
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> Count Two: Aiding and abetting armed bank robbery, 18 U.S.C. § 2 and § 2113(a), (d)
>
> Count Three: Brandishing a firearm during, in relation to, and in furtherance of a crime of violence, "that is, conspiracy to commit bank robbery as alleged in Count One," 18 U.S.C. § 924(c).
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> Count Four: Brandishing a firearm during, and in relation to a crime of violence, "namely, conspiracy to commit bank robbery and armed bank robbery as alleged in Count One and Count Two," 18 U.S.C. § 924(c).

App. J, pp. 51a-55a. Before trial, Davis moved to dismiss Count Four as duplicitous, which Jordan joined. Dist. Dkt. Nos. 48, 55. To avoid dismissal of Count Four, the government suggested—providing no authority—the district court could "consolidate" Counts Three and Four. Dist. Dkt. No. 58. The defendants opposed consolidation, asserting that doing so would violate the Fifth Amendment's

Grand Jury indictment requirement. Dist. Dkt. No. 71.[1] Citing no authority, the district court "consolidated" Count Four "into" Count Three, over defense counsel's objection, stating it would "read to [the jury] the single count, Four." Dist. Dkt. No. 167.

At the close of trial evidence, the petit jury was instructed that to convict Petitioners of Count Three under 18 U.S.C. § 924(c) it had to find each Petitioner possessed a firearm in furtherance of "Conspiracy to Commit Bank Robbery or Armed Bank Robbery." App. I, p. 45a. The jury was instructed that Count Two's armed bank robbery rested on aiding and abetting liability. App. I, pp. 39a, 43a-44a. While the jury was generally instructed its verdict must be unanimous, it was not instructed that it must unanimously agree on the underlying crime of violence for Count Three. Compare App. I, p. 49a (general unanimity instruction) with App. I, pp. 45a (Consolidated Count 3 instruction). The district court overruled defense counsel's special verdict request for Count Three and furnished the jury with a general verdict form. Dist. Dkt. No. 170. The general verdict for the § 924(c) count does not reveal which offense the jury chose. App. H, p. 30a.

The trial record therefore does not indicate whether the § 924(c) charge rests on conspiracy or aiding and abetting armed bank robbery, nor does the verdict assure the jury unanimously agreed on either alternative.

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[1] The Fifth Amendment's indictment requirement only permits a grand jury to substantively amend an indictment. *See Stirone v. United States*, 361 U.S. 212, 217 (1960); U.S. Const. amend. V ("No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury. . . .").

At the sentencings, held in April 2008, the Court found conspiracy (Count One) qualified as the § 924(c) crime of violence—with no reference to aiding and abetting armed bank robbery. Dist. Dkt. No. 172. Davis received 209 months of imprisonment, including a mandatory consecutive 84-months (7 years) for the § 924(c) conviction. App. F, pp. 14a-21a. Jordan received 199 months of imprisonment, including a mandatory consecutive 84-months (7 years) for the § 924(c) conviction. App. G, pp. 22a-29a. The final judgments for each Petitioner states conspiracy is the crime of violence for Count Three's § 924(c) conviction. App. F, p. 14a; App. G, p. 22a.

The direct appeal did not address the lack of special verdict as to which alleged § 924(c) crime of violence the jury found, and the Ninth Circuit affirmed the convictions. App. D and E, pp. 9a-13-a: *United States v. Jordan*, 351 F. App'x 248 (9th Cir. 2009), *cert. denied sub nom.*, *Davis v. United States*, 559 U.S. 1057 (2010).

B. Habeas Proceedings under *Johnson* and *Davis*

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), Petitioners each sought relief under 28 U.S.C. § 2255 from Count Three's § 924(c) conviction and sentence. Dist. Dkt. Nos. 224, 225. Without holding a hearing or ordering the government to respond, the district court denied the motions to vacate. App. C, pp. 6a-8a. The district court did not address whether the § 924(c) count rested on conspiracy or aiding and abetting. Instead, the district court summarily found: "*Johnson* is no aid to Defendants, because the physical-force clause of § 924(c)(3)(A) applies to bank robbery under § 2113(a)." App. C, p. 7a.

