No.

In The Supreme Court Of The United States

Edward Stain,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented for Review

1. Petitioner Stain asks this Court to address whether a conviction under 18 U.S.C. § 924(c) is unconstitutional when the *Shepard* documents do not clearly establish that a jury unanimously based its § 924(c) conviction on one constitutionally qualifying predicate offense. Here, the government conceded that one possible predicate offense—conspiracy—no longer qualifies as a § 924(c) predicate, given *United States v. Davis*, 139 S. Ct. 2319 (2019). The Fourth Circuit holds that for ambiguous § 924(c) convictions, courts are to apply the modified categorical approach, limiting review to the *Shepard* documents, and if one predicate offense does not qualify, courts must vacate the § 924(c) conviction. Yet the Ninth Circuit failed to apply modified categorical analysis to the ambiguous § 924(c) convictions, creating an incongruous result requiring review by this Court.

2. Petitioner Stain also asks this Court to address whether aiding and abetting Hobbs act robbery, aiding and abetting armed bank robbery, substantive Hobbs Act robbery, and substantive armed bank robbery are qualifying crimes of violence under § 924(c)'s force clause. Circuits have failed to apply categorical analysis to aiding and abetting's distinct elements, which do not meet the requirements of 18 U.S.C. § 924(c)(3)(A)'s force clause. Circuits have also interpreted, post-*Johnson*, the Hobbs Act robbery and armed bank robbery statutes statute too narrowly and against the statutory plain language to now require intentional violent physical force as an element.

Related Proceedings

Petitioner Edward Stain moved to vacate his two 18 U.S.C. § 924(c) convictions, pursuant to 28 U.S.C. § 2255 in the District of Nevada. The district court denied Stain's motion to vacate, but granted a certificate of appealability on July 12, 2017. App. B. The Ninth Circuit affirmed the denial of § 2255 relief on August 11, 2021. App. A. Stain remains in federal custody of the Bureau of Prisons, with an estimated release date of November 1, 2041.

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Petition for Certiorari

Petitioner Edward Stain petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit opinion denying appellate relief is not published in the Federal Reporter but is reprinted at: *United States v. Stain*, No. 17-16707, 2021 WL 3523500 (9th Cir. Aug. 11, 2021) (unpublished). App. A.

The district court's order denying Stain's motion to vacate is not published but is reprinted at: *United States v. Stain*, No. 2:02-cr-00201-LRH-NJK, 2017 WL 2974951 (D. Nev. July 12, 2017) (unpublished). The district court's amended judgments, jury verdict, jury instructions, and superseding indictment are unpublished and not reprinted. App. C, E, G, H, I, J.

Jurisdiction

The memorandum of the Ninth Circuit denying Stain's timely appeal of denial of habeas release was entered on August 11, 2021. App. A. The district court had jurisdiction over the initial motion to vacate under 28 U.S.C. § 2255(b). The Ninth Circuit had jurisdiction over the final judgment per 28 U.S.C. §§ 1291 and 2253(a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a).

This petition is timely per Supreme Court Rule 13.1 because the petition is filed within 90 days of the lower court's order denying relief.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

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

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

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

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

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

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

5. The federal Hobbs Act robbery statute, 18 U.S.C. § 1951, provides in relevant part:

> (a) 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.
>
> (b) As used in this section—
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

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

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
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> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

> 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

Petitioner Edward Stain, a first-time offender, has been in prison for half of his life serving a 44½ year prison sentence—*32 years* of which consists of two mandatory consecutive prison terms under 18 U.S.C. § 924(c). The jury was instructed that it could convict Stain of aiding and abetting use of a firearm under 18 U.S.C. § 924(c) based on an unconstitutional predicate or a constitutional predicate—but the general verdict returned by the jury does not reveal which predicate it chose. Because the Ninth Circuit ignored this Court's precedent that the categorical approach must clearly establish a valid § 924(c) predicate offense, review by this Court is necessary to ensure congruous results.

A. An ambiguous general jury verdict.

Stain's case involves five co-defendants and a string of three armed bank and casino robberies, during which no one was injured and no weapons were fired. Stain was 23 years old at the time of the offense and did not participate in the actual robberies, although he was present at each scene. Unlike his five co-defendants, Stain exercised his right to trial and received over 44 years in prison due to two stacked § 924(c) counts. The five co-defendants pled guilty, received

sentences of 12 years or less with no § 924(c) counts, and have completed their sentences.

The grand jury ultimately issued a Third Superseding Indictment alleging six counts against Stain:

> Count One: Conspiracy, 18 U.S.C. §§ 371 and 2, to commit (a) armed bank robbery; (b) possession of a firearm during a crime of violence; and (c) Hobbs Act robbery.
>
> Count Two: Aiding and abetting Hobbs Act robbery, 18 U.S.C. §§ 2 and 1951(a).
>
> Count Three: Aiding and abetting possession of a firearm during a crime of violence, 18 U.S.C. §§ 2 and 924(c).
>
> Count Four: Aiding and abetting armed bank robbery, 18 U.S.C. §§ 2 and 2113(d).
>
> Count Five: Aiding and abetting possession of a firearm during a crime of violence, 18 U.S.C. §§ 2 and 924(c).
>
> Count Six: Aiding and abetting Hobbs Act robbery, 18 U.S.C. §§ 2 and 1951(a).

App. J: 61a. This third superseding indictment incorporated conspiracy (Count One) into both § 924(c) counts, but also tied Count Three's § 924(c) count to Hobbs Act robbery and Count Five's § 924(c) count to armed bank robbery. App. J: 65a-66a. No offense location was identified for either § 924(c) count. The two § 924(c) counts carried a total 32-year mandatory consecutive sentence: 7-years for the first § 924(c), and 25-years for the second § 924(c). [1]

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[1] Today, because of the First Step Act of 2018's changes to § 924(c) sentencing, the two § 924(c) counts would each carry a 7-year consecutive mandatory sentence—resulting in a 26½-year total sentence rather than 44½ years.

The jury instructions addressed the § 924(c) charges in six different instructions—instructions that cross-referenced other counts and instructions. App. I: 32a-50a. Through these instructions, the district court informed the jury that each § 924(c) count could rest on conspiracy.

