NO. _____

In The
Supreme Court of the United States

JERALD DEAN GODWIN,
Petitioner,
v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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February 8, 2021

QUESTION PRESENTED

I. Does the Eleventh Circuit's practice of applying published panel orders—issued in the context of an application for leave to file a second or successive 28 U.S.C. § 2255 motion and decided in a truncated time frame without adversarial testing—as binding precedent in *all* subsequent appellate and collateral proceedings deprive inmates and criminal defendants of their right to due process, fundamental fairness, and meaningful review of the claims presented in their § 2255 motions and direct appeals?

II. The Eleventh Circuit Court of Appeals has held that a predicate conviction for bank robbery under 18 U.S.C. § 2113(a) categorically qualifies as a "crime of violence" for purposes of the elements clause in 18 U.S.C. § 924(c)(3)(A). However, as the history and text of the federal bank robbery statute make clear—and as prosecutions under the statute illustrate—section 2113(a) may be violated: (1) by unintended or otherwise accidental intimidation; or (2) by extortionate threats to economic interests alone. Given these circumstances, can the Eleventh Circuit's holding be reconciled with this Court's precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Curtis Johnson v. United States,* 559 U.S. 133 (2010), and *Mathis v. United States*, 136 S. Ct. 2243 (2016)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Jerald Dean Godwin*, No. 09-cr-86, U.S. District Court for the Middle District of Alabama. Judgment entered on June 15, 2010.
- *Jerald Dean Godwin v. United States*, No. 16-cv-509, U.S. District Court for the Middle District of Alabama. Judgment entered on February 28, 2020.
- *Jerald Dean Godwin v. United States*, No. 20-11665, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered on September 9, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Jerald Dean Godwin respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision below is unpublished. *Godwin v. United States*, 824 Fed. App'x 955 (11th Cir. 2020) (unpublished). The opinion is included in Petitioner's Appendix. Pet. App. 1a.

The district court's opinion denying Mr. Godwin's 28 U.S.C. § 2255 motion is published. *Godwin v. United States*, 441 F. Supp. 3d 1243 (M.D. Ala. 2020). The opinion is included in Petitioner's Appendix. Pet. App. 1b.

The district court's order granting Mr. Godwin's application for a certificate of appealability is unreported, but reproduced in the Petitioner's Appendix. Pet. App. 1c.

The report and recommendation of the magistrate judge, which recommended that Mr. Godwin's § 2255 motion be denied, is unreported. *Godwin v. United States*, 2018 WL 10667128 (M.D. Ala. 2018), *adopted by* 441 F. Supp. 3d 1243. The recommendation is reproduced in the Petitioner's Appendix. Pet. App. 1d.

JURISDICTION

The Eleventh Circuit's opinion in this case was issued on September 9, 2020. *See* Pet. App. 1a. No rehearing was sought, rendering the petition for

writ of certiorari due on or before December 8, 2020. However, due to public health concerns relating to the COVID-19 pandemic, this Court entered an order, extending the deadline to file the petition to 150 days from the date of the lower court judgment. The certiorari petition is now due on February 8, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 924(c) provides for a mandatory consecutive sentence for any defendant who uses a firearm during a "crime of violence" or a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). For purposes of § 924(c), "crime of violence" means an offense that is a felony and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Additionally, the federal bank robbery statute, 18 U.S.C. § 2113(a), provides, in relevant part, that:

> (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 [shall be imprisoned in accordance with the rest of the § 2113].

18 U.S.C. § 2113(a).

Section 2255(h)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides:

> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--
>
> . . .
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

28 U.S.C. 2244(b)(4) provides:

> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

28 U.S.C. § 2244(b)(4).

STATEMENT OF THE CASE

In May 2009, a federal grand jury returned an indictment against Mr. Jerald Dean Godwin, charging him with: (1) bank robbery, in violation of 18 U.S.C. § 2113(a) (Count One); and (2) brandishing a firearm during and in relation to a "crime of violence"—the bank robbery charged in Count One—in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Two). Notably, the indictment charged Mr. Godwin only with standard bank robbery under § 2113(a), and not with armed bank robbery under § 2113(d).

Subsequently, Mr. Godwin agreed to plead guilty to the indictment pursuant to a written Fed. R. Crim. P. 11(c)(1)(C) agreement. The agreement described the statutory elements of Mr. Godwin's bank robbery offense as: (1) that the defendant took from the person, money, then in the possession of a federally insured bank; (2) that the defendant took such money by means of force or violence or intimidation; and (3) that the defendant did so knowingly and willfully.

The district court accepted Mr. Godwin's guilty plea, and adjudged him guilty. In June 2010, the district court sentenced Mr. Godwin to 70 months' imprisonment as to Count One, to be followed by a mandatory consecutive 84 months as to Count Two. Mr. Godwin declined to file a direct appeal.

Subsequently, on June 26, 2015, this Court decided *Johnson v. United States*, and held that the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague because of the uncertainty surrounding how to estimate the risk posed by a crime, and how much risk was required for a crime to qualify as a violent felony. 135 S. Ct. 2551, 2558-63 (2015).

