No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____◆_____

QUENTIN JACKSON,

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 WRIT OF CERTIORARI

_____◆_____

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QUESTIONS PRESENTED

QUESTION ONE:

The circuit courts agree that a conviction under 18 U.S.C. § 2113(a) will be sustained even if the defendant was not aware that his conduct would be perceived as intimidating by anyone, yet the Ninth Circuit in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) nevertheless determined that a conviction for violating § 2113(a) can serve as predicate offense for the substantial sentencing enhancements under § 924(c).

Similarly, a conviction under 18 U.S.C. § 1951 will be sustained even if the defendant was not aware that his conduct would place someone in fear of immediate or future injury to the person or property of another, yet the Ninth Circuit in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) nevertheless determined that a conviction for violating § 1951 can serve as predicate offense for the substantial sentencing enhancements under § 924(c).

The question presented is what constitutes a threat of physical force under 18 U.S.C. § 924(c)(3)(A), and, specifically, following *Borden v. United States*, 141 S. Ct. 1817 (2021), can reasonable jurists can debate whether the elements clause of § 924(c) requires proof that when the defendant acted he knew within a practical certainty that his conduct would be perceived as threatening by another, or is it sufficient that a reasonable person would have perceived the defendant's conduct as communicating a threat even if the defendant did not?

QUESTION TWO:

Does the "realistic probability" test articulated in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) determine the scope of a federal statute, or is it the province of federal courts to say what federal law is?

LIST OF PARTIES

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

LIST OF RELATED CASES PURSUANT TO SUPREME COURT RULE 15

United States v. Quentin Jackson, U.S.C.A. 20-16634 (9th Cir.)

United States v. Quentin Jackson, U.S.D.C. No. 1:06-cr-0134-AWI (E.D. Cal.)

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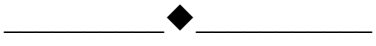
PETITION FOR A WRIT OF CERTIORARI

Quentin Jackson respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit's order denying his request for a certificate of appealability to challenge the district court's denial of his 28 U.S.C. § 2255 motion to vacate and correct his sentence, and in so doing refusing Jackson's request, in light of *Borden v. United States*, 141 S. Ct. 1817 (2021), to revisit its previous decisions in *United States v. Watson*, 881 F.3d 782, 783 (9th Cir. 2018) and *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) holding that §§ 2113 and 1951, respectively, qualify as crimes of violence under 18 U.S.C. § 924(c) even though an individual can be convicted of violating said offenses without knowingly or intentionally communicating a threat of violent physical force against the person or property of another.



OPINIONS BELOW

The November 17, 2021 order denying Jackson's request for a certificate of appealability to challenge the district court's denial of his 28 U.S.C. § 2255 motion to vacate and correct his sentence issued by the United States Court of Appeals for the Ninth Circuit is unpublished and reproduced in the appendix to this petition at A1. There was no request for a rehearing.

The June 25, 2020 memorandum decision and order of the United States District Court for the Eastern District of California denying Jackson's motion to vacate and correct his sentence pursuant to 28 U.S.C. § 2255 is unpublished and reproduced in the appendix at B1-B6.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Jackson's request for a certificate of appealability to challenge the district court's denial of his 28 U.S.C. § 2255 motion was filed on November 17, 2021. Appendix at A1. This Court therefore has jurisdiction over this timely petition pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3. *See Hohn v. United States*, 524 U.S. 236 (1998) (holding the Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel).

PROVISIONS OF LAW INVOLVED

The **Fifth Amendment** to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Under **18 U.S.C. § 924(c)** any person who brandishes a firearm "during and in relation to any crime of violence or drug trafficking crime" is subject to an enhanced mandatory consecutive sentence. Section 924(c)(3) defines a "crime of violence" as "an offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another

The federal armed bank robbery statute codified at **18 U.S.C. § 2113(a) and (d)** reads as follows:

> (a) Whoever, by force and violence, or by **intimidation**, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . .
>
> Shall be 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.

The Hobbs Act robbery statute codified at **18 U.S.C. § 1951(a) and (b)** reads as follows:

> (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.

STATEMENT OF THE CASE

The core question presented in this case was seemingly resolved by this Court in *Borden v. United States*, 141 S. Ct. 1817 (2021). Just like § 924(e)(2)(B)(1), the elements clause at issue in *Borden*, the elements clause of § 924(c) likewise requires the use, attempted use, or threatened use of force. In *Borden* this Court held that when a sentencing enhancement statute with draconian penalties that stripped federal judges of their sentencing discretion under 18 U.S.C. § 3553(a) required proof that a defendant necessarily *used* violent physical force against another, to qualify as a crime of violence a conviction must necessarily establish that when the defendant acted he knew within a practical certainty that his conduct would result in physical harm to another. *Borden*, 141 S. Ct. at 1823-27, 34 (plurality); *Id.* at 1835 (Thomas, J., concurring in judgment). Presumably a *threat* of physical force against another likewise requires proof that the defendant knowingly or intentionally communicated a threat of physical force against another, and not simply that the defendant's conduct resulted in the perception of such a threat.

