No. _____

In the

Supreme Court of the United States

ANDREW CHAPNICK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

CUAUHTEMOC ORTEGA
Federal Public Defender
BRIANNA MIRCHEFF*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4784
Facsimile: (213) 894-0081

Attorneys for the Petitioner
* Counsel of Record

Questions Presented

1. Whether a § 2255 motion filed within one year of *Johnson v. United States*, claiming that *Johnson* invalidates the residual clause of the pre-*Booker* career offender guideline, asserts a "right . . . initially recognized" in *Johnson* for timeliness purposes under 28 U.S.C. § 2255(f)(3).

2. Whether federal bank robbery under 18 U.S.C. § 2113(a) and (d) be a crime of violence under the elements clause of 18 U.S.C. § 924(c)(3)(A), where the offense fails to require any intentional use, attempted use, or threat of violent physical force?

Statement of Related Proceedings

- *United States v. Andrew Chapnick,*
  2:02-cr-00144-SVW-1 (C.D. Cal. Dec. 12, 2002)
- *United States v. Andrew Chapnick,*
  2:02-cr-00145-SVW-1 (C.D. Cal. Jul. 22, 2004)
- *Andrew Chapnick v. United States,*
  2:16-cv-04278-SVW (C.D. Cal. Dec. 29, 2019)
- *Andrew Chapnick v. United States,*
  2:16-cv-04185-SVW (C.D. Cal. Dec. 29, 2019)
- *Andrew Chapnick. v. United States*,
  19-56257 (9th Cir. Dec. 14,, 2020)

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In the

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ANDREW CHAPNICK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Andrew Chapnick petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability in his case.

Opinions Below

The Ninth Circuit's order denying Mr. Chapnick's application for a certificate of appealability ("COA") was not published. (App. 1a.) The district court issued a written order denying Mr. Chapnick's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and denying his request for a certificate of appealability. (App. 2a-7a.)

Jurisdiction

The Ninth Circuit issued its order denying Mr. Chapnick a COA on December 14, 2020. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

28 U.S.C. § 2255(f) states:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
> …
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

Introduction

Section 2255(f) states that a one-year statute of limitations applies to federal habeas petitions and runs from the latest of several triggering dates, including "the date on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3). This case turns on when, precisely, a "right" has been "recognized" by this Court—and whether it requires that this Court decide a case in the same statutory context, or whether a habeas petitioner should file once this Court issues a decision with clear application to his case. The Circuits are divided on this question, meaning that similarly situated petitioners receive relief, or not, depending of the geography of their conviction. The Court should grant Petitioner's writ.

In 2015, this Court held that the residual clause in the Armed Career Criminal Act was void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within a year of that decision, thousands of inmates filed habeas

petitions claiming that their convictions and sentences, though not based on the ACCA, were infected by the same ordinary-case analysis and ill-defined risk threshold that combined in *Johnson* to "produce[] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Among that number was Mr. Chapnick. Mr. Chapnick's § 2255 motion challenged both the residual clause in 18 U.S.C. § 924(c) and the residual clause in the career-offender provision of the mandatory guidelines, and argued that both were void for vagueness under *Johnson*. The Ninth Circuit denied his mandatory guideline claim as untimely, in that this Court had yet not decided a case that addressed directly *Johnson*'s impact on the mandatory career-offender guideline, and thus, had not recognized "the right" Petitioner asserted. It denied his Section 924(c) claim based on a prior opinion holding armed bank robbery to be a crime of violence, even after *Johnson*.

This Court should grant plenary review on the first of those two questions: whether a claim raising *Johnson*'s impact on the career-offender provision of the mandatory guidelines is timely under 28 U.S.C. § 2255(f)(3). There is an entrenched division in the Circuits on this question: the First and Seventh Circuits find such claims timely, the Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits find the claims untimely, and the district courts of the D.C. Circuits are internally divided—as the district courts of the

Ninth Circuit were prior to the Court's holding in *Blackstone*.

The status quo is intolerable, the circuit split does not appear likely to resolve itself, and the inferior federal courts have struggled without guidance on this issue for too long. The Court should grant the writ and decide, finally, whether a claim that *Johnson* invalidates the residual clause in the mandatory career-offender guideline is timely if filed within a year of *Johnson*.

If it will not, it should grant certiorari to consider whether armed bank robbery remains a crime of violence after *Johnson*.

Statement of the Case

1. Mr. Chapnick pleaded guilty to: (1) conspiracy to commit bank robbery, in violation of 18 U.S.C. §§ 371, 2113(a) (Count 1); and (2) bank robbery, in violation of 18 U.S.C. § 2113(a) (Count 3) in Case No. 02-0144; and (1) bank robbery, in violation of 18 U.S.C. § 2113(a) (Counts 1 and 2); (2) armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Counts 3, 5, and 7); and (3) carrying and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Count 8), in Case No. 02-145. On July 12, 2004, he was sentenced to 272 months imprisonment under the then-mandatory Sentencing Guidelines—(1) 60 months on Count 1 of the Indictment in Docket No. 02-0144; (2) 188 months on Count 3 of the Indictment in Docket No. 02-0144 and Counts 1, 2, 3, 5, and 7 of the

Indictment in Docket No. 02-0145; with all such counts from both dockets to be served concurrently; plus (3) a mandatory consecutive 84 months for the Section 924(c) conviction.

2. On June 13, 2016, Mr. Chapnick filed a motion to vacate his sentence under 28 U.S.C. § 2255. In it, he argued that his sentence, imposed under the mandatory career-offender guideline was invalid because it was premised on the residual clause. He also argued that his Section 924(c) conviction should be vacated because armed bank robbery was no longer a crime of violence.

After full briefing, the district court denied Mr. Chapnick claims, and declined to grant a certificate of appealability as to any claim. The court deemed the mandatory guideline claim to be governed by *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018), the Ninth Circuit's holding that a *Johnson* claim to the mandatory guideline was not timely because this Court had not yet applied *Johnson* to the residual clause in the pre-*Booker* guideline. (App. 5a-6a.) It also denied his 924(c)-based claim based on the Ninth Circuit's holding in *United States v. Watson*, holding that armed bank robbery remained a crime of violence even after *Johnson*. (App. 4a.)