C. Habeas Appeal to Ninth Circuit

Petitioners timely appealed, each seeking a certificate of appealability (COA). During pendency of the motions for COA, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding § 924(c)'s residual clause is unconstitutionally vague. Following *Davis*, the Ninth Circuit granted COAs as to whether the § 924(c) convictions were unconstitutional.

The government's answering brief conceded the following: *Davis* applies retroactively, invalidating § 924(c)'s residual clause; the district court improperly instructed the jury that either conspiracy or armed bank robbery could support a § 924(c) conviction; and conspiracy to commit robbery is not a qualifying § 924(c) crime of violence. Government's Answering Brief, *United States v. Jordan and Davis*, Nos. 17-15097, 17-15100, App. Dkt. 21, pp. 15-18 (9th Cir. Feb. 14, 2020). The conceded errors deprived Petitioners of their Due Process rights, requiring relief under, 28 U.S.C. § 2255 from the unconstitutional § 924 charge.

Yet the Panel denied relief, turning *Davis* on its head and applying a facts-based analysis that *Davis* squarely rejected. App. B, pp. 3a-4a. The Ninth Circuit also denied Petitioners' request for en banc review as to whether Supreme Court precedent requires application of the categorical approach to determine whether an ambiguous record establishes a qualifying crime of violence under 18 U.S.C. § 924(c). App. A, pp. 1a-2a.

Davis's estimated release date is August 4, 2021, after which he will serve a five-year term of supervision. Jordan completed his sentence in November 2020 and is serving a five-year term of supervision.

Reasons for Granting the Petition

This Court should grant review of Petitioners case to correct the Ninth Circuit's erroneous approach to reviewing constitutional challenges to § 924(c) convictions and sentences.

I. The circuit split regarding the type of review applicable to ambiguous § 924(c) convictions requires resolution by this Court.

Since *Taylor*—most recently in *Davis*—this Court instructs that federal courts are not to apply a review of the particular facts underlying a § 924(c) conviction to determine its viability. Rather, this Court requires courts to apply the limited modified categorical approach to determine if the record conclusively establishes the jury unanimously agreed upon a qualifying predicate. This review is limited to *Shepard* documents and does not include a fact-based inquiry into the record.

Yet here, the Ninth Circuit strayed from this Court's *Taylor* line of cases to apply a fact-based *Hedgpeth* harmless error review. The Ninth Circuit reviewed the trial evidence to determine the § 924(c) conviction was constitutional. App. B, p. 4a. To do so, the Ninth Circuit framed the issue as a "flaw" in the jury instructions. App. B, p. 4a. But the true issue is the unconstitutional "flaw" in the jury's conviction because the Court can never be certain which predicate underlies the

§ 924(c) conviction. And the categorical and modified categorical approaches, according to this Court, demand certainty.

Other circuits, and district courts, correctly adhere to the modified categorical review considering a limited class of judicial records to determine whether the predicate can be determined with certainty. This divide treats similarly situated petitioners disparately. Given the dire mandatory, consecutive sentencing consequences of § 924(c) convictions, this Court's guidance is critical to provide equity and consistency. Petitioners ask this Court to grant review to resolve the ongoing split and settle any tension that may exist between the *Taylor* line of cases and *Hedgpeth*.

A. The Ninth Circuit's approach contradicts this Court's *Taylor* line of cases.

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); *see also Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding "it is not apparent to us from the sparse record before us which of those statutes were the bases" for the ACCA predicate convictions). For crime of violence determinations, both *Johnson* and *Davis* require courts to apply the categorical approach for record analysis as established by *Taylor* and its progeny. *Johnson*, 135 S. Ct. at 2557; *Davis*, 139 S. Ct. at 2326-36; *see Taylor*, 495 U.S. at 602, *Shepard*, 544 U.S. at 26, *Descamps v. United States*, 570 U.S. 254, 263-64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018). The categorical approach determines: (1) if the limited

Shepard documents clearly establish with certainty the predicate on which the jury found the § 924(c) offense was based, and (2) if that predicate qualifies under the § 924(c) elements clause crime-of-violence definition.