Jackson requests certiorari to provide much needed clarification regarding application of this Court's decision in *Borden* to the determination of what constitutes a threat of violent physical force under 18 U.S.C. § 924(c)(3)(A), and specifically, whether a conviction that only requires proof that a defendant was negligent regarding the possibility that his intentional conduct could be construed by another as threatening qualifies as a crime of violence. Additionally, when determining the reach of a federal statute does, as the Ninth Circuit believes, and

this Court debated during oral argument in *United States v. Taylor*, Case No. 20-1459 (Dec. 7, 2021), the "realistic probability test" articulated by this Court in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) have any role to play?

A. The Circuit Courts Are Clear that Convictions for 18 U.S.C. §§ 2113 and 1951 Will Be Sustained Even If a Defendant Was Unaware that his Conduct Could Be Perceived as Threatening, and Paradoxically, the Circuit Courts Are Equally Clear that §§ 2113 and 1951 Qualify as Crimes of Violence.

In *Leocal v. Ashcroft* this Court held that when a defendant engaged in the intentional conduct of driving while under the influence, which *resulted* in serious harm to another, the offense did not qualify as a crime of violence because the conviction did not require proof that when the defendant acted, he was aware that his conduct could result in harm to another.[1] 543 U.S. 1, 3, 9 (2004).

In *Borden* this Court built on *Leocal* to hold that an offense cannot qualify as a violent felony under § 924(e)(2)(B)(i)—the elements clause of the Armed Career Criminal Act[2]—unless a conviction necessarily establishes that when the defendant acted he made "a deliberate choice [to use force] with full awareness of [the] consequent harm." *Borden*, 141 S. Ct. at 1823 (plurality); *Id.* at 1835 (Thomas, J., concurring in judgment) (agreeing with the plurality that the elements clause of the ACCA only captures intentional conduct "designed to cause harm" to another). This Court held that the elements clause does not reach the individual who intentionally

[1] In *Leocal* this Court addressed the definition of a crime of violence codified at 18 U.S.C. § 16. The elements clause codified at § 16(a) is substantively identical to the elements clause codified at 18 U.S.C. § 924(c)(3)(A).

[2] The elements clause of the ACCA is substantively identical to the elements clause of 18 U.S.C. § 924(c)(3)(A) except that the latter also reaches the use, threatened use and attempted use of violent physical force against the property of another.

engages in forceful conduct in conscious disregard of "a substantial and unjustifiable" risk that his intentional conduct will result in harm to another, let alone the individual who simply "fail[s] to perceive the possible consequence of his behavior." *Id*. at 1824 (internal quotations omitted). The defendant's conduct should necessarily establish a deliberate intent to harm another rather than simply evince a "degree of callousness toward risk." *Id*. at 1830.

In other words, this Court's jurisprudence establishes that it is not the resulting harm that is dispositive, but rather, whether when the defendant acted he intended to harm another. *Id*. at 1825-27, 1831 n. 8. (citing *United States v. United States Gypsum*, 438 U.S. 422, 445 (1978) for the proposition that it makes no difference whether an individual acts with the purpose of harming another or simply knows that his conduct will harm another, "the law. . . views both as 'intending' the result"). An individual who does not intend the resulting harm from his conduct but rather "pay[s] insufficient attention to the potential application of force" has not engaged in conduct that is "opposed to or directed at another," and thus "he does not come within the elements clause. He has not used force 'against' another person in the targeted way that clause requires." *Id*. at 1827

Accordingly, if a prior conviction merely required proof that when the defendant intentionally engaged in forceful conduct that resulted in harm to another, the defendant "consciously disregard[ed] a substantial and unjustifiable risk" that his conduct would harm another "in gross deviation from accepted standards," then the conviction does not qualify as a crime of violence. *Id*. at 1824

(internal quotations omitted). And, "one more step down the mental-state hierarchy," offenses such as 18 U.S.C. §§ 1951 and 2113 that merely require proof that a defendant should have been aware of a "substantial and unjustifiable risk" that his conduct could result in harm to another "in gross deviation from the norm," also do not qualify as crimes of violence. *Id.* (internal quotations omitted).

While *Borden* involved the actual application of force that resulted in harm, the elements clause reaches conduct that involves both the use and threatened use of force without distinction, and thus the same analysis that applies to the actual use of force should apply equally to conduct that is perceived as threatening force. Yet that is not happening in the context of offenses involving §§ 1951 and 2113, where courts are continuing to look at the *resulting* harm—the perception by another of a threat—as opposed to whether when the defendant acted he *intended to communicate a threat* of physical force. Indeed, just like in *Leocal*, a defendant can be convicted of violating either § 2113 or § 1951 so long as he engaged in intentional conduct that happened to result in harm to another (where the harm in this case is the perception of a threat of bodily injury) without any proof that the defendant was aware his conduct could be perceived as threatening physical harm to another. Nevertheless, notwithstanding that proof of a defendant's deliberate intent to threaten another is not an element of the offense, the circuit courts continue to classify §§ 2113 and 1951 as crimes of violence.

