No. 20-

In The Supreme Court Of The United States

Nathan Dent,
Frank Morales,

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

RENE L. VALLADARES
Federal Public Defender
*Wendi L. Overmyer
Assistant Federal Public Defender
*Amy B. Cleary
Assistant Federal Public Defender
Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org
Amy_Cleary@fd.org
*Counsel for Petitioners,
Nathan Dent
Frank Morales

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Questions Presented

I. The government concedes that one of the possible predicate offenses used to convict Petitioners under 18 U.S.C. § 924(c)—conspiracy—is not a § 924(c) crime-of-violence predicate under *United States v. Davis*, 139 S. Ct. 2319 (2019). However, the federal circuits are split over the standard to apply when the § 924(c) predicate is ambiguous, i.e., where one possible predicate does not qualify as a crime of violence and another possible predicate does. The Fourth Circuit holds the § 924(c) conviction must be vacated if one possible predicate offense does not qualify as a crime of violence. The Ninth Circuit holds the § 924(c) conviction remains valid if one possible predicate offense qualifies as a crime of violence.

The question presented is whether an 18 U.S.C. § 924(c) conviction resting on more than one possible predicate offense is unconstitutional where at least one predicate does not qualify as a crime of violence.

II. Petitioners also ask this Court to address whether, to make federal armed bank robbery "fit" the 18 U.S.C. § 924(c)(3)(A) crime-of-violence physical force clause definition, the Circuits interpret armed bank robbery too narrowly by requiring violent force as an element of 18 U.S.C. § 2113(a).

List of Proceedings

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

1. *United States v. Dent,* No. 19-17370 (9th Cir. Oct. 2, 2020) (unpublished) (Order denying Petition for Rehearing), App. A.

2. *United States v. Morales,* No. 19-17369 (9th Cir. Oct. 2 2020) (unpublished) (Order denying Petition for Rehearing), App. B.

3. *United States v. Dent*, No. 19-17370 (9th Cir. May 15, 2020) (unpublished) (Order denying Certificate of Appealability), App. C.

4. *United States v. Morales*, No. 19-17369 (9th Cir. May 15, 2020) (unpublished) (Order denying Certificate of Appealability), App. D.

United States District Court (D. Nev.):

1. *United States v. Dent,* No. 2:09-cr-261-GMN-RJJ-2, 2019 WL 4658356 (D. Nev. Sept. 23, 2019) (unpublished) (Order denying Motion to Vacate under 28 U.S.C. § 2255 and denying a Certificate of Appealability), App. E.

2. *United States v. Morales,* No. 2:09-cr-261-GMN-RJJ-1, 2019 WL 4658354 (D. Nev. Sept. 23, 2019) (unpublished) (Order denying Motion to Vacate under 28 U.S.C. § 2255 and denying a Certificate of Appealability), App. F.

3. *United States v. Morales and Dent*, No. 2:09-cr-261-GMN-RJJ, Dkt. Nos. 3, 47, 84, 86, 95, 136, 137 (D. Nev. Nov. 3, 2009) (Joint Superseding Indictment, Plea Agreements, Plea Hearing Transcripts, Final Judgments), App. G-M.

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Petition for Certiorari

Petitioners Nathan Dent and Frank Morales jointly petition for a writ of certiorari to review the final judgments of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Supreme Court Rule 12.4, as Petitioners are co-defendants and each challenge judgments from the same court on identical issues.

Opinions Below

The Ninth Circuit's summary opinions denying relief and reconsideration are not published. App. A, B, C, D. The District of Nevada's orders are unreported but reprinted at 2019 WL 4658356 and 2019 WL 4658354. App. E, F.

Jurisdiction

The Ninth Circuit Court of Appeals issued judgments denying reconsideration on October 2, 2020. App. A, B. 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)(1)(A) of Title 18 of the United States Code provides, in relevant part:

> 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 conspiracy to commit "Hobbs Act robbery," 18 U.S.C. § 1951(a), provides in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

4. The 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.
>
> * * *
>
> (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 Nathan Dent and Frank Morales are just two of many individuals convicted and sentenced to mandatory, consecutive prison terms under 18 U.S.C. § 924(c) where the record is unclear if the § 924(c) conviction is actually based on a qualifying crime-of-violence predicate offense *or* a non-qualifying offense. This important issue has split the federal Circuit courts, resulting in inconsistent decisions over whether a § 924(c) conviction resting on more than one predicate is constitutional when one predicate does not qualify as a crime of violence. Resolution by this Court is necessary to ensure congruous results and prohibit using § 924(c) to unconstitutionally convict and imprison.