On June 27, 2016—within one year of *Johnson* for purposes of § 2255(f)(3)[1]—Mr. Godwin timely filed an initial, *pro se* 28 U.S.C. § 2255 motion, seeking to vacate his § 924(c) conviction and his total sentence based

[1] The one-year anniversary of *Johnson* occurred on June 26, 2016, which was a Sunday. As a result, a § 2255 motion relying on *Johnson* is timely under § 2255(f)(3) if filed on or before June 27, 2016. *See* Fed. R. Civ. P. 6(a)(1)(C).

on *Johnson*. Specifically, Mr. Godwin argued that the residual clause in § 924(c)(3)(B) was unconstitutionally vague because it suffered from the same twofold indeterminacy that caused the Supreme Court to invalidate the residual clause of the ACCA:

> Petitioner would hold that both 18 U.S.C. § 924(e) and 18 U.S.C. § 924(c) (at question in the instant offen[s]e) are penal statutes requiring higher sentences after the court adjudicating the offense finds that it is a "crime of violence." Before *Johnson*, what constituted a "crime of violence" in both 18 U.S.C. § 924(e) and 18 U.S.C. § 924(c), was determined by refer[r]ing to elements of the offense, in other words, categorically; as opposed to referencing the actual conduct of the defendant. It is this categorical approach that is at the very heart of the argument in Johnson: "It is one thing to apply an imprecise serious potential risk standard to real world facts; it is quite another to apply it to a judge imagined abstraction." *Johnson v. United States*, 135 S. Ct. at 2558.

The government filed a response in opposition to Mr. Godwin's § 2255 motion, arguing that: (1) Mr. Godwin's § 2255 motion was untimely, because it was neither governed by *Johnson* nor filed within one year of the date that his convictions became final; (2) Mr. Godwin's § 2255 motion was barred by the collateral attack waiver in his plea agreement; (3) Mr. Godwin's *Johnson* claim was procedurally barred because he did not raise it in the trial court or on direct appeal; and (4) Mr. Godwin's claim failed on the merits, because *Johnson* had no impact on the residual clause in § 924(c)(3)(B), and, even if it did, bank robbery continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A).

On June 8, 2016, the Eleventh Circuit issued a published panel order—denying an application for leave to file second or successive § 2255 motions—and holding, for the first time, that "a bank robbery conviction under § 2113(a) by force and violence or by intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause." *In re Sams,* 830 F.3d 1234, 1239 (11th Cir. 2016).

The Eleventh Circuit then decided *St. Hubert*, and held that published panel orders such as *Sams* were entitled to full precedential value, even on direct appeal or in initial collateral proceedings. *United States v. St. Hubert*, 883 F.3d 1319, 1329 (11th Cir. 2018), *opinion vacated and superseded by St. Hubert*, 909 F.3d 335.

On July 20, 2018, a magistrate judge issued a report and recommendation, recommending that Mr. Godwin's § 2255 motion be denied, and his case dismissed with prejudice. Specifically, the magistrate judge determined that Mr. Godwin was not entitled to relief on the merits of his *Johnson* claim, because, irrespective of whether *Johnson* invalidated the residual clause in § 924(c)(3)(B), his underlying predicate conviction continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). The magistrate judge explained that *In re Sams* constituted binding Eleventh Circuit precedent, foreclosing Mr. Godwin's arguments and mandating the conclusion that his § 924(c) conviction was unaffected by *Johnson*.

Mr. Godwin filed objections to the R&R, challenging the magistrate judge's conclusion that he was not entitled to relief on the merits of his *Johnson* claim. Mr. Godwin acknowledged the Eleventh Circuit's decision in *St. Hubert*, but argued that *St. Hubert* was wrongly decided because it was inappropriate for published panel orders denying an application for leave to file a second or successive § 2255 motion under §§ 2244(b)(3)(A) and 2255(h)(2) to be applied as binding precedent in a case involving an *initial* § 2255 motion. Mr. Godwin pointed out the significant legal and pragmatic concerns associated with applying these published panel orders as binding precedent across the board, and he argued that this practice deprived him of his right to due process, fundamental fairness, and meaningful review of the claims presented in his § 2255 motion.

Mr. Godwin later supplemented these objections in response to the magistrate judge's invitation to address the impact of *Stokeling v. United States*, 139 S. Ct. 544 (2019), upon his case. Mr. Godwin also filed supplemental briefing addressing: (1) whether § 2113(a) was categorically overbroad because it could be violated "by extortion"; and (2) whether Mr. Godwin had satisfied his burden—under *Beeman v. United States*, 871 F.3d 1215, 1221-25 (11th Cir. 2017)—of proving that his § 924(c) conviction relied solely upon the residual clause.