For example, in the Ninth Circuit the requisite *mens rea* for bank robbery is established upon proof that the defendant took the property of another through

conduct that can objectively be characterized as intimidating, and thus, "[w]hether [the defendant] specifically intended to intimidate [the victim] is irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993). In other words, the element of "intimidation" is established so long as the defendant willfully engaged in conduct "that would put an ordinary, reasonable person in fear of bodily harm," regardless of whether the defendant understood that his conduct would be perceived as intimidating by the ordinary person, let alone that the defendant intended to threaten anyone. *United States v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990). *Accord*, *United States v. Armour*, 840 F.3d 904, 909 (7th Cir. 2016) (explaining that the government's burden of proof to establish bank robbery by intimidation is "low" given that all the government need establish is that a "bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force"); *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (explaining that "intimidation occurs when an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts," and thus "[w]hether a particular act constitutes intimidation is viewed objectively . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating") (internal quotations omitted); *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003) (agreeing with the Ninth Circuit that "intimidation is measured. . . under an objective standard, whether or not [the defendant] intended to intimidate the teller is irrelevant in determining his guilt"); *United States v. Woodrup*, 86 F.3d 359, 364 (4th Cir. 1996)

("[N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . The intimidation element of § 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation.") (internal quotations omitted); *United States v. Higdon*, 832 F.2d 312, 315 (5th Cir. 1987) ("[N]either the plain meaning of the term 'intimidation' nor its derivation from a predecessor statute supports Higdon's argument that a taking 'by intimidation' requires an express verbal threat or a threatening display of a weapon"). In other words, the circuit courts are clear—the minimum conduct required to sustain a conviction for bank robbery by intimidation could not be further from the purposeful, targeted and directed harm against another that is necessary to justify the imposition of the draconian penalties under the elements clause of § 924(c). *Borden*, 141 S. Ct. at 1825-27, 1833.

Indeed, having liability under 18 U.S.C. § 924(c)(3)(A) turn on whether a reasonable person would perceive the defendant's conduct as potentially harmful to another, regardless of whether the defendant understood his conduct could harm another, is the very definition of negligence,[3] *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015), and it is exactly what this Court held in *Borden* and *Leocal* is insufficient to constitute a crime of violence. Following *Borden* and *Leocal*, the

[3] To recognize that a conviction under § 2113(a) requires nothing more than a showing of negligence with respect to the element of intimidation is not to say that § 2113 is a crime of negligence. Of course it isn't. Complex statutes, such as § 2113(a), have multiple material elements each of which may have a distinct *mens rea*. *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). The *mens rea* pertaining to the actual taking in § 2113(a) is different from the *mens rea* pertaining to intimidation.

dispositive question is whether the defendant necessarily made the decision to communicate a threat of violent physical force against another; absent that conscious election by the defendant to deliberately harm another there is no basis for stripping a sentencing judge of his/her discretion under 18 U.S.C. § 3553(a) to fashion a sentence that is sufficient but not greater than necessary to accomplish the penological goals established by Congress. *Borden*, 141 S. Ct. at 1824 (internal quotations omitted) (explaining that a defendant's "failure to perceive the possible consequence of his behavior" does not support a draconian sentencing enhancement under the elements clause). It is the requisite knowledge regarding the likelihood of harming another through one's conduct that is missing as an element of § 2113.

Yet, notwithstanding the fact that the circuit courts are clear that the element of intimidation under § 2113 is established so long as a reasonable person would have been placed in fear, and it is irrelevant whether the defendant appreciated that his conduct could instill a fear of harm in others, the circuit courts are paradoxically equally clear that § 2113 constitutes a crime of violence. *See, e.g.*, *United States v. Hernández-Román*, 981 F.3d 138, 146 (1st Cir. 2020) (reaffirming that both Hobbs Act robbery and armed bank robbery qualify as crimes of violence under the elements clause of section 924(c)); *United States v. Hendricks*, 921 F.3d 320, 328 (2d Cir. 2019) (having "little difficulty in holding that bank robbery. . . categorically constitutes a crime of violence for the purposes of § 924(c)(1)(A)"); *United States v. Wilson*, 880 F.3d 80, 84–85 (3d Cir. 2018) (same); *United States v. McNeal*, 818 F.3d 141, 153–54 (4th Cir. 2016) (same); *United States v. Brewer*, 848

F.3d 711, 715–16 (5th Cir. 2017) (same); *United States v. McBride*, 826 F.3d 293, 295–96 (6th Cir. 2016) (same); *United States v. Campbell*, 865 F.3d 853, 856 (7th Cir. 2017) (same); *United States v. Harper*, 869 F.3d 624, 625–27 (8th Cir. 2017) (same); *United States v. Watson*, 881 F.3d 782, 785 (9th Cir. 2018) (same); *United States v. Deiter*, 890 F.3d 1203, 1216 (10th Cir. 2018) (same); *In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (same).