3. Petitioner filed a request for a certificate of appealability in the Ninth Circuit, supported by full briefing on the standard and the reasons for granting the COA. The Ninth Circuit denied it in an order citing *United*

States v. Blackstone, 903 F.3d 1020, 1027-28 (9th Cir. 2018) and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018), but not further analyzing the question. (App. 1a.) Again, *Blackstone* is the Ninth Circuit's precedential decision holding that a claim seeking to apply *Johnson* to the mandatory guidelines is not timely. *Watson* is the Ninth Circuit's precedential decision finding armed bank robbery to be a crime of violence after *Johnson*.

Reason or Granting the Writ

A. The Court Should Grant Plenary Review to Clarify the Timeliness of Mandatory Guidelines Claims Based on *Johnson*.

This Court should grant plenary review in order to settle the deep—and expanding—disconnect between the Circuits in their treatment of timeliness of mandatory-guidelines claims.

1. *There is a deep and entrenched inter- and intra-circuit split on the timeliness of mandatory guidelines claims.*

At the beginning of OT 2018, this Court denied a number of claims raising the application of *Johnson* to the mandatory guidelines. *See Brown v. United States*, 139 S. Ct. 14, 14 & n.1 (2018) (Sotomayor, J., dissenting from denial of certiorari). At the time, the Solicitor General represented that the circuit split was shallow and might resolve itself without the intervention of the Court. Today, more than two years later, that prediction has proved false.

a. The Seventh Circuit has held that mandatory guidelines

claims based on *Johnson* are timely. *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). Contrary to the United States' prediction, *see* Brief in Opposition, at 15, *United States v. Gipson*, 17-8637 (2018), the Seventh Circuit has not retreated from that position to align itself with other courts. *Sotelo v. United States*, 922 F.3d 848, 851 (7th Cir. 2019) ("[W]e reject the government's suggestion to reconsider *Cross*'s holding that *Johnson* recognized a new right as to the mandatory sentencing guidelines."). Instead, it continues to grant petitioners relief under *Cross*. *E.g.*, *D'Antoni v. United States*, 916 F.3d 658, 665 (7th Cir. 2019)

The First Circuit issued a published order finding a mandatory guideline claim timely. *Moore v. United States*, 871 F.3d 72, 81 (1st Cir. 2017). The Solicitor General maintained that that decision did not represent the "settled circuit law on the issue," because it was issued in the context of a second-or-successive application. *See* Brief in Opposition, at 15 n.4, *United States v. Gipson*, 17-8637 (2018). But since that time, *Moore* has been the basis for grants of substantive relief in the First Circuit. *E.g.*, Order, *United States v. Moore*, 1:00-10247-WGY, 2018 WL 5982017 (D. Mass. Nov. 1, 2018) (granting § 2255 relief); *United States v. Roy*, 282 F. Supp. 3d 421, 432 (D. Mass. 2017). The United States has not appealed those decisions.

Thus, in two Circuits, petitioners have been granted substantive relief on claims that would be shut out of court in the Ninth Circuit.

b. Meanwhile, the Second, Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have all held that *Johnson* did not recognize the right not to be sentenced under the ordinary case doctrine in the guideline context, and thus *Johnson* claims raised by those sentenced under the mandatory career-offender guideline are untimely. *United States v. Green*, 898 F.3d 315, 322-23 (3d Cir. 2018); *United States v. Brown*, 868 F.3d 297, 301-03 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625, 629-31 (6th Cir. 2017); *United States v. Greer*, 881 F.3d 1241, 1247 (10th Cir. 2018); *In re Griffin*, 823 F.3d 1350 (11th Cir. 2016).

Notably, while those decisions are all final, they have not been uniformly endorsed. The Fourth Circuit issued its decision in *Brown* over the dissent of Chief Judge Gregory. 868 F.3d at 304. Judge Costa concurred in the judgment of the Fifth Circuit's recent decision in *London*, writing separately to express his view that the Fifth Circuit is on "the wrong side of a split over the habeas limitations statute." 937 F.3d at 510. In the Sixth Circuit, Judge Moore wrote a concurring decision expressing her view that the Sixth Circuit's decision in *Raybon* "was wrong on this issue." *Chambers v. United States*, 763 F. App'x 514, 519 (6th Cir. 2019). Judge Berzon, in the Ninth Circuit, opined that "Blackstone was wrongly decided" and that "the Seventh and First Circuits have correctly decided" the timeliness question.

Hodges v. United States, 778 F. App'x 413, 414 (9th Cir. 2019) (Berzon, J., concurring). An Eleventh Circuit panel called into question that court's decision in *In re Griffin*. *See In re Sapp*, 827 F.3d 1334, 1336-41 (11th Cir. 2016) (Jordan, Rosenbaum, Pryor, J.) ("Although we are bound by *Griffin*, we write separately to explain why we believe *Griffin* is deeply flawed and wrongly decided."). Thus even in Circuits that have "settled law," the question continues to vex the courts.

c. Finally, some Circuits have not yet issued decisions. Thus, in some places, the timeliness of the claim depends on which courthouse, or even which courtroom in a single courthouse, one finds oneself. *Compare United States v. Hammond*, 354 F. Supp. 3d 28, 42 (D.D.C. 2018) (finding mandatory guideline claim based on *Johnson* timely) *with* Order, *United States v. Upshur*, 10-cr-251, 2019 WL 936592, at *7 (D.D.C. Feb. 26, 2019) (finding mandatory guideline claim based on *Johnson* untimely).

The split in this case is well-developed and mature, and it's not going away. Nor is the issue continuing to evolve in the lower courts: Instead, as new cases are decided, courts simply decide which side of the split they will join. There is simply no reason to let the lower courts continue to struggle over the question; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown*, 139 S. Ct. at 16 (Sotomayor, J., dissenting from denial of

certiorari) (citing Sup. Ct. Rule 10).