During deliberations, the jury asked two questions in one note: "Conspiracy—Does it have to be for every count? Can Mr. Stain be guilty on one count and not on others?" App. I: 52a. Before the court could provide an answer, a second jury note was submitted, stating, "We found the answer to our question to conspiracy on jury instruction number 15, lines 8, 9, and 10." App. I: 57a.[2] The jury never said it found an answer to or resolved its second question: "Can Mr. Stain be guilty on one count and not on others?" App. I: 57a-59a. Twenty minutes after the second note, the jury confirmed it reached a verdict. App. I: 58a.

The jury returned a general verdict of "guilty" on all six counts. App. H: 29a. The general verdict failed to specify whether the jury unanimously agreed that the § 924(c) offenses rested on conspiracy, aiding and abetting Hobbs Act robbery, aiding and abetting armed bank robbery, or a combination . App. H: 29a.

Stain received a 12½-year concurrent sentences for the non-§ 924(c) counts (Counts Two and Four), with a 5-year concurrent sentence for Count One's

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See First Step Act of 2018, Pub. L. 115–391, 132 Stat. 5194 (Dec. 21, 2018). In 2020, Stain sought a reduced sentence under 18 U.S.C. § 3582(c)(1)(A), based in part on the First Step Act, which the district court denied and is pending appeal at the Ninth Circuit. *See United States v. Stain*, No. 21-10154 (9th Cir.).

[2] On direct appeal, the Ninth Circuit found Instruction 15 to be erroneous, vacating the conspiracy count, as detailed below.

conspiracy, followed by the mandatory consecutive 7-year sentence for Count Three and the mandatory consecutive 25-year sentence for Count Five—for a total 44½ years of imprisonment. App. G: 25a. The final judgment did not specify a predicate for the § 924(c) offenses. App. G: 24a.

B. Conspiracy count reversed by 9th Circuit on direct appeal.

Stain appealed his conviction and sentence. In 2008, the Ninth Circuit reversed Stain's conviction for conspiracy (Count One), finding that Jury Instruction 15 fatally varied from "a single conspiracy to commit all three robberies" as charged in the indictment. App F: 22a-23a. Appellate counsel did not challenge the § 924(c) convictions other than general insufficiency. Thus, the Ninth Circuit did not address which predicate(s) were the basis for the § 924(c) convictions.

The district court amended its judgment by removing Count One and its 60-month sentence. App. E: 16a.

C. First habeas proceeding results in amended judgment.

Stain filed a pro se motion to vacate in 2009, arguing his § 924(c) convictions resulted from ineffective assistance of counsel for failing to object to the § 924(c) counts as violating the Double Jeopardy Clause, and asking the court to reduce the special assessment from $600 to $500 due to the reversal of Count One. Three years later, the district court granted in part and denied in part the motion to vacate, rejecting the § 924(c) challenge but granting the special assessment reduction. App. D:14a-15a. The district court entered a second

amended judgment reducing the special assessment. App. D:13a. Stain timely appealed, but the Ninth Circuit denied a certificate of appealability.

D. Habeas proceedings under *Johnson* and *Davis*

Two years later, on June 26, 2015, this Court in *Johnson v. United States*, 576 U.S. 591 (2015), struck down the residual clause of the Armed Career Criminal Act ("ACCA") as void for vagueness under the Fifth Amendment's Due Process Clause. Stain timely challenged his § 924(c) convictions and sentences, given *Johnson*, resulting in the present appeal.

Without argument or a hearing, the district court issued a written order denying relief, but granting a COA. App. B:3a-8a. Citing only the third superseding indictment and providing no analysis of the remaining *Shepard* documents, the district court summarily held that "Hobbs Act robbery and federal armed bank robbery (counts 2 and 4) served as the underlying crime of violence for Stain's two separate § 924(c) convictions (counts 3 and 5)." App. B: 4a. The district court did not reach *Johnson*'s applicability to § 924(c)(3)(B)'s residual clause, because it concluded that both Hobbs Act robbery and armed bank robbery are categorically crimes of violence under the force clause of § 924(c)(3)(A). App B:5a-7a. The district court did not address conspiracy.

E. Habeas Appeal to Ninth Circuit

Stain timely appealed. During pendency of the appeal, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding § 924(c)'s residual clause is unconstitutionally vague. The Ninth Circuit granted supplemental briefing

regarding *Davis*, but ultimately concluded neither § 924(c) count rested on conspiracy. App. A:1a-2a. Without discussion, the Ninth Circuit summarily held: "the record makes clear that Stain's § 924(c) convictions rested on his two robbery convictions. The jury instructions for Count Three's § 924(c) conviction explicitly required the jury to find that Stain committed Hobbs Act robbery as alleged in Count Two. Similarly, the jury instruction for Count Five's § 924(c) conviction explicitly required the jury to find that Stain committed armed bank robbery as alleged in Count Four." App. A:1a. The opinion found Stain waived his argument about aiding and abetting and thus did not address its elements. App. A:1a-2a. The Ninth Circuit applied its precedent finding Hobbs Act robbery and armed bank robbery qualify as crimes of violence under § 924(c), affirming denial of habeas relief. App. A:1a (citing *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *pet. for cert. filed* (U.S. Jan. 18, 2021) (No. 20-1000); *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018)).

Reasons for Granting the Petition

This Court should grant review of Petitioner Stain's case because it presents an important question of federal law: whether this Court's precedent concerning the categorical approach applies when a general verdict provides uncertainty about the predicate supporting a § 924(c) conviction and sentence. *See* Sup. Ct. R. 10(c).

I. This Court's review is necessary because the Ninth Circuit's decision conflicts with decisions of this Court requiring certainty in 18 U.S.C. § 924(c) convictions.

For crime of violence determinations, both *Johnson* and *Davis* require courts to apply the categorical approach. *Johnson*, 576 U.S. at 596; *Davis*, 139 S. Ct. at 2326-36. 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).

To determine the predicate offense, this Court requires applying the modified categorical approach to determine whether the record conclusively establishes the jury unanimously agreed upon a valid predicate. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013). This review is limited to *Shepard* documents and does not include a fact-based inquiry into the record. *Shepard*, 544 U.S. at 26; *Mathis v. United States*, 136 S. Ct. 2243, 2251–52 (2016) (reiterating rules for categorical and modified categorical analysis, prohibiting consideration of "the particular facts underlying the [] convictions"). The permissible *Shepard* documents are limited to "the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy or some comparable judicial record." *Moncrieffe*, 569 U.S. at 190-91 (quoting *Shepard*, 544 U.S. at 26). *Shepard* documents must establish with "certainty" that a conviction rested on a predicate offense "necessarily" including the elements required to constitute a crime of violence. *Id.* at 24–25.