Pursuant to *Borden* and *Leocal*, it cannot be that an offense that requires intentional conduct without any proof that the defendant was aware that his conduct could result in harm to another is a crime of violence that strips sentencing judges of their discretion under 18 U.S.C. § 3553. That, however, is what is happening across the circuits in the context of convictions under 18 U.S.C. § 2113, as well as § 1951, which replaces the "intimidation" element in bank robbery with "fear of injury."[4] This case, therefore, presents a question of exceptional importance that requires this Court's guidance. Either *Borden* and *Leocal* do not mean what they appears to say—which is that individual culpability regarding the use of force against another is dispositive—or else federal courts across the country are

[4] The circuit courts have unanimously concluded that "fear of injury" in § 1951 is equivalent to "intimidation" in § 2113, and have concluded that Hobbs Act robbery therefore qualifies a crime of violence. See *United States v. Garcia-Ortiz*, 904 F.3d 102, 106-09 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *United States v. Walker*, 990 F.3d 316, 331 (3d Cir. 2021); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 275-76 (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); *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020); *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).

imposing extremely harsh sentencing enhancements under 18 U.S.C. §§ 924(c) and 924(e), for convictions that lack the requisite *mens rea* to qualify as a crime of violence. Thus, the consequences viewed from either the individual perspective or at a systematic level are substantial. Certiorari is necessary to ensure all circuits appropriately exclude offenses that do not require proof that a defendant was anything but negligent regarding the possibility that his conduct could be construed as a threat of physical force against another.

Additionally, in concluding that Hobbs Act robbery is a crime of violence, the Ninth Circuit evinced confusion about the applicability of the "realistic probability test" derived from *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). *Dominguez*, 954 F.3d at 1260. This Court established the "realistic probability test" in the context of determining the scope of a *state* law statute. *Duenas-Alvarez*, 549 U.S. at 193-94. In *Dominguez*, the Ninth Circuit extended the "realistic probability test" to evaluating the scope of 18 U.S.C. § 1951—a federal statute. *Dominguez*, 954 F.3d at 1260. The government recently adopted this same position before this Court in oral argument in *United States v. Taylor*, Case No. 20-1459. Tr. of Oral Arg., at 13-14 (Dec. 7, 2021). Clarity is also, therefore, needed from this Court regarding whether it intended *Duenas-Alvarez*'s "realistic probability test" to usurp the role of the federal courts to determine the scope and meaning of federal law.

B. Facts and Procedural History.

On April 6, 2006, the government filed an indictment against Jackson charging him with one count of attempted bank robbery, three counts of armed

bank robbery in violation of 18 U.S.C. § 2113(a) and (d), one count of Hobbs Act robbery in violation of 18 U.S.C. §1951, and four counts of carrying a firearm during a crime of violence, premised on the three armed bank robberies and the one Hobbs Act robbery, in violation of 18 U.S.C. § 924(c)(1).

On June 4, 2007, Jackson entered a guilty plea to two counts of bank robbery and one count of violating § 924(c), with the government agreeing to recommend the low end of the advisory sentencing guideline range and dismiss the remaining counts. Jackson, however, subsequently withdrew his guilty plea and proceeded to trial where a jury found him guilty on all counts. On March 3, 2008, the court sentenced Jackson to over 89 years (1,070 months) with 660 months attributed to the three § 924(c) convictions premised on the armed bank robberies and 300 months attributed to the one § 924(c) conviction premised on Hobbs Act robbery. Appendix C1-C2. In other words, Jackson received 80 years for his four § 924(c) convictions when the government was willing to resolve the case with only one § 924(c) conviction for 5 years. Jackson is now 64 years old, and according to the Bureau of Prison's public website, his projected release date is April 18, 2082.

On June 26, 2015 this Court issued *Johnson v. United States*, 135 S. Ct. 2551 (2015) ("*Johnson II*"), which held that the residual clause of 18 U.S.C. § 924(e)(2)(B) defining a "crime of violence" in the context of the Armed Career Criminal Act was unconstitutionally vague. On February 16, 2017, in light of *Johnson II*, the Ninth Circuit granted Jackson permission to file a second or successive 28 U.S.C. § 2255 motion and deemed his § 2255 motion challenging the

constitutionality of his four § 924(c) convictions filed in district court as of June 23, 2016.

On the merits Jackson argued that his convictions for violating § 2113(a) and (d) and § 1951 did not qualify as crimes of violence under § 924(c)(3)(A)—the elements clause—because neither § 2113 nor § 1951 require proof that a defendant was anything but negligent with respect to whether a reasonable person would construe his actions as threatening,[5] and thus both § 2113 and § 1951 reach more conduct than is covered by § 924(c)(3)(A). Jackson argued that his convictions under § 924(c) could, therefore, only have been secured under § 924(c)(3)(B)'s residual clause, and thus, pursuant to the reasoning of *Johnson II*, his § 924(c) conviction was sustained in violation of his Fifth Amendment right to due process and must be vacated. Additionally, among other things, Jackson argued that his § 924(c) conviction premised on Hobbs Act robbery could not stand because the elements clause did not cover threats to intangible property, which could be the basis for a Hobbs Act robbery conviction under the plain language of the statute.

On June 23, 2020, Jackson supplemented his § 2255 motion in district court on the basis that this Court in *United States v. Davis*, 139 S. Ct. 2319 (2019) applied *Johnson II* to 18 U.S.C. § 924(c) and confirmed that the residual clause codified at § 924(c)(3)(B) was unconstitutionally vague.

[5] Because the categorical approach looks at the "minimum conduct criminalized" by a statute, *Moncrieffe v. Holde*r, 569 U.S. 184, 191 (2013), with respect to 18 U.S.C. § 2113 the inquiry here is limited to bank robbery by intimidation.