The modified categorical approach examines a limited number of court documents, commonly called *Shepard* documents. *Shepard*, 544 U.S. at 26. The permitted *Shepard* documents *do not* include the closings and alleged trial evidence upon which the Circuit panel relied here. Appendix A, pp. 4-5. Rather, the permissible *Shepard* documents are limited to: "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 v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Shepard*, 544 U.S. at 26). These 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. *Id.* at 24-25. When ambiguity exists regarding which statute serves as the crime-of-violence predicate, the government has not met its burden and the conviction cannot stand. "The problem," this Court explains, "is that what the [district] court has been required to find is debatable." *Shepard*, 544 U.S. at 25 (alteration and internal quotation marks omitted); *see, e.g., Taylor,* 495 U.S. at 602 (vacating where record was too "sparse" to identify the statutes under which the defendant was convicted).

This modified categorical approach also comports with this Court's holding in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), requiring that any fact increasing

the mandatory minimum sentence is an element that must be submitted to a jury and unanimously found beyond a reasonable doubt. The *Davis* holding also rests on the "rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." 139 S. Ct. at 2333. The ambiguity regarding Count Three's predicate offense must be resolved in Petitioners' favor.

In applying categorical analysis, courts neither examine the underlying facts nor make a sufficiency-of-the evidence determination. *Mathis*, 136 S. Ct. at 2251-52 (reiterating rules for categorical and modified categorical analysis, prohibiting consideration of "the particular facts underlying the [] convictions"). How a defendant committed the offense "makes no difference" to the crime of violence determination. *Id.* at 2251. Thus, the Ninth Circuit's discussion of alleged facts underlying the offenses is irrelevant and improper. App. B, p. 4a.

Looking to the narrowly permitted *Shepard* documents here reveals ambiguity about whether the § 924(c) predicate crime of violence was conspiracy or aiding and abetting armed bank robbery. App. F-J, pp. 14a-55a. The jury instructions explicitly authorized the jury to find § 924(c) guilt on either conspiracy or aiding and abetting armed bank robbery. App. I, p. 45a. And, jurors are presumed to have followed follow the district court's instructions. Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985). The general verdict form allowed § 924(c) guilt based on either conspiracy or aiding and abetting armed bank robbery, and the

jury did not specify which of the two served as the basis for the § 924(c) conviction. App. H, p. 30a.

The remaining record documents indicate conspiracy is the underlying crime of violence. The superseding indictment specified only conspiracy as the basis under § 924(c) in Count 3. App. J, pp. 51a-55a. The final judgments also state conspiracy as the crime of violence for Count Three's § 924(c) charge. App. F, p. 14a; App. G, p. 22a.

Because conspiracy does not qualify as a crime of violence under § 924(c), Petitioners' convictions and sentences under § 924(c) are unconstitutional. The lack of specificity and unanimity as to the predicate crime of violence leaves this Court with no assurance, much less the requisite certainty, that the § 924(c) convictions rest on a constitutional predicate. To avoid an unconstitutional result in direct conflict with this Court's precedent, review is necessary.

B. The Ninth Circuit's application of fact-based harmless error review to ambiguous § 924(c) jury convictions is unsound.

Until the government clearly establishes the underlying predicate, the Court cannot compare that predicate's elements to § 924(c)'s required elements. The categorical approach's requirement of a clearly established predicate conviction ensures that the crime-of-violence determination does not become the nebulous, protracted fact-based analysis the Ninth Circuit undertook here. *Davis* specifically rejected—at length—the Ninth Circuit's fact-based approach for § 924(c) challenges. *Davis*, 139 S. Ct. at 2326-36.