When ambiguity exists about which statute served as the crime-of-violence predicate, the government has not met its burden and the conviction cannot stand. "The problem," this Court explains, "is that what the [district] court has been required to find is debatable." *Shepard*, 544 U.S. at 25 (alteration and internal quotation marks omitted). For example, in *Taylor*, this Court reversed and remanded because "it is not apparent to us from the sparse record before us which of those statutes were the bases" for the ACCA predicates. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *see also United States v. Matthews*, 278 F.3d 880, 884 (9th Cir. 2002) (en banc) (remanding ACCA enhancement where district court did not properly find the predicates).

Until the government clearly establishes the underlying predicate, a court cannot determine whether § 924(c)(3)(A)'s requirements are met, as "evidentiary gaps work against the government in criminal cases." *Pereida v. Wilkinson*, 141 S. Ct. 754, 766 (2021). Thought not a criminal case, this Court's recent *Pereida* decision is instructive here. *Pereida* held that under the Immigration and Nationality Act certain nonpermanent residents seeking to cancel a removal order must show they have not been convicted of a disqualifying offense. *Pereida*, 141 S. Ct. at 767. An immigrant has not carried that burden when he has been convicted under a divisible statute listing multiple offenses, some of which are disqualifying, and cannot prove he was not convicted of a disqualifying subsection. *Id.* at 765–66. *Pereida* recognized that "just as evidentiary gaps work against the government in

criminal cases, they work against the alien seeking relief from a lawful removal order." 141 S. Ct. at 766.

The *Pereida* decision specifically distinguished the *Johnson* line of cases that apply here:

> *Johnson* involved a criminal prosecution under the [ACCA] in which the government bore the burden of proof. There, "nothing in the record" indicated which of several crimes in a divisible statute the defendant had been convicted of committing. Accordingly, if it wished to win certain sentencing enhancements, the government had to show that all of the statute's offenses met the federal definition of a "violent felony."

Pereida, 141 S. Ct. at 765–66 (cleaned up). Record "materials will not in every case speak plainly," and therefore "any lingering ambiguity about them can mean the government will fail to carry its burden of proof in a criminal case." *Id.* at 765.

This Court also recognizes that, in the categorical analysis context, judge-made findings about conduct underlying the predicate offense "raise serious Sixth Amendment concerns." *Descamps v. United States*, 570 U.S. 254, 269–70 (2013). Thus, the modified categorical approach also reflects this Court's holding in *Alleyne v. United States*, 570 U.S. 99, 108 (2013), requiring that any fact increasing the mandatory minimum sentence is an element that must be submitted to a jury and unanimously found beyond a reasonable doubt. Here, the indictment and general verdict listed multiple predicates in a single § 924(c) count, which allowed an increased mandatory minimum sentence without the unanimity required by *Alleyne*. To prevent courts from "guess[ing] which predicate the jury relied on," the *Alleyne* decision "expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." *In re Gomez*, 830 F.3d

1225, 1227–28 (11th Cir. 2016) (granting application for successor motion to vacate for challenge to general guilty verdict for duplicitous § 924(c) count under *Johnson*). *Alleyne* prohibits affirming the Stain's § 924(c) convictions and 32-year mandatory minimum consecutive sentences through retroactive judicial fact-finding.

This Court also recognizes, in crime of violence determinations, the "rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. The ambiguity regarding Count Three and Five's predicate offenses must therefore be resolved in Stain's favor.

By failing to examine the permitted *Shepard* documents here, the Ninth Circuit ignored this Court's precedent. Neither the indictment nor the jury instructions establish with any certainty whether the § 924(c) predicate crime of violence was conspiracy, aiding and abetting Hobbs Act robbery, or aiding and abetting armed bank robbery. App. I-J: 30a-67a.

In the third superseding indictment, Counts Three and Five each charge § 924(c) offenses based on the conspiracy *and* robbery counts. Count Three includes Count One (conspiracy): "The factual allegations set forth in Count One are incorporated herein by reference;" and includes Count Two (Hobbs Act robbery): "during and in relation to a crime of violence, namely, Interference with Commerce by Threats or Violence, as alleged in Count Two of this indictment." App. J:65a. No offense location was identified. App. J:65a. Count Five includes Count One (conspiracy): "The factual allegations set forth in Count One are incorporated herein

by reference;" and includes Count Four (armed bank robbery): "during and in relation to a crime of violence, namely, armed bank robbery, as alleged in Count Four of this indictment." App. J:65a. Again, no offense location was identified. App. J:65a. The resulting ambiguity about whether Counts Three and Five rested on conspiracy or on substantive robbery allegations created considerable consternation.

The jury instructions explicitly authorized the jury to find § 924(c) guilt on either conspiracy or aiding and abetting the Hobbs Act or armed bank robberies. App. I: 32a-50a. And jurors are presumed to have followed follow the district court's instructions. *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985). The jury instructions addressed the § 924(c) charges in six different instructions—instructions that also cross-referenced other counts and instructions.

First, in Instruction 12, the court read the indictment to the jury but mistakenly added language to Counts Three and Five not contained in the indictment. *Compare* App. I:37a. 39a, *with* App. J:65a–66a. This mistake added Ramada Inn's interstate commerce status to *both* Counts Three and Five: "At all times material to this indictment, Ramada Inn . . .was engaged in interstate commerce and was an industry which affected interstate commerce." App I:37a, 39a. Thus, the district court instructed the jury Count Three's § 924(c) charge could rest on Counts One or Two, and Count Five's § 924(c) charge rested on Counts One, Two, or Four.

Second, in Instruction 15, the court incorrectly instructed the jury on conspiracy (resulting in the Ninth Circuit vacating the conspiracy conviction on direct appeal). Instruction 15 erroneously stated: "First, beginning on or about March 22, 2002 and ending on or about December 23, 2002, there was an Agreement between two or more persons *to commit at least one crime* as charged in the indictment." App. I:41a (emphasis added). Stain objected, stating the conspiracy instruction would mislead the jury to believe an agreement to have a firearm could convict him of the substantive § 924(c) counts, which the court overruled. On appeal, the Ninth Circuit found Instruction 15 fatally varied from "a single conspiracy to commit all three robberies" as charged in the indictment. App. F:22a. Vacating the Count One conspiracy conviction, this Court held "the jury was instructed 'in such a way as to allow [Stain] to be convicted on the basis of conduct other than that with which he was charged." App. F:22a. The remaining instructions for the relevant offenses (Instructions 16, 17, 18, 19) only added to the existing confusion, particularly along with incorrect Instructions 12 and 15. App. I:43a-46a.