On June 25, 2020, the district court issued a decision denying Jackson's § 2255 motion on the merits on the basis that the Ninth Circuit's decisions in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) and *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) were binding precedent holding that bank robbery and Hobbs Act robbery, respectively, are crimes of violence under 18 U.S.C. § 924(c)(3)(A). Appendix at B4-B5.

Jackson filed a timely notice of appeal with the Ninth Circuit on August 21, 2020, and requested that the Ninth Circuit grant him a certificate of appealability to challenge the district court's denial of his § 2255 motion on the basis that offenses, such as § 2113 and § 1951, that merely require proof of intentional conduct that *results* in harm to another but do not necessarily establish that the defendant was more than merely negligent regarding the possibility that his conduct could harm another (or be perceived as threatening harm), cannot qualify as crimes of violence. *See, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (an offense is categorically overbroad if the least of the acts criminalized are not encompassed under the relevant definition of a crime of violence).

Jackson argued that in light of this Court's decision to grant certiorari in *Borden v. United States*, No. 19-5410, reasonable jurists clearly can, and are, disputing whether 18 U.S.C. §§ 1951 and 2113 qualify as crimes of violence under 18 U.S.C. § 924(c)(3)(A), and he urged the Ninth Circuit to grant him a certificate of appealability to revisit its decisions in *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) and *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) in

light of this Court's forthcoming decision in *Borden*. Additionally, Jackson renewed his argument that the Ninth Circuit's reliance in *Dominguez* on this Court's "realistic probability test" to defeat his argument that the scope of § 1951 was broader than the elements clause of § 924(c) where the statute reaches robberies effected by a future threat to intangible property, was misplaced. The Ninth Circuit declined Jackson's invitation to reconsider *Watson* and *Dominguez*,[6] and denied his request for a certificate of appealability. Appendix at A1.

Where the reasoning of the Ninth Circuit in *Watson* and *Dominguez* appears irreconcilable with the reasoning of this Court's decision in *Borden* strongly suggesting that a crime of violence requires proof, not merely that a reasonable person would perceive a defendant's conduct as threatening, but that the defendant engaged in conduct with the intent that it be perceived as such, Jackson requests certiorari to clarify that the Ninth Circuit, along with at least eleven other circuits, are improperly applying this Court's jurisprudence when determining what constitutes a qualifying threat of force under § 924(c)(3)(A).

[6] Indeed, in an unpublished decision following *Borden*, the Ninth Circuit has reaffirmed *Watson*. *Young v. United States*, Nos. 20-71740, 20-71741, 2022 U.S. App. LEXIS 1280, at *11-12 (9th Cir. 2022) ("There is simply no room to find [armed bank] robbery . . . is anything but a crime of violence under § 924(c)(3)(A)'s elements clause following . . . Watson's binding precedent.") (alterations in original, internal quotations omitted).

REASONS FOR GRANTING THE WRIT

The issue presented here is not whether the defendant is guilty of a serious crime that puts innocent people in harm's way, and it is not whether the defendant intentionally engaged in conduct that a reasonable person would construe as threatening, but whether a defendant's convictions for violating §§ 1951 and 2113 necessarily establish that he is someone who made the election to deliberately communicate a threat of violent physical force against another such that it is appropriate to strip sentencing judges of their discretion and mandate severe sentencing enhancements on top of the already harsh sentence a defendant receives for committing the underlying offense.[7] Following this Court's decisions in *Borden* and *Leocal* it seems clear that in order to qualify as a threat under § 924(c)(3)(A), the defendant had to know within a practical certainty that his conduct would be perceived as a threat of physical harm, yet the Ninth Circuit and every other circuit court to consider the issue—at least eleven—do not require the defendant to even be aware that his conduct could be perceived by another as threatening physical harm.

[7] Because the Ninth Circuit denied Jackson a certificate of appealability, this Court should grant his petition for certiorari if it is merely debatable whether a defendant's conviction for violating § 1951 or § 2113(a) necessarily establishes that he is someone who was more than negligent regarding whether his conduct would be construed as a threat of violent physical force against another. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (explaining that a certificate of appealability should issue under 28 U.S.C. § 2253(c)(2) when the request presents a "question of some substance" that "is debatable among jurists of reason"). Indeed, as this Court has explained, "a COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). Accordingly, the only question presented here is "the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*.

A. Where there is No Ambiguity in the Ninth Circuit (1) that Convictions for 18 U.S.C. §§ 1951 and 2113 Will Be Sustained When a Defendant was Merely Negligent Regarding the Possibility that His Conduct Could Be Perceived as Threatening and (2) that Convictions for §§ 1951 and 2113 Constitute Crimes of Violence under 18 U.S.C. § 924(c)(3)(A), this Case Provides an Excellent Vehicle for this Court to Clarify What Qualifies as a Threat under § 924(c)(3)(A).