2. *The question presented is of exceptional importance.*

a. This disparate caselaw is too important to be left in place. More than a thousand individuals filed petitions after *Johnson* raising a claim that *Johnson* applied to their career-offender sentence. *See id.* If their claims are not heard, many will spend an additional decade or more in custody, based solely on an improperly imposed guideline sentence. *Cf* Sentencing Resource Counsel Project, Data Analyses 1 (2016), *available* http://www.src-project.org/wp-content/uploads/2016/04/Data-Analyses-1.pdf (citing FY 2014 statistics, the average guideline minimum for career offenders charged with drug offenses was 204 months, and the average minimum for drug offenders not charged as career offenders was 83 months); *see also* App. 1a (career-offender designation in Mr. Chapnick's case raised guideline range from 108-135 months to 188-235 months).

Not only will those sentenced under the mandatory guidelines be left out in the cold, but petitioners in the future will be left without clear guidance for what event triggers the statute of limitations for filing a habeas claim. A defendant is permitted to file a single § 2255 petition before he triggers the higher standard for filing a second or successive petition under 28 U.S.C. § 2255(h). If he files too late, or too early, even his meritorious claims will likely never be adjudicated. Where such high stakes decisions

have such little margin for error, it is important that litigants have clear rules to apply.

b. Moreover, this Court's failure to address this arbitrariness has created a secondary market for habeas relief, where petitioners receive differential treatment depending, not only on the Circuit where they sustained their conviction, but on the Circuit in which they happen to be serving their sentence. For example, Petitioner Stony Lester was convicted in the Eleventh Circuit, a circuit which has held *Johnson* does not apply to the mandatory guidelines at all. *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2017) (en banc). Like all others convicted in that Circuit, he was foreclosed from relief via § 2255 motion. *Lester v. United States*, 921 F.3d 1306 (11th Cir. 2019).

Luckily for Mr. Lester, the BOP placed him far from home, in a facility in the Fourth Circuit. That Court has held that a petitioner may file, via 28 U.S.C. § 2241's "escape hatch," a petition arguing that one's mandatory guideline calculation was wrong. *United States v. Wheeler*, 886 F.3d 415, 433 (4th Cir. 2018). Thus, even as the Eleventh Circuit denied his § 2255 petition, the Fourth Circuit found that his career-offender sentence should be vacated, concluded that any route to such relief was blocked in the Eleventh Circuit, and it granted his § 2241 petition. *Lester v. Flournoy*, 909 F.3d 708, 714 (4th Cir. 2018). After two Circuits expended simultaneous efforts writing separate

published opinion spanning seventy-five pages (and pointing in different directions), Mr. Lester was released from custody. Notably, all that effort was poured into case where Mr. Lester's substantive eligibility for relief has been clear for a full decade. *See Lester*, 909 F.3d at 710 (citing *Chambers v. United States*, 555 U.S. 122, 127-28 (2009) as the case that established that Lester's career-offender sentence was erroneous).

If his claim is unique, it soon will not be. Three Circuits deem an error in the calculation of the mandatory guidelines to be a miscarriage of justice cognizable under 28 U.S.C. § 2241. *Wheeler*, 886 F.3d at 433; *Brown v. Caraway*, 719 F.3d 583, 587-88 (7th Cir. 2013); *Hill v. Master*, 836 F.3d 591, 593 (6th Cir. 2016). Others have caselaw foreclosing that route to the prisoners housed within their Circuit. *E.g.*, *McCarthan v. Director of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1090 (11th Cir. 2017) (en banc). Thus, while it might have seemed like the fight was winding down when the Court denied *Brown v. United States,* et al., this fall, those denials in fact signaled the start of the second round. This second round creates yet another level of disparity even more disconnected from substantive merit for relief. And it requires another set of attorneys and courts, far from the relevant records and unfamiliar with the local state laws, to expend efforts reviewing a case.

This is too much arbitrariness to be tolerated. It cannot be that some

federal inmates whose convictions arise in certain circuits or who are housed in certain circuits receive review of their mandatory-guidelines career offender claims, and others are foreclosed from review simply because of where they were sent to serve out their term. The evolution of this secondary market for relief underscores the need for this Court's immediate intervention.

3. *The Ninth Circuit's decision is wrong.*

On the merits, the Ninth Circuit erred in dismissing Mr. Chapnick's claim as untimely—too *early*—because the Court has not yet explicitly applied *Johnson* to the mandatory guidelines.

1. Where a federal prisoner believes he should benefit from a Supreme Court decision, he must file his petition within one year of the date "on which the right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2255(f)(3).[1] *Johnson* struck down the residual clause of the Armed Career Criminal Act as void for vagueness. 135 S. Ct. at 2557. In so doing, it reiterated that due-process vagueness principles apply, not only to statutes defining the elements of crimes, but also to provisions "fixing

[1] Section 2255(f)(3) states, in whole: "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." The panel's decision, however, discussed only the first clause.

sentences." *Id.* (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). And it concluded that the combination of the ordinary-case analysis and an ill-defined risk threshold "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558. Mr. Chapnick's mandatory-guideline claim asserts the right not to have his sentence fixed by the same residual-clause analysis the Supreme Court already deemed unconstitutionally vague in *Johnson*. He satisfies Section 2255(f)(3) and his claim is timely.

The Ninth Circuit's decision in *Blackstone*, the decision that foreclosed Mr. Chapnick's claim in the Ninth Circuit, rested on three errors: disregard for the text of Section 2255(f)(3), a faulty analogy between the statute of limitations for federal prisoners and the "clearly established federal law" standard applicable to state prisoners, and a misreading of this Court's decision in *Beckles v. United States*, 137 S. Ct. 886 (2017).

2. First, the *Blackstone* court's analysis disregards the starting place for any statutory interpretation question: the text of Section 2255(f)(3) itself. Section 2255 uses "right" and "rule," not "holding." *Moore v. United States*, 871 F.3d 72, 82 (1st Cir. 2017). "Congress presumably used these broader terms because it recognizes that the Supreme Court guides the lower courts not just with technical holdings but with general rules that are logically inherent in those holdings, thereby ensuring less arbitrariness and

more consistency in our law." *Id.* While *Johnson*'s holding struck down the residual clause of the ACCA, the right it recognized was the right not to have one's sentence dictated by a residual clause that combines the hopelessly vague ordinary-case analysis and an ill-defined risk threshold. That is the same right that Mr. Chapnick asserts. A contrary view "divests *Johnson*'s holding from the very principles on which it rests and thus unduly cabins *Johnson*'s newly recognized right." *United States v. Brown*, 868 F.3d 297, 310 (4th Cir. 2017) (Gregory, C.J., dissenting).