The jury was left confused, asking: "Conspiracy—Does it have to be for every count? Can Mr. Stain be guilty on one count and not on others?" App. I:52a. The jury then said it found the answer to its conspiracy question in the (erroneous) Instruction 15. App. I:57a. But the jury never said it found an answer to the question "Can Mr. Stain be guilty on one count and not others." App. I:52a-60a.

The general verdict form did not specify which of the multiple predicates served as the basis for the two § 924(c) convictions. App. H:29a. The final and amended judgments do not identify the underlying crime of violence for the § 924(c) counts, and state all counts rest on aiding and abetting. App. C, E, G.

"[T]he party who bears the burden of proving [a conviction] bears the risks associated with failing to do so." *Pereida*, 141 S. Ct. at 765. The government failed to obtain a verdict that clearly indicates which offense the jury predicated Stain's two § 924(c) convictions upon. The resulting ambiguity the jury's verdict must be resolved in Stain's favor.

A. This Court's review is also necessary because the Ninth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit's failure to apply the modified categorical approach here has led to incongruous results. *See* Sup. Ct. R. 10(a). The Fourth Circuit holds that when a § 924(c) offense could rest on two predicates, courts 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*, 994 F.3d 192, 201 (4th Cir. 2020). In *Runyon*, the jury submitted a general verdict that did not state whether it relied on conspiracy to commit murder for hire or carjacking in finding Runyon guilty under § 924(c). *Id.* The Fourth Circuit, applying the modified categorical approach, found Runyon "could have been convicted by the jury's reliance on either predicate offense, requiring us to determine whether each predicate offense qualifies as a crime of violence." *Id.* However, because the Fourth Circuit found both predicates qualified under §

924(c)'s force clause, it did not vacate the § 924(c) conviction. *Id.* at 202–04. The Office of the Federal Public Defender estimates that, due to *Runyon*, over 70 defendants in the District of Maryland will likely receive relief from § 924(c) convictions in pending § 2255 motions, with several hundred defendants in the Fourth Circuit also expected to receive relief.

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

Several district courts agree with the Fourth Circuit, applying modified categorical approach to ambiguous § 924(c) convictions, affording habeas relief. *See, e.g.,* U*nited States v. White,* 510 F. Supp. 3d 443 (W.D. Tex. Dec. 29, 2020) (granting § 2255 relief, vacating ambiguous § 924(c) conviction where Shepard documents did not clearly establish a qualifying predicate); *United States v. Berry*, No. 3:09-cr-00019, 2020 WL 591569, *3 (W.D. Va. Feb. 6, 2020) (same); *United States v. McCall*, No. 3:10-cr-170-HEH, 2019 WL 4675762, *6-7 (E.D. Va. Sept. 24, 2019); *United States v. Lettiere*, No. CV 16-157-M-DWM, 2018 WL 3429927, *4 (D. Mont. July 13, 2018); *United States v. Sangalang*, No. 2:08-CR-163 JCM (GWF),

2018 WL 2709865 (D. Nev. June 5, 2018); *United States v. Flores*, No. 2:08-cr-163-JCM-GWF, 2018 WL 2709855, *6-9 (D. Nev. June 5, 2018) (same).

The lack of specificity and unanimity as to the predicate crime of violence leaves this Court with no assurance, much less the requisite certainty, that Stain's § 924(c) convictions rest on constitutional predicates. To avoid an unconstitutional result in direct conflict with this Court's precedent, review is necessary. This Court's review and correction of the Ninth Circuit's failure to apply modified categorical analysis to ambiguous § 924(c) convictions will ensure national consistency for similarly situated defendants.

II. Certiorari is necessary to ensure predicates meet this Court's requirements of intentional, violent physical force under 18 U.S.C. § 924(c)(3)(A).

Stain's predicate § 924(c) convictions are unconstitutional because conspiracy, aiding and abetting Hobbs Act robbery, aiding and abetting armed bank robbery, and substantive Hobbs Act and armed bank robbery do not qualify as § 924(c) crimes of violence.

To qualify under § 924(c)'s force clause, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This means the offense must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817 (2021).

The government agrees that, without the residual clause, conspiracy to commit Hobbs Act robbery, 18 U.S.C. § 371 (Count One), no longer qualifies as a crime of violence under § 924(c). Brief for the United States, *United States v. Davis*, No. 18-431, p.50 (U.S. Feb. 12, 2019); *see also Dominguez*, 954 F.3d at 1265 (Nguyen, J., concurring); *United States v. Soto-Barraza*, 799 F. App'x 456, 458 (9th Cir. 2020) (unpublished) (accepting "the government's concession that conspiracy to commit Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3) in light of the Supreme Court's decision in [*Davis*]" and vacating a § 924(c) conviction). Conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under the physical force clause because it requires no overt act, let alone have as an element the use, attempted use, or threatened use of force. *United States v. Si*, 343 F.3d 1116, 1123–24 (9th Cir. 2003).

Because only the force clause of § 924(c) remains, the Circuits have now interpreted offenses that used to be caged within the residual clause to make them "fit" within the force clause. Circuits have failed to apply categorical analysis to the distinct elements of aiding and abetting either Hobbs Act or armed bank robbery, which do not meet the requirements of § 924(c)(3)(A)'s force clause. And federal Circuits also interpret substantive Hobbs Act robbery, 18 U.S.C. § 1951(a), and armed bank robbery, 18 U.S.C. § 2113(d), too narrowly and against the statutory plain language by finding intentional violent physical force is always required as an offense element.

It is imperative this Court decide the proper interpretation of offenses so defendants are not mandatorily imprisoned for offenses not fitting the § 924(c) definition.

A. Neither aiding and abetting Hobbs Act robbery nor aiding and abetting armed bank robbery qualify as § 924(c) crimes of violence.

To establish guilt for aiding and abetting a federal offense under 18 U.S.C. § 2, a defendant need facilitate only commission of the offense—he need not participate in every offense element. *Rosemond v. United States*, 572 U.S. 65, 73 (2014). An aider and abettor, therefore, need not necessarily "use" force.

The aiding and abetting statute provides: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). A defendant "can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Rosemond*, 572 U.S. at 73. Indeed, "[t]he quantity of assistance [is] immaterial, so long as the accomplice did *something* to aid the crime." *Id.* (cleaned up). An aider and abettor simply need not use, attempt to use, or threaten violent physical force to be convicted.

