No. 18-6269

In the

Supreme Court of the United States

MATTHEW LLOYD, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Reply Brief in Support of Petition for Writ of Certiorari

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Reply Argument

I. Because federal bank robbery by "intimidation" may be committed without resorting to the use or threatened use of violent physical force, the government's suggestion that bank robbery categorically is a crime of violence is incorrect.

A robbery statute that requires proof of de minimis, or even no physical force is not a crime of violence. The government does not cite one case that proves 18 U.S.C. § 2113(a), in every case, requires that a certain degree of physical force be used, attempted or threatened. Instead it says this must be so because numerous circuit courts have labeled the offense a crime of violence. Br. in Opp. 8-9. But these courts also have held the element of intimidation is established without proof that the accused intentionally threatened violent physical force. The government does not address these cases. These cases demonstrate federal bank robbery does not satisfy the force clause definition because intimidation can be proven through inferences extrapolated from knowing, but not intentionally threatening, behavior. This Court has never said that a presumed, implicit or inherent threat which circuit courts commonly attribute to a reasonable bank employee constitutes the intentional threat of violent physical force required by the force clause.

The plain language of the bank robbery statute requires the government prove that the robbery was committed by force and violence, or by intimidation, or extortion." 18 U.S.C. § 2113(a). The statute does not define intimidation. However, in countless cases, the circuit courts have

allowed a wide range of conduct to satisfy the element of intimidation. Irrespective of the accused's quietude as he asks for the bank's money, they have uniformly concluded that robbery is inherently or implicitly intimidating to the reasonable bank employee. Whether the accused specifically intended to intimidate the bank employee is actually irrelevant. *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993).

Likewise, the government does not have to show the accused expressly threatened bodily harm, made threatening body motions, or possibly carried concealed weapons. *United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008); *United States v. Gilmore*, 282 F.3d 398, 403 (6th Cir. 2002); *United States v. Lucas*, 963 F.2d 243, 248 (9th Cir. 1992). Simply put, the government can prove intimidation without having to show the accused intentionally threatened the use of physical force. These cases, never mentioned by the government, show that courts allow juries to substitute a set of assumptions about what a person asking for money from a bank might do if does not get the money promptly, for the individualized proof of actual behavior.

Admittedly then, the inherent threat of harm which the courts attribute to the reasonable bank employee, is not tantamount to an actual threatened use of physical force. *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016), relied on by the government, illustrates this point. Br. in Opp. 9. There the

court held that a conviction for armed federal bank robbery is a crime of violence as defined by 18 U.S.C. § 924(c)(3)(A)'s force clause because the "victim's fear of bodily harm is necessarily fear of violent physical force that is inherent in armed bank robbery." *Id.* at 909. That statement admits the intentional threat of physical force is not an element of the offense: the accused does not have to say anything or to act threateningly to be found guilty of robbery by intimidation. Robbery by intimidation, the least culpable means of committing the offense, does not require in every case, proof that the accused intentionally made a threat to use violent physical force.

To constitute a crime of violence under the force clause, the offense must have an element of "physical force." Importantly, "physical force" means "*violent* force" - that is "strong physical force," which is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). In *Stokeling v. United States*, the Court refined that definition further. There, the Court said, in the context of robbery, physical force means force that in the "physical contest between the criminal and the victim . . . . must overpower[] a victim's will" and be "'capable of causing physical pain or injury.'" 2019 WL 189343, *7 (January 15, 2019) (quoting *Johnson*, 559 U.S. at 140. Federal bank robbery, as defined by 18 U.S.C. § 2113(a), cannot categorically come within the force clause because the offense can be accomplished through an act in which there

is no physical contest, let alone one which potentially may cause physical pain or injury. "Indeed, intimidation generally may be established based on nothing more than a defendant's written or verbal demands to a teller . . ." *Ketchum*, 550 F.3d at 367. The circuit courts offer numerous examples which show the threatened use of violent force is not an essential component of bank robbery in every case.

In *United States v. Mitchell*, 113 F.3d 1528, 1530 (10th Cir. 1997), Mitchell argued the evidence did not establish intimidation because the only bank employee present could not have been intimidated by his actions. He said when he went to the teller's window, he did not have a weapon or claim to have a weapon. He did not yell or threaten to injure the teller. Nor did he ever touch her. All he said was, "this is a hold up" and "get back." *Id.* at 1531. The court characterized this behavior as "aggressive" which "'very well could have been considered as intimidating by the jury.'" *Id.* (quoting *United States v. Slater*, 692 F.2d 107, 109 (10th Cir. 1992)).