Indeed, any uncertainty about the breadth of the "right" recognized by *Johnson* was dispelled by *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018). There, the Court held that "*Johnson* is a straightforward decision, with equally straightforward application" to the 18 U.S.C. § 16(b) residual clause. *Id.* Though Section 16(b) uses wholly different statutory language, the Court acknowledged that the residual clause was subject to the same vagueness concerns highlighted in *Johnson*, and thus could not be distinguished. *Id.* at 1213-14. "And with that reasoning, *Johnson* effectively resolved the case now before us." *Id.* at 1213. Just as *Johnson* "effectively resolved" the validity of the residual clause in Section 16(b), a provision that used wholly different statutory language, *Johnson* effectively resolved the issue here.

Moreover, Section 2255(f)(3) requires only that the petitioner *assert* the right recognized by the Supreme Court. It "does not say that movant must

ultimately *prove* that the right applies to his situation; he need only claim the benefit of a right that the Supreme Court has recently recognized." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). To "assert" is "to invoke or enforce a legal right." Black's Law Dictionary 139 (10th ed. 2014); *see also Dodd v. United States*, 545 U.S. 353, 360 (2005) (describing a § 2255 motion as timely if it was filed within one year of the decision from which it "sought to benefit"). And asserting a right does not require anything more than staking a claim to some potential benefit. *Cf.* 50 U.S.C. § 3996(a) (permitting service members to take steps "for the perfection . . . or further assertion of rights"). The government's contrary reading "would require that [the Court read] 'asserted' out of the statute." *Cross*, 892 F.3d at 294.[2]

3. The Ninth Circuit panel did not grapple with these textual points, concluding that it would violate AEDPA's purpose to read the "right" recognized by *Johnson* as encompassing those sentenced under an analogous statute. *Blackstone*, 903 F.3d at 1026. It's true that, when describing the boundaries of "clearly established federal law" for purposes of Section 2254(d)(1), the Court has cautioned against reading its holdings at a high

[2] The statute also requires that the right be "recognized" by the Supreme Court—though, apart from specifying *who* must make the decision, (the Supreme Court as opposed to a circuit court,) the phrase offers little interpretative aid because it depends entirely on how broadly or narrowly one defines "right."

level of generality. But this faulty analogy disregards the different text, purpose, and nature of the two inquiries.

First, the restrictive language in Section 2254(d)(1) (requiring a state decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law") appears nowhere in Section 2555(f)(3). In fact, it does not appear in all of Section 2255. "Where Congress employs different language in related sections of a statute, we presume these differences in language convey differences in meaning." *Lopez v. Sessions*, 901 F.3d 1071, 1077-78 (9th Cir. 2018) (internal alterations omitted).

Moreover, Section 2254(d)(1) serves a different purpose than Section 2255(f)(3). Section 2254(d)(1)—the clearly-established-federal-law standard—is a barrier for state prisoners who claim that a state court has contravened Federal law, as interpreted by the Supreme Court. The strictness of that rule promotes comity and federalism: Section 2254 is a vehicle to correct state courts that go rogue in violation of the Supreme Court's interpretation of the federal constitution. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). In that context, as a matter of respect to state courts, the Supreme Court will intervene only if the state court's decision is clearly answered to the contrary by a prior decision of the Supreme Court. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). Thus, the standard is "intentionally difficult to meet." *Id.* Section 2255(f)(3), by contrast, is a statute-of-limitations provision for federal

prisoners. Comity and federalism concerns have no relevance when a federal prisoner asks a federal court to vacate a federal judgment. *See Danforth v. Minnesota*, 552 U.S. 264, 279 (2008) ("Federalism and comity considerations are unique to federal habeas review of state convictions.").

If the Court were to examine the purpose of AEDPA, as the panel suggests it should, *Blackstone*, 903 F.3d at 1027, the proper inquiry is not the purpose of the clearly established federal law requirement in Section 2254(d)(1), but the purpose of the statute-of-limitation provision itself. AEDPA's statute of limitations has the "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 266 (2002). This, too, is a unifying mark of statutes of limitation; they are "designed to encourage [petitioners] 'to pursue diligent prosecution of known claims.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (citation omitted); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) ("Statutes of limitation . . . . stimulate to activity and punish negligence."). Mr. Chapnick filed as soon as he saw the relevance of *Johnson* to his own case; the Ninth Circuit's decision would thwart the very purpose of § 2255(f)(3) by forcing him to wait and file a later (now potentially successive) petition. Because Congress intended the AEDPA statute of limitations "to eliminate delays in the federal habeas review process," not create them,

Holland v. Florida, 560 U.S. 631, 648 (2010), a reading of Section 2255(f)(3) that encourages petitioners to sit on their hands is contrary to the purpose of AEDPA.[3]

4. Even if the panel's reliance on Section 2254(d)(1) were not precluded by the plain language and the animating principles of the statute-of-limitations provision, there is no reason to import the "clearly-established-federal-law" standard, a merits concept, into the decision whether the statute of limitations is satisfied. A statute-of-limitations analysis is a preliminary question, not intended to prejudge the merits of the case. This concept is uniform across bodies of law. *Chapnick v. Philip Morris USA*, 582 F.3d 1039, 1045 (9th Cir. 2009) (noting that courts can look at statute-of-limitations affirmative defense to evaluate fraudulent joinder, as that defense is "rather unique" in that it does not "relate to the merits of the case"); *George v. United States*, 672 F.3d 942, 946 (10th Cir. 2012) (Gorsuch, J.) ("The merits of that claim or assertion of adverse interest are irrelevant. . . . Were the rule otherwise, of course, the statute of limitations and merits inquiries would collapse and involve no analytically distinct work."). That is because a statute

[3] This concern for diligence is manifested in other linguistic choices in the same provision, which requires the petitioner to move when the right is "*initially* recognized" and "*newly* recognized"—reinforcing Congress's desire to encourage diligence, as well as its acknowledgment that a right may be addressed and refined over a number of decision. 28 U.S.C. § 2255(f)(3) (emphasis added).

of limitations is premised on notice of one's claim, not its ultimate validity. *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984) ("[T]he crucial issue in our statute of limitations inquiry is whether [the City] had notice of the federal claim, not whether the claim itself is valid.").