This Court has not addressed whether aiding and abetting Hobbs Act robbery or aiding and abetting armed bank robbery are crimes of violence under § 924(c)'s force clause. Petitioners urge this Court to follow the correct categorical analysis for aiding and abetting outlined by three federal circuit judges in separate dissenting and concurring opinions: Judge Nguyen's concurrence and dissent in part

in *Dominguez*, 954 F.3d at 1262;[3] Judge J. Pryor's concurrence in *Boston v. United States*, 939 F.3d 1266, 1272 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 103 (2020); and Judge Martin's dissent in *In re Colon*, 826 F.3d 1301, 1306 (11th Cir. 2016).[4] The categorical analysis these judges undertake and the reasoning they provide explains why aiding and abetting Hobbs Act or armed bank robbery are not crimes of violence.

There is no carve-out under *Davis* for aiding and abetting offenses—the statutory elements must be categorically analyzed. The Ninth Circuit has long held the government must prove four elements for aiding and abetting, which are distinct from the elements of the substantive offense. *United States v. Gaskins*, 849 F.2d 454 (9th Cir. 1988). In *Gaskins*, the Ninth Circuit reversed an aiding and abetting drug conviction where the district court precluded the defense at trial from rebutting the government's required elements for aiding and abetting. *Id.* at 460. The Ninth Circuit noted there are distinct elements for aiding and abetting:

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[3] While *Dominguez* and Judge Nguyen's separate opinion address attempted Hobbs Act robbery, the required categorical analysis Judge Nguyen outlined applies equally to aiding and abetting Hobbs Act and armed bank robbery.

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

> [T]he government's argument that an aider and abettor is a principal does not provide an answer to the issue before us because the argument ignores the different elements the government must prove under the two theories and ignores the different arguments that the defense may make concerning the elements of the theory involved.

Id.

The Ninth Circuit's jury instructions contain the elements of aiding and abetting Hobbs Act robbery, which are materially distinct from the elements required for substantive Hobbs Act or armed bank robbery. These distinct elements are: (1) someone else committed Hobbs Act or armed bank robbery; (2) the defendant aided, counseled, commanded, induced or procured that person in at least one element of Hobbs Act or armed bank robbery; (3) the defendant acted with the intent to facilitate Hobbs Act or armed bank robbery; and (4) the defendant acted before the crime was completed. *Compare* Ninth Circuit Manual of Model Criminal Jury Instructions, § 5.1 Aiding and Abetting (Sept. 2019), *with* Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.143A Hobbs Act—Robbery and § 8.162—Bank Robbery (Mar. 2021).[5]

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[5] Other Circuits have similar elements the government must prove to obtain an aiding and abetting conviction, distinct from the substantive offense. *See, e.g.*, First Circuit Pattern Criminal Jury Instructions, § 4.18.02(A) Aid and Abet (June 2018); Third Circuit Pattern Jury Instructions (Criminal Cases), § 7.02 Accomplice Liability: Aiding and Abetting (Nov. 2014); Fifth Circuit Pattern Criminal Jury Instructions, § 2.04 Aiding and Abetting (2019); Eighth Circuit Manual of Model Criminal Jury Instructions, § 5.01 Aiding and Abetting (Aug. 2014).

The Ninth Circuit's elements for aiding and abetting comport with *Rosemond*, 572 U.S. 65, in which this Court clarified aiding and abetting merely requires the defendant to aid or abet *one* element of the substantive offense. "Even when a principal's crime involves an element of force, there is 'no authority for demanding that an affirmative act [of aiding and abetting] go toward an element considered peculiarly significant; rather, . . . courts have never thought relevant the importance of the aid rendered.'" *In re Colon*, 826 F.3d at 1307 (Martin. J., dissenting) (quoting *Rosemond*, 572 U.S. at 75).

In categorical analysis, a court must presume the least of the acts charged—which the Ninth Circuit failed to do here. *Borden*, 141 S. Ct. at 1822; *Moncrieffe*, 569 U.S. at 190–91. Stain was not required to aid or abet by intentionally using, attempting use, or threatening use of force. *In re Colon*, 826 F.3d at 1306–07 (Martin, J., dissenting) (noting even if a defendant did use force to aid and abet a crime, "this use of force was not necessarily an *element* of the crime, as is required to meet the 'elements clause' definition."). Several scenarios illustrate aiding and abetting robbery without the use, attempted use, or threatened use of force. Judge Pryor notes a defendant need not even be present during the substantive offense to be convicted of aiding and abetting. *Boston*, 939 F.3d at 1272 (Pryor, J., concurring). Judge Martin provides several examples in which "a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all," including: "lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere." *In re Colon*, 826 F.3d at 1307 (Martin,

J., dissenting); *see also Boston*, 939 F.3d at 1272 (Pryor, J., concurring) (providing an example of serving as the getaway driver to principal).

Nor does mere intent to facilitate Hobbs Act or armed bank robbery render aiding and abetting a crime of violence. *See Dominguez*, 954 F.3d at 1264–66 (Nguyen, J., concurring and dissenting in part). A court must be careful to not "bootstrap" intent to commit a crime to mean all acts of aiding and abetting include violent force. *Id.* at 1265 (Nguyen, J., concurring and dissenting in part). Rather, a crime of violence must require the government to prove the defendant intentionally used, attempted to use, or threatened to use violent force. This question differs from a defendant's general intent. *Id.* at 1266 (Nguyen, J., concurring and dissenting in part) ("[A] crime of violence must have as an element the [*use,*] *attempted use, or* [*threatened use*] of physical force, which is entirely different from one's *intent* to use physical force"). Circuit opinions hinging on general intent alone to find an offense is a crime of violence are thus erroneous. *Id.* at 1264–66 (Nguyen, J., concurring and dissenting in part) (listing erroneous Seventh and Tenth Circuit cases). And, as set forth below, both Hobbs Act robbery and armed bank robbery lack the specific intent to use force, thus failing to qualify as a crime of violence given *Borden*. *See infra*, pp. 26-27, 35-36.

The Ninth Circuit has previously—and correctly—categorically analyzed the separate elements of state aiding and abetting offenses to hold a defendant's aiding and abetting conviction was a non-qualifying predicate. *United States v. Valdivia-Flores*, 876 F.3d 1201, 1206–09 (9th Cir. 2017) (finding Washington's aiding and

abetting statute is not a categorical "aggravated felony" for immigration purposes). Thus, there are distinct elements required for aiding and abetting offenses that courts must analyze categorically. Yet the Ninth Circuit failed to categorically analyze these distinct elements in Stain's case.