Rather than apply the modified categorical approach, the Ninth Circuit erroneously applied fact-based harmless error analysis under *Hedgpeth v. Pulido*, 555 U.S. 57 (2008). In doing so, the Ninth Circuit relied on its flawed reasoning in *United States v. Dominguez*, 954 F.3d 1251, 1259 (9th Cir. 2020), which summarily held "[w]here two counts served as predicate offenses for a § 924(c) conviction, the conviction is lawful so long as either offense qualifies as a crime of violence." But *Dominguez* improperly employed the fiction that the jury found § 924(c) guilt based on both Hobbs Act robbery and Hobbs Act conspiracy. The categorical and modified categorical approach preclude this dual predicate assumption; therefore, *Dominguez*'s summary and unreasoned holding conflicts with Supreme Court precedent about the categorical and modified categorical approach.

The "key question" for both the categorical and modified categorical approaches is "a question of law: What do the uncontested documents in the record establish about the elements of the crime of conviction with the requisite certainty?" *Marinelarena v. Barr*, 930 F.3d 1039, 1049 (9th Cir. 2019) (en banc), *petition for cert. filed*, No. 19-632 (Nov. 15, 2019). The Court "must ask what the [petitioner's] conviction *necessarily* involved, 'not what acts [the petitioner] committed.'" *Id.* at 1051. Where "the record of conviction is ambiguous on this point then [a petitioner's] 'conviction did not '*necessarily*' involve facts that correspond to' a []qualifying offense." *Id.* at 1052-53.

Furthermore, under *Stromberg v. California*, 283 U.S. 359 (1931), upon which *Hedgpeth* relies, *see* 555 U.S. at 58, ambiguous sentencing records require

reversal. *See also Zant v. Stephens*, 462 U.S. 862, 881 (1983) ("A general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.") (emphasis added) (citing Stromberg).

Any the tension between the Supreme Court's *Taylor* line of cases limiting crime-of-violence determinations to categorical analysis, and the Supreme Court's holding in *Hedgpeth* applying a factual harmlessness review to instructional error, was resolved by *Davis*'s rejection of a fact-based approach to crime-of violence determinations. In *Davis*, as here, "the government abandoned its longstanding position that § 924(c)(3)(B) requires a categorical analysis and began urging lower courts to adopt a new case specific method" that would look to the defendant's actual conduct in the predicate offense." 139 S. Ct. at 2327 (cleaned up). Analyzing § 924(c)'s "text, context, and history," this Court held "the statute simply cannot support the government's newly minted case-specific theory." *Id.* at 2327, *see also id*. at 2328-36.

This Court's holding in *Alleyne*, 570 U.S. 99, also precludes the panel's fact-based analysis. Under *Alleyne*, a fact increasing the mandatory minimum sentence is an element that must be submitted to a jury and found beyond a reasonable doubt. *Id.* at 108. Here, the indictment and general verdict listing multiple predicates in a single § 924(c) count allowed an increased mandatory minimum sentence without the unanimity required by *Alleyne*. To prevent courts from

"guess[ing] which predicate the jury relied on," the *Alleyne* decision "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." *In re Gomez*, 830 F.3d 1225, 1227-28 (11th Cir. 2016) (granting application for successor motion to vacate for challenge to general guilty verdict for duplicitous § 924(c) count under Johnson). *Alleyne* prohibits affirming the Petitioners' § 924(c) convictions and seven-year mandatory minimum consecutive sentences through retroactive judicial fact-finding. *See Descamps*, 570 U.S. at 269-70 (holding that having a judge, not a jury, make findings about underlying conduct "raise[s] serious Sixth Amendment concerns").

C. The Ninth Circuit's reasoning produces incongruous results.

The split has already led to incongruous results. The Fourth Circuit recently held that when a § 924(c) offense potentially rests on two predicates, the Court must "determine whether each predicate offense qualifies as a crime of violence" and "if one predicate offense does not qualify, we would be required to vacate the conviction." *United States v. Runyon*, 983 F.3d 716, 725 (4th Cir. 2020). In *Runyon*, the jury submitted a general verdict that did not indicate whether it relied on conspiracy to commit murder for hire or carjacking in finding Runyon guilty under § 924(c). *Id.* at 725. The Fourth Circuit, applying the modified categorical approach, found Runyon "could have been convicted by the jury's reliance on either predicate offense, requiring us to determine whether each predicate offense qualifies as a crime of violence." *Id.* However, because the Fourth Circuit found both predicates qualified under § 924(c)'s force clause, it did not vacate the § 924(c)

conviction. *Id.* at 726-27. The Office of the Federal Public Defender estimates that, due to *Runyon*, more than 70 defendants in the District of Maryland will likely receive relief from § 924(c) convictions in pending § 2255 motions, with several hundred defendants in the Fourth Circuit also expected to receive relief.