Like other statutes of limitations, then, Section 2255(f)(3) is merely a triggering point—marking the moment when Mr. Chapnick had notice that his sentence was imposed in violation of the Constitution. When Mr. Chapnick filed his claim, *Johnson* had held that a provision materially identical to the provision that drove his sentencing was void for vagueness. It had reiterated that, under *Batchelder*, sentencing provisions that fixed sentences were subject to a vagueness challenge. *Johnson*, 135 S. Ct. at 2557. The Ninth Circuit had always applied *Batchelder* to the mandatory guidelines. *United States v. Gallagher,* 99 F.3d 329, 334 (9th Cir. 1996); *United States v. (Linda) Johnson,* 130 F.3d 1352, 1354 (9th Cir. 1997). In other words, *Johnson* was the last piece of the puzzle. Because statutes of limitations generally run from the occurrence of the last circumstance necessary to give rise to a claim, *see (Robert) Johnson v. United States*, 544 U.S. 295, 305-09 (2005), Petitioner was correct in assuming that *Johnson* was the trigger that started the clock.

5. The Ninth Circuit's faulty analogy to the clearly-established-federal-law standard in Section 2254(d) also puts that Court in conflict with

settled interpretation given to the "right" as defined in the second clause of Section 2255(f)(3), which, of course, must have the same meaning as the provision interpreted here. *See* 28 U.S.C. § 2255(f)(3) ("the date on which the right asserted was initially recognized, if *that right* has been newly recognized by the Supreme Court") (emphasis added). The Circuits have broadly read the second clause to invoke *Teague*'s "new rule" jurisprudence.[4] And in that context, this Court has recognized that the "new rule" is the case that "breaks new ground," not a later case that merely applies that rule to a different context. *Chaidez v. United States*, 568 U.S. 342, 342-48 (2013).

In *Stringer v. Black*, the Court held its decisions applying *Godfrey v. Georgia*, 446 U.S. 420 (1980), to similar capital sentencing statutes in Oklahoma and Mississippi did not create new rules. 503 U.S. 222, 229 (1992). For "new rule" purposes, it didn't matter that Oklahoma's statute "involved somewhat different language" than the Georgia statute considered in *Godfrey*. *Id.* at 228-29 ("[I]t would be a mistake to conclude that the

[4] *Butterworth v. United States*, 775 F.3d 459, 464-65 (1st Cir. 2015); *Coleman v. United States*, 329 F.3d 77, 81-82 (2d Cir. 2003); *United States v. Smith*, 723 F.3d 510, 515 (4th Cir. 2013); *United States v. Morgan*, 845 F.3d 664, 667-68 (5th Cir. 2017); *Headbird v. United States*, 813 F.3d 1092, 1095 (8th Cir. 2016); *United States v. Hong*, 671 F.3d 1147, 1148-50 (10th Cir. 2011); *Figueroa-Sanchez v. United States*, 678 F.3d 1203, 1207-08 (11th Cir. 2012);.The Ninth Circuit has said the same, albeit in unpublished opinions. *Simpson v. Evans*, 525 F. App'x 535, 537 (9th Cir. 2013); *United States v. Berkley*, 623 F. App'x 346, 347 (9th Cir. 2015).

vagueness ruling of *Godfrey* was limited to the precise language before us in that case."). Nor did it matter that Mississippi's sentencing process differed from Georgia's, because those differences "could not have been considered a basis for denying relief in light of [Supreme Court] precedent existing at the time." *Id.* at 229. *Godfrey* may have broken new ground and created a new rule, but the application of *Godfrey* to analogous statutory contexts did not.

Under *Stringer* and *Chaidez*, an application of a new rule to an analogous statutory scheme does not create a second new rule; the second rule is merely derivative of the first. And for the same reason, a new rule recognized by the Supreme Court should not be confined to its narrow holding. Rather, the "right" recognized by a decision of this Court encompasses the principles and reasoning underlying the decision that have applications elsewhere—even if there are minor linguistic or mechanical differences in the provisions at issue.

Applying this standard here, the "right" recognized in *Johnson* must be defined according to the principles it recognized—and not merely its narrow result. *Johnson* did not merely strike down the residual clause of the ACCA; it recognized the right not to have one's sentence fixed by the application of the ordinary-case analysis applied to a hazy risk threshold. And application of Johnson to the pre-*Booker* guidelines "is not clearly different in any way that would call for anything beyond a straightforward application of

Johnson." *Moore*, 871 F.3d at 81. Because "the mandatory Guidelines' residual clause presents the same problems of notice and arbitrary enhancement as the ACCA's residual clause at issue in *Johnson*," Petitioner here is asserting the same right newly recognized in *Johnson*, and he can lay claim to Section 2255(f)(3)'s statute-of-limitation provision. *Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

6. At bottom, the Ninth Circuit's decision in *Blackstone* overlearns the lesson of *Beckles v. United States*, 137 S. Ct. 886 (2017). It's true that *Beckles* created an exception to *Johnson*'s reach where the sentencing provision does not "fix the permissible range of" sentences, as with the advisory guidelines. *Id.* at 894-95. But *Beckles* did nothing to disturb *Johnson*'s reasoning that where a vague sentencing provision *does* fix a defendant's sentence, it is subject to attack under the Due Process Clause. If anything, it reiterates that point. *Id.* at 892; *see also Cross*, 892 F.3d at 304-05; *Brown*, 868 F.3d at 308 (Gregory, C.J., dissenting). Nor did it upset *Booker*'s holding that, by virtue of Section 3553(b), the mandatory guidelines fixed sentences; they "had the force and effect of laws" and that, "[i]n most cases . . . the judge [was] bound to impose a sentence within the Guidelines range." *Booker v. United States*, 543 U.S. 220, 234 (2005); *see Brown*, 868 F.3d at 310 (Gregory, C.J., dissenting).