Under the correct categorical analysis outlined by several circuit judges, aiding and abetting Hobbs Act or armed bank robbery are not a qualifying § 924(c) crimes of violence because the government need not prove—as an element—the defendant intentionally used, attempted use, or threatened use of physical force against the person of another. Therefore, Stain asks this Court to grant review, correct the Circuits' disregard of this Court's precedent, and instruct the Circuits that aiding and abetting both Hobbs Act robbery and armed bank robbery are not crimes of violence under § 924(c)'s force clause.

B. Hobbs Act robbery does not qualify as a crime of violence.

Substantive Hobbs Act robbery, 18 U.S.C. § 1951(a), can be committed by causing fear of future injury to intangible property and does not require intentional use of force. It is therefore not a § 924(c) crime of violence. But to make the Hobbs Act robbery statute "fit" the 18 U.S.C. § 924(c)(3)(A) physical force clause definition, the Circuits have repeatedly narrowed the conduct that Hobbs Act robbery used to cover.

Hobbs Act robbery, 18 U.S.C. § 1951(a), can be committed by causing fear of future injury to intangible property and thus is not a § 924(c) crime of violence. The

Hobbs Act prohibits "obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery." 18 U.S.C. § 1951(a). "Robbery" is defined as:

> the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or ***fear of injury, immediate or future, to his*** person or ***property***, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951(b)(1) (emphases added). Hobbs Act robbery fails to qualify under § 924(c)'s force clause for at least six reasons.

First, this Court's recent *Borden* decision requires intentional use of force—there must be a "conscious object (not the mere recipient) of the force." 141 S. Ct. at 1826. Yet Hobbs Act robbery has no such requirement. For Hobbs Act robbery, the Ninth Circuit only requires the general intent to take money or property from a person (or in the person's presence). Ninth Circuit Manual of Model Criminal Jury Instructions, § 8.143A Hobbs Act—Robbery (Mar. 2021). Other Circuit's agree that Hobbs Act robbery carries "an implicit mens rea element of general intent—or knowledge—as to the actus reus of the offense." *United States v. García-Ortiz*, 904 F.3d 102, 108–09 (1st Cir. 2018) (citing *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001) (noting circuit precedent suggesting a "knowing" mens rea standard for Hobbs Act robbery and rejecting a requirement of specific intent to commit the crime).

A "knowing" mens rea equates with recklessness, as Justice Kavanaugh noted in his *Borden* dissent: "[a]s has long been recognized, the difference between

knowledge and recklessness as to the consequences of one's actions is one of degree, not of kind." *Borden*, 141 S. Ct. at 1844 (Kavanaugh, J., dissenting). Hobbs Act robbery thus lacks the specific intent to use force, failing to qualify as a crime of violence under *Borden*.

Borden also explains it is insufficient under the physical force clause's mens rea requirement for an offense to merely require intentional performance of a particular act. *Borden*, 141 S. Ct. at 1826. Both the plurality and concurring opinions agreed that, to satisfy the physical force clause, the offense elements must require a *specific intent to harm* another. *Borden*, 141 S. Ct. at 1825–27 (plurality opinion); *id.* at 1834 (Thomas, J., concurring). *Borden* requires intentional use of force—there must be a "conscious object (not the mere recipient) of the force." *Id.* at 1826. What is dispositive under the physical force clause, the plurality underscored, is not that a defendant's prior actions *did cause harm*, but that–when he acted–he *intended to harm* another. *Id.* at 1831 & n.8. Justice Thomas, who supplied the fifth vote, agreed with the plurality on that critical point: the elements clause only captures intentional conduct "designed to cause harm" to another. *Id.* at 1835 (Thomas, J., concurring). Given *Borden*, this Court's review is necessary as Hobbs Act robbery requires no specific intent to injure property or put a person in fear of injury and thus does not qualify under § 924(c)'s force clause.

Second, the Hobbs Act's plain language criminalizes a threat of "injury, immediate or future, to his person *or property*." 18 U.S.C. § 1951(b)(1) (emphasis

added). Based on its plain language, Hobbs Act robbery can be committed by threats to property. *See United States v. O'Connor*, 874 F.3d 1147, 1154, 1158 (10th Cir. 2017) ("Hobbs Act robbery criminalizes conduct involving threats to property," and "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so"). Threats to property, however, do not require violent physical force.

Third, the Hobbs Act's plain language does not require the use or threats of violent physical force, as defined by *Stokeling*, 139 S. Ct. at 554, and instead can be committed by causing fear of future injury to property. "When interpreting a statute, we must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

Fourth, "fear of injury" to property includes not only a fear of future physical damage to tangible property, but also a fear of future economic loss or damage to intangible property. Federal circuits have long been in accord, unanimously interpreting Hobbs Act "property" to broadly include "intangible, as well as tangible, property." *United States v. Local 560 of the Int'l Bhd. of Teamsters,* 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases and describing the Circuits as "unanimous" on this point); *see also, e.g.*, *United States v. Brown*, No. 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that "property" includes "money and other tangible and intangible things of value" and fear as "an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm"); *United States v. Nguyen*, No. 2:03-cr-00158-KJD-PAL,

Dkt. 157 at p. 28 (D. Nev. Feb. 10, 2005) (providing Hobbs Act robbery jury instruction that "fear" includes "worry over expected personal harm or business loss, or over financial or job security").

Fifth, "fear of injury" does not encompass violent force. Instead, the Hobbs Act expressly provides alternative means encompassing violent force: "actual or threatened force, or violence." 18 U.S.C. § 1951(b)(1). 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 "fear of injury" as requiring the use or threat of violent physical force would render superfluous the other alternative means of committing Hobbs Act robbery.

Sixth, intangible property—by definition—cannot be in the victim's physical custody. This preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property's proximity to the victim or another person. *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (noting Hobbs Act robbery can be committed by "threats to property alone," and such threats—"whether immediate or future—do not necessarily create a danger to the person"), *cert. denied*, 139 S. Ct. 845 (2019).

Hobbs Act robbery, therefore, can be committed via non-violent unintentional threats of future harm to an intangible property interest. Such threats are not threatening physical force—let alone the intentional violent physical force against a person or property the § 924(c)(3)(A) physical force clause requires.