In *Gilmore*, 282 F.3d at 401 (6th Cir. 2002), Gilmore claimed the evidence was insufficient for the jury to conclude that he intimidated anyone in the bank. In a series of bank robberies, all he ever did was present a note asking for money. *Id.* at 400-01. The Sixth Circuit disagreed. It said his notes were "imperatives" which is a "common means of successfully robbing banks." *Id.* at 402. These notes are intimidating because "they carry with

them an implicit threat: if the money is not produced, harm to the teller or other bank employee may result." *Id.*

In *United States v. Hopkins*, 703 F.2d 1102 (9th Cir. 1983), Hopkins said his bank robbery conviction should be reversed because "his conduct and demeanor" were not intimidating. At trial the jury heard that he spoke "calmly, made no threats, and clearly [was] unarmed." *Id.* at 1103. He simply presented the teller a note which read, "Give me all your hundreds, fifties and twenties. This is a robbery." *Id.* The court held that "the threats implicit in Hopkins' written and verbal demands for money provide sufficient evidence of intimidation to support the jury's verdict." *Id.* at 1103.

In *United States v. Clark*, 227 F.3d 771, 773 (7th Cir. 2000), Clark's note to the teller read, "It is important that you remain calm and place all of your twenties and hundred dollar bills on the counter and act normal of the next fifteen minutes." During the interaction, Clark's hands were visible and flat on the counter. He argued the government had not proven intimidation because there was no evidence he ever threatened the teller through "his words, conduct, demeanor or appearance." *Id.* at 774. The court found the evidence sufficient because regardless of "how one interprets Clark's manners as polite or non-violent, the combination of his actions still amount to intimidation." *Id.* at 775. It said it was reasonable for the teller to "suspect" that Clark "might use physical force to compel satisfaction of his demand for

money." *Id.*

Rather than point to specific actions or words that prove the accused intended to use physical force to get the money, in each of these cases the courts find the element of intimidation satisfied by implication or suspicion. These cases illustrate that robbery by intimidation may be proven by conjecture and presumptions. That, in turn, defines the issue Lloyd asks the Court to decide here: does an offense have as an element the intentional threatened use of physical force when the element can be established by a presumption that the accused might use force even though he said or did nothing to imply that would happen. Lloyd believes the Court should rule in his favor because the origin of that presumption demonstrates how attenuated it is from actual proof that the accused threatened to use physical force.

Over the years, circuit courts were persuaded by the reasoning of the Sixth Circuit in a case from 1975, *United States v. Robinson*, 527 F.2d 1170 (6th Cir. 1975). *See United States v. Brewer*, 848 F.3d 711, 715-16 (5th Cir. 2017) (using *Robinson* to find bank robbery a crime of violence); *Clark*, 227 F.3d 771, 773; *United States v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992) (relying on *Robinson* to find intimidation where accused behavior was not forceful, purposeful or aggressive). In *Robinson*, the court thought the jury justifiably found the accused's behavior intimidating because he was wearing

a leather coat in which "a weapon could presumably be concealed." 527 F.2d at 1172. Such a suspicion was reasonable "especially in an era characterized by a dramatic increase in crime generally and of bank robbery in particular, and by increased violence." *Id.* Forty years ago that inference may have had statistical support, but it does not now, when the incidence of violence has decreased significantly. *See* 2017 FBI Report on Crime in the United States (finding robbery decreased nationally by 2.2% between January to June 2017). Nor, decades later, can it objectively prove the accused communicated a determination to use physical force if the bank employee does not promptly accede to his demands for money. The courts' broad interpretation of intimidation confirms that the threat of violent physical force is not a indispensable element of bank robbery.[1]

The circuit courts and the government cannot have it both ways - on the one hand non-threatening behavior is enough to be intimidating, but on the other, it threatens the use of violent force because courts accord this behavior

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[1] Logically, this interpretation of intimidation makes the most sense. Any definition that requires a finding of the threat of physical force would ultimately render the first two means of committing bank robbery (i.e., through force or violence) both superfluous and meaningless. This Court's precedent rejects such an interpretation, as it is contrary to the canon against surplusage. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme").