The Eleventh Circuit, in In re Gomez, 830 F.3d at 1227, authorized a successor motion to vacate where the defendant was convicted of an indictment charging a § 924(c) offense based on multiple predicate offenses (including Hobbs Act robbery and Hobbs Act conspiracy). *Id.* The general verdict form was ambiguous because it did not reveal the particular predicate upon which the § 924(c) conviction necessarily rested. *Id.* The Eleventh Circuit found that a "crime of violence" finding could not be predicated on this ambiguous verdict, authorizing a successor motion to vacate. *Id.*

Numerous district courts are in accord with the Fourth Circuit, applying this Court's modified categorical approach to ambiguous § 924(c) convictions, affording habeas relief. *See, e.g., United States v. White*, -- F. Supp. 3d --, No. 11-cr-00276-DC, 2020 WL 8024725, *4-5 (W.D. Tex. Dec. 29, 2020) (granting § 2255 relief, vacating ambiguous § 924(c) conviction where *Shepard* documents did not clearly establish a qualifying predicate); *United States v. Berry*, No. 3:09-cr-00019, 2020 WL 591569, *3 (W.D. Va. Feb. 6, 2020) (same); *United States v. McCall*, No. 3:10-cr-170-HEH, 2019 WL 4675762, *6-7 (E.D. Va. Sept. 24, 2019); *United States v. Lettiere*, No. CV 16-157-M-DWM, 2018 WL 3429927, *4 (D. Mont. July 13, 2018); *United States v. Sangalang*, No. 2:08-CR-163 JCM (GWF), 2018 WL 2709865 (D. Nev. June 5, 2018);

United States v. Flores, No. 2:08-cr-163-JCM-GWF, 2018 WL 2709855, *6-9 (D. Nev. June 5, 2018) (same).

The Ninth Circuit's opinion also creates incongruity with non-trial § 924(c) convictions resting on ambiguous predicates. For example, in cases with ambiguous plea agreements—where the plea agreement lists multiple § 924(c) predicates—there would be no trial transcript to review for factual harmless error analysis. Yet the Ninth Circuit's opinion would permit relief in the plea agreement scenario while precluding it from those who exercised their trial rights. The Ninth Circuit's holding would also require district and circuit courts to engage in post-hoc judicial fact-finding, usurping the role of the jury, violating the Fifth and Sixth Amendments.

Therefore, the Ninth Circuit's opinion, which creates a circuit split and conflicts with this Court's established precedent applying the categorical approach to crime-of-violence determinations, cannot stand. The Ninth Circuit's erroneous approach to crime-of-violence determinations conflicts with other circuits and this Court's precedent. Whether this Court's precedent requires the categorical approach, rather than a fact-based harmless error analysis, to determine validity of an 18 U.S.C. § 924(c) conviction under *United States v. Davis*, 139 S. Ct. 2319 (2019), is a question of exceptional national importance. Without resolution by this Court, the circuit division will remain unresolved. This Court's review and correction of the Ninth Circuit's approach will ensure national consistency for similarly situated defendants.

II. Certiorari is necessary to resolve whether aiding and abetting armed bank robbery is not a qualifying crime of violence under § 924(c)'s physical force clause.

Petitioners maintain that the § 924(c) count is unconstitutional as neither conspiracy nor aiding and abetting armed bank robbery qualify as § 924(c) crimes of violence. The government conceded below that conspiracy to commit armed bank robbery, 18 U.S.C. § 371 (Count One), does not qualify as a § 924(c) crime of violence and cannot sustain Count Three. Petitioners maintain that Count Two's aiding and abetting armed bank robbery, 18 U.S.C. §§ 2 and 2113 (Count Two) does not qualify as a crime of violence under § 924(c)'s force clause, and ask this Court to resolve this question.