Where the elements of "intimidation" (§ 2113) and "fear" (§ 1951) turn not on what the defendant intends, thinks or believes, but on whether an ordinary person would have recognized that the natural and probable consequences of the defendant's conduct would probably result in a bodily injury—that is a negligence standard. *Elonis*, 135 S. Ct. at 2011. And, what it is most decidedly not, is a conscious decision to deliberately target another with the threat of violent physical force, and thus the defendant's conduct is "not aimed in [the] prescribed manner." *Borden*, 141 S. Ct. at 1825. As *Borden* clarified, the intentional use of force that happens to result in injury is not enough to qualify a prior conviction as a crime of violence. This Court drew a line between those who act with a practical certainty that they will harm another, and those who act in disregard of a risk that their conduct could harm another. In other words, a defendant acts in the prescribed manner when the predicate conviction necessarily establishes that the defendant consciously desired to harm another, which in this context means the defendant consciously desired to communicate a threat of physical harm, or, at minimum, knew that his intentional conduct would result in said harm. *Id*. at 1823-25.

The Ninth Circuit in *Dominguez*, however, never reached the dispositive issue under the mistaken assumption that all that is required to qualify an offense

as a crime of violence is knowing or willful conduct. *Dominguez*, 954 F.3d at 1261. Similarly, the Ninth Circuit in *Watson* never reached the dispositive issue under the mistaken assumption that all that is required to qualify an offense as a crime of violence was the knowing taking of property that was effected by force or intimidation. *Watson*, 881 F.3d at 785.[8] The fact that the taking was knowing or willful, however, is not the issue. Indeed, the driving of the car that caused the serious injuries in *Leocal* was also intentional, but the government was not required to prove that the defendant engaged in said conduct with the desire to harm another. *Leocal*, 543 U.S. at 9. Because Jackson sustained § 924(c) convictions that were premised on both § 1951 and § 2113 convictions—the two most common offenses involving threats that the government has relied upon to secure § 924(c) enhancements—this case presents an excellent vehicle for this Court to establish

[8] By holding that § 2113(a) is a general intent crime, *Carter v. United States*, 530 U.S. 255 (2000) did no more than recognize that in order to secure a conviction the government simply needs to prove that the defendant knew the facts that brought his conduct into the reach of the statute. *Carter*, 530 U.S. at 269-70 (explaining that requiring a defendant to know the facts that bring him within the reach of § 2113(a) protects "the hypothetical person who engages in forceful taking of money while sleepwalking"). This Court's decision in *Carter*, therefore, is in complete harmony with the negligent *mens rea* circuit courts have historically associated with the element of intimidation in § 2113(a). Notably, following Carter, the government argued to the Eighth Circuit that the "*Carter* Court. . . clearly stated that the *mens rea* for the *actus reus* of bank robbery is satisfied by proof that defendant knew that he was physically taking the money – that he did not forcefully take the money while sleepwalking or some similar situation," and "[s]ince intimidation is determined under an objective standard, defendant's subjective intent is irrelevant." *United States v. Yockel*, Government's Answering Brief, 2002 WL 32144417, at 28-30 (8th Circuit). The Eight Circuit agreed, "reaffirm[ing] that the intimidation element of section 2113(a) is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts whether or not the defendant actually intended the intimidation." *United States v. Yockel*, 320 F.3d 818, 823 (8th Cir. 2003). In so holding the Eighth Circuit relied on the Ninth Circuit's decision in *United States v. Foppe*. *Id*. at 824.

what constitutes the threat of physical force against another under § 924(c)(3)(A) following *Borden*.

With respect to bank robbery, in the Ninth Circuit a defendant can be convicted where he does nothing more than calmly hand a note to a teller explaining that a bank robbery is in progress and politely requesting the teller to provide him with some money regardless of whether the bank robber was aware of the inherently intimidating nature of his conduct. For example, in *United States v. Lucas*, 963 F.2d 243 (9th Cir. 1992), the defendant simply 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 at 244. The Ninth Circuit held that by "opening the bag and requesting the money," Lucas employed the requisite "intimidation." *Id*. at 248. Although there was no evidence that the defendant understood his conduct could be perceived as threatening to anyone, the Ninth held the evidence was sufficient for the conviction. Notably, there was no threat to do anything, let alone use violence, if his demand for money was not met.

Just like in *Lucas*, in *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983), the Ninth Circuit had no difficulty holding that the government had established the element of "intimidation" where the defendant had entered the bank, passed a note, spoke "calmly, made no threats, and was clearly unarmed." *Id*. at 1103 (explaining that the element of intimidation is established simply by making a verbal or written demand for money to which one is not entitled). Whether the defendants in *Lucas*

and *Hopkins* were "willing" to use or threaten to use violent force is pure speculation;[9] they did nothing to communicate or express that willingness to their victims, and whether they were aware that their victims feared bodily harm "is irrelevant." *Foppe*, 993 F.2d at 1451. *See, e.g.*, *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991) (confirming "that the threat implicit in a written or verbal demand for money is sufficient evidence to support the jury's finding of intimidation").

Not surprisingly, therefore, district courts in the Ninth Circuit are instructing juries that all the government needs to prove in order to establish "intimidation" is that the defendant willfully took the money "in such a way that would put an ordinary, reasonable person in fear of bodily harm." *United States v. Hamman*, No. 3:16-cr-185, Doc 96 at 9 (D. Oregon, Instructions Filed 1/24/17); *see, United States v. Johnson*, No. 8:13-cr-190, Doc. 273 at 20 (C.D. Cal., Instructions Filed 1/20/17) (to establish "intimidation," the government needs to prove only that the defendant "knowingly and deliberately did something . . . that would cause a reasonable person under those circumstances to be fearful of bodily injury").