A. Original Proceedings

Petitioners Dent and Morales, co-defendants who each pled guilty in 2009 under separate plea agreements, stand convicted of aiding and abetting brandishing a firearm during a crime or violence under 18 U.S.C. § 924(c) (Count Three). App. G, H, I, J, K, L. M. At the outset of these proceedings, the government alleged two possible crime of violence predicates for the § 924(c) count, though it later retracted this position.

The superseding indictment alleged three counts against Dent and Morales:

> Count One: Conspiracy to interfere with commerce by robbery (Hobbs Act conspiracy), 18 U.S.C. § 1951(a);
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> Count Two: Armed bank robbery, 18 U.S.C. § 2113(a), (d); and
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> Count Three: Aiding and abetting brandishing a firearm during, in relation to, and in furtherance of a crime of violence, "namely, violations of Title 18, United States Code, Section 1951(a), **Conspiracy** to Interfere with Commerce by Robbery (commonly referred to as "**Hobbs Act Conspiracy**"), **and** Title 18, United States Code, Section 2113, **Armed Bank Robbery**, as further set forth in Counts One and Two of this Indictment," under 18 U.S.C. § 924(c)(1)(A) and (2).

App. M (emphases added). Thus, the superseding indictment listed both Counts One and Two as the predicate crime of violence offense for Count Three. App. M.

In Dent's plea agreement, Count Three did not specify the predicate "crime of violence" upon which the § 924(c) charge rested. App. I, p. 11. Dent's plea agreement instead stated the "essential elements" of the § 924(c) charge required the government to prove he: "(i) committed another substantive crime (in this case bank robbery), (ii) knowingly brandished a firearm, and (iii) brandished the firearm

during and relation to a crime of violence;" *or* the government prove aiding and abetting Count Three requiring: "(i) the crime of 'Brandishing a Firearm During a Crime of Violence" in violation of 18 U.S.C. § 924(c)(1)(A)(ii) was committed by someone, (ii) defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of the offense of 'Brandishing a Firearm During a Crime of Violence,' and (iii) defendant acted before the above-referenced crime was completed." App. I, p. 11.

Likewise, in Morales's plea agreement, Count Three failed to specify upon which predicate "crime of violence" the § 924(c) charge rested. App. K, p. 10. Morales's plea agreement stated the "essential elements" of Count Three's § 924(c) charge required the government to prove Morales: "(i) committed another substantive crime (in this case bank robbery), (ii) knowingly brandished a firearm, and (iii) brandished the firearm during and relation to a crime of violence." App. K, p. 10.

At Dent's and Morales's change of plea hearings, the district court did not clarify or identify the predicate crime of violence for Count Three. At Dent's plea hearing, the district court reviewed the essential elements of Count Three with Dent, stating only "that the essential elements set forth in Part III of the plea memorandum would have to be proved by the government beyond a reasonable doubt before the jury [] to secure a conviction." App. J, p. 15. The court accepted Dent's guilty plea to Count Three without clarifying the predicate crime of violence offense. At Morales's plea hearing, the district court merely confirmed Morales

"knowingly brandished a firearm during and in relation to help accomplish" "bank robbery" and displayed a firearm as "part of an agreement or conspiracy" to accomplish that crime. App. L, pp. 12-13. The court accepted Morales's guilty plea without clarifying the predicate crime of violence offense in Count Three. App. L, pp. 14-15.

The district court also did not address the predicate crime of violence at either Dent's or Morales's sentencing hearings. Dist. Ct. Dkt. 138, 139. And, the final judgments for both Dent and Morales fail to identify the predicate offense underlying Count Three's § 924(c) count. App. G, H.

Dent received a total sentence of 155 months in prison: 71 months on Counts One and Two, to run concurrently, followed by the mandatory consecutive 84-month sentence for the § 924(c) conviction. App. G. Morales received a total sentence of 234 months in prison: 150 months on Counts One and Two, to run concurrently, followed by the mandatory consecutive 84-month sentence for the § 924(c) conviction. App. H. Neither Dent or Morales filed a direct appeal.

B. Habeas Proceedings under *Johnson and Davis*

Following this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), Dent and Morales each sought relief under 28 U.S.C. § 2255 from Count Three's § 924(c) conviction and sentence. Dist. Ct. Dkt. 100, 105, 107, 108. During pendency of their motions to vacate, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding § 924(c)'s residual clause is unconstitutionally vague.