While Mr. Godwin's objections were pending, this Court decided *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), and confirmed that the residual

clause in § 924(c)(3)(B), "carrie[d] the same categorical-approach command as § 16(b)," and was therefore doomed to the same unconstitutional fate as the statutes at issue in *Johnson* and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

On February 28, 2020, the district court issued a published opinion, overruling Mr. Godwin's objections, adopting the recommendation of the magistrate judge, and denying Mr. Godwin's § 2255 motion with prejudice. The district court reached this conclusion based on its determination that: (1) Mr. Godwin's argument was "foreclosed by the Eleventh Circuit's opinion in *In re Sams*," which held that a conviction for bank robbery under § 2113(a) fell within the scope of the § 924(c)(3)(A) elements clause; and (2) it was bound by *St. Hubert*, 909 F.3d at 346, to follow *Sams*. *Godwin*, 441 F. Supp. 3d at 1257-59. However, in reaching this conclusion, the court expressly noted that Mr. "Godwin's arguments on these issues are far from frivolous, and deserve careful consideration." *Id.* at 1257. The court expressed "misgivings" with *Sams* being applied as binding precedent, since *Sams* "was decided on an application for leave to file a second or successive habeas petition filed by a pro se prisoner on an expedited, 30-day timeline," and at any rate, did "not at all address the extortion or mens rea issues raised here by Godwin." *Id.* at 1257-58.

The district court granted Mr. Godwin a certificate of appealability ("COA") as to the following issue:

> Whether Mr. Godwin's 18 U.S.C § 924(c) conviction is unconstitutional in light of *Johnson v. United States*, 135 S. Ct.

2551 (2015), and/ or *United States v. Davis*, 139 S. Ct. 2319 (2019)?

Mr. Godwin appealed, arguing that: (1) his underlying predicate conviction—for bank robbery 18 U.S.C. § 2113—did not categorically qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A); and (2) the residual clause in § 924(c)(3)(B) was unconstitutionally vague. Mr. Godwin also reiterated his contention that it was inappropriate for published panel orders such as *Sams*—decided on an emergency 30-day basis, without counseled briefing from either party—to be applied as binding precedent foreclosing merits review of the claim presented in his § 2255 motion.

The government responded by moving for summary affirmance.

Subsequently, the Eleventh Circuit granted the government's motion, and affirmed the district court's denial of Mr. Godwin's § 2255 motion. *Godwin*, 824 F. App'x at 958. The Court of Appeals determined that Mr. Godwin's *Johnson* claim failed on the merits, because, even though *Davis* invalidated the residual clause in § 924(c)(3)(B), his underlying predicate conviction continued to qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). *Id.* at 957-58. The panel explained its conclusion as follows:

> Here, the government's position that Godwin's claim is foreclosed by *In re Sams* is correct as a matter of law. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. Specifically, we have already determined that bank robbery under § 2113(a) categorically qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause. *See In re Sams*, 830 F.3d at 1238-39. It is immaterial that the decision in *In re Sams* was an order on a successive application because, as a published order, it is binding precedent even in § 2255 proceedings. *St. Hubert*, 909 F.3d at 346.

> It is true that, in *In re Sams*, we did not expressly decide whether § 2113(a) is divisible. But by applying the categorical approach in reaching our conclusion that bank robbery categorically qualifies as a crime of violence under § 924(c)(3)(A)'s elements clause, we necessarily concluded that § 2113(a) is indivisible. And although we did not consider in *In re Sams* the precise arguments Godwin now asserts regarding the bank robbery statute, our prior panel precedent rule applies all the same because we did not limit our holding in *In re Sams* to any portion of the bank robbery statute. *See In re Lambrix*, 776 F.3d at 794; *In re Sams*, 830 F.3d at 1238-39. Godwin's arguments that *In re Sams* and *St. Hubert* were wrongly decided are without merit, as we remain bound by our prior published decisions, and neither case has been "overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *See In re Lambrix*, 776 F.3d at 794 (internal quotation marks omitted).

Id. In other words, the panel found itself bound to follow *St. Hubert*'s mandate that published panel orders such as *Sams* are to be applied as binding precedent in all subsequent Eleventh Circuit cases, regardless of context.

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. As a result of *St. Hubert*, inmates in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other Circuits, and they are deprived of their right to due process, fundamental fairness, and meaningful review of the claims presented in their § 2255 motions.

As already discussed, the Eleventh Circuit held in *St. Hubert* that:

> Lest there be any doubt, we now hold in this direct appeal that law established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions are binding precedent on *all* subsequent panels of this Court, including those reviewing direct appeals and collateral attacks, unless and until they are overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.

St. Hubert, 909 F.3d at 346 (quotations and alterations omitted).

As several judges of the Eleventh Circuit have noted, there are significant legal and pragmatic concerns associated with applying these published panel orders as binding precedent across the board, irrespective of context. *See United States v. St. Hubert*, 2019 WL 1262257 (11th Cir. 2019) (Wilson, J., dissenting from the denial of rehearing en banc); (J. Pryor, J., dissenting from the denial of rehearing en banc); (Martin, J., dissenting from the denial of rehearing en banc); *see also In re: Williams*, 898 F.3d 1098, 1104 (11th Cir. 2018) (Wilson, J., specially concurring).