To hold that Hobbs Act robbery qualifies as a crime of violence under the physical force clause, the Circuits erroneously interpret the Hobbs Act robbery statute to be limited to conduct involving violent physical force. *See United States v. García-Ortiz*, 904 F.3d 102, 106–09 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Walker*, 990 F.3d 316, 325–26 (3d Cir. 2021), *petition for cert. filed*, No. 21-102 (July 26, 2021); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *Dominguez*, 954 F.3d at 1260; *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

Yet circuit model jury instructions demonstrate the plain overbreadth of Hobbs Act robbery. The Third, Fifth, Tenth, and Eleventh Circuits use pattern Hobbs Act jury instructions defining Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions, §§ 6.18.1951-4 and 6.18.1951-5 (Oct. 2017) (defining "fear of injury" as when "a victim experiences anxiety, concern, or worry over expected personal physical or

economic harm" and "[t]he term 'property' includes money and other tangible and intangible things of value"); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), § 2.73A (2019) ("The term 'property' includes money and other tangible and intangible things of value."); Tenth Circuit Criminal Pattern Jury Instructions, § 2.70 (Apr. 2021) ("'Property' includes money and other tangible and intangible things of value that are transferable – that is, capable of passing from one person to another. 'Fear' means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances."); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), § O70.3 (Aug. 2021) ("Property' includes money, tangible things of value, and intangible rights that are a source or element of income or wealth. 'Fear' means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.").

Because Hobbs Act robbery is both overbroad and indivisible, a conviction under 18 U.S.C. § 1951(a) cannot qualify as a predicate offense under 18 U.S.C. § 924(c)'s physical force clause. The Ninth Circuit's contrary holding is legally erroneous, ignores this Court's precedent, and requires correction by this Court.

C. Armed bank robbery does not qualify as a § 924(c) crime of violence.

Federal armed bank robbery can be committed by three means: "by force and violence, or by intimidation . . . or . . . by extortion." 18 U.S.C. § 2113(a), (d). Applying the categorical approach, armed bank robbery by intimidation and bank robbery by extortion are the least egregious of § 2113(a)'s range of covered conduct.

Because armed bank robbery by intimidation or extortion does not require the intentional use, attempted use, or threatened use of violent physical force, the statute is not a crime of violence under 18 U.S.C. § 924(c)'s force clause.

During pendency of Stain's appeal, the Ninth Circuit issued *United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018), finding federal armed bank robbery qualifies as a crime of violence under § 924(c)'s force clause. *Watson*, however, failed to acknowledge this Court's prior case law interpreting and applying the federal bank robbery statute, and also creates inter-circuit conflicts. Certiorari is necessary to clarify that, under the categorical approach, federal armed bank robbery is overbroad and not a crime of violence.

First, "intimidation" does not meet § 924(c)'s force clause. In the Ninth Circuit, "express threats of bodily harm, threatening body motions, or the physical possibility of concealed weapon[s] are *not* required for a conviction for bank robbery by intimidation." *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991) (alteration and emphasis in original) (citation omitted). Intimidation does not require a willingness to use violent physical force, robbery by intimidation is satisfied by "an empty threat, or intimidating bluff." *Holloway v. United States*, 526 U.S. 1, 11 (1999). Yet *Watson* failed to acknowledge this precedent.

Second, *Watson* also ignores this Court's holdings that: (1) violent force must be "capable" of potentially "causing physical pain or injury" to another, *Stokeling*, 139 S. Ct. at 554; and (2) violent force must be physical force, rather than "intellectual force or emotional force," *id.* at 552 (quoting *Johnson*, 559 U.S. at 138).

Intimidation in a federal bank robbery can be, and often is, accomplished by a simple demand for money. While a verbal request for money may have an emotional or intellectual impact on a bank teller, it does not require threatening, attempting, or inflicting violent physical force capable of causing pain and injury to another or another's property.

Third, an examination of bank robbery by intimidation cases reveals several circuit affirmances for evidentiary sufficiency despite a lack of threatened violent physical force. The Fourth, Fifth, Ninth, and Eleventh Circuits incorrectly apply the categorical approach by defining "intimidation" under 18 U.S.C. § 2113 broadly for sufficiency purposes to affirm § 2113 convictions involving non-violent conduct that does not involve the use, attempted use, or threatened use of violent force. Yet, notwithstanding this broad definition, these same circuits also find "intimidation" always requires as an element the use, attempted use, or threatened use of violent force under § 924(c)'s force clause. These circuits cannot have it both ways.

For example, in *United States v. Lucas*, 963 F.2d 243, 244, 248 (9th Cir. 1992), the Ninth Circuit found intimidation under § 2113 when the defendant walked into a bank, stepped up to a teller window carrying plastic shopping bags, placed the bags on the counter with a note that read, "Give me all your money, put all your money in the bag," and then said, "Put it in the bag." The defendant never threatened to use violent physical force against anyone, demonstrating that bank robbery does not require the use or threatened use of "violent" physical force.

The Tenth Circuit, in *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982), affirmed a bank robbery by intimidation conviction when the defendant simply helped himself to money and made neither a demand nor threat to use violence. The defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing. *Id.* Yet the Tenth Circuit conversely holds that, under crime of violence analysis, intimidation necessarily requires "a threatened use of physical force." *United States v. McCranie*, 889 F.3d 677, 681 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1260 (2019).

The Fourth Circuit, in *United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008), similarly upheld a bank robbery by intimidation conviction when the defendant gave the teller a note that read, "These people are making me do this," and then the defendant told the teller, "They are forcing me and have a gun. Please don't call the cops. I must have at least $500." *Id.* The teller gave the defendant $1,686, and the defendant left the bank. *Id.* Paradoxically, the Fourth Circuit also holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. McNeal*, 818 F.3d 141, 157 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016).

The Fifth Circuit permits conviction for robbery by intimidation when a reasonable person would feel afraid even when there was no weapon, no verbal or written threat, and when the victims were not actually afraid. *United States v.*

Higdon, 832 F.2d 312, 315–16 (5th Cir. 1987). And yet, the Fifth Circuit also inconsistently holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *United States v. Brewer*, 848 F.3d 711, 716 (5th Cir. 2017).

The Eleventh Circuit affirmed a robbery in *United States v. Kelley*, 412 F.3d 1240, 1244–45 (11th Cir. 2005), where a teller at a bank inside a grocery store left her station to use the phone and two men laid across the bank counter to open her unlocked cash drawer, grabbing $961 in cash. *Id.* at 1243. The men did not speak to any tellers at the bank, did not shout, and said nothing when they ran from the store. *Id.* Yet, once again, the Eleventh Circuit also holds for crime of violence purposes that "intimidation" necessarily requires the threatened use of violent physical force. *Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018).