To qualify under § 924(c)'s force clause, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This means the offense must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States,* 139 S. Ct. 544, 554 (2019) *(citing Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely reckless or negligent, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

A. Aiding and abetting armed bank robbery does not qualify as a § 924(c) crime of violence.

As a matter of law, aiding and abetting armed bank robbery does not qualify as a crime of violence under the § 924(c)(3)(A) force clause because it does not categorically require as an element the use of intentional violent force against a

person or property of another. This Court has not addressed whether aiding and abetting armed bank robbery is a crime of violence under § 924(c)'s force clause. To establish guilt for aiding and abetting a federal offense under 18 U.S.C. § 2, a defendant need only facilitate commission of the offense—the defendant need not participate in every element of the offense. *Rosemond v. United States*, 572 U.S. 65, 73 (2014). An aider and abettor is not required to necessarily "use" force.

The aiding and abetting statute states: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). It is sufficient for the prosecution to prove the defendant participated in a criminal scheme "knowing its extent and character." *Rosemond*, 572 U.S. at 77. And, a defendant "can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Allison v. Kyle*, 66 F.3d 71, 73 (5th Cir. 1995). "The quantity of assistance [is] immaterial, so long as the accomplice did *something* to aid the crime." *Id.* (emphasis in original) (cleaned up).

Applying categorical analysis demonstrates aiding and abetting lacks the necessary "active employment" for the "use, attempted use, or threatened use of physical force against the person of another" which necessitates intentional use of force. *Leocal*, 543 U.S. at 8-10. An aider and abettor simply need not use, attempt to use, or threaten violent physical force to be convicted.

Petitioners acknowledges that several circuits decline to distinguish aiders and abettors from principals in robbery crime-of-violence inquiries.[2] These flawed opinions, however, rely on irrelevant determinations of punishment and fail to adequately resolve the central inquiry: whether an aider or abettor *necessarily* commits an offense containing the force requirements that § 924(c)(3)(A) mandates.

For example, the Eleventh Circuit was the first to consider whether aiding and abetting Hobbs Act robbery qualified under § 924(c)'s elements clause, denying authorization for a successor motion to vacate on this issue. *See In re Colon*, 826 F.3d 1301 (11th Cir. 2016). Citing § 2's language that an aider and abettor "is punishable as a principal," two judges concluded an aider and abettor of Hobbs Act robbery necessarily commits a crime meeting the elements clause. *Id.* at 1305. *Colon*'s analysis is deficient because it confused the categorical approach—which examines elements—with the contextually distinct punishments provided for aider or abettors. For categorical analysis, only the statutory elements of an offense—not its punishment—can render it a crime of violence. *See United States v. Benally*, 843 F.3d 350, 352 (9th Cir. 2016).

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[2] *See, e.g.,* U*nited States v. García-Ortiz,* 904 F.3d 102, 109-10 (1st Cir. 2018) (finding aiding and abetting Hobbs Act robbery is a § 924(c) crime of violence); *United States v. Richardson*, 906 F.3d 417, 421 (6th Cir. 2018) (same), *vacated on other grounds,* 136 S. Ct. 1157 (2019); *United States v. Brown*, 973 F.3d 667, 697 (7th Cir. 2020) (same), *petition for cert. pending*, No. 20-6527 (Dec. 3, 2020); *Kidd v. United States*, 929 F.3d 578, 580-81 (8th Cir. 2019) (finding aiding and abetting armed robbery is a § 924(c) crime of violence), *cert. denied*, 140 S. Ct. 894 (2020); *United States v. Deiter*, 890 F.3d 1203, 1215-16 (10th Cir. 2018) (finding aiding and abetting armed bank robbery is an ACCA violent felony); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (denying application for successor motion to vacate, noting aiding and abetting Hobbs Act robbery is a § 924(c) crime of violence).