First and foremost, the Eleventh Circuit requires any non-capital application seeking leave to file a second or successive § 2255 motion to be submitted pursuant to a standardized form. *See* 11th Cir. R. 22-3(a); *see also Williams*, 898 F.3d at 1104. These forms are almost always filled out by a *pro se* prisoner, who is given a 2.5″ x 5.25" space in which to explain why his claim relies upon a "new rule of constitutional law." *Id.* at 1101. Even if the applicant feels that he needs additional space to explain the complexities of his legal claim, the form expressly prohibits the submission of additional briefing or attachment.[2] As a result, these applications are usually decided without

[2] Specifically, Instruction (4) on the first page of the form provides that:

> Additional pages are not permitted except with respect to identifying additional grounds for relief and facts on which you rely to support those grounds. To raise any additional claims, use the "Additional Claim" pages attached at the end of this application, which may be copied as necessary. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.

The form is accessible at:
http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Form2255APP_FEB17.pdf

counseled argument from the petitioner, and are always decided without oral argument and without an opposing brief from the government. *Id.* at 1102.

Moreover, in the two years following *Johnson*, the Eleventh Circuit issued more than 3,588 orders on second or successive applications. *Williams*, 898 F.3d at 1104. In each of these cases, the Court considered itself bound to issue a ruling within 30 days, "no matter what" the unique circumstances of the case. *Id.* at 1103 (citing *In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014)); *see also see also* 28 U.S.C. § 2244(b)(3)(D) ("The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion). The Court adhered to this deadline, even if it did not have access to the whole record. *Williams*, 898 F.3d at 1102. Notably, no other Circuit considers itself so strictly bound by this deadline. *See Moore v. United States*, 871 F.3d 72, 77–78 (1st Cir. 2017); *Johnson v. United States*, 623 F.3d 41, 43 n.3 (2d Cir. 2010); *In re Hoffner*, 870 F.3d 301, 307 n.11 (3d Cir. 2017); *In re Williams*, 330 F.3d 277, 281 (4th Cir. 2003); *In re Siggers*, 132 F.3d 333, 335 (6th Cir. 1997); *Gray-Bey v. United States,* 201 F.3d 866, 867 (7th Cir. 2000); *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015); *Browning v. United States*, 241 F.3d 1262, 1263 (10th Cir. 2001).

Worse still, any mistakes made in such an order, published or unpublished, are effectively made unreviewable by operation of 28 U.S.C. § 2244(b)(3)(E). *Id.* at 1104; *see also* 28 U.S.C. § 2244(b)(3)(E) (mandating that

the "denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari"). And unlike other Circuits, the Eleventh Circuit has added to this procedural hurdle by holding that it is "require[d] to dismiss a claim that has been presented in a prior application" for leave to file a second or successive § 2255 motion—even if the applicant files the second application because the Court got it wrong the first time. *See In re Baptiste*, 828 F.3d 1337, 1339 (11th Cir. 2016).

Despite the limitations inherent in this truncated, non-adversarial procedure, the Eleventh Circuit began using these published panel orders to decide, on the merits, that certain crimes qualified as "crimes or violence" or "violent felonies." *See, e.g., In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (per curiam) (bank robbery in violation of 18 U.S.C. § 2113(a), (d)); *In re Saint Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016) (Hobbs Act robbery); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) (aiding-and-abetting Hobbs Act robbery); *In re Smith*, 829 F.3d 1276, 1280 (11th Cir. 2016) (carjacking in violation of 18 U.S.C. § 2119); *In re Watt*, 829 F.3d 1287, 1290 (11th Cir. 2016) (aiding-and-abetting assaulting a postal employee); *Sams*, 830 F.3d at 1239 (bank robbery in violation of 18 U.S.C. § 2113(a)); *In re Burgest*, 829 F.3d 1285, 1287 (11th Cir. 2016) (Florida manslaughter and kidnapping); *In re Welch*, 884 F.3d 1319 (11th Cir. 2018) (Alabama first degree robbery and first degree assault). Some of these orders were decided over dissents, and others decided issues of first

impression. *See Williams*, 898 F.3d at 1098 & n.4 (collecting cases). And in all of these orders, the Court exceeded its gatekeeping function under §§ 2255(h)(2), 2244(b)(3), which, properly conceived, focuses not on whether a proposed § 2255 motion, if authorized, would ultimately succeed, but rather, "whether the petitioner has made out a prima facie case of compliance with the § 2244(b) requirements." *Id.* at 1101.

As a specially concurring, three-judge panel of the Eleventh Circuit has succinctly explained: "after *St. Hubert*, published panel orders—typically decided on an emergency thirty-day basis, with under 100 words of argument (often written by a pro se prisoner), without any adversarial testing whatsoever, and without any available avenue of review—bind all future panels of this court." *Id.*

As a result of *St. Hubert*, courts in the Eleventh Circuit are now denying § 2255 motions and affirming convictions based on precedent *that was never subjected to the full adversarial process*. There is no way around it: inmates and defendants in the Eleventh Circuit receive a more truncated form of judicial review than inmates in other circuits.