Of course the Ninth Circuit is not unique in sustaining convictions under 18 U.S.C. § 2113 where there was no evidence the defendant was aware that others perceived his conduct as threatening violent physical force. For example, the Fourth Circuit, in *United States v. Ketchum*, similarly upheld a bank robbery by

[9] Just because a defendant commits a robbery while armed does not mean the defendant was necessarily willing to use force against another, recognizing that while some robbers "are prepared to use violent force to overcome resistance, others are not." *United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016).

intimidation conviction against a sufficiency challenge where the defendant affirmatively voiced no intent to use violent physical force, and instead informed the teller that he was requesting the money under duress. 550 F.3d 363, 365 (4th Cir. 2008). Indeed, even where a defendant does not interact with the teller at all but simply reaches over and/or jumps over the counter and removes the money himself, circuit courts have had no problem concluding that the element of "intimidation" was satisfied so long as the defendant's conduct could be perceived as intimidating to the tellers present regardless of the defendant's awareness of how others perceived his conduct. *See, e.g.*, *United States v. Kelley*, 412 F.3d 1240, 1245-46 (11th Cir. 2005) (holding that the requisite intimidation was established where the defendant lay across a bank counter and helped himself to money in the teller's drawer even though the defendant said nothing); *United States v. Caldwell*, 292 F.3d 595, 597 (8th Cir. 2002) (holding that where the defendant did not say anything to the teller, nor make any intimidating gestures nor indicate in any way that he was armed, the element of intimidation was still satisfied because the act of slamming his hands on the counter as he leapt over it to walk by the teller and take the money from an unlocked drawer would make "any reasonable bank teller [feel] intimidated"); *United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (upholding a § 2113 conviction where defendant entered a bank, walked behind the counter, and removed cash from the tellers' drawers, but did not speak or interact with anyone beyond telling a manager to "shut up" when she asked what the defendant was doing).

Clearly, circuit courts sustaining convictions under 18 U.S.C. § 2113 have not been concerned with whether the defendant had the capacity to place himself in the teller's shoes and appreciate that his conduct would be perceived by others as intimidating. The fact that Jackson was convicted of violating § 2113(d) does not alter the relevant analysis. The *actus reus* of federal bank robbery does not change whether the violation is for subsection (a) or subsection (d) of the statute. In a subsection (d) bank robbery, the defendant merely satisfies the act of "intimidation" in a specific manner*, i.e.*, by carrying a dangerous weapon. § 2113(d). Critically, however, the government need not prove an added layer of *mens rea*, nor that the defendant intended to threaten the individuals in the bank with the weapon nor even understood that his possession of said weapon would put others in fear of violent physical force. Indeed, as the Ninth Circuit's model armed bank robbery jury instruction makes clear, all the jury needs to find is that the defendant "made a display of force that *reasonably caused* [*name of victim*] *to fear bodily harm* by using a [specify dangerous weapon or device]." Ninth Circuit's Manual of Model Criminal Jury Instructions, § 9.1 (Rev. Mar. 2021) (emphasis added).

The enhanced penalties associated with subsection (d) do not arise from the defendant's intent, but from "the greater burdens that [the weapon] imposes upon victims and law enforcement officers," who witness it. *United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989) (holding that a toy gun can therefore qualify as a dangerous weapon under § 2113(d)); *accord United States v. Arafat*, 789 F.3d 839, 847 (8th Cir. 2015); *United States v. Cruz-Diaz*, 550 F.3d 169, 175 (1st Cir.

2008); *United States v. Garrett*, 3 F.3d 390, 391 (11th Cir. 1993); *United States v. Medved*, 905 F.2d 935, 939 (6th Cir. 1990). Once again, the concern is the perception of the victim, not the intent of the defendant who may, or may not, have understood his actions to communicate a threat; what the defendant intended with respect to the element at issue here – the threat – is irrelevant.

Likewise, substantive Hobbs Act robbery effected by placing someone in fear of injury to their person or property does not demand any greater awareness of the harm to another caused by one's conduct than required by the statute addressed in *Leocal*. Just like *in Leocal*, a defendant can be convicted of Hobbs Act robbery so long as he engaged in intentional conduct that happened to result in harm to another (where the harm in this case is the perception of a threat of injury by another) without any proof that the defendant was aware his conduct could be perceived as threatening or result in harm to another. Ninth Circuit Model Jury Instruction § 9.8 (Rev. June 2021).

Generally, when someone enters your store to steal from you, as polite as they may be, the fact that they are there to steal from you is sufficient to induce a fear of injury and be *perceived by another as a threat* of violence regardless of whether the defendant intended to make any such threat. *See, e.g.*, *United States v. Kornegay*, 641 Fed. Appx. 79, 83 (2d Cir. 2016) (unpub) (finding sufficient evidence for one count of Hobbs Act robbery of a cell phone store where a salesperson tried to lock the door to keep the defendants out but the defendants were able to force the door open and, because the defendants had previously robbed the store, the

employees were already afraid; whether the defendant intended them to be placed in fear of bodily injury or not was irrelevant).