In opposing Dent's and Morales's motions, the government acknowledged Hobbs Act conspiracy "served as an additional predicate for [the] 924(c) conviction." Dist. Ct. Dkt. 111, p. 2 n.1; Dist. Ct. Dkt. #112, p. 2 n.1. Both parties filed various supplemental authority during the habeas litigation. Dist. Ct. Dkt. 116, 117, 127, 129, 131, 133.

Three months after this Court issued *Davis*, the district court found Dent's and Morales's motions were timely, but denied the motions and requests for a Certificate of Appealability (COA). App. E, F. The district court agreed Hobbs Act conspiracy is not a qualifying crime of violence. App. E, F. However, the court believed the § 924(c) convictions were "not solely based" on Hobbs Act conspiracy as they were "also grounded" on armed bank robbery, which the Ninth Circuit holds is a qualifying crime of violence. App. E, F (citing *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018)).

C. Habeas Appeal to Ninth Circuit

Dent and Morales timely appealed, each seeking a COA. The Ninth Circuit denied their COA requests without addressing the ambiguity of the predicates underlying their § 924(c) conviction. App. C, D. The Ninth Circuit instead asserted Dent and Morales had "not made a substantial showing of the denial of a constitutional right," citing 28 U.S.C. § 2253(c)(2), *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), and *Watson*, 881 F.3d 782. App. C, D. Dent and Morales moved for reconsideration, which the Ninth Circuit summarily denied. App. A, B.

Dent's estimated release date is April 25, 2021, after which he will serve a five-year term of supervised release. Morales's estimated release date is January 28, 2026, after which he will serve a five-year term of supervised release.

Reasons for Granting the Petition

This Court should grant review to correct the Ninth Circuit's erroneous standard for adjudicating ambiguous § 924(c) convictions—a standard that conflicts with the Fourth Circuit's well-reasoned approach to this issue—and should grant review of the federal Circuits' erroneous interpretation of the armed bank robbery statute. Both questions are of exceptional importance given the graduated mandatory minimum sentences ranging from five years to life that § 924(c) imposes on defendants. Dent and Morales are just two of the hundreds of defendants now serving mandatory minimum sentences for § 924(c) convictions. According to the United States Sentencing Commission's latest statistics, between 13% to 20% the current federal prison population is serving a § 924(c) sentence.[1] This case thus presents an excellent vehicle for the Court to resolve constitutional and statutory questions of great import to many defendants.

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[1] U.S. Sent. Comm'n, *Federal Offenders in Prison* (May 2019) (finding 20,319 individuals, 13% of the current federal prison population, is serving a § 924(c) sentence) available at https://www.ussc.gov/research/quick-facts/federal-offenders-prison-interactive; *see also* Federal Bureau of Prisons, *Inmate Statistics, Offenses* (Jan. 16, 2021) (finding 29,988 federal inmates are serving prison sentences for weapons offenses, making up 20.3% of the total federal prison population) available at https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

I. The circuit split regarding the standard for ambiguous § 924(c) convictions requires resolution by this Court.

This Court has consistently explained that, under the modified categorical approach, federal courts must determine if the record conclusively establishes the § 924(c) conviction rests on a qualifying predicate offense. This review is limited to *Shepard* documents, which must clearly establish a qualifying predicate.

The Ninth Circuit strayed from this Court's rulings to hold, however, that as long as *one* possible predicate § 924(c) offense qualifies as a crime of violence the inquiry is over, even when other possible predicates do not, i.e., when the predicate is ambiguous. *United States v. Dominguez*, 954 F.3d 1251, 1259 (9th Cir. 2020) *petition for cert. pending*, No. 20-1000 (Jan. 21, 2021). The Ninth Circuit's problematic standard does not require certainty as to the predicate underlying the § 924(c) conviction. This violates the categorical and modified categorical approaches—both of which this Court holds demand certainty.

Other federal Circuits and district courts correctly adhere to the modified categorical approach to determine whether the underlying § 924(c) predicate can be determined with certainty. This divide treats similarly situated petitioners disparately. Given the extreme consequences of mandatory, consecutive sentencing for § 924(c) convictions, this Court's guidance is critical to provide equity and consistency. Dent and Morales ask this Court to grant review to resolve the ongoing split regarding ambiguous § 924(c) convictions.

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 analysis 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 § 924(c) offense was based; and (2) if that specific predicate qualifies under the § 924(c) elements clause crime-of-violence definition.