Thus, this practice both pretermits the adversarial process, and insulates erroneous precedent from review. As Justice Gorsuch noted in *Dimaya*: "the crucible of adversarial testing is crucial to sound judicial decision making. We rely on it to yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232-33

(2018) (Gorsuch, J., concurring) (quotation omitted). Applying published panel orders as binding precedent in initial § 2255 proceedings is unsound, unfair, and unconstitutional. As a result of *St. Hubert*, all courts in the Eleventh Circuit court "are prohibited from giving inmates the type of merits review of their sentences that inmates routinely receive in other Circuit[s]." *In re Williams*, 898 F.3d 1098, 1110 (11th Cir. 2018) (Martin, J., specially concurring).

Mr. Godwin's case presents an ideal vehicle to resolve this issue, because it is clear from the record that the district court denied his § 2255 motion because: (1) *In re Sams* establishes that Mr. Godwin's predicate conviction continues to qualify as a crime of violence for purposes of § 924(c)(3)(A); and (2) as a result of *St. Hubert*, this decision constitutes binding precedent, even though rendered in the context of applications to file a second or successive § 2255 motion. Mr. Godwin challenged this ruling both in the district court and on appeal, specifically emphasizing that it was inappropriate for published panel orders such as *Sams* to be applied as binding precedent in a case involving an *initial* § 2255 motion. The Eleventh Circuit then affirmed the district court's decision based upon *Sams* and upon *St. Hubert*'s extension of the prior panel precedent rule. Therefore, the question presented is squarely at issue under the facts of this case.

Additionally, the Eleventh Circuit's application of the prior panel precedent rule violates due process. The Due Process Clause provides that

"[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court identified three factors that must be balanced when analyzing a procedural due process claim: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The private interest at issue in this case is especially great, as it implicates Mr. Godwin's liberty. The risk of error is likewise especially high, as the procedures utilized by the Eleventh Circuit in this case will result in the unchallenged, per curiam affirmance of countless appeals based on precedent that was never subjected to the adversarial gauntlet. And, the process that Mr. Godwin seeks is not at all burdensome: he simply desires that the Eleventh Circuit decide his case based on precedent that was subject to full adversarial testing.

II. The Eleventh Circuit's rejection of Mr. Godwin's *Johnson/ Davis* claim is contrary to—or misapprehends a crucial aspect of—this Court's precedent in *Leocal, Curtis Johnson,* and *Mathis.*

As previously discussed, the Eleventh Circuit held in *In re Sams* that "a bank robbery conviction under § 2113(a) by force and violence or by

intimidation qualifies as a crime of violence under the § 924(c)(3)(A) use-of-force clause." *Sams,* 830 F.3d at 1239. Even setting aside the myriad problems that stem from *Sams* having preclusive effect, the panel's conclusion overlooks or misapprehends crucial aspects of this Court's precedent.

Courts determine whether an offense qualifies as a "crime of violence" under the elements clause in § 924(c)(3)(A) by employing the categorical approach, and looking to the statutory elements of the offense, not the actual facts of the defendant's conduct. *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013), *overruled in part by Ovalles*, 905 F.3d at 1252; *see also Davis*, 139 S. Ct. at 2328-39 (discussing the § 924(c)(3)(A) elements clause). Even if the evidence indicates that the defendant's conduct was unmistakably violent, the court must "ask whether the crime, in general, plausibly covers any non-violent conduct." *McGuire*, 706 F.3d at 1336; *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). A predicate conviction will only be considered a crime of violence "if the plausible applications of the statute of conviction all require the use or threatened use of force." *McGuire*, 706 F.3d at 1337.

When applying the "elements-only" categorical approach to a statute that is phrased disjunctively, courts must carefully distinguish between a statute that lists multiple elements in the alternative—thereby defining multiple crimes—and a statute that enumerates various factual means of committing a single element. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). In applying the categorical approach, it is only the *elements*—the

constituent parts of a crime's legal definition—that are relevant to the court's determination that an offense falls within the scope of the elements clause in § 924(e)(2)(B)(i) or § 924(c)(3)(A). *Id.* at 2248. Facts, by contrast, are mere real-world things, extraneous to the crime's legal requirements, and having no legal consequence to the "crime of violence" determination under the categorical approach. *Id.* In *Mathis*, this Court illustrated this distinction with the following hypothetical:

> To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." And similarly, to bring the discussion back to burglary, a statute might—indeed, as soon discussed, Iowa's burglary law does—itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score.

Id. at 2249 (citations omitted).