Applying a non-violent construction of "intimidation" when determining whether to affirm a bank robbery conviction on sufficiency grounds, but then finding—under the categorical approach—that "intimidation" *always* requires a defendant to threaten the use of violent physical force is impermissibly inconsistent and injudicious. Given this confusion in the Circuits' decision, this Court's intervention is necessary.

Fourth, § 924(c)'s force clause requires the use of violent force to be intentional and not merely reckless or negligent. *Borden,* 141 S. Ct. at 1826. But to commit federal armed bank robbery by intimidation, a defendant's conduct need not be intentionally intimidating.

This Court holds § 2113(a) "contains no explicit mens rea requirement of any kind." *Carter v. United States*, 530 U.S. 255, 267 (2000). Instead, federal bank robbery is a general intent crime, requiring only proof "the defendant possessed knowledge with respect to the actus reus of the crime (here, the taking of property of another by force and violence or intimidation)." *Id.* at 268. As a general intent crime, an act of intimidation can be committed negligently, a mens rea insufficient to demonstrate an intentional use of violent force. Thus, bank robbery lacks the specific intent required by *Borden* for § 924(c)'s force clause.

Without an intentional mens rea requirement, a conviction under the federal bank robbery statute does not categorically qualify as a crime of violence. *Watson*'s implicit holding that bank robbery is an intentional crime cannot be squared with this Court's case law.

The final step of categorical approach analyzes whether an overbroad statute is divisible or indivisible. *Mathis*, 136 S. Ct. at 2249. In assessing whether a statute is divisible, courts assess whether the statute sets forth indivisible alternative means by which the crime could be committed or divisible alternative elements that the prosecution must select and prove to obtain a conviction. *Id.* at 2248-49. And, "[i]f statutory alternatives carry different punishments, then . . . they must be elements." *Id.* at 2256. Here, the statute provides one punishment—a person who violates § 2113(a) "[s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 2113(a). Because the federal armed bank robbery statute is indivisible, it cannot constitute a crime of violence.

In holding otherwise, *Watson* failed to cite *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir. 1989), which held § 2113(a)—bank robbery—contains alternative means, while § 2113(b)—bank larceny—is a separate crime. *Watson* instead summarily held the federal bank robbery statute, 18 U.S.C. § 2113(a), is divisible because "it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786 (citing *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006) and *Eaton*, 934 F.2d at 1079). But the cited cases do not establish that § 2113(a) is divisible. For example, in *Eaton*, the Ninth Circuit clarified that "force and violence," "intimidation," and "extortion" are three alternative means—rather than alternative elements—to take property. 934 F.2d at 1079. And the *Jennings* opinion only addressed a guideline enhancement to a bank robbery conviction. 439 F.3d at 612.

Circuits are split over whether § 2113(a) is divisible. Like *Watson*, the First, Second, and Fifth Circuits similarly misapply the divisibility analysis, holding § 2113(a) sets forth separate elements. *See King v. United States*, 965 F.3d 60, 69 (1st Cir. 2020); *United States v. Evans*, 924 F.3d 21, 28 (2d Cir.), *cert. denied*, 140 S. Ct. 505 (2019); *United States v. Butler*, 949 F.3d 230, 236 (5th Cir.), *cert. denied*, 141 S. Ct. 380 (2020).

But the Third, Fourth, and Sixth Circuits treat "force and violence," "intimidation," or "extortion" as alternative means of committing § 2113(a) bank robbery, rendering it indivisible. *United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 830 (2017); *United States v. Williams*, 841 F.3d

656 (4th Cir. 2016) (holding § 2113(a), bank robbery, has a single "element of force and violence, intimidation, or extortion."); *United States v. Askari*, 140 F.3d 536, 548 (3d Cir.) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery."), *vacated on other grounds,* 159 F.3d 774 (3d Cir. 1998).

Certiorari is necessary to resolve this split and correctly instruct circuit courts that general intent "intimidation," as used in the federal bank robbery statute, does not require an intentional threat of violent physical force and thus is not a crime of violence under the § 924(c) force clause. Certiorari is also necessary to clarify that § 2113(a) is an indivisible statute and thus is not a crime of violence under the § 924(c) force clause.

III. The proper application and interpretation of 18 U.S.C. § 924(c) is of exceptional, national importance.

Because of the Ninth Circuit's failure to apply modified categorical analysis Stain will remain in prison for *20 more years* serving two stacked consecutive mandatory sentences under 18 U.S.C. § 924(c). After completion of the prison terms, Stain will also serve a longer supervised release term than would otherwise be imposed, solely because of the § 924(c) convictions.[6]

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[6] The convictions under § 924(c) led to higher supervision terms than would have been imposed for aiding and abetting Hobbs Act or armed bank robbery. Because 18 U.S.C. § 924(c) carries a statutory imprisonment maximum of life imprisonment, it is a Class A felony with a five-year maximum supervised release term. In contrast, aiding and abetting Hobbs Act and armed bank robberies, each with a 20-year imprisonment statutory maximum, are Class C felonies and carry a three-year maximum supervised release term. *See* 18 U.S.C. §§ 1951(a) and 2113;

Stain is just one of the thousands of defendants currently serving consecutive mandatory minimum sentences for § 924(c) convictions. According to the Sentencing Commission's latest statistics, approximately 21,700 individuals (14.3% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm'n, *Quick Facts: Federal Offenders in Prison* (March 2021). In Fiscal Year 2020, over 2500 individuals were convicted of a § 924(c) offense, at least 22% of which involved a robbery offense, with an average sentence of 138 months (11½ years) in prison. U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (May 2021).

Given the vast numbers of defendants' lives affected by the Circuits' interpretation of 18 U.S.C. § 924(c), this Court's intervention is necessary. Petitioners ask this Court to review the Circuit's misapplication of the modified categorical approach to ensure compliance with the Constitution and Supreme Court post-*Davis*, post-*Borden* precedent.

Conclusion

Petitioner Stain requests that the Court grant his petition for a writ of certiorari.

Dated: November 9, 2021.

Respectfully submitted,
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Federal Public Defender

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18 U.S.C. § 3559(a) (felony classifications); 18 U.S.C. § 3583(b) (authorized terms of supervised release).

s/ Wendi L. Overmyer

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