The modified categorical approach permits examination of a limited number of court documents, commonly called *Shepard* documents, typically: "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. *Shepard*, 544 U.S. at 24-25. But when ambiguity exists regarding which statute served as the crime-of-violence predicate, the government fails 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." *Id.* at 25 (alteration and internal quotation marks omitted); *see, e.g.,* T*aylor,* 495 U.S. at 602 (vacating where record was too "sparse" to identify the statutes under which the defendant was convicted).

Looking to the narrowly permitted *Shepard* documents here reveals unresolved ambiguity about whether the § 924(c) predicate crime of violence was conspiracy *or* armed bank robbery. App. H-M. The superseding indictment listed both Counts One and Two as the predicate crime of violence offenses for Count Three. App. M.

The plea agreements fail to address the ambiguity by specifying the predicate "crime of violence" upon which the § 924(c) charge rested and compounds the uncertainty by including aiding and abetting liability. App. I, p. 11; App. K, p. 10.

The plea hearings themselves failed to resolve this ambiguity. At Dent's plea hearing, the district court did not review the essential elements of Count Three, stating only "that the essential elements set forth in Part III of the plea memorandum would have to be proved by the government beyond a reasonable doubt before the jury [] to secure a conviction." App. J, p. 15. At Morales's plea hearing, the district court confusingly confirmed Morales "knowingly brandished a firearm during and in relation to help accomplish" "bank robbery" and displayed a

firearm as "part of an agreement or conspiracy" to accomplish that crime. App. L, pp. 12-13.

As a result, the district court did not address the predicate crime of violence at either Dent's or Morales's sentencing hearings. Dist. Ct. Dkt. 138, 139. And, the final judgments did not identify the § 924(c) predicate offense. App. G, H.

Because conspiracy does not qualify as a crime of violence under § 924(c), Dent's and Morales's convictions and sentences under § 924(c) are unconstitutional. The lack of specificity for the underlying 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 direct conflicting with this Court's precedent, further review is necessary.

B. The Ninth Circuit's standard for ambiguous § 924(c) convictions is unsound.

Until the government clearly establishes the underlying predicate, a court cannot compare that predicate's elements to § 924(c)'s required elements. Yet the Ninth Circuit summarily held in *Dominguez*, 954 F.3d at 1259, that "[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." In so holding, the Ninth Circuit improperly employed the fiction that the *Dominguez* jury found § 924(c) guilt based on *both* Hobbs Act robbery and Hobbs Act conspiracy. The categorical and modified categorical approach prohibit this dual predicate assumption; therefore, *Dominguez*'s summary and unreasoned holding conflicts with this Court's

precedent governing application of the categorical and modified categorical approaches.

The key question under the modified categorical approach is whether the *Shepard* documents establish the elements of the crime of conviction with the requisite certainty—meaning the § 924(c) offense necessarily involved elements equating to a crime of violence. *Moncrieffe*, 569 U.S. at 190 (citing *Shepard*, 544 U.S. at 24). In conducting this analysis, the reviewing court must presume the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized. *Id.* at 190-91 (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Where, as here, the record is ambiguous as which possible predicate underlies the § 924(c) offense, the § 924(c) conviction cannot *necessarily* rest on the elements required by § 924(c)'s physical force clause.

Here, the *Shepard* documents do not demonstrate that Dent's and Morales's § 924(c) convictions rest solely on either conspiracy or armed bank robbery. The district court and the government both conceded this point. Specifically, the district court agreed that Hobbs Act conspiracy underlies the § 924(c) conviction and is not a qualifying crime of violence, but ultimately affirmed by finding the § 924(c) conviction was "also grounded" on armed bank robbery. App. E, F. And, in response to Dent's and Morales's motions to vacate, the government also acknowledged Hobbs Act conspiracy "served as an additional predicate for his 924(c) conviction." Dist. Ct. Dkt. 111, p. 2 n.1; Dist. Ct. Dkt. 112, p. 2 n.1. The *Shepard*

documents therefore fail to clearly establish the § 924(c) counts necessarily rest on an offense meeting § 924(c)'s physical force clause.

Cementing the demand for certainty in relation to predicates underlying § 924(c) convictions, *Davis*'s held 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 categorical approach and the rule of lenity require the ambiguity that exists here be resolved in Dent's and Morales's favor. To avoid an unconstitutional result and resolve the ongoing inter-circuit conflict, further review by this Court is necessary.