The Ninth Circuit's decision in *Blackstone* thus read too much into the Justice Sotomayor's statement, in *Beckles*, that the application of *Johnson* to the mandatory guidelines is an "open" question. *Beckles*, 137 S. Ct. at 903 n.4 (Sotomayor, J., concurring). The concurrence simply clarified that the Court's holding was limited to the advisory guidelines; the case did not present the application of *Johnson* to the mandatory guidelines, and, perforce, did not foreclose it. And it certainly casts no doubt on Mr. Chapnick's assertion of the right recognized in *Johnson*.

For all of these reasons, the Ninth Circuit's decision on timeliness is wrong, and should be reversed.

B. This Court Should Also Grant Certiorari to Decide Whether Armed Bank Robbery Satisfies the Force Clause of Section 924(c).

The Court should grant the writ of certiorari to address whether bank robbery has, as an element, the use, threatened use, or attempted use of physical force. A number of circuits have held that federal bank robbery by intimidation—conduct that does *not* require any specific intent or any actual or threatened violent force—qualifies as a crime of violence under the elements clauses—while, at the same time, those same courts have acknowledged an ever decreasing bar for what constitutes "intimidation" in the context of *sufficiency* cases. The courts cannot have it both ways—either bank robbery requires a threat of violent force, or it doesn't, but the same

rule must apply to both sufficiency cases and to the categorical analysis. Given the heavy consequences that attach to a bank robbery conviction, and the sheer number of these cases prosecuted federally, further guidance from this Court is necessary to bring this area of caselaw into order.

1. The categorical approach determines whether an offense is a crime of violence.

There are two requirement for "violent force." First, violent *physical* force is required for a statute to meet § 924(c)'s elements clause. *Stokeling v. United States*, 139 S. Ct. 544, 552 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*")). In *Johnson I*, this Court defined "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140. In *Stokeling*, this Court recently interpreted *Johnson I*'s "violent physical force" definition to encompass physical force "potentially" causing physical pain or injury to another. 139 S. Ct. at 554. Second, the use of force must also be intentional and not merely reckless or negligent. *Leocal v. Ashcroft*, 543 U.S. 1, 12-13 (2004); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016).

The Ninth Circuit was wrong to conclude that federal bank robbery satisfied both requirement—in fact, bank robbery requires neither violent physical force or intentional force.

a. Federal bank robbery does not require the use or threat of violent physical force.

First, intimidation for purposes of 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 force on a bank teller, it does not require a threat of violent force must be "capable" of "potentially" "causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 554.

For example, in *United States v. Lucas*, the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." 963 F.2d 243, 244 (9th Cir. 1992). The Ninth Circuit held that by "opening the bag and requesting the money," the defendant employed "intimidation," and sustained the conviction. *Id.* at 248. Because there was no threat—explicit or implicit—to do anything, let alone use violence, if that demand was not met, the minimum conduct necessary to sustain a conviction for bank robbery does not satisfy *Stokeling*'s standard for a crime of violence under the elements clause.

Likewise, in *United States v. Hopkins*, the defendant entered a bank and gave the teller a note reading, "Give me all your hundreds, fifties and twenties. This is a robbery." 703 F.2d 1102, 1103 (9th Cir. 1983). When the teller said she had no hundreds or fifties, the defendant responded, "Okay,

then give me what you've got." *Id.* The teller walked toward the bank vault, at which point the defendant "left the bank in a nonchalant manner." *Id.* The trial evidence showed the defendant "spoke calmly, made no threats, and was clearly unarmed." *Id.* But the Ninth Circuit affirmed, holding "the threats implicit in [the defendant's] written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.*

Despite the fact that the Ninth Circuit has concluded that such minimal conduct is sufficient to sustain a conviction, the Ninth Circuit concluded in *Watson* that bank robbery *always* requires the threatened use of violent physical force. This decision cannot be squared with the Circuit's sufficiency decisions and means that either the Ninth Circuit is ignoring this Court's decisions setting out the standard for violence—-or, for decades, people have been found guilty of crime of bank robbery who simply aren't guilty. Either way, the matter requires this Court's intervention.

This pattern of inconsistent holdings applies broadly across the circuits. *See United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (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); *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (upholding bank robbery by intimidation conviction where the defendant gave

a 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."); *United States v. Higdon*, 832 F.2d 312, 315-16 (5th Cir. 1987) (upholding conviction for robbery by intimidation where there was no weapon, no verbal or written threat, and when the victims were not actually afraid, because a reasonable person would feel afraid); *United States v. Kelley*, 412 F.3d 1240, 1244-45 (11th Cir. 2005) (upholding conviction when a teller at a bank inside a grocery store left her station to use the phone, two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash, did not speak to any tellers at the bank, did not shout, and did not say anything when they ran from the store). All of these courts have applied a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction, but have held that "intimidation" *always* requires a defendant to threaten the use of violent physical force. These positions cannot be squared.

The Ninth Circuit reached its conclusion by asserting that bank robbery by intimidation "requires 'an implicit threat to use the type of violent physical force necessary to meet the *Johnson I* standard.'" 881 F.3d at 785 (citing *Johnson 2010*, 559 U.S. 133). It is wrong, however, to equate *willingness* to use force with a threat to do so. Indeed, the Ninth Circuit has previously acknowledged this very precept. In *United States v. Parnell*, 818

F.3d 974, 980 (9th Cir. 2016), the government argued that a defendant who commits a robbery while armed harbors an "uncommunicated willingness or readiness" to use violent force. *Id.* at 980. In finding that Massachusetts armed robbery statute does not qualify as a violent felony, the Court rejected the government's position and held that "[t]he [threat of violent force] requires some outward expression or indication of an intention to inflict pain, harm or punishment," while a theorized willingness to use violent force does not. *Id. Watson* failed to honor, or even address, this distinction.