Additionally, in the context of 18 U.S.C. § 924, the phrase "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States,* 559 U.S. 133, 140 (2010) (holding that Florida battery did not qualify as a "violent felony" under the ACCA's elements clause, because it encompassed mere intentional touching, which was not the type of violent force contemplated by § 924(e)). As

this Court has explained in the context of the ACCA, this degree of force includes "the amount of force necessary to overcome a victim's physical resistance," no matter how slight. *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (holding that a state court robbery statute—which could be violated by the application of only slight force overcoming "victim resistance"—satisfies the requirements of the § 924(e) elements clause). However, the term "physical force" is not broad enough to encompass any "nominal contact" that "does not require resistance or even physical aversion on the part of the victim." *Id.* at 553 (distinguishing Florida robbery from Florida battery, and reaffirming the *Curtis Johnson* articulation of "physical force" as "force capable of causing physical pain or injury to another person").

"In deciding whether an element requires the use of such force, [courts] focus on the least culpable conduct criminalized by the statute." *United States v. Deshazior*, 882 F.3d 1352, 1357 (11th Cir. 2018) (citing *Moncrieffe*). As a result, a particular offense does not satisfy the requirements of the elements clause if there is "a realistic probability" that these least culpable acts encompass nonviolent conduct. *St. Hubert*, 909 F.3d at 350, *overruled on other grounds by Davis*, 139 S. Ct. at 2336. A § 2255 movant may show this "realistic probability" by pointing to "his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues." *Gonzales v. Duenas-Alvares*, 549 U.S. 183, 193 (2007); *see also St. Hubert*, 909 F.3d at 350.

Moreover, like the identically-worded elements clause in § 16(a), the elements clause in § 924(c)(3)(A) requires a "crime of violence" to have "as an element the *use*, attempted use, or threatened use of physical force." *Compare* 18 U.S.C. § 16(a) *with* 18 U.S.C. § 924(c)(3)(A). As this Court noted in *Leocal*, the term "use" in this context requires "active employment." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (relying upon *Bailey v. United States*, 516 U.S. 137 (1995), which narrowed the scope of § 924(c) by interpreting the statutory term "use"). Thus, the "use of physical force" identified in § 924(c)(3)(A)—like the key phrase in § 16(a)—"most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9 (holding that a Florida conviction for driving under the influence did not qualify as a "crime of violence" under the elements clause in § 16(a) because the statute only required proof that the person acted negligently in operating the vehicle). Since *Leocal*, many lower courts have clarified that a statute requiring a *mens rea* of recklessness likewise does not satisfy the "use of physical force" requirement inherent in the "crime of violence" definitions in § 16(a) and § 2L1.2, because it "cannot be said to require the *intentional* use of force." *United States v. Palomino Garcia*, 606 F.3d 1317, 1335-36 (11th Cir. 2010) (emphasis in original) (holding that the defendant's prior conviction for Arizona aggravated assault did not qualify as a "crime of violence" for purposes

of U.S.S.G. § 2L1.2).[3] As a result, section 924(c)(3)(A) requires the *intentional* use, attempted use, or threatened use of physical force.

The federal bank robbery statute under which Mr. Godwin was convicted provides, in relevant part, that:

> (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 [shall be imprisoned in accordance with the rest of the § 2113].

18 U.S.C. §§ 2113(a) (emphasis added).

To prove a violation of § 2113(a), the government must demonstrate that the defendant: (1) knowingly took money or property in the possession of a federally insured bank from or in the presence of the person described in the indictment; (2) the defendant did so "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a). Thus, notably, the bank robbery statute may be violated, either: (1) by taking property "by force and violence"; (2) by taking property "by intimidation"; or (3) by obtaining property "by

[3] There is presently an active circuit split—and a grant of certiorari from this Court—concerning the same and related issues. Specifically, the First, Fourth, and Ninth Circuits have arrived at the same conclusion as the Eleventh Circuit in *Palomino Garcia*, and held that an offense that can be committed recklessly does not qualify as a "crime of violence" or "violent felony" under the elements clause. *See United States v. Windley,* 864 F.3d 36 (1st Cir. 2017); *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018); *United States v. Orona*, 923 F.3d 1197 (9th Cir. 2019). The Sixth, Fifth, Eighth, Tenth, and D.C. Circuits have reached a contrary conclusion. *See United States v. Burris,* 920 F.3d 942 (5th Cir. 2019); *Davis v. United States*, 900 F.3d 733 (6th Cir. 2018); *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016); *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271 (D.C. Cir. 2018). On March 2, 2020, this Court granted *certiorari* to resolve whether a criminal offense that can be committed with a mens rea of recklessness can qualify as a "violent felony" under the ACCA's elements clause. *See United States v. Borden*, 796 F. App'x 266 (6th Cir. 2019), *cert granted, Borden v. United States*, No. 19-5410.

extortion." 18 U.S.C. § 2113(a). This disjunctive phrasing does not set out alternative elements and separate crimes, but rather, enumerates the various felonious *means* by which one can accomplish the prohibited taking of property from a bank. *See Mathis*, 136 S. Ct. at 2249. Indeed, a jury need not agree on any one particular method by which money or property was taken from the bank in order to support a conviction under § 2113. *See* 11th Circuit Pattern Jury Instruction (Criminal), § O76.1 (2016). As a result, the "itemized construction" of § 2113(a) gives the court no special license to explore the particular *means* by which money was taken from a bank on a particular occasion, and the court must look solely to the *elements* of the offense.