C. The Ninth Circuit's reasoning conflicts with that of other federal courts, producing a split and incongruous results.

The split over the adjudication of ambiguous § 924(c) predicates has led to incongruous results. The resulting Circuit split requires guidance from this Court.

The Fourth Circuit holds 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 without indicating whether it relied on the predicate offense of conspiracy to commit murder for hire or carjacking to find 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 physical force clause, it did not vacate the § 924(c) conviction. *Id.* at 726-27. Due to *Runyon*, eligible defendants in the Fourth Circuit will receive relief from § 924(c) convictions through § 2255 motions.

The Fifth Circuit is in accord. *United States v. Jones*, 935 F.3d 266, 272-74 (5th Cir. 2019), vacated ambiguous § 924(c) convictions finding the jury's general verdict may have relied on an invalid crime of violence (RICO conspiracy) rather than a valid drug trafficking predicate. On remand, the defendants in *Jones* were resentenced for the remaining non-§ 924(c) convictions. *United States v. Jones*, No. 2:13-cr-00205-SM-JCW, Dkt. Nos. 917, 918, 919 (E.D. La. Nov. 13, 2019).

Numerous district courts are also 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. Rodriguez*, No. 94-cr-313-CSH, 2020 WL 1878112 (S.D.N.Y. Apr. 15, 2020) (same); *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).

Therefore, the Ninth Circuit's decision to allow an ambiguous § 924(c) conviction to stand when one of the possible predicates does not qualify, creates a circuit split and conflicts with this Court's established precedent. Without resolution by this Court, the circuit division will remain unresolved. This Court's review and correction of the Ninth Circuit's approach here will ensure national consistency for similarly situated individuals with § 924(c) convictions who, like Dent and Morales, are serving very lengthy, unconstitutional prison sentences.

II. Certiorari is necessary to resolve whether Circuits have impermissibly narrowed the scope of federal armed bank robbery under 18 U.S.C. § 2113, contravening the statute's plain language.

Dent's and Morales's Count Three § 924(c) convictions are unconstitutional as neither conspiracy nor armed bank robbery qualify as § 924(c) crimes of violence. The district court agreed below that conspiracy does not qualify as a § 924(c) crime of violence and cannot sustain Count Three. App. E, F. In an abundance of caution, Dent and Morales also ask this Court to resolve whether their Count Two armed bank robbery convictions under 18 U.S.C. §§ 2 and 2113 qualify as a crime of violence under § 924(c)'s physical force clause.

To qualify under § 924(c)'s physical 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).

The Court should determine whether the Circuits have properly interpreted the armed bank robbery statute, 18 U.S.C. § 2113(a). The Circuits have consistently held that armed bank robbery necessarily requires the use, attempted use, or threatened use of violent physical force, a holding that conflicts with the plain language of the statute. To make the armed bank robbery statute "fit" the § 924(c)(3)(A) physical force clause definition of crime of violence, the Circuits' interpretation have narrowed the conduct that armed bank robbery used to cover by ignoring the non-violent, unintentional conduct the statute covers. It is imperative this Court decide the proper interpretation of armed bank robbery so defendants are only mandatorily incarcerated for a firearms offense truly predicated on a violent crime.

A. Armed bank robbery encompasses non-violent conduct.

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). Federal armed bank robbery fails to qualify under § 924(c)'s physical force clause for at least seven reasons.

First, 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.

Second, "intimidation" does not require violent force. This Court holds that to meet the § 924(c) physical force clause: (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.

Furthermore, "intimidation" does not require a willingness to use violent physical force, as robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). 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). And, 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. 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).

Third, to commit federal armed bank robbery by intimidation, a defendant's conduct need not be intentionally intimidating. Yet § 924(c)'s physical force clause requires the use of violent force to be intentional and not merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016). This Court holds the armed bank robbery statute, § 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 physical force clause.

Fourth, "extortion" does not require violent physical 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").

Fifth, the armed bank robbery statute expressly provides alternative means to commit bank robbery: "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a), (d). Canons of statutory interpretation require giving each word meaning: "Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (cleaned up). Interpreting "intimidation" and "extortion" as requiring the use or threat of violent physical force would render superfluous the other alternative means of committing armed bank robbery.

Sixth, the presence of a weapon alone does not establish the requisite force necessary under the physical force clause. 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 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).

Thus, the Ninth Circuit recognizes in other contexts that a weapon alone does not meet the required violent force of § 924(c). *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 physical force clause); *Parnell*, 818 F.3d at 980 (finding Massachusetts armed robbery does not qualify as a violent felony under ACCA's physical force clause).