Colon contains a compelling dissent that correctly identifies the *Colon* majority's problematic categorical approach to 18 U.S.C. § 2: courts do not ask how a defendant is punished, but rather how liability is established. Specifically, an aider or abettor may be convicted of a crime without committing all of that crime's elements. *In re Colon*, 826 F.3d at 1306-07 (Martin, J., dissenting). In her dissent, Judge Martin favorably compared the aiding and abetting issue with post-*Johnson* decisions finding conspiracy offenses do not satisfy the physical force clause and stated, "I am not willing to assume, as the majority does here, that aiding and abetting crimes meet the 'elements clause' definition simply because an aider and abettor 'is punishable as a principal.'" *Id.* at 1307-08 (quoting 18 U.S.C. § 2(a)). Judge Martin conducted the correct analysis.

Another sitting judge on the Eleventh Circuit also agrees *Colon* was wrongly decided. *Boston v. United States*, 939 F.3d 1266, 1273-74 & n.3 (11th Cir. 2019) (Pryor, J., concurring), cert. *denied, 14*1 S. Ct. 103 (2020). This concurrence explains *Colon* "tak[es] a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transform[s] it into a reality—that a getaway car driver actually committed a crime involving the element of force." *Id.* ("I believe *Colon*'s rule does not comport with ACCA's intent, written into the text of § 924, to punish more harshly offenders with a history of violent criminal conduct. For these reasons, I believe that *Colon* was wrongly decided.").

In a recent dissent from the denial of certiorari, Justice Sotomayor notes *Colon* should not have precedential value as it merely denied authorization for a successive habeas petition and was "not [a] fully briefed direct appeal[] subject to adversarial testing." *St. Hubert v. United States*, 140 S. Ct. 1727, 1728 (June 8, 2020) (Sotomayor, J., dissenting from denial of certiorari). Her reasoned dissent discusses why "summary action[s] . . . without merits briefing or oral argument 'do[] not have the same precedential effect as does a case decided on full briefing and argument.'" *Id.* at 1730 (citing *Gray v. Mississippi*, 481 U.S. 648, 651, n.1 (1987), and *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)). Therefore, this Court should correct *Colon*'s non-precedential and flawed reasoning.

Because aiding and abetting armed bank robbery can be committed by merely facilitating commission of the offense—and the defendant need not participate in every element—aiding and abetting Hobbs Act robbery is overbroad and is not a crime of violence.

B. Armed bank robbery also does not qualify as a crime of violence.

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 18 U.S.C. § 924(c)'s force clause.

During pendency of Petitioners' 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 § 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.

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

"Intimidation" does not meet § 924(c)'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*, 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*, 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 important, *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*, 559 U.S. at 138).

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." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016). 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 § 924(c)'s force clause.

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

Section 924(c)'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 § 924(c)'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§ 924(c) force clause.

3. 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 § 924(c) force clause.

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

The Ninth Circuit has repeatedly held the presence of a weapon alone does not establish the requisite force necessary under the force clause. *United States v. Shelby*, 939 F.3d 975, 979 (9th Cir. 2019) (finding Oregon first-degree armed robbery does not qualify as a violent felony under ACCA's force clause); *Parnell*, 818 F.3d at 980 (finding Massachusetts armed robbery does not qualify as a violent felony under ACCA's force clause).

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 § 924(c).

5. 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, and Sixth 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).

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 § 924(c).

Conclusion

The continuing split between federal circuit courts indicates the judiciary cannot agree on whether crime-of-violence determinations are limited to the categorical approach. In conflict with the Fourth Circuit, the Ninth Circuit continues to apply a fact-based analysis despite numerous requests by defendants it follow this Court's categorical approach. The unfortunate result is that petitioners in the Fourth Circuit receive habeas relief from ambiguous § 924(c) convictions, while those in the Ninth Circuit cannot. Certiorari is therefore necessary to preclude unpredictable, arbitrary, and unconstitutional convictions as this Court provided in *Taylor, Shepard, Descamps, Mathis, Johnson*, *Dimaya*, and *Davis*.

Petitioners also ask this Court to address whether aiding and abetting armed bank robbery and substantive armed bank robbery are qualifying crimes of violence under 18 U.S.C. § 924(c)'s force clause.

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