When it comes to determining, however, whether bank robbery or Hobbs Act robbery are crimes of violence under § 924(c), the Ninth Circuit, like its sister circuits, are not concerned with whether the defendant understood that his conduct would be perceived as threatening physical force against another. It is irrelevant that the defendant did not intend to communicate a threat of physical harm. All that matters is that a reasonable person who is the victim of said robbery would likely be in fear of bodily injury, it is of no matter that the robber need not actually threaten anyone or even be aware that his conduct might instill in others a fear of bodily harm. *Watson*, 881 F.3d at 785; *Dominguez*, 954 F.3d at 1260.

The reasoning of the circuit courts concerning what constitutes a threat under § 924(c)(3)(A) is irreconcilable with this Court's decisions in *Leocal* and *Borden*. While it makes perfect sense that liability for bank and Hobbs Act robbery should turn on whether a reasonable person would have perceived a threat of violent physical force irrespective of whether the defendant subjectively intended to put anyone in fear, it likewise makes sense that when what is at stake is a draconian sentencing enhancement designed to incapacitate the worst of the worst for decades upon decades (and in this case effectively life), it should matter whether the defendant intended to communicate a threat of physical force against another. This Court in *Borden* effectively said as much. *Borden*, 141 S. Ct. at 1825-27, 1831 n. 8 (emphasizing that such enhancements are premised not on a defendant's

indifference to risk, but on his callousness towards others as evidenced by his election to engage in conduct despite knowing his conduct will likely result in physical harm to another) .

Because convictions under § 1951 and § 2113 do not require the government to prove beyond a reasonable doubt that when the defendant knowingly and willfully engaged in the taking of property, that he was anything but negligent regarding the possibility that others would be placed in fear of injury, and thus such convictions will be sustained even if the defendant did not knowingly communicate a threat of violent physical force to another, following *Borden* neither Hobbs Act robbery nor federal bank robbery qualify as predicates under § 924(c).

B. This Case also Provides an Excellent Vehicle to Address the Timely Issue of the Applicability of *Duenas-Alvarez*'s "Realistic Probability Test" when Determining the Meaning and Scope of a Federal Statute.

Hobbs Act robbery criminalizes a threat of "injury, immediate or future, to [another's] person or property." 18 U.S.C. § 1951(b)(1). The circuit courts 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) (describing the circuits as "unanimous" on this point). Because 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). In other words, as Jackson argued below, Hobbs Act robbery can be committed via non-violent threats of future harm to an intangible property interest, and because Hobbs Act robbery can be committed by causing fear of future injury to intangible property and thus does not require the use of physical force against the person or property of another, it does not categorically qualify as a crime of violence under 18 U.S.C. § 924(c)(3)(A).

The Ninth Circuit rejected this argument by abdicating its responsibility to determine the meaning and scope of a federal statute. Specifically, the Ninth Circuit deferred to the U.S. Attorneys' Office, defining the reach of the statute based on the past prosecutorial decisions of that office, concluding that the statute only reached as far as the cases the U.S. Attorneys' Office has previously elected to prosecute. *Dominguez*, 954 F.3d at 1260 (reasoning that it did not need to reach the issue of threats to intangible property "because Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest").

In so doing, the Ninth Circuit relied on *Duenas-Alvarez*'s "realistic probability test." *Id.* In sharp contrast to *Dominguez*, *Duenas-Alvarez* involved a *state* conviction. The *Duenas-Alvarez* court examined how the state courts had applied the state's laws to determine the scope of conduct necessarily established by the defendant's conviction. *Duenas-Alvarez*, 549 U.S. at 190-93. It is hardly

remarkable that this Court turned to how the statute had been treated in the state courts given that when conducting the categorical analysis, federal courts are bound by a state court's interpretation of its laws. *Johnson v. United States*, 559 U.S. 133, 138 (2010). What would be remarkable, however, is the proposition that when it comes to determining the meaning and scope of a federal statute, federal courts should defer to the prosecutorial decisions of the U.S. Attorneys' Office.

When interpreting the reach of a federal statute it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *See, e.g.*, *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) (rejecting the government's argument that the defendant was required to "'demonstrate that the government has or would prosecute' threats to property as a Hobbs Act robbery" because the defendant "does not have to make that showing" under the categorical approach given that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so").

Recently, before this Court the government again made the argument, in reliance on *Duenas-Alvarez*, that federal courts should to defer to the exercise of its prosecutorial discretion when determining the reach and scope of a federal statute. *United States v. Taylor*, Case No. 20-1459. Tr. of Oral Arg., at 13-14 (Dec. 7, 2021). In response Justice Sotomayor queried, why federal courts would defer to the charging practices of the U.S. Attorneys' Office when interpreting a federal statute when "[w]e're the ones who read it and say what it is." *Id.* at 8.

Given the government's repeated efforts to define federal offenses in terms of its prosecution practices by invoking *Duenas-Alvarez*, a practice that has actually been adopted by the Ninth Circuit, clarity is needed from this Court to reaffirm that it is emphatically the role of the federal courts—not the U.S. Attorneys' Office—to say what federal law means. And, because Hobbs Act robbery does not necessarily require the use or threatened use of violent force against a person or property of another, it does not qualify as a crime of violence under § 924(c)(3)(A).

CONCLUSION

For these reasons, Jackson respectfully requests that the Court grant his petition for a writ of certiorari.

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