Certiorari is necessary to harmonize these contradictory lines of cases.

b. Federal bank robbery is a general intent crime.

Second, the elements clause of Section 924(c) and the career offender enhancement requires that the use of violent force to be intentional and not merely reckless or negligent. *Leocal*, 543 U.S. at 12-13; *Benally*, 843 F.3d at 353-54. But to commit federal bank robbery by intimidation, the defendant need not *intentionally* intimidate.

This Court holds § 2113(a) "contains no explicit *mens rea* requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). This Court held in *Carter* that federal bank robbery does not require an "intent to steal or purloin." *Id*. In evaluating the applicable mens rea, this Court emphasized it would read into the statute "only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id*. at 269.

The *Carter* Court recognized bank robbery under § 2113(a) "certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity)," *id*., but found no basis to impose a specific intent in § 2113(a), *id*. at 268-69. Instead, the Court determined "the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent—that is, that 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.

This Court's classification of § 2113(a) as a general intent crime in *Carter* means the statute requires nothing more than knowledge—a lower mens rea than the specific intent required by the elements clause. Consistent with *Carter*, the Ninth Circuit holds juries need not find intent in § 2113(a) cases. Rather, in the Ninth Circuit, a finding of robbery by intimidation focuses on the objective reaction of the victim, not the intent of the defendant. This is not enough to classify an offense as a crime of violence.

For example, in *United States v. Foppe*, the Ninth Circuit held a jury need not find the defendant intentionally used force and violence or intimidation on the victim bank teller. 993 F.2d 1444, 1451 (9th Cir. 1993). The Ninth Circuit held a specific intent instruction was unnecessary because "the jury can infer the requisite criminal intent from the fact that the

defendant took the property of another by force and violence, or intimidation." *Id.* Nowhere in *Foppe* did the Ninth Circuit suggest that the defendant must know his actions are intimidating. To the contrary, *Foppe* held the "determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions," rather than by proof of the defendant's intent. *Id.* ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see also Hopkins*, 703 F.2d at 1103 (approving instruction stating intimidation is established by conduct that "would produce in the ordinary person fear of bodily harm," without requiring any finding that the defendant intended to, or knew his conduct would, produce such fear).

Other circuits' decisions are in accord: bank robbery by intimidation focuses on the objective reaction of the victim, not on the defendant's intent. *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996) (citation omitted) ("The 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. . . . [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate."); *Kelley*, 412 F.3d at 1244 ("[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) (discussing *Foppe* with approval).

As this Court has recognized, an act that turns on "whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks," requires only a negligence standard, not intent. *Elonis*, 135 S. Ct. at 2011. Because jurors in a bank robbery case are called on only to judge what a reasonable bank teller would feel—as opposed to the defendant's intent—the statute cannot be deemed crime of violence.

In sum, *Watson*'s sub silentio holding that bank robbery is an intentional crime cannot be squared with this Court's case law. Consequently, this Court should grant certiorari to clarify that bank robbery cannot be a crime of violence under the elements clause, because general intent "intimidation" does not satisfy that standard.

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

The fact that Mr. Chapnick was found guilty of armed bank robbery, which requires proof a defendant "use[d] a dangerous weapon or device," does not undermine his arguments. 18 U.S.C. § 2113(d). Indeed, *Watson* did not address the armed element of armed bank robbery other than to state that because "[a] conviction for armed bank robbery requires proof of all the elements of unarmed bank robbery," "armed bank robbery under §

2113(a) and (d) cannot be based on conduct that involves less force than an unarmed bank robbery requires." 881 F.3d at 786.

Moreover, the "dangerous weapon or device" standard is less pernicious than it seems. For one thing, because the standard applies from the point of view of the victim, a "weapon" was dangerous or deadly if it "instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 18 (1986).

Relying on *McLaughlin*, the Ninth Circuit affirms armed bank robbery convictions that do not involve actual weapons. In *United States v. Martinez-Jimenez*, for example, the defendant entered a bank and ordered people in the lobby to lie on the floor while his partner took cash from a customer and two bank drawers. 864 F.2d 664 (9th Cir. 1989). The defendant "was holding an object that eyewitnesses thought was a handgun" but was in fact a toy gun he purchased at a department store. *Id.* at 665. His partner testified that "neither he nor [the defendant] wanted the bank employees to believe that they had a real gun, and that they did not want the bank employees to be in fear for their lives." *Id.* Yet, the defendant was guilty of armed bank robbery even where: (1) he did not "want[] the bank employees to believe [he] had a real gun," and (2) he believed anyone who perceived the gun accurately would know it was a toy. Such a defendant does not intend to threaten violent force.

Other federal circuits also hold armed bank robbery includes the use of fake guns. "Indeed, every circuit court considering even the question of

whether a fake weapon that was never intended to be operable has come to the same conclusion" that it constitutes a dangerous weapon for the purposes of the armed robbery statute. *United States v. Hamrick,* 43 F.3d 877, 882-83 (4th Cir.1995); *see e.g., United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015) (affirming toy gun as dangerous weapon for purposes of § 2113(d)); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir. 2008) (noting "toy gun" qualifies as dangerous weapon under § 2113(d)); *United States v. Garrett,* 3 F.3d 390, 391 (11th Cir.1993) (same); *United States v. Medved,* 905 F.2d 935, 939 (6th Cir.1990) (same).

Indeed, this Court's reasoning in *McLaughlin* holds that an unloaded or toy gun is a "dangerous weapon" for purposes of § 2113(d) because "as a consequence, it creates an immediate danger that a violent response will ensue." 476 U.S. at 17-18. Thus, circuit courts including the Ninth Circuit define a "dangerous weapon" with reference to not only "its potential to injure people directly" but also the risk that its presence will escalate the tension in a given situation, thereby inducing *other people* to use violent force. *Martinez-Jimenez*, 864 F.2d at 666-67. In other words, the armed element does not require *the defendant* to use a dangerous weapon violently against a victim. Rather, the statute can be satisfied where the defendant's gun (even if a toy) makes it more likely that a *police officer* will use force in a way that harms a victim, a bystander, another officer, or even the defendant. *Id.* A statute does

not have "as an element" the use, attempted use, or threatened use of force when the force can be deployed by someone *other than* the defendant.