Both the history and the text of the federal bank robbery statute support this conclusion. Structurally, all forms of standard bank robbery—whether committed "by force and violence," "by intimidation," or "by extortion"—are criminalized in a single paragraph in § 2113(a). Regardless of *how* the property was obtained from the bank on a particular occasion, the statute contains a single penalty provision making the single offense punishable by "not more than twenty years." *See* 18 U.S.C. § 2113(a). In contrast, sections 2113(b), (d), and (e) each set forth a separate penalty for a separate crime with different elements. *See* 18 U.S.C. § 2113(b)(making it a crime punishable by no more than one year to carry away property from a bank); 18 U.S.C. § 2113(d) (making armed bank robbery punishable by no more than 25 years); 18 U.S.C. § 2113(e)(making bank robbery with forced accompaniment punishable by no

less than 10 years). This structural division of penalties—and the lack thereof with respect to the first paragraph of § 2113(a)—constitutes strong evidence that "by extortion", "by intimidation", and "by force and violence" are simply alternative means of satisfying a single element of the same bank robbery offense, rather than multiple crimes with separate penalty provisions. *See Mathis*, 136 S. Ct. at 2249 (noting that a single statute may list elements in the alternative, and thereby define multiple crimes, if it contains two separate penalties, "one more serious than the other").

The history of the federal bank robbery statute likewise supports this conclusion. Prior to 1986, § 2113(a) "cover[ed] the taking of property of a federally insured bank by force and violence or by intimidation, if the taking was 'from the presence of another.' Federal courts [were] divided over the question whether this provision proscribed extortionate conduct—e.g., a perpetrator who, from a place outside the bank, threaten[ed] the family of a bank official in order to cause the bank official to remove money from the bank and deliver it to a specified location." H.R. Rep. No. 99-797 sec. 5[4]. Rather than making bank extortion a new federal offense, Congress resolved this split by amending the federal bank robbery statute to include unlawfully obtaining property "by extortion." *Id.* ("There is no gap in federal law. Extortionate conduct is prosecutable [] under the bank robbery provision . . ."). Thus, the amendment to § 2113(a) establishes bank robbery as a single offense that

[4] *Compare, e.g., Brinkley v. United States*, 560 F.2d 871 (8th Cir. 1977) (conduct covered); with *United States v. Culbert*, 548 F.2d 1355 (9th Cir. 1977) (conduct not covered).

occurs both when money is taken "by force and violence or by intimidation" inside the bank, and when it is taken "by extortion" from outside the bank. Thus, the particular place the offender was standing when he made the demand for money is a factual circumstance with no consequence to the elements of the offense. *See Mathis*, 136 S. Ct. at 2250 (holding that Iowa's burglary statue set forth alternative means of satisfying a single locational element, rather than alternative elements and separate crimes).

As a result, applying the categorical approach and looking to the least of the acts criminalized by § 2113(a), the statute is categorically overbroad because it may be violated either "by intimidation" or "by extortion." Neither of these alternatives categorically involve as an element the *intentional use*, attempted use, or threatened use of *violent physical force* against the person or property of another.

As the Eleventh Circuit has explained, a bank robbery occurs "by intimidation" when "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's actions." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005). "Whether a particular act constitutes intimidation is viewed objectively, and a defendant can be convicted under section 2113(a) *even if he did not intend for an act to be intimidating*." *Id.* (emphasis added). Several other circuit courts have similarly held that "the intimidation element of § 2113(a) is satisfied if 'an ordinary person in the teller's position reasonably could infer a threat of bodily

harm from the defendant's acts,' whether or not the defendant actually intended the intimidation." *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996); *see also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) ("As intimidation is measured, in this circuit, under an objective standard, whether or not Yockel intended to intimidate the teller is irrelevant in determining his guilt"); *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) ("The determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions. Whether Foppe specifically intended to intimidate [the victim] is irrelevant").

As a result of this precedent, the second element of § 2113(a) may be accomplished by *unintended* intimidation, measured only by reference to the objective fears of the teller. However, the "use of force" required by the § 924(c)(3)(A) elements clause requires "a higher degree of intent than negligent or merely accidental conduct." *Leocal*, 543 U.S. at 9. Unintended or otherwise accidental intimidation does not require the *intentional* employment of physical force necessary to satisfy the "use of physical force" component of § 924(c)'s elements clause. *Palomino Garcia*, 606 F.3d at 1335-36. Therefore, the bank robbery statute criminalizes conduct that does not involve as an element the *intentional* use or threatened use of physical force, and it does not categorically qualify as a "crime of violence" under § 924(c)(3)(A).