a presumption of implied physical force. This convenient presumption allows the courts to fit bank robbery by intimidation into the force clause when the actual conduct which defines intimidation falls outside that clause's definition.[2]

An Oregon case points up the deficiency in the circuits' reasoning. In *State v. Hall*, 149 Or. App. 358, 364-65 (Ct. App. 1997), the court held to prove robbery by intimidation, the prosecution must show the accused "threatens the immediate use of physical force when, by words or conduct, [he] communicates his [] determination to use physical force if the victim does not promptly accede to [his] demands." The court found the evidence was insufficient because after the accused demanded cash, the cashier simply acquiesced. *Id.* at 365. It said there was no evidence the accused "made verbal threats or engaged in conduct that indicated that he would, in fact, immediately resort to physical force unless his demand was met." *Id.*

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[2] Furthermore, the intimidation element does not assume an intentional threat of force because bank robbery is a general intent crime. It only requires that the accused's acts be intentional. *Carter v. United States*, 530 U.S. 255, 268, 271 (2000). The accused need only know his acts may result in certain consequences. *Id.* at 268; *see also United States v. Gonyea*, 140 F.3d 649, 653 (6th Cir. 1998) (general intent requires only that accused intended to do act law proscribes). The statute does not oblige the government to prove he intentionally intimidated anyone because that would make bank robbery a specific intent offense. *Carter*, 530 U.S. at 271-72.

Arguably, a robbery statute where the prosecution must prove the accused threatened the immediate use of physical force unless his demand was met, has as an element the threatened use of physical force. But, the inverse corollary must also be true - a robbery statue where a mere note proves intimidation and does not in every case require proof the accused threatened the immediate use of force unless his demand was met, does not have as an element the threatened use of physical force. The numerous cases where the circuit courts have found federal bank robbery can be completed without an immediate threatened use of physical force, prove it is not a crime of violence as defined in § 924(c)(3)(A).

II. Federal armed bank robbery's fourth element, assault or putting life in jeopardy by way of a dangerous device, requires only a risk of force and no actual or threatened force.

The government says because Lloyd was convicted of robbery by assaulting a person with a dangerous weapon, that establishes the intentional use of force. Br. in Opp. 14-15. But what matters under the categorical approach is what the statute requires. Thus, it is notable that the government has no answer to Lloyd's argument that the circuit courts do not require that an accused actually be armed at all and it is enough either that he says he has a weapon or that, for some other reason the bank employee believes he is armed.

Section 2113(d) does not require proof in every case that the accused

used or threatened the use of violent physical force because of the broad range of conduct that courts have found satisfies that element. The government does not have to show that a dangerous weapon was displayed or brandished. *See e.g. United States v. Ray*, 21 F.3d 1134, 1141 (D.C. Cir. 1994) (no proof accused had weapon but jury could infer he did from his comments). Instead, implying one is armed (id.) or merely having a toy gun that is neither displayed or referenced, is enough. *See McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986) (display of gun instills fear in average citizen and creates immediate danger that violent response will ensue); *United States v. Martinez-Jimenez*, 864 F.2d 664, 666 (9th Cir. 1989) (toy gun is dangerous weapon; "dangerousness results from the greater burdens that it imposes upon victims and law enforcement officers."). Even an unlit road flare has been held to constitute a "dangerous weapon." *United States v. Boyd*, 924 F.2d 945, 947-48 (9th Cir. 1991). As these ways to commit armed bank robbery fall outside the force clause's definition of a crime of violence, any conviction under §§ 2113(a) and (d) cannot be used to support a conviction for violating § 924(c).

Conclusion

The Tenth Circuit did not live up to its obligation to approve the severe penalties in § 924(c) only if it is certain the defendant has committed a crime of violence that necessarily satisfies § 924(c)(3)(A)'s definition of violent physical force. That deficiency resulted in Lloyd unjustly being convicted and ordered to serve a mandatory consecutive 7 year prison term. This Court should grant certiorari to correct the Tenth Circuit's flawed analysis and provide direction to the lower courts on the important question of federal law this case clearly presents.

Respectfully submitted,

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DATED: January 22, 2019

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Certificate of Service

I, Devon M. Fooks, hereby certify that on January 22, 2019, a copy of the petitioner's Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice,

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