In other words, *Watson* is correct that the "armed" part of armed bank robbery does not control.

3. The federal bank robbery statute is indivisible and not a categorical crime of violence under 18 U.S.C. § 924(c).

The federal bank robbery statute is not a crime of violence for a third reason—the federal bank robbery statute includes both bank robbery and bank extortion. Because bank extortion does not require a violent threat, and because the statute is not divisible, this overbreadth is fatal.

The Ninth Circuit did not reach the question of whether bank extortion can be accomplished without fear of physical force—though the caselaw makes clear that it can. *United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). Rather, with little analysis, the Court concluded that bank robbery and bank extortion were divisible portions of the statute. *Watson*, 881 F.3d at 786. This analysis gives short shrift to this Court's divisibility opinions.

Where a portion of a statute is overbroad, a court must determine whether the overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at

2249. If a criminal statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,'" the statute is divisible. *Descamps*, 570 U.S. at 263-64. And only when a statute is divisible may courts then review certain judicial documents to assess whether the defendant was convicted of an alternative element that meet the elements clause. *Id.* at 262-63.

Watson summarily held the federal bank robbery statute was divisible because "it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006) and *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991)). The sources it cited do not establish that § 2113(a) is divisible—indeed, each indicates the exact opposite: that force and violence, intimidation, and extortion are indivisible means of satisfying a single element.

Eaton does not make the case for divisibility. *Eaton* points out that bank robbery is defined as "taking 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank. . . ." *Eaton*, 934 F.2d at 1079 (emphasis added) (citation omitted). But it goes on to note that the "essential element" of bank robbery "could [be] satisfied . . . through mere 'intimidation.'" This seems to make the opposite case—that the element is a

wrongful taking, and that violence, intimidation, and extortion are merely means of committing the offense.

Jennings is no more persuasive. *Jennings* addressed the application of a guideline enhancement to the facts of a bank robbery conviction. 439 F.3d at 612, and in so doing, notes that bank robbery "covers not only individuals who take property from a bank 'by force and violence, or by intimidation,'" as defendant Jennings did," "but also those who obtain property from a bank by extortion." *Jennings*, 439 F.3d at 612. A statement of the statutes coverage does not affect the divisibility analysis.

Watson also failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which held that "bank larceny" under § 2113*(b)*—which prohibits taking a bank's property "with intent to steal or purloin"—is not a lesser included offense of "bank robbery" under § 2113*(a)*. 891 F.2d at 734. In the course of reaching that conclusion, *Gregory* compared the elements of the two offenses, holding "[b]ank robbery is defined as taking or attempting to take 'by force and violence, *or* by intimidation . . . *or* . . . by extortion' anything of value from the 'care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association. . . .' 18 U.S.C. § 2113(a)." *Id.* (alteration in original) (emphasis added).

Other circuits have similar decisions. The First Circuit specifically holds that § 2113(a) "includes both 'by force and violence, or intimidation' and

'by extortion' as separate *means* of committing the offense." *United States v. Ellison*, 866 F.3d 32, 36 n.2 (1st Cir. 2017) (emphasis added). The Seventh Circuit's model jury instructions specifically define extortion as a "means" of violating § 2113(a): "The statute, at § 2113(a), ¶1, includes a *means* of violation for whoever 'obtains or attempts to obtain by extortion.' If a defendant is charged with this *means* of violating the statute, the instruction should be adapted accordingly." Pattern Criminal Jury Instructions of the Seventh Circuit 539 (2012 ed.) (emphasis added). The Third Circuit agrees. *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998) ("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).

The Fourth Circuit, in *United States v. Williams*, treated "force and violence," "intimidation," and "extortion" as separate means of committing § 2113(a) bank robbery. 841 F.3d 656 (4th Cir. 2016). "As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force and violence, intimidation, or extortion; and (2) bank burglary, which simply involves entry or attempted entry into a bank with the intent to commit a crime therein." 841 F.3d at 659. Bank robbery, the Court wrote, has a single "element of force and violence, intimidation, or extortion." *Id.* at 660.

And the Sixth Circuit, without deciding the issue, noted § 2113(a) "seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it . . . on the other." *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017).

Section 2113(a), in other words, may be divisible into two crimes at most: robbery (under the first paragraph) and entering a bank with the intent to commit a felony (under the second paragraph). But the robbery offense is not further divisible; it can be committed through force and violence, *or* intimidation, *or* extortion. These three statutory alternatives exist within a single set of elements and therefore must be means.

In addition to the caselaw making this point, the statute's history confirms bank robbery is a single offense that can be accomplished "by force and violence," "by intimidation," or "by extortion." Until 1986, § 2113(a) covered only obtaining property "by force and violence" or "by intimidation." *See United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002). A circuit split ensued over whether the statute applied to wrongful takings in which the defendant was not physically present inside the bank. H.R. Rep. No. 99-797 sec. 51 & n.16 (1986) (collecting cases). Most circuits held it did cover extortionate takings. *Id.* Agreeing with the majority of circuits, the 1986

amendment added language to clarify that "extortion" was a means of extracting money from a bank. *Id.* ("Extortionate conduct is prosecutable [] under the bank robbery provision. . . ."). This history demonstrates Congress did not intend to create a new offense by adding "extortion" to § 2113(a), but did so only to clarify that such conduct was included within bank robbery. Obtaining property by extortion, in other words, is merely an alternative means of committing robbery.

Because § 2113(a) lists alternative means, it is an indivisible statute. And because the Ninth Circuit disregarded this Court's caselaw when it reached the opposite conclusion, the Court should grant this petition.

Conclusion

For the foregoing reasons, Mr. Chapnick respectfully requests that this Court grant his petition for writ of certiorari.

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Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: February 22, 2020

By: BRIANNA MIRCHEFF
Deputy Federal Public Defender
Attorney for the Petitioner