Moreover, the level of physical force required to violate § 2113(a) does not rise to the level of "violent force—that is, force capable of causing physical

pain or injury to another person" or their property. *Curtis Johnson*, 559 U.S. at 140. As noted previously, the plain language of § 2113(a) provides that the taking of property may occur, not just by force and violence, but also "by intimidation" or "by extortion." As Congress has specifically explained, "[t]he term 'extortion' as used in 18 U.S.C. 2113(a) means obtaining property from another person, without the other person's consent, induced by the wrongful use of actual or threatened force, violence, *or fear*." H.R. Rep. No. 99-797 sec. 51 (emphasis added). This wrongful use of fear to obtain property may include placing someone in fear of unlawful litigation, or having their sexually explicit videos published online. *See Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 320 (S.D.N.Y. 2016) ("Where a lawsuit is not pursued by lawful methods alone, however, a lawsuit or threats to initiate a lawsuit may constitute extortion [under the Hobbs Act]"); *see also Azzara v. United States*, 2011 WL 5025010, at *3 (S.D.N.Y. 2011) (unpublished) (recounting the facts giving rise to the petitioner's conviction for Hobbs Act extortion, where the defendant threatened to display sexually explicit videotapes on a website after being ordered to destroy the tapes).

Thus, as the Eleventh Circuit has explained, "extortion" may be accomplished by putting the victim in a "state of anxious concern, alarm, or apprehension of harm, *and it includes fear of economic loss* as well as fear of physical violence." *United States v. Vallejo*, 297 F.3d 1154, 1165 (11th Cir. 2002) (emphasis added); *see also United States v. Bornscheuer*, 563 F.3d 1228,

1236-37 (11th Cir. 2009) (affirming the defendant's conviction for Hobbs Act extortion, in part because the defendant's extortionate threat to "take other action" "include[ed] the commission of acts calculated to cause economic loss"). Plainly, an extortionate threat to economic interests alone does not involve the threatened use of *physical* force.

Furthermore, "extortion does not even require an explicit threat from the defendant"; rather "it requires only that defendant induced his victim to part with property through the use of fear. The jury is then permitted to find such inducement by use of fear from testimony as to the state of mind of the victim." *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971); *see also United States v. Grassi*, 783 F.2d 1572, 1578 (11th Cir. 1986) (citing *Hyde*); *see also United States v. Golay*, 560 F.2d. 866, 869 (8th Cir. 1977) ("[i]t is possible for a defendant using extortionate tactics to be convicted of bank robbery"). Thus, robbery "by extortion" under § 2113(a) does not require the defendant to make any actual threat, much less engage in forcible or violent conduct.

Accordingly, as these examples illustrate, the level of force required to violate § 2113(a) "by extortion" does not rise to the level of "violent force—that is, force capable of causing physical pain or injury to another person" or their property under *Curtis Johnson* and *Stokeling*. *See Curtis Johnson*, 559 U.S. at 140. Therefore, § 2113(a) is categorically overbroad because it may be violated "by extortion," and a conviction under that statute does not qualify as a "crime of violence" for purposes of the elements clause in § 924(c)(3)(A).

Likewise, for purposes of § 2113(a), "intimidation" occurs whenever "an ordinary person in the teller's position *reasonably could infer a threat of bodily harm* from the defendant's actions." *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (emphasis added). Applying this standard, a defendant in the Eleventh Circuit may be convicted of bank robbery if he does nothing more than present a demand letter to the teller. *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996) (affirming the defendant's conviction under § 2113(a), where "[t]he evidence showed that Cornillie presented demand letters to the bank tellers and that the bank tellers complied with his demands out of fear"). Indeed, the teller's "inference" that there has been a threat of bodily harm can support a conviction under § 2113(a), even if the defendant does not interact with the teller at all. *See Kelley,* 412 F.3d at 1245-46 (affirming the appellant's conviction under § 2113(a), where the evidence showed that the tellers heard the appellant "slam" into the counter and then observed him taking money from the cash drawer).

"It is thus possible for a defendant to engage in intimidation without ever issuing a verbal threat by, for example, slamming a hand on a counter." *In re Smith*, 829 F.3d 1276, 1283 (11th Cir. 2016) (Pryor, J., dissenting) (discussing whether carjacking qualifies as a crime of violence under § 924(c)). As these examples illustrate, § 2113(a) does not require the defendant to make any actual threat, much less engage in forcible or violent conduct. Therefore, there is not just a realistic probability, but a legal certainty, that § 2113(a)

encompasses conduct which does not rise to the level of "force capable of causing physical pain or injury to another person" or property required under *Curtis Johnson* and *Stokeling*. *See Curtis Johnson*, 559 U.S. at 140.

Accordingly, applying the categorical approach and looking to the least of the acts criminalized by § 2113(a), the federal bank robbery statute does not have *as an element* the use, attempted use, or threatened use of physical force against the person or property of another. The Eleventh Circuit's decision to the contrary conflicts with this Court's precedent, and this Court's review is required to ensure that the Eleventh Circuit gives full force and effect to *Curtis Johnson*, *Mathis*, and *Leocal*.

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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