Seventh, the armed bank robbery statute is not divisible. In assessing whether an overbroad 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. *Mathis*, 136 S. Ct. 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). Thus, armed bank robbery is an indivisible statute.

Circuits are split over whether § 2113(a) is divisible. The First, Second, Fifth, and Ninth 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. denied*, 141 S. Ct. 380 (Oct. 5, 2020); *United States v. Watson*, 881 F.3d 782, 786 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018)). 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). Review by this Court is necessary to resolve this divisibility split.

* * *

Armed bank robbery can therefore be committed via non-violent means of intimidation and extortion. Such means do not encompass physical force—let alone the violent physical force against a person or property the § 924(c) physical force clause requires.

B. To hold the offense is a crime of violence, Circuits narrowly interpret the armed bank robbery statute, conflicting with its plain language and earlier Circuit precedent.

To hold armed bank robbery qualifies as a crime of violence under the physical force clause, the Circuits erroneously interpret the armed bank robbery statute is limited to conduct involving violent physical force. *See*, *e.g., Watson,* 881 F.3d at 785; *United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1260 (2019); *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018); *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017); *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir.), *cert. denied*, 137 S. Ct. 164 (2016).

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* standard.'" 881 F.3d at 785 (citing *Johnson*, 559 U.S. 133). Yet, the Ninth Circuit previously held, "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). The Ninth Circuit is unwilling to reverse this position.[2]

[2] The Ninth Circuit has declined requests for en banc review of *Watson*. *See, e.g., United States v. Gray*, No. 18-16399, Dkt. No. 41 (9th Cir. Aug. 21, 2020) (denying motion for en banc review of *Watson*). The Ninth Circuit has also declined to issue COAs in numerous habeas appeals requesting review of *Watson*. *See, e.g., United States v. Ward*, No. 20-16061, Dkt. No. 3 (9th Cir. Aug. 7, 2020) (denying a COA); *United States v. Peterson*, No. 19-17402, Dkt. No. 5 (9th Cir. May 15, 2020) (same); *United States v. Lewis*, No 18-16412, Dkt. No. 4 (9th Cir. Dec. 20, 2018) (same); *United States v. Young*, No. 18-16602, Dkt. No. 4 (9th Cir. Dec. 20, 2018).

An examination of armed bank robbery by intimidation cases reveals other Circuits also routinely affirm § 2113(a) convictions for sufficiency purposes despite a lack of threatened violent physical force. *See, e.g., United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (affirming armed 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." The teller gave the defendant $1,686, and the defendant left the bank); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (affirming armed bank robbery by intimidation conviction where teller at 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, without speaking to anyone at the bank and saying nothing as they ran from the store); *United States v. Lucas*, 963 F.2d 243, 244, 248 (9th Cir. 1992) (affirming armed bank robbery by intimidation conviction where defendant walked into 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 said, "Put it in the bag"); *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987) (affirming armed bank robbery by intimidation where there was no weapon, no verbal or written threat, and victims were not actually afraid); *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (affirming bank robbery by intimidation conviction where 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).

And, the Circuits traditionally hold armed bank robbery by intimidation does not require an intentional mens rea. *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 jury may not consider 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"); *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).

Yet, these same Circuits *now* hold armed bank robbery always encompasses intentional violent force to find it a § 924(c) crime of violence. This Court's

intervention is necessary to review the Circuits' narrowed application of the categorical approach, as the Circuits' original, broad interpretation of the federal armed bank robbery statute did not satisfy § 924(c)'s physical force clause.

Conclusion

The continuing split between federal circuit courts indicates the judiciary cannot agree on how to resolve ambiguous 18 U.S.C. § 924(c) convictions that rest on more than one predicate offense where at least one predicate does not qualify as a crime of violence. The unfortunate result is that petitioners in the Fourth and Fifth Circuits 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.

Petitioners Dent and Morales also ask this Court to address whether Circuits narrowly interpreting armed bank robbery to make it "fit" within § 924(c)'s physical force clause conflict with the armed bank robbery statute's plain language.

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Respectfully submitted,
RENE L. VALLADARES
Federal Public Defender

/s/ Wendi L. Overmyer
Wendi L. Overmyer
Assistant Federal Public Defender

Amy B. Cleary
Assistant Federal Public Defender

Office of the Federal Public Defender
411 E. Bonneville, Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Wendi_Overmyer@fd.org
Amy_Cleary@fd.org
Counsel for Petitioners, Nathan Dent and
